IS THERE AN ELEPHANT IN THE ROOM?: JUDICIAL REVIEW OF EDUCATIONAL ADEQUACY AND THE SEPARATION OF POWERS IN STATE CONSTITUTIONS

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ABSTRACT

Scholarship of education finance adequacy litigation has nearly universally acknowledged the thorny separation of powers problems that this form of litigation presents for state courts. This scholarship tacitly assumes a uniform approach to separation of powers among the states—one that defaults to the federal approach. Proposals for adjudicatory reforms purport either to respect separation of powers principles as we know them from federal case law or to reject the notion that such principles should have any real operation in any state courts. However, this scholarship has not addressed, or even acknowledged, what would seem to be a very large elephant in the room: state constitutional text. Many state constitutions contain explicit separation of powers mandates, while others follow the federal implied model. Yet no education finance scholarship has attempted to assess differences in justiciability doctrine that might result from these textual differences.

In this Article, I assess the import of these omissions. I begin by attempting to identify an association between the explicitness of a state's constitutional text relating to separation of powers and the decision of the state's courts whether to engage in merits adjudication of educational adequacy claims, in which separation of powers principles are thought to be salient. Surprisingly, despite the near-ubiquitous consideration of separation of powers principles in the cases, I find no evidence of any association between these two variables.

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Based on a review of the cases with my findings in mind, I suggest that a different factor—more fundamental but largely overlooked— appears to overshadow separation of powers text: courts' varying and often shifting conceptions of the nature of education rights. This overlooked factor appears to impact judicial decision making both as to justiciability and as to adjudication and remediation of any constitutional harms. Critical analysis of the nature of state-level education rights is largely absent from the scholarship in the field. Accordingly, I propose and justify a new direction for inquiry in education finance litigation, one that focuses on courts' varying conceptions of education rights and their impact on the proper scope of judicial review in state constitutional litigation.

I. EDUCATION FINANCE LITIGATION IN CONTEXT

Solutions to the problems of state public education systems have often come through "public law," or "institutional" litigation, and this litigation has often resulted in court-ordered or court-supervised policy making.[1]

1. Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1022 (2004) ("The best-known body of public law litigation is the Herculean effort of the federal courts to desegregate the nation's public schools."); *see also* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284, 1288–89 (1976) (developing the concept of "public law litigation," the initial and current term used to describe these suits); Theodore Eisenberg & Stephen C. Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465, 467–68 (1980) (explaining the concept of "institutional

For example, *Brown v. Board of Education*[2] and its progeny[3] ultimately led to court-ordered and court-supervised desegregation at the state and local levels, some of which continues to this day.[4] In such cases, the prospect of court involvement is sometimes subject to criticism on comparative institutional competence grounds,[5] but because the judiciary in such cases typically occupies its traditional role of protecting individual liberties from being infringed by the affirmative actions of the majority, this form of public law litigation can be defended as a simple extension of traditional constitutional adjudication.[6]

Although public law or institutional litigation typically is brought in federal court, scholars have placed a common species of state court litigation into this category: education finance litigation.[7] Litigation over educational equity or equality fits nicely into the public law litigation paradigm, as much of it is logically similar to desegregation litigation. In education finance adequacy litigation,[8] however, judicial review is often viewed as

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litigation," which generally involves courts in the supervision of large public institutions, such as school districts, following a finding that constitutional rights have been broadly violated in such institutions).

2. 347 U.S. 483 (1954) (*Brown*).

3. *E.g.*, Brown v. Bd. of Educ., 349 U.S. 294 (1955) (*Brown II*); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971). Federal desegregation case law constitutes an enormous body of judicial opinion.

4. *See, e.g.*, Kathleen S. Devine, Civil Right Division, U.S. Dep't of Justice, Alabama Statewide Special Education Agreement, *available at* http://www.usdoj.gov/crt/edo/documents/kdevine-spch.php (discussing longstanding desegregation litigation in Alabama and stating that "[a]t present, 82 school systems are still under court order in the *Lee v. Macon* cases"); *see also* Youngblood v. Bd. of Pub. Inst. of Bay County, 958 F.2d 1082 (11th Cir. 1992) (reaffirming the original 1970 order establishing court supervision); Sharpton v. Bd. of Pub. Inst. of Indian River County, 432 F.2d 927 (5th Cir. 1970) (establishing court supervision that remains to this day); Lee v. Macon County Bd. of Educ., No. 70-S-251-S (N.D. Ala. May 13, 2003), *available at* http://www.usdoj.gov/crt/edo/documents/clayor2.pdf (order approving the most recent consent decree in the ongoing *Lee v. Macon* litigation).

5. Sabel & Simon, *supra* note 1, at 1018–19 (explaining that, despite significant criticism and judicial disapproval on institutional grounds, public law litigation remains a staple of the American system of law).

6. *See* Alfred A. Lindseth, *The Legal Backdrop to Adequacy*, *in* COURTING FAILURE: HOW SCHOOL FINANCE LAWSUITS EXPLOIT JUDGES' GOOD INTENTIONS AND HARM OUR CHILDREN 35 (Eric A. Hanushek ed., 2006) (describing protecting individual rights, such as through desegregation rulings, as the courts' "traditional role").

7. *See* Sabel & Simon, *supra* note 1, at 1022–28 (describing federal desegregation litigation, state education finance equity litigation, and state education finance adequacy litigation as three types of public law litigation).

8. I use this term throughout to describe the currently dominant form of education finance litigation that presents the theory that the state constitution is violated because the legislature has not appropriated sufficient overall funding to meet a defined constitutional standard. *See, e.g.*, William E. Thro, *Judicial Analysis During the Third Wave of School Finance Litigation: The Massachusetts Decision as a Model*, 35 B.C. L. REV. 597, 600–03 (1994) (describing the three "waves" of education finance reform litigation); *see also infra* notes 18–19 and accompanying text (discussing the "third wave" of education finance reform litigation, generally understood to be the "adequacy" wave). *But see, e.g.*, 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) (explaining that no clear line divides equality theories from adequacy theories, and that in fact,

more suspect. Litigation over educational adequacy ostensibly places the judiciary in the position of rendering value judgments as to legislative appropriation levels in the absolute, and this requirement raises significant separation of powers concerns.[9] Due to this characteristic, education finance litigation based on theories of inadequacy of spending or resources has recently generated a spate of both judicial activity and scholarly commentary.

A. The Litigation-Based Reform Context

Education finance litigation involves constitutional challenges to state education funding systems, where the ultimate goal is an increase or reallocation of statewide education funding. It has been generally accepted in the scholarly community that this litigation has proceeded through three "waves" of reform.[10] Recently, this "wave" metaphor has received significant scholarly criticism.[11] However, I briefly review it here because, despite its flaws, the "wave" metaphor provides a useful framework for understanding, at a broad level, the types of cases analyzed in this Article.

Under this metaphor, the first wave involved challenges brought in federal and state courts based on the Equal Protection Clause of the Fourteenth Amendment. The Supreme Court closed the federal door on these

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both theories are present in most education finance cases); William S. Koski & Rob Reich, *When "Adequate" Isn't: The Retreat from Equity in Educational Law and Policy and Why it Matters*, 56 EMORY L.J. 545, 611 (2006) (advocating for a return to equity as the dominant theory); James E. Ryan, *Standards, Testing, and School Finance Litigation*, 86 TEX. L. REV. 1223, 1233–38 (2008) (doubting the existence of distinct theories of relief in education finance reform litigation).

9. *See, e.g.*, Joshua Dunn & Martha Derthick, *Who Should Govern? Adequacy Litigation and the Separation of Powers*, *in* SCHOOL MONEY TRIALS: THE LEGAL PURSUIT OF EDUCATIONAL ADEQUACY 322 (Martin R. West & Paul E. Peterson eds., 2007) (outlining objections to education adequacy litigation based on separation of powers principles); Lindseth, *supra* note 6, at 44–46 (outlining separation of powers-based objections to judicial review in education finance adequacy litigation). According to Lindseth, this greater concern for the judicial role results from the fact that a constitutional challenge based on adequacy grounds in effect challenges the decision of a majoritarian branch of government on a matter of discretionary policy. *Id.* at 45; *see also* Michael Heise, *Preliminary Thoughts on the Virtues of Passive Dialogue*, 34 AKRON L. REV. 73, 96–98 (2000) ("State court participation in an effort to overcome legislative inertia is more intrusive than a judicial participation in an effort to get state lawmakers to cease doing something.") (citing Note, *Unfulfilled Promises: School Finance Remedies and State Courts*, 104 HARV. L. REV. 1072, 1082 (1991)).

10. *See, e.g.*, Michael Heise, *State Constitutions, School Finance Litigation, and the "Third Wave": From Equity to Adequacy*, 68 TEMP. L. REV. 1151 (1995) (adopting the wave metaphor); William E. Thro, *A New Approach to State Constitutional Analysis in School Finance Litigation*, 14 J.L. & POL. 525, 530 (1998) (outlining the "waves" metaphor and how school finance decisions have seemed to fall into the extremes of judicial abdication or judicial activism); Thro, *supra* note 8, at 603 (outlining the waves metaphor).

11. *See* Koski, *supra* note 8, at 1283–96 (explaining that no clear line divides equality theories from adequacy theories, and that in fact, both theories are present in most education finance cases); Ryan, *supra* note 8, at 1237 (calling into doubt the distinctions made between the second and third waves); *id.* at 1229 n.35 (citing Richard Briffault, *Adding Adequacy to Equity*, *in* SCHOOL MONEY TRIALS, *supra* note 9, at 25, 25–27). *See also* Koski & Reich, *supra* note 8, at 547 (making the prescriptive case for returning to equity as the dominant theory).

types of challenges through its rulings in *San Antonio Independent School District. v. Rodriguez*[12] that education is not a federal fundamental right,[13] and that wealth is not a suspect classification for the purposes of analysis under the Equal Protection Clause.[14] Based on these holdings, the Supreme Court in *Rodriguez* applied rational basis review and upheld Texas's school finance system, despite broad inequalities in funding, based on what the Court determined to be the legitimate governmental objective of preserving local control over educational decision making.[15]

The denial of strict scrutiny review of educational funding inequalities in federal courts had the immediate effect of directing all education finance litigation to state courts, where this litigation was pursued in a second wave of reform involving primarily equity-based challenges based on the equal protection or uniformity provisions of state constitutions.[16] These second-wave challenges met with varying levels of success, typically depending on whether education was found to have the status of a fundamental right in the state—the same determination that was ultimately dispositive in *Rodriguez*.[17] Ultimately, however, litigants generally migrated away from the equality-based strategy in favor of a new strategy: suits based on the absolute inadequacy of education spending.[18] These challenges make up the third wave of litigation-based reform, and adequacy-based theories currently remain dominant in education finance reform litigation.[19]

Constitutional challenges to state education finance systems are extremely controversial, only partially because of the huge amounts of public dollars at stake in such suits.[20] Much of the controversy stems from the

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12. 411 U.S. 1 (1973) [hereinafter *Rodriguez*].
13. *Id.* at 37.
14. *Id.* at 28–29.
15. *Id.* at 55.
16. *See* Thro, *supra* note 8, at 601–03.
17. *See* R. CRAIG WOOD, EDUCATIONAL FINANCE LAW: CONSTITUTIONAL CHALLENGES TO STATE AID PLANS—AN ANALYSIS OF STRATEGIES 69–70 (3d ed. 2007) (outlining the history of the "equity" wave).
18. *See* Thro, *supra* note 8, at 603–04. Many explanations exist for this migration, among them that the issues surrounding determinations of equality and equity became too complex for courts and the public to accept, that urban districts did not see many benefits in equity litigation, and that the pervasive influence of "local control" impaired the goals of plaintiffs. *See* Michael Heise, *Equal Educational Opportunity, Hollow Victories, and the Demise of School Finance Equity Theory: An Empirical Perspective and Alternative Explanation*, 32 GA. L. REV. 543, 579–85 (1998) (explaining these theories and introducing the alternative explanation that remedies did not have their desired effects of centralization of and increases in spending).
19. As several scholars have pointed out, equity theories have not disappeared from education finance litigation. *See supra* note 10. In fact, in some cases equity remains the dominant theory, and at least one scholar has determined that, even in purported "adequacy" cases, the adjudication of the claims amounts to evaluating inequalities. *See* Ryan, *supra* note 8. Nevertheless, this third "wave" remains distinct from prior reform periods because inadequacy was not pressed by litigants as a dominant theory of relief during these prior periods.
20. *See, e.g.*, Kern Alexander, *The Common School Ideal and the Limits of Legislative Authority:*

widely held concern that school policy is the paradigmatic province of state legislatures, and that courts are ill-suited to render decisions approving or disapproving of what are essentially subjective, priority-setting policy decisions of a legislative body.[21] Right or wrong, this criticism is pervasive. The third wave of school finance litigation draws attention above all others from both courts and commentators on this basis,[22] and courts and commentators have struggled to identify adjudicatory models that would both allow for judicial review and preserve the traditional role of the judiciary in this litigation.

B. The Scholarly Context

Much research has been conducted over the past thirty years relating to constitutional challenges to state education spending. Although the vast majority of this work employs descriptive doctrinal analysis or normative analysis, a small group of existing studies in this field quantitatively examines the influences of several internal or external factors on judicial decision making, and the findings of these studies have been of some interest.[23] However, none of these studies has directly considered separation of powers as a relevant explanatory legal variable.[24]

The Kentucky Case, 28 HARV. J. ON LEGIS. 341, 343 (1991) (describing the outcome of what many consider the seminal education finance case of the adequacy era: "The case caused the legislature to fashion new tax legislation which resulted in increased revenues of over one billion dollars.").

21. *See* Blanchard, *infra* note 128, at 264–76 (outlining and responding to these concerns); Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101, 173–80 (1995) (same). Several commentators have suggested that the recent move to standardize education and insert test-based accountability has provided the courts with appropriate standards by which they can make such judgments. *See, e.g.*, Molly McUsic, *The Use of Education Clauses in School Finance Reform Litigation*, 28 HARV. J. ON LEGIS. 307, 315–17 (1991); William F. Dietz, Note, *Manageable Adequacy Standards in Education Reform Litigation*, 74 WASH. U. L.Q. 1193, 1200 (1996). These articles are subject to the criticism that they advocate as minimum standards goals that are merely typically developed and stated as "stretch" goals. *See generally* LAWRENCE BRADEN ET AL., THE STATE OF STATE STANDARDS (Chester E. Finn, Jr. & Michael J. Petrilli eds., 2000), *available at* http://www.edexcellence.net/doc/Standards2000.pdf (finding that many purported state standards of minimum competency are in fact developed aspirationally). Therefore, judging the adequacy of legislative action based on their achievement places an impossibly high burden on legislative bodies and gives them every incentive not to propose educational goals that are difficult to achieve. *See* Ryan, *supra* note 8, at 1247–50 (arguing that adequacy standards based on content learning standards are too easy for legislatures to "game"). *Cf.*, Paul E. Peterson, *A Lens that Distorts*, 7 EDUC. NEXT 46 (Fall 2007) (outlining the lowering of state standards that has resulted from increased scrutiny of testing results due to the federal No Child Left Behind Act). Over the years, a robust literature and consulting industry has emerged, putting forth competing models for determining the cost of an adequate education. *See* Bruce D. Baker, *The Emerging Shape of Educational Adequacy: From Theoretical Assumptions to Empirical Evidence*, 30 J. EDUC. FIN. 259, 270–73 (2005) (outlining the cost determination literature).

22. *See, e.g.*, Ryan, *supra* note 8, at 1255–56 (outlining the tendency of litigation based on non-comparative methodologies to draw criticisms based on lack of institutional competence).

23. *See infra* Part II.A.

24. *See infra* Part II.A.

The normative legal scholarship of education finance adequacy, although it has often acknowledged the importance of inter-branch relations, has also generally omitted any comparative analysis of separation of powers doctrine in the states.[25] The growing body of normative scholarship in education finance adequacy has been dominated by an approach that either assumes or advocates the justiciability of education finance adequacy suits and has often supported this conclusion with the argument that federal separation of powers principles should not apply in the states.[26] More importantly, this scholarship, whether it finds federal separation of powers principles important or largely irrelevant in the state context, tacitly assumes uniformity of these principles *among the states themselves*.

These tendencies seem to be poorly fitted to the landscape of constitutional text among the several states. Unlike the United States Constitution, the constitutions of about two-thirds of the states that have addressed education finance adequacy litigation contain explicit separation of powers provisions.[27] The remaining third contain no explicit mandate and instead reflect the federal approach of inferring separation of powers principles from the three-branch structure of the constitutional government.[28]

Despite this unique characteristic of state constitutions, very little scholarship has attempted to determine the influence of separation of powers principles on education finance litigation outcomes, and none has examined the influence of these principles on justiciability determinations, where they should be most salient. Further, no studies have considered in any depth how state courts differentiate between abstention and review of the merits in adequacy litigation.

Studies of education finance litigation tend to assume that all courts abstaining from the merits simply have it wrong, and that courts reaching the merits and identifying constitutional harms generally have it right.[29] Accordingly, scholars tend to limit their normative proposals to reforming either adjudication of the merits or remediation of the identified constitutional harms, and they consequently give short shrift to concerns over the propriety of judicial review. Where they do address the proper extent of judicial review, it is nearly always in relation to remediation of harms, and even this scholarship tacitly assumes uniformity of separation of powers doctrine among the states.

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25. *See infra* Part II.B.
26. *See infra* Part II.B.
27. *See* G. Alan Tarr, *Interpreting the Separation of Powers in State Constitutions*, 59 N.Y.U. ANN. SURV. AM. L. 329, 337 (2003). *See also* John Devlin, *Toward a State Constitutional Analysis of Separation of Powers: Legislators and Legislative Appointees Performing Administrative Functions*, 66 TEMP. L. REV. 1205, 1236–37 (1993) ("The most immediately striking difference among state constitutional texts concerns their respective guarantees of the separation of governmental powers.").
28. *See* Tarr, *supra* note 27.
29. *See infra* Part II.B.

A review of this literature suggests that there may be a rather large elephant in the room. Unlike the federal Constitution, some state constitutions provide explicitly for separation of powers.[30] Others imply these principles as the federal Constitution does.[31] Intuitively, one might expect that these textual differences would be associated with differences in state court determinations of the propriety of judicial review.[32] One would also expect reform proposals relating to judicial review to be tailored to any identified differences, rather than applicable uniformly among the states. At a minimum, one would expect that some studies would confirm or rule out a potential association between textual differences and differences in judicial review, but thus far, no study has considered the question.

In this Article, I consider the question and the implications of its surprising answer. First, in Part II, I review the scholarship addressing judicial decision making in education finance litigation, focusing on scholarship that has at least partially addressed separation of powers principles or judicial review, ultimately framing the question that this Article confronts. Then, in Part III, I describe the quantitative methodology employed in this Article and code the variables to be analyzed.

Using these coded data, in Part IV, I analyze the variables with the goal of identifying any association between the manner in which separation of powers principles are expressed in state constitutions and the level of merits review of education finance adequacy litigation employed or approved in each state. I conclude from the results of these analyses that, contrary to what one would intuitively expect, knowledge of the separation of powers principles expressed in a state's constitution does not allow one to more accurately predict the extensiveness of judicial review in education finance adequacy litigation. In fact, the concepts appear to be completely unrelated. In Part V, I consider an alternative explanation for this surprising lack of association, and I sketch out a proposal for a new direction for inquiry in the scholarship of education finance.

II. JUDICIAL DECISION MAKING IN EDUCATION FINANCE LITIGATION

Existing scholarship relating to judicial decision making in education finance adequacy litigation has taken one of two paths. Some scholars have analyzed this litigation empirically and descriptively, attempting to look backward for explanations of case outcomes. Others have looked at litigation-based reforms more theoretically, employing normative analyses

30. *See infra* Part VI., tbl.1 (listing and categorizing state constitutional separation of powers provisions).

31. *See infra* Part VI., tbl.1 (listing and categorizing state constitutional separation of powers provisions).

32. *Cf.*, Tarr, *supra* note 27, at 340 (arguing that the state constitutional differences require a "distinctive jurisprudence" in state courts on separation of powers questions).

of the appropriate influences that legal and political factors should have on case outcomes, often proposing reforms to the adjudicatory methodologies used in these cases. In this Part, I review this literature, focusing first on the findings of the empirical scholarship, and continuing to the normative scholarship, with particular focus on the many proposals for adjudicatory reform that this literature has produced.

A. Empirical Scholarship of Factors Influencing Adjudication

1. Dominant Theories of Judicial Behavior

Political scientists generally recognize two broad theories of the factors that influence judicial decision making.[33] The first of these is generally termed the "legal perspective" theory[34] or the "legal subculture" theory.[35] In its purest form, the legal perspective theory, associated with the legal formalist theoretical approach to judging, posits that judges make decisions in litigation from a purely legal perspective.[36] That is, judges are assumed to decide cases based on the facts presented and the law applica-

33. In this Article, I focus on the two branches of decision making theory that have remained dominant over time in the political science and empirical legal literature. These are the "legal perspective" and the "political perspective." *See infra* notes 51–107 and accompanying text. Certainly, other approaches have found favor among political scientists and some legal scholars. Among these are the "strategic" model—a game theoretic approach—which holds that judges exhibit self-interested rational choices in an effort to maximize their personal goals and interests, while operating within the confines of their institutional roles; the "ruling coalition" model, which posits that, on multijudge appellate courts, the court as a whole tends to follow a subgroup of elite ideological leaders within the court, despite the political orientation of the court as a whole; and the "historical new institutionalist" model, which explains that judicial personal preferences and concepts of role are shaped and determined by the institution of the judiciary itself, in that judges internalize a shared "mission" and act to further this mission, whether consciously or unconsciously. *See generally*, Katayoun Mohammad-Zadeh, The Separation of Powers and the Supreme Court: A New Institutional Analysis of Inter-Branch Disputes, 1946–2005 (May 2007) (unpublished Ph.D. dissertation, University of Southern California) (on file with University of Southern California Library); *see also* Michael Heise, *The Past, Present, and Future of Empirical Legal Scholarship: Judicial Decision Making and the New Empiricism*, 2002 U. ILL. L. REV. 819, 833–43 (2002) (reviewing the different models of judicial decision making favored in the legal and political science literature). Although these competing approaches are well-accepted in the political science community, they have not yet appeared in the education finance scholarly literature.

34. G. ALAN TARR, JUDICIAL PROCESS AND JUDICIAL POLICYMAKING 270–71 (3d ed. 2003); *see also* Paula J. Lundberg, *State Courts and School Funding: A Fifty-State Analysis*, 63 ALB. L. REV. 1101, 1105–06 (2000) (citing HENRY R. GLICK, COURTS, POLITICS, AND JUSTICE 292, 308 (3d ed. 1993) in explaining the continuing relevance of the legal perspective theory).

35. ROBERT A. CARP & RONALD STIDHAM, JUDICIAL PROCESS IN AMERICA 283 (5th ed. 2001) (citing RICHARD J. RICHARDSON & KENNETH N. VINES, THE POLITICS OF FEDERAL COURTS (1970)).

36. *See* TARR, *supra* note 34, at 249. Professor Brian Tamanaha has recently shown that the more extreme version of this characterization—that of "meachanical jurisprudence"—has always been a strawman. See Brian Z. Tamanaha, *The Distorting Slant of Quantitative Studies of Judging*, 50 B.C. L. REV. 685, 690–98 (2009) (challenging the "mechanical jurisprudence" conception of judicial formalism).

ble to those facts, detached to the extent possible from external political factors and personal preferences.[37]

It is both intuitive and empirically established that judges do not always rely strictly on legal principles and established facts when rendering their decisions.[38] Thus, another theoretical approach to explaining judicial behavior has developed over time and has become dominant in the literature. This approach is referred to as the "political perspective"[39] or the "democratic subculture."[40] Under this theoretical approach, judges are assumed to be political actors, who make decisions based on nonlegal factors, such as their backgrounds, their personal attitudes and beliefs, their institutional roles, their interactions with other appellate judges, and the political cultures of the states in which they sit.[41]

The legal perspective theory of decision making is rightly criticized as overly simplistic when considered in the absolute.[42] Most would agree that judges are expected to render their decisions based on the law and facts, and to disassociate themselves from their own passions and prejudices. Intuitively, however, no human can completely divorce himself from his environment, background, personal opinions, or political ideology.[43] Nevertheless, scholars continue to view legal factors as a relevant explanatory variable,[44] and they have established that the law, especially where it is

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37. *See id*.

38. *See, e.g.*, Lori A. Ringhand, *Judicial Activism: An Empirical Examination of Voting Behavior on the Rehnquist Natural Court*, 24 CONST. COMMENT. 43, 66–67 (2007) (empirically examining the opinions joined by each justice on the Rehnquist Court and concluding that the more "conservative" justices were more willing to invalidate congressional enactments and overturn precedents than their more "liberal" colleagues). *See generally* Andrew D. Martin, Kevin M. Quinn & Lee Epstein, *The Median Justice on the United States Supreme Court*, 83 N.C. L. REV. 1275 (2005) (defining a well-accepted methodology for determining ideological leanings); Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557 (1989) (applying another well-accepted method to analyze ideology in the Supreme Court).

39. TARR, *supra* note 34, at 249.

40. CARP & STIDHAM, *supra* note 35, at 283 (citing RICHARD J. RICHARDSON & KENNETH N. VINES, THE POLITICS OF FEDERAL COURTS (1970)).

41. *See* CARP & STIDHAM, *supra* note 35, at 291; HENRY R. GLICK, COURTS, POLITICS, AND JUSTICE 312–13 (3d ed. 1993); CHRISTOPHER E. SMITH, COURTS, POLITICS, AND THE JUDICIAL PROCESS 137 (1993); TARR, *supra* note 34, at 261–62.

42. *See, e.g.*, GLICK, *supra* note 41, at 305–08 (outlining this criticism of the legal perspective).

43. *Cf.*, Carolyn Shapiro, *Coding Complexity: Bringing Law to the Empirical Analysis of the Supreme Court*, 60 HASTINGS L.J. 477, 487 (2009) (criticizing the failure of a popular political science database to take proper account of legal factors, while at the same time conceding that "[t]here can, of course, be no question that policy preferences or ideology play a role in Supreme Court decision making").

44. *See, e.g.*, Heise, *supra* note 33, at 839–40 (explaining the continuing relevance of legal factors in judicial decision making); Lundberg, *supra* note 34, at 1105–06 nn.19–29 and accompanying text (explaining the continuing relevance of the legal perspective theory of judicial decision making, despite the recent importance of attitudinal theories and political institutional theories); Richard L. Revesz, *A Defense of Empirical Legal Scholarship*, 69 U. CHI. L. REV. 169, 177–78 (2002) (explaining that scholars of judicial decision making in the legal academy generally pay more attention to legal factors than social scientists); Yohance C. Edwards & Jennifer Ahern, Note, *Unequal Treatment in State Supreme Courts: Minority and City Schools in Education Finance Reform Litigation*, 79 N.Y.U.

clear, does act as an important constraint on judicial decision making.[45] Based on the scholarship, the most justifiable position appears to be that legal factors constitute an important element of judicial decision making, but not a dispositive one.[46]

Scholars have analyzed the outcomes of constitutional challenges to state school finance legislation using many different variables within these competing theories of judicial decision making. The variables analyzed under the legal perspective theory have included the facts of each case, the legal theories presented to the courts, and the differences in state constitutions' "education clauses."[47]

The variables analyzed under the political perspective theory can be usefully grouped into two categories. The first category includes factors external to the judges, such as the political structure of the state, the state's judicial selection methods, the demographics of the litigants and the states, and the history of state legislative activity relating to education finance. The second category includes factors internal to the judges, such as their political affiliations and their beliefs and values.[48]

The few empirical legal studies addressing education finance litigation have generally examined a host of legal and political factors together, em-

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L. REV. 326, 334 (2004) (including several legal factors in a multifactor analysis of case outcomes in education finance litigation); *see also* CARP & STIDHAM, *supra* note 35, at 314. According to the authors, the "legal subculture" is most predictive of results where the law is clear. This conclusion is, of course, intuitive, but also helpful in organizing research relating to legal principles as a determinant of case outcomes. Recent political science scholarship comparatively analyzing several familiar predictive models of judicial decision making concluded that most models, including the "pure" legal model (which states that *only* legal factors influence judicial decision making), have poor predictive value in the separation of powers context, but that a more complex model considering the historical and institutional mission of the judiciary, along with the clarity of legal text it interprets, has significant predictive force. *See generally* Mohammad-Zadeh, *supra* note 33. Although Mohammad-Zadeh ultimately concludes that judicial decision making is a complex construct made up of political, personal, group, historical, and legal factors, in the words of the author, the findings of the study indicate that "law in fact *does* matter." *Id*. at 385.

45. *See, e.g.*, CARP & STIDHAM, *supra* note 35, at 314; Mohammad-Zadeh, *supra* note 33, at 385.

46. *See, e.g.*, TARR, *supra* note 34, at 261 (explaining that, although judges appear to be constrained by legal rules, other factors such as political preferences influence their decisions). *Cf.*, James L. Gibson, *From Simplicity to Complexity: The Development of Theory in the Study of Judicial Behavior*, 5 POL. BEHAV. 7, 9 (1983) ("In a nutshell, judges' decisions are a function of what they prefer to do, tempered by what they think they ought to do, but constrained by what they perceive is feasible to do."). Based on Professor Gibson's formulation, judicial decision making can be explained as a function of the political preferences and role orientations of the judges, tempered by the institutional environment within which the courts exist. Although it has not been broadly interpreted as such, Professor Gibson's formulation appears to leave room for legal factors as part of the "feasibility" element.

47. I use the term "education clause" to denote the provision of each state constitution that provides for the establishment and maintenance of a state public school system. For a collection of each of these fifty state constitutional provisions, see WOOD, *supra* note 17, at 103–08.

48. I respectfully derive the distinction between external and internal political factors from Vriesenga. *See* Michael P. Vriesenga, Judicial Beliefs and Education Finance Adequacy Remedies 87–89 (Aug. 24, 2005) (unpublished Ph.D. dissertation, Vanderbilt University) (on file with Vanderbilt University Library).

ploying logistic regression techniques or cross-tabulations.[49] A smaller number of studies have focused on more limited variables, some from the legal perspective and some from the political perspective.[50] Taken together, these studies offer limited, but important, empirical conclusions relating to the influence of the many legal and political variables impacting judicial decision making in education finance litigation.

2. *Legal Factors*

Most empirical studies seeking to identify relationships between case outcomes and independent variables have included as variables "legal" factors, including the facts before the courts in education finance cases and the applicable legal rules. Several scholars have argued that the relative "strength" of the language of a state constitution's education clause[51] ought to determine differences in the outcomes of adequacy litigation in relation to outcomes in other states.[52] However, little scholarship has been able to

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49. *See generally* Edwards & Ahern, *supra* note 44 (conducting a percent-difference analysis and a covariance analysis of the influence of several variables analyzed in prior empirical analyses of education finance litigation outcomes); Heise, *supra* note 9 (empirically examining the effectiveness of competing theories of judicial review on remediation of adequacy-based constitutional violations); Lundberg, *supra* note 34 (conducting a logistic regression analysis including legal factors, demographic factors, and political factors in the context of education finance litigation in general); James E. Ryan, *The Influence of Race in School Finance Reform*, 98 MICH. L. REV. 432, 455–56 (1999) (empirically examining the influence of race and other demographic factors on education finance litigation outcomes); Karen Swenson, *School Finance Reform Litigation: Why Are Some State Supreme Courts Activist and Others Restrained?*, 63 ALB. L. REV. 1147 (2000) (conducting a similar logistic regression analysis, but defining variables and variable categories somewhat differently from those defined in Professor Lundberg's study). These studies have generally proceeded from each other. For example, Edwards and Ahern pointed out that the small size of the samples studied by both Lundberg and Swenson, considered along with the many predictors utilized in their regression models, rendered the statistical reliability of their conclusions suspect. Edwards & Ahern, *supra* note 44, at 333 n.41. These methodological objections were one factor motivating Edwards and Ahern to attempt to replicate the conclusions of Lundberg and Swenson. *Id.* at 333 n.41 and accompanying text. One of the stated purposes of the Edwards and Ahern study was also to replicate in another context the analysis performed by Professor Ryan. *Id.*

50. One study examined only legal factors. Bill Swinford, *A Predictive Model of Decision Making in State Supreme Courts: The School Financing Cases*, 19 AM. POL. RES. 336, 347 (1991) (analyzing the influence of education clause language on case outcomes). Two studies examined only attitudinal factors and their influence on outcomes of education finance litigation. *See* William S. Koski, *The Politics of Judicial Decision-Making in Educational Policy Reform Litigation*, 55 HASTINGS L.J. 1077, 1083 (2004) (examining the influence of judicial ideology on case outcomes in Ohio and Wisconsin); Vriesenga, *supra* note 48, at 198–201 (examining the influence of judicial political attitudes on the content of remedial orders).

51. Classification of state education clauses by the relative strength of their text was first suggested by Erica Black Grubb in her 1974 article, *Breaking the Language Barrier: The Right to Bilingual Education*, 9 HARV. C.R.-C.L. L. REV. 52, 66–70 (1974), and was first accomplished by Gershon M. Ratner in his 1985 article, *A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills*, 63 TEX. L. REV. 777, 814–16 nn.143–46 (1985). The most authoritative statement of this typology is found in William E. Thro's 1993 article, *The Role of Language of the State Education Clauses in School Finance Litigation*, 79 EDUC. L. REP. 19, 23–25 (1993).

52. *See* Thro, *supra* note 51, at 22; William E. Thro, *To Render Them Safe: The Analysis of State Constitutional Provisions in Public School Finance Reform Litigation*, 75 VA. L. REV. 1639, 1661–69

identify a relationship between the language of a state constitution's education clause and the outcome of education finance litigation in that state.[53]

In an early political science study, Professor Bill Swinford identified a positive relationship between state education clause language and case outcomes.[54] Swinford's study analyzed the cases decided from 1971 through 1989, and the typology he used to classify the relative strength of the state education clauses differed from the one generally accepted in the education finance scholarly community today.[55] Nevertheless, Swinford found that, where a state specifies that education should be equal or efficient in the constitution, litigation is more likely to be successful in that state.[56] His findings lent some support to the thesis that a state's education clause language matters, at least in primarily equity-based litigation.[57]

Professor Paula Lundberg ostensibly identified a relationship between strength of education clause language and case outcomes in cases where the courts rendering a verdict against the state principally relied on the education clause (rather than some other constitutional provision) in making their decisions.[58] However, methodological concerns limit the implications of Lundberg's findings. By design, Lundberg's analysis compared cases in which the majority of deciding judges both principally relied on the education clause *and* rendered or upheld a verdict against the state with cases in which the education clause was not placed at issue *and* cases in which it was placed at issue, but the court rendered a verdict for the state.[59] Under such limitations, a finding that the education clause's language was associated with outcomes could mean that the strength of the education clause impacts decision making, or it could equally likely mean that states with weak education clause language are more likely to expe-

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(1989); Jonathan Banks, Note, *State Constitutional Analyses of Public School Finance Reform Cases: Myth or Methodology?*, 45 VAND. L. REV. 129, 153–54 (1992).

53. *See, e.g.*, Ryan, *supra* note 49, at 455–56; Thro, *supra* note 10, at 540; Julie K. Underwood, *School Finance Litigation: Legal Theories, Judicial Activism, and Social Neglect*, 20 J. EDUC. FIN. 143, 150 (1994).

54. Swinford, *supra* note 50, at 347. "Case outcomes," as used herein, refers to an ultimate victory either for the state defendant or the plaintiffs.

55. *Id.* at 340–41.

56. *Id.* at 347.

57. Swinford's study's time period encompassed primarily cases decided within the second wave of education finance litigation. *See id.*; *see also* Thro, *supra* note 8, at 600–03 (outlining the waves of litigation-based education finance reform). Because of their timing and their limitation to constitutional language relating to equality or efficiency only, Swinford's conclusions should be viewed with care. Many courts examining claims during the second wave of education finance litigation did not address the education clause in their decisions, as most of these cases were founded on theories of equity and were brought pursuant to the state's equal protection clause. *Id.* at 601–02. Moreover, the failure of later scholarship to identify a clear relationship suggests that other factors were at work.

58. Lundberg, *supra* note 34, at 1133–35.

59. *See id.* at 1133 (explaining that, to create a modified education clause variable, the initial education clause variable was multiplied by one if the court rendered a judgment in favor of the plaintiffs and relied primarily on the education clause, and zero if the court either rendered a judgment for the state or rendered a judgment for the plaintiffs without relying primarily on the education clause).

rience equity suits than adequacy suits.[60] Thus, the findings related to the education clause variable should be read with care.[61]

Moreover, contemporaneous scholarship by Karen Swenson examining the same set of cases at a more general level (i.e., including ultimate judgments in favor of both plaintiffs and state defendants) failed to identify any relationship.[62] Yohance Edwards and Jennifer Ahern also attempted to replicate these results, combining the factors analyzed by both Lundberg and Swenson with certain demographic factors studied by Professor James Ryan, as discussed below, while adding the additional political demographic factor of the numerosity of the plaintiffs in each case.[63] Like Swenson, Edwards and Ahern were unable to identify a relationship between education clause language and case outcomes.[64]

These and other scholars have expressed puzzlement at the difficulty in identifying any clear relationship between education clause language and case outcomes. Intuitively, it should be much easier for a legislature to meet its constitutional obligation in a state with less demanding education clause language than in a state with more demanding education clause language.[65] It may be that the relative "strength" of the subjective terms in a state constitution's education clause has had no demonstrable relevance to outcomes in education finance cases in general because, as one scholar has put it, they are "inherently nebulous"[66] and thus not subject to prediction. Or it may be because about one-third of such cases have not proceeded to a substantive interpretation of the constitutional language, but are instead ultimately dismissed on procedural grounds rooted in the sepa-

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60. Because the "zero" category in Lundberg's study included both (i) plaintiff victories where the education clause was either not at issue or not primarily relied on, and (ii) defendant victories either where the education clause was not at issue or where it was explicitly at issue but the court rejected it or applied it in favor of the state, a finding of a relationship does not necessarily indicate that strong education clause language leads to plaintiff victories. Further, this categorization would conflate defendant judgments in equity claims, which are often on the merits-based or equal protection provisions, with defendant judgments in adequacy claims, which are nearly uniformly procedural dismissals on separation of powers grounds. This observation leads one to question whether any cases resulting in a defendant victory could legitimately be viewed as cases where the education clause is actually put at issue. *See infra* Part V. (examining the cases in total and concluding that a state has truly won a merits victory in only one adequacy-based case). To be fair, though, the Lundberg study was published in 2000, prior to several of the more recent separation of powers-based dismissals, and this fact alone may indicate that the education clause factor should be revisited empirically.

61. *See* Edwards & Ahern, *supra* note 44, at 333 n.41 (identifying and explaining an additional methodological concern that both the Lundberg and Swenson studies suffer from the flaw that they do not utilize enough observations to support the regression models in them).

62. Swenson, *supra* note 49, at 1174–75. This study was subject to the same criticism as Professor Lundberg's study. *See* Edwards & Ahern, *supra* note 44 (making the same methodological critique).

63. Edwards & Ahern, *supra* note 44.

64. *Id*. at 349–50.

65. *See id*. at 334; Lundberg, *supra* note 34, at 1108; Swenson, *supra* note 49, at 1174–75; Thro, *To Render Them Safe*, *supra* note 52, at 1661–69.

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

ration of powers.[67] Such dismissals may depend less on differences in the language of state education clauses than they do on differences in textual commands for separation of powers found in state constitutions.

Other legal factors have been analyzed and have generated some findings of interest. For example, Edwards and Ahern concluded that the dominant theory of constitutional violation presented to the court (i.e., equity versus adequacy) did not have a significant influence on case outcomes.[68] Lundberg also found no such influence.[69] Swenson found that existing state per-pupil expenditure levels were weakly significant positive predictors of the likelihood of plaintiff verdicts in education finance cases, but that the state's level of reliance on local funding sources and the size of gaps in property wealth between its districts were not significant predictors of case outcomes.[70]

While Swenson found a weakly significant relationship between case outcomes and the existing level of per-pupil expenditures, this effect is now subject to some question. Swenson identified a relationship indicating that courts in states with lower existing per-pupil expenditures at the time of litigation are more likely to overturn their school finance systems.[71] However, since the publication of her study, some high-spending states have seen their systems overturned, while some lower-spending states have experienced the opposite.[72] At a minimum, Swenson's findings on this point should be revisited, both due to the potential dynamic changes wrought by recent cases and due to the initial weakness of the identified effect.

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67. *See Ex parte* James, 836 So. 2d 813 (Ala. 2002) (dismissing ongoing adequacy litigation as nonjusticiable); Coal. for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles, 680 So. 2d 400 (Fla. 1996) (dismissing adequacy litigation as nonjusticiable); Comm. for Educ. Rights v. Edgar, 672 N.E.2d 1178 (Ill. 1996) (same); Neb. Coal. for Educ. Equity & Adequacy v. Heineman, 731 N.W.2d 164 (Neb. 2007) (same); Okla. Educ. Ass'n v. State, 158 P.3d 1058 (Okla. 2007) (same); Marrero v. Commonwealth, 739 A.2d 110 (Pa. 1999) (same); City of Pawtucket v. Sundlun, 662 A.2d 40 (R.I. 1995) (same).

68. Edwards & Ahern, *supra* note 44, at 350.

69. Lundberg, *supra* note 34, at 1133; *see also* Edwards & Ahern, *supra* note 44, at 350.

70. Swenson, *supra* note 49, at 1174–75.

71. *Id.*

72. *See, e.g.*, Campaign for Fiscal Equity, Inc. v. State, 801 N.E.2d 326 (N.Y. 2003) (ordering General Assembly to commission costing-out study to determine cost of a "sound basic education," as interpreted by the court—and as found by the court not to exist in plaintiff districts—in one of the highest-spending states in the nation); Okla. Educ. Ass'n v. State, 158 P.3d 1058 (Okla. 2007) (dismissing adequacy-based challenge on separation of powers grounds in one of the lowest-spending states in the nation). For data comparing the current per-pupil expenditures of the several states, see *Detailed State Data Comparison*, EDUCATIONWEEK, Jan. 8, 2009, http://www.edweek.org/apps/qc2009/state_compare.html.

3. Political Factors External to Judges

Scholars have also predicted that the political characteristics of the states in which court decisions are rendered should have great influence on the outcomes of cases.[73] Indeed, such relationships have been identified as to certain variables in education finance cases. For example, in her 2000 study, Lundberg found that courts in states with what she termed "traditionalistic," as opposed to "moralistic" or "individualistic," cultural demographics were more likely to strike down their education systems, and that states with fewer urban residents were also more likely to see their education systems invalidated.[74]

Similarly, Swenson found a positive relationship between the "liberalism" of the state's populace and the likelihood that a state's courts would overturn its education funding system, and this effect did not depend on political factors such as the method of selecting judges (discussed below) or the political party of the governor.[75] Edwards and Ahern corroborated these findings as to cultural demographic factors, but found that these effects were greatly influenced by the presence of plaintiffs from predominantly urban districts, who were far less likely to succeed in education finance litigation than those from suburban districts unless they joined forces, which improved the odds of success for both.[76]

One additional demography-based study is notable due to its troubling conclusions. Ryan found a negative relationship between the predominance of minority races in the school districts that were plaintiffs in school finance litigation and the success of reform mandates issued after judgments against the state.[77] Edwards and Ahern extended these findings to the context of actual case outcomes, rather than on effectiveness of remedies.[78] Interestingly, though, they found that this effect was influenced by several of their other measured factors and that it was overshadowed by the urban-suburban effect that they had also identified.[79]

As to judicial selection procedures (i.e., whether judges in each state were elected or appointed), Swenson found no evidence that they exerted significant influence on the outcomes of education finance cases.[80] This result, like many others in the empirical scholarship in this area, was counter-intuitive because of the obvious political implications of statewide

73. *See, e.g.*, Melinda Gann Hall & Paul Brace, *Justices' Responses to Case Facts: An Interactive Model*, 24 AM. POL. Q. 237, 244 (1996) (constructing a predictive model based on such factors).
74. Lundberg, *supra* note 34, at 1142.
75. Swenson, *supra* note 49, at 1177–78.
76. Edwards & Ahern, *supra* note 44, at 351.
77. Ryan, *supra* note 49, at 471–72.
78. Edwards & Ahern, *supra* note 44, at 349.
79. *Id.* at 349–50; *see also supra* note 76 and accompanying text.
80. Swenson, *supra* note 49, at 1174.

education finance rulings and remedies.[81] Nevertheless, Lundberg came to a conclusion similar to that of Swenson.[82] In fact, Lundberg also found that neither term length nor the political partisanship of judicial selection was significantly related to case outcomes.[83] In contrast, Edwards and Ahern found that, in states where judges were elected, plaintiffs were slightly more likely to win than in states where judges were appointed.[84]

One final conclusion as to external political factors is notable. In their study, Edwards and Ahern identified an intriguing and apparently strong relationship between the size of each plaintiff class (i.e., how many school districts joined as plaintiffs in each case) and the outcomes of the cases.[85] To date, Edwards and Ahern's study is the only one to have included this variable, and, as the authors state, their results suggest that coalition building may be important to success.[86]

The research discussed above has yielded a few notable findings. However, if one is studying adequacy litigation, the implications of all of these education finance studies are limited because each study examined both equity-based and adequacy-based cases. None of these studies has limited itself to adequacy-based litigation, which arguably implicates different legal, cultural, and political values than equity-based litigation.[87] If

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81. *See* William A. Fischel, *How* Serrano *Caused Proposition 13*, 12 J.L. & POL. 607 (1996) (arguing that an education finance decision led voters in California to so severely limit the taxation of property as to cripple state funding); Michael Heise, *The Courts, Educational Policy, and Unintended Consequences*, 11 CORNELL J.L. & PUB. POL'Y 633, 662 (2002) (describing the property tax "revolt" partially precipitated by the plaintiff victory in the *Serrano v. Priest* litigation in California in the 1970s). *But see* Kirk Stark & Jonathan Zasloff, *Tiebout and Tax Revolts: Did* Serrano *Really Cause Proposition 13?*, 50 UCLA L. REV. 801 (2003) (using multiple regression analysis to debunk Fischel's theory).

82. Lundberg, *supra* note 34, at 1137–38.

83. *Id.* at 1138.

84. Edwards & Ahern, *supra* note 44, at 349–50. Rather than measures of significance or strict quantification of effects, the methodology of the Edwards and Ahern study limited their conclusions to identification of relationships worthy of "further discussion." *Id.* at 348 ("To determine what merits discussion, the authors decided a priori that discussion was warranted whenever there was more than a 10.0% difference between two of the groups for categorical variables. For continuous variables, when the authors found a difference of more than 30.0% between the overall mean, and the mean for the cases that won or for those that lost, and 30.0% represented a substantial difference in the means, they considered it a meaningful magnitude of association."). Nevertheless, their findings are worthy of note.

85. Edwards & Ahern, *supra* note 44, at 351.

86. *Id.* at 354.

87. *See, e.g.*, Dunn & Derthick, *supra* note 9, at 32 (explaining that separation of powers issues are plainly relevant in adequacy litigation). Some scholars have begun to analyze whether "adequacy" litigation, as a separate category of litigation, even exists. *See, e.g.*, Ryan, *supra* note 8, at 1225–26; Richard Briffault, *Adding Adequacy to Equity: The Evolving Legal Theory of School Finance Reform* 4–8 (Princeton Law & Pub. Affairs Working Paper No. 06-013, 2006), *available at* http://ssrn.com/abstract=906145. These scholars have argued that litigation said to be founded on theories of adequacy usually merely masks an underlying claim based on comparability of resources. These developing arguments have strong force. However, as argued *infra*, it is equally plausible that, in cases where equity claims masquerade as adequacy claims, the "equity" component emerges as a means for the court to engage in merits review without truly confronting the separation of powers concerns made plain by substantive interpretation of most state education clauses.

it is possible, eliminating pure equity cases from the analysis might change these identified results.[88] This limitation, along with the methodological concerns noted above, requires the continuation and refining of work in this area.

4. Political Factors Internal to Judges

The studies examining factors internal to the judges deciding adequacy-based cases are somewhat sparse. To begin with, Lundberg was unable to identify any significant relationship between the political party affiliations of deciding judges and case outcomes.[89] This failure to find a relationship involving political affiliation, although initially surprising, could be explained by the fact that educational policy tends to transcend political divisions—a Republican may be no less likely than a Democrat to support increases in education funding or reform of educational policy in general. Evidence for this view can be found in the Republican-led, but bipartisan, enactment of the federal No Child Left Behind Act,[90] which greatly enlarged the federal role in education policy and substantially increased federal funding of education, both of which are policy results that traditionally, or perhaps stereotypically, would be disfavored by Republican partisans in policy arenas other than education.[91]

As a result of the failure of the reported studies to link judicial decision making in education finance litigation to political affiliations, scholars have recently attempted to move beyond the arguably inappropriate proxy of political labeling and instead examine the influence of the judges' actual personal political attitudes and ideologies on the outcomes of education

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88. In addition, due to the small number of highest-state-court opinions in education finance litigation (and the inherent limitation on this number due to there being only 50 states in the Union), we should view—with caution—the results of inferential analyses using logistic regression analyses of multiple variables, as these techniques generally require fairly large sample sizes to minimize sampling error. Edwards and Ahern attempted to address this limitation through their use of cross-tabulation analysis with "significance" determined a priori. *See* Edwards & Ahern, *supra* note 44, at 346–48. However, their designations of findings as worthy of "further discussion" were somewhat arbitrary, so these findings may indicate some association or none at all. I attempt to avoid these problems by focusing on one explanatory variable and employing a measure of association, rather than regression.

89. Lundberg, *supra* note 34, at 1118, 1136.

90. No Child Left Behind Act (NCLBA) of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002). *See also* Joseph O. Oluwole & Preston C. Green III, *No Child Left Behind Act: Teachers Relevant to the Failure to Make Adequate Yearly Progress and Due Process*, 238 EDUC. L. REP. 491, 491 (2009) (reviewing the bipartisan enactment of the legislation).

91. *See, e.g.*, *Government Reform*, 2008 REPUBLICAN PLATFORM, http://www.gop.com/2008Platform/GovernmentReform.htm ("Republicans will uphold and defend our party's core principles: Constrain the federal government to its legitimate constitutional functions. Let it empower people, while limiting its reach into their lives. Spend only what is necessary, and tax only to raise revenue for essential government functions. Unleash the power of enterprise, innovation, civic energy, and the American spirit—and never pretend that government is a substitute for family or community.").

finance adequacy cases. These scholars generally employ the technique of "attitudinal modeling."

Attitudinal modeling of judicial decision making is well-known to political science scholarship and has gained a significant foothold in legal scholarship as well.[92] Most studies employing attitudinal modeling have found significant relationships between modeled judicial attitudes and case outcomes, although the vast majority of such studies have focused on the United States Supreme Court and its decisions.[93] Few have addressed state court decision making,[94] and only two major attitudinal studies have thus far been completed relating to education finance litigation.[95] The first, an unpublished dissertation, was itself limited to examining the influences of judicial attitudes on the extent of remedies imposed by the highest state courts after deciding adequacy challenges in favor of plaintiffs, rather than each case's merits-based outcome on the constitutional question.[96] The study was further limited to four representative cases, rather than a complete enumeration.[97] Nevertheless, the study reported a significant relationship between judicial beliefs about education, as modeled in the dissertation, and the size and nature of the remedies awarded in successful education finance challenges.[98]

In the second of the two studies, an in-depth and rigorous case study, Professor William Koski identified a relationship between the "liberalism" of a state court, as modeled based on prior, non-education-related decisions, and case outcomes.[99] Similarly to Michael Vriesenga's study,[100] Koski limited his case study to two (albeit a well-selected two) state high court decisions, those in Ohio and Wisconsin, but the rigor in his case studies makes the findings related to these two states compelling.[101] Nevertheless, the existence of this limitation in both studies necessitates further inquiry on a broader scale.

Several other education finance scholars have suggested that judicial attitudes, beliefs, or philosophies are the most likely explanation for the outcomes of education finance litigation,[102] but no empirical studies other

92. *See, e.g.*, CARP & STIDHAM, *supra* note 35, at 349–50; TARR, *supra* note 34, at 266. *See generally* Heise, *supra* note 33.

93. *See, e.g.*, JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002); Ringhand, *supra* note 38; Segal & Cover, *supra* note 38.

94. *See* Vriesenga, *supra* note 48, at 95 (citing KENNETH M. DOLBEARE, TRIAL COURTS IN URBAN POLITICS: STATE COURT POLICY IMPACT AND FUNCTIONS IN A LOCAL POLITICAL SYSTEM (1967) as an example of one such study).

95. *See* Koski, *supra* note 50, at 1083; Vriesenga, *supra* note 48, at 96.

96. Vriesenga, *supra* note 48, at 219.

97. *Id.*

98. *Id.*

99. Koski, *supra* note 50, at 1083.

100. Vriesenga, *supra* note 48.

101. Koski, *supra* note 50.

102. *See, e.g.*, Swenson, *supra* note 49, at 1178–79 (concluding that education finance decision

than Vriesenga's and Koski's exist in the scholarly literature to date. Further, the limitations of attitudinal modeling of judicial decision making have subjected this methodology to growing criticism.[103]

First, absent some sort of survey instrument, interview protocols, or unfettered access to the private papers of each judge studied (options which would each present their own logistical problems), judicial "attitudes" or "ideologies" can only be modeled based on what jurists say publicly, and generally, far fewer public statements of state court judges exist than do public statements of the justices of the United States Supreme Court.

Analyzing based on statements judges make in other education cases, or in non-education cases, as Koski did,[104] might provide a way to address this problem, but court memberships can change far more rapidly on state courts than on the United States Supreme Court,[105] so it could be difficult to identify such prior statements in significant number to form a reliable model of judicial beliefs from one set of cases to the next. Perhaps further, more comprehensive research including more than a few states will illustrate whether the attitudinal effect is general or more limited and whether coding cases across subject matter categories can work broadly. In any event, another more practical limitation to attitudinal research counsels for the continuation of other approaches.

Assuming that judicial beliefs can be accurately gleaned and categorized from the reasoning appearing in state court education finance opinions, or from the reasoning or dicta of unrelated cases with strong political implications, the conclusion that judges tend to vote based on what they believe, in addition to (or rather than) based on the facts before them or the legal rules applicable to the case, is not very helpful to policy makers or even to the courts themselves in the absence of consistent legal doctrine that might make such attitudinalism readily apparent on a case-by-case basis. Policy makers cannot force judges to ignore their beliefs. Judges might be shamed into ignoring their own beliefs, or they might be punished at the ballot box in some states for failing to do so, but without

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making might be predicted only based on the "whimsy" of state supreme courts); 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, 235 (1990) (concluding that two rulings from the same state's highest court, one of which upheld the state's education finance system and the other of which invalidated the same system, could only be justified by an intervening change in the court's membership).

103. *See, e.g.*, Joshua B. Fischman & David S. Law, *What is Judicial Ideology, and How Should We Measure It?*, 29 WASH. U. J.L. & POL'Y 133 (2009); Shapiro, *supra* note 43; Brian Z. Tamanaha, *The Distorting Slant in Quantitative Studies of Judging*, 50 B.C. L. REV. 685 (2009).

104. *See* Koski, *supra* note 50.

105. *See, e.g.*, Robert A. Kagan, Bobby D. Infelise & Robert R. Detlefsen, *American State Supreme Court Justices, 1900–1970*, 9 AM. B. FOUND. RES. J. 371, 400 (1984) (tabularly reporting turnover rates among state supreme court justices during each five-year period from 1900 to 1970 as averaging between 33.9% and 38.5%).

consistently and predictably applicable legal doctrine, the failure of judges to suppress their personal beliefs would be detectable only through further attitudinal modeling.[106]

Interestingly, and possibly because judicial attitudinalism seems inherently irremediable, scholars of education finance have not focused prescriptions for reform on eliminating the influence of personal judicial attitudes on case outcomes.[107] Rather, the bulk of reform proposals focus on adjudication of the merits and remediation of identified constitutional violations. Particularly in adequacy cases, these proposals have recently coalesced around a common theme: "dialog."

B. Normative Scholarship Proposing Adjudicatory Reforms

The normative scholarly literature of judicial review in education finance litigation has been burgeoning of late. It has become clear based on the cases that separation of powers is a central principle in all education finance litigation, particularly in adequacy cases,[108] and a small but growing body of normative scholarship has begun to explore the proper implications of that principle. Here, I will focus on this scholarship relating to separation of powers concerns. This scholarship often comes under the banner of examining "judicial activism," which may or may not be the appropriate label for the studies to which it is attached.[109] Much of this

106. *See* GLICK, *supra* note 41, at 307 (explaining the limits that legal doctrine places on attitudinalism).

107. For example, no scholar has advocated eliminating or expanding the partisan election of state court judges as a means of reforming education finance litigation. Interestingly, one scholar of federal judicial decision making has recently advocated embracing the influence of ideology and taking it into account more explicitly in the United States Supreme Court confirmation process. *See* Lori A. Ringhand, *In Defense of Ideology: A Principled Approach to the Supreme Court Confirmation Process*, 18 WM. & MARY BILL RTS. J. 131 (2009).

108. *See generally* Dunn & Derthick, *supra* note 9.

109. *See* Keenan D. Kmiec, Comment, *The Origin and Current Meanings of "Judicial Activism"*, 92 CAL. L. REV. 1441 (2004) (exploring several meanings of the term, each of which may be valid in different circumstances). The term "judicial activism" generally refers to the perceived or actual tendency of some jurists to decide issues not before them or to read their own policy preferences into statutes and constitutional provisions that do not contain such preferred policies as written. *See* Florida v. Wells, 495 U.S. 1, 12–13 (1990) (Stevens, J., concurring in the judgment) ("It is a proper part of the judicial function to make law as a necessary by-product of the process of deciding actual cases and controversies. But to reach out so blatantly and unnecessarily to make new law in a case of this kind is unabashed judicial activism."); BLACK'S LAW DICTIONARY 862 (8th ed. 2004) (defining "judicial activism" as "[a] philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions . . . ."); Thro, *supra* note 10, at 540–43 (classifying several courts deciding adequacy cases in favor of plaintiffs as exhibiting "judicial activism" because the courts found content in their education clauses that no fair reading of these clauses would reveal). However, the term "activism" has also been used to describe the failure of courts to exhibit judicial restraint based on separation of powers concerns. *See, e.g.*, Swenson, *supra* note 49, at 1149–50 ("Striking down a statewide system of public school finance is a quintessential example of judicial activism—the least accountable branch of state government overrules the highly visible public policies set by state and local legislative bodies, and uses relatively novel legal precedent."); Kmiec, *supra*, at 1464–66 (reviewing conceptions of judicial activism as striking down

scholarship considers separation of powers principles along with other principles of adjudication in developing proposals for adjudicatory reforms.[110]

Beginning in the early 1990s, and in response to the then-recently decided landmark case of *Rose v. Council for Better Education*[111] in Kentucky, which many credit as ushering in the "adequacy" theory as the dominant one, scholars began to examine whether the newly-ascendant adequacy-based suits would prove more effective than the previously dominant suits presenting equity-based theories of relief.[112] Several of these scholars initially argued that adequacy suits implicate separation of powers concerns *less* directly than equity suits because they do not result in redistributive remedies.[113] More recently, this perception has somewhat reversed itself in the literature,[114] but some early studies took it to be true.

In 1991, Professor Molly McUsic saw in the then-emerging adequacy suits the opportunity for courts to eschew the role of super-education board or legislative policy maker by focusing their merits decisions on "output-based," rather than "input-based," methodologies; namely, the content learning standards that had already been promulgated in each of the fifty states.[115] McUsic proposed that courts faced with adequacy suits adopt the state-developed content standards as the constitutional standard of adequacy, declare any system where students are not meeting them as unconstitutional, and order that student achievement be brought up to the articulated standards.[116] Beyond those tasks, she argued, the courts should not dictate any increases in expenditures, but should leave such decisions to the legislatures.[117] By specifying required outputs rather than mandating inputs such as expenditures, McUsic argued, courts could avoid the separation of powers concerns that had plagued earlier litigation.[118]

McUsic's proposal was based on the language of the decision of the Kentucky Supreme Court in *Rose* and the earlier West Virginia Supreme Court decision in *Pauley v. Kelly*.[119] Although neither court adopted its

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acts of coordinate branches that are arguably constitutional).

110. *See, e.g.*, Dunn & Derthick, *supra* note 9, at 339–40 (arguing based on institutional concerns that adequacy litigation should be limited); Ryan, *supra* note 8, at 1255–57 (defending a proposed adjudicatory reform due to its potential to mitigate separation of powers concerns).

111. 790 S.W.2d 186 (Ky. 1989).

112. *See, e.g.*, McUsic, *supra* note 21, at 327 ("Minimum standards claims are less likely to disrupt local control of schools, pit the judiciary against the legislature, or require legislators to enact a funding scheme that thwarts the interests of their wealthier constituents.").

113. *See, e.g.*, *id.* at 329–30.

114. *See, e.g.*, Heise, *supra* note 9, at 104–05 (reviewing the separation of powers concerns wrought by adequacy litigation, whether courts are active or passive in their remediation).

115. McUsic, *supra* note 21, at 330.

116. *Id.*

117. *Id.*

118. *Id.* at 330–31.

119. 255 S.E.2d 859 (W. Va. 1979).

state's content-learning standards as constitutional principle, each court chose to define its state constitution's education clause's requirements in arguably output-based terms, indicating that the state's school system must be designed to educate children in certain competencies.[120] McUsic argued that adopting these types of "output" standards would prevent courts from legislating from the bench by mandating certain policies.[121] She even suggested that courts use achievement test scores to determine whether the standards are met, and fashion remedies that require certain performance levels on such tests.[122]

To date, no court has adopted McUsic's proposal.[123] Most likely, this is because standards promulgated by state education agencies are often difficult to test, and they are most often designed as aspirational guidelines rather than as minimum requirements.[124] Such standards would therefore be quite onerous if they were set as the absolute minimum level of educational attainment for all students enforceable under the state constitution. In fact, when examined with a practical eye, even the guidelines from *Rose*, *Pauley*, and other subsequent adequacy cases decided in favor of plaintiffs, which guidelines were devised by the courts themselves rather than gleaned from state standards, appear to be unattainable in the absolute.[125]

Thus, it is difficult to see how an approach like McUsic's could ever work, regardless of its assumed greater potential to avoid separation of powers concerns. In fact, because such an approach would virtually guarantee that a state's system would be unconstitutional in perpetuity, and

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120. *See* McUsic, *supra* note 21, at 331–32 n.109 (quoting Pauley v. Kelley, 255 S.E.2d 859, 877 (W. Va. 1979)) & 332 n.110 (quoting Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 212 (Ky. 1989)). On closer examination, neither of these courts actually mandated that students achieve the stated outcomes. They merely specified that a valid system would provide sufficient funding to allow students to achieve them. As Professor Ryan has noted, only one court to date has actually approached education finance adequacy litigation using an output-based approach. *See* Ryan, *supra* note 8, at 1237 (finding that only one state court has ever relied on state content standards in part as the constitutional standard).

121. McUsic, *supra* note 21, at 330.

122. *Id.* at 333.

123. *See* Koski & Reich, *supra* note 8, at 571 ("[N]either [the New York Court of Appeals] nor any other court has gone so far as to constitutionalize the outcomes accountability movement."). Koski was correct at that time that the New York Court of Appeals did not actually set the state Regents standards as the constitutional standard, but the trial court's later remedial order in that case, which was affirmed by the Court of Appeals, relied for its funding orders on a private, third-party adequacy study based on an assumed goal of educating all New York City students sufficiently to pass the rigorous requirements for a Regents diploma. *See* Lindseth, *supra* note 6, at 52.

124. *See* Paul T. Hill & Robin J. Lake, *Standards and Accountability in Washington State*, *in* BROOKINGS PAPERS ON EDUCATION POLICY 199, 233 (Diane Ravitch ed., 2002), *available at* http://muse.jhu.edu/journals/brookings_papers_on_education_policy/v2002/2002.1cohen.pdf (concluding, based on an extensive case study, that although rhetoric surrounding standards adoption consistently characterizes them as minimum requirements for completion of certain levels of education, the processes in adopting standards reflect an aspirational view of standards).

125. *See* Thro, *supra* note 10, at 548 ("If [the Kentucky] standard is taken literally, there is not a public school system in America that meets it.").

because this perpetual state of unconstitutionality would serve as a lure for serial lawsuits guaranteeing plaintiff victories against the state (and possibly attorneys' fees), this approach would likely offend the separation of powers more greatly than other approaches. Moreover, pegging the constitutional standard to state content standards presents the legislature with a significant opportunity to "game" the system by simply lowering the content standards.[126] If state learning standards were indeed the constitutional standard, then the state constitution could be amended through a simple legislative or administrative change in the learning standards. Most would agree that it should not be so easy to amend a state constitution.

Since McUsic's early adequacy study, the normative scholarship has continued to propose adjudicatory reforms, but it has largely altered its focus from the adjudication of the merits to the fashioning of remedies.[127] Scholars have now reached a near-consensus that courts should engage in at least some merits review of the constitutional standard, often based on the premise that federal justiciability doctrine is unsuited to state courts.[128]

Education finance scholars have proposed different means by which this adjudication should occur. However, most have developed what might be regarded as a consensus position—with few detractors of late—that

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126. Ryan, *supra* note 8, at 1250.

127. *See, e.g.*, George D. Brown, *Binding Advisory Opinions: A Federal Courts Perspective on the State School Finance Decisions*, 35 B.C. L. REV. 543 (1994) (coining the term "binding advisory opinions" and advocating an active state court approach to participatory remediation in cooperation with state defendants); Larry J. Obhof, *Rethinking Judicial Activism and Restraint in State School Finance Litigation*, 27 HARV. J.L. & PUB. POL'Y 569, 572–73 (2004) (advocating review of the merits, but complete abstention from the remedy); Thro, *supra* note 10, at 539–44 (arguing for active judicial review, accompanied by limited deference to legislative bodies as to remediation); *see also* Avidan Y. Cover, Note, *Is "Adequacy" a More "Political Question" than "Equality?": The Effect of Standards-Based Education on Judicial Standards for Education Finance*, 11 CORNELL J.L. & PUB. POL'Y 403, 419 n.107 (2002) (citing Brown, *supra*); Margaret Rose Westbrook, Comment, *School Finance Litigation Comes to North Carolina*, 73 N.C. L. REV. 2123, 2181 n.473 (1995) (same). *But see generally* Ryan, *supra* note 8 (proposing a reform to adjudication that encompasses a corollary reform to remediation in conflict with the generally favored "dialogic" approach). To be sure, arguments for either costing-out the merits or using standards-based merits determinations of adequacy remain visible in the literature. *See, e.g.*, Janet D. McDonald, Mary F. Hughes & Gary W. Ritter, *School Finance Litigation and Adequacy Studies*, 27 U. ARK. LITTLE ROCK L. REV. 69 (2004) (examining the adequacy study conducted in the Arkansas adequacy litigation); Steve Smith, *Education Adequacy Litigation: History, Trends, and Research*, 27 U. ARK. LITTLE ROCK L. REV. 107 (2004) (outlining the costing-out and standards-based approaches). However, the scholarship examining and proposing reforms to remedial practices has become ascendant, to the extent that it has attracted attention even outside the education-finance field. *See, e.g.*, Alana Klein, *Judging as Nudging: New Governance Approaches for the Enforcement of Constitutional Social and Economic Rights*, 39 COLUM. HUM. RTS. L. REV. 351, 397–402 (2008) (tentatively holding up education finance litigation in the United States as an exemplar of a proposed approach to remediation of social welfare claims).

128. One of the first fulsome examinations of the question came in Michael D. Blanchard, *The New Judicial Federalism: Deference Masquerading as Discourse and the Tyranny of the Locality in State Judicial Review of Education Finance*, 60 U. PITT. L. REV. 231 (1998), where the author argued that, due to institutional differences between state and federal courts, separation of powers objections to adjudication of education finance cases were not well-taken. Similar arguments have been made since then both by education scholars and prominent scholars of constitutional law. *See infra* notes 172–193 and accompanying text.

courts should follow what has been referred to by Professor Michael Heise as a "dialogic" approach.[129] That is, courts should adjudicate the merits, but should abstain from making specific injunctive remedial orders binding on state legislatures—what I refer to here as "remedial abstention." Although it had earlier foundations,[130] this school of thought was fully developed by William E. Thro, a frequent and respected commentator on education finance issues.[131] Thro identified what he saw as an emerging trend in education finance decisions, whereby courts deciding these challenges took on one of two postures—either that of "activism" or that of "abdication."[132] Thro argued that this polarization was harmful to judicial legitimacy, and that a more moderate approach was necessary for the judiciary to assume its proper role in education finance reform.[133]

To that end, Thro proposed a three-step approach to adjudication of education finance claims. First, a court should determine whether the state's education clause establishes a quality standard or a fundamental right to education.[134] If this question is answered in the negative, then the litigation should be terminated in favor of the state defendant.[135] If it is answered affirmatively, then the court should examine what is mandated by the quality standard or what is required or guaranteed by the fundamental right.[136]

According to Thro, the court should approach this second inquiry by asking two subsidiary questions: first, whether a standard can be adopted from a coordinate branch; and second, what level of educational quality is necessary to meet the standard.[137] Thro proposed that a standard should be adopted from another branch where possible, but that if the judiciary were

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129. *See* Heise, *supra* note 9, at 76–84 (describing judicial approaches in education finance adequacy suits as "dialogic").

130. *See, e.g.*, Brown, *supra* note 127, at 545 (criticizing the very limited form of remedial abstention present in the cases at that time and terming it as "remedial deference"); John Dayton, *The Judicial-Political Dialogue: A Comment on Jaffe and Kersch's "Guaranteeing a State Right to Quality Education"*, 22 J.L. & EDUC. 323 (1993) (challenging a court-centered version of education reform); Enrich, *supra* note 21, at 176–77 (explaining the Kentucky, Washington, and Massachusetts decisions as judicial "goad[ing]" or "backstop[ping]," where the judiciary entered ongoing or predicted political stalemates and removed many political barriers to progress); Mark Jaffe & Kenneth Kersch, *Guaranteeing a State Right to Quality Education: The Judicial-Political Dialogue in New Jersey*, 20 J.L. & EDUC. 271 (1991) (analyzing the New Jersey line of cases and arguing that the New Jersey Supreme Court's policy-directive rulings played an important role in spurring effective three-branch dialogue); Michael A. Rebell, *Fiscal Equity Litigation and the Democratic Imperative*, 24 J. EDUC. FIN. 23 (1998) (arguing for a cooperative process of reform between the three branches of government and the public).

131. Thro, *supra* note 10, at 539–44.

132. *Id.* at 530–32.

133. *Id.* at 533–34.

134. *Id.* at 537–38.

135. *Id.* at 544.

136. *See* Thro, *supra* note 10, at 544.

137. *Id.* at 544–45.

to adopt or create one, it should be demanding, but attainable.[138] Finally, the court should determine how to remedy a violation if it identifies one.[139] Thro proposed that courts identifying a violation should defer to the more politically accountable branches for remediation, but—rather than completely abstaining from all aspects of remediation—they should give guidance to the coordinate branches as to how to remedy the violation by "admonishing" them to consider both financial and nonfinancial means of remedying inadequacies.[140]

Using terminology developed later by Heise, Thro's proposed approach could be termed an "active dialogic" approach, in which the court does not make a specific remedial order, but does provide guidance to the legislature as to which legislative reforms will likely succeed.[141] This can be contrasted with a "passive dialogic" approach, in which the court merely identifies a constitutional violation and steps away, leaving the legislature with complete remedial discretion.[142]

In crafting his proposal, Thro determined without much discussion that education finance cases should always be justiciable on the merits.[143] To the extent that any separation of powers concerns entered Thro's analysis, they did so through his proposed strict construction of weak state constitutional education clauses and through his proposal to "admonish," rather than order, legislative action. Thro argued that litigation in states with weak education clause language should be decided in favor of the state on the merits, rather than on direct separation of powers grounds.[144] The virtue of Thro's proposed approach is that it would add predictability to education finance litigation, and it would require courts, at least at the merits review stage, to stand on legal principle.

However, the approach reveals the difficulties in identifying the principles on which merits adjudication must stand, and its deference to legislative definition of the constitutional standard would allow for legislative gaming in ways similar to McUsic's approach. Further, and more importantly, in cases where the state is found in violation of the education clause, Thro's guidance-based approach would ultimately amount to ongoing judicial supervision of legislative policy making, unless the legislature were to somehow fix the system perfectly on the first try. Taken together, these outcomes would only constitute an insignificant move away from the judicially "activist" approach that Thro decried in the article.

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138. *Id.* at 549.
139. *Id.* at 550.
140. *Id.* at 552.
141. *See* Heise, *supra* note 9, at 80 (discussing the two dialogic approaches).
142. *Id.*
143. Thro, *supra* note 10, at 546–47.
144. *Id.* at 544.

In a similar vein, but at the opposite end of the dialogic spectrum, Professor Larry Obhof proposed an analytical framework for courts, advocating a "passive dialogic" approach. Obhof first correctly categorized the three typical outcomes of education finance adequacy litigation—total abstention (which Obhof and others called "abdication");[145] engagement in merits review with abstention from the remedial phase (which Obhof termed the "middle ground" approach); and total engagement in review including the fashioning of a specific, policy-directive remedy and possible supervision of its implementation (which Obhof called "judicial activism").[146] Building from Thro's 1998 study, Obhof's study more restrictively concluded that his "middle ground" approach—wherein the court finds a constitutional violation but always abstains from the remedial phase on separation of powers grounds—is the correct approach.[147]

Under this "middle ground" approach, a court would follow a three-step process. First, the court would determine whether the state education clause sets a standard of quality.[148] Next, the court would determine what the standard of quality demands.[149] Finally, the court would determine whether the current state system meets the standard.[150] Beyond these determinations, Obhof argued, courts should take no role.[151] Obhof further argued that this remedial abstention would limit the courts to their proper role of interpreting the state constitution's text, would stem "judicial activism," and would lead to "predictability" in school finance litigation.[152] However, Obhof did not address what the judiciary's proper role might be if the state legislature were to fail to act to remedy its own violation of the state constitution. For example, after the Ohio Supreme Court followed the "middle ground" approach in *DeRolph v. State*,[153] the court was forced

145. Obhof, *supra* note 127, at 572–73; Thro, *supra* note 10, at 546–47.

146. Obhof, *supra* note 127, at 572–73.

147. *Id.* at 602. As Obhof pointed out, this was the approach loosely followed by the Ohio Supreme Court in *DeRolph v. State*, 677 N.E.2d 733 (Ohio 1997) [hereinafter *DeRolph I*].

148. Obhof, *supra* note 127, at 593–96.

149. *Id.* (citing *DeRolph I* as the exemplar of the "middle ground" approach).

150. *Id.*

151. *Id.* One scholar has referred to these types of approaches as "binding advisory opinions." *See* Brown, *supra* note 127 (coining the term "binding advisory opinions" to describe the tendency of state courts to issue rulings finding constitutional violations, but to abstain from ordering any specific remedies); *see also* Cover, *supra* note 127, at 419 n.107; Westbrook, *supra* note 127, at 2181.

152. Obhof, *supra* note 127, at 593–96. In this section of his article, Obhof refers to the type of "judicial activism" that most education finance scholars purport to study—that which causes the court to invade the province of the legislature by ordering the legislature to enact policy. In other sections of the same study, Obhof identifies the more common form of "judicial activism"—that which arises when a court or jurist decides issues not presented in the case or inserts preferred policies into a statute or constitutional provision not containing them as written. *Id.* at 592 (explaining that the Vermont Supreme Court in *Brigham v. State*, 692 A.2d 384 (Vt. 1997), when presented only with an equity challenge, not only rejected any separation of powers concerns over judicial review, but also went on to issue an adequacy ruling interpreting a very weak constitutional education clause to impose very specific policy preferences on the state legislature).

153. 780 N.E.2d 529 (Ohio 2002) [hereinafter *DeRolph V*].

to revisit the case several times through compliance actions, and even after all of these additional appeals, the court finally dismissed the case without holding that the legislature had achieved such compliance.[154]

Obhof and Thro thus illustrate the two extremes of the current rough consensus, in that Thro contemplates deference to legislative bodies, but clearly sees a role for the courts in directing the remediation of identified constitutional violations,[155] whereas Obhof favors complete remedial abstention after the identification of a constitutional violation. In this way, Obhof's proposal exemplifies Heise's "passive dialogic" approach, while Thro's proposal exemplifies Heise's "active dialogic" approach.[156]

Professor Michael Rebell has recently argued that, in the context of education adequacy litigation, courts can and should legitimately become involved in political decision making through "colloquy" with the political branches.[157] According to Rebell, concerns over separation of powers and judicial institutional competence are outdated and without "factual basis."[158] Rebell supported his contention with evidence that such involvement has been successful in the past in federal public law litigation.[159]

Although Rebell seems dismissive of separation of powers concerns, in fact his approach is only a small step removed from Thro's active dialogic approach, which was developed specifically to serve these concerns. Rebell conceives of courts taking a direct remedial role in education finance suits, but not specifying expenditure levels.[160] Rather, Rebell sees the courts' role as one of specifying legislative actions that must be taken to determine necessary expenditure levels, commonly referred to as "costing out" studies, and setting up mechanisms for ensuring accountability.[161] Thus, Rebell's proposed approach is more of a "super" active dialogic approach, where a court not only gives the legislature clues as to how to remedy a violation, but also directly supervises the remediation. Unlike the two exemplar approaches reviewed above, Rebell's does not contem-

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154. *Id.* (recounting the serial relitigation of the case in the state's courts).

155. *See* Thro, *supra* note 10, at 551–52 (advocating for deference to the political branches in crafting a remedial response to an identified constitutional violation, but indicating that courts should signal to the political branches that financial as well as nonfinancial factors should be remedied).

156. *See* Heise, supra note 9, at 80 (discussing the two dialogic approaches); *see also* Koski, *supra* note 8, at 1297–98 (concluding that, although legal principles may not be of much help in determining outcomes of education finance litigation, judicial decisions can nevertheless act as "catalysts" for reform by providing the political branches with "cover").

157. Michael A. Rebell, *Poverty, "Meaningful" Educational Opportunity, and the Necessary Role of the Courts*, 85 N.C. L. REV. 1467, 1539–42 (2007). The progenitor of Rebell's ideas can be found in another of his articles, penned almost a decade earlier. *See* Rebell, *supra* note 130 (advocating for a judicial dialogue with the coordinate branches and the public).

158. Rebell, *supra* note 157, at 1535.

159. *Id.* at 1531–32 (reviewing an empirical study that Rebell and colleague Arthur R. Block completed in the 1980s examining judicial decision making in federal educational civil rights cases).

160. *Id.* at 1540–41 (preliminarily outlining the roles that each branch should take, based on Rebell's conception of their comparative institutional competencies).

161. *Id.* at 1540–42.

plate any sort of remedial abstention. However, similar to the other, less active dialogic approaches, Rebell's proposed approach sees state courts uniformly as guides and catalysts and is tailored to respect what are perceived as uniformly held institutional concerns.

Similarly, after an exhaustive review of the history of education finance reform litigation, Professor Koski described this form of litigation optimistically as a process of "compromise" between the judiciary and the legislature.[162] Taking on the objection to nonspecific remediation in such litigation, Koski argued that the "fuzzy" standards inherent in education finance litigation remedial orders allow for the judiciary to act as a "catalyst" to executive and legislative branch action without mandating what that action should be.[163] At times, this role might be conceived of as providing "cover" for actions that a legislature is politically unwilling to take on its own.[164] At other times, it might be conceived as a standing "'veto power'" over legislative schemes that do not comport with the state constitution.[165] In neither case, though, do judges dictate policy choices, so this conception of the judicial role fits well within the literature on dialogic adjudication.

Professors James Liebman and Charles Sabel have proposed a model of judicial review that mostly fits within the dialogic frame, but which arguably departs from it in some ways.[166] These scholars propose a model that they term "non-court-centric judicial review,"[167] which textually suggests a version of the dialogic approach, and much of what they propose would fit the familiar dialogic model. They hold up as exemplars Kentucky and Texas, both of which experienced adequacy suits that resulted in verdicts for the plaintiffs unaccompanied by policy-directive remedial orders, and both of which later saw significant beneficial educational reforms emerge in the legislative and executive branches.[168] Importantly, each state, in response to its court's ruling, revamped the educational standards that had been set for curriculum, instruction, and achievement, and both promulgated progressive programs to improve student outcomes.[169]

Liebman and Sabel see the courts' role as providing a forum for debate over educational issues between the public and its representatives, and

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162. Koski, *supra* note 8, at 1297.
163. *Id.*
164. *Id.* at 1297–98.
165. *Id.* at 1298.
166. James S. Liebman & Charles F. Sabel, *A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform*, 28 N.Y.U. REV. L. & SOC. CHANGE 183, 278–83 (2003).
167. *Id.* at 281.
168. *Id.* at 231–66 (describing the processes of reform in each state in two complementary case studies).
169. *Id.*

they particularly view outcome standards developed through such a forum as important to non-court-centric judicial review because they emanate from the public and their elected representatives, rather than the courts.[170] In contrast to at least the passive form of the dialogic model, though, Liebman and Sabel's model would allow these politically developed standards to become the means by which courts can monitor compliance with the constitution and with judicial orders on an ongoing basis.[171] Thus, the model at least contemplates ongoing monitoring in the more-familiar institutional litigation mold, rather than remedial abstention, but in all other aspects, it fits within the dialogic frame and serves the same values—preserving judicial institutional legitimacy in litigation highly charged with separation of powers implications.

In 2006, Professor James Ryan authored an article that focused primarily on mandating preschool education as a remedial measure, one of very few pieces advocating specific, policy-directive remediation of state education adequacy claims.[172] Though it was focused on a small subset of adequacy remedies, Ryan's 2006 article directly addressed a "general" separation of powers objection to such remedies.[173] In this article, Ryan defined this "general" separation of powers objection as the argument that determination of whether to provide preschool is a public policy issue reserved to legislative discretion.[174]

Ryan addressed this general objection by arguing that all constitutional text requires interpretation, even text imposing an affirmative duty on the legislature.[175] Ryan then argued, "[i]f courts are willing, as they should be, to determine whether state constitutions create a right to equal or adequate educational opportunities, they must be committed to defining the content of those opportunities."[176] According to Ryan, such content would likely have to include preschool, at least for some students.[177] Ryan has recently reiterated his position that courts should remedy education finance adequacy violations directly and specifically.[178] Thus, unlike the other

170. *Id.* at 282 (explaining that the constitutional definition of inadequacy, as a result of the non-court-centric model, becomes that which is constructed collaboratively and responsively between the court, the political branches, and the public).

171. *Id.* at 280–81 (describing the information available to the court for monitoring and praising the usefulness of this information for "distinguish[ing] between good faith and bad faith efforts at compliance" with court decisions).

172. James E. Ryan, *A Constitutional Right to Preschool?*, 94 CAL. L. REV. 49, 84–87 (2006).

173. *Id.*

174. *Id.* at 85. Ryan also identified a more "specific" objection—that the legislature has plenary authority to determine the age at which education is to begin, *id.* at 86 (citing Hoke County Bd. of Educ. v. State, 599 S.E.2d 365, 391–92 (N.C. 2004)), but this objection only applies to one case beyond the scope of this Article.

175. Ryan, *supra* note 172, at 85.

176. *Id.*

177. *Id.*

178. *See* Ryan, *supra* note 8, at 1225–26, 1256.

prominent scholars in the field, Ryan contemplates that courts finding a state education clause violation should issue policy-directive remedial orders mandating specific educational services.

A number of normative scholars have taken a more theoretical approach to the question of judicial review and remediation, proposing that state court judicial review of education adequacy is, on balance, normatively desirable and warranted by the uniqueness of state governmental systems and education clause provisions.[179] These scholars have focused on the fact that the education clauses of state constitutions, and similar provisions relating to welfare, are repositories of "positive rights."[180] They contrast these positive state constitutional rights with those in the United States Constitution, which is regarded nearly universally as a charter of "negative liberties," prohibitions, or negative rights.[181] Negative rights allow individuals and entities to prevent government action that has the purpose or effect of invading protected individual interests, such as free speech, freedom of conscience, general liberty, human life, and property.[182] In their default sense, negative rights do not require any affirmative action on the part of government; instead, they set limits on government action.[183]

In contrast, the language of state education clauses is the language of affirmative obligations, which may compel affirmative action on the part of government, even where the education provisions are read in their de-

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179. *E.g.*, 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 (1993); Helen Hershkoff, *Foreword: Positive Rights and the Evolution of State Constitutions*, 33 RUTGERS L.J. 799 (2002); Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833 (2001) [hereinafter Hershkoff, *Passive Virtues*]; Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131 (1999) [hereinafter Hershkoff, *Limits of Federal Rationality Review*]; Helen Hershkoff, *Welfare Devolution and State Constitutions*, 67 FORDHAM L. REV. 1403 (1999); Burt Neuborne, *Foreword: State Constitutions and the Evolution of Positive Rights*, 20 RUTGERS L.J. 881 (1989). *See also* Sonja Ralston Elder, Note, *Standing Up to Legislative Bullies: Separation of Powers, State Courts, and Educational Rights*, 57 DUKE L.J. 755 (2007); Josh Kagan, Note, *A Civics Action: Interpreting "Adequacy" in State Constitutions' Education Clauses*, 78 N.Y.U. L. REV. 2241 (2003). *See generally* Koski, *supra* note 8 (presenting a tentative defense of the "fuzzy standards" inherent in education finance adequacy litigation).

180. *See, e.g.*, Hershkoff, *Limits of Federal Rationality Review*, *supra* note 179, at 1138 (contrasting state constitutional positive rights provisions with negative-rights-based federal constitutional provisions).

181. *See, e.g.*, *id.* at 1133 (outlining the federal approach to the Constitution as a "'charter of negative rather than positive liberties'") (quoting Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983)); Neuborne, *supra* note 179, at 883 n.12 (citing David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864 (1986), for this distinction).

182. Hershkoff, *Limits of Federal Rationality Review*, *supra* note 179, at 1138 (citing RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 184–205 (1977), for the proposition that negative constitutional rights can be viewed as "trumps" against governmental action).

183. *See* David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 864–67 (1986) (outlining the textual, historical, and jurisprudential support for this view of the federal Constitution).

fault (i.e., nonrelative, noncontingent) sense.[184] Scholars see this distinction between positive state-level rights and negative federal-level rights as counseling a more active state court role. These scholars argue that, due to the uniquely positive or affirmative nature of education provisions, courts should not approach them in the ways that federal courts approach the negative rights in the federal constitution.[185] Because affirmative provisions in state constitutions contemplate a governmental duty to act on behalf of individuals (or the public), the argument goes, federal limitations on judicial review such as the political question doctrine and rational basis review are inappropriate.[186]

Further, in addition to these uniquely affirmative provisions, many state constitutions contain provisions specifically providing for judicial review, advisory opinions, easy amendment of the constitution, and judicial elections, all unlike the federal Constitution.[187] According to these scholars, the existence of these factors mutes familiar concerns that exist over federal court judicial review—concerns rooted in federal separation of powers doctrine and justified based on the insulated and apolitical nature of the federal judiciary.[188]

The scholarship in this area has advocated a unique, state-specific approach to doctrines of judicial review and the separation of powers, whe-

184. Several constitutional scholars have argued that even the "negative rights" contained in the federal Constitution can also be read to imply affirmative governmental duties. *See* Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330 (2006) (locating a federal positive right to adequate education in the Fourteenth Amendment); Frank I. Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH U. L.Q. 659, 686–87 (1979) (outlining, in appendix form, several then-recent negative rights decisions that could be characterized as protective of positive welfare rights); Cass R. Sunstein, Lochner*'s Legacy*, 87 COLUM. L. REV. 873, 889–90 (1987) (explaining that "deprivation" depends on a baseline entitlement, and that only Lochnerian assumptions of the lack of entitlement to basic social services prevent courts from viewing the failure to provide them as such a "deprivation"). For example, the right to state-provided counsel imposes an affirmative obligation on the state to pay for a lawyer for an indigent defendant. *See* Currie, *supra* note 183, at 873–74 (considering this and other oft-proposed counter-examples to the concept of a negative-rights-based federal constitution). However, as Professor Currie has pointed out, none of these accounts has established these affirmative obligations as absolute. *Id*. All of these construed "positive" federal rights arise only as contingent on negative, prohibitory provisions, such as due process in the case of the right to state-provided counsel. *Id*.; *see also id*. at 872–85 (considering several other familiar counter-examples and coming to the same conclusions). In contrast, the affirmative obligations in state constitutional language are stated as absolutes—that is, the duties they impose do not require any contingent or relative state action to give them force. They apply independently and absolutely, rather than relatively, and are thus completely positive obligations.

185. *See* Feldman, *supra* note 179 (proposing an alteration to separation of powers doctrine in state positive rights claims); Hershkoff, *Limits of Federal Rationality Review*, *supra* note 179, at 1169–70 (proposing and defending a standard of review that would require courts to determine "whether a challenged law actually helps effectuate the constitutional mandate").

186. *See* Hershkoff, *Limits of Federal Rationality Review*, *supra* note 179, at 1155–57 (discussing the inapplicability of rationality review to positive rights claims).

187. *See generally* Hershkoff, *Passive Virtues*, *supra* note 179 (outlining these differences in detail); *see also* Blanchard, *supra* note 128, at 258–76 (referring to a very similar list of differences).

188. *See* Hershkoff, *Passive Virtues*, *supra* note 179, at 1881–97 (discussing and refuting the separation of powers objection to expansive state court judicial review).

reby state supreme courts take a more active and participatory role in developing state public policy by providing content to affirmatively stated constitutional obligations and engaging in ongoing "dialog" with the coordinate branches as to how to fulfill them.[189] Thus, although it is partially based on more theoretical rather than practical foundations, and although it attempts to address separation of powers concerns directly, rather than dismissively, this body of scholarship ends up advocating a version of the dialogic approach.

With limited exceptions,[190] scholars have uniformly concluded or assumed, often dismissively, that separation of powers principles do not prevent adequacy cases from being subjected to adjudication on the merits, and these conclusions have placed all states on similar footing as to the operation of separation of powers principles. Scholars have also reached a rough consensus that, once the merits are adjudicated, courts should abstain from ordering or compelling any specific, judge-made remedial measures, but should instead engage in dialog with the coordinate branches to encourage reform, either through articulating broad constitutional guidelines and stepping back to allow the legislature to decide how to meet them, or through articulating the need for legislative standards and monitoring the cooperative development of these standards without mandating their content.[191]

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189. *See* Feldman, *supra* note 179, at 1096–98 (arguing for an active dialogic approach and holding up the Texas litigation as a successful example of such an approach); Hershkoff, *Passive Virtues*, *supra* note 179, at 1918–19 (justifying the expansion of judicial review in state courts in part based on its potential catalytic effects); Hershkoff, *Limits of Federal Rationality Review*, *supra* note 179, at 1182 ("Indeed, in difficult cases, the state court's most appropriate stance may be to acknowledge openly the limits of the judicial process—to '[f]ace up to indeterminacy'—and to use its power of review to encourage the coordinate branches to work together to develop conditional responses to constitutional questions. The state court can thus contribute to the more effective implementation of positive rights by encouraging, and insisting upon, the gathering of information, the testing of methods, and the 'learning by monitoring' that commentators associate with improved decisionmaking.") (quoting Robert H. Mnookin, *Final Observations*, *in* THE INTEREST OF CHILDREN: ADVOCACY, LAW REFORM, AND PUBLIC POLICY 510, 526 (Robert H. Mnookin ed., 1985) (alteration in Hershkoff) *and* Charles F. Sabel, *Learning by Monitoring: The Institutions of Economic Development*, *in* THE HANDBOOK OF ECONOMIC SOCIOLOGY 137–65 (Neil J. Smelser & Richard Swedberg eds., 1994)). *See also* Klein, *supra* note 127, at 397–402 (tentatively holding up education finance litigation in the United States as an exemplar of the dialogic approach and terming it as "experimentalist" judging).

190. *See, e.g.*, Scott R. Bauries, *Florida's Past and Future Roles in Education Finance Reform Litigation*, 32 J. EDUC. FIN. 89, 103–04 (2006) (advocating a prelitigation approach of using state constitutional amendment initiatives to provide courts with textual standards that are judicially manageable); John Dayton & R. Craig Wood, *School Funding Litigation: Scanning the Event Horizon*, 224 EDUC. L. REP. 1 (2007) (concluding that separation of powers principles and concerns will often pose an insurmountable obstacle to reform through the courts); Dunn & Derthick, *supra* note 9 (same).

191. Professor Ryan is the most significant exception. However, even Ryan acknowledges that, if legislatures are recalcitrant after courts issue their policy-directive orders, courts could become enmeshed in serial litigation and compliance review and ultimately lose their nerve, tacitly conceding the possibility of institutional conflicts and limitations on judicial legitimacy. *See* Ryan, *supra* note 8, at 1260 ("Indeed, there are *no* examples of states where plaintiffs have won a school finance case and legislatures have responded adequately without any further court involvement.").

Taken as a whole, this scholarship provides some guidance as to the proper influence of separation of powers concerns on merits adjudication and remediation in adequacy litigation. But it appears to suffer from a glaring deficiency, in that it fails to account for or even acknowledge an elephant in the room—the explicit separation of powers provisions contained in many state constitutions. Unlike the federal Constitution, the constitutions of many states contain very explicit mandates for keeping the three branches of government separate and distinct from one another, often explicitly forbidding any kind of power-sharing. Yet the scholarship in education finance takes no account of the existence of these explicit provisions.

This deficiency exists even in scholarship purporting to examine the ways in which separation of powers principles should operate in state courts, in comparison with federal courts.[192] It seems undeniable that we should not propose adjudicatory reforms bound up with concerns over separation of powers without taking proper account of the unique character of separation of powers text in state constitutions and the effects of textual differences on state constitutional adjudication.

To do so, a reasonable place to begin is to ask whether it makes any difference whether separation of powers is explicitly mandated or implicit in a state constitution. In the political science literature and in case law, the point has been made that explicit constitutional commands for separation of powers leave judges with less discretion to determine the boundaries of their institutional roles than do implied commands.[193] In theory, this distinction should lead courts in states with explicit separation of powers provisions in their constitutions to abstain more frequently from one or more phases of litigation challenging the absolute sufficiency of legislative appropriations decisions, such as educational adequacy litigation. However, to date, no education finance scholarship has attempted to answer this question.

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192. *See, e.g.*, Blanchard, *supra* note 128, at 264–76 (carefully analyzing whether separation of powers principles should operate similarly in state courts and federal courts, but omitting any discussion of the explicit clauses); Feldman, *supra* note 179, at 1083–89 (outlining a justification for a different approach in the states to separation of powers grounded in the initial notion that states need not adopt the restrictive federal doctrine, but failing to discuss the many explicit state provisions); Hershkoff, *Passive Virtues*, *supra* note 179, at 1881–97 (carefully analyzing whether separation of powers principles should operate similarly in state courts and federal courts, but omitting any discussion of the explicit clauses).

193. *See* Tarr, *supra* note 27, at 339–40 (examining the explicit mandate for separation of powers in the Indiana Constitution and concluding that the provision forecloses judicial flexibility in determining that different branches can share their powers); *see also* Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 214 (Ky. 1989) ("The United States Constitution has no separation of powers provision within it. The separation of powers doctrine in the Federal area, has been recognized in federal common law. We on the other hand, are faced with a strongly written, definitive constitutional scheme. We must, perforce, follow our constitution. The federal cases and situations referred to are clearly not even persuasive here.").

In the next two Parts, I address the question. I examine whether the character of the provisions in state constitutions establishing separation of powers (i.e., explicit or implicit) has any association with the extent of judicial review and remediation in education finance adequacy litigation.

III. METHODOLOGY

To answer this question, I employ a well-known measure of association[194] in categorical data,[195] called Goodman and Kruskall's *lambda*.[196] The *lambda* measure is used where a researcher seeks to study relationships between two variables, where one variable can logically be designated as the dependent variable and the other can logically be designated as the independent variable.[197] Here, "separation of powers," as defined below, can logically be designated as the independent variable because I seek

194. *See* JEAN DICKINSON GIBBONS, NONPARAMETRIC MEASURES OF ASSOCIATION 1 (1993) ("*Measures of association* assign a numerical value to the degree of association or strength of relationship between variables. Two variables are said to be *associated* if the behavior of one affects the behavior of the other or, equivalently, if they are not independent. Two variables are said to be *independent* if changes in the value of one variable do not have any effect on the value of the other variable.").

195. "Categorical data" are data occupying distinct categories with no partial values between them, as opposed, for example, to continuous data, which are data that can theoretically assume any fractional value. Data can be measured at several different levels of precision. *See* GENE V. GLASS & KENNETH D. HOPKINS, STATISTICAL METHODS IN EDUCATION AND PSYCHOLOGY 5–10 (2d ed. 1984) (explaining levels of measurement). There are four main "levels" of measurement accepted in statistical science. *See id*. These levels range from nominal—the least precise because it denotes only names of categories, with order being irrelevant; to ordinal—more precise because it not only names categories, but also places them in order; to interval—more precise because it adds precision by placing observations in order with equal space in between; to ratio—the most precise because it incorporates interval measurement properties and a true zero point. *See* G. DAVID GARSON, HANDBOOK OF POLITICAL SCIENCE METHODS 138–39 (2d ed. 1976) (explaining levels of measurement). The independent variable, *separation of powers*, is treated here as being measured at the nominal, or "named," level of measurement, in that state constitutional language is categorized based simply on whether the constitution in each state contains explicit text mandating separation of powers, or whether separation of powers must be inferred from the constitutional structure. This variable could alternatively be treated as ordinal, if we assume that implicit constitutional text contains more of a certain attribute, say interpretive flexibility, than explicit constitutional text. *See* GLASS & HOPKINS, *supra*. However, ordinal variables may be measured using statistics designed for either ordinal-level data or nominal-level data. *See* GARSON, *supra*, at 200–01. Thus, for the purposes of this study, such theoretical leaps were not necessary, and the choice to treat the independent variable as nominal likely had little impact on the robustness of the findings. The dependent variable, *judicial review level*, however, is ordinal, or "ordered," because its categories naturally reflect increasing levels of judicial merits review, from no merits review (complete abstention) to merits review without remediation (partial or remedial abstention) to full merits review and remediation (no abstention). *See* GLASS & HOPKINS, *supra*. *Lambda* is an appropriate measure for categorical data at both of these levels of measurement precision, so it is a proper measure of association between these variables. *See* GARSON, *supra*, at 200–01 (explaining that *lambda* may be used to measure association between either nominal- or ordinal-level variables).

196. *See* MICHAEL S. LEWIS-BECK, DATA ANALYSIS: AN INTRODUCTION 26–28 (1995) (explaining Goodman and Kruskall's *lambda*).

197. *Id*. at 26–27.

to understand whether this variable has any effects on the extent of judicial review.

The *lambda* measure is based on the logic of the proportionate reduction in prediction errors. *Lambda* describes how much one can reduce one's error in correctly predicting the dependent variable if one knows the value of the independent variable.[198] The percentage of the normal error in predicting the value of the dependent variable that can be reduced if one knows the value of the independent variable is referred to as the proportionate reduction in error. *Lambda* expresses this value as a decimal between 0, the lowest possible value, which indicates that the independent variable is of no help in predicting the dependent variable; and 1, the highest possible value, which indicates that knowledge of the independent variable allows one to perfectly predict the value of the dependent variable every time.

Because explicitness in constitutional text and extensiveness of judicial review do not occur in the real world as numerical values, the variables capturing these attributes required careful coding.[199] Coding is a process by which the categories within non-numerical variables are assigned numbers to enable analysis through quantitative methods.[200] Coding of legal issues should comport with the underlying doctrine and should be logically defensible.[201] Accordingly, I based my coding of the variables on clear textual differences between constitutional schemes in the states,[202] theories of what those differences are likely to mean, and accepted classifications of the differing levels of judicial review in education finance litigation.[203]

A. The Independent Variable: Separation of Powers Text

In this Article, I seek to test whether explicit constitutional commands for separation of powers lead state courts to restrain their own involvement in judicial review of education finance adequacy litigation at predictably different rates than implied constitutional commands. Thus, the independent variable is described as each state's constitutional text establishing the separation of powers. This variable is denoted in the results as "*Separation of Powers Text*" or "*sop*." Constitutional text providing for separation of powers is coded as (1) *explicit*; or (2) *implicit*. The theory underly-

198. ALBERT M. LIEBETRAU, MEASURES OF ASSOCIATION 17–18 (1983); *see also* LEWIS-BECK, *supra* note 196, at 26–27.

199. *See* GARSON, *supra* note 195, at 153 (describing the purpose and procedure of coding).

200. *Id.* at 153.

201. *See* Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 80–97 (2002) (explaining coding practices and discussing their impacts on reliability and validity of measurement); Shapiro, *supra* note 43, at 527–30 (explaining good coding practices).

202. *See infra* notes 204–218 and accompanying text.

203. *See, e.g.*, Obhof, *supra* note 127, at 572–73 (classifying the different levels of review in education finance litigation).

ing this coding is that explicit constitutional commands and prohibitions are to be viewed as less subject to judicial interpretation than implied duties and prohibitions.[204] Therefore, when coding the independent variable, it made the most sense to categorize express and implied constitutional commands differently.

General separation of powers theory also justifies this coding choice. The two dominant theoretical approaches to resolving separation of powers problems are the formalist approach and the functionalist approach.[205] Each of these two theoretical approaches holds that governmental functions are to be divided among the three branches.[206] Where they differ is the extent to which they are willing to tolerate power sharing.[207]

Under a pure formalist conception of separation of powers, each branch has clearly defined functions, and no member of one branch may exercise any of the functions of another branch.[208] Under a functionalist approach, some power sharing is allowed, but a member of one branch may not take action that amounts to exercising the "core functions" or "whole power" of another branch.[209] Functionalists often employ judicial balancing tests to determine whether an action taken by a member of one branch involves so much use of another branch's power that it upsets the

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204. *See supra* note 193 and accompanying text.

205. There are several other theories, but these two remain dominant. For example, at least two scholars would add two additional analytical frames to the traditional ones of "formalist" and "functionalist": those of "originalist" and "fused." *See* Bruce G. Peabody & John D. Nugent, *Toward a Unifying Theory of the Separation of Powers*, 53 AM. U. L. REV. 1, 12–14 (2003). One other would convert the entire debate into one about the protection of ordered liberty, rather than governmental powers. *See* Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1523–24 (1991). The purpose of this Article is not to resolve these ongoing debates, but rather to draw on general principles that have emerged over time and apply them to the data analyzed.

206. *See* M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603, 610–11 (2001) (explaining the differences between the traditional formalist and functionalist schools of thought).

207. *See id.* at 611 ("While a functionalist would be flexible—in particular, tolerating the exercise of 'judicial' or 'legislative' power by an administrative agency—as long as a 'core' function of the department in question was not jeopardized, they agree with formalists that the Constitution allocates three different powers to three different institutions.") (citations omitted); *see also* Adrian Vermeule, *The Judicial Power in the State (and Federal) Courts*, 2000 SUP. CT. REV. 357, 360 (2000) (critically reviewing the literature relating to separation of powers theory).

208. *See, e.g.*, Robert F. Williams, *Rhode Island's Distribution of Powers Question of the Century: Reverse Delegation and Implied Limits on Legislative Powers*, 4 ROGER WILLIAMS U. L. REV. 159, 166 (1998) ("'[t]he formalist approach is committed to strong substantive separations between the branches of government, finding support in the traditional expositions of the theme of "pure" separated powers, such as the maxim that "the legislature makes, the executive executes, and the judiciary construes the law."'" (quoting Brown, *supra* note 205, at 1523–24 (quoting Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 46 (1825)))).

209. *See id.* at 166 ("'In contrast, advocates of the "functionalist" approach urge the Court to ask a different question: whether an action of one branch interferes with one of the core functions of another . . . .'") (quoting Brown, *supra* note 205, at 1527–28); Tarr, *supra* note 27, at 334 (explaining that James Madison's "lax" conception of the separation of powers held that only the assumption of the "whole power" of a coordinate branch constituted a violation) (quoting THE FEDERALIST NO. 47, at 325–26 (James Madison) (Jacob E. Cooke ed., 1961)).

balance of power among the branches or has the effect of concentrating power too much in one branch.[210]

Based on this dichotomy, I determined that state constitutional text containing explicit prohibitions, rather than prohibitions to be inferred from structure, would more likely mandate a formalist or "pure separation" approach. Such language, by explicitly prohibiting the exercise by a member of one branch over the powers of another, attempts to cabin judicial (and legislative and executive) discretion and to prevent the sorts of balancing and power-sharing arrangements common to functionalist approaches.

In contrast, a state constitution merely specifying that the government has three branches and broadly outlining each branch's responsibilities would be more susceptible to a functionalist approach because it does not make any explicit attempt to limit discretion. Any such limits must be inferred by the judiciary, and if the judiciary in the state wants to choose a balancing approach, rather than a boundary approach, the constitutional text does not stand in the way. Of course, this does not mean that every state in which the doctrine is implicit will follow a functionalist approach, but there should be some difference between these states and states with explicit provisions.

The constitution of every state in which the highest court has addressed an education finance adequacy challenge contains either explicit or implicit separation of powers principles.[211] For example, the language of the Florida Constitution provides, "No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein."[212] Similarly, the Alabama Constitution provides:

> In the government of this state, except in the instances in this Constitution hereinafter expressly directed or permitted, the legislative

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210. *See* Vale Krenik, Note, *"No One Can Serve Two Masters": A Separation of Powers Solution for Conflicts of Interest within the Department of Health and Human Services*, 12 TEX. WESLEYAN L. REV. 585, 601–02 (2006) ("The formalist approach requires that the three functions of legislative, executive, and judicial must be strictly relegated to respective branches of the government. The functionalist approach only requires that the respective branches retain exclusive jurisdiction over 'core' functions that cannot be usurped, but allows for ebb and flow of power between the branches. Under the formalist model, there can be no inter-branch interference not expressly authorized by the Constitution and separation of powers disputes are to be resolved predominantly by classification of function. Functionalism contrasts with formalism by allowing inter-branch blending, and dispute resolution is analyzed by reference to characteristic functions of separation of powers such as maintaining a system of checks and balances, preventing excessive concentrations of powers, and protecting individual liberty."); *see also* Williams, *supra* note208 208, at 167 ("The functionalist approach permits much more judicial discretion than the formalist approach.") (citing Brown, *supra* note 205, at 1528).

211. *See infra* Part VI., tbl.1 for a complete enumeration of the constitutional provisions of these states and their relevant codings.

212. FLA. CONST. art. II, § 3.

> department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end that it may be a government of laws and not of men.[213]

In contrast, the New York Constitution, rather than explicitly forbidding encroachments by members of one branch upon the powers held by other branches, simply sets forth the three branches of government.[214] Thus, it is reasonable to predict that courts in Florida and Alabama would feel more constrained by constitutional text from intruding upon legislative judgments regarding appropriations, a universally-agreed legislative function, than courts in New York.

As it happens, the highest courts in these three states did follow the predicted pattern. The highest courts of both Florida and Alabama ultimately dismissed education finance adequacy challenges based on the separation of powers clauses of their state constitutions.[215] Conversely, the highest court in New York ultimately not only approved merits review of the adequacy challenge brought in that state, but also approved the trial court's authority to issue a policy-directive remedial order.[216]

Of course, these categories can be criticized as an oversimplification of the ongoing debates between formalists, functionalists, and those proposing alternative approaches. Many scholars analyze separation of powers in the federal system under the familiar formalist and functionalist theories, but other approaches are certainly available, and the Constitution's text does not explicitly foreclose the use of any of these approaches. In contrast, in states whose constitutions contain very rigid, inflexible, and explicit separation of powers text, the very existence of this text may foreclose other options and mandate a formalist approach, leaving the other, less strict approaches available only in the states following the federal model. I do not attempt here to resolve the ongoing debates regarding separation of powers in the federal system. Rather, I take the explicit provi-

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213. ALA. CONST. art. III, § 43. Professor Brown points out that James Madison proposed an amendment to the original Constitution containing nearly this exact language. *See* Brown, *supra* note 205, at 1539, 1539 n.115 (citing 12 THE PAPERS OF JAMES MADISON 202 (C. Hobson & R. Rutland eds., 1979) *and* E. DUMBAULD, THE BILL OF RIGHTS AND WHAT IT MEANS TODAY 36–39 (1957)). However, this amendment was ultimately rejected in favor of the mere designation of three separate branches of government, from which American courts have inferred federal separation of powers doctrine.

214. N.Y. CONST. art. III, § 1: ("The legislative power of this state shall be vested in the senate and assembly."); *id*. art. IV, § 1: ("The executive power shall be vested in the governor, who shall hold office for four years . . . ."); *id*. art. VI, § 1(a): ("There shall be a unified court system for the state.").

215. Coal. for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles, 680 So. 2d 400, 407 (Fla. 1996); *Ex parte* James, 836 So. 2d 813, 819 (Ala. 2002).

216. Campaign for Fiscal Equity, Inc. v. State, 801 N.E.2d 326 (N.Y. 2003).

sions unique to state constitutions on their own apparently formalistic terms and attempt to discern whether these terms make any difference in the context of judicial review of policy making.

All twenty-six states in which adequacy-based constitutional challenges have reached a decision in the highest court as to violation and remedy at least once have constitutional provisions providing for the establishment and maintenance of a system of public schools.[217] Of these twenty-six state constitutions, twenty contain explicit provisions mandating separation of powers.[218] The remaining six contain provisions similar to the United States Constitution, establishing three branches of government and assigning each branch a set of duties, but not explicitly prohibiting power sharing or balancing of powers.

B. The Dependent Variable: Judicial Review Level

The dependent variable is described as the level of judicial review employed or approved by states' highest courts in education finance adequacy litigation. This variable is denoted in the results as "*Judicial Review Level*" or "*judrev*." Judicial review levels are coded as (1) *no merits review* (total abstention); (2) *merits review with no specified remedy* (partial or remedial abstention, or a merits verdict in favor of the state); and (3) *merits review with specified remedy* (no abstention). These codings are not only logically defensible, but also in agreement with the characterizations in prior scholarship.[219]

It is well known among scholars studying education finance litigation that the opinions of states' highest courts often overrule or modify earlier decisions at the same level, owing in part to the multiple trips that many education finance cases make to the state's high court before final resolution, if such resolution indeed ever comes.[220] Thus, all cases in the data set are coded based on their most recent status, taking account of the final position that each court has taken regarding the propriety of judicial review.[221]

For example, if a state court initially were to allow review, but later hold that the courts should have abstained on separation of powers grounds, that case would be coded as "*no merits review*" because the later highest court decision specifically disapproved of the earlier decision to

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217. This study was completed as of July 31, 2009. Any decisions rendered after that date were not included in the analyses.

218. See *infra* Part VI. for a matrix categorizing all state provisions included in this study according to my coding protocol for the *separation of powers* variable.

219. *See* Obhof, *supra* note 127, at 572–73 (classifying the same three different levels of review, but respectively coding them "abdication," "middle ground," and "activism").

220. *See, e.g.*, Michael Heise, *Schoolhouses, Courthouses, and Statehouses: Educational Finance, Constitutional Structure, and the Separation of Powers Doctrine*, 33 LAND & WATER L. REV. 281, 282–87 (1998) (outlining the saga of education finance reform litigation in New Jersey).

221. *See supra* note 217.

engage in merits review. However, if a state's highest court initially were to allow review and order or approve policy-directive remedial action or retain jurisdiction, but subsequently decide not to invalidate the legislature's responsive enactments, then that case would nevertheless be coded into one of the "merits review" categories, because the court's initial decision as to the proper extent of merits review and remediation of the case would have remained good law.

Over almost four decades of education finance litigation in state courts, the highest courts of most states have had the opportunity to address state constitutional challenges based on some theory at least once. At this writing, the highest courts of twenty-six states have addressed education finance constitutional challenges at least partly founded on theories of adequacy, and they have issued rulings as to justiciability or have adjudicated the merits and either issued or abstained from issuing a remedy.[222] These twenty-six courts have at times prospectively prohibited or allowed, or retrospectively invalidated or approved, judicial review at one of three levels. In eight states, the most recent highest court decision has held that the courts may not engage in merits review of legislative decision making establishing levels of education spending in cases alleging that such spending fails to meet a constitutional standard of quality.[223] Typically, courts in these states have relied on separation of powers principles in justifying abstention.

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222. *Ex parte* James, 836 So. 2d 813 (Ala. 2002); Hull v. Albrecht, 960 P.2d 634 (Ariz. 1998); Lake View Sch. Dist. v. Huckabee, 220 S.W.3d 645 (Ark. 2005); Coal. for Adequacy & Fairness in Sch. Fund., Inc. v. Chiles, 680 So. 2d 400 (Fla. 1996); Idaho Sch. for Equal Educ. Opportunity [ISEEO] v. State, 129 P.3d 1199 (Idaho 2005); Comm. for Educ. Rights v. Edgar, 672 N.E.2d 1178 (Ill. 1996); Montoy v. State, 112 P.3d 923 (Kan. 2005); Rose v. Council for Better Educ., Inc., 790 S.W.2d 186 (Ky. 1989); McDuffy v. Sec'y of Executive Office of Educ., 615 N.E.2d 516 (Mass. 1993); Columbia Falls Elem. Sch. Dist. v. State, 109 P.3d 257 (Mont. 2005); Neb. Coal. for Educ. Equity & Adequacy v. Heineman, 731 N.W.2d 164 (Neb. 2007); Londonderry Sch. Dist. v. State, 907 A.2d 988 (N.H. 2006); Abbott v. Burke, 693 A.2d 417 (N.J. 1997); Campaign for Fiscal Equity, Inc. v. State, 801 N.E.2d 326 (N.Y. 2003); Hoke County Bd. of Educ. v. State, 599 S.E.2d 365 (N.C. 2004); Derolph v. State, 677 N.E.2d 733 (Ohio 1997); Okla. Educ. Ass'n v. State, 158 P.3d 1058 (Okla. 2007); Pendleton Sch. Dist. v. State, 200 P.3d 133 (Or. 2009); Marrero v. Commonwealth, 739 A.2d 110 (Pa. 1999); City of Pawtucket v. Sundlun, 662 A.2d 40 (R.I. 1995); Abbeville County Sch. Dist. v. State, 515 S.E.2d 535 (S.C. 1999); W. Orange-Cove Consol. I.S.D. v. Alanis, 107 S.W.3d 558 (Tex. 2003); Brigham v. State, 889 A.2d 715 (Vt. 2005); Seattle Sch. Dist. v. State 585 P.2d 71 (Wash. 1978); State v. Campbell County Sch. Dist., 19 P.3d 518 (Wyo. 2001).

223. *See, e.g.*, *James*, 836 So. 2d at 819 (dismissing the ongoing litigation based on the court's determination that the separation of powers clause of the state constitution prevented judicial review); *Chiles*, 680 So. 2d at 407 (dismissing the case based on the separation of powers clause of the state constitution); *Edgar*, 672 N.E.2d at 1192–93 (dismissing the case based on a lack of "judicially manageable standard[s]"); *Heineman*, 731 N.W.2d at 183 (upholding the trial court's dismissal of the action on political question grounds); *Okla. Educ. Ass'n*, 158 P.3d at 1065–66 (upholding the trial court's dismissal of the action based on the separation of powers clause of the state constitution); *Marrero*, 739 A.2d at 113–14 (upholding the trial court's dismissal of the action on separation of powers grounds); *Sundlun*, 662 A.2d at 56, 58 (dismissing the action based on legislative discretion and separation of powers principles). In *James*, the court did not explicitly overrule its prior decision allowing merits review, but the court made clear that no challenge on the merits would be justiciable in the future. 836 So. 2d at 819. Thus, this case is included as a "total abstention" case.

Where the most recent state highest court decisions have either prospectively allowed or retrospectively approved merits review, they have approved such review at one of two levels. More restrained (or "dialogic") courts in eleven states have sanctioned review only of the question whether the state constitution was violated by legislative establishment of a particular system of funding education or a particular funding level.[224] The courts that found a constitutional violation have nevertheless abstained from the remediation of the identified constitutional infirmity, leaving it up to the legislative body of the state to construct a remedy—usually a new funding system or a new appropriations bill increasing state funding, but sometimes, the definition of the constitutional standard itself. These courts, like the courts completely abstaining, have often referred to separation of powers principles to justify remedial abstention.

The final group of seven courts have allowed or approved much more searching court involvement.[225] These courts have issued, or more com-

224. *See Albrecht*, 960 P.2d at 640 ("Accordingly, in deference to legislative authority and intent, we invalidate the entire Act, thereby enabling the legislature to reconsider the entire financing mechanism in light of the constitutional requirement that a 'general and uniform' system cannot allow some districts to employ local funding mechanisms that the state system withholds from other districts."); ISEEO v. State, 129 P.3d at 1208 (holding portions of the state system unconstitutional, but abstaining from any specific remediation out of concern for judicial usurpation of the legislative role to determine policy); *Rose*, 790 S.W.2d at 213–15 (affirming the trial court's finding of unconstitutionality, but then reversing, on separation of powers grounds, the trial court's specific remedial order and retention of ongoing jurisdiction); *McDuffy*, 615 N.E.2d at 552–54, 561 (invalidating the state education system on adequacy grounds, but abstaining from remediation); *Columbia Falls*, 109 P.3d at 261–63 (deferring to the legislature to define an adequate education, but declaring that the current Montana system would violate any such definition); *DeRolph*, 677 N.E.2d at 747 n.9 (holding the state system unconstitutional on adequacy grounds, but then declining to order specific remedial action because it would encroach on a "clearly legislative function"); *Pendleton Sch. Dist*, 200 P.3d at 145 (quoting Olsen v. State, 554 P.2d 139, 140 (Or. 1976)) (addressing the merits, but holding that the education clause required only "a minimum of educational opportunities"); *Abbeville*, 515 S.E.2d at 541 (determining that educational adequacy was justiciable, but admonishing the trial court on remand not to order any policy-directive remedy if a violation were identified, so as not to become a "super-legislature"); *Alanis*, 107 S.W.3d at 563–64, 582 (reaffirming the judiciary's authority and responsibility to adjudicate educational adequacy, but also reaffirming the legislature's authority and responsibility to determine how to meet the constitutional standard); *Brigham*, 889 A.2d at 721–22 (explaining that remediation of a constitutional violation on adequacy grounds would amount to a declaration of unconstitutionality); *Seattle*, 585 P.2d at 104–05 (invalidating the state system based on an inadequate funding source and the failure of the legislature to define "education," and reversing the trial court's retention of jurisdiction as incompatible with the supreme court's expression of confidence that the legislature would act on its own to render the system constitutional).

225. *See Huckabee*, 220 S.W.3d at 655–57 (directing the legislature to enact legislation that had been proposed in an earlier special session to remedy inequality and inadequacy); *Montoy*, 112 P.3d at 939–40 (ordering specific appropriations to remedy educational inadequacy); *Londonderry*, 907 A.2d at 995–96 (declaring, after several attempts at dialogic adjudication, that the court would order policy-directive remedial action if the legislature failed to act by a certain date); *Abbott*, 693 A.2d at 444 (remanding for the ordering of a costing-out study); *Campaign*, 801 N.E.2d at 348 (remanding for the ordering of a costing-out study); *Hoke*, 599 S.E.2d at 393 (holding that the trial court, if the evidence warranted, could impose any policy-directive warranted, but disapproving the remedy of requiring the provision of preschool to at-risk students due to lack of support in the evidence); *Campbell County*, 32 P.3d at 331 (adjudicating a violation and then assuming ongoing monitoring jurisdiction over increases to the capital funds budget).

monly approved the trial courts' power to issue, policy-directive remedial orders, ranging from requiring the legislative body in the state to commission a third-party study to determine the cost of providing an adequate education system, to mandating the actual appropriation of additional state funding for education.

IV. STATE CONSTITUTIONAL TEXT AND JUDICIAL REVIEW

The focus of this Part is to identify the existence or non-existence of an association between the separation of powers limitations set forth in state constitutions and the courts' ultimate judicial review determinations in adequacy-based education finance litigation in the states. To that end, the variables, as coded above, are analyzed using the *lambda* test of proportionate reduction in errors. The results of this analysis are presented in Tables 1 and 2 below.

Table 1
Judicial Review Level * Separation of Powers Cross Tabulation

			Separation of Powers		
			Explicit	Implicit	Total
Judicial Review Level	No Merits Review	Count	6	2	8
		Expected Count	6.2	1.8	8.0
		% within Judicial Review Level	75.0%	25.0%	100.0%
	Merits Review with No Remedy Specified	Count	9	2	11
		Expected Count	8.5	2.5	11.0
		% within Judicial Review Level	81.8%	18.2%	100.0%
	Merits Review and Specified Remedy	Count	5	2	7
		Expected Count	5.4	1.6	7.0
		% within Judicial Review Level	71.4%	28.6%	100.0%

Total	Count	20	6	26
	Expected Count	20.0	6.0	26.0
	% within Judicial Review Level	76.9%	23.1%	100.0%

Table 2
Directional Measures

			Value	Asymp. Std. Error[a]	Approx. T[b]	Approx. Sig.
Nominal by Nominal	Lambda	Symmetric	.000	.095	.000	1.000
		Judicial Review Level Dependent	**.000**	**.133**	**.000**	**1.000**

a. Not assuming the null hypothesis.

b. Using the asymptotic standard error assuming the null hypothesis.

The results of the *lambda* analysis indicate absolutely no evidence of any association between the two variables. If it were possible to use information about separation of powers text to make predictions about judicial review levels, the value of *lambda* would differ from zero, indicating the percentage to which the error in predicting judicial review levels could be reduced by knowing whether a state's separation of powers doctrine is explicit or implicit. In this case, the value is zero to three decimal places. This result means that knowledge of whether the separation of powers principles of a particular state constitution are explicit or implicit is of no help whatsoever in predicting the extent to which the state's highest court

will engage in or approve merits review or remediation of an alleged constitutional violation.[226]

This result is strikingly counter-intuitive. Scholars have often assumed or argued without controversy that separation of powers principles are likely to be quite influential in determining the outcomes of education finance adequacy litigation.[227] Further, scholars have argued, and some courts have assumed, that explicit separation of powers principles leave less room for courts to interpret their powers broadly than implicit principles.[228] However, it appears from these results that either or both of these principles fails to reflect actual practice.[229]

The results therefore call into question whether that elephant that I expected to be in the room is actually there. It appears that what I and some others[230] have considered to be a salient characteristic of many state constitutions—the explicitness of separation of powers doctrine in the constitutional text—does not have any discernable impact on whether courts choose to abstain from the merits of constitutional litigation *on the very grounds of separation of powers*.[231]

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226. LEWIS-BECK, *supra* note 196, at 28.

227. *See, e.g.*, Dunn & Derthick, *supra* note 9, at 324 ("Adequacy lawsuits are, then, political events: they allocate things of value; they propel the courts into an institutional sphere normally reserved for the legislature, which has the authority to raise revenue and appropriate funds; and they depend for implementation on action by governors and legislatures.").

228. *See* Tarr, *supra* note 27, at 339–40 (examining the explicit mandate for separation of powers in the Indiana Constitution and concluding that the provision forecloses judicial flexibility in determining that different branches can share their powers); *cf.*, Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 214 (Kan. 1989) ("The United States Constitution has no separation of powers provision within it. The separation of powers doctrine in the Federal area, has been recognized in federal common law. We on the other hand, are faced with a strongly written, definitive constitutional scheme. We must, perforce, follow our constitution. The federal cases and situations referred to are clearly not even persuasive here.").

229. Although beyond the scope of this study, the results also provide additional support to the existing studies debunking the conventional wisdom that state court judges tend to favor textualist modes of constitutional interpretation—that is, to use constitutional text as the sole, or at least the dominant, factor in determining constitutional meaning. *See, e.g.*, John Copeland Nagle, *The Worst Statutory Interpretation Case in History*, 94 NW. U. L. REV. 1445, 1468 (2000) (Book Review: WILLIAM D. POPKIN, STATUTES IN COURT: THE HISTORY AND THEORY OF STATUTORY INTERPRETATION (1999)) (characterizing the point that state courts lean toward textualist methods as "received wisdom"); Richard J. Peltz, *Limited Powers in the Looking-Glass: Otiose Textualism, and an Empirical Analysis of Other Approaches, When Activists in Private Shopping Centers Claim State Constitutional Liberties*, 53 CLEV. ST. L. REV. 399, 408–09 (2005–2006) (describing the results of an empirical study finding that state court judges selectively employ textualist interpretivism where it suits the purpose of expanding state power to define individual rights).

230. *E.g.*, Tarr, *supra* note 27, at 339–40.

231. My findings also lend empirical support to prior research identifying a tendency among state courts to elevate other constitutional provisions over their separation of powers clauses when deciding issues of legislative delegation and legislative vetoes. *See* Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 VAND. L. REV. 1167, 1208 (1999) ("[T]he case law suggests the approach of a state court in evaluating rules review is much less likely a result of the state constitution's separation of powers clause so much as it is dependent on a variety of other formal constitutional and judicial factors.").

V. Is There an Elephant in the Room?

The surprising findings of the quantitative analysis above generate several questions. Are the explicit separation of powers clauses in many state constitutions merely superfluous? Has the legal and educational scholarship been correct in tacitly assuming the uniformity of separation of powers principles among the states? Simply put: Is there an elephant in the room at all? In the following Subpart, I consider these questions, taking a fresh look at the cases, and I suggest that another largely unexamined legal factor may be working to nullify differences in constitutional text.

A. A Review of the Cases in Light of the Findings

To begin with, there clearly are differences in the ways in which states have applied separation of powers doctrine in education finance adequacy litigation. As Table 2 shows, almost a third (8/26) of the highest courts in states where these challenges have been brought have dismissed them on explicit separation of powers grounds. The other roughly two-thirds have engaged in some level of adjudication and remediation. Several of these latter courts follow what has been termed a dialogic approach, adjudicating the merits of the alleged constitutional violation but abstaining from the remedial phase, sometimes merely stating that a constitutional violation exists and other times both identifying a violation and providing the legislature with clues to guide, but not compel, its remediation.

Thus, it is obvious that separation of powers principles do not operate uniformly throughout the states. However, as I have shown, the lack of uniformity evident in the cases does not reveal any pattern that can be predicted based on differences in constitutional text relating to separation of powers. Coupled with the findings of prior research that education clause language has little to no impact on case outcomes, we may be left with the uncomfortable conclusion that law matters little, if at all, in education finance adequacy litigation. But this conclusion should not be accepted lightly. Something else may be at work here. Another legal factor might be confounding textual effects. To discover whether this is so, I consider the adjudicatory process in its stages—from the threshold justiciability determination, to the adjudication of the merits of the constitutional claim, to the remediation of any identified harm—in light of separation of powers principles that might impact each stage.

As I have explained, separation of powers concerns arise in some way in nearly every education finance adequacy case. Several state courts have addressed these concerns by dismissing the cases as nonjusticiable. Others have engaged in merits adjudication after rejecting such concerns. Still others have engaged in review and limited their involvement by abstaining

from ordering a binding remedy. As I will show, these decisions have much to do with conceptions of rights and duties.

Most courts engaging in merits adjudication have stated in their opinions traditional conceptions of the role of the judiciary as the protector of individual rights against state infringement, or have stated interpretations of the education clauses in their states' constitutions as repositories of individual rights.[232] For example, in Montana, the court concluded that, because the education clause "guarantees a right to education," legislative action establishing an education system, though nonjusticiable in the abstract, was rendered justiciable.[233]

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232. *See Rose*, 790 S.W.2d at 201 (holding that an adequate education is a "fundamental right" in Kentucky); *id.* at 189–90 ("The framers of our constitution intended that each and every child in this state should receive a proper and an adequate education, to be provided for by the General Assembly. This opinion dutifully applies the constitutional test of [the education clause] to the existing system of common schools. We do no more, nor may we do any less." (italics omitted)); Columbia Falls Elem. Sch. Dist. v. State, 109 P.3d 257, 261 (Mont. 2005) (holding that the education clause, by guaranteeing an individual right to education, was justiciable, and that "the courts, as final interpreters of the Constitution, have the final 'obligation to guard, enforce, and protect every right granted or secured by the Constitution'") (quoting Robb v. Connolly, 111 U.S. 624, 637 (1884)); Londonderry Sch. Dist. 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"); Robinson v. Cahill, 351 A.2d 713, 720 (N.J. 1975) ("[T]he right of children to a thorough and efficient system of education is a fundamental right guaranteed by the Constitution."); Campaign for Fiscal Equity, Inc. v. State, 801 N.E.2d 326, 349 (N.Y. 2003) ("Courts are, of course, well suited to . . . review challenged acts of our co-equal branches of government—not in order to make policy but in order to assure the protection of constitutional rights."); Hoke County Bd. of Educ. v. State, 599 S.E.2d 365, 379 (N.C. 2004) ("[T]he initial question before us is not whether that right exists but whether that right was shown to have been violated."); W. Orange-Cove Consol. I.S.D. v. Alanis, 107 S.W.3d 558, 563 (Tex. 2003) ("[t]he provision also requires the Legislature to . . . accomplish that general diffusion of knowledge . . . essential to the preservation of the liberties and rights of the people.") (quoting Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 394 (Tex.1989)); Brigham v. State, 889 A.2d 715, 720 (Vt. 2005) ("Adjudicating cases involving alleged violations of plaintiffs' constitutional rights resulting from a legislative enactment does not undermine the legislative process, nor is it disrespectful of the other branches of government. Rather, the court abdicated its duty to uphold the Vermont Constitution by refusing to entertain plaintiffs' claims."); Seattle Sch. Dist. v. State, 585 P.2d 71, 91–93 (Wash. 1978) (defending the decision to engage in merits review based on the conception that the constitution imposed an affirmative duty on the legislature that implied a correlative individual right on state residents, which the court was duty-bound to adjudicate); State v. Campbell County Sch. Dist., 19 P.3d 518, 539–40 (Wyo. 2001) ("Constitutional provisions imposing an affirmative mandatory duty upon the legislature are judicially enforceable in protecting individual rights, such as educational rights. Although this court has said the judiciary will not encroach into the legislative field of policy making, as the final authority on constitutional questions the judiciary has the constitutional duty to declare unconstitutional that which transgresses the state constitution. When the legislature's transgression is a failure to act, our duty to protect individual rights includes compelling legislative action required by the constitution."). *But see* Montoy v. State, 112 P.3d 923, 929 (Kan. 2005) (referring to the remedial posture of the case in rejecting the application of the Court's previous pronouncements of a limited judicial role in *U.S.D. No. 229 v. State*, 885 P.2d 1170 (1994), which had focused judicial review only on actions exceeding constitutional limitations, *id.* at 1174); Pendleton Sch. Dist. v. State, 200 P.3d 133 (Or. 2009) (engaging in merits review without addressing the questions of separation of powers or judicial review, but referring to the education clause throughout as a repository of legislative duties, never mentioning the word "rights").

233. *Columbia Falls*, 109 P.3d at 261.

A small number of courts not stating individual rights-based conceptions of the education clause have focused on the mandatory, as opposed to discretionary, nature of the affirmative commands in state education clause language as a justification for judicial involvement.[234] Others have relied on traditional conceptions of the judicial role as the ultimate interpreter of every constitutional provision.[235] These latter cases have in common with the individual rights cases a lack of any significant focus on legislative discretion in enacting public policy.

In sharp contrast, courts electing to abstain from merits review appear to ignore any conceptions of individual rights and rely instead on a conception of the education clause as a repository of discretionary legislative duties.[236] For example, the Florida Supreme Court, in justifying its total abstention, cited the legislative "duty," as well as the "enormous discretion" provided in the state's education clause, without mentioning rights in any form.[237] In fact, every single state supreme court that has held education finance adequacy litigation to be nonjusticiable has stated a conception of the education clause as a repository of discretionary duties, rather than

234. *See* Lake View Sch. Dist. v. Huckabee, 91 S.W.3d 472, 484 (Ark. 2002), *mandate recalled*, 142 S.W. 3d 643 (Ark. 2004) ("We refuse to close our eyes or turn a deaf ear to claims of a dereliction of duty in the field of education."); DeRolph v. State, 677 N.E.2d 733, 740–41 (Ohio 1997) (referring to the education clause as containing a "directive" to the legislature, which established an "obligation"); Abbeville County Sch. Dist. v. State, 515 S.E.2d 535, 539–40 (S.C. 1999) (citing the "mandatory" nature of the education clause as a basis for review); *see also DeRolph*, 677 N.E.2d at 740 n.5 (declining to address the plaintiffs' contention that education is a fundamental, individual right).

235. *See* ISEEO v. Evans, 850 P.2d 724, 734 (Idaho 1993) (rejecting the idea that education is a fundamental right, but justifying judicial review, stating, "[W]e decline to accept the respondents' argument that the other branches of government be allowed to interpret the constitution for us. That would be an abject abdication of our role in the American system of government") (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)).

236. *See Ex parte* James, 836 So. 2d 813, 818–19 (Ala. 2002) (describing the education clause in terms of legislative "power," "province," and "matters" that were beyond the judiciary's competence to adjudicate); Coal. for Adequacy & Fairness in Sch. Fund., Inc. v. Chiles, 680 So. 2d 400, 408 (Fla. 1996) (construing the education clause as imposing both a "duty" and "enormous discretion" upon the legislature); Comm. for Educ. Rights v. Edgar, 672 N.E.2d 1178, 1190 (Ill. 1996) (construing the education clause as a repository of duties and limiting its own role to "ensur[ing] that the enactment [of legislation] does not exceed whatever *judicially enforceable limitations* the constitution places on the General Assembly's power") (emphasis added); Neb. Coal. for Educ. Equity & Adequacy v. Heineman, 731 N.W.2d 164, 179–82 (Neb. 2007) (referring to the education clause as establishing the legislature's affirmative "duty" and its "discretion," and specifically pointing out that the voters of the state had rejected a popular constitutional amendment that would have established an individual right); Okla. Educ. Ass'n v. State, 158 P.3d 1058, 1065–66 (Okla. 2007) (referring to the education clause as establishing a legislative "duty," which was accompanied with substantial "authority" and "discretion"); Marrero v. Commonwealth, 739 A.2d 110, 112 (Pa. 1999) (specifically rejecting a conception of individual rights in favor of a completely duty-based conception of the education clause); City of Pawtucket v. Sundlun, 662 A.2d 40, 57 (R.I. 1995) (holding that no enforceable individual right to education exists under the state constitution, and that the legislature's duty to provide education is subject to "virtually unreviewable discretion").

237. *Chiles*, 680 So. 2d at 408 (denying review and holding that "the legislature has been vested with enormous discretion by the Florida Constitution to determine what provision to make for an adequate and uniform system of free public schools").

of individual rights or any "mandatory" duties. Inversely, in every case where a court has stated a conception of the education clause as a repository of individual rights, the court has engaged in or approved merits adjudication at some level.

These judicial behaviors directly implicate separation of powers principles. Questions of separation of powers and justiciability call for different analyses where individual rights are at issue than where only the discretionary duties of a coordinate branch are at issue. Chief Justice Marshall suggested this principle himself in *Marbury v. Madison*[238] while explicating the foundational principle of judicial review:

> The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.[239]

The Supreme Court in *Baker v. Carr*[240] applied this very principle to deny application of the political question doctrine to a suit alleging Equal Protection Clause violations.[241] The principle makes sense, in that it would not be desirable to allow a branch of government to take action in violation of an individual's constitutional rights, and then use the separation of powers as a shield to avoid judicial review of such action simply because it involved political discretion or political decision making in some way.[242]

State courts have been receptive to this distinction in education finance adequacy cases, and some have applied it to justify both merits adjudication and active remediation.[243] Based on the cases, getting to the merits

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238. 5 U.S. (1 Cranch) 137 (1803).

239. *Id.* at 170. Scholars have at times credited this often-overlooked statement in *Marbury* as establishing the foundations of the modern political question doctrine. *See, e.g.*, Rachel E. Barkow, 102 COLUM. L. REV. 237 (2002) (identifying this statement as the initial recognition of the political question doctrine in federal court); William Bradley Colwell, *Judicial Review: Issues of State Court Involvement in School Finance Litigation*, 24 J. EDUC. FIN. 69 (1998) (same).

240. 369 U.S. 186 (1962).

241. *Id.* at 229 ("When challenges to state action respecting matters of 'the administration of the affairs of the State and the officers through whom they are conducted' have rested on claims of constitutional deprivation which are amenable to judicial correction, this Court has acted upon its view of the merits of the claim.") (quoting Boyd v. Nebraska *ex rel.* Thayer, 143 U.S. 135, 183 (1892) (Field, J., dissenting)).

242. *See, e.g.*, Gomillion v. Lightfoot, 364 U.S. 339, 347 (1960) ("A statute which is alleged to have worked unconstitutional deprivations of petitioners' rights is not immune to attack simply because the mechanism employed by the legislature is a redefinition of municipal boundaries.").

243. *See, e.g.*, Columbia Falls Elem. Sch. Dist. v. State, 109 P.3d 257, 261 (Mont. 2005) (holding that the education clause, by guaranteeing an individual right to education, was rendered justiciable and compatible with separation of powers principles); Londonderry Sch. Dist. v. State, 907 A.2d 988, 996 (N.H. 2006) (explaining the court's willingness to engage in policy-directive remediation by stating that "the 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 essen-

adjudication stage often depends on the existence of individual rights.[244] Further, reaching merits adjudication has resulted in some measure of victory for the plaintiffs in every education finance adequacy suit, save one, and the one court ruling for the state on the merits did not express an individual rights view of the education clause.[245]

Put differently, in adequacy litigation, every state high court finding individual rights in its education clause has at some point found these individual rights violated by an existing state education financing system. Therefore, based on the existing cases, it seems that, if a litigant in an education finance adequacy suit were to succeed at convincing the court that the education clause guarantees individual rights, rather than simply spelling out discretionary legislative duties, that litigant would be virtually guaranteed to win the case. However, this conclusion does not encompass all merits adjudication cases. Recent scholarship sheds light on the remainder.

Professor Ryan has recently shown that, where courts clear the justiciability hurdle and proceed to merits adjudication, they nearly uniformly employ comparative adjudicatory methodologies.[246] Inherently, employing

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tial").

244. *See supra* note 232 and accompanying text.

245. *See supra* note 232 and accompanying text. In the one exception case, the Oregon Supreme Court did not address separation of powers concerns, and thus, it put forth no particular conception of the nature of education rights. *See* Pendleton Sch. Dist. v. State, 200 P.3d 133 (Or. 2009) (addressing the merits without discussing separation of powers, but upholding a judgment for the state). The Texas Supreme Court recently issued a ruling in favor of the state in that state's long-running education finance litigation. Neely v. W. Orange-Cove Consol. I.S.D., 176 S.W.3d 746 (Tex. 2005). However, this most recent ruling merely held that the legislature had complied in good faith with the court's prior orders after finding a constitutional violation. *Id*. The plaintiffs in that prior case initially won on the merits, *see* W. Orange-Cove Consol. I.S.D. v. Alanis, 107 S.W.3d 558, 563–64 (Tex. 2003), and the court has not retreated from or overturned this initial merits ruling. Rather, the *Neely* court merely held that its initial ruling had been complied with. *Neely*, 176 S.W.3d 746.

246. *See* Ryan, *supra* note 8, at 1232–39. It is true that courts have, at times, used "costing out" studies in education finance litigation, attempting to determine what an adequate education costs, and then used the resulting data in part to evaluate the state of education in the forum state. However, as Professor Ryan establishes, most of these courts also base their merits adjudication on comparative data, and the costing-out methodologies more often inform remediation, rather than adjudication of the merits. *See id*. at 1236, 1236 n.84 (referring to the comparative methodology employed by the Arkansas courts, which ultimately ordered a costing-out study). Despite this tendency of adequacy-based methodologies to creep in at the fringes of some cases, Ryan's conclusion remains that, with the possible exception of Kansas, every state supreme court has employed primarily comparative methodologies in reaching its decision in favor of the plaintiffs. *Id*. at 1232–39. In addition to the Kansas Supreme Court, it appears that the Oregon Supreme Court must be added to the list of exceptions, in that it very recently issued a decision in an adequacy-based challenge without employing comparative methodologies. *Pendleton*, 200 P.3d 133. Interestingly, unlike every other decision studied by Ryan, the Oregon court's decision went in favor of the state defendant. *Id*. Professor Ryan's findings support prior scholarship that essentially predicted this effect. *See* Koski, *supra* note 8, at 1283–96 (explaining that no clear line divides equality theories from adequacy theories, and, in fact, both theories are present in most education finance cases). Ryan's findings also support prior scholarship making similar normative claims. *See* Cover, *supra* note 127, at 427 (arguing for a return to equity, even if in the guise of adequacy); Koski & Reich, *supra* note 8, at 611 (arguing that adequacy theories are insufficient means of securing equity and advocating for a return to equity as the dominant theory of relief).

comparative methodologies requires measuring the educational resources of one individual (or individual district) against the resources of a similarly situated individual (or district)—the way that courts have always adjudicated individual rights to equal protection. If so, then it appears that, at the merits adjudication stage, the individual rights conception is present in almost all cases, even though, as I have discussed, some of these merits adjudication courts do not state this conception explicitly at the justiciability stage.

Considering these points together, it appears that, if a plaintiff wishes to secure victory in an education finance "adequacy" suit, the plaintiff must either (1) convince the court that the education clause guarantees individual rights; or (2) present the court with evidence that individuals (whether by themselves or aggregated) are being treated differently from similarly situated individuals. Simply put, in adequacy litigation, proving the existence of individual rights appears to greatly improve success rates at the threshold justiciability stage, and proving harms to individual rights all but dictates success at the merits adjudication stage. These conclusions seem at odds with basic adequacy theory.

In the course of education finance reform, litigants have pursued the adequacy theory as an alternative to equity theory because of the perception that equity verdicts tend to lead to undesirable consequences and create undesirable incentives both politically and practically.[247] For example, remedies in equity suits tend to be redistributive, which can lead to political consequences and pit groups of individual citizens against each other's interests.[248] Further, large, urban districts tend to spend more than other districts by default, which may lead to the practical consequence that they cannot prove they are harmed by inequality, or that equality-based judgments might perversely reduce their relative funding.[249]

Adequacy-based claims were conceived to circumvent these concerns by making absolute levels of funding, rather than relative levels of funding, the issue. In theory, a state can have a very egalitarian education funding system, ensuring individual equality or equity, but this system could nevertheless be funded at such a low level as to be constitutionally inadequate—an "equality of poverty."[250] In this case, adequacy claims

247. *See* Enrich, *supra* note 21, at 145–66 (outlining the perceived problems with equality theories).

248. *See* Heise, *supra* note 10, at 1168–74 (outlining the difficulties that equity plaintiffs encountered, leading to a move to adequacy as the dominant theory of relief).

249. *See id*.

250. R. Craig Wood, *Constitutional Challenges to State Education Finance Distribution Formulas: Moving from Equity to Adequacy*, 23 ST. LOUIS U. PUB. L. REV. 531, 551 n.132 (2004) (quoting Deborah A. Verstegen, *The New Finance: Today's High Standards Call for a New Way of Funding Education*, 189 AM. SCH. BD. J. 24, 24–26 (Oct. 2002), *available at* http://www.asbj.com/MainMenuCategory/Archive/2002/October.aspx). *See also* Michael Heise, *Litigated Learning and the Limits of Law*, 57 VAND. L. REV. 2417, 2440–42 (2004) (outlining three reasons why litigants switched from

could be used to ensure that the entire state system would be brought up to an acceptable level of funding, resources, achievement, or whatever else the standard might be, and that the courts would find them more palatable because they would not demand redistributive remedies. Thus, as originally conceived, adequacy claims were supposed to be system-wide challenges that would allow courts greater institutional leeway to participate in shaping a more just statewide policy in education. However, it appears that courts have preferred to approach these claims, if at all, in the more familiar mode of individual rights.

In sum, of the nearly one-third of courts that have abstained completely from adequacy litigation, none have done so while also finding individual rights in the state education clause. Many courts choosing not to abstain have cleared the justiciability hurdle based explicitly on the existence of individual rights in the state education clause. The others, as Ryan has shown, have used comparative adjudicatory methodologies—which I argue inherently require a court to see plaintiffs or plaintiff classes as asserting individual rights—to allow for comparisons with other, similarly situated rights-holders. Thus, empirically, it appears that one could very reliably predict the outcome of an adequacy case by knowing whether education is a discretionary legislative duty or an individual right in any particular state.[251]

These preliminary conclusions might be satisfying—discretionary duties lead to abstention while individual rights lead to review (and thus almost certain victory)—were it not for the disconnected remedial decisions that courts often go on to make in cases where plaintiffs win a judgment. For instance, some courts justify adjudicating adequacy claims based on individual harms, but after identifying a constitutional violation, they order remedial legislative action system-wide,[252] thus reconceptualizing the claims as system-wide (i.e., nonindividual) claims only at the remedial stage.

This shifting of conceptions appears to be even more pronounced in dialogic courts, which adjudicate the merits, but abstain from remediation, at most providing only nonbinding guidance to the legislature as to remediation of the identified constitutional harm.[253] In some states, an alleged

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equity theory to adequacy theory: the lack of effectiveness of equity theories, a realization that equity-based litigation would disfavor urban districts with high per-pupil funding levels, and a desire to eliminate political opposition resulting from "leveling down" of expenditures).

251. This preliminary conclusion is just that—preliminary. It should be subjected to more rigorous empirical testing.

252. *See, e.g.*, State v. Campbell County Sch. Dist., 19 P.3d 518, 539–40, 565–66 (Wyo. 2001) (adjudicating the merits based on a justification that individual rights are at issue, but imposing a policy-directive, system-wide remedy as to capital financing).

253. *See, e.g.*, Columbia Falls Elem. Sch. Dist. v. State, 109 P.3d 257, 261–63 (Mont. 2005) (deferring to the legislature to define an adequate education based on its institutional function, but declaring that the current Montana system would violate any conceivable such definition).

violation of individual rights is sufficient to make a question of legislative discretion justiciable on the merits, as it probably should be. However, granting this point, it is difficult to imagine an independent justification for any sort of remedial abstention on separation of powers grounds. Simply put, if individual rights are violated, then they should require individual remedies, but courts approach such violations as though any binding remedial order will co-opt statewide appropriations policy. Here at the remedial stage, then, it appears that some dialogic courts convert the cases from individual rights claims to system-wide challenges to legislative discretion.

Other dialogic courts reach the merits after concluding that something in the education clause both compels and limits legislative action, and thus justifies judicial review. In these courts, adequacy claims are justiciable because the state constitution itself has been drafted to give the courts a role in supervising legislative policy development in education, or in enforcing mandatory legislative duties.[254] Nevertheless, once a court following this approach has identified a constitutional harm, the dialogic approach counsels remedial abstention. Again, if the specific command of the state constitution requires the judiciary to take a role in determining the sufficiency of legislative appropriations, then it is difficult to imagine that the same command counsels the same judiciary not to simply state a required level of appropriation that establishes a constitutional "floor." In other words, from a separation of powers perspective, stating that one level of appropriation is *not sufficient* is not all that different from stating that another level of appropriation is *required*.[255]

Similar to justifications for complete abstention from the merits, justifications for remedial abstention are grounded in separation of powers principles,[256] regardless of whether these principles are implicit or explicit.

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254. *E.g.*, Lake View Sch. Dist. v. Huckabee, 91 S.W.3d 472 (Ark. 2002), *mandate recalled*, 142 S.W. 3d 643 (Ark. 2004); *see also supra* note 234 and accompanying text.

255. In fact, following the former approach may be more institutionally troubling because it is inherently nonspecific, meaning that the legislature must guess at what is affirmatively required of it—always under the specter of another judicial ruling that funding is not sufficient—thus playing an interbranch game of "hot and cold" until, hopefully, the appropriations ultimately meet the undefined constitutional standard.

256. *See, e.g.*, Hull v. Albrecht, 960 P.2d 634, 640 (Ariz. 1998) (invalidating legislative action in establishing capital facilities funding on adequacy grounds, but deferring to the legislature as to a remedy, stating "[a]ccordingly, in deference to legislative authority and intent, we invalidate the entire Act, thereby enabling the legislature to reconsider the entire financing mechanism in light of the constitutional requirement that a 'general and uniform' system cannot allow some districts to employ local funding mechanisms that the state system withholds from other districts"); ISEEO v. State, 129 P.3d 1199, 1208 (Idaho 2005) (after holding portions of the state system unconstitutional, the court abstained from any specific remediation out of concern for judicial usurpation of the legislative role to determine policy); Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 213–14 (Kan. 1989) (after affirming the trial court's finding of unconstitutionality, reversing, on separation of powers grounds, the trial court's specific remedial order and retention of ongoing jurisdiction); McDuffy v. Sec'y of Executive Office of Educ., 615 N.E.2d 516, 552–54, 561, 554 n.92 (Mass. 1993) (invalidat-

However, a court can only pursue remedial abstention if it first decides the threshold justiciability question, also a question of separation of powers, in favor of merits review. Otherwise, of course, the case is dismissed. The question then becomes, why do many courts approve merits adjudication but opt for remedial abstention if both considerations are bound up with separation of powers concerns?[257] Based on the cases, it seems that, at least at the remedial stage, the dialogic courts see the claims before them as challenges to system-wide policies, not to affirmative violations of individual rights.[258] That the courts maintain this perception, regardless of whether they take an individual-rights view or a legislative-duty view at the justiciability stage, and despite their near-ubiquitous use of individual-rights-based comparative methodologies in adjudicating the merits, is interesting and worthy of further study.

Not all courts take a dialogic approach. Several courts expressing an individual rights-based view of the education clause proceed both to merits

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ing the state education system on adequacy grounds, but abstaining from remediation, and stating, after reviewing the approaches of sister courts, "[a]s did these courts, we have declared today the nature of the Commonwealth's duty to educate its children. We have concluded the current state of affairs falls short of the constitutional mandate. We shall presume at this time that the Commonwealth will fulfill its responsibility with respect to defining the specifics and the appropriate means to provide the constitutionally-required education."); *Columbia Falls*, 109 P.3d at 261–63; DeRolph v. State, 677 N.E.2d 733, 747 n.9 (Ohio 1997) (holding the state system unconstitutional on adequacy grounds, and then declining to order specific remedial action because it would encroach on a "clearly legislative function"); Abbeville County Sch. Dist. v. State, 515 S.E.2d 535, 541 (S.C. 1999) (determining that educational adequacy was justiciable); W. Orange-Cove Consol. I.S.D. v. Alanis, 107 S.W.3d 558, 563–64, 582 (Tex. 2003) (reaffirming the judiciary's authority and responsibility to adjudicate educational adequacy, but also reaffirming the legislature's authority and responsibility to determine how to meet the constitutional standard); Brigham v. State, 889 A.2d 715, 721–22 (Vt. 2005) (explaining that remediation of a constitutional violation on adequacy grounds would amount to a declaration of unconstitutionality); Seattle Sch. Dist. v. State 585 P.2d 71, 104–05 (Wash. 1978) (invalidating the state system based on an inadequate funding source and the failure of the legislature to define "education" and then reversing the trial court's retention of jurisdiction as incompatible with the supreme court's expression of confidence that the legislature would act on its own to render the system constitutional).

257. Professor Fallon's recent work in this area offers a potentially helpful answer. *See* Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—And Their Connections to Substantive Rights*, 92 VA. L. REV. 633 (2006). Professor Fallon argues, under his "Remedial Influences on Justiciability Thesis," that federal courts, especially the Supreme Court, often allow their perceptions of the workability or political desirability of potential remedies to influence and cause the "adjusting" of threshold justiciability determinations, including determinations that the political question doctrine bars certain claims. *Id.* at 636, 662–64. This phenomenon is part of Fallon's larger "Equilibration Thesis," which holds that federal courts, especially the Supreme Court, seek workable and acceptable balances between justiciability, merits adjudication (or "substantive rights" determinations, as Fallon conceives this stage), and remediation, and that these three stages of adjudication constantly influence each other. *Id.* at 637. Based on the pattern of decisions in state courts, and particularly the existence of remedial abstention, it appears that the "Remedial Influences on Justiciability Thesis" is at work in a different way in dialogic cases, in that the "adjusting" occurs more often and more explicitly at the remediation stage than the justiciability stage through a second, remediation-based abstention decision in state supreme courts. *Id.* at 636. Further, it appears from my review of the cases that the influence of "substantive rights" determinations has an explicit influence on justiciability in state supreme courts, further supporting Fallon's theories. These propositions should be subjected to further empirical testing.

258. *See supra* note 224 and accompanying text.

adjudication and policy-directive remediation.[259] Other state courts view the education clause as a repository of highly discretionary legislative (thus, unenforceable) duties, and dismiss litigation prior to reaching the merits.[260] Where the former courts proceed to full adjudication and policy-directive remediation and the latter courts proceed to premerits dismissal, their approaches may be defended as logically consistent.[261] Nevertheless, policy-directive remedial orders are frequently flouted by the coordinate branches, suggesting that separation of powers principles are indeed operating to limit judicial remedial power in these cases, but in the least productive way—through legislative resistance and foot-dragging.[262] Complete abstention, on the other hand, could have the practical effect of rendering state education clauses legal nullities, and this prospect rightly worries education reformers and scholars.[263] Each of these outcomes is problematic, and it appears that each is driven by conceptions of the nature of rights and duties in education. Regardless of a court's approach to separation of powers, nothing compels a court to choose between abstention from the remedial phase and policy-directive remediation. Similarly, nothing compels a court to hold all legislative discretionary duties to be nonjusticiable.

Each of these determinations appears to be bound up with judicial conceptions of the rights and duties established in state education clauses, but this brief review indicates that these conceptions often shift during litigation. Considering the frequent disconnects between justiciability, adjudicatory methodologies, and remediation, one can justifiably conclude that rights to education and duties to educate are not fully understood among state courts. A clearer understanding and definition of these rights and duties and their links to justiciability and remediation is needed.

B. Conclusion: The Elephant in the Room

It appears that conceptions of rights and duties in education finance adequacy litigation are at the heart of judicial decision making, both as to justiciability and remediation, but these conceptions have not been explored deeply in much education finance litigation scholarship. The cur-

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259. *See supra* note 225 and accompanying text.

260. *See supra* note 223 and accompanying text.

261. For example, the long-suffering and often pilloried New Jersey Supreme Court has taken the former approach, tailoring its remedial orders to specific, "special needs" districts. *See* Abbott v. Burke, 693 A.2d 417, 443–44 (N.J. 1997) (ordering a costing-out study tailored to certain "special needs" districts). Subsequent litigation in the state has generally focused on compliance with this and related orders. Although it is subject to the usual criticisms grounded in the separation of powers, at least the court's approach is consistent with its individual rights-based view of the education clause.

262. *See, e.g.*, Ryan, *supra* note 8, at 1241 (describing the New Jersey legislature's attempts to avoid compliance with the state supreme court's orders to increase funding).

263. *See, e.g.*, Rebell, *supra* note 157, at 1535 (criticizing arguments justifying courts' focused attention to separation of powers concerns).

rent scholarship has mostly produced very general descriptions of education rights, but little critical analysis of whether these general conceptions are logically sound or normatively desirable. Further, little existing scholarship of education finance has attempted to sketch out the proper connections between rights and remedies.

While the field of education finance was in its infancy, several studies were published defending, attacking, or evaluating a potential federal substantive right to education and other social goods under the Fourteenth Amendment.[264] After the Supreme Court's decision in *San Antonio Independent School District v. Rodriguez*,[265] this literature saw a sharp decline, at least as it related to education. In the past three decades, a few notable pieces have argued for a renewed federal approach,[266] but Supreme Court case law has affirmatively foreclosed such an approach.[267] Recently, Professor Goodwin Liu has returned attention to the question of the existence of fundamental education rights in the federal system, expanding this inquiry to include positive conceptions of legislative duties.[268] This recent

264. The most widely cited study on this point is Frank I. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969), in which Professor Michelman defended a conception of the Fourteenth Amendment as encompassing many social rights, including a right to education.

265. 411 U.S. 1 (1973).

266. *See generally* Susan H. Bitensky, *Theoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 NW. U. L. REV. 550 (1992); Erwin Chemerinsky, *The Deconstitutionalization of Education*, 36 LOY. U. CHI. L.J. 111 (2004); Penelope A. Preovolos, Rodriguez *Revisited: Federalism, Meaningful Access, and the Right to Adequate Education*, 20 SANTA CLARA L. REV. 75 (1980).

267. *See* Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450, 458–61 (1988) (declining to apply strict scrutiny analysis, whether on a "suspect classification" basis or a "fundamental right" basis, to a state's requirement for the payment of a transportation fee before a student could ride the public school bus). This case had the effect of reaffirming *Rodriguez*, which had arguably been called into question by subsequent Supreme Court case law relating to education. *See* Papasan v. Allain, 478 U.S. 265, 285–86 (1986) (declining to decide whether education is a federal fundamental right); Plyler v. Doe, 457 U.S. 202, 230 (1982) (invalidating a Texas law that completely denied educational services to the children of illegal immigrants, stating that the state's justification was "wholly insubstantial in light of the costs involved to these children, the State, and the Nation"). The *Plyler* Court rejected the notion that education is a fundamental right or that wealth is a suspect classification, but applied more searching review than that traditionally associated with rational basis review, ultimately invalidating state action. *Id*. at 227–30. One commentator argues that this subsequent case law leaves the "door" to a federal right to education under the Equal Protection Clause "open." Daniel S. Greenspahn, *A Constitutional Right to Learn: The Uncertain Allure of Making a Federal Case Out of Education*, 59 S.C. L. REV. 755, 768–69, 775 n.96 (2008) (arguing that the state of Supreme Court case law allows for the recognition of a federal right to education, but ultimately concluding that pressing for such a federal right is unwise in the current political and judicial climate). However, this recent paper does not take account of *Kadrmas*'s explicit adoption of both of *Rodriguez*'s rights-based holdings, and its rejection of the "intermediate scrutiny" standard arguably utilized in *Plyler*. Taking these cases together, judicial recognition of a federal right to education is highly unlikely. *See* R. Craig Wood & Bruce D. Baker, *An Examination and Analysis of the Equity and Adequacy Concepts of Constitutional Challenges to State Education Finance Distribution Formulas*, 27 U. ARK. LITTLE ROCK L. REV. 125, 136 (2004) (reviewing this line of cases and concluding that "no firm federal case yet exists").

268. *See* Liu, *supra* note 184 (making the case for a federal duty to ensure the provision of a minimal educational opportunity in each state as derivative of the individual right to national citizenship provided through the Fourteenth Amendment); *see also* Rebecca Aviel, *Compulsory Education and*

federal scholarship provides a novel justification that has appealed to commentators,[269] but its likelihood of success, in light of the Court's current approach, is virtually nil. Understanding this point, commentators have begun to approach federal rights to education from a statutory perspective, advocating for legislation based on the spending power of Congress under the "cooperative federalism" model.[270]

Early scholarship on state-level education finance litigation focused on an aspect of rights theory, comparing state court determinations of whether education rights were fundamental or nonfundamental with the effects of such determinations on merits adjudication, thus examining state education rights analogously to federal equal protection rights.[271] However, this scholarship nearly uniformly assumed the existence of state-level individual "rights" to education and focused solely on determinations of whether such rights were fundamental.[272] It did not attempt to address conceptions of the nature of education rights beyond their fundamentality, nor did it attempt to develop broad theories of rights to education in the states.

More recent scholarship, most prominently that of Professor Helen Hershkoff, has promoted or defended relatively active state court judicial review of educational policy and other social welfare claims based on general conceptions of affirmative or positive rights. This scholarship has pointed out that education provisions are phrased positively or affirmatively in state constitutional text, and that they should therefore be approached

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Substantive Due Process: Asserting Student Rights to a Safe and Healthy School Facility, 10 LEWIS & CLARK L. REV. 201 (2006) (advocating for a federal due process right to safe and healthy school facilities).

269. *See, e.g.*, John E. Coons, *Private Wealth and Public Schools*, 4 STAN J. C.R. & C.L. 245, 264–65 (2008) (praising Professor Liu's work); Carl F. Kaestle, *Equal Educational Opportunity and the Federal Government: A Response to Goodwin Liu*, 116 YALE L.J. POCKET PART 152 (2006) (same); Robin West, *A Response to Goodwin Liu*, 116 YALE L.J. POCKET PART 157 (2006) (same).

270. *See, e.g.*, Christopher Edley, Jr., *Keynote Address: Symposium on Education as a Civil Right*, 4 STAN. J. C.R. & C.L. 151 (2008) (calling for a new academic approach to educational rights as fundamental civil rights, focusing on subconstitutional statutory means of rights definition, establishment, and enforcement). This article was part of a recent symposium issue of the Stanford Journal of Civil Rights and Civil Liberties, wherein several recognized scholars offered their conceptions of a federal right to education. 4 STAN. J. C.R. & C.L., Issue 2 (2008). *See also* Kimberly Jenkins Robinson, *The Case for a Collaborative Enforcement Model for a Federal Right to Education*, 40 U.C. DAVIS L. REV. 1653 (2007) (advocating for a federal statutory right, expanding upon the No Child Left Behind Act's cooperative federalist approach); Kurtis D. Behn, Note, *Finding a Coherent Federal Education Policy Where Adequacy Litigation and No Child Left Behind Meet*, 40 SUFFOLK U. L. REV. 439 (2007) (same).

271. *See* Blanchard, *supra* note 128, at 248–49; Allen W. Hubsch, *The Emerging Right to Education under State Constitutional Law*, 65 TEMP. L. REV. 1325 (1992) (reviewing the different state approaches to the fundamentality of education as a right for the purposes of equal protection analysis); Thro, *supra* note 10, at 537–38. One early student note focusing on equity litigation hinted at some of the topics that I see in this new direction for scholarship. *See* Note, *Unfulfilled Promises: School Finance Remedies and State Courts*, 104 HARV. L. REV. 1072 (1991) (examining the gaps between merits adjudication and effective remediation and proposing a more active judicial role). More recently, Professors Wood and Baker have pointed out that declaring the existence of a fundamental right to education is no guarantee of success in equity suits. *See* Wood & Baker, *supra* note 267, at 142.

272. *See supra* note 271.

more aggressively than the rights emanating from negatively phrased federal constitutional text, such as the Equal Protection Clause.[273] With a few notable exceptions,[274] the literature does not contain much in the way of critical or normative analysis of the desirability, workability, or nature of individual "rights" to education in the states, beyond either attempting to fit these rights into the federal individual liberties mold or contrasting them textually with federal individual rights. These recent studies lay an important foundation for defining and defending conceptions of education rights at the state level, but as in most existing scholarship, rights are assumed to exist, and the work focuses almost entirely on defending justiciability. As to attempting to define the rights beyond a mere contrast with typical federal rights, a scholarly gap exists.

The existence of this gap[275] in the literature on state education rights is puzzling, considering the very robust and current literature that has developed critically and normatively analyzing different conceptions of state-level rights in analogous areas—such as housing, for example.[276] Consider-

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273. *See generally* Feldman, *supra* note 179; Hershkoff, *Limits of Federal Rationality Review*, *supra* note 179; Neuborne, *supra* note 179.

274. A few scholars have made admirable forays down the latter road. Professor Michael Heise has provided an important piece of the scholarly agenda that I envision, connecting rights with remedies in state courts. *See* Heise, *supra* note 9, at 96–98 (providing a preliminary discussion of the connections between rights and remedies in state court education finance litigation). Also, Professors William S. Koski and Rob Reich have developed a conception of educational equality based on the definition of education as a "positional good," whereby one's own possession of education is increased or decreased in value depending on the quantum of education that others possess. *See* Koski & Reich, *supra* note 8, at 596–604. These scholars have begun the dialogue of the nature of education rights that has been lacking in state court scholarship. Professor Ryan has recently provided empirical support and additional justifications for viewing education rights as positional or relative in nature. *See generally* Ryan, *supra* note 8. However, further approaches are needed, and though it has begun in earnest, this rights-related discourse is in its infancy.

275. When I say that this scholarship contains a gap, I draw a distinction between the many studies that offer competing methodologies for adjudicating whether a school funding system is adequate or equitable, and the far fewer treatments of the nature of the rights underlying such methodologies.

276. *See, e.g.*, Kristen David Adams, *Do We Need a Right to Housing?*, 9 NEV. L.J. 275, 286–305 (2009) (critically analyzing the various arguments made in numerous articles and monographs relating to the desirability and nature of an individual right to housing); Adam S. Cohen, *More Myths of Parity: State Court Forums and Constitutional Actions for the Right to Shelter*, 38 EMORY L.J. 615, 656–60 (1989) (explaining that, once they can escape the myth of federal-state court parity, state courts have the potential to recognize rights to housing not available under federal law); Robert Doughten, *Filling Everyone's Bowl: A Call to Affirm a Positive Right to Minimum Welfare Guarantees and Shelter in State Constitutions to Satisfy International Standards of Human Decency*, 39 GONZ. L. REV. 421, 435–45 (2003–2004) (advocating for positive rights to minimum welfare and shelter under state constitutions); Robert C. Ellickson, *The Untenable Case for an Unconditional Right to Shelter*, 15 HARV. J.L. & PUB. POL'Y 17, 31–32 (1992) (challenging the idea of an individual constitutional right to housing, in part by comparing a judicially constructed housing right to what the author saw as an uncontroversial textual "entitlement" to education based on each state's education clause); Katherine Barrett Wiik, *Justice for America's Homeless Children: Cultivating a Child's Right to Shelter in the United States*, 35 WM. MITCHELL L. REV. 875, 927–34 (2009) (arguing for the establishment of an individual right to housing under state constitutions); Bradley R. Haywood, Note, *The Right to Shelter as a Fundamental Interest under the New York State Constitution*, 34 COLUM. HUM. RTS. L. REV. 157, 195–96 (2002) (arguing in support of an affirmative right to housing).

ing the fact that every single state constitution contains an education clause at least requiring the establishment of *some* education system available to all state residents free of charge, one would expect that at least as much scholarship would exist defining any rights created by such provisions as that which exists for defining rights to housing, which do not find explicit mention in any state's constitutional text.[277] But the substantive housing rights literature dwarfs the literature on substantive education rights in the states. The dearth of academic work developing and defending conceptions of state constitutional education rights leaves a theoretical void into which state courts tread in unpredictable and sometimes counterproductive ways.

The preliminary conclusions of this Article generate several questions for further study. Are education clauses properly perceived as repositories of rights or simply discretionary duties? Do educational duties necessarily imply educational rights? Are education rights, if they exist, individual or collective? Are they best conceived of as positive or negative rights, notwithstanding their affirmative textual character, or are they some new blend of both? A few courts have attempted to address these questions in limited ways, but their answers often lack a stable conception of education rights, and consequently, similar case scenarios, where the same "rights" are ostensibly at issue, can yield opposite outcomes.[278] These questions are important in a pure normative sense because they get at why we see education as so important as well as whether and how we want education rights to be enforced. They are also important in the descriptive sense, in that they have the potential to shed light on judicial decision making processes and the factors that influence such processes. They deserve more scholarly attention.

In this Article, I have examined a hypothesized association between certain state constitutional text and judicial review determinations and have found no evidence of any such association. The failure to find any association led me to delve more deeply into the cases, and this further analysis yielded a preliminary discussion of the courts' often-shifting conceptions of rights and duties at different stages of litigation. Based on this preliminary analysis, I have suggested that differences in these judicial conceptions of rights and duties may explain the lack of association between se-

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277. *See* Norma Rotunno, Note, *State Constitutional Social Welfare Provisions and the Right to Housing*, 1 HOFSTRA L. & POL'Y SYMP. 111, 145–47 (1996) (listing several state constitutional welfare provisions, one of which mentions "farms" for the needy) (citing IND. CONST. art. IX, § 3 ("The counties may provide farms, as an asylum for those persons who, by reason of age, infirmity, or other misfortune, have claims upon the sympathies and aid of society.")); *see also* Ellickson, *supra* note 276, at 31 (explaining that every state constitution requires the establishment of an education system and inferring an "entitlement" or "positive liberty" to education from these provisions).

278. *E.g.*, *compare* Roosevelt Elementary Sch. Dist. v. Bishop, 877 P.2d 806 (Ariz. 1994) (finding a fundamental right to adequate educational facilities under the Arizona Constitution's education clause), *with* Shofstall v. Hollins, 515 P.2d 590 (Ariz. 1973) (finding no fundamental right to education under the same education clause).

paration of powers text and separation of powers-related determinations in state courts. I have also identified a lack of a significant amount of scholarship on the nature of education rights in state constitutions.

In the final analysis, then, it may be true that there actually *is* an elephant in the room, but it is of a different color and size than the one I initially thought I would find. Rather than separation of powers commands in state constitutions, the important underexamined or unacknowledged factor in education finance adjudication, and in much education finance scholarship, appears to be state courts' varying conceptions of the nature of education rights.

One might surmise that, since separation of powers principles appear to be overshadowed by conceptions of rights and duties in education finance cases, textual differences in the constitutional provisions containing these rights and duties might better predict case outcomes. However, the literature on this point is incomplete and contradictory, and it is aging rapidly, considering the pace of litigation in the states.[279] Further, none of this literature has addressed these education clauses, or courts' constructions of these education clauses, in reference to abstention decisions made either at the premerits stage or at the remediation stage of litigation. This omission is important empirically because, as I have explained, decisions on the merits nearly always favor the plaintiffs in education finance adequacy litigation, while decisions whether and to what extent to abstain are much less predictable.

Focusing on textual differences in the education clauses is not likely to be fruitful to empirical researchers because of the nature of these textual differences. Following William Thro's categorical approach to distinguishing between state education clauses, one can discern that the differences between the categories amount to not much more than differences in the number of precatory adjectives and adverbs contained in each constitution.[280] Words such as "adequate," "suitable," or "thorough"[281] have no

279. *See supra* note 222 and accompanying text. Just since this Article was accepted for publication, two states' supreme courts (Oregon and Indiana) have issued rulings on education finance adequacy challenges. These decisions have been incorporated into the analyses herein. As of the final editing date for this Article, at least three other states' supreme courts (Connecticut, South Carolina, and Colorado) have heard oral arguments, and decisions are working their way through the appellate courts in several other states. *See State by State*, NATIONAL ACCESS NETWORK, http://www.schoolfunding.info/states/state_by_state.php3 (last visited Apr. 6, 2010) (online forum tracking developments in education finance litigation and recent events and providing useful links to research and advocacy organizations in specific states); *Recent Cases*, NATIONAL SCHOOL BOARDS ASSOCIATION, http://www.nsba.org/MainMenu/SchoolLaw/Issues/Finance/RecentCases.aspx (last visited Apr. 6, 2010) (collecting slip opinions from recent litigation related to education in state and federal courts). In both the Connecticut and South Carolina cases, the courts heard oral arguments well over one year prior to this piece's acceptance for publication.

280. *See* Thro, *supra* note 51, at 23–25 (describing the categories, and citing the states included in each, as of 1993). Under Thro's very well-accepted formulation, in Category I states, the constitution merely mandates a "free" or "common" school system; in Category II states, the education clause contains additional qualifying adjectives such as "thorough and efficient"; in Category III states, a

certain or generally accepted legal meaning—they require interpretation.[282] Thus, in future empirical research, it is necessary to move beyond the education clauses and examine the rights and duties that courts derive from them.

Judicial construction of state constitutional education clauses and education rights at different stages in the litigation process therefore requires further scholarly investigation. Such future research should aim to take our understanding of education rights beyond categorization and comparison of state education clauses based on subtle textual differences and into a deeper examination of the proper conceptions of the nature of the rights themselves.

Education-specific rights and duties are, at present, unique to state constitutions. For decades, however, they have been analyzed primarily using the tools and the assumptions appropriate to federal court adjudication, including federally-derived conceptions of rights and duties and federally-derived approaches to separation of powers and judicial review. A better understanding of state-specific approaches to education-specific rights and duties may provide space for the development of a general jurisprudence of rights in state courts unconstrained by federal doctrine.[283]

"purposive preamble" introduces the clause, and the mandate is verbally strengthened through additional modifiers such as "by all suitable means"; and in Category IV states, the education clause adds adjectives describing the importance of education such as "paramount" or "primary." *See id.*

281. Each of these is an example of a modifier that might distinguish one state's education clause from others under Thro's typology. *See* Thro, *supra* note 51, at 23–25 (setting forth the typology).

282. *See* Enrich, *supra* note 21, at 171 ("[E]ven at a particular point in time, adequacy does not seem amenable to objective determination. The constitutional language . . . does not typically specify a concrete level of exertion or accomplishment that is to be achieved.").

283. *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977) (admonishing state courts to develop their own conceptions of individual rights, unconstrained by what Justice Brennan saw as the overly restrictive federal doctrines relating to individual rights).

Appendix

State	Separation of Powers Provision(s)	Coding
Alabama	ALA. CONST. art. III, § 43: "In the government of this state, except in the instances in this Constitution hereinafter expressly directed or permitted, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end that it may be a government of laws and not of men."	Explicit
Florida	FLA. CONST. art. II, § 3: "The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein."	Explicit
Illinois	ILL. CONST. art. II, § 1: "The legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another."	Explicit
Nebraska	NEB. CONST. art. II, § 1: "The powers of the government of this state are divided into three distinct departments, the Legislative, Executive and Judicial, and no person or collection of persons being one	Explicit

State	Separation of Powers Provision(s)	Coding
	of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted."	
Oklahoma	OKLA. CONST. art. IV, § 1: "The powers of the government of the State of Oklahoma shall be divided into three separate departments: The Legislative, Executive, and Judicial; and except as provided in this Constitution, the Legislative, Executive, and Judicial departments of government shall be separate and distinct, and neither shall exercise the powers properly belonging to either of the others."	Explicit
Pennsylvania	PA. CONST. art. II, § 1: "The legislative power of this Commonwealth shall be vested in a General Assembly, which shall consist of a Senate and a House of Representatives." PA. CONST. art. IV, § 1: "The Executive Department of this Commonwealth shall consist of a Governor, Lieutenant Governor, Attorney General, Auditor General, State Treasurer, and Superintendent of Public Instruction and such other officers as the General Assembly may from time to time prescribe." PA. CONST. art. V, § 1: "The judicial power of the Commonwealth shall be vested in	Implicit

State	Separation of Powers Provision(s)	Coding
	a unified judicial system consisting of the Supreme Court, the Superior Court, the Commonwealth Court, courts of common pleas, community courts, municipal and traffic courts in the City of Philadelphia, such other courts as may be provided by law and justices of the peace. All courts and justices of the peace and their jurisdiction shall be in this unified judicial system."	
Rhode Island	R.I. CONST. art. V: "The powers of the government shall be distributed into three separate and distinct departments: the legislative, executive and judicial."	Implicit
Arizona	ARIZ. CONST. art. III: "The powers of the government of the State of Arizona shall be divided into three separate departments, the Legislative, the Executive, and the Judicial; and, except as provided in this Constitution, such departments shall be separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others."	Explicit
Arkansas	ARK. CONST. art. IV, § 1: "The powers of the government of the State of Arkansas shall be divided into three distinct departments, each of them to be confided to a separate body of magistracy, to-wit:	Explicit

State	Separation of Powers Provision(s)	Coding
	Those which are legislative, to one, those which are executive, to another, and those which are judicial, to another." ARK. CONST. art. IV, § 2: "No person or collection of persons, being of one of these departments, shall exercise any power belonging to either of the others, except in the instances hereinafter expressly directed or permitted."	
Idaho	IDAHO CONST. art. II, § 1: "The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial; and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others, except as in this constitution expressly directed or permitted."	Explicit
Indiana	IND. CONST. art. III, § 1: "The powers of the Government are divided into three separate departments; the Legislative, the Executive including the Administrative, and the Judicial: and no person, charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided."	Explicit
Kentucky	KY. CONST. § 27: "The powers of the	Explicit

State	Separation of Powers Provision(s)	Coding
	government of the Commonwealth of Kentucky shall be divided into three distinct departments, and each of them be confined to a separate body of magistracy, to wit: Those which are legislative, to one; those which are executive, to another; and those which are judicial, to another." KY. CONST. § 28: "No person or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted.	
Massachusetts	MASS. CONST. pt. 1, art. XXX: "In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men."	Explicit

State	Separation of Powers Provision(s)	Coding
Montana	MONT. CONST. art. II, § 1: "The power of the government of this state is divided into three distinct branches—legislative, executive, and judicial. No person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted."	Explicit
Ohio	OHIO CONST. art. II, § 1: "The legislative power of the state shall be vested in a General Assembly consisting of a senate and house of representatives but the people reserve to themselves the power to propose to the General Assembly laws and amendments to the constitution, and to adopt or reject the same at the polls on a referendum vote as hereinafter provided." OHIO CONST. art. III, § 1: "The executive department shall consist of a governor, lieutenant governor, secretary of state, auditor of state, treasurer of state, and an attorney general, who shall be elected on the first Tuesday after the first Monday in November, by the electors of the state, and at the places of voting for members of the general assembly." OHIO CONST. art. III, § 5: "The supreme	Implicit

State	Separation of Powers Provision(s)	Coding
	executive power of this State shall be vested in the governor." OHIO CONST. art. IV, § 1: "The judicial power of the state is vested in a supreme court, courts of appeals, courts of common pleas and divisions thereof, and such other courts inferior to the Supreme Court as may from time to time be established by law."	
South Carolina	S.C. CONST. art. I, § 8: "In the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other."	Explicit
Texas	TEX. CONST. art. II, § 1: "The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein	Explicit

State	Separation of Powers Provision(s)	Coding
	expressly permitted."	
Vermont	VT. CONST. ch. II, § 5: "The Legislative, Executive, and Judiciary departments, shall be separate and distinct, so that neither exercise the powers properly belonging to the others."	Explicit
Washington	WASH. CONST. art. II, § 1: "The legislative authority of the state of Washington shall be vested in the legislature, consisting of a senate and house of representatives, which shall be called the legislature of the state of Washington, but the people reserve to themselves the power to propose bills, laws, and to enact or reject the same at the polls, independent of the legislature, and also reserve power, at their own option, to approve or reject at the polls any act, item, section, or part of any bill, act, or law passed by the legislature." WASH. CONST. art. III, § 1: "The executive department shall consist of a governor, lieutenant governor, secretary of state, treasurer, auditor, attorney general, superintendent of public instruction, and a commissioner of public lands, who shall be severally chosen by the qualified electors of the state at the same time and place of voting as for the members of the legis-	Implicit

State	Separation of Powers Provision(s)	Coding
	lature." WASH. CONST. art. III, § 2: "The supreme executive power of this state shall be vested in a governor, who shall hold his office for a term of four years, and until his successor is elected and qualified." WASH. CONST. art. IV, § 1: "The judicial power of the state shall be vested in a supreme court, superior courts, justices of the peace, and such inferior courts as the legislature may provide."	
Kansas	KAN. CONST. art. I, § 2: "The supreme executive power of this state shall be vested in a governor, who shall be responsible for the enforcement of the laws of this state." KAN. CONST. art. II, § 1: "The legislative power of this state shall be vested in a house of representatives and senate." KAN. CONST. art. III, § 1: "The judicial power of this state shall be vested exclusively in one court of justice, which shall be divided into one supreme court, district courts, and such other courts as are provided by law; and all courts of record shall have a seal. The supreme court shall have general administrative authority over all courts in this state."	Implicit

State	Separation of Powers Provision(s)	Coding
New Hampshire	N.H. CONST. pt. I, art. 37: "In the government of this state, the three essential powers thereof, to wit, the legislative, executive, and judicial, ought to be kept as separate from, and independent of, each other, as the nature of a free government will admit, or as is consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of union and amity."	Explicit
New Jersey	N.J. CONST. art. III, § 1: "The powers of the government shall be divided among three distinct branches, the legislative, executive, and judicial. No person or persons belonging to or constituting one branch shall exercise any of the powers properly belonging to either of the others, except as expressly provided in this Constitution."	Explicit
New York	N.Y. CONST. art. III, § 1: "The legislative power of this state shall be vested in the senate and assembly. N.Y. CONST. art. IV, § 1: "The executive power shall be vested in the governor, who shall hold office for four years . . . ." [voluminous unrelated matter appended]. N.Y. CONST. art. VI, § 1(a): "There shall be a unified court system for the state." [voluminous unrelated matter appended].	Implicit

State	Separation of Powers Provision(s)	Coding
North Carolina	N.C. CONST. art. 1, § 6: "The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other."	Explicit
Wyoming	WYO. CONST. art. II, § 1: "The powers of the government of this state are divided into three distinct departments: The legislative, executive and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others, except as in this constitution expressly directed or permitted."	Explicit
Oregon	OR. CONST. art. III, § 1: "The powers of the Government shall be divided into three seperate [sic] departments, the Legislative, the Executive, including the administrative, and the Judicial; and no person charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided."	Explicit