ENSURING SUCCESSFUL REMEDIES IN EDUCATION ADEQUACY LITIGATIONS:
A Comparative Institutional Perspective

By MICHAEL A. REBELL*

“[T]he opportunity of an education ….. is a right which must be made available to all on equal terms.”
Brown v. Board of Education

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In recent years, state courts throughout the country have upheld students’ constitutional rights to a quality basic education. Outdated and inappropriate concepts of “judicial activism” have, however, in many cases constrained their efforts to develop effective remedies to fully implement these rights. This paper argues that courts that commit to overseeing a sustained remedial process can do so responsibly and effectively. The judiciary has unique capacities for defining overall goals, seeing a problem through to final resolution and sorting through complex evidence, which should work in tandem with the differing capacities of the other branches. Further, courts are able to ensure adherence to constitutional rights that the other, more political branches may not have the will or the ability to protect on their own.

INTRODUCTION

The United States Supreme Court’s recent decision in Parents Involved in Community Schools v. Seattle Sch. Dist. turned the doctrine of equal educational opportunity proclaimed in the Court’s landmark Brown v. Board of Education decision on its head. It used that historic ruling that outlawed racial segregation in the schools ----- and that clearly was intended to advance educational opportunities for African-American students ----- as a precedent for limiting opportunities to these students by substantially constraining the ability of local school districts to

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1 Executive Director, Campaign for Educational Equity, and Professor of Law and Educational Practice, Teachers College, Columbia University, and Lecturer in Law, Columbia Law School. Mr. Rebell was also co-counsel for Plaintiffs in Campaign for Fiscal Equity v. State of New York, 655 N.E. 2d 307 (NY, 1995), 801 N.E. 2d 326 (NY 2003), and 861 N.E.3d 50 (NY 2006).


3 347 U.S. 483 (1954)
implement voluntary school desegregation plans. *Seattle* culminates a series of Supreme Court decisions over the past few decades that have inverted the strong stance the federal courts took in the 1960s to eliminate school desegregation and have already led to a clear trend of rising resegregation throughout the country.  

The federal courts’ retreat from active promotion of school desegregation has heightened the significance of the extraordinary series of state court litigations that have sought to promote equal educational opportunity by challenging the constitutionality of state education finance systems. Such cases have been filed in 45 of the 50 states since 1973. Overall, plaintiffs have prevailed in 60% of these state court litigations, and, in the more recent subset of “education adequacy” cases

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4 This retreat began with the Court’s rulings in 1973 that the fourteenth amendment did not prohibit *de facto* segregation, *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189 (1973), and in 1974 that extensive patterns of urban segregation could not be remedied by metropolitan area solutions without a showing of intentional segregation by the suburban school districts. *Milliken v. Bradley*, 418 U. S. 717 (1974). For a detailed overview of the Supreme Court’s desegregation decisions, see

5 In 2000, over 70% of all black and Latino students attended predominantly minority schools, a higher percentage than thirty years earlier. Furthermore, between 1980 and 2003, the percentage of White students in schools attended by the average Black student fell from 45% to 29%. *Parents Involved v. Seattle*, supra, 551 U. S.  at (Appendix A to opinion of Breyer, J, dissenting.)

6 The state courts took on the responsibility for reviewing the massive inequities in the financing of public education throughout the United States after the U.S. Supreme Court had ruled (at about the same time that it began its retrenchment from active enforcement of school desegregation) in *San Antonio Ind’t Sch. Distr. v. Rodriguez* 411 U.S. 1 (1973), that education is not a fundamental interest under the federal constitution. This holding, on its face, is difficult to reconcile with the Court’s ringing declaration in *Brown* that “Today, education is perhaps the most important function of state and local governments…In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.” 347 U.S. at 493.
decided since 1989, plaintiffs have won 20 of 28 (71%) of final constitutional liability decisions.\(^7\)

Presumably, even if movement toward racial balance in the schools has now been substantially stalled, the prospect of ensuring adequate resources for all students can continue to fuel progress toward meaningful educational opportunity for low-income and minority students. As a recent *New York Times* article put it,

> Nationwide, minority parents in struggling school districts have skirted the debate over racial integration and pushed instead for more money for their children’s schools, in lawsuits demanding that states give poor districts more resources…As a practical matter, lawyers say, fiscal-equity cases …are increasingly important as other tools to address racial inequities are cut off.\(^8\)

However, the penumbra of *Seattle* decision may also have negative implications for continuing progress toward equal educational opportunity through the state court education finance decisions. On its face, *Seattle* does not speak to the issues of school finance or educational adequacy, but implicit in the Supreme Court’s increasingly constrained approach to equal educational opportunity, however, is a disparagement of judicial efforts to remedy the severe impediments toward equity that continue to plague the nation’s public schools. Justice Thomas’s concurring opinion was quite explicit on this point. He said that “this Court does not sit to…solve the problems of troubled inner city schooling…We are not social engineers.”\(^9\)

\(^7\) For an overview of the state court challenges to state education finance systems, see Michael A. Rebell, *Education Adequacy, Democracy and the Courts*, in Achieving High Educational Standards for All (Timothy Ready et al., eds 2002). For up-to-date information on the state court litigations, see National ACCESS Network, www.schoolfunding.info.


\(^9\) 551 U.S. , ( 2007) ( Thomas, J, concurring.) Justice Kennedy in his concurring opinion in *Seattle*, took issue with Justice Thomas and the other three members of the plurality opinion for being “too dismissive of the legitimate interest government has in
Similar skepticism regarding the propriety of judicial efforts to implement Brown’s vision of equal educational opportunity, and of the courts’ ability to do so, have also increasingly been advanced by critics of the education adequacy decisions of the state courts. Familiar refrains that “Courts are usurping the power of the Legislature,”\textsuperscript{10} have been accompanied by more nuanced arguments that “the reach of the courts … will hit a frustrating ‘wall’ quickly as such litigation seeks squarely to address student achievement through standards – and assessments – based lawsuits.”\textsuperscript{11}

These attacks on the courts’ efforts to promote reforms that are necessary to remedy constitutional inadequacies constitute a second front in the current legal and ideological campaign to undermine Brown’s historical significance. Although Brown is best known for its key holding that outlawed racial segregation in the schools, that landmark litigation also inspired a broad range of judicial involvement in promoting institutional reform that is now deeply rooted in both federal and state jurisprudence. A second ruling (“Brown II”\textsuperscript{12}), issued a year after the initial constitutional holding authorized the federal district courts to oversee the implementation of school

\footnotesize{ensuring all people have equal opportunity regardless of their race,” (551 U.S. at 7 but it is far from clear that the limited openings for affirmative action allowed by his key swing decision can accomplish this goal.}


\textsuperscript{12} 349 U.S. 294 (1955).
desegregation by local school districts; in doing so, it initiated a “new model of public law litigation,” in which both federal and state courts have for the past half century issued broad remedial decrees that go beyond the traditional judicial role of resolving private disputes between individuals and impact substantially on the implementation of public policy.

Accordingly, over the past 50 years, the courts have promoted institutional reform in the schools not only in regard to desegregation and a range of other areas like bilingual education, gender equity, and special education, but also in a broad array of other social welfare areas like de-institutionalization of services for the developmentally disabled and prison reform. State courts similarly have taken on such “new model” responsibilities both in regard to fiscal equity and educational adequacy, and also in such sectors as land use regulation and gay rights. The strong stance of the federal courts on school desegregation in the 1960s fueled the civil rights movement, just as the strong stance of the state courts in the past two decades has led to a national wave of fiscal equity reform throughout the United States.

The new model of public law litigation has, in fact, become an established part of the legal landscape, so much so conservatives as well as liberals now tend to look to the courts routinely to remedy legislative or executive actions of which they disapprove. Indeed, if “judicial activism” is defined in terms of declaring an act of the legislature unconstitutional, the conservative Rehnquist Court was the most activist in American history. Until 1991, the United States Supreme Court struck down an average of about one congressional statute every two years. From 1994 to 2004, the Court struck down 64 congressional provisions, or about six per year. This invalidated legislation has involved civil rights, social security, church and state, campaign finance, and a host of other major social policy issues. Paul Gewirtz & Chad Goldner, Op-Ed.,” So Who Are the Activists?” New York Times, July 6, 2005, at A19. The Roberts’ Court appears to be continuing or even accelerating this trend. See, Adam Cohen, “Last Term’s Winner at


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illustrated by the Supreme Court’s stance in *Seattle*, it is in the realm of equal educational opportunity law, where judicial involvement in public policy implementation first began, that the new judicial role is most on the defensive. Not only have the federal courts almost fully backed out of any serious attempts to promote school desegregation, but the highly successful state court efforts to promote fiscal equity and educational opportunity are now the prime targets of a resurgent movement to curb “a perversion of the judicial process [that]…. has only managed to divert attention from the serious task of school reform….”  

15 Sol Stern “*Campaign for Fiscal Equity*: The March of Folly,” in Courting Failure, supra, n 2.


17 42 U.S.C.A § 2000d.
assiduous efforts federal courts throughout the South to implement *Brown*.\(^{18}\) Similarly, fiscal equity and education adequacy reforms have proved most effective in states like Kentucky, Vermont and Massachusetts where the legislative and executive branches decided early on to cooperate with their state courts in developing effective remedies to cure constitutional inequities in school finance.

At both the federal and state levels, the stated prime educational goals of the legislative and executive branches is to eliminate achievement gaps and to provide all students with a meaningful opportunity to achieve proficiency in regard to challenging academic standards.\(^{19}\) The premise of this paper is that these national educational goals, which, in essence, call for the full implementation of *Brown*’s vision of equal educational opportunity, cannot be achieved without the concerted efforts of all three branches of the government. Much of the recent progress toward attaining these goals has resulted from the active involvement of the state courts, working together

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\(^{18}\) Gerald Rosenberg argues in *The Hollow Hope: Can Courts Bring About Social Change* that the widely held assumption that *Brown* and other Supreme Court decisions have had a major impact on the direction of social reform is overstated. He discusses in detail the Southern resistance to *Brown* and the wavering response of the federal courts to implementing desegregation in the decades following *Brown*. He does not, however, give sufficient credence to the enormous impact of major court decisions on value formation and on follow up legislation. *See, e.g.*, Michael W. McCann, *Rights at Work: Pay Equity Reform and The Politics of Legal Mobilization* (1994) (demonstrating the manner in which rights established through litigation fueled the political movement for equal pay); Douglas S. Reed, *On Equal Terms*’ The Constitutional Politics of Educational Opportunity 16 (2001) (analyzing the impact of courts on education finance reform, partially as “a rejoinder to Rosenberg”); and Stuart A. Scheingold, *The Politics of Rights: Lawyers, Public Policy and Political Change* 98–107 (1974) (discussing the relationship between legal rights and progressive social movements).

with state legislatures and state governors, in the remedial stages of educational adequacy litigations. Substantially greater progress could be achieved if the value of the courts’ principled perspectives and of their sustained oversight capabilities were fully understood and if judicial efforts, especially at the remedial stages of litigations, were properly coordinated with appropriate policy initiatives of the legislative and executive branches.

Utilizing a comparative institutional approach, this paper will propose a conceptual framework and a practical model for advancing educational equity through an active colloquy between the state courts and the other two branches of government. Part I will review the historic “judicial activism” debate and will demonstrate that despite continuing critical commentary in the popular press and partisan political rhetoric, the legitimacy of the courts’ new role and their capacity to effectuate it has, in fact, become an integral aspect of the functioning of modern government that has been widely accepted by courts, Congress, state legislatures and the public at large. Part II will examine the state courts’ involvement in the education finance litigations over the past 30 years, and will focus particularly on the extraordinary patterns of plaintiff victories in the educational adequacy cases since 1989.

The discussion in Part III addresses the issue of how we should define and assess the extent to which courts in educational adequacy litigations have been “successful.” Courts, in their remedies, need to convey the ultimate meaning of compliance. They need to make clear that compliance is not just a matter of doing better or of adding more money but of achieving a concrete end ---“adequacy” ---- that has specific input and outcome characteristics. Asserting that “success” must mean the promotion of equal educational opportunity on a sustained basis, I postulate that constitutional compliance means developing and implementing 1) challenging academic and performance standards; 2) adequate funding; 3) effective programs and
accountability mechanisms, and 4) a supportive political culture, all of which culminates in 5) substantially improved student performance.

Part IV contends that the achievement of success, in the broad terms set forth in the previous paragraph, requires an effective on-going dialogue among the three branches of government. It discusses the concept of comparative institutional analysis and suggests that this analytic perspective provides a basis for developing a model of a functional separation of powers in which the judicial, legislative and executive branches working together can deal effectively with difficult social policy issues like providing meaningful educational opportunity for all children.

Building on a comparative institutional framework articulated in Castenada v. Pickard, 648 F.2d 989, (5th Cir. 1981), Part V sets forth for discussion purposes a specific “Adequate Education Remedial Oversight (“AERO”) model. The AERO approach calls for courts to outline in general principled terms the expectation that the legislative and executive branches will develop challenging standards, fair and adequate funding systems, and effective accountability systems, but it leaves to the political branches the full policy prerogatives for developing these policies, so long as they are being well implemented and they are promoting student progress. A productive dialogue among the three branches on constructing the infrastructure for equity on a sustained basis will also substantially aid the development of a supportive political culture, as will judicial encouragement of active advocacy and public engagement opportunities.

Since significant compliance can not be achieved overnight, the court’s nominal jurisdiction will probably need to be maintained over a multi-year period in most cases, but actual interventions should be rare if expectations regarding the importance of ultimate outcomes and the limits of judicial intervention procedures are clearly spelled out in advance. Adoption of the AERO model as a framework for judicial remedies will allow the state courts, working effectively
with the legislative and executive branches, to achieve lasting success in education adequacy litigations.

I – REVISITING THE JUDICIAL ACTIVISM DEBATE

In the initial days of judicial enforcement of desegregation decrees, there was a wide-ranging academic debate regarding the phenomenon of “judicial activism.” The courts’ forays into policy-making in areas that traditionally had been considered to be in the legislative or executive domain were repeatedly attacked as violating traditional separation of powers precepts. 20

Defenders of the courts’ new role argued that the judges were merely adapting traditional concepts of judicial review and their obligation to enforce constitutional rights to the needs of a complex administrative state, and that 21“no branch could correctly claim to be the representative of the people. Representation was to be by each of them, according to the functions they performed.” 22

Probably the most influential academic analysis of these issues was that of Harvard law professor Abram Chayes who related the growth of judicial involvement in the reform of public institutions since Brown to the broader expansion of governmental activities in the welfare state era. 23


23 Chayes, supra, n. .
The courts’ institutional capacity to carry out successfully these broad new remedial tasks was also widely questioned. Critics claimed that courts are incapable of obtaining sufficient social science data and that judges generally are unable fully to understand and digest the data that are obtained. They also contended that judges lack coherent guidelines for resolving policy conflicts and that, therefore, they fail to undertake a comprehensive policy review or to consider the overall implications and consequences of their orders. Defenders of this new remedial role retorted that the courts’ lack of established organizational mechanisms is a virtue, not a vice, because it permits a flexible response that can be tailored to the needs of the particular situation. They emphasized that the courts have always delved into complex social and economic facts, and that processes of judicial appointment or election assure that judges are “likely to have some experience of the political process and acquaintance with a fairly broad range of policy problems.”

In the 1980s, my colleague Arthur R. Block and I undertook two major empirical studies to test the validity of the competing arguments in the judicial activism debate in actual instances of educational policymaking by courts, legislatures, and a major administrative agency, the Office of


28 Chayes, , supra note at 1308.
Civil rights in the U.S. department of Health, Education and Welfare (“OCR”). In regard to the separation of powers issues, we concluded that judicial deliberations tended to be based on principled constitutional values, rather than instrumental policy considerations, although in many circumstances the distinctions between “principle” and “policy” were difficult to draw. Significantly, however, judges tended to approach principle/policy issues in a distinctly different way: their decisions tended to reflect a “rational-analytic” decision-making mode, in contrast to the mutual adjustment processes that tend to predominate in legislative decision making, and the “pragmatic/analytic” policy making mode of the administrative agency.

One of the other major conclusions of our comparative empirical studies was that the evidentiary records accumulated in the court cases were more complete and had more influence on the actual decision-making process than did the factual data obtained through legislative hearings. The latter tended to be “window dressing” occasions organized to justify political decisions that had already been made. Fact gathering through the administrative process proved to be more comprehensive and more sophisticated than that of either the courts or the legislatures, at least in this massive OCR special investigation context, but questions arose concerning the objectivity of

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30 A comparative analysis of the fact finding capabilities of the U.S. Congress and the courts reached similar conclusions, see Neal Devons, ‘Congressional Fact Finding,’ 50 DUKE L.J. 1169 (2001). See also, Sheila Jasanoff, ‘Judicial Fictions: The Supreme Court’s Quest for Good Science,’ 38 Soc’y 27, 28 (2001) (“Adversarial questioning of experts in legal proceedings has frequently exposed hidden interests and tacit normative assumptions that are embedded in supposedly value-neutral facts. The confrontation of lay and expert viewpoints that the law affords has emerged as a powerful instrument for probing some of the untested epistemological foundations of expert claims.”)
the agency’s use of the data since the OCR tended to adopt a “prosecutorial” stance in its approach to the evidence.  

In regard to remedies, our studies concluded that judicial remedial involvement in school district affairs was both less intrusive and more competent than is generally assumed, largely because school districts and a variety of experts generally participated in the formulation of reform decrees, with the courts serving as catalysts and mediators. OCR proved effective in administering remedial agreements that called for immediate, statistically measurable implementation, but in regard to the major New York City faculty desegregation agreement that required phased-in implementation over a number of years, the agency’s “staying power” and its ability to respond flexibly to changed circumstances was markedly less effective than that of the courts.

In the years since our study was completed, the courts’ role in social science fact finding and in overseeing remedial processes has become more extensive and more established. The U.S. Supreme Court substantially expanded the authority of federal judges to determine the

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31 See also, James O. Freedman, Crisis and Legitimacy: The Administrative Process and American Government 24 (1978) (discussing the implications of authorizing administrative agencies to combine investigative, prosecutorial and adjudicatory functions); William N. Eskridge, Jr. Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation, 74 Va. L. Rev. 275, 308 (1988) (“an agency tends to be ‘captured’ over time, as interest group demands grow increasingly asymmetrical and the agency loses outside political support and institutional momentum.”).

32 See also, Stephenson, “Legislative Allocation of Delegated Power: Uncertainty, Risk and the Choice Between Agencies and Courts, 119 Harv. L. Rev. 1035, 1036 (2006) (“court decisions [ in comparison to administrative agency decisions] tend to be ….stable over time.”); Gary Orfield and Susan E. Eaton, Dismantling Desegregation: the Quiet Reversal of Brown v. Board of Education 350 (1996). (“Courts have some special strengths in removal from politics and the ability to stay with a complex issue long enough to implement change.”). Legislatures generally do not purport to engage in remedial oversight of the reform processes they initiate, although oversight hearings and modification of statutory provisions in light of events could be said to constitute analogous functions. We did not, therefore, attempt to extend our comparative analysis of remedial oversight capabilities to the legislative domain.
admissibility of scientific evidence when it ruled in 1992 in *Daubert v. Merrell Dow Pharmas, Inc.* that judges must determine whether expert evidence proffered by a party is “scientifically valid.” Essentially, judges now are being asked to assess expert evidence and “to make informed discriminations between good and bad science.”

Although criticisms of particular instances of active judicial involvement in social policy making still resound in political debates and in the popular press, serious academic discussion of the “legitimacy” of the courts’ enhanced role has been muted in recent years. Chayes’s contention that the courts’ expanded role is a fundamental judicial reaction to deep-rooted social and political trends seems to be borne out by the fact that the activist stance initiated during the Warren Court era has, as discussed above, persisted to a large extent through the Burger, Rehnquist and Roberts’


34 Id at 590-91, n. 9.

35 Jasanoff, Judicial Fictions, supra note at 29. Researchers also appear to be looking to the courts as a source for effective resolution of major social science issues because the courts’ discovery processes are sometimes more comprehensive than data gathering techniques available to professionals in the field: “Both in terms of resources and access to documents, data, and personnel, the Court’s investigation far exceeded that typically made by researchers.” Clive R. Belfield and Henry M. Levin, “The Economics of Education on Judgment Day,” Occasional Paper No. 28, National Center for the Study of Privatization in Education, Teachers College, Columbia University, 17 (July, 2001). Belfield and Levin also opined that:

Courts can navigate well through (disputed) social science arguments regarding educational outcomes, educational inputs (the education production function), and the deployment of teacher inputs. Moreover, rulings themselves can offer useful guidance to researchers on what fields of inquiry are important for resolving key public policy concerns, on what empirical evidence and which methodologies are deemed most valid, as well as indicate new areas for academic interest.

Id at 24-25.
years and that conservatives no less than liberals now tend to look to the courts routinely to remedy legislative or executive actions of which they disapprove.\textsuperscript{36} As Feeley and Rubin have noted:

\begin{quote}
[Judges] are part of the modern administrative state…And they fulfill their role within that context. Under certain circumstances that role involves public policy makings; as our state has become increasingly administrative and managerial, judicial policy-making has become both more necessary for judges to produce effects and more legitimate as a general model of governmental action.\textsuperscript{37}
\end{quote}

The irony of the fact that some political commentators and academics continue to invoke anachronistic “judicial activism” charges is that while these pundits persist in arguing that the courts’ new role is usurping legislative powers, Congress and the state legislatures have themselves asked the courts to take on more of these policy-making activities by passing regulatory statutes that directly or implicitly call for expanded judicial review. A prime example is the Individuals with Disabilities in Education Act, in which Congress set forth a detailed set of substantive and procedural rights and explicitly established a new area of court jurisdiction for individual suits, regardless of the amount in controversy.\textsuperscript{38} The significance of this trend of the

\begin{itemize}
\end{itemize}
creation of new statutory rights that explicitly or implicitly expand the enforcement responsibilities of the courts has been recognized even by harsh critics of judicial involvement in social policy making.\textsuperscript{39} Under these circumstances, as Chayes aptly put it, we should “concentrate not on turning the clock back (or off), but on improving the performance of public law litigation…” \textsuperscript{40}

Concerns regarding the courts’ capacity to engage in sophisticated fact-gathering and remedial processes have also been muted by the findings of empirical investigations into what courts actually do in these cases. One of the major shortcomings of the judicial activism debate was its focus on the limitations of the judicial branch, while ignoring the comparable institutional shortcomings of the legislative and the executive branches. For example, Donald Horowitz, one of

Additionally, the Clean Air Act of 1970 establishes a right to healthy air and explicitly authorizes citizen suits. \textit{See} Clean Air Act § 304(a), 42 U.S.C.§ 7604(a) (2000).

\textsuperscript{39} \textit{See}, \textit{e.g.} Ross Sandler and David Schoenbrod, Democracy By Decree: What Happens When Courts Run Government (2003). Although recognizing the significance of this trend, Sandler and Schoenbrod are highly critical of its implications: “By extrapolating [the Brown precedent] to a whole host of newly minted rights, [Congress has] created a new governmental lineup in which one set of officials at the federal level largely escapes accountability for the costs of the laws they pass and another set of officials at the state and local levels lacks the power to balance the costs of implementing the federal statutory rights against other competing priorities.” \textit{Id} at 33. But cf Mark Tushnet, “Sir, Yes, Sir: The Courts, Congress and Structural Injunctions,” 20 \textit{CONST. COM.} 189 (2003) (arguing that Sandler and Schoenbrod’s criticism of the courts is misguided since the political branches, through clear democratic processes, authorized and required them to enforce the affirmative rights at issue).

\textsuperscript{40} Chayes, \textit{supra}, note at 1313. In one area, that of prison litigations, Congress has acted affirmatively to limit judicial involvement. Thus, the Prison Litigation Reform Act of 1995, (“PLRA”), among other things, limits the type of relief that courts can provide, makes any relief granted subject to termination after two years and abridges the courts’ authority to appoint a special master. Pub. L. No. 104-134, 110 Stat. 1321 (codified as amended at scattered sections of 18 U.S.C.). Although the PLRA has not totally eliminated prison reform litigation, see, e.g. Wilson v. Vannatta, 291 F. Supp.2d 811 (2003) (claim that deprivation of food, exercise and medication violates the Constitution upheld), it has substantially decreased their incidence and impact. William C. Collins, \textit{Bumps in the Road to the Court house: The Supreme Court and the Prison Litigation Reform Act}, 24 \textit{PACE L.REV.} 651 (2005) (Rate of prison civil rights filings declined from 29.3 per 1,000 prisoners in 1981 to 11.4 in 2001.)
the foremost critics of the courts’ new role, catalogued a bevy of examples of alleged judicial incompetence, ranging from receiving information in a skewed and halting fashion to failing to understand the social context and potential unintended consequences of the cases before them.\footnote{Donald Horowitz, The Courts and Social Policy, } As Prof. Neil Komesar has forcefully pointed out, however, Horowitz’s critique, like that of many of his current disciples, was unreasonably one-sided:

\begin{quote}
…Horowitz’s study can do no more than force us to accept the reality of judicial imperfection. By its own terms it is not comparative, and that is far more damning than Horowitz supposes. All societal decision makers are highly imperfect. Were Horowitz to turn his critical eye to administrative agencies or legislatures he would no doubt find problems with expertise, access to information, characterization of issues, and follow-up. Careful studies would undoubtedly reveal important instances of awkwardness, error and deleterious effect.\footnote{Neil K. Komesar, A Job For the Judges: The Judiciary and the Constitution In a Massive and Complex Society, 86 MICH. L. REV. 657, 698 (1988).}
\end{quote}

The implications of Komesar’s comparative institutional approach are profound, and his insights provide a fruitful basis for constructing a conceptual framework for effective judicial involvement in promoting equal educational opportunity. We will return to this issue in Part IV. First, however, we need to consider the problems and possibilities raised by judicial involvement in educational adequacy litigations by discussing in more detail the courts’ experiences to date with these cases.

\section{II – The State Courts’ Education Adequacy Decisions}

As noted above,\footnote{See discussion, supra, at} constitutional challenges to the inequitable and inadequate funding of public education have been litigated in the state courts of 45 of the 50 states since 1973. In the early years, most of these cases were based on “equity” claims that challenged the disparities in the
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levels of expenditure among different school districts in the state on constitutional equal protection grounds. Since 1989, most of the cases have been based on “adequate education” claims stemming from clauses in state constitutions that guarantee students a “thorough and efficient,” “sound basic,” “quality” or some similar essential educational level. Since the current wave of adequacy litigations was initiated, the courts have been upholding plaintiffs’ claims at an accelerating rate: plaintiffs have prevailed in over 70% of the final state court decisions in education adequacy cases since 1989.

One reason for plaintiffs’ remarkable success rate in these cases is that the adequacy lawsuits emphasize the lack of basic educational services students actually receive, rather than amount of funding provided to the school districts. The evidence in these cases graphically portrays the flagrant lack of educational opportunity that the educational systems in most of the states continue to impose on millions of poor and minority students more than 50 years after the Supreme Court’s decision in *Brown*, and the judges have responded accordingly. For example, one poor rural Arkansas school district had a single uncertified mathematics teacher to cover all high school mathematics courses. The teacher was paid $10,000 a year as a substitute teacher, which he supplemented with $5,000 annually for school bus driving.\footnote{Lake View v. Huckabee, 2001.} Many high schools in California’s low-income and minority communities do not offer the curriculum students must take just to \textit{apply} to the state’s public universities.\footnote{Williams v. California, Complaint, ¶ 280} Passing an examination in a laboratory science course is required for high school graduation in New York State, but 31 New York City high schools have no science labs.\footnote{CFE II, 801 N.E. 2d at 334, n. 4.} In South Carolina, annual teacher turnover rates exceed 20% in

\footnote{Lake View v. Huckabee, 2001.} \footnote{Williams v. California, Complaint, ¶ 280} \footnote{CFE II, 801 N.E. 2d at 334, n. 4.}
eight poor, rural, mostly minority school districts, and in those districts graduation rates fall between 33% and 57%. 47

Plaintiffs’ extraordinary success rate in these cases is even more notable when one realizes that defendants have never prevailed in any final decision in a case in which the courts fully examined the evidence as to whether students were receiving an adequate education. 48 Defendant victories have occurred only when the courts in a particular state had ruled that the issue was not “justiciable” or that because of separation of powers reasons a trial should not be held and the evidence of inadequacy should not even be considered. 49 Whenever judges have actually examined


48 The one arguable exception is the affirmation, without opinion, by the Arizona Supreme Court of a lower court’s summary judgment ruling which refused to provide extra resources for English Language learners and other “at-risk” students to remedy educational disparities “caused by socioeconomic factors rather than by the financing schemes.” Crane Elementary Sch. Dist. v. State of Arizona, No. CV 2001-016305 ( Ct. App, Div. One, 2006), sl op at 20, aff’d P.3rd ( 2007). Whether this decision should be considered an “adequacy” decision or a more focused attempt to establish specific constitutional rights for English Language Learners or other “at-risk” groups is debatable. Note in this regard that the Arizona Supreme Court had previously held that the capital funding provisions of the state education finance system were unconstitutional. Roosevelt Sch. Dist. No. 66 v. Bishop, 877 P.2d 806 ( AZ 1994).

49 See, e.g., Coalition for Adequacy and Fairness in School Funding v. Chiles, 680 So. 2d 400, 408 ( Fla, 1996) ( holding that there were “no judicially manageable standards” which would not “present a substantial risk of judicial intrusion into the powers and responsibilities assigned to the legislature…”); City of Pawtucket v. Sundlun, 662 A.2d 40, 59 ( R.I. 1995) ( consideration of Plaintiffs’ claims would “interfere with the “plenary power of the General Assembly in education.”); Marrero v. Commonwealth, 739 A. 2d 110, 113-4 ( Pa. 1999) ( issue is nonjusticiable because the court is “unable to judicially define what constitutes an ‘adequate’ education or what funds are ‘adequate’ to support such a program.)

The vast majority of the state courts which did review the evidence and find constitutional violations viewed the separation of powers and justiciability issues very differently. As the Kentucky Supreme Court put it:
the “savage inequalities,”\textsuperscript{50} that continue to be imposed on most low income and minority students in the United States, they have uniformly responded by holding that these conditions deny students the opportunity to be educated at the basic levels that are needed to function in contemporary society.

The judges’ awareness of the importance of education in contemporary society also has led them to reject the “minimalist” standard of adequacy advocated by the defendants in most of these cases;\textsuperscript{51} the courts repeatedly have called instead for an education system that is at more than a minimum level:\textsuperscript{52}

This high minimum approach focuses on what would be needed to assure that all children have access to those educational opportunities that are necessary to gain a level of learning and skills that are now required, say, to obtain a good job in our increasingly technologically

\textsuperscript{50} A moving description of the impact of these resource deficiencies is contained in Jonathan Kozol, Savage Inequalities (1991).

\textsuperscript{51} See, e.g., Lindseth, supra n \textsuperscript{48} at 48: “At most these constitutional provisions should be read as establishing the minimum level of education required…”

\textsuperscript{52} See Brigham v. State, 692 A. 2d 384, 397 (Vt. 1997); See also William H. Clune, “The Shift From Equity to Adequacy in School Finance,” 8 Educ. Pol’y 376 (1994) (describing the thrust of the cases as calling for a high minimum level).
complex society and to participate effectively in our ever more complicated political process.\textsuperscript{53}

In addition to the persuasive power of the evidence of distressing educational inadequacy that has been revealed in the record of these cases, the other major reason for plaintiffs’ victories was the advent at about the same time that this wave of cases began of the standards-based education reform movement. These reforms responded to a series of major commission reports in the 1980s that had concluded that the American education system was in danger of losing its competitive position in the global economy by inducing virtually all of the states to develop substantive content standards that specified the knowledge and skills that students were expected to learn during their years in school. The standards gave courts the tools they needed to deal with complex educational issues. They provided judges workable criteria for applying to contemporary needs constitutional concepts that had originally been articulated in the 18\textsuperscript{th} and 19\textsuperscript{th} centuries, and they provided the “judicially manageable standards” that were necessary to craft practical remedies in these litigations.\textsuperscript{54} At the same time, the constitutional concepts of adequate education that the courts have developed in these cases have also provided important guidance to the states in crafting their standards, and reforming their educational policies, and the courts’ insistence on fair funding to provide all students a reasonable opportunity to meet the state standards has substantially aided the implementation of these reforms.

III – DEFINING AND ASSESSING ‘SUCCESS’ IN EDUCATION ADEQUACY LITIGATIONS

\textsuperscript{53} Paul A. Minorini & Stephen D. Sugarman, Educational Adequacy and the Courts: The Promise and Problems of Moving to a New Paradigm, in Equity and Adequacy in Education Finance: Issues and Perspectives 175, 188 (Helen F. Ladd et al. eds., 1999)

\textsuperscript{54} For a detailed discussion of the significance of the standards-based reform movement for the education adequacy litigations, see Rebell, Education Adequacy, supra, at
Plaintiffs’ extraordinary winning record in the education adequacy cases is both an indication of the depth of the problems raised by the continuing denial of educational opportunities to most low income and minority students more than 50 years after Brown v. Board of Education, and a reflection of the continuing vigor of America’s egalitarian imperative that still strongly seeks to overcome these inequities. The key question, however, is what have these judicial interventions accomplished? Have the many court orders issued by state courts throughout the country resulted in lasting reforms that provide children the opportunity for a quality basic education? Or have they, as some critics have claimed, “only managed to divert public attention away from the serious task of school reform”? To answer this question, it is important to first define what “success” means in this context.

There is an extensive literature that purports to assess the extent to which the state courts cases which have invalidated state education finance schemes have been “successful.” The two most common measures of success in these cases have been the extent to which disparities in the levels of spending among school districts in the state have been ameliorated and the extent to which overall spending on education has increased. On both of these measures, the cases have been enormously successful. Virtually all of these studies have concluded that the litigations have resulted in a narrowing of interdistrict expenditure disparities and an increase in educational spending. Analyses of expenditure patterns in specific states also confirm the general conclusion

55 Sol Stern, supra n at 2

56 See, e.g., Sheila E. Murray, William N. Evans, and Robert N. Schwab, “Education Finance Reform and the Distribution of Education Resources, 88 Am Eco Rev. 789-812 (study of 16 states indicates that “successful litigation reduced inequality by raising the spending in the poorest districts while leaving spending in the richest districts unchanged…”); William N. Evans, Sheila E. Murray and Robert N. Schwab, , The Impact of Court-Mandated Finance Reform, in Equity and Adequacy in Education Finance,
that litigation does result in a reduction in spending disparities and an increase in educational expenditures. 57 For example, in Kentucky where the key case was decided almost two decades ago, the courts’ intervention has resulted in “stunning” improvements inter-district equity and in educational expenditures:

In 1985-86, just before the suit was filed, Kentucky spent $3,759 per child, forty-eighth among the states and shamefully below the national average ($5,679). A decade later, with its $600 million annual tax increase, it was spending $5,906, thirtieth in the nation, and still below the national average ($6,546) but with a far narrower gap. Measured in constant dollars, American school spending had increased 15 percent during that decade, Kentucky’s by 57 percent…. And the huge spending gaps between the richest and the poorest districts were closed ---- indeed…


57 Close analyses of patterns in particular states may be more accurate gauges of these issues. The methodologies used in the large meta-studies depend on judgments made about which states will be analyzed and for which time periods. These judgments also often overlook the impact of key predecessor or follow-up litigations which may substantially influence the trends that are being analyzed. See Michael A. Rebell, “Discussion: Do State Governments Matter?’ in Yolanda K. Kodrzycki, Education in the 21st Century: Meeting the Challenges of a Changing World ( Federal Reserve Bank of Boston, 2002).
on average, the poorer districts now spend slightly more than the richest. 58

Similarly, in Massachusetts, enactment of the Education Reform Act of 1993 in response to that state’s adequacy litigation has also sharply reduced the funding gaps between rich and poor school districts, 59 and in New Jersey, as a result of the Abbott litigation, the lowest wealth districts now actually outspend the affluent districts by $900 per pupil. 60

The fact that litigation appears to reduce spending disparities and raise educational expenditures shows that from an “equity” perspective the cases have been quite successful. 61

These finding are obviously also highly relevant to an assessment of success of education adequacy cases. If money is a prerequisite for educational adequacy, then the additional funding that has resulted from these cases should lead to increased opportunity and improvements in student achievement.

58 Peter Schrag, Final Test: The Battle for Adequacy in America’s Schools 92 (2d ed, 2005).


61 An important issue, however, is how long these gains last. Although equity cases are often quite successful in increasing educational expenditures and reducing inter-district disparities in the initial years after issuance of a court decrees, there has sometimes been substantial “backsliding” in later years after the court has relinquished jurisdiction. See discussion, below at .
Some have questioned, however, whether funding increases do actually lead to improved student achievement, and this issue has been raised in virtually all of the educational finance litigations of the past 30 years. After decades of battling of experts on this question, a common sense consensus has emerged: virtually every court (29 of 30) has agreed that, of course, money matters.\textsuperscript{62} Low-income and minority children, like all other children, obviously need the things that only money can buy like qualified teachers, adequate facilities, up-to-date textbooks, lower class sizes, and more time on task. There is, however, a key proviso to this consensus position: Yes, money matters \textit{---- if it is spent well}.\textsuperscript{63}

The critical question, then, in assessing the “success” of the judicial interventions in adequacy cases is whether, in fact, the extra funds are spent well and are used in ways that actually provide students the “thorough and efficient,” “sound basic” or “quality” education guaranteed by their state constitutions. The most obvious gauges of whether the increased expenditures have been spent well are scores on student achievement tests. The available data based on standardized test scores does indicate some dramatic improvements in student test scores in a number of states where remedies from a major education adequacy litigation have been in place for a decade or more. For example, Massachusetts was first in the nation in both reading and math on the 2007 NAEP tests;\textsuperscript{64} between 1998 and 2004, the failure rate of 10\textsuperscript{th} graders taking the highly challenging Massachusetts Comprehensive Assessment System (MCAS) exams has dropped

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dramatically from 45% to 15% in math and from 34% to 11% in English language arts.\textsuperscript{65}

Improvements in student achievement in state assessments in New Jersey have also been dramatic:
From 1999 to 2005, mean scale scores rose 19 points in 4\textsuperscript{th} grade mathematics, with the greatest increases occurring in the Abbott districts, which were the focus of the judicial remedies, almost halving the achievement gaps between the Abbott districts and the rest of the state.\textsuperscript{66} Kentucky’s free and reduced lunch students outscored students from similar backgrounds nationally by 7 points in 4\textsuperscript{th} grade reading and 5 points in 8\textsuperscript{th} grade reading on the 2007 NAEP tests. \textsuperscript{67}

Although test score measures obviously are relevant, they cannot, at least at the present time, serve as the sole or even the major indicator of the success or failure of a judicial intervention. As the New York Court of Appeals noted, although performance levels on various examinations obviously “are helpful, [they] should also be used cautiously as there are a myriad of factors which have a causal bearing on test results.”\textsuperscript{68} Furthermore, changes in methodology over time often make it difficult to equate and compare test scores that are collected for different years,


\textsuperscript{66} Goertz and Weiss, supra, n \textsuperscript{at} 16. Goertz and Weiss also report that the gap between the Abbott districts and all other districts was reduced by 12 points or .4 standard deviations in reading during this same time period. ( \textit{Id} at 17). Although statewide results in 8\textsuperscript{th} grade math and language arts was essentially stagnant between 2000 and 2005, the Abbott districts saw an increase in both math and language art scores of 6 points and 1 point respectively, leading to closure in the achievement gap between the Abbott districts and the rest of the state of three points in math and one point in language arts. ( \textit{Id} at 18).


\textsuperscript{68} CFE I, 655 N.E. 2d \textsuperscript{at} (NY, 1995)
especially when states sometimes reduce their cut scores or water down the content of the tests to improve their proficiency rates.\footnote{See, e.g., Center on Educational Policy, “Answering the Question That Matters Most: Has Student Achievement Increased Since No Child Left Behind?” (2007) (Test data in only 25 of the 50 states have consistent tests that allow results that allow for comparisons in elementary math since 2002); Goertz and Weiss, supra, n at 16. (“It is difficult to assess the impact of the Abbott decisions on indicators of student achievement because New Jersey, like most other states, has changed its assessments several times over the last 30 years.”)
}

An additional problem is that, especially because of the influence of the federal No Child Left Behind (NCLB) Act’s exclusive focus on reading and math test scores, in many cases, performance measures tend to be limited to test scores in these areas, rather than the full range of subjects covered by most state standards and needed to prepare students to function productively as citizens and in the work place. In addition, many of the existing state tests are not well aligned with the state standards and/or are not properly validated in accordance with professional psychometric requirements.\footnote{John Cronin, Michael Dahlin, Deborah Adkins, G. Gage Kingsbury, The Proficiency Illusion (2007). (Study of 26 states finds that half of the reported improvement in reading and 70% of the reported improvement in math is related to decreases in cut scores, changes that made the tests easier and/or teaching to the test.)}

Test scores have at times been notoriously manipulated. For example, spectacular increases in passing rates, from 52% in 1994 to 72% in 1998 on all three of the Texas Assessment of Academic Skills (TAAS) exams, were later shown to be largely explained by the fact that large

\footnote{For a detailed discussion of these issues, see Michael A. Rebell and Jessica Wolff, Moving Every Child Along: From NCLB Hype to Meaningful Educational Opportunity, ch. 7 (forthcoming, 2008). For additional discussions of problems raised by utilizing a single stakes standardized achievement test as a measure of proficiency, see, e.g., Jay Heubert and Rita Hauser, High Stakes Testing for Tracking, Promotion and Graduation (1999), Daniel Korentz, “Limitations in the Use of Achievement Tests as Measures of Educator’s Productivity,” Journal of human resources, Vol. 47, No. 4, pp 752-777}
numbers of students dropped out of school before taking the grade 10 exam and by a substantial increase in the number of students classified as “special education” whose exam results were not included in the proficiency calculation.\footnote{Walt Haney, “The Myth of the Texas Miracle in Education,” Educational Policy Analysis Archives, Vol 8, No. 41 (200).} Graduation rates, which are often used as an indicator of successful achievement are also notoriously unreliable, since there is no agreed standard for measuring this rate; for example, some states include only students who graduate high school after four years, while others include students who take as long as seven years to graduate, and some include those who pass receive alternative GED diplomas and others do not;\footnote{Jay P. Greene and Marcus Winter, “Public School graduation Rates in the United States,” (Manhattan Institute, 2002).} there also are extensive data collection gaps, especially in regard to numbers of students who drop out, which sometimes result in dramatic overestimation of graduation rates.\footnote{Christopher B. Swanson and Duncan Chaplin, “Counting High School Graduates When graduates Count: Measuring Graduation Rates Under the High Stakes of NCLB (Urban Institute, 2003). A recent report form the Kentucky state auditor indicated that reported drop out figures in that state may understate the real problem by as much as 30%. Weston and Sexton, supra n at 14.}

Consideration must also be given to the time period covered by the test scores. This issue has two dimensions. The first is that test scores will be relevant for judging “success” only after a sufficient period of time has passed to allow for the reforms to take effect and for them to have an impact on students’ behaviors and outcomes. Although it may be reasonable now to examine student achievement results from cases decided in the late 1980s or early 1990s like Kentucky and Massachusetts, it is unreasonable to expect to see dramatic improvements in states where cases were decided very recently. Thus, although test scores may provide at least a partial retrospective
perspective for assessing success, during the critical initial stages of the implementation of reforms, they can provide little if any guidance judging the value of the reforms or of the manner in which they are being implemented.

Second, for the constitutional right to an adequate education to be satisfied, output measures that are indicative of success must be maintained over time. Examples abound of teachers and schools achieving large test score gains for a year or two due to teaching to the test, changes in school population or outright cheating, which are followed by small gains or declines in following years.\textsuperscript{75} For example, on New York City’s fourth grade reading exams in 2005, 83% of the fourth graders at P.S. 33 in the Bronx scored at or above proficiency, an astounding increase compared with only 35.8% the year before. The next year, however, the fourth grade scores at that school plummeted to 47.5%, and the last year’s fourth graders who were now in fifth grade had a pass rate of only 41.1%.\textsuperscript{76}

A key issue in assessing success in education adequacy cases, then, is whether reforms, even if they lead to increased funding for under-performing schools and higher test scores and other output indicators, remain in place over a long period of time. “Success” in this realm must be judged not just by the inputs and the outcomes that obtain at a given point in time, but by whether systems have been put into place which will provide all students the opportunity for a basic quality education on a long-lasting basis.

What types of systems are needed to effectuate such enduring improvements? A recent decision of the Superior Court of Alaska well summarized the types of systemic reforms that the

\textsuperscript{75} See, e.g. Brian Jacob and Steven D. Levitt, “Catching Cheating Teachers: The Results of an Unusual Experiment in Implementing theory, Brookings-Whaton Papers on Urban Affairs 2003 ( 2003) pp 185-220. [ Add other cites]

\textsuperscript{76} [ cites]
experience of the adequacy cases has shown to be needed to ensure sustained constitutional compliance:

First, there must be rational educational standards that set out what it is that children should be expected to learn. These standards should meet or exceed a constitutional floor of an adequate knowledge base for children. Second, there must be an adequate method of assessing whether children are actually learning what is set out in the standards. Third, there must be adequate funding so as to accord to schools the ability to provide instruction in the standards. And fourth….there must be adequate accountability and oversight by the State over those school districts so as to insure that the districts are fulfilling the State’s constitutional responsibility to [provide an adequate education] as set forth in [the state’s] constitution.  

If these are indeed the critical steps that a state must take to ensure that a constitutionally acceptable educational opportunity is provided to all children, the question for present purposes is what responsibilities should courts assume in educational adequacy litigations to ensure that each of these steps are actually taken. Although many courts have promoted effective action in one or more of these areas, few courts have taken responsibility for ensuring that each of these elements of a successful remedy have been well developed and fully implemented. Moreover, even if appropriate standards and assessment systems have been adopted, and equitable funding and effective accountability mechanisms have been put into place, critical issues remain as to whether these reforms will be sustained and how long judicial oversight should remain in place to ensure continued compliance.

Therefore, in order to measure judicial “success” in an educational adequacy litigation, it is important to consider a comprehensive range of inputs, outcomes and their long-term

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77 Moore v. State of Alaska, supra, n at 174
implementation, and not merely to take a snapshot of funding increases or test score improvements at a particular point in time. Only such a comprehensive assessment can verify that the litigation has resulted in a system that can, on a sustained basis, ensure that all students will be provided a meaningful opportunity to receive a quality basic education. In practical terms, a constitutionally adequate and “successful” educational system, therefore, should be measured by the following indicators:

1. **Challenging Standards.** The development of challenging academic content and performance standards that meet constitutional requirements.

2. **Adequate funding.** Adoption of a state education finance system that provides sufficient funding to all schools to allow them to provide all of their students a meaningful opportunity to meet the state standards.

3. **Effective Program Implementation and Accountability Systems.** Development of effective educational programs designed to prepare students to meet state standards and of accountability mechanisms designed to ensure that these programs are properly implemented and funded on a sustainable long-term basis.

4. **A Supportive Political Culture.** Continuing commitments by the three branches of government to promote and maintain equity in education, supported by on-going public dialogue and advocacy for equity initiatives.

5. **Improved Student Performance:** Improvements in scores on validated assessments of academic proficiency and on other indicators such as graduation rates which demonstrate that all students are receiving the opportunity for a basic quality education on a sustained basis.

If this broad range of sustained activity constitutes the full measure of success in an education adequacy litigation, a critical question that must be considered is whether a court in practice can really accept responsibility for overseeing such a comprehensive array of tasks. The recent history of the remedial process in Arkansas is instructive in this regard. Initially, the Arkansas Supreme Court ruled out taking on such extensive responsibilities, but as events
unfolded, it saw the necessity to do so and developed mechanisms for comprehensively reviewing the states’ actions in each of these areas.

After holding that the state’s educational finance system was denying students the opportunity for an adequate education, the Arkansas Supreme Court in 2002 explicitly rejected the idea of retaining jurisdiction to oversee the remedial process. The Court stated at that time that “It is not this court’s intention to monitor or superintend the public schools of this state.”

Two years later, however, in response to allegations that the legislature had not complied with its order, the Court appointed two special masters and gave them an extensive mandate to examine all aspects of the implementation of a constitutionally acceptable education system.

The court’s directive to the Masters specifically directed them to review, among other things, 1) the steps taken to assure that a “substantially equal educational opportunity has been made available to all students,” 2) the testing measures in place to evaluate the performance and ranking of Arkansas students; 3) the cost study the legislature had commissioned, and whether a fair funding formula is in place to ensure that “the school children of this state are afforded an adequate education”; and 4) whether accountability measures have been implemented to evaluate and monitor how the money is actually being spent in local school districts.

The Masters held extensive hearings and issued a detailed report covering each of these areas. While this matter was under review, the legislature met and enacted legislation that dealt appropriately with all of the issues. The Court, therefore, once again terminated its jurisdiction of the case, and once again explicitly stated that “it is not this court’s constitutional


role to monitor the General Assembly on an ongoing basis over an extended period of time until the educational programs have all been completely implemented or until the dictates of *Lake View III* have been totally realized.\(^80\)

A year later, however, the Court again became concerned that the State was failing to comply with its own remedial legislation. Consequently, it reappointed the Special Masters to determine whether the General Assembly had engaged in any “backtracking.”\(^81\) After analyzing the Masters’ findings, the Court concluded that the General Assembly had, indeed, failed to comply with its legislative commitments to improve the education system, and ordered the General Assembly to do so.\(^82\) The next year the court reappointed the Masters to review the legislature’s compliance actions, and after they issued a report which found that the General Assembly had brought the system into compliance with the constitutional adequacy requirements, the Court again accepted their conclusions.\(^83\)

The Arkansas court’s experience indicates that implementation of the recommended remedial system for developing and sustaining a constitutionally adequate system of education, though complex, is both appropriate and feasible. As the Arkansas Court itself emphasized in its latest order, in adequacy cases, there is a need for “constant vigilance to ensure the constitutional goal is met [and] constitutional compliance in the field of education is an ongoing task requiring constant

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study, review and adjustment.\textsuperscript{84} The Court’s actions in directing the Masters to review legislative and executive actions in developing and implementing challenging standards, adequate funding and effective accountability and assessment systems demonstrates both the importance of judicial oversight and the fact that courts can ensure that the other branches carry out their respective functions effectively in each of the remedial areas that are necessary for a successful result.

The Arkansas Supreme Court was firm in its resolve to carry out its constitutional responsibilities:

\begin{quote}
We will not waver in our commitment to the goal of an adequate and substantially equal education for all Arkansas students….Make no mistake, this court will exercise the power and authority of the judiciary \textit{at any time} to assure that the students of our State will not fall short of the goal set forth by this court. We will assure its attainment.\textsuperscript{85}
\end{quote}

Was there not, however, a better way for the court to have effectuated this resolve and ensured effective compliance with constitutional requirements? Could another approach have ensured compliance without re-instating judicial oversight three times after having terminated jurisdiction, having special masters hold hearings and write four major reports, and issuing six compliance rulings over a multi-year period? Utilizing the important perspectives of comparative institutional analysis that are discussed in the next Part of this paper, I will in the final section propose a principled mechanism that will allow courts to ensure effective implementation of constitutional guarantees of meaningful educational opportunities that is consistent with both separation of powers and judicial economy.


Although an extraordinary number of state courts have held that large numbers of students are being denied their constitutional right to an adequate education, many of these courts have faced substantial difficulties in seeking to remedy these constitutional deficiencies. In some states, legislatures and governors have responded promptly and positively to judicial decrees, but in other states, as in Arkansas, there has been excessive delay and resistance to court orders, and, at times, explosive confrontations between courts and legislatures. In two instances, State

86 In fact, many of the courts which have dismissed claims in adequacy cases on “political question” or separation of powers grounds, were, in effect, expressing their apprehensions about the courts’ abilities to effectuate successful remedies in these cases. For example, the Nebraska Supreme Court in refusing to consider plaintiffs’ education adequacy claims explained that “The landscape is littered with courts that have been bogged down in the legal quicksand of continuous litigation and challenges to their state’s funding systems.” Nebraska Coalition for Educ. Equity et al v. Heineman, 2007 Neb. LEXIS65, (Neb, 2007). A plausible mechanism for effectuating successful remedies in these cases might induce more state courts to accept jurisdiction of them.

87 In New York, for example, the legislature failed to act by the July 30, 2004 deadline established by the New York State Court of Appeals in Campaign for Fiscal Equity (CFE II) v. State of New York, 801 N.E. 2d 326 (NY, 2003), causing plaintiffs to seek and obtain a further remedial order from the trial court, which was upheld in modified form by the Court of Appeals. Campaign for Fiscal Equity v. State, 861 N.E.2d 50, 61 (N.Y. 2006) (CFE III). In New Hampshire, the state legislature and governor reacted to the court’s ruling in Claremont School District v. Governor, 703 A.2d 1353 (1997) by proposing a number of constitutional amendments limiting the court’s power and affirming the state’s unconstitutional school funding system. After the amendments failed to pass, the legislature created a funding system that did not address many of the tax issues raised by the lawsuit, and which was based upon the results of a cost study that had been substantially manipulated to lower costs. Their reaction led to further legal challenges. Drew Dunphy, “Moving Mountains in the Granite State: Reforming School Finance and Defining Adequacy in New Hampshire,” (Campaign for Fiscal Equity, 2001), 14-25.

88 For example, in Kansas, after the state Supreme Court responded to the legislature’s failure to comply fully with its initial order with a definitive requirement for a substantial funding increase by a date certain, leaders of the state Senate informed the
Supreme courts, after initially confronting opposition to their orders, retreated from the fray and announced they would no longer seek to enforce their own decrees.  

Attaining success in an educational adequacy litigation —— especially if “success’ is defined in accordance with the comprehensive definition set forth in the previous section —— clearly is not an easy task. But ensuring meaningful educational opportunities to all children is an affirmative mandate of most state constitutions, and this egalitarian imperative has also been adopted as the paramount national educational policy through the NCLB. The stakes involved in this endeavor are extremely high, both for the individuals involved and for the nation as a whole. Whereas 30 years ago, a high school drop-out earned about 64% of the amount earned by a diploma recipient, in 2004 he or she would earn only 37% of the graduate’s amount.  

Inadequate education also dramatically raises crime rates and health costs, denies the nation substantial tax revenues and raises serious questions about the civic competence of the next generation to function.


productively in a complex democratic society. The stark fact is that over the next 50 years, the students from minority groups who are disproportionately represented among the drop-out and low achieving student population, will constitute a majority of the nation’s public school students. If they are not competent “knowledge workers,” America’s ability to compete effectively in the global marketplace will be seriously jeopardized.

The main reason that courts have not consistently been able to effectuate fully successful remedies in education adequacy cases is that they have been hamstrung by anachronistic concepts of separation of powers. Although the concept of “judicial activism” has been largely disproved or discredited, as discussed in detail in the first section of this paper, allegations of judicial usurpation of legislative and executive authority still abound and many judges are still sensitive to them.

The continuing charges of “judicial activism” in the state court context is particularly inapposite. Historically the judicial activism arguments arose from the federal court school desegregation cases. The facile extension of criticisms of those federal court interventions in school affairs, whatever their actual validity, to the recent actions of state courts in the education adequacy cases is entirely inappropriate. State court cases do not involve the federalism issues that


overlay the separation of powers concerns in the school desegregation cases; in contrast to federal judges, who were often castigated for being outsiders who lacked familiarity with local needs and local mores, state court judges, who are usually drawn from the local political elite, are well aware of the legal and political environment on the state scene.93

Moreover, state court judges have a “firmer democratic pedigree.” First, unlike the federal judiciary, many state constitutions explicitly provide for judicial review. Second, well over half of the nation’s state judges are elected, either in garden-variety partisan elections, or a variant of a retention election. Third, the constitutions that state judges are called upon to interpret are capable of relatively easy amendment, rendering their decisions subject to a form of “majoritarian ratification.”94

A final significant distinction between federal courts and state courts is that in key areas of state responsibility like education and welfare, state constitutions incorporate “positive rights” that call for the affirmative governmental action in contrast to the “negative restraints” of the federal constitution. The implications of such substantive entitlement to affirmative governmental action have been explained by Prof. Helen Hirshkoff:

93 “[F]ederal judges have occasionally been pictured as ‘outsiders,’ rendering their controversial decisions subject to more resistance than an equally controversial decision handed down by the ‘local’ judge.” Burt Neuborne, “Toward Procedural Parity in Constitutional Litigation, 22 Wm & Mary L. Rev. 725, 732 (1981).

94 Burt Neuborne, “Forward: State Constitutions and the Evolution of Positive Rights,” 20 Rutgers L.J. 881, 900 (1989). See also, Douglas S. Reed, “Popular Constitutionalism: Toward A Theory of State Constitutional Meanings,” 30 Rutgers L. Rev. 871 (1999) (arguing that the meaning of state constitutions are generated through an exchange between popular mobilization and judicial interpretation, especially in states where the initiative mechanism exists); Judith S. Kaye, “Contributions of State Constitutional Law to the Third Century of American Federalism, 13 Vt. L. Rev. 49, 56 (1988). (“state courts are generally closer to the public, to the legal institutions and environments within the state, and to the public policy process. This both shapes their strategic judgments and renders any erroneous assessments they may make more readily redress able by the People.”)
[A] positive constitutional right imposes an affirmative obligation on the state to realize and advance the objects and purposes for which … powers have been granted…. Judicial review in such a regime must serve to ensure that the government is doing its job and moving policy closer to the constitutionally prescribed end.”

Although most of the state courts have recognized that education is a positive right, and that the courts have a responsibility to remedy constitutional violations in this area, many of the judges have nevertheless refrained from instituting the kind of comprehensive remedies that are necessary to vindicate these rights. The courts’ boldness often disappears at the remedy stage, because the judges recognize the enormity of the task and sometimes doubt their expertise or their institutional capacity to oversee wholesale educational reform. But, as Neil Komesar has emphatically pointed out, all government institutions are imperfect, and the fact is that neither the legislative or executive branches on their own have made much headway to date in ensuring the meaningful educational opportunities guaranteed to all children by the state constitutions.


96 Examples.
Comparative institutional analysis removes the myopia from discussions of judicial capability, most of which tend to emphasize the judiciary’s deficiencies without considering whether the task at hand can better be performed by a legislature, a state education department or another governmental or private agency: “In the relevant comparative institutional world, courts may be called upon to consider issues for which they are ill equipped in some absolute sense because they are better equipped to do so in a relative sense.” Most of the courts which have invoked the “political question” doctrine in declining to accept jurisdiction of an education adequacy case have done so after focusing on the courts’ limitations but without undertaking any comparative institutional analysis of the difficulties the other branches would face in confronting these problems.


Komesar has analyzed in depth whether courts, legislatures or the market provide the best forum for deciding specific public policy issues like land use and violation of property rights. For him, the key question with these imperfect alternatives is “deciding who decides.”

In the present context, however, that question has already been answered. The vast majority of state courts have already decided that specific constitutional provisions compel them to take responsibility for ensuring that all students are provided the opportunity for a basic quality education. The key issue in this arena, therefore, is how courts that have taken on this responsibility can craft remedies that effectively vindicate students’ constitutional rights. Comparative institutional analysis can provide important insights that respond to this concern.

Experience has shown that if constitutional rights in this area are to be vindicated, it will be through the combined efforts of all three branches of government. In the complex administrative environment in which we now live, courts, legislatures, and administrative agencies operating alone cannot successfully resolve major social problems. Although one of the branches may initiate a reform or take prime responsibility, successful policy making in a complex regulatory environment requires the extensive, complementary involvement of all three branches of government.

For example, it was not until Congress assisted the courts by passing Title VI of the 1964 Civil rights Act and Title I of the 1965 Elementary and Secondary Education Act (“ESEA”) which

provided a carrot (Title I’s substantial federal funding) and a stick (Title VI’s cut-off of federal funding for failure to comply with school desegregation decrees) that extensive desegregation in the South was achieved.\(^{100}\) Similarly, the extensive rights to educational opportunity now enjoyed by students with disabilities were originally developed as part of the remedies ordered by federal courts in two constitutional litigations.\(^{101}\) These remedial procedures were then codified by Congress into a major federal statute,\(^{102}\) which is now being broadly implemented by the federal Office for Civil Rights, state education departments, and scores of federal and state courts.

Effective implementation of remedies in education adequacy cases have also occurred when the three branches of government have worked together harmoniously to accomplish that end. Bert T. Combs, lead counsel for the plaintiffs in the Rose case (and a former Kentucky governor) attributed the success of that endeavor to the effective collaboration between the three branches of government:

Legal historians will note that Kentucky’s School Reform Law is a classic example of how this democracy of ours can work for progress when heads of the three coordinate branches of

\(^{100}\) The combination of forceful decisions by the Supreme Court, passage of Title VI and the ESEA, and vigorous enforcement by the Office for Civil Rights (“OCR”) of the Department of Health Education and Welfare in the 1960s had dramatic results: although more than 98% of black students in the states of the deep South had been attending schools that had 90% or more black students in 1964, by 1972 less than 9% were in such segregated facilities. Jeremy Rabkin, “Office for Civil Rights,” in The Politics of Regulation 304, 338 (James Q. Wilson, ed., 1980).


\(^{102}\) The Individuals with Disabilities Act (“IDEA”), 20 U.S.C. §§ 1400-1462.
government lay aside their egos and pride of turf and work together.\textsuperscript{103}

This pattern of effective “colloquy”\textsuperscript{104} among the branches has also occurred in other states such Vermont and Massachusetts where, as Prof. George Brown has noted, there has been a pattern of “implicit dialogue” between the branches of state government in school finance cases that is noticeably different from the remedial pattern that occurs in federal court remedial interventions:

...the school finance cases represent development of a new form of public law litigation: the dialogic as opposed to the managerial model. The state judiciary is taking a track different in two ways from the federal judicial approach. They are less managerial and more advisory...what is transpiring is a multi-faceted dialogue between these courts and legislatures, across state judicial systems...

\textsuperscript{105}

Although Prof. Brown and other commentators\textsuperscript{106} have recognized that this positive pattern of inter-institutional dialogue sometimes occurs in state court education finance decisions, they have not developed a practical conceptual framework that can regularize and advance these

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\textsuperscript{106} See, e.g. Paul D. Kahn, State Constitutionalism and the Problems of Fairness, 30 Valparaiso L. Rev. 459, 465, 468 (1996) (“When the political will is there, courts have proven useful in mobilizing a response to the problem. They do not usually stand against the political branches, but along side them in a common endeavor.”)
\end{flushleft}
practices. Comparative institutional analysis can provide important insights for developing a functional model that can maximize the potential for productive dialogues among the three branches of government at the remedial stage of an educational adequacy litigation. Such a model would focus on how the strengths of each of the branches of government can best be utilized to effectuate long lasting reforms that can provide all students meaningful educational opportunities.

The empirical studies of the comparative functioning of the executive, legislative and judicial branches that I undertook in the 1980s with my colleague Arthur Block are relevant in this regard. We reached a number of conclusions regarding the comparative institutional strengths and weaknesses of the judicial, legislative and executive branches in implementing educational policy reforms. Our findings have largely been confirmed by a number of commentators that have considered these issues in the years since. Although I do not, of course, claim that the comparative institutional analysis that we undertook in a limited number of case studies at a certain point in time constitutes a definitive analysis of comparative institutional functioning, our findings can provide a starting point for developing a comparative institutional remedial model, which can then be the subject of critical analysis and further empirical study.

The key conclusions we reached were that the rational-analytic decision making mode of the courts was effective for articulating fundamental principles, while the legislatures’ mutual adjustment decision-making mode was better equipped to develop specific policies through broad political compromises, and the administrative agency’s pragmatic-analytic decision-making

107 See discussion, above, at .
108 See discussion, above, at .
approach was most useful for understanding and reflecting grass roots implementation needs.\textsuperscript{109} In regard to fact-finding, we determined that legislative hearings tended to be “window-dressing” occasions with little relevance to actual decisions, whereas judicial fact-finding was relatively efficient and administrative fact-finding was the most efficient mechanism when it was fully invoked. Administrative agencies were most effective in formulating comprehensive educational reform plans, but courts were relatively effective in this regard when the resources of the affected parties were utilized by the courts. Courts, on the other hand, have significant compliance monitoring “staying power,” in contrast to administrative agencies, which have relatively ineffective compliance monitoring power; legislative oversight and statutory modifications have some influence on remedial enforcement.\textsuperscript{110}

Komesar’s analysis of the major functional distinctions between courts and legislatures complements our findings. He emphasizes three major characteristics of the judicial process: higher threshold access costs, limited scale, and judicial independence.\textsuperscript{111} For example, his emphasis on judicial independence explains the source and significance of the judicial orientation toward principled analysis of issues:

\textsuperscript{109} Our comparative institutional findings are summarized in Rebell and Block, Equality and Education, supra n at 190-191.

\textsuperscript{110} In regard to interest group representation, our research also demonstrated that legislatures can best digest and reflect input from all of the interests that are sufficiently well organized to exert political pressure, while courts effectively consider input from all those interests that are sufficiently well organized to seek and obtain formal legal representation. There is limited input from affected interests in the administrative process, which tends to discourage active participation by such groups. We also found that representation of minority group interests is most effective in the judicial arena.

\textsuperscript{111} Komesar, Imperfect Alternatives, \textit{supra}, n at 123. In regard to fact finding, Komesar also noted that “The tradeoff is between a political process that integrates far more information but with a more significant risk of bias and an adjudicative process that suppresses information but decreases distortions in its presentation.” \textit{Id} at 141-142.
From a social standpoint, the greater insulation of judges from the various pressures, produced in part by the presence of all the formalities, provides an important source of comparative advantage for the adjudicative process. This independence provides judges with the opportunity to shape social decisions without some of the biases and pressures that distort other institutions.”

On the other hand, Komesar’s emphasis on the higher threshold costs of access to the judicial process highlights a major comparative disadvantage of the judicial process, namely that that “judges are far less able to initiate decision making than legislators. Legislators can resolve a social issue without anyone officially and formally bringing the issue to their attention.” Initial access to the judicial process is not a major issue in regard to education adequacy since courts in 45 of the 50 states have already considered the issue. The question of continuing access is, however, significant because lack of resources may limit plaintiffs’ abilities to continue to pursue compliance remedies in a long-standing litigation or to initiate a new suit if a court has prematurely terminated jurisdiction. The fact that judicial proceedings have a “limited scale” is a reminder that judges alone do not have the tools and resources to solve major social problems; they can be effective only in a productive “dialogue” with the other branches.

The greater access costs and limited scale of judicial operations also mean that courts can only take on a small number of public policy responsibilities. Although the question of which policy areas merit the scarce amount of available judicial attention is of major importance generally for comparative institutional analysts, it is less significant in the present context because state constitutions have been interpreted by most courts to compel them to give their attention to education adequacy issues, and these courts have already agreed that this a high priority area to

112 Id at 128.

113 Id at 125.
which they are already giving substantial time and attention. The key question at this point is how that involvement can be improved.

These findings on comparative institutional functional capacities could substantially assist courts --- and legislatures, state education departments and executive agencies --- in the practical tasks of developing workable remedial processes. Clearly, the courts’ principled approach to issues and their long term “staying power” are essential for providing continuing guidance on constitutional requirements and sustained commitment to meeting constitutional goals. Legislatures, however, are better equipped to develop specific reform policies and executive agencies are most effective in undertaking the day to day implementation tasks of “explaining what is required, why it is required and how it can be done well, and then checking that districts and schools can and do carry out those requirements.”\textsuperscript{114} When disputes arise on whether specific mechanisms are, in fact, meeting constitutional requirements, judicial fact-finding mechanisms should be invoked, although there is a problem in assuring access to this process for all of the affected interests.

Few courts have, however, directly considered these comparative functional factors in formulating their remedies because few courts have fully confronted the reality that to successfully implement a successful remedy in a case involving complex institutional reform they need to deal over a multi-year period with the development and implementation of a number of important policies and actions. A number of years ago, however, the U.S. Court of Appeals for the Fifth Circuit in a case involving the provision of educational opportunities to linguistic minority children

\textsuperscript{114} Weston and Sexton, supra, n at 19. Weston and Sexton further point out that implementation also often requires “conscious tactical choices” and “choosing what to give priority.” \textit{Id.}
did articulate a framework for judicial oversight of a complex remedial reform process which implicitly emphasized the comparative functional strengths of each of the branches of government.

The major issue before the U.S. Court of Appeals for the Fifth Circuit in Castaneda v. Pickard\textsuperscript{115} was whether the language remediation program the school district had implemented satisfied the requirements of the federal Equal Educational Opportunity Act of 1974. The Court developed a three staged process for reviewing the district’s development and implementation of an educational program that would comply with the statutory requirements. In essence, under the Castenada procedures the court’s role would be to:

1. “[A]scertain that a school system is pursuing a program informed by an educational theory recognized as sound by some experts in the field, or, at least deemed a legitimate experimental strategy…”

2. Determine “whether the programs and practices actually used by a school system are reasonably calculated to implement effectively the educational theory adopted by the school.”

3. Ensure that “after being employed for a period of time sufficient to give the plan a legitimate trial, [the plan] produce[s] results indicating that the language barriers confronting students are actually being overcome…”\textsuperscript{116}

This Castenada framework for judicial oversight properly balances the principled oversight responsibilities of the courts and the policy making prerogatives of the political branches in a

\textsuperscript{115} 648 F.2d 989 (5th Cir. 1981).

manner that is remarkably consistent with the functional strengths and weaknesses of the branches as identified by comparative institutional analysis. It utilizes the courts’ “staying power” to make sure that the political branches carry out their responsibilities to provide meaningful programs to all students on a sustained basis, but, so long as the school officials are using sound professional judgment to develop and implement effective plans, all of the detailed policy-making and administrative functions would be left in their hands.\textsuperscript{117}

The \textit{Castenada} approach is fully consistent with constitutional separation of powers precepts. The framers of the Constitution emphasized a “blended” concept of separation of powers.\textsuperscript{118} Their central concern was not a tight compartmentalization of responsibilities, but rather the avoidance of excessive concentration of power in one of the political branches. As James Madison put it, the key issue was whether, “the whole power of one department is exercised by the same hands which possess the whole power of another department.”\textsuperscript{119} The \textit{Castenada} procedures delineate a

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\textsuperscript{117} Douglas S. Reed, in On Equal Terms: The Constitutional Politics of Educational Opportunity (2001), after examining the implementation of court decrees in a number of states, recommends that “judges need to stay focused on their agenda-setting powers, rather than micromanaging particular outcomes.” Id at 170. His concept of “agenda setting” would, however, go beyond \textit{Castenada}’s concept of the principled court role since he would have the court issue a “policy blueprint” that would sketch out a “vision of what a constitutional program of educational financing would look like.” Id at 171.
\textsuperscript{118} Thus the presidential veto power granted “legislative” authority to the chief executive; the Senate’s ratification of presidential appointments and treaties and Congress’ power to impeach the president and try high government officers granted “executive” and “judicial” authority to the legislature. For a more detailed discussion of “blending”, see Sharp, “The Classical American Doctrine of ‘the Separation of Powers’,” 2 Chi L.Rev. 385, 427 (1935). \textit{See also}, Edward Levi, “Some Aspects of the Separation of Powers,” 76 Colum L. rev. 371, 372-75 (fear of legislative, not judicial power, was framers’ prime concern.)
\textsuperscript{119} The Federalist No. 47 302-03 (Clinton Rossiter, ed. 1961. \textit{See also}, Thomas Jefferson, Notes on the State of Virginia 195 (1787) (“The concentrating of these in the same hands is precisely the definition of despotic government.”)
\end{quote}
responsible, functional division of labor among the three branches of government that avoids excessive concentration of power in the judiciary or any other branch, and it provides an appropriate and effective balancing of responsibilities for the remedial stage of an institutional reform litigation.

Although the Castenada procedures do not encompass the full range of comparative institutional insights discussed earlier in this section, they do provide a useful framework for developing a remedial model for the state court education adequacy context that further develops and applies these insights. In the next part, I will propose a model for utilizing the Castenada framework to encompass all five of the remedial phases necessary for sustained success in education adequacy cases which also utilizes of the insights of comparative institutional analysis, as well as practical examples of techniques that have worked in past cases of this type. To facilitate a conversation about this model, I will call it the ‘Adequate Education Remedial Oversight” model, a name that yields a workable acronym, i.e. the “AERO” model.

V- A MECHANISM FOR JUDICIAL SUCCESS: THE ADEQUATE EDUCATION REMEDIAL OVERSIGHT (“AERO”) MODEL

The core of the AERO model is its extension of the Castenda framework to all of the stages of the remedial process for an education adequacy case. After finding that a state’s current system is not meeting constitutional requirements for providing all students a basic quality education, the court should state that it expects the defendants to develop challenging standards, an education finance system that ensures adequate funding levels, and effective programs and accountability
mechanisms.\textsuperscript{120} It should also emphasize that if these reforms are to achieve constitutional compliance on a sustained basis, all three branches of government should encourage maximum public involvement in establishing and maintaining viable policies in these areas. The court should make clear that the legislative and executive branches will retain the power and duty to develop appropriate policies and practices in each of these areas and that so long as these tasks are promptly undertaken and supported by sound professional opinion, the court will not second guess their decisions. The state will, however, be held accountable for effectively implementing these policies and practices, and, at the end of a reasonable time period, for achieving acceptable results.

In theory, this approach could require extensive judicial hearings at each stage of the remedial process. This level of judicial involvement is not, however, likely to be necessary in most cases. Hearings will only actually occur when one of the parties --- presumably the plaintiffs ----- requests specific judicial oversight. In the past, judicial intervention during the remedial stage has been invoked repeatedly in some states, like New Jersey and New Hampshire, but rarely, if at all, in many others states like Kentucky, Massachusetts and Vermont, where the court decision essentially served as a catalyst for latent reform by the political branches which were then quickly put into place. If the AERO model is put into effect, the political context in many states will continue to promote co-operative solutions which obviate the need for any resort to the courts, and

\textsuperscript{120} See, e.g., Roosevelt v. Bishop (AZ, 1994) (C.J. concurring): “This case…involves the meaning and application of a state constitutional clause that gives the children of Arizona a fundamental constitutional right to education and that places on the legislature the corresponding obligation to enact laws necessary to establish and maintain a system that will transform that right from dry words on paper to a reality bringing to fruition the progressive views of those who founded this state. … Parents, their children, and all citizens need to know what rights the constitution gives our children, and the legislature needs to know the extent of its obligation in effectuating those rights. This court exists primarily for the purpose of resolving such issues.”
the blueprint for successful compliance that the court lays out is, in fact, likely to encourage more states to undertake such co-operative remedial actions.

Second, in states where there may be potential for resistance, delay or serious compliance disputes, the court’s clear advance notice of how the process will unfold if hearings are requested may in many situations induce the parties to work out their disagreements and avoid actual litigation. Advance notice that the court will hold the state officials responsible for effective implementation of their policies and for positive outcomes will in many situations induce the legislature and the administrative officials to carry out their constitutional responsibilities thoroughly, and to work cooperatively with the plaintiffs and other affected groups toward that end. At the same time, if plaintiffs are informed in advance that the court will give great deference in any hearing to the policy and administrative prerogatives of the legislative and executive branches, they will be more inclined to work with the legislature and/or the administrative officials rather than to resort to the courts.

Indeed, it is often the uncertainty about whether, when and how courts will exercise their jurisdiction during the remedial process that creates and exacerbates confrontations and delays in the resolution of remedial disputes. In New York, for example, after the legislature failed to meet the court’s deadline for enacting reforms, it took the plaintiffs over two years to get a definitive final ruling from the state’s highest court on the extent of the defendants’ compliance obligations. During that time, political confrontations and media wars mounted and no action whatsoever was taken by the legislature. Only a few months after a definitive ruling was issued by the Court, major reforms to the state funding system and an extensive new accountability system were adopted.121 Ohio was an even more extreme example. There, the court held that the legislature was not in

compliance, but announced that it would not continue to enforce its own constitutional ruling.  

Not surprisingly, ever since, there have been no further serious attempts to comply and rising political confrontation on school funding issues.

The actual mechanisms that court may use to deal with issues that require judicial involvement at any of the various stages of the remedial process will also vary, depending on practices and procedures in the particular jurisdiction. In New Jersey, on many occasions, the Supreme Court retained jurisdiction and the full court quickly considered controversies that arose. In Massachusetts a single Justice of the Supreme Judicial Court was designated to hear any potential future compliance issues. In Arizona, Vermont and Wyoming, the trial courts were given definitive authority to act promptly to resolve issues that arose during the remedial process, and, in Arkansas, as we have seen, the Court appointed two special masters to carry out these responsibilities. Whatever the means permitted or preferred in a particular state, the important point is that the courts must make clear that there will be prompt and definitive judicial procedures to resolve any major disputes that may arise at any stage of the remedial process.

Is this approach feasible? Can courts efficiently and economically carry out a compliance monitoring role until constitutionally acceptable results have been achieved without intruding on the prerogatives of the other two branches? The balance of this part will attempt to answer affirmatively both of these questions by describing in detail how each phase of the remedial process can unfold under the proposed AERO model and at what point the courts’ jurisdiction can appropriately be terminated.

122 De Rolph v. State, 780 N.E. 2d 529 (2002); State ex rel. State v. Lewis, 98 Ohio St.3d 123 above.

123 See discussion at pp above.
1. Challenging Standards

The Courts’ prime responsibility in an education adequacy case is to articulate the constitutional parameters for an adequate education in a principled manner that will guide legislative and executive efforts to develop specific policies and structures that comply with constitutional requirements. The fact that the nationwide standards-based reform movement has led virtually every state to organize its education system around clearly articulated state academic and performance standards has greatly facilitated the courts’ efforts in carrying out this task.

A significant interplay between courts, legislatures and state education departments that is largely consistent with the functional division of labor anticipated by the AERO model has actually occurred in the development of these educational standards in many of the states. Rarely have any disputes emerged that would have required hearings or other forms of remedial intervention by courts in the development and implementation of the standards. Typically, the courts have articulated the constitutional parameters for academic standards in their initial liability decision, and the legislatures have readily accepted and acted upon the courts’ direction.

These dynamic dialogues between the branches have taken many forms, but from an analytical perspective most of the situations fit into one of two basic categories: 1) cases in which the courts have been the prime movers in articulating the operative concepts of adequacy that were then adopted and further developed by the legislative and/or executive branches; and 2) cases in which adequacy concepts originated by the legislature have been adopted by the courts or have substantially influenced the courts’ development of their constitutional concepts. In these dialogues, the courts have tended to discuss concepts of adequate education in broad, principled terms like preparing students to “function productively as civic participants” and to “compete in
the global economy."^{124} They often then explicitly call upon the other branches of government to “develop and adopt specific criteria implementing these….broad constitutional guidelines.”^{125}

The first category of interaction has been the most prevalent pattern. It is exemplified by the situation in Kentucky where the Court first articulated constitutional guidelines for an adequate education that were then developed into specific statutory and regulatory concepts by the legislature. The Kentucky Supreme Court in its 1989 adequacy ruling held that an efficient system of education must have as its goal to provide each and every child with at least the seven following capacities:

1. sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization;
2. sufficient knowledge of economic, social, and political systems to enable the student to make informed choices;
3. sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation;
4. sufficient self-knowledge and knowledge of his or her mental and physical wellness;
5. sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage;
6. sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and

^{124} The various state supreme courts have also tended to engage in a productive dialogue among themselves, by citing, endorsing, and adapting constitutional concepts of adequacy that were developed in sister states. For a discussion of the “consensus” definition of adequate education that appears to have emerged from this nation-wide judicial dialogues, see Rebell and Wolff, supra, n at .

^{125} Claremont Sch. Dist v. Governor, 703 A. 2d at 1357. The New Hampshire Court also focused on the functional distinctions between the roles of the legislature and the executive branch, since it insisted that it “in the first instance, it is the legislature's obligation, not that of individual members of the board of education, to establish educational standards that comply with constitutional requirements.” Id.
7. sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.  

The legislature responded to this judicial guidance by enacting the Kentucky Education Reform Act (“KERA”), one of the most sweeping education reform measures in American history. KERA set forth six specific learning goals based on those constitutional requirements, required the Department of Education to develop those goals into more specific expectations and a model curriculum, mandated specific educational innovations including state funded preschool and a statewide school technology system, prohibited a number of corruption-prone district practices, mandated a minimum local tax effort, and added major new funding to equalize what districts were able to raise.”

The Kentucky constitutional goals have proved quite influential. They have been adopted by other state supreme courts that have similarly used them as general guidelines for their legislatures to use in developing specific, appropriate adequacy standards. Legislatures in other states, like Arkansas, have followed the Rose guidelines, even without a specific directive from their own state courts to do so.

126 790 S.W.2d at 212.

127 Weston and Sexton, supra, at.


129 Lake View, 91 S.W.3d 472 at 88; (“Many of the "Rose standards," as we will call them, were adopted by our General Assembly with Act 1108 and Act 1307 in 1997, as
In Montana, the Court held that the present educational finance system was unconstitutional because the legislature had not defined “quality education,” the key constitutional term, before determining its funding allocations. “Unless funding relates to needs such as academic standards, teacher pay, fixed costs, costs of special education, and performance standards, then the funding is not related to the cornerstones of a quality education,” the court said. The legislature then promptly enacted legislation that defined a “basic system of quality public schools,” emphasizing educational programs to provide for students with special needs.

The Washington Supreme Court was especially sensitive to the functional distinctions between the respective roles of the courts and the legislature. After specifying that the state constitution’s education clause “embraces broad educational opportunities needed in the contemporary setting to equip our children for their role as citizens and as potential competitors in today's market as well as in the market place of ideas,” it expressly declined to assume the legislature’s responsibility for developing these general guidelines into more specific operative categories:

Respondents also suggest the need for additional judicial guidelines for matters less fundamental than those discussed heretofore. However, in light of the judicial

\[\text{has already been set forth in this opinion.})\] The Arkansas Supreme Court also endorsed the Rose standards. Id at

\[\text{130}\] Columbia Falls Elementary School District No. 6 v. State, 109 P.3d 257, 312 (Mont. 2005). The Montana Court also refused to follow the State’s position that good test scores were all that was required for a showing of “quality.” See id. at 263. The Court noted that an educational system was about more than test scores. For instance, extracurricular activities were important and their value would not necessarily be reflected in test scores. In addition, although the Court accepted the State’s assertion that Montana students were performing well on tests, compared to students from similar states, there was no guarantee that their success would continue. Id.


guidelines already set forth and considering the need for the Legislature to rethink and retool much of the present educational system, so that it may mesh as a working whole, we decline respondents' invitation.\(^{133}\)

At the other end of the continuum were states in which the courts looked to educational standards that had been adopted by the legislature in determining the constitutional requirements for educational adequacy. Thus, in Idaho, the court stated:

> Balancing our constitutional duty to define the meaning of the thoroughness requirement of art. 9 § 1 with the political difficulties of that task has been made simpler for this Court because the executive branch of the government has already promulgated educational standards pursuant to the legislature's directive in I.C. § 33-118.\(^{134}\)

In Kansas, the Supreme Court noted that “These standards were developed after considerable study by educators from this state and others…..hence, the court will not substitute its judgment of what is ‘suitable’, but will utilize as a base the standards enunciated by the legislature and the state education department.”\(^{135}\) Similarly, in Texas, the court accepted the legislative standards as “defining the contours of its constitutional duty.”\(^{136}\)

\(^{133}\) Id at 95-96. The Legislature then adopted a “Basic Education Act” which set forth detailed staffing ratios and salaries and all of the other categories specific categories that had been identified by the Respondents. Basic Education Act of 1977, Wash. Rev. Code § 28A.150.210 (1977) (amended 1993) (. In fact, the legislature in Washington responded to the initial directive of the trial court and was already in compliance by the time the case reached the Supreme Court.)


\(^{135}\) Unified Sch. Dist. No. 229 v. State, 885 P.2d 1170, 1186 (Kan. 1994). The interplay between the courts and the legislature in Kansas was actually more complex than this quote might indicate. In a case three years earlier, Mock v. State, No. 91-CV 1009, ( Kan. Dist. Cit, Oct 14, 1991), the trial judge had developed ten goals for preparing learners to live, learn and work in a global society that became the basis for settling the litigation and were codified in KSA 72-6439. This was the legislation that was
The Supreme Court of North Carolina explicitly directed the trial court to consider the “educational goals and standards adopted by the legislature” to determine “whether any of the state’s children are being denied their right to a sound basic education.”\textsuperscript{137} The trial judge then reviewed the standards in a number of subject areas and concluded that they did provide students a reasonable opportunity to acquire the skills that constituted a sound basic education as defined by the Supreme Court. The Chief Justice of that court, when later interviewed, explained that courts gain a sort of democratic legitimacy in their educational adequacy rulings by accepting legislatively-enacted standards:

\begin{quote}

Courts can look at what the legislatures have done, and do so recognizing that they have had the opportunity to hear from everybody and to thrash it out in open hearings, unconstrained by the case and controversy limitations. It does give the judge some guidelines and, at least, reassurance.\textsuperscript{138}
\end{quote}

subsequently upheld as meeting constitutional requirements by the Kansas Supreme Court in the 1994 case. The ten goals were subsequently repealed by the legislature, but, nevertheless, in a later case, the Supreme Court again stated that “we need look no further than the legislature's own definition of suitable education [as set forth in the state’s school accreditation and student performance standards] to determine that the standard is not being met under the current financing formula.” \textit{Montoy v. State}, 120 P.3d 306, 309 (Kan. 2005) (per curiam)

\textsuperscript{136} \textit{Edgewood Ind’t Sch. Dist. v. Meno}, 893 S.W. 2d 450,462 (Tex, 1995)

\textsuperscript{137} Leandro v. State, 488 S.E.2d 249, 259 (N.C. 1997).

\textsuperscript{138} Tico A. Almeida, “Refocusing School Finance Litigation on At-Risk Children: Leandro v. State of North Carolina,” 22 Yale L & Pol’y Rev. 525 545 (2004). The trial judge to whom the case was remanded agreed: “Judge Manning described the standards program as instrumental in his task of gauging constitutional adequacy, commenting that, ‘The ABCs are a great tool, and without it, I couldn't have done it. I would have had to have said [to the State], you've got to have an accountability system, because we can't measure your results from what you tell us.’ Id.
The North Carolina Supreme Court did, however, also influence the manner in which the state’s standards were implemented since it upheld the trial court’s determination, after an extensive analysis of the standards, that “Level III” proficiency on standardized End of Grade and End of Class tests would be considered the operative constitutional standard for adequacy in regard to test scores.\footnote{Hoke County Board of Education v. State, 599 S.E.2d 365, 382 (N.C. 2004).}

A variation on the basic pattern of judicial acceptance of legislative standards occurred in New York, where the standards adopted by the State Board of Regents strongly influenced the development of a constitutional standard by the courts, but the courts explicitly declined to adopt the regulatory standards \textit{per se} as the constitutional requirement. The trial court heard extensive testimony regarding the content of the Regents Learning Standards and this evidence clearly influenced the court’s definition of the requirements for a sound basic education.\footnote{\textit{CFE v. State of New York}, 719 N.Y.S. 2d 475, 485, ( S.Ct, N.Y. Co, 2001); see also, \textit{Rebell, Education Adequacy, supra}, n \textit{at} \quad ( describing detailed trial testimony on the regents’ standards and its impact on court’s decision).} Nevertheless, the Court specifically held that the Regents’ standards exceeded constitutional requirements,\footnote{\textit{id} at 483. The situation in New York was actually quite complex and nuanced. Even though the final definition of a sound basic education had clearly been influenced by the extensive trial testimony regarding the Regents Learning Standards, the Court of Appeals in its first CFE decision had articulated a “template definition” of sound basic education ( which emphasized the skills students would need to “function productively as civic participants”) that also strongly influenced the presentation of the issues at trial and determined which aspects of the Regents Standards would be most closely examined by the trial court. For example, because of the Court of Appeals’ emphasis on civic functioning, those aspects of the Regents standards that dealt with civics took on enhanced significance. \textit{Rebell, Educational Adequacy, supra} n \textit{at}\quad at}
and that, in any event, “the ambit of a constitutional right [cannot be defined] by whatever a state agency says it is.”

Overall, the courts have tended to articulate broad constitutional guidelines in order to spur legislatures that had not adopted detailed academic content and performance standards on their own to do so. However, where a legislature had already exercised its policy making functions and had adopted detailed standards, the courts have tended to accept those standards and have not engaged in extensive discussions of constitutional requirements. In short, the development of challenging academic standards is an area where the type of inter-branch colloquy called for in the AERO model already is the operative general practice. The result of this colloquy has been greater precision and a higher level of validity in regard to both constitutional concepts and legislative standards.

2. Adequate funding

The lack of adequate funding, especially in schools attended by low income and minority students, is the immediate concern in most education adequacy litigations. Ensuring all students adequate funding involves two major dimensions: determining how much money is needed and

\[\text{id at 484. This position was affirmed by the Court of Appeals, CFE v. State of New York, 801 N.E. 2d 326, (NY, 2003). A similar result was reached by the Alaska trial court which held “this court does not find it necessary or appropriate to adopt the State’s existing content and performance standards as a constitutional definition of educational adequacy… it is sufficient that the State has demonstrated that it adopted a comprehensive set of content and performance standards through an extensive collaborative process, and the resultant standards define an education that meets or exceeds the “constitutional floor” of an adequate education. Moore v. State of Alaska, Case No. 3AN-04-0756 (Sup. Ct, Alaska, 3rd Jud’l Distr, June 21, 2007)), at p.175.}\]

143 New Hampshire has been a rare notable exception to this pattern. The New Hampshire legislature still had not complied with the court’s direction to develop a set of adequacy standards almost a decade after the court’s initial directive. Londonderry School District v. State, 907 A.2d 988, 989 (N.H. 2006).
revising the state’s education finance system to ensure that this amount is actually made available to all school districts.

The best way to determine the amount of funding school districts need is to undertake a detailed analysis of the cost of the resources that are required to actually provide all students a meaningful opportunity to meet the state’s academic and performance standards. Courts have, in fact, specifically ordered such “cost studies” in Wyoming, Ohio, New York and a number of other states, and these precedents have been the catalysts for a plethora of other cost studies. Utilizing a variety of professional methodologies, such studies have been carried out, often without explicit courts orders, in more than 39 states.144 Although there is on-going dispute about the relative advantages and disadvantages of each of the various methodologies, the focus of all of these studies is on matching funding to student needs, and the transparency of these procedures is a vast improvement over past practices under which funding allocations generally were determined through back room political deals unrelated to actual student need.145

The courts’ approach to cost studies generally has been remarkably consistent with the Castenda framework. None of the courts that have ordered these studies have specified a methodology or constrained the policy prerogatives of the political branches in conducting the studies. For example, the Wyoming Supreme Court’s order merely directed the State to determine the cost of the “basket of goods and services” needed to provide all students with a “proper”

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144 For an overview of these methodologies, and of the courts’ role in ensuring the integrity of the studies, see Michael A. Rebell, “Professional Rigor, Public Engagement and Judicial Review: A Proposal for Enhancing the Validity of Education Adequacy Studies,” 109 TCHRS C. REC. 1303 ( 2007).

145 Id at
education,” leaving it to the state to define the “basket” and the methods for determining its costs. Similarly, the New York Court of Appeals succinctly directed the state to “ascertain the actual cost of providing a sound basic education in New York City.” Most of the legislatures have also generally responded appropriately to these directives. For example, in Wyoming, the legislature promptly developed a work plan to respond to the court order and delegated responsibilities to six joint interim committees to follow through on the plan. After the legislature established a basket of educational goods and services based on a common core of knowledge and skills, and student performance standards related to them, it hired a consultant to undertake a detailed analysis of the cost of an adequate education based on this basket.

Where allegations of bias or manipulation have arisen, the courts have held hearings that have played a critical role in ensuring the professional integrity of the studies. For example, in Ohio, the Court unearthed “evidence of a conscious consideration by the State [to manipulate the consultant’s] methodology with an intent to lower the base cost of calculation.” In Texas the Court similarly found that legislative leaders had directed their consultant to remove discussion of higher performance targets from their report because “the higher costs associated with the higher

\[146\] Campbell v. State of Wyoming, 801 N.E. 2d at .

\[147\] CFE II, 801 N.E. 2d at .


\[150\] DeRolph v. State 712 N.E. 2d 125, 194 (Ohio Court of Common Pleas 1999), aff’d, 728 N.E. 2d 993 (Ohio, 2000).
performance levels would be the focus of attention.” The courts’ ability to comprehend the complex educational finance issues raised by these studies confirms our previous findings regarding the effectiveness of judicial fact-finding procedures. Judicial scrutiny has not only ensured the integrity of the studies directly reviewed by the courts, but it has provided guidance to the development of professional practice in the field as a whole, as the “battles of the experts” in the courtroom has been the focus of the professional dialogue on the state of practice in the emerging field.

Over all, the actual experiences to date with cost studies indicates that the courts have played an important role in initiating and ensuring the integrity of the adequacy cost studies, without infringing upon legislative and executive policy prerogatives. In fact, by ensuring the integrity of these studies, judicial oversight enhances the value of the legislature’s policy decisions. Since cost studies have been shown to be critical mechanisms for establishing the amount of funding actually needed to provide all students a meaningful educational opportunity, courts should not shrink from encouraging legislatures to undertake these studies and resolving serious controversies that may emerge regarding the validity of the studies or their use.

Some courts, however, have summarily determined that reviewing cost studies is not an appropriate role for the courts without considering the importance of judicial scrutiny to the integrity of process for ensuring adequate funding to meet constitutional requirements. In New York, for example, a panel of Special Masters appointed by the trial court (two of whom were, in fact, former appellate judges) provided the Court of Appeals with a thorough record regarding allegations of improper weightings and manipulations of a “cost effectiveness screen” in the state’s

151 West Orange Cove v. Neeley. No. GV-100528 (Travis County District Court 2004), 57–58

152 Rebell, Professional Rigor, supra, n at .
cost study. Instead of reviewing that record and making a final determination on these issues (and thereby providing important guidance to the state for future cost studies), the Court summarily rejected the Referees’ report and Plaintiffs’ allegations. The Court also rejected the Special Masters’ saavy recommendation that because economic conditions and student needs constantly change, the court should require the state to ensure that appropriate procedures are in place for undertaking new costing-out analyses on a regular basis in the future.

In addition to ensuring that adequate levels of funding are made available, courts also have a constitutional responsibility to verify that the state has in place funding formulas and other mechanisms to ensure that the requisite amount of funding is actually made available to all local school districts. Here again, consistent with the Castenada framework, most courts have made clear that the policy determinations that enter into the revision of a complex state education finance system should be undertaken by the political branches. They generally assume that their main

\[153\] CFE III, 861 N.E. 3d at 57. Chief Judge Kaye, dissenting, stated that it was the Court’s obligation to scrutinize the allegations of improprieties in the use of the study; she proceeded to do so and concluded that the weightings used by the state and their application of a “cost effectiveness filter” were improper. Id at 67. Judge Rosenblatt, concurring, hoped that the legislature would “avail themselves of the valuable work performed by the distinguished panel of referees,” and indicated that he did not believe that the minimum amount approved by the majority was “necessarily the proper budgetary amount to provide New York City schools, and that he hoped that Governor-elect Spitzer would “continue in a direction above the minimum.” Id at 33. Since the Court’s order called for a determination of the “actual cost” of providing a sound basic education, it is not clear that the traditional “arbitrary or irrational” standard was appropriate in this context.

\[154\] Report and Recommendations of the Judicial Referees.” CFE v. State of New York. Index 111070/93 (Supreme Court of New York County, 2004):39. (“We recommend, on a going-forward basis, the simultaneous use of complementary costing-out studies, on a cycle to be repeated every four years.) See, also, e.g., Campbell County School District v. State. 19 P.3d 518, 549 (Wyoming Supreme Court 2001) (“the model and statute must be adjusted for inflation/deflation every two years at a minimum;”)


responsibility is “to get the process moving,” by declaring the old system unconstitutional and
deferring to the legislature, usually with a deadline date, to determine specifically how to revise the
state’s education finance system to meet constitutional requirements. For example, the New York
Court of Appeals, directed the state to “Reform[] the current system of financing school
funding…. by ensuring that every school in New York City would have the resources necessary
for providing the opportunity for a sound basic education” but offered no specific details about the
content of those reforms.

Where the courts have determined after a reasonable period of time that the legislature has
failed to respond or has adopted reforms that do not meet constitutional requirements, the courts
have tended to propose concrete guidelines or suggestions to focus attention on the need for
specific action. Still, they tend to leave the definitive policy-making responsibilities with the other
branches. For example, in *Hull v. Albrecht*, after finding that the State had failed to meet
constitutional strictures regarding uniformity in the funding of capital facilities, the Arizona
Supreme Court set forth examples of several ways that the legislature could meet the constitutional
requirements, including equalization of local property taxes, instituting a statewide tax, or

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155 Brown, supra, n. , 35 Boston College L. rev at  at 566. See also, Colin S. Diver, *The
Judge as Political Powerbroker: Superintending Structural Change in Public
Institutions*, 65 VA. L. REV. 43, 92 (1979) (the courts' role “is to stir the governmental
entities to action to make sure that issues are addressed and choices made, not to make
those choices itself.”)

156 *CFE II, supra*, 86 N. E.2d at . {Add other examples}

157 960 P. 2d 634 ( AZ 1998)
redrawing of district lines to minimize disparities in property values among the districts. The Court made clear, however, that “Which approach to take, of course, is up to the legislature.”

Although the courts almost uniformly review the legislatures’ initial compliance efforts, they often terminate jurisdiction before a sufficient period of time has passed to assess the actual implementation of the new statutory scheme. In some states, this has led to the filing of new cases and new rounds of litigation to review major revisions that the legislature has adopted which plaintiffs claim will undermine the equity and adequacy of the initial reforms. Continuation of judicial oversight through a reasonable implementation period would allow for prompt and orderly review of such allegations and in many cases is also likely to induce more sustained compliance and forestall the need for the court to actually intervene.

3. **Effective Program Implementation and Accountability Systems**

Even if challenging standards are developed and adequate funding is made available, effective appropriate educational programs need to be developed to implement the constitutional standards and mechanisms must be in place to ensure that these programs are adequately funded and that this money is spent well. Especially because schools predominantly attended by low-income and minority students have been under-funded for decades, it is important that new funding that results from these litigations is properly used to overcome past deficiencies and build up the

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158 Id at 1146. The legislature responded by enacting a complex Students FIRST (Fair and Immediate Resources for Students Today) Act, which the courts ultimately upheld so long as it ensured through state funding that all school districts would be able to comply with the minimum adequacy standards for capital facilities standards that the Act had established. Roosevelt Elem. Sch. Dist. No. 66 v. State, 74 P.3d 258 (AZ Ct, App. 2003), mot. for rev. denied, 2004 Ariz. LEXIS 8 (2004).

159 See discussion below at pp.
capacity of these schools to meet their students’ extensive educational needs. A court that fails to consider these issues during the remedial process “abdicates its responsibilities.”  

Consistent with the Castenada framework, the policy decisions about educational programming and spending oversight should be the domain of the legislative and executive branches, but it is the courts’ responsibility to make sure that these decisions are actually made and properly implemented. Few courts have, however, effectively undertaken these accountability responsibilities. Most have issued orders requiring adequate funding and then implicitly assumed -- but taken no steps to ensure --- that once adequate funding was in place, the legislature and/or state education department would make sure that local school districts would develop and implement appropriate programs. 


161 See, e.g., Lake View 2004 Ark. LEXIS 425, 40 June 18, 2004 ( “it is not this court's constitutional role to monitor the General Assembly on an ongoing basis over an extended period of time until the educational programs have all been completely implemented or until the dictates of Lake View III have been totally realized. Accordingly, we release jurisdiction of this case and the mandate will issue.”); Rose v. CBE, supra, n at 214-15 ( “We reverse the decision of the trial court with respect to the requirement that the General Assembly, or any of the defendants in the trial court, further report to the trial court.”); McDuffy v. Secretary, 615 N.E. 2d 516, 555-56 ( MA, 1993) ( “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.”);
Once a legislature has adopted an educational program to implement the standards, the courts readily accept their policy preferences.\textsuperscript{162} The few compliance problems involving educational programming that have been scrutinized by the courts have involved implementation of the programs, and not their educational content. The main issue usually is whether the local school districts are actually receiving sufficient funding to implement the programs that will meet students’ needs. A striking example in this regard occurred in New Hampshire where the Court found that the statutory scheme permits a school district to provide less than an adequate education as measured by the state’s minimum school approval standards “when the local tax base cannot supply sufficient funds to meet the standards.” \textsuperscript{163}

A rare example of active judicial oversight of educational programming issues was the New Jersey Supreme Court’s forceful action to compel compliance with its decision in \textit{Abbott v. Burke}.\textsuperscript{164} In that case, the Court had ordered the State to ensure not only that funding was “substantially equal” between poorer urban districts and successful districts but also that additional funds be provided for supplemental educational programs that would meet the special needs of students in the poorer urban districts. Seven years later, having determined that, despite further

\textsuperscript{162} In Arkansas, for example, the Court noted with approval that the legislature had enacted an Act which “requires the State Board of Education to develop a plan for reviewing and revising the curriculum framework in core-academic areas, including reading, writing, mathematics, science, history, geography, and civics. Act 1116 requires the elimination of low-level, general-education tracks…The Department of Education adopted rules to implement the Act 1467 standards, including a core curriculum for graduation, testing of students at each grade level, gifted-and-talented programs, and the ability for students to transfer from an academically-distressed school.” Lake View, supra, 189 S.W. 3rd at 6-7.

\textsuperscript{163} Claremont School District v. Governor, 794 A. 2d 744, 754. (N.H.2002)

\textsuperscript{164} 575 A. 2d 359 (N.J.1990).
admonitions from the court,\textsuperscript{165} the Department of Education and the Commissioner had failed to develop and implement the special supplemental programs and services that the children in these districts require, the New Jersey Supreme Court took a proactive stance. It ordered the Commissioner to submit programmatic proposals in a wide variety of areas for review by a Special Master and the trial court. Following the review, which largely affirmed the validity of the Commissioner’s proposals, and consistent with the \textit{Castenada} procedures, the Court authorized and directed him, among other things to “implement whole-school reform; implement full-day kindergarten and a half-day pre-school program for three- and four-year olds as expeditiously as possible….\textsuperscript{166}

Once adequate funding has been put into place, few courts scrutinize or monitor the accountability systems that the states adopt to oversee the spending of education funds. Even some of the few courts that have included accountability concepts in their orders have declined to enforce them. For example, the New York Court of Appeals included in its \textit{CFE II} order a requirement that “the new scheme should ensure a system of accountability to measure whether the reforms actually provide the opportunity for a sound basic education.”\textsuperscript{167} Both the plaintiffs and the defendant governor asked the courts to enforce this provision by insisting that the New York City Department of Education, which was slated to receive billions of dollars of court-ordered funds, develop a comprehensive plan and annual reports that would detail how these funds would be spent, and what results had been achieved. Although a panel of referees and the lower court had


\textsuperscript{166} Abbott v. Burke, 710 A.2d 450, 473 (N.J. 1998). Continuing compliance problems have, however, led the New Jersey Supreme Court to impose additional specific program requirements such as minimum qualifications of pre-school staff. See, Goertz and Weiss, supra n \textsuperscript{16} at 8

\textsuperscript{167} \textit{CFE II, supra}, 801 N.E. 2d at \textsuperscript{8}. 
endorsed this request,\textsuperscript{168} it was ultimately denied by the Court of Appeals based on an abstract separation of powers concern that the courts’ involvement in this case must be terminated as soon as possible.\textsuperscript{169}

Ironically, some opponents of judicial involvement in education adequacy cases rebuke the courts for mandating sizeable increases in education funding without taking any steps to ensure that the money is actually spent effectively,\textsuperscript{170} while at the same time others argue that the courts are inappropriately supervising school finance systems for many years and should terminate their involvement in these litigations as soon as possible.\textsuperscript{171} The fact is that courts have a unique capacity for ensuring that effective accountability measures are put into effect, not by micromanaging the day-to-day operations of a school system but by making sure that legislatures, state education departments, and school districts do their jobs well. The increased levels of information made available through the standards-based reforms adopted by most states provide

\textsuperscript{168} Report and Recommendations of the Judicial Referees, supra n at 47–48, (“The parties have agreed on several enhancements to the current system of accountability that we believe are appropriate”).

\textsuperscript{169} \textit{CFE III}, 861 N.E.2d at 58 (“[I]n fashioning specific remedies for constitutional violations, we must avoid intrusion on the primary domain of another branch of government.”). Subsequently, the Legislature did adopt a “Contract for Excellence” law that requires New York City and other school districts receiving large funding increases to meet certain programming and accountability requirements. See N.Y. Educ Law § . These Contract for Excellence requirements cover only a portion of the CFE funds, and effectiveness of these provisions, and the degree to which they will be enforced, are open questions at the time of this writing.

\textsuperscript{170} See, e.g., Koret Task Force on K-12 Education, in Courting Failure, supra note, at 340 (accusing courts of “almost always turn[ing] to calls for increased spending on schools” without providing strong accountability systems); Federick M. Hess, “Adequacy Judgments and School Reform,” in School Money Trials, supra n at 159 (arguing that court interventions lead to ineffective “accommodative reforms” instead of needed “disruptive reforms.”)

\textsuperscript{171} See, e.g., Alfred A. Lindseth, supra n. at 34; (criticizing the fact that courts “act as superlegislatures on matters affecting k-12 education…. For many years and even decades…”) and Sandler & Schoenbrod, supra note , at 218-19 ( ).
judges readily available tools for undertaking these responsibilities. For that reason, the AERO model recommends that courts regularly utilize their “staying power” and maintain their jurisdiction long enough to ensure that effective programming and accountability systems have been put into place.

4. Supportive Political Culture

Even after a court has affirmed that the state has adopted and implemented proper funding, education programming and accountability systems, constitutional compliance will not be complete unless there can be a reasonable expectation these reforms will be maintained on a continuing basis. Currently, in many cases, even when defendants have complied with a court order to reform the state funding system, an “inequitable equilibrium” resulting from the distribution of political power in the state under which suburban majorities tend to dominate the legislature\(^\text{172}\) will in time cause the reforms to unravel.

According to Jeffrey Metzler, who coined this term,

\[\text{[W]hile an outside event, such as an adverse court ruling, may temporarily upset this equilibrium, in many cases the system will gradually return to its equilibrium point, or something close to it. Thus, while a state may change its basic approach to education funding in response to outside pressure, the}\]

\(^{172}\) See, e.g., Marilyn Gittell, ed. Strategies for School Equity: Creating Productive Schools in a Just Society (1998); Reed, supra, at 205–212. (analyzing the pressures on legislators from interest groups and voter sentiments, and the economic and racial motives that drive voters’ views.); Aaron Jay Saiger, “The Last Wave: The Rise of the Contingent School District,” 84 N.C.L. Rev 857, 892 (2006) (Legislatures are structurally dominated by suburban interests that fundamentally oppose both redirecting funds from richer to poorer districts and capping the ability of the rich to finance their own schools.”); Michael Mintrom, “Why Efforts to Equalize School Funding Have Failed: Towards a Positive Theory, 46 Poli Research. Quarterly 847-62 9 1993); (arguing that equalization efforts will generally be opposed or undermined by various local actors.)
legislature often manipulates that approach in order to restore the previous equilibrium.\textsuperscript{173}

Such returns to inequitable financing systems have occurred in a number of states like Washington and Kansas.\textsuperscript{174} A related problem, which has occurred in states like Montana, Massachusetts and Kentucky is that state funding which initially was at a reasonable adequacy level becomes reduced through inflation or appropriation reductions to levels which in time become inadequate.\textsuperscript{175}

To achieve lasting reforms, Metzler argues that “courts and reformers must dig deeper, and they must focus on changing the political dynamics that perpetuate the inequitable equilibrium of school finance.”\textsuperscript{176} In other words, to achieve permanent constitutional compliance in a fiscal equity or an education adequacy case, it is necessary to foster a supportive political culture. Such a culture has, in fact, has largely emerged in Kentucky. The Rose decision and the dramatic KERA reforms have sparked widespread agreement throughout the state that dramatic improvements in the education system are


\textsuperscript{174} In Washington, although the legislature responded to the state Supreme Court’s order with a series of thorough-going equalization reforms, by the 1990s, inequities in the state’s treatment of Seattle, plaintiff district, were greater than ever. See, Diane W. Cipollone, “Defining a ‘Basic Education’ : Equity and Adequacy in the State of Washington (Campaign for Fiscal Equity, 1998); see also, League of Education Voters, A Brief History of School Finance in Washington, (2005), (gap between rich and poor is “almost back to where we started.’ The situation in Kansas is discussed in Molly Hunter, Education Adequacy Litigations in Kansas: Are the Courts Pushing Sisyphus’ Rock Up the Hill and the Legislature Rolling It Down?, Paper prepared for the symposium on “Equal Education Opportunity: what Now?,” Teachers College, Columbia University, November 12-13, 2007.

\textsuperscript{175} See Weston and Sexton, supra n. at p. 7. [Add other cites].

\textsuperscript{176} Metzler, supra, n at 564.
Ensuring Successful Remedies

needed if Kentucky is to be in a position to compete in the national economy. As a result, the
funding, educational programming and accountability changes that stemmed from the
Supreme Court’s 1989 order in the Rose case have had a strong, broad-based constituency.
That supportive political culture is still evident today. As Susan Perkins Weston and Robert
Sexton note in their paper for this Symposium:

In the new emphasis on schools that are not on track for
2014…..it is worth noting that the leading voices of concern about
those weaknesses comes from a state Board of Education appointed
entirely by our Republican governor, based on their concern to
ensure success as defined in regulations adopted almost entirely by
previous Boards appointed by Democrats.177

In many other states, of course, there has been active resistance to court orders in
education adequacy cases.178 Is it possible to develop a supportive political culture in these
situations? Although changing the dynamics of a state’s political culture is obviously a
formidable task, experiences with school desegregation and educational adequacy cases indicate
that significant transformations of political attitudes regarding education equity are achievable.
Furthermore, adoption of the AERO model can substantially aid such a transformative process.
During the period of massive resistance to school desegregation in the South, attitudes of the
key political leaders dramatically affected the level of confrontation that occurred. For example,
President Eisenhower’s lack of enthusiasm for the Supreme Court’s decision in Brown clearly
encouraged the initial oppositional posture of white leaders and citizens throughout the

177 Weston and Sexton, supra n at 16. Even states like Kentucky and
Massachusetts, which have developed supportive political cultures may need occasional
principled interventions from the courts to sustain adequate funding levels. See
discussion at pp above.

178 See discussion at pp , above.
South. On the other hand, in school districts where local leaders were willing to take a strong public stance in support of the court decrees, desegregation was expedited and successfully achieved without substantial conflict or confrontation. [Add other examples]

Strong, ongoing citizen advocacy can substantially aid this process. In Kentucky, for over two decades, the Prichard Committee, a blue ribbon citizens’ education advocacy group, and other civic and business groups have supported “ongoing public dialogue about the relationship between a richer civic life, a more vibrant economy and proper investment in learning for all children.” As Weston and Sexton have noted,

Sustainable success means structures to counterbalance those [pressures for inequities]. Funding on a basis that applies to all students….makes it much harder to advocate systems that only work for a few. Statewide assessment and goals keeps the focus on results for all children. Active public engagement maintains a vigorous public discourse on the importance of deep investment in education. The same engagement demonstrates that strong political forces are ready to push for that investment to continue.

Advocacy of this type is critical for countering the tendency toward “inequitable equilibrium.”

The public engagement campaign waged by the Campaign for Fiscal Equity in New York substantiates this insight. At the time the suit was filed on behalf of public school students in New York City, there was great apprehension that any remedial order ultimately issued by the Court would encounter massive resistance from upstate interests and

179 Michael J. Klarman, From Jim Crow to Civil Rights 415 (2004).
180 See, Howard J. Kalodner and James Fishman, Limits of Justice (1978).
181 Weston and Sexton, supra, n at 20.
182 Id at 21. See also, Michael W. McCann, Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization (1994) ( litigation followed by broad-based advocacy are necessary for effective social reform); Leveraging the Law: Using the Courts to Achieve Social Change (David a. Schultz, ed, 1998) (same).
politicians in the state legislature. During the years that the case was being tried and appealed, CFE reached out to school boards, unions, business and civic groups throughout the state and brought together a statewide coalition for reform. The day after the Court’s major decision in favor of New York City school children was announced, a spokesman for a group representing 275 upstate small city and rural districts announced at a press conference in Albany “that they firmly supported the CFE decision because of their conviction that it would benefit all the children in the state.”183 The major newspaper of New York State’s most affluent suburban county also strongly supported the CFE decision, having been convinced, through the extensive public dialogue process, that because quality education in the affluent districts would not be threatened, they had a moral obligation to support educational improvement in inner city and rural areas.184 After the state’s highest court issued its final decision, legislation was rapidly passed by the legislature which provided a higher level of funding for New York City than the Court had ordered -- and substantial additional funding for needy upstate districts.

The AERO approach can help to promote positive leadership and fruitful public dialogues on the importance of equity in education. One of the court’s primary roles in an institutional reform case of this type is to give meaning to “the public values of the Constitution.”185 By keeping a focus on this principled perspective as it monitors development and implementation of the funding, education reform and accountability


184 Id at 312-313.

systems, the Court can enhance understanding and foster public support for equity in education. Realization of an effective colloquy with the other branches can also reduce confrontational tensions, establish greater understanding among political leaders and groups representing varying interests and make the quest for equity “seem like the natural way things should be done.”

There is substantial public support for equal educational opportunity and for fairness in funding. People also are becoming sensitized to the enormous detrimental implications of the growing gap between the “haves and have-nots” in our society. Moreover, if we are to fully

186 Weston and Sexton, supra n at 21.

187 State and national polls have revealed a consistent willingness of overwhelming majorities of the American public (59% to 75%) to pay higher taxes for education, especially if there is a reasonable expectation that the money will be spent well. See, e.g., Majority of Voters Indicate They Will Vote for Candidates Who Make Education a Top Priority; Report to Reveal Mixed Support for No Child Left Behind, EDUC. WK., Apr. 1, 2004, http://www.publiceducation.org/doc/2004_Poll_Press_Release.doc (interpreting the results from Public Education Network/Education Week Poll 2004 and stating that “[a] majority of voters (59 percent) say they are willing to pay higher taxes to improve public education”); Lowell C. Rose & Alec M. Gallup, 38th Annual Phi Delta Kappa/Gallup Poll of the Public’s Attitudes Toward the Public Schools, 88 Phi Delta Kappan 41, 47 (2006), available at http://www.pdkintl.org/kappan/k0609pol.htm (finding that 66% of Americans responded affirmatively to the question, “Would you be willing to pay more taxes for funding preschool programs for children from low-income or poverty-level households?”); Americans Willing To Pay for Improving Schools, NPR Online (1999), http://www.npr.org/programs/specials/poll/education/education.front.html (interpreting the data from the 1999 National Public Radio poll and stating that “[t]hree out of four Americans say they would be willing to have their taxes raised by at least $200 a year to pay for specific measures to improve community public schools.”)

188 The growing gap between haves and have-nots in America is illustrated by the fact that from 1973 to 2000, the average real income of the bottom 90% of American taxpayers declined by 7%, while the income of the top 1% rose by 148%. Heather Boushey & Christian E. Weller, What the Numbers Tell Us, in Inequality Matters: The growing Economic Divide in America and its Poisonous Consequences 27, 31.(James Lardner & David A. Smith eds., 2005). Another ominous reflection of these trends is the
realize Brown’s vision for equal educational opportunity, and if we are to prepare our students to compete effectively in the global marketplace and to function productively as civic participants in a democratic society, ultimately, despite the U.S. Supreme Court’s recent ruling in Parents Involved v. Seattle, serious pursuit of racial integration of the schools will have to again become national and state policy.\textsuperscript{189}

Although courts on their own cannot initiate and maintain the broad public dialogue that is needed to deal with these issues, their articulation of principles and the particular procedures they adopt in these cases can contribute to the process and inspire legislatures and executive agencies to seek analogous ways to promote public engagement in their sectors. During the desegregations era, the federal courts were very aware of the need to communicate to the broader community and they often sought their active input, sometimes through creative mechanisms such as including various organizations of citizens as active participants in helping to develop and implement the decree. As the judge in the Lansing, Michigan case put it:

\begin{quote}
The court recognizes that the issues involved are of particular interest and vital significance to all Lansing area citizens. Therefore, this opinion is aimed at communicating the factual and legal bases for the court’s decision, not only to the parties and reviewing courts, but also to the community. For it is the hope of the court that a sincere civic involvement in implementing the terms of this decision will help
\end{quote}

\textsuperscript{189} Decades of experience have now proved that all children, minority and majority, are better prepared for work and civic life when they have experienced integrated education. See generally Janet Ward Schofield, Review of Research on School Desegregation’s Impact on Elementary and Secondary School Students, in Handbook of Research on Multicultural Education 597 (James A. Banks ed., 2001) (reviewing a wide array of research on the impact of school desegregation); Amy Stuart Wells & Robert L. Crain, Perpetuation Theory and the Long-Term Effects of School Desegregation, 64 REV. EDUC. RES. 531 (1994) (drawing together twenty-one studies on the long-term effects of school desegregation).
improve the school system and strengthen the community, for citizens of all races, and their children.\(^\text{190}\)

State courts in education adequacy litigations should also encourage public participation in remedial hearings that they hold to the maximum extent possible. Existing rules regarding involvement of *amici curiae* should be liberally applied and new procedures developed that will allow the court both to maximize the information available to them on the remedial issues being considered and, at the same time, to involve the interested public in the equity issues that are under consideration.

A noteworthy example in this regard is the procedure adopted by the Supreme Court of New Hampshire in the *Claremont* litigation. It issued an invitation to “the public, legislators, members of the bar and anyone who wants to comment on the plan to do so.” These comments needed to be in writing, but did not have to be in a technical legal form.\(^\text{191}\) Promoting broad public engagement in this way also mitigates the high cost of access to the judicial process by facilitating the courts’ ability to obtain maximum information without requiring the plaintiffs to bear the full costs of an extended litigation.\(^\text{192}\) Such open access can be especially important in cases where

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\(^{190}\) Quoted in Kalodner and Fishman, supra n at 7. See also, Michael A. Rebell and Robert L. Hughes, “Efficacy and Engagement: The Remedies Problem Posed by *Sheff v. O’Neill* ---- and a Proposed Solution,” 29 Conn L.Rev. 1115, 1154-1156 (discussing extensive use of bi-racial citizens committees in desegregation cases to help develop viable desegregation plans and to foster public communication and support for desegregation.)

\(^{191}\) “High Court Open to Public’s ABC Comments,” Union Leader, Concord, N. Hampshire, May 22, 1998.

\(^{192}\) Another significant example of effective public engagement occurred in the post-trial remedial phase of the *Rose* case in Kentucky. There, the trial court drew upon extensive expert testimony and a post-trial amicus brief filed by the Prichard Committee, which had brought to the trial judge’s attention the significant national education reform initiatives, including the emphasis on educational standards. After issuing his liability decision, the trial court judge stayed his decision on the appropriate remedy for six months. During
school districts or teachers unions are the plaintiffs in an adequacy litigation and the parent and student perspective on issues like the need for monitoring and accountability may not otherwise be satisfactorily considered.

Significant institutional changes can occur and major power dynamics can be shifted if new “modes of discourse” are found that analyze problems in new ways and afford the opportunity for important attitudinal changes. If at the beginning of the remedial process, the court outlines a set of clear expectations and fair procedures for resolving disputes, and shows resolve in sticking with these procedures, confrontational resistance to constitutional mandates will diminish or dissipate over time in many cases. A clear message that “resistance is futile” can also help change the political dynamic in difficult situations, as evidenced by the outcome of the dramatic confrontation in Kansas in 2005. Furthermore, judicial focus on the principled goals of constitutional compliance can raise the level of public debate and induce leaders of the other branches to take seriously their own constitutional responsibilities to promote rational discourse and civic dialogue on how to best attain the stated national goals of equal educational opportunity and high academic achievement for all children.

5. Improved Student Performance

Few of the adequacy cases actually review student performance, since generally courts terminate their jurisdiction long before the funding and accountability measures that are needed to

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that time, a select committee he had appointed held five hearings around the state – one of which was attended by the governor and all of which were covered extensively by the press— and then enumerated five student outcomes that it believed would constitute an adequate education. The select committee’s recommendations were substantially adopted by the trial court, and their key elements were also included in the final decision of the Supreme Court. See Molly A. Hunter, All Eyes Forward: Public Engagement and Educational Reform in Kentucky, 28 J. L. & Educ. 485 (1999).

193 See, Hunter, supra n at .
ensure constitutional compliance have fully taken effect. Recently, however, several “second
generation cases” have arisen in which plaintiffs have asked courts to issue additional remedial
orders in long standing litigations in order to ensure full constitutional compliance. The
Massachusetts case of Hancock v. Commissioner of Education\(^\text{194}\) is particularly noteworthy in this
regard since all parties there agreed that the state had, over a seven-year period, phased in a
foundation system, implemented a far-reaching Education Reform Act that increased school
spending by over $6.5 billion, and substantially improved the educational performance of most
students in the state.\(^\text{195}\) Plaintiffs claimed, nevertheless, that more needed to be done because many
low income and minority students in a number of districts were still not being adequately served.

The evidence in the case focused on four “focus districts” that were chosen to represent the
16 low income and minority districts that had brought the suit. A majority of the justices accepted
the trial judge’s findings that although statewide results were impressive, “the goals of education
reform …. [c]learly… have not… been fully achieved.”\(^\text{196}\) Specifically,

In all four focus districts, public school students who required special education, and
students who had limited English proficiency, came from low-income families, or
were members of racial or ethnic minority groups, performed at substantially lower
levels on the MCAS examinations than did their peers in the focus districts. The pass
rates for these targeted populations on the 2003 grade ten MCAS mathematics
examination were twenty-three per cent in Brockton, twenty-five per cent in Lowell,
fifteen per cent in Springfield, and twelve per cent in Winchendon, compared with a
Statewide average of fifty per cent.\(^\text{197}\)

\(^{194}\) 822 N.E. 2d 1134 (MA, 2005)

\(^{195}\) Id at 1147.

\(^{196}\) Hancock, 822 N.E. 2d at 1140.

\(^{197}\) Id at 1148.
Despite the fact that constitutional compliance had not yet been achieved for these students, the high court terminated its jurisdiction and left unfettered responsibility to the other branches. The Chief Justice explained that

> The presumption exists that the Commonwealth will honor its obligations... I am confident that the Commonwealth's commitment to educating its children remains strong, and that the Governor and the Legislature will continue to work expeditiously “to provide a high quality public education to every child.”

Justice Greaney disagreed and dissented. He opined that since the state had failed to provide all of its students “a reasonable opportunity to acquire an adequate education,” the Court needed to continue its oversight. His view was that “The problem is of such magnitude that the collective involvement of all three branches of government is needed….In view of the enormity of the task, to remove the court from the process entirely is a great misfortune and mistake.”

198 Id at 1158. (Marshall, C.J., concurring with plurality opinion).

199 Id at 1169.

200 Id at 1170. Developments since 2005 appear to have borne out Justice Greaney’s expectations. The results of the 2007 MCAS examinations show continuing dismal results for most minority students: while 39% of White students and 43% of Asian students scored ‘proficient’ or better on the 2007 administration of the science exam, these figures fall to 8% for African American students and 7% for Hispanic students. Also, while 52% of White 8th grade students and 65% of Asian 8th grade students achieved proficient or above on the 2007 MCAS math examination, less than 20% of both Hispanic students and Black students earned this distinction. In addition, on the Grade 10 MCAS ELA examination, at least 75% of both White and Asian students scored proficient or better while 42% of Hispanic students and 47% of Black students earned this distinction. Paul Reville, “The Massachusetts Case: A Personal Account,” Paper prepared for the Symposium on “Equal Educational Opportunity: What Now?” Teachers College, Columbia University, November 12-13, 2007
Justice Greaney’s statement is clearly correct. If, as the Court acknowledged in *Hancock*, constitutional compliance has not yet been achieved, the integrity of the constitutional process --- as well as the need to fortify a long lasting supportive political culture ---- requires the courts to ensure that constitutional mandates are respected, and comparative institutional analysis dictates that the principled approach and staying power of the court will be necessary to complete the task. One of the decisive functional advantages of courts is that they strive to complete tasks that they have undertaken. Aggrieved parties expect to be made whole and courts endeavor to do so to the best of their ability. Legislators and administrators, by way of contrast, tend to react to crises or policy priorities of the day; their attention shifts as events (and election results) unfold.

In the area of school desegregation, the U.S. Supreme Court has held that a court should terminate its jurisdiction only after the court has determined that the school board has “complied in good faith with the …..decree since it was entered, and [that] the vestiges of past discrimination had been eliminated to the extent practicable.” An analogous test should be applied in state court adequacy cases. A decree should not be terminated until there has been a determination that the state has “complied in good faith” with the court order and that the opportunity for an adequate education has been provided to all students “to the extent practicable.”

In *Hancock*, the majority of the Supreme Judicial Court implicitly determined that the state had complied in “good faith” with the prior *McDuffy* order because of the substantial increases in educational spending and the effective implementation of standards based reforms that had been accomplished over the previous decade. Before reaching this conclusion, however, the Court should have directly addressed the two issues that most concerned the lower court and the dissenters. The first was the fact that although a cost study had been undertaken in the 1990s, no

current analysis of the school districts’ actual needs had apparently been undertaken by the legislature. Second was the trial judge’s finding that the State Education Department lacked sufficient funding to carry out its statutory duties of evaluating and providing corrective measures to low-performing schools and districts. These issues raised serious questions about the long-term sustainability of the reforms.

The Massachusetts Supreme Judicial Court also did not determine whether the State had provided educational opportunities to the low income and minority students in the focus districts and elsewhere in the state “to the extent practicable.” Especially because the Court had acknowledged that test scores of these students were unacceptably low, the decree should not have been terminated without further direct consideration of the implications of the test score issue.

202 Justice Greaney also agreed with the trial judge that a cost study should be ordered because:

Actual spending levels strongly suggest, however, that the formula now relied on by the department to reflect the minimum amount each district needs to provide an adequate education to its students does not reflect the true cost of successful education in the Commonwealth, at least in the focus districts…. a realistic assessment of the costs of effectively implementing an educational plan in such districts reasonably could, and should, contemplate other factors that affect student performance such as poverty, teenage pregnancy, nutrition, family issues, drugs, violence, language deficiencies and the need for remedial teaching and tutoring. It also should include a cost assessment of measures necessary to improve the administrative ability of the districts successfully to implement the educational plan.

Id at 1169-1170.

203 She had found, among other things, that “in the three years since the department developed the school accountability system, it has been able to conduct school panel reviews in only twelve to fourteen schools each year, although the annual pool of schools demonstrating ‘low’ or ‘critically low’ performance is in the hundreds.” Hancock, supra n. at 1149.
Clearly, determining the relationship between levels of student progress and performance and the reasonableness of state efforts to provide opportunities for an adequate education is a complex undertaking. It requires consideration of such questions as whether compliance requires total elimination of racial achievement gaps or a substantial narrowing of that gap. Should constitutional compliance mean that performance in the focus districts must be on par with state averages? Or should continuing rates of progress toward parity over a substantial period of time suffice? In the alternative, should “substantial compliance” at some lower level of student progress and proficiency be accepted, provided sufficient inputs have been provided\textsuperscript{204} and effective accountability systems are in place; or, if sufficient instructional inputs have been provided and results still are not satisfactory, does the state have an obligation to provide “instruction plus”\textsuperscript{205} in order to accord all students a meaningful educational opportunity? Determining these issues requires a sensitive weighing of constitutional principles and factual evidence regarding actual rates of student progress and student proficiency after adequate funding and accountability systems have been put in place.\textsuperscript{206}

\textsuperscript{204} The Court agreed that the focus districts’ failings in student performance were tied to a lack of educational resources. \emph{Id} at 1149.

\textsuperscript{205} Paul Reville, “The Massachusetts Case: A Personal Account,” supra n.\textsuperscript{205}.

\textsuperscript{206} A Kentucky trial court recently dismissed plaintiffs’ suit for additional funding in order to maintain progress toward constitutional compliance in that state. Young v. Williams, Case No. 03-CI-00055 and 03-CI-01152 (Franklin Co. Cir Ct, Feb 13, 2007). The court held that it had the power and duty to determine whether current funding levels are adequate, and that objective outputs such as test scores should be the main determinant of adequacy. Nevertheless, the court dismissed the complaint after summarily determining, without a trial, and without any explanation, that although the state’s long-term proficiency goals have not yet been met, the current rate of progress of Kentucky students was sufficient. (The progress made by Kentucky’s students in the past 18 years is not self-evidently satisfactory. For example, in fourth grade math, the state was who were four points below the national average on the NAEP test in 1990 and was still four points below in 2007, although on eigth grade math its average score
If the courts do not answer these questions --- or induce the legislative and executive branches to enter into a dialogue with them to determine the answers ---- no one will. Legislatures tend to set unrealistic achievement targets for purposes of political motivation, and not as realistic determinations of how success should be defined. For example, Congress’s definition of compliance for purposes of the No Child Left Behind Act is 100% of the students in the United States being proficient in meeting challenging state standards by 2014, a goal which even the prime sponsors of the bill acknowledged to be unattainable. If the courts do not insist on pursuing this dialogue, this critical conversation will simply never take place.

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207 20 U.S.C. § 6301 et seq. (2001). The implications of Congress’ adoption of an impossible goal as a legal mandate are discussed in detail in Rebell and Wolff, supra, n

208 Senator Edward M. Kennedy, one of the congressional architects of the law, recently acknowledged that “the idea of 100 percent proficiency is, in any legislation, not achievable” A. R. Paley, A. R., “No Child” target is called out of reach: Goal of 100% proficiency debated as Congress weighs renewal.” Washington Post, p. A1.(2007).

209 Experience with NCLB also indicates that the tests utilized by many states have not been validated in accordance with professional psychometric standards, and, as discussed above at pp , that many states test students knowledge only in reading and math or a limited number of areas that do not correspond to the full scope of knowledge and skills encompassed by constitutional requirements for an adequate education. See Rebell and Wolff, supra n at . Again, if the courts do not press
How long must a court retain jurisdiction to ensure that the legislative and executive branches had attempted to remedy constitutional deficiencies “in good faith” and have provided meaningful educational opportunities to all students “to the extent practicable”? Obviously, the answer depends on the complexity of the issues being dealt with, and the degree of co-operation or resistance that the court encounters in the particular state. In some states, the criteria for success may be satisfied relatively quickly, while in others, the necessary duration may require some form of oversight or procedures for quickly re-invoking jurisdiction for a much longer period of time. In Massachusetts, the court had already maintained nominal jurisdiction over the prior *McDuffy* case for 12 years at the time it decided *Hancock*, since it had authorized a single justice “to retain jurisdiction to determine whether, within a reasonable time, appropriate legislative action has been taken.”\(^{210}\) Consistent with the expectations of the AERO model, the single judge, for all of the years prior to the filing of the *Hancock* motion, had never been called upon to involve the court in any way in implementation of the prior order.\(^{211}\) Entry of a *Hancock* order that would have delineated the final actions the state needed to take probably would a probably have allowed for a prompt and fully successful termination of the litigation.

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\(^{210}\) *McDuffy*, supra, n at 556.

\(^{211}\) Arkansas provides further evidence that although judicial commitment to the AERO model is likely to require a lengthy period of judicial oversight, actual invocation of judicial authority is likely to be infrequent. *See*, discussion above at pp. Once the Arkansas Supreme Court demonstrated its resolve to ensure constitutional compliance by appointing the Masters, the legislature promptly enacted constitutionally acceptable legislation even before the Masters’ report was issued or the court had acted on it.
VI - CONCLUSION

Although more than two dozen state highest courts have held that large numbers of students are being denied their constitutional rights to a quality basic education, in many of these cases, the courts have terminated their jurisdiction before they had ensured that appropriate remedies were in place and that lasting constitutional compliance had been achieved. Because “for most practical purposes, remedies control the value of constitutional rights,”212 millions of students in these states continue to be denied the meaningful educational opportunities to which they are entitled.

Although judges must be sensitive to separation of powers precepts, the fact is that if the courts are not committed to completing the job of establishing and sustaining meaningful educational opportunities in education adequacy cases, the other branches are not likely to do so on their own. The Adequate Education Remedial Oversight model proposed in this paper essentially adopts and regularizes the “best practices” that many state courts have already put into practice and combines them with the insights of comparative institutional analysis to promote the degree of effective co-operation among the three branches of government that is necessary to provide to overcome achievement gaps and meet the nation’s oft-proclaimed commitment to provide the meaningful educational opportunities to all students.

The AERO model provides a mechanism through which courts can articulate expectations and monitor the policy formulations and program implementations of the legislative and executive branches in a manner which appropriately respects their powers and responsibilities. It does so by establishing clear expectations that in order to successfully comply with the constitutional mandate to provide all students a quality basic education, legislatures and executive agencies must 1)

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develop and implement challenging academic content and proficiency standards; 2) provide adequate funding to all schools, 3) put in place effective programs and accountability systems; 4) establish a supportive political culture for sustained compliance; and 5) demonstrate that student achievement has improved “to the extent practicable.”

Although, at times, issues in these cases can involve difficult “political thickets,” the clear expectations provided by the AERO model will provide helpful guidelines for legislatures, governors and state education departments that are initially disposed toward compliance, as well as a clear message that resistance will ultimately be futile for those that may initially be inclined to flout their constitutional obligations. In short, the AERO model provides a mechanism for courts to both promote constitutional compliance in these important cases and to minimize the number of “political thickets” they need to confront. Although some courts may be uneasy about the prospect of maintaining some level of judicial oversight for a sufficient time period to ensure that these requirements are met, ultimately judges must accept the fact that, as the U.S. Supreme Court held in analogous circumstances, “a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us.”

\[213\text{ Reynolds v. Sims, 377 U.S. 533, 5 (1964).} \]