HOW ADEQUACY LITIGATION FAILS TO FULFILL THE PROMISE OF *BROWN* [BUT HOW IT CAN GET US CLOSER][*]

David Hinojosa and Karolina Walters[**]

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TABLE OF CONTENTS

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* The opinions expressed in this Article reflect solely those of the authors and are not representative of Mr. Hinojosa's current employer, the Mexican American Legal Defense and Educational Fund (MALDEF).

** David Hinojosa is the Regional Counsel for MALDEF's Southwest Office in San Antonio, Texas. He has served as MALDEF's lead counsel for the "Edgewood ISD Plaintiffs" in the last two Texas school finance cases, the first statewide adequacy or educational opportunity challenge filed by fifty-one parents and at-risk children in New Mexico, Martinez v. State of New Mexico, and on behalf of Plaintiff–Intervenor at-risk students and parents in Colorado's first adequacy case, Lobato/Ortega v. Colorado. He also serves as MALDEF's lead counsel in a number of school desegregation, equal-educational-opportunity-language, and higher education-access cases. Karolina Walters is a former staff attorney for MALDEF's Southwest Office in San Antonio, Texas. During her tenure at MALDEF, she served as counsel to amici defending the University of Texas at Austin's holistic admissions policy against a Fourteenth Amendment Equal Protection challenge—Fisher v. University of Texas. She also worked on school desegregation and equal-educational-opportunity-language cases.

INTRODUCTION

A quality education is often seen as the potential equalizer in the pursuit of the "American Dream" between the "haves" and the "have-nots." There is nary a sane person who would say that they stand against equal educational opportunities for all school children. Indeed, all fifty states have constitutional articles specifically addressing the states' obligations to provide a public education.[1] First through school desegregation and then school finance litigation, advocates have pursued equal educational opportunities in the courts for well over a century. This Article explores this quest, charting the challenges of school desegregation and school finance litigation and offers three potential considerations for school finance litigators, and the courts, that may help bring us closer to realizing the dream of equal educational opportunities of *Brown v. Board*, while bearing in mind that a more comprehensive approach is necessary to fully reach the promise of *Brown* of integration and opportunity.

The Article begins with a discussion of the 100-year school desegregation march to the *Brown v. Board* historic decision, from the lesser-known *Roberts v. City of Boston* decision to *Mendez v. Westminster*. At the heart of these cases was the legal, social, and educational lesson that needed to be taught: segregating students on the basis of race in schoolhouses was not only "perhaps the most virulent form of this polity-threatening corruption,"[2] but was also detrimental to the learning of students and to our greater society by denying equal educational opportunities. Our highest Court waited until 1954 in *Brown v. Board*[3] to hold that the ill-conceived notion enunciated in *Plessy v. Ferguson* and other cases—that segregating people on the basis of race was acceptable so long as equal services and facilities were available—bore no protection under the Equal Protection Clause.[4] As former NAACP Legal Defense Fund attorney Jack Greenberg described the *Brown* decision, "'*Brown* led to the sit-

1. MOLLY A. HUNTER, REQUIRING STATES TO OFFER A QUALITY EDUCATION TO ALL STUDENTS 2 (2010), *available at* http://www.educationjustice.org/assets/files/pdf/Publications/By%20Topic/Litigation/Requiring%20States%20to%20Offer%20a%20Quality%20Education%20to%20All%20Students.pdf.

2. James S. Liebman, *Desegregating Politics: "All-Out" School Desegregation Explained*, 90 COLUM. L. REV. 1463, 1475 (1990).

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

4. Plessy v. Ferguson, 163 U.S. 537, 550-52 (1896), *overruled by Brown*, 347 U.S. 483; *see also infra* Section I.A (discussing other cases upholding separate-but-equal schools).

ins, the freedom marches . . . the Civil Rights Act of 1964. . . . If you look at *Brown* as . . . the icebreaker that broke up . . . that frozen sea, then you will see it was an unequivocal success.'"[5] *Brown* also

> reminded the nation that there are limits to majoritarianism that the courts are obliged to . . . enforce in . . . the spirit and letter of the United States Constitution . . . [and] contributed to an unprecedented expansion of the American economy, consumer and tax base, created a more informed citizenry, and strengthened substantive democracy.[6]

Indeed, the success of *Brown* cannot reasonably be questioned when considering that it struck down as unconstitutional hundreds of policies and practices aimed specifically at excluding African-American and, successively, other minority students from all-white schools.[7] Before, a public school could tell a student: You cannot enter these doors because you are black, brown, Native American, Asian, or some other race or ethnicity. Today, that simply cannot occur because of the *Brown* decision.

As the years passed, however, the courts often scaled back efforts to desegregate public schools. Indeed, many say the watering-down effect of the *Brown* decision began the very next year when the Supreme Court announced in *Brown II* that responsible actors need only address the illegal segregation "with all deliberate speed."[8] Fifty years following the *Brown* decision, America should have been celebrating the ruling.[9] Yet, while countless civil rights activists and various organizations and governmental entities held festivities to

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5. Ellis Cose, *A Dream Deferred*, WASH. POST (May 11, 2004, 4:43 PM) (alteration in original), http://www.washingtonpost.com/wp-dyn/articles/A18184-2004May11.html.

6. Lynn Huntley, *Foreword* to ON THE RIGHT SIDE OF HISTORY: LESSONS FROM *BROWN* 3, 3 (2004).

7. *See, e.g.*, Michael Heise, *Litigated Learning and the Limits of Law*, 57 VAND. L. REV. 2417, 2421 (2004) ("*Brown* rendered state-enforced 'whites only' public schools to little more than a painful relic of American history.").

8. Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294, 301 (1955); *see also, e.g.*, James E. Ryan, *The Supreme Court and Voluntary Integration*, 121 HARV. L. REV. 131, 132 (2007).

9. There are some who believe that, perhaps, the "Euro-centric" public school system has harmed African-American students and that integration may not be the solution to opportunity and achievement. *See, e.g.*, Danielle N. Boaz, *Equality Does Not Mean Conformity: Reevaluating the Use of Segregated Schools to Create a Culturally Appropriate Education for African American Children*, 7 CONN. PUB. INT. L.J. 1, 2-3 (2007).

honor the families, the advocates, and the decision, others reasonably questioned the lasting impact and relevance of *Brown*.[10]

Still, the importance of realizing equal educational opportunities for minority students remained with advocates and civil rights organizations. Saddled with de facto segregated schools, advocates turned their attention to federal and state courts to enforce constitutional rights to equitable educational opportunities between school districts. The movement eventually turned to addressing the adequacy of funding school districts at the state level.[11] Some researchers criticize the justiciability of such claims, suggesting that the courts should stay out of the fray and allow legislators, policy makers, and voters to decide how to fund schools.[12] At the same time, others suggest that adequacy cases are the only remaining type of education cases capable of rooting out inequalities in public education, and thus, fulfilling the promise of equal educational

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10. *See, e.g.*, Michael W. Combs & Gwendolyn M. Combs, *Revisiting* Brown v. Board of Education*: A Cultural, Historical-Legal, and Political Perspective*, 47 HOW. L.J. 627, 628 (2004) (discussing three different research camps on the influence of the Supreme Court's decision in *Brown*); Heise, *supra* note 7, at 2418; Jeannie Oakes & Martin Lipton, *"Schools That Shock the Conscience":* Williams v. California *and the Struggle for Education on Equal Terms Fifty Years After* Brown, 15 BERKELEY LA RAZA L.J. 25, 27 (2004) ("[A]lthough fifty years removed, *Williams v. California* provides sobering evidence that, while much has changed since *Brown*, the struggle for education on equal terms remains much the same.").

11. This Article does not discuss the merits of common jurisdictional defenses argued by many state defendants, such as the lack of justiciable equity and adequacy claims. In the authors' opinions, such last-ditch efforts by states are mounted only when their state legislatures or educational agencies are caught in a predicament in which they fail to fulfill their constitutional duties and merely ask the courts to withdraw themselves from judging whether those duties have been met. *Cf.* Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist. (*Edgewood V*), 176 S.W.3d 746, 780-81 (Tex. 2005) (noting that very few state courts have found school finance cases nonjusticiable and that the majority of courts do find such claims viable). As the United States Supreme Court stated in *Baker v. Carr*, "The doctrine of which we treat is one of 'political questions,' not one of 'political cases.' The courts cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority." 369 U.S. 186, 217 (1962). To the authors, courts that reject adequacy or litigation cases often provide a political answer to a difficult, yet justiciable question.

12. *See, e.g.*, William S. Koski, *Courthouses vs. Statehouses?*, 109 MICH. L. REV. 923, 926 (2011) (reviewing ERIC A. HANUSHEK & ALFRED A. LINDSETH, SCHOOLHOUSES, COURTHOUSES, AND STATEHOUSES: SOLVING THE FUNDING-ACHIEVEMENT PUZZLE IN AMERICA'S PUBLIC SCHOOLS (2009) and MICHAEL A. REBELL, COURTS & KIDS: PURSUING EDUCATIONAL EQUITY THROUGH THE STATE COURTS (2009)).

opportunities for children of color in *Brown v. Board*.[13] In fact, Mr. Hinojosa himself has probably been guilty of comparing the importance of adequacy litigation to that of *Brown* on at least one occasion. While there should be no question whether courts can appropriately rule on state constitutional adequacy claims,[14] the question of whether adequacy cases have realized equitable opportunities for children of color and at-risk[15] children on the whole remains elusive at best.[16] Certainly, on the school segregation aspect of *Brown*, adequacy litigation has made no in roads to achieving desegregated schools, nor does it even claim to pursue such. Although one could plausibly argue that having adequate funding in transportation includes taking into account some of the costs related to magnet and diverse cluster schools, that issue is typically not raised. However, yielding equal educational opportunities for minority and at-risk children, especially in high-poverty schools, remains largely an aspirational goal, and one perhaps more important than ever before, given the increase in the number of minority and at-

13. *See, e.g.*, Michael A. Rebell, *Education Adequacy, Democracy, and the Courts*, *in* ACHIEVING HIGH EDUCATIONAL STANDARDS FOR ALL 218, 218, 221 (Timothy Ready, Christopher Edley, Jr. & Catherine E. Snow eds., 2002).

14. For over two centuries, dating back to *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), the courts have been called upon to weigh the constitutionality of legislative acts. *See* Montoy v. State (*Montoy III*), 112 P.3d 923, 930 (Kan. 2005) ("Although the balance of power may be delicate, ever since *Marbury v. Madison*, it has been settled that the judiciary's sworn duty includes judicial review of legislation for constitutional infirmity." (citation omitted)). Nevertheless, a minority of state courts has refused to weigh the merits of equity and adequacy lawsuits, claiming such cases are nonjusticiable or violate the separation of powers. *See, e.g.*, Hornbeck v. Somerset Cnty. Bd. of Educ., 458 A.2d 758, 790 (Md. 1983) ("The quantity and quality of educational opportunities to be made available to the State's public school children is a determination committed to the legislature . . . ."); Marrero v. Pennsylvania, 739 A.2d 110, 114 (Pa. 1999) (adequacy funding questions "are exclusively within the purview of the General Assembly's powers"); City of Pawtucket v. Sundlun, 662 A.2d 40, 58 (R.I. 1995). This Article does not directly address those issues as the Article is premised, in part, on the need of the courts to intervene more appropriately in both school desegregation and school finance cases in order to secure equal educational opportunities for minority and at-risk students.

15. For purposes of this Article, "at-risk" refers to economically disadvantaged or low income and English language learner (ELL) students, unless otherwise indicated. The authors are well aware that this definition may be too narrow in some respects and too broad in other respects, but given the various definitions of "at-risk" across the states, the authors focus their writing on these two student groups.

16. *See, e.g.*, Combs & Combs, *supra* note 10, at 628 (discussing three different research camps on the influence of the Supreme Court's decision in *Brown*).

risk students served in public schools across the United States coupled with the increase in high-stakes testing and accountability measures.

Today, with the ever-expanding and more rigorous standardized curriculum, testing, and accountability systems pervading public schools, the need to provide students, particularly at-risk and minority students, access to the educational opportunities necessary for the students to acquire the knowledge and skills to meet the standards imposed by state and the federal governments is perhaps greater than ever before. Even beyond those standards is the accompanying elusive mission of public schools to ensure that all students achieve their full potential and receive a well-rounded education that prepares them to enter college without remediation. The second part of the goal-oriented mission of public schools, college readiness, is perhaps even more important than the first because states can set very low academic standards.[17]

The argument, of course, is not to vary the standards between white and non-white students, wealthy and poor children, or property-wealthy and property-poor school districts. However, because all students are held to the same standards and all students should have the opportunity to reach their full potential, it seems reasonable that the courts should measure public school finance systems to ensure that at-risk and minority children can access the necessary educational resources they need to achieve success.[18] And the courts can begin to do so by applying appropriate standards for an adequate education. Accordingly, the authors suggest that the courts, and advocates, should ensure that the adequacy standards applied in these school finance cases should not merely reflect state

17. *See, e.g.*, James E. Ryan, *Standards, Testing, and School Finance Litigation*, 86 TEX. L. REV. 1223, 1248 (2008) (noting that in response to the No Child Left Behind Act, some states lowered their standards). The No Child Left Behind Act was signed into law on January 8, 2002, and was the reauthorization of the law formerly known as the Elementary and Secondary Education Act of 1965. No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified as amended at 20 U.S.C. § 6301 (2002)).

18. *See, e.g.*, Ronald F. Ferguson, *Paying for Public Education: New Evidence on How and Why Money Matters*, 28 HARV. J. ON LEGIS. 465 (1991). These additional, necessary educational resources may include high-quality pre-kindergarten programs, reduced class sizes, quality bilingual and other supported language programs, and extended day and summer programs. *See, e.g.*, Findings of Fact & Conclusions of Law at 92-102, Lobato v. State, No. 2005CV4794 (Colo. Dist. Ct. Dec. 9, 2011) (discussing educational needs of English Language Learner and low-income students).

standards, but must be scrutinized to ensure that the standards are high enough to ensure opportunities beyond a basic high school education. If courts continue to apply the lowest level of academic achievement when defining an "adequate education," especially when applying minimal state accreditation standards or no standards at all, the courts will essentially gut the constitutional rights at stake and render them meaningless.

Second, adequacy lawsuits are often brought by a plethora of school districts and school children ranging widely in demographics and funding. While this may seem like a logical political maneuver to gather public support, evidence of success in higher-funded plaintiff districts enrolling few at-risk students may mask the real challenges high-poverty schools and at-risk students face, leaving courts uncertain how to receive and weigh evidence of achievement in determining adequacy claims. Therefore, the authors suggest that even before filing suit, advocates must come to terms on who will be the plaintiffs in order to make the strongest claims and other potential parties with more political, rather than legal, interests should consider not filing suit altogether.[19]

Equally important to school finance litigation itself are the remedies sought by litigants and the remedies ordered by the courts. If the claims and evidence demonstrate that certain students in certain school districts are not obtaining an adequate education, the authors suggest that the prayers for relief should focus on those specific deficiencies. Instead, what often occurs is a presentation of evidence centered on the most at-risk students (oftentimes non-white students) and poorest school districts in the state, which is then followed with a request for a declaration that the entire school-funding system be held constitutionally inadequate. When such a ruling issues, the legislative remedy often turns into a hugely political game, with the losers commonly being persons and organizations representing at-risk students. As a result, many of the cyclical problems with unequal educational opportunities and arbitrary, inadequate funding systems are never addressed.

By the same token, the courts must ensure that their orders follow the evidence and claims in the cases. Courts have broad equitable powers, and if the evidence points to a group of students being harmed by the lack of access to adequate resources and opportunities, then an order should follow directing the responsible actors to rectify the wrong. And, the courts may want to consider

19. *See infra* Section II.B.

conducting fairness hearings to ensure that the legislative remedy matches the ordered relief. Otherwise, we will likely find ourselves in a revolving door of unequal opportunity.[20]

Lastly, we discuss a suggestion on how adequacy litigation—knowing its limitation in not desegregating schools—may come closer to realizing *Brown's* promise of equal opportunity. As school finance lawsuits have become the go-to litigation for equal educational advocates, if part of the promise of *Brown* is to ever be realized, advocates must seek more comprehensive claims beyond the traditional equity and adequacy claims. Such claims may include attacking ill-conceived reform measures such as accountability and teacher evaluation systems that drive quality teachers away from minority students and high-need schools. And if the courts have blocked access to the courts, the public must demand equal opportunity in state and national capitols and in their local districts both through legislation and, when necessary, by modifying their education clauses.

But, as noted below, efforts to ensure that students of all races and ethnicities learn alongside one another and from one another should not cease because equitable and adequate resources and opportunities will only get us halfway there. Efforts must continue at the local, state, and federal levels to ensure that students attend diverse schools. For some, this may mean redefining local school boundaries, expanding magnet schools, or using socioeconomic status to assign students. This Article addresses only a snapshot of the systemic changes that can positively affect minority and at-risk student achievement and access, and much work will remain to be done in homes and classrooms across the country. While *Brown* indeed operated as the icebreaker, it was, and remains, an unfulfilled promise, but one that the public can ill afford to abandon.

I. SCHOOL DESEGREGATION

A. Separate-but-"Equal" Schools

The general public often sees the *Brown* cases[21] as the first cases challenging the racial segregation of students and educational

20. *See infra* Subsection II.B.3.

21. *See* Brown v. Bd. of Educ., 347 U.S. 483, 483 n.1 (1954). Although the *Brown v. Board of Education* case is often highlighted as the seminal school case, it was merely one of four school desegregation cases consolidated for argument reaching the U.S. Supreme Court in 1953, the others being: *Briggs v. Elliott* (South

opportunity in public schools. However, one of the first reported cases complaining of an African-American student's right to attend a school irrespective of race was *Roberts v. City of Boston*.[22] In 1848, Sarah Roberts and her father, Benjamin Roberts, challenged the Boston Public Schools' refusal to allow Sarah into an all-white neighborhood school that was much closer to her home than either of the two all-black schools in the city.[23] Not only was the all-white school closer to his home, but Mr. Roberts also complained of the quality and condition of the all-black school. Although the Fourteenth Amendment to the U.S. Constitution had yet to be adopted, Mr. Roberts' attorneys developed claims grounded in equal treatment.[24] They argued that no Massachusetts law authorized the City of Boston to segregate students on the basis of race, the Massachusetts Constitution required equal treatment of black students, and segregating students stigmatized the black students.[25] Mr. Roberts further argued that the all-black schools were inferior to the quality of the all-white schools. The Massachusetts Supreme Court, while conceding that black people "are entitled by law, in this commonwealth, to equal rights, constitutional and political, civil and social,"[26] held that the City's segregated schools were well within the discretionary judgment of the primary school committee.[27] In response to the allegations of perceived prejudice, the court pronounced, "This prejudice, if it exists, is not created by law, and probably cannot be changed by law."[28]

The *Roberts* opinion, upholding segregated schools on the basis of local control, resurfaced in other cases, including *Plessy v. Ferguson*.[29] Although *Plessy* concerned whether a railroad company could have separate coaches for whites and non-whites, it based its

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Carolina); *Davis v. County School Board* (Virginia); and *Gebhardt v. Belton* (Delaware). *Id.*

22. 59 Mass. (1 Cush.) 198, 198 (1849).

23. *Id.* at 204-05. According to the record, the City created two all-black schools earlier in the 1800s at the request of African-American parents due to the prejudice their children faced in the schools. *See id.* at 199-200.

24. *Id.* at 202-03. The statute under which Mr. Roberts brought his claim read, "[A]ny child, unlawfully excluded from public school instruction in this commonwealth, shall recover damages therefor against the city or town by which such public instruction is supported." *Id.* at 198.

25. *See id.* at 201-02.

26. *Id.* at 206.

27. *Id.* at 209.

28. *Id.*

29. 163 U.S. 537, 544 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

decision to authorize "separate but equal" coaches, in part, on the *Roberts* holding that cities could establish separate schools for students on the basis of race absent a law requiring otherwise.[30]

In turn, school and state officials and the courts used both the *Roberts* and *Plessy* decisions to deny students of other non-white races access to white-only schools. In *Gong Lum v. Rice*, a parent of a U.S.-born citizen of Chinese descent challenged the segregation of Chinese students in Mississippi's public schools.[31] Relying on the *Roberts* and *Plessy* decisions, among others, the Supreme Court held, "The decision [to segregate Chinese students from white students] is within the discretion of the state in regulating its public schools, and does not conflict with the Fourteenth Amendment."[32]

B. The Tide Begins to Turn

In the 1940s, the tide began to turn for advocates using the Fourteenth Amendment as a sword to strike down segregated schools, in spite of local discretionary decisions, and to invoke more effectively the stigmatizing effects of segregation. One of the first federal district court cases challenging the segregation in schools was *Mendez v. Westminster*.[33]

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30. *Id.* at 544-45.

31. 275 U.S. 78, 79-80 (1927).

32. *Id.* at 86-87. The *Gong Lum* decision was perhaps more remarkable because the local school district did not have a separate school for Chinese or other non-white students. The Court sidestepped this issue, explaining that the plaintiff could have gone to a separate school for non-white students in another district, but that the plaintiff failed to raise an issue with the inconvenience of having to go to such a school outside the district. *Id.* at 84. The Supreme Court's reluctance to enforce the "separate but equal" mandate was further evidenced in its decision in *Cummings v. County Board of Education*, where it found that a Georgia school district's decision to close an all-black high school, while supporting an all-white high school for girls, was not unconstitutional. *See* 175 U.S. 528, 545 (1899). The Court reasoned that the local board's actions were justified because the board decided to use local, limited funds to operate all-black primary schools for the three-hundred young black students, rather than keep open the all-black high school for the sixty black students. *See id.* at 544-45. The Court concluded that local-taxation issues were a matter for the states and that "any interference on the part of Federal authority with the management of such schools cannot be justified except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land." *Id.* at 545.

33. Mendez v. Westminster Sch. Dist., 64 F. Supp. 544, 545 (S.D. Cal. 1946), *aff'd*, 161 F.2d 774 (9th Cir. 1947). Although *Mendez* is thought of as the first school segregation lawsuit brought by Mexican-American students and parents, in the 1920s and 1930s suits challenging the establishment of separate Mexican

Historically, school districts throughout the Southwest placed Mexican-American and Latino students in inferior "Mexican schools."[34] These sub-standard school buildings often were insufficiently resourced and poorly equipped.[35] Furthermore, school districts paid the Mexican schoolteachers less compared to the teachers at the Anglo schools and hired novice teachers at the Mexican schools or incompetent teachers who had been banned from the Anglo schools.[36] On March 2, 1945, Gonzalo Mendez and other Mexican American and Latino parents filed suit in a California Federal District Court against Westminster School District, Santa Ana School District, and others, seeking to enjoin school officials from segregating their children in "Mexican schools."[37] The *Mendez* plaintiffs argued first that California law did not authorize the segregation of Mexican-American or Latino students, unlike Native American and Asian-American students.[38] Second, they argued that

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schools were brought in Arizona, California, and Texas. *See* JAMES A. FERG-CADIMA, MEXICAN AM. LEGAL DEF. & EDUC. FUND, BLACK, WHITE AND BROWN: LATINO SCHOOL DESEGREGATION EFFORTS IN THE PRE- AND POST-*BROWN V. BOARD OF EDUCATION* ERA 14 (2004), *available at* http://inpathways.net/LatinoDesegregationPaper2004.pdf. In *Romo v. Laird*, a state court upheld the Tempe School District's creation of separate schools for Mexican-American students for pedagogical reasons, such as speaking Spanish, as long as the children's educational opportunities were "equal." *Id.* at 35 app. A (citing Romo v. Laird, No. 21617, slip op. at 5-6 (Maricopa Cnty. Super. Ct. 1925)). Although the court held that the Mexican school was unequal because it lacked similar certified teachers as the white-only schools and ordered the integration of the students, the school district responded by assigning certified teachers to the Mexican schools, thus continuing the segregation. *Id.* In Texas, the Court of Appeals held that San Felipe School District "school authorities have no power to arbitrarily segregate Mexican children, assign them to separate schools, and exclude them from schools maintained for *children of other white races*, merely or solely because they are Mexicans," but allowed the segregation to stand. *Id.* at 36 app. B (quoting Indep. Sch. Dist. v. Salvatierra, 33 S.W.2d 790, 795 (Tex. Civ. App. 1930)). And in California, a San Diego Superior Court judge struck down an "Americanization" school established specifically for educating Mexican-American students by the Lemon Grove School Board, finding that California law did not permit such. *See id.* at 39 app. C (citing Alvarez v. Owen, No. 66625 (San Diego Cnty. Super. Ct. Apr. 17, 1931)) (the "Lemon Grove Incident").

34. *See, e.g.*, Thomas A. Saenz, Mendez *and the Legacy of* Brown*: A Latino Civil Rights Lawyer's Assessment*, 15 BERKELEY LA RAZA L.J. 67, 67 (2004).

35. *See* GILBERT G. GONZALEZ, CHICANO EDUCATION IN THE ERA OF SEGREGATION 22 (1990).

36. *Id.*

37. *Mendez*, 64 F. Supp. at 545; *see also* Frederick P. Aguirre et al., Mendez v. Westminster*: A Living History*, 2014 MICH. ST. L. REV. 401.

38. *Mendez*, 64 F. Supp. at 545.

segregating students in "Mexican schools" stigmatized those children to a degree that harmed the children educationally and violated the rights of children to the equal protection of the law under the Fourteenth Amendment.[39]

The defendant districts argued that the federal courts had no jurisdiction over a state matter and that the segregation was based on educational needs, such as special instructional techniques to learn English and the American culture.[40] The defendants also relied on *Plessy v. Ferguson*, arguing that segregation on the basis of race or national origin was constitutional as long as the districts maintained separate-but-equal facilities.[41] On February 18, 1946, Judge Paul J. McCormick issued an injunction enjoining the segregation of Mexican schoolchildren, holding:

> 'The equal protection of the laws' pertaining to the public school system in California is not provided by furnishing in separate schools the same technical facilities, text books and courses of instruction to children of Mexican ancestry that are available to the other public school children regardless of their ancestry. A paramount requisite in the American system of public education is social equality. It must be open to all children by unified school association regardless of lineage.[42]

While Judge McCormick found that California law did not authorize the segregation of students of Mexican or Latin American descent, his decision also challenged implicitly the holdings in *Roberts*, *Plessy*, and *Cummings*, criticizing the "separate but equal" standard and denouncing local discretionary decisions that segregated students on the basis of race or ancestry by holding similar actions by the Westminster defendants in violation of the equal protection rights of Latino students under the Fourteenth Amendment to the U.S. Constitution. The court also provided further substance and guidance to the segregation of ELL students, stating that although credible examinations of students' English proficiency may allow for temporary, specially designed pedagogical programs for those students, they "do not justify the general and continuous segregation in separate schools of the children of Mexican ancestry from the rest of the elementary school population."[43] On appeal, the

39. *Id.* at 545-46.
40. *Id.* at 546.
41. *Id.* at 550 & n.7.
42. *Id.* at 549.
43. Findings of Fact & Conclusions of Law at 8, *Mendez*, 64 F. Supp. 544 (No. 4292-M Civ.), *available at* http://mendezetalvwestminster.com/pdf/Findings%20of%20Fact%20and%20Conclusions%20of%20Law.pdf.

Ninth Circuit unanimously upheld the decision.[44] At first glance, the decision may appear to upend the precedents established in *Plessy*, *Cummings*, and *Gong Lum*, and indeed, the NAACP Legal Defense Fund (LDF) filed an amicus brief urging the Court to overturn *Plessy*.[45] However, the Court explained that those holdings did not apply in *Mendez* primarily because no California law allowed the segregation of Latino students and none of those cases ever held that public entities could discriminate within a race; because Latinos were of the "white" race, those cases allowing segregation between the races did not apply.[46]

C. *Brown v. Board* Arrives

In 1954, the Supreme Court decided the seminal civil rights education cases, consolidated in *Brown v. Board*.[47] Unlike the prior school desegregation cases that were tried with very specific relief tied to the plaintiffs' demands, including *Mendez*, *Gong Lum*, and *Roberts*, the *Brown* cases were part of a much larger, refined attack developed by the NAACP LDF and its partners aimed ultimately at overturning *Plessy*.[48] Plaintiff children and their parents in four different school districts around the country filed lawsuits seeking equal educational opportunities and a reversal of *Plessy*'s "separate but equal" application to public schools at the primary and secondary levels. The *Briggs* plaintiffs filed their lawsuit initially asking for a bus for its African-American students (many who had to walk eight miles to the nearest all-black school), equivalent facilities, and

44. Westminster Sch. Dist. v. Mendez, 161 F.2d 774, 781 (9th Cir. 1947) ("By enforcing the segregation of school children of Mexican descent against their will and contrary to the laws of California, respondents have violated the federal law as provided in the Fourteenth Amendment to the Federal Constitution by depriving them of liberty and property without due process of law and by denying to them the equal protection of the laws.").

45. *See* Saenz, *supra* note 34, at 68.

46. *Id.* at 69 (noting that California state law did not authorize the segregation acts of the districts and discussing the Ninth Circuit's holding that "the practiced segregation was not between 'children of parents belonging to one or another of the great races of mankind'" (quoting *Mendez*, 161 F.2d at 780)). In response, the California legislature repealed the law authorizing the segregation of Native American and Asian-American students, rather than amending it to add Latinos. *See* Kevin R. Johnson, Hernandez v. Texas*: Legacies of Justice and Injustice*, 25 CHICANO-LATINO L. REV. 153, 168 (2005).

47. 347 U.S. 483 (1954).

48. *See* Saenz, *supra* note 34, at 68.

curricula under the "separate but equal" doctrine.[49] When the Clarendon County School District rebuffed the demands, the plaintiffs filed suit with the help of the NAACP and the LDF and later amended their complaint to attack segregation head on.[50] Two judges on the three-judge panel hearing *Briggs* initially found that the school district violated the rights of African-American school children to "separate but equal" facilities and ordered the district to provide such but refused to overturn *Plessy*.[51] In a powerful dissent that foretold a ruling yet to come, Judge Waring stated, "*Segregation is per se inequality*."[52]

The plaintiffs in the Delaware case, *Gebhart v. Belton*, similarly challenged the provision of unequal educational opportunities through curricula offerings, conditions of facilities,

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49. Briggs v. Elliott *(South Carolina)*, LEADERSHIP CONF., http://www.civilrights.org/education/brown/briggs.html (last visited Oct. 23, 2014).

50. Reportedly, federal district court Judge Julius Waties Waring, who sat on the three-judge panel hearing the *Briggs* case, urged then-LDF attorney Thurgood Marshall to broaden his complaint and attack *Plessy* outright. *See* ELLIS COSE, BEYOND *BROWN V. BOARD*: THE FINAL BATTLE FOR EXCELLENCE IN AMERICAN EDUCATION 22 (2004). Like *Briggs*, the plaintiffs in *Brown* argued that their school district offered inferior opportunities, including facilities, curricula, teaching resources, and student personnel services, and that segregation engendered unequal opportunities. *See* Brown v. Bd. of Educ., 98 F. Supp. 797, 797-98 (D. Kan. 1951), *rev'd*, 347 U.S. 483 (1954). The district court concluded that the facilities and other opportunities in the all-black schools were comparable to those in the all-white schools and that both the *Plessy* and *Gong Lum* cases disposed of plaintiffs' attack against the "separate but equal" doctrine. *Id.* at 798-800; *see also* Davis v. Cnty. Sch. Bd., 103 F. Supp. 337, 339-41 (E.D. Va. 1952) (holding segregation constitutional but ordering the district to provide equality in buildings, facilities, curricula, and transportation), *rev'd sub nom. Brown*, 347 U.S. 483 (1954).

51. Briggs v. Elliott, 98 F. Supp. 529, 537-38 (E.D.S.C. 1951) (holding that "[t]he court should not use its power to abolish segregation in a state where it is required by law if the equality demanded by the Constitution can be attained otherwise" but should instead rectify the inequalities by directing the responsible actors to do so), *vacated*, 342 U.S. 350 (1952).

52. *Id.* at 548 (Waring, J., dissenting). In calling on the courts to address directly the racial segregation claim, Judge Waring pronounced:

> If they are entitled to any rights as American citizens, they are entitled to have these rights now and not in the future. And no excuse can be made to deny them these rights which are theirs under the Constitution and laws of America by the use of the false doctrine and patter called "separate but equal" and it is the duty of the Court to meet these issues simply and factually and without fear, sophistry and evasion.

Id. at 540. The *Briggs* Court held in a later hearing that the district was making sufficient progress in equalizing resources and held steadfast to its decision not to reverse *Plessy*. Briggs v. Elliott, 103 F. Supp. 920, 921-23 (E.D.S.C. 1952), *rev'd sub nom. Brown*, 347 U.S. 483 (1954).

class sizes, and several others, as well as the segregated schools themselves.[53] The Delaware Supreme Court affirmed the lower court's holding that segregated facilities, in and of themselves, did not violate the equal protection rights of African-American students.[54] The court did find that many of the educational opportunities offered by the two subject school districts were unequal between the all-black and all-white schools. But unlike the South Carolina and Virginia federal courts that allowed the school districts in those cases time to equalize deficient opportunities, the Delaware Supreme Court ordered the two defendant school districts to allow the African-American students admission without delay, though the defendants then applied for a writ of certiorari, which was granted.[55]

At the time the four *Brown* cases reached the U.S. Supreme Court, the Court acknowledged that the provision of equalizing resources between the segregated schools was achieved, or was in the works, in each of the cases before it.[56] Accordingly, the Court turned to the question whether it should consider the effects of segregation on public schools in determining the equal protection claims.[57] The Court first examined the role of public education in 1954 and its relationship to opportunity, noting that

> education is perhaps the most important function of state and local governments[;] . . . the very foundation of good citizenship[;] . . . a principal instrument in awakening the child to cultural values. . . . 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. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.[58]

The Court next examined the evidence and argument related to the question of whether the segregation itself, even with equal facilities and the like, deprives minority school children of equal educational opportunities. After noting some of the psychological and sociological evidence, as well as findings by the Delaware and Kansas lower courts and rulings in the Supreme Court's higher education-access cases, the Court held,

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53. 91 A.2d 137, 139-41 (Del. 1952), *aff'd sub nom. Brown*, 347 U.S. 483 (1954).
54. *Id.* at 140-44.
55. *Id.* at 148-49, 152.
56. Brown, 347 U.S. at 492 & n.9.
57. *Id.* at 492.
58. *Id.* at 493.

> [I]n the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.[59]

To say the least, it was a profound decision, the effect of which rippled across the country. African-American students, parents, educators and advocates from all over celebrated the demise of the "separate but equal" doctrine. However, only half of the battle was won. Many segregated schools refused to open their doors the very next school day. The next important question for the Court was, "What now?" In order to address the remedial phase, the Supreme Court asked the parties to address outstanding questions of how the courts could enforce the mandate.[60]

D. Enter *Brown II*

As stark of a struggle as it was to achieve the *Brown* ruling, it proved even more difficult enforcing it. Some school district and state officials reported to the Supreme Court in 1955 that they were already undergoing efforts to desegregate their schools without waiting for a ruling on the remedy phase from the Court.[61] However, others, like those in Virginia and South Carolina, awaited further guidance from the Supreme Court.[62] The Court's decision in *Brown*

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59. *Id.* at 488, 494-95.

60. *Id.* at 494 n.13 ("4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment (*a*) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or (*b*) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions? 5. On the assumption on which questions 4(*a*) and (*b*) are based, and assuming further that this Court will exercise its equity powers to the end described in question 4(*b*), (*a*) should this Court formulate detailed decrees in these cases; (*b*) if so, what specific issues should the decrees reach; (*c*) should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees; (*d*) should this Court remand to the courts of first instance with directions to frame decrees in these cases, and if so what general directions should the decrees of this Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?" (internal quotation marks omitted)).

61. *See Brown II*, 349 U.S. 294, 299 (1955) (identifying the District of Columbia, Kansas, and Delaware among those enacting desegregation plans).

62. *Id.*

II turned out not to be the hammer that equal-opportunity advocates expected from the Warren Court and helped curtail any immediate need to desegregate the schools.

The Court required that actors responsible for segregation allow public students entry into the schools "with all deliberate speed" but gave school districts and states no specific timetable and required the lower courts charged with enforcing school desegregation to be "flexible" and balance the needs between the public and private.[63] The Court's call to desegregate schools was not realized in some places until years later as school districts refused to integrate the minority children with white children. Despite the "end" of racial segregation in public schools, Clarendon County's black children did not step into all-white schools until twelve years later and by that time, many white parents had placed their children in private schools.[64] In Little Rock, President Dwight D. Eisenhower called out the 101st Airborne to enforce the *Brown* mandate.[65] While some places resisted *Brown* by enacting school-choice plans, rigging school boundaries, and committing other acts intended not to integrate schools, officials in Prince Edward County of Virginia decided in 1959 to close doors to their schools altogether.[66] For five years, the district locked the gates of all of its public schools in lieu

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63. *Id.* at 300-01; *see also* COSE, *supra* note 50, at 7. *But see* Cooper v. Aaron, 358 U.S. 1, 4, 7, 12, 16 (1958) (rejecting the Little Rock School Board's request to delay full implementation of its school desegregation plan based on chaos and hostility in the schools, asserting that its "all deliberate speed" mandate meant "that delay in any guise in order to deny the constitutional rights of Negro children could not be countenanced, and that only a prompt start, diligently and earnestly pursued, to eliminate racial segregation from the public schools could constitute good faith compliance. State authorities were thus duty bound to devote every effort toward initiating desegregation and bringing about the elimination of racial discrimination in the public school system. . . . Thus law and order are not here to be preserved by depriving the Negro children of their constitutional rights.").

64. Briggs v. Elliott *(South Carolina)*, *supra* note 49.

65. *Little Rock School Desegregation (1957)*, KING INST. ENCYCLOPEDIA, http://mlk-kpp01.stanford.edu/index.php/encyclopedia/encyclopedia/enc_little_rock_school_desegregation_1957/ (last visited Oct. 23, 2014).

66. *See Massive Resistance*, VA. HIST. SOC'Y, http://www.vahistorical.org/collections-and-resources/virginia-history-explorer/civil-rights-movement-virginia/massive (last visited Oct. 23, 2014) (describing the "Southern Manifesto," which laid out the opposition to integrated schools and was signed by more than one hundred southern officeholders in 1956); *see also* Leslie "Skip" Griffin Jr., Brown *at 60 and* Milliken *at 40*, HARV. ED. MAG., Summer 2014, *available at* http://www.gse.harvard.edu/news/ed/14/06/brown-60-milliken-40.

of integrating their schools, forcing African-American families to move outside the county, send their children away to schools in other states, or cease educating their children altogether.[67]

Complications in desegregating schools also arose in desegregation cases involving Latino students. In *Mendez* and other cases, Latinos typically argued in school desegregation cases that they were "white" for racial classification purposes, and state laws did not allow for their segregation.[68] This approach impeded desegregation in some districts, which, under the *Brown* mandate to integrate African-American with white students, integrated the African-American students with Latino—but not white—students, arguing that such was permissible.[69] The Supreme Court's decision in *Hernandez v. Texas* should have helped shed light on how integrating black and Latino students was not permissible. In *Hernandez*, a Mexican-American convicted of murder claimed that Jackson County, Texas violated his equal protection rights under the U.S. Constitution by denying qualified Mexican-Americans access to the jury rolls.[70] The Supreme Court held that the Equal Protection Clause was not designed solely to address the black–white paradigm but also to protect separate classes targeted for discrimination. Thus, while the courts often recognized Latinos as part of the "white" race, for equal protection purposes they were deemed a separate class because of the historical discrimination imposed against Mexican-Americans.[71] Nevertheless, some school districts persisted in

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67. Griffin, *supra* note 66.

68. Saenz, *supra* note 34, at 69-70; *see also* Johnson, *supra* note 46, at 172 ("Mexican Americans at times claimed to be 'white' to avoid the discrimination suffered by African Americans and to accrue the benefits of whiteness secured by law.").

69. FERG-CADIMA, *supra* note 33, at 26 (citing NAT'L INST. OF EDUC., DESEGREGATION AND EDUCATION CONCERNS OF THE HISPANIC COMMUNITY 11 (1977) (transcribing observations of Dr. José Cárdenas, Director, Intercultural Development Research Association)).

70. Hernandez v. Texas, 347 U.S. 475, 476-77 (1954). For an excellent history of the factual and legal analysis of the *Hernandez* case, see "COLORED MEN" AND "HOMBRES AQUÍ": *HERNANDEZ V. TEXAS* AND THE EMERGENCE OF MEXICAN-AMERICAN LAWYERING (Michael A. Olivas ed., 2006).

71. *Hernandez*, 347 U.S. at 479-80 ("At least one restaurant in town prominently displayed a sign announcing 'No Mexicans Served.' On the courthouse grounds at the time of the hearing, there were two men's toilets, one unmarked, and the other marked 'Colored Men' and 'Hombres Aqui' ('Men Here')."). It should be noted that Gus Garcia, Carlos Cadena, and John Herrera, attorneys for Mr. Hernandez, used the segregated restroom marked "Hombres Aqui" during the trial. *See* A CLASS APART (PBS Home Video 2009). It should be further noted that the

assigning black and Latino students to the same schools, but not integrating white students.

One of the first federal court of appeals cases to address school district practices of assigning African-American students to predominantly Mexican-American schools was *Cisneros v. Corpus Christi Independent School District*.[72] There, the school district drew school boundaries, among several other discriminatory practices, to ensure white students largely remained in separate schools but integrated Mexican-American and African-American students in other schools.[73] The Fifth Circuit held the school district's actions unconstitutional.[74] In 1973, the U.S. Supreme Court's decision in *Keyes v. School District No. 1* put to rest the question of whether school districts could achieve the mandate of *Brown* by integrating African-American students with Latino, but not white, students.[75] The Supreme Court held that although it had previously identified Latinos as a separate class for equal protection purposes, the lower district court erred by failing to combine the Latino and African-American student populations for purposes of defining a "'segregated' school" in Denver.[76]

The Supreme Court eventually adopted stronger mandates to ensure that schools desegregated pursuant to *Brown*. For example, the Supreme Court struck down freedom-of-choice plans that tended to perpetuate segregated schools and required school districts to take affirmative action to integrate the schools and required districts to develop plans that would work now.[77] Lower courts turned to evaluating not only student demographics but also non-exhaustive program areas in order to determine whether vestiges of discrimination remained, including student enrollment, faculty hiring

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Hernandez decision was not seen by some to be as far-reaching as promised because the Supreme Court's decision required Latino litigants to prove that they were discriminated against "in a particular local community." Saenz, *supra* note 34, at 72 n.32; *cf.* Keyes v. Sch. Dist. No. 1, Denver, Colo., 413 U.S. 189, 197 (1973); Cisneros v. Corpus Christi Indep. Sch. Dist., 467 F.2d 142, 149 (5th Cir. 1972) (concluding that Latinos are a separate class without demonstration of proof of discrimination in a particular community).

72. 467 F.2d 142.

73. *Id.* at 149.

74. *Id.* at 148-49.

75. 413 U.S. at 196-97.

76. *Id.* at 197. The Court reasoned its decision on the fact that Latinos ("Hispanos" is used in Court's opinion) and African-Americans had experienced much of the same discrimination and unequal education, as found in two reports centered on Hispanos in the Southwest. *Id.* at 197-98.

77. *See* Green v. Cnty. Sch. Bd., 391 U.S. 430, 438-39 (1968).

and assignments, facilities, curriculum, and extracurricular programs.[78] The burden shifted to school districts to explain away continuing racial imbalances and encouraged school districts to consider redrawing school-attendance boundaries and bussing students to desegregate schools.[79] With the passage of the Civil Rights Act of 1964, these court rulings eventually led to 79% of African-American students in the South attending integrated schools by 1970, up from just 16% four years earlier.[80]

But for those intent on realizing the dream of *Brown*, a change in the Supreme Court's composition brought about a change in the direction of effectuating the mandate to desegregate schools. In 1974, the Court in *Milliken v. Bradley* reversed a lower court decision ordering the bussing of Detroit school children to surrounding suburban school districts.[81] Two years later in *Pasadena City Board of Education v. Spangler*, the Supreme Court limited a district court's power to modify a school-assignment plan despite the racial imbalances noted one year after implementation.[82] In *Dowell*, the Supreme Court relaxed its standard for lifting an injunction when applied to school desegregation cases, requiring that school districts need only comply in good faith with the desegregation plan and eliminate vestiges of discrimination to the extent practicable.[83] In 1993, the Supreme Court again sought to return control to local school districts authorizing courts to relinquish partial control over areas of school operation in which the districts have fully complied.[84]

After witnessing a decline in school desegregation into the 1990s, America's public schools have experienced a growth in

78. *See id.* at 435. These program areas came to be known as the "*Green* factors." *See, e.g.*, Freeman v. Pitts, 503 U.S. 467, 467 (1992).

79. *See* Swann v. Charlotte–Mecklenburg Bd. of Educ., 402 U.S. 1, 26-30 (1971).

80. Photograph of Little Rock Central High School National Historic Site Museum Exhibit: Beyond Central High School (on file with author).

81. 418 U.S. 717, 757 (1974); *see also* Kristi L. Bowman, *A New Strategy for Pursuing Racial and Ethnic Equality in Public Schools*, 1 DUKE F. FOR L. & SOC. CHANGE 47, 50 (2009).

82. 427 U.S. 424, 434-36 (1976).

83. Daniel J. McMullen & Irene Hirata McMullen, *Stubborn Facts of History—The Vestiges of Past Discrimination in School Desegregation Cases*, 44 CASE W. RES. L. REV. 75, 79-80 (1993). *But see* Bd. of Educ. v. Dowell, 498 U.S. 237, 246-50 (1991) (disputing the contention that the Court was changing its standard for withdrawing injunctive relief).

84. Freeman v. Pitts, 503 U.S. 467, 490-91 (1992).

segregation for African-American and Latino children.[85] This has occurred due to a number of reasons, including: the changing of the legal standards for enforcing the *Brown* mandate over time; the growing reluctance of the courts and the federal government to enforce outstanding school desegregation decrees; the sanctioning of de facto segregation; housing patterns; school site selections; the high legal threshold required to prove intentional discrimination; the success of reverse-discrimination claimants; and federal, state, and local leaders' lack of will to ensure diverse schools and equal opportunities, among others.[86]

While school desegregation cases continue, and the mandate to desegregate remains enforceable sixty years following *Brown*,[87] advocates in search of ensuring equal educational opportunities for all students turned to school finance litigation over the years in both federal and state court.[88]

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85. COSE, *supra* note 50, at 10 (citing GARY ORFIELD & CHUNGMEI LEI, *BROWN* AT 50: KING'S DREAM OR *PLESSY*'S NIGHTMARE? 4 (2004), *available at* http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/brown-at-50-king2019s-dream-or-plessy2019s-nightmare/orfield-brown-50-2004.pdf); *see also* ERICA FRANKENBERG, CHUNGMEI LEI & GARY ORFIELD, A MULTIRACIAL SOCIETY WITH SEGREGATED SCHOOLS: ARE WE LOSING THE DREAM? 4-6 (2003), *available at* http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/a-multiracial-society-with-segregated-schools-are-we-losing-the-dream/frankenberg-multiracial-society-losing-the-dream.pdf; Liebman, *supra* note 2, at 1465-66 (noting that even with the soft enforcement of desegregation decrees by the Bush and Reagan administrations, segregated schools declined).

86. *See, e.g.*, Bowman *supra* note 81, at 49-50; *see also* Robert L. Carter, *50 Years of* Brown, *in* ON THE RIGHT SIDE OF HISTORY: LESSONS FROM *BROWN*, *supra* note 6, at 5, 7 (noting the factors impacting the influence of Brown including demographic factors, housing patterns, and site-selection policies).

87. *See, e.g.*, Fisher v. Tucson Unified Sch. Dist., 652 F.3d 1131, 1143-44 (9th Cir. 2011) (reversing the lower court's declaration of unitary status due to an evidentiary record replete with evidence showing the school district's lack of good faith compliance); *see also Fifth Circuit Refuses to Dismiss Longstanding School Desegregation Case in St. Martin Parish, Louisiana*, NAACP LEGAL DEF. FUND (June 24, 2014), http://www.naacpldf.org/update/fifth-circuit-refuses-dismiss-longstanding-desegregation-case-st-martin-parish-louisiana (discussing the case and also fact that the NAACP LDF currently has 100 school desegregation cases on its docket).

88. *See* James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 252 (1999) ("School finance litigation is . . . often depicted both as a means of moving beyond race as the salient issue in education reform and as an effective way to achieve educational equity and adequacy for disadvantaged students from all racial and ethnic backgrounds."). Other areas of education law litigated to ensure substantial reforms and equal educational opportunities—not discussed in this

II. THE ADVENT OF SCHOOL FINANCE LITIGATION

A. Equity Cases

Over the past forty-five years and counting, public-education advocates have filed several actions in courts seeking equitable and adequate resources for all school children, lending credence to the mission of *Brown*.[89] In describing the history of school finance litigation, researchers typically describe school finance litigation in terms of "waves." The "first wave"[90] entails federal claims filed under the Equal Protection Clause of the Fourteenth Amendment and

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Article—include enforcement of the Equal Educational Opportunities Act of 1974, § 1703(f), which requires that states and local education agencies take appropriate action to ensure that ELL students have access to quality language programs implemented with the necessary resources so that the students can "overcome [their] language barriers" and enforcement of the Individuals with Disabilities Education Act, which ensures services to children with disabilities and governs how states and local education agencies provide intervention and services to students with disabilities. *See* 20 U.S.C. § 1703(f) (2006); *id.* § 1400(d).

89. Despite the complimentary goals of securing equal educational opportunities for school children of color and of poverty, advocates in school desegregation cases have often failed to collaborate on joint efforts on school finance advocates. Bowman, *supra* note 81, at 53-56. This may be due to the fact that school-desegregation advocates see school finance supporters as essentially arguing for separate-but-equal, or separate-but-adequate, schools. *See, e.g.*, Oakes & Lipton, *supra* note 10, at 25-26 (comparing the arguments for equal educational tools essential for a fundamental education in the school finance case, *Williams v. California*, to the arguments of school desegregation lawyers in the era of separate but equal). This may also occur because some actors in school finance cases, as well as school-desegregation litigators, fail to see school finance as a civil rights issue; or because school finance advocates often must "accept and ignore" segregated schools, which detracts attention away from desegregating and integrating schools. *Cf.* Greg Winter, *50 Years After* Brown*, the Issue Is Often Money*, N.Y. TIMES (May 17, 2004), http://www.nytimes.com/2004/05/17/education/17BROW.html (quoting *Brown* attorney Jack Greenberg as discounting financing cases as not being adequate and that "'[i]ntegration is the only way to do that;'" and quoting Campaign for Fiscal Equity's school finance attorney Michael Rebell as countering that "'[t]he fact that school districts remain very separate is a reality that the Supreme Court has allowed. . . . This is the world we're living in.'"). MALDEF is one of the very few organizations to combat lack of equal educational opportunities using state constitutional clauses for school finance cases, Title VI and the Fourteenth Amendment for school desegregation cases, and the Equal Educational Opportunities Act of 1974 for language discrimination. *See* FERG-CADIMA, *supra* note 33, at 29-30.

90. The authors are unsure if this description as a "first wave" is accurate because only a handful of cases were filed in federal court during this era, and those ceased—in large part—in 1973, following the *Rodriguez* decision.

typically begins with a discussion of the *Rodriguez v. San Antonio Independent School District* case.[91] Although a handful of other cases were filed before *Rodriguez*,[92] undoubtedly it is the seminal federal school finance case.

Rodriguez began as a student protest in 1968, when approximately 400 students attending Edgewood High School on the impoverished, but prideful, west side of San Antonio, Texas walked out of school protesting the quality of education and the condition of their school.[93] The mostly Mexican-American students drafted a list of demands, asking for qualified teachers, higher-level academic courses, auditing of school district expenditures, stricter discipline, and adequate teaching facilities.[94] Several weeks later, Mr. Demetrio Rodriguez and other Edgewood parents filed suit challenging Texas's unequal school finance system under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.[95]

The evidence of inequalities was largely irrefutable. In a survey of 110 school districts in Texas, the ten wealthiest districts with property values above $100,000 per pupil received $585 per pupil for a property tax of only $0.31.[96] The students in the four poorest districts with property values below $10,000 per pupil received only $60 per pupil—despite taxing their residents at a rate nearly 250% higher: $0.70.[97] The groups of districts also differed along racial lines: the ten wealthiest districts enrolled 8% minority students compared to 79% in the poorest districts.[98] The lack of resources

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91. *See, e.g.*, Ryan, *supra* note 17, at 1229.

92. *See, e.g.*, Rebell, *supra* note 13, at 224 (citing McInnis v. Shapiro, 293 F. Supp. 327 (N.D. Ill. 1968) (arguing that the Illinois school-funding system's minimum foundational funding was inadequate for disadvantaged urban students)).

93. The number of students and protestors was estimated between 300 and 3,000. *See, e.g.*, Cynthia E. Orozco, Rodriguez v. San Antonio ISD, TEX. ST. HIST. ASS'N, http://www.tshaonline.org/handbook/online/articles/jrrht (last visited Oct. 23, 2014) (estimating 400 protestors); Ron White, *3000 Ask Reforms in Walkout*, SAN ANTONIO LIGHT, May 16, 1968, at 1 (estimating 3,000 protestors); Doris Wright, *Edgewood Students Protest*, SAN ANTONIO EXPRESS, May 17, 1968, at 1A (estimating 300 protestors). Portions of this Section were excerpted from DAVID HINOJOSA, *RODRIGUEZ V. SAN ANTONIO ISD*: 40 YEARS LATER (forthcoming 2015).

94. Wright, *supra* note 93, at 12A. The students carried signs, including some stating: "Better Education Now Not Tomorrow" and "We Want a Gym, Not a Barn." *Id.*; White, *supra* note 93, at 4.

95. *See* Rodriguez v. San Antonio Indep. Sch. Dist., 337 F. Supp. 280, 281 (W.D. Tex. 1971) (per curiam), *rev'd*, 411 U.S. 1 (1973).

96. *Id.* at 282.

97. *Id.*

98. *Id.* at 282 n.3.

caused high-minority, property-poor districts like Edgewood to struggle in recruiting and retaining qualified teachers.[99]

Following trial, the three-judge panel issued its decision, finding the Texas school finance system unconstitutional and relying partly on *Brown*, held that education was a fundamental right under the U.S. Constitution.[100] But the victory was short-lived. On March 21, 1973, in a five-four decision, the Supreme Court reversed the lower-court opinion.[101] Although the Court agreed with the lower court that "'the grave significance of education both to the individual and to our society' cannot be doubted," the Court refused to hold that the importance of education elevated it to a fundamental right, concluding that education was neither explicitly nor implicitly a right guaranteed under the Constitution.[102] Relying once again on "local control," in applying rational basis to the Texas system, the Court found the grossly inequitable system passed constitutional muster.[103] In a stinging dissent, Justice Thurgood Marshall berated the majority for retreating from the foundation of *Brown* and suggested that the plaintiffs turn to state courts for recourse.[104]

The "second wave" of school finance litigation included other state actions already filed, or that soon followed, asserting similar equity claims but, as Justice Marshall suggested, under state constitutional equal protection and education clauses.[105] At the center of the claims in these cases was the unequal educational opportunities afforded to students based on where they lived and where they went to school, which stemmed from school finance systems allocating disparate resources based on lower property values. While race was not central to many of the claims, because many minority students lived in the lower-property-wealth districts, minorities were often impacted disparately by inequitable funding systems.

In California, students and parents sued in state court under both the United States Constitution and California constitution in

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99. JOSÉ A CÁRDENAS, TEXAS SCHOOL FINANCE REFORM: AN IDRA PERSPECTIVE 9 (1997) (noting that in 1969, less than half of Edgewood's teachers met minimum certification requirements and the teacher turnover rate was 33%).

100. *Rodriguez*, 337 F. Supp. at 281-82.

101. *See Rodriguez*, 411 U.S. at 6.

102. *Id.* at 30 (quoting *Rodriquez*, 337 F. Supp. at 283).

103. *Id.* at 50-51.

104. *Id.* at 71-72, 133 n.100 (Marshall, J., dissenting).

105. *See* Ryan, *supra* note 17, at 1229. Plaintiffs in Serrano v. Priest (*Serrano I*), 487 P.2d 1241 (Cal. 1971), asserted both state and federal constitutional claims. *See* Serrano v. Priest (*Serrano II*), 557 P.2d 929, 930 (Cal. 1976).

1968, challenging the grossly inequitable California school finance system that also relied on disparate property values and property-tax rates.[106] Following *Rodriguez*, the California Supreme Court revisited its decision in *Serrano I* and pronounced once again that, under the California constitution, education was a fundamental right.[107] The court ultimately struck down the California school finance system as unconstitutional.[108] However, voters in property-wealthy districts retaliated and passed an initiative that capped raises on property taxes; consequently, the legislature was forced to level down resources allocated for public education.[109]

Similarly, in New Jersey, plaintiffs filed suit challenging the school-funding inequities under the state constitution, requiring a "thorough and efficient system of free public schools."[110] The New Jersey Supreme Court ultimately found the system unconstitutional after determining that the state failed to "fulfill[] its obligation to afford all pupils that level of instructional opportunity which is comprehended by a thorough and efficient system of education for students," as required under the state constitution.[111] In separate litigation filed in 1981, *Abbott v. Burke*, plaintiffs challenged the constitutionality of the New Jersey school-funding system because of the significant disparities in expenditures between poor urban school districts and wealthy suburban districts, and the lack of adequate funds.[112]

Other state courts upheld similar equity challenges in the early years following *Rodriguez*, including challenges in Arkansas, Connecticut, and Wyoming.[113] The relatively simple notion behind these complex equity cases was captured well by the Vermont Supreme Court when it held, "Money is clearly not the only variable affecting educational opportunity, but it is one that government can effectively equalize."[114] The success of these state equity cases slowed in the 1980s with fifteen courts denying challenges up to that

106. *Serrano I*, 487 P.2d at 1244.
107. *See Serrano II*, 557 P.2d at 951.
108. *See id.* at 957-58.
109. Rebell, *supra* note 13, at 227.
110. N.J. CONST. art. VIII, § IV, para. 1.
111. Robinson v. Cahill, 303 A.2d 273, 295 (N.J. 1973).
112. *The History of* Abbott v. Burke, EDUC. L. CENTER, http://www.edlawcenter.org/cases/abbott-v-burke/abbott-history.html (last visited Oct. 23, 2014).
113. Rebell, *supra* note 13, at 226.
114. Brigham v. State, 692 A.2d 384, 390 (Vt. 1997).

period, many relying on similar reasoning found in *Rodriguez*,[115] but the pendulum again swung back in favor of the plaintiffs in the late 1980s.[116] In Texas, property-poor school districts, including Edgewood Independent School District (ISD), and parents, including Demetrio Rodriguez, again challenged the inequities in the Texas school finance system. This time, they won, with the Supreme Court of Texas holding in 1989 that the state's education clause requires that "[c]hildren who live in poor districts and children who live in rich districts . . . be afforded a substantially equal opportunity to have access to educational funds."[117] Like the advantages built-in for the former all-white districts in *Brown*, the *Edgewood* Court noted that the Texas school finance system favored high-wealth districts, allowing those districts, "to provide . . . their students broader educational experiences including more extensive curricula, more up-to-date technological equipment, better libraries and library personnel, teacher aides, counseling services, lower student-teacher ratios, better facilities, parental involvement programs, and drop-out prevention programs. They are also better able to attract and retain experienced teachers and administrators."[118]

In Wyoming, the state supreme court found several educational inequalities favoring the high-spending wealthy districts, such as more and better-equipped science and computer labs, larger and newer book and audio-visual collections, stronger gifted and talented programs, and a more expansive curriculum, among several other

115. Rebell, *supra* note 13, at 227; *see also* Unified Sch. Dist. No. 229 v. State (*USD 229*), 885 P.2d 1170, 1184-85 (Kan. 1994) (citing twelve state court opinions rejecting equity claims).

116. It has been reported that the "adequacy" movement overtook the "equity" movement in the late 1980s. *See, e.g.*, Rebell, *supra* note 13, at 228. However, this statement is not entirely accurate. Many of the cases termed "adequacy" cases were more like "equity" cases because fundamental to the claims and evidence at issue in many of those cases was the disparate access to resources between school districts. *See, e.g.*, Edgewood Indep. Sch. Dist. v. Kirby (*Edgewood I*), 777 S.W.2d 391, 397 (Tex. 1989) (holding that students in all school districts must have substantially equal access to similar revenue at similar tax effort—a ruling based on equity); *see also* Ryan, *supra* note 17, at 1236-37 (describing the evidence and analysis of unequal educational opportunities in "adequacy" cases, including those in Montana, Texas, Tennessee, Arizona, New Jersey, Arkansas, and Vermont). As Ryan notes, "The mislabeling of some cases, moreover, has given the false impression that almost all school finance decisions since 1989 have been about adequacy as opposed to equity." *Id.*

117. *Edgewood I*, 777 S.W.2d at 397.

118. *Id.* at 393.

advantages.[119] The court ultimately held the school system in violation of the state constitution's education clause, stating in part "that the spending disparities among the State's school districts translate into a denial of equality of educational opportunity."[120]

Like their predecessor cases, the courts found the large disparities in access to educational resources unacceptable and unconstitutional. Although these cases importantly brought attention to the arbitrary inequitable systems that typically based funding on a student's zip code and led to significant school finance reforms in states where successful cases were brought, the success was limited. First, for states where equity claims were denied outright as nonjusticiable or violating the separation of powers doctrine, there was no recourse other than local advocacy efforts. Second, even in those states where equity claims were successful, that success was limited to guaranteeing near-equal funding compared to other wealthier school districts in the state but did not ensure that the funding was adequate to meet the educational needs of their at-risk and minority students. And with testing and accountability reforms beginning to take shape in states across the country, the need to ensure not only equitable, but also adequate funding to deliver equal educational opportunities for all children became equally important.

B. The "Shift" to "Adequacy" Litigation

The struggle for equal educational opportunities in school desegregation litigation was rooted not only in the need to integrate students of different races, but also in the widely held belief that white-only schools offered a higher-quality education. If the white-only schools were in disrepair, poorly resourced, and taught with teachers lacking certification, for example, there may not have been such desperation in integrating the schools.[121] However, that often was not the case. Thus, while achieving a certain quality of education through desegregation remained a central theme, federal courts' reluctance to impose monetary orders in order to affect the quality of education[122] forced advocates to look elsewhere.

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119. *See* Helena Elementary Sch. Dist. No. 1 v. State, 769 P.2d 684, 687-88 (Mont. 1989).

120. *Id.* at 690.

121. Although, undoubtedly, the inherent evil of separating children on the basis of race alone would have been attacked.

122. Missouri v. Jenkins, 515 U.S. 70, 74-78 (1995) (describing the prior district court's desegregation orders resulting in millions of dollars in costs to

On the heels of increasingly challenging attempts to reduce inequalities in school funding for public school children based on federal and state constitutional equal protection claims, plaintiffs began asserting adequacy claims under the education clauses of state constitutions as a means to improve educational opportunities and achievement for all children.[123] This "third wave" of school finance litigation—or adequacy litigation—shifted the focus away from trying to equalize the amount spent on each student and instead questioned the sufficiency of school funding for students based on educational need.[124] Adequacy litigation is seen as a means of ensuring that all public school children (regardless of race or zip code) receive a minimum, adequate level of education, with one court describing adequacy litigation as establishing "a constitutional floor of minimally adequate education to which public school students are entitled."[125]

As mentioned earlier, in some states, such as New York and Colorado, advocates turned to adequacy litigation, in part, because previous attempts at remedying the state's school finance system based on equality arguments had failed.[126] But, generally, there was a

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implement quality-of-education programs and capital construction). The Court rejected and remanded the district court's order of increasing salaries across the board in order to attract white students outside of the district. *Id.* at 100.

123. *See* Campaign for Fiscal Equity v. State, 719 N.Y.S.2d 475, 481 (Sup. Ct. 2001) (describing how the previous school finance litigation in New York "was among the majority of cases that found that unequal funding of school districts did not violate state equal protection clauses"); Jared S. Buszin, *Beyond School Finance: Refocusing Education Reform Litigation to Realize the Deferred Dream of Education Equality and Adequacy*, 62 EMORY L.J. 1613, 1621-22 (2013).

124. *See Campaign for Fiscal Equity*, 719 N.Y.S.2d at 481; Buszin, *supra* note 123, at 1621.

125. *Campaign for Fiscal Equality*, 719 N.Y.S.2d at 481; *see* Buszin, *supra* note 123, at 1621 (describing adequacy litigation as litigation wherein "courts have interpreted the education clauses in state constitutions to require states to provide a substantive education that does not fall below a minimally adequate level"); Paul L. Tractenberg, *Beyond Educational Adequacy: Looking Backward and Forward Through the Lens of New Jersey*, 4 STAN. J. C.R. & C.L. 411, 420-21 (2008) (describing New Jersey's definition of a "thorough and efficient" or "adequate education" as requiring "an equal educational opportunity for all that must be understood to embrace that educational opportunity which is needed in the contemporary setting to equip a child for his role as a citizen and as a competitor in the labor market, but not the best possible education" (footnotes omitted) (internal quotation marks omitted)).

126. *See Campaign for Fiscal Equality*, 719 N.Y.S.2d at 479; Buszin, *supra* note 123, at 1620; *see also* James E. Ryan, *The Influence of Race in School Finance Reform*, 98 MICH. L. REV. 432, 450 (1999).

growing belief that equalizing expenditures per student alone did not always result in equalizing educational opportunities for all public school children.[127] Indeed, other factors, including socioeconomic status and race, tended to impact educational achievement, essentially requiring certain school districts "to spend more than average simply to provide average educational opportunities."[128] How courts would address the disparities among school districts and, particularly, the special needs of at-risk student populations in primarily low-wealth districts that enroll high concentrations of minority and low-income children, would come to mark the success of adequacy litigation at achieving sufficiency in school funding, and for all public school children.

1. *Problems with Defining an Adequate Education*

Adequacy claims originate from the education clauses of state constitutions, which require state legislatures to provide for a public-education system using terms such as "thorough and efficient," "adequate," or "ample."[129] While few can legitimately dispute that all children deserve a minimally adequate education,[130] the real challenges in trying to achieve equal educational opportunities through adequacy litigation begin with defining what constitutes an adequate education.[131]

State courts weighing adequacy cases must interpret the meaning of an adequate education and set the standards used to apply and enforce that obligation on state defendants: pivotal responsibilities for the courts. If the bar is set too low, it renders the constitutional duty of providing an adequate education meaningless.

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127. *See* Rebell, *supra* note 13, at 227; Buszin, *supra* note 123, at 1630; *see also* Hoke Cnty. Bd. of Educ. v. State, No. 95CVS1158, 2000 WL 1639686, at *56 (N.C. Super. Ct. Oct. 12, 2000) (crediting expert opinion "that throwing money at an education problem without having goals in place for the spending and a system of accountability to measure the effectiveness of the spending is wasteful and not likely to result in improving student performance"), *rev'd on other grounds*, 599 S.E.2d 365 (N.C. 2004).

128. Ryan, *supra* note 126, at 435 ("The greater needs of poor children, coupled with the greater costs of operating urban schools, virtually guarantee that urban schools will have to spend more than average simply to provide average educational opportunities."); *see* Rebell, *supra* note 13, at 227; Buszin, *supra* note 123, at 1631.

129. Rebell, *supra* note 13, at 232 (internal quotation marks omitted); Buszin, *supra* note 123, at 1621-22.

130. Buszin, *supra* note 123, at 1622.

131. *See* Rebell, *supra* note 13, at 231.

If the bar is set too high, it may become judicially unmanageable.[132] The courts must also decide whether to use prudential standards, plain-meaning language, state educational standards, or a combination thereof when defining an adequate education.

One of the inherent problems in using state standards to define an adequate education is that states may set the bar low for an accredited education and, in turn, fund high-poverty, high-minority schools only up to that level.[133] In 1995, the Texas Supreme Court equated the provision of an adequate education with state accreditation standards and found that the cost of providing an accredited education was $3,500 per student.[134] This was particularly problematic because the state created the accreditation standards to ensure that most school districts met those standards, not to ensure that students were receiving an adequate education.[135] The court did hold that the Texas legislature's discretion was not limitless, stating the legislature could be held liable if it "define[d] what constitutes a general diffusion of knowledge so low as to avoid its obligation to make suitable provision imposed by article VII, section 1" of the Texas constitution (the education clause).[136] Nevertheless, when the Texas Supreme Court weighed the efficiency of the Texas public-education system in 2005, the court found compelling the fact that most plaintiff school districts were accredited.[137]

In Kansas, the Kansas Supreme Court initially tied the state's duty of providing an adequate education to the state educational standards and found that, through the accreditation standards, all

132. *See Edgewood V*, 176 S.W.3d 746, 778 (Tex. 2005) (comparing, at one extreme, a first-grade reading standard as inadequate and, at the other, an adequacy standard requiring that all students must be taught "multiple languages or nuclear biophysics" and provided unlimited resources).

133. Ryan, *supra* note 88, at 260 ("Many school finance and school desegregation cases thus have become primarily concerned with obtaining sufficient funds to finance a basic level of education in the poorest and/or most racially isolated school districts.").

134. *See* Edgewood Ind. Sch. Dist. v. Meno (*Edgewood IV*), 917 S.W.2d 717, 730 (Tex. 1995).

135. *See Edgewood V*, 176 S.W.3d at 788 ("[T]he requirements for an 'academically acceptable' rating are set to assure, not that there will be a general diffusion of knowledge, but that almost every district will meet them.").

136. *Edgewood IV*, 917 S.W.2d at 730 n.8.

137. *See Edgewood V*, 176 S.W.3d at 791-92 (discussing implications of accredited schools in striking down efficiency/equity claims). Curiously though, the same court held the fact that school districts were providing an accredited education did not preclude the court from holding the system in violation of an Article VIII, § 1(e) claim. *Id.* at 797.

school districts were meeting that standard.[138] The state legislature later eliminated those educational goals, and when students and districts again challenged the school finance system, a lower court dismissed the case, citing the decision in *USD 229*.[139] The Kansas Supreme Court reversed, holding that while the court held previously that accreditation standards serve as a base for defining suitability, the legislature did not have unfettered discretion and the plaintiffs should be able to prove that achievement gaps based on race and socioeconomic status—among other evidence—demonstrate an inadequate and unsuitable education.[140] The court further counseled that "'[t]he issue of suitability is not stagnant; past history teaches that this issue must be closely monitored.'"[141]

In Colorado, the state supreme court used neither state standards nor prudential standards in determining what constitutes an adequate education. There, the court previously held, on an appeal reversing a dismissal in favor of defendants at the pleading stage,

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138. *See USD 229*, 885 P.2d 1170, 1186 (Kan. 1994) (holding that the court would "utilize as a base the standards enunciated by the legislature and the state department of education"). The standards were the educational goals then existing in K.S.A. 72-6439(a):

> (1) Teachers establish high expectations for learning and monitoring pupil achievement through multiple assessment techniques; (2) schools have a basic mission which prepares the learners to live, learn, and work in a global society; (3) schools provide planned learning activities within an orderly and safe environment which is conducive to learning; (4) schools provide instructional leadership which results in improved pupil performance in an effective school environment; (5) pupils have the communication skills necessary to live, learn, and work in a global society; (6) pupils think creatively and problem-solve in order to live, learn and work in a global society; (7) pupils work effectively both independently and in groups in order to live, learn and work in a global society; (8) pupils have the physical and emotional well-being necessary to live, learn and work in a global society; (9) all staff engage in ongoing professional development; [and] (10) pupils participate in lifelong learning.

Id. at 1187 (internal quotation marks omitted).

139. *See* Montoy v. State (*Montoy I*), 62 P.3d 228, 230, 233-35 (Kan. 2003).

140. *Id.* at 233-35.

141. *Id.* at 234 (quoting *USD 229*, 885 P.2d at 1186). The Texas courts have held similarly that "the State's provision for a general diffusion of knowledge must reflect changing times, needs, and public expectations." *Edgewood IV*, 917 S.W.2d at 732 n.14. Texas has not consistently applied this provision and dismissed allegations showing gaping deficiencies in the state accreditation standards in 2004. *See Edgewood V*, 176 S.W.3d at 787-88. Such holdings remain important when state courts do use state standards as a gauge for determining the merits of adequacy claims.

that the trial court must "determine whether the state's public school financing system is rationally related to the constitutional mandate that the General Assembly provide a 'thorough and uniform' system of public education."[142] The trial court accepted the higher court's suggestion that it may "rely on the legislature's own pronouncements [to develop] the meaning of a 'thorough and uniform' system of education"[143] and ultimately held the system "irrational, arbitrary, and severely underfunded."[144] Ignoring both the history surrounding the education clause and the standards and goals imposed by the Colorado General Assembly, the state supreme court selectively interpreted the words "'thorough'" and "'uniform,'" ultimately concluding the current system met the mandate because it was "of a quality marked by completeness, is comprehensive, and is consistent across the state."[145]

Courts that have had greater success in ruling on adequacy cases and weighing educational opportunities tend to invoke prudential-type standards for an adequate education. Using such prudential standards not only avoids arbitrarily setting accreditation standards too low, but also gives clearer, meaningful guidance to state legislatures, litigants, and the courts on the important issue of adequate funding that can withstand the test of time. One of the early, landmark adequacy decisions was *Rose v. Council for Better Education, Inc.*, in which plaintiffs representing poor school districts alleged that the Kentucky school finance system was so inadequate and inequitable "as to result in an inefficient system of common school education in violation of [the] Kentucky Constitution . . . and the equal protection clause and the due process of law clause of the [Fourteenth] Amendment."[146] In *Rose*, the Supreme Court of Kentucky credited the trial court's findings that Kentucky's school financing system was unconstitutional because "students in property poor school districts are offered a minimal level of educational opportunities, which is inferior to those offered to students in more affluent districts."[147] The trial court referred to this disparate treatment as "'invidious' discrimination, based on the place of a

142. Lobato v. State, 218 P.3d 358, 363 (Colo. 2009) (en banc).

143. *Id.*

144. Findings of Fact & Conclusions of Law, *supra* note 18, at 182.

145. *Compare* Lobato v. State, 304 P.3d 1132, 1140-41 (Colo. 2013) (en banc), with *id.* at 1151-60 (Hobbs, J., dissenting) (criticizing the majority for selective definitions of "thorough and uniform").

146. 790 S.W.2d 186, 190 (Ky. 1989).

147. *Id.* at 192.

student's residence."[148] However, what distinguishes *Rose* from earlier school finance litigation based on equal protection claims is that the Supreme Court of Kentucky further recognized that problems within Kentucky's school system could not simply be addressed through financial equalization between districts.[149] For example, the court noted that "[a] substantial difference in the curricula offered in the poorer districts contrasts with that of the richer districts, particularly in the areas of foreign language, science, mathematics, music and art."[150] This recognition that the achievement of an adequate education included more than just accounting for particular financial inputs into a given school district led the court to establish a standards-based definition of what it would mean for a child in Kentucky to achieve an "efficient" education for state constitutional purposes, which included:

> (i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization; (ii) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices; (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation; (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness; (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage; (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and (vii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.[151]

Other state courts later adopted Kentucky's definition of an "efficient" education or referenced it as a basis when defining what constitutes an adequate education.[152]

2. *Choosing the "Right" Plaintiffs*

Critics of school finance cases often lament advocates for failing to be more selective in choosing the plaintiffs and claims that more closely align with the denial of equal educational

148. *Id.*
149. *Id.* at 197.
150. *Id.*
151. *Id.* at 212.
152. *See* Rebell, *supra* note 13, at 235-36.

opportunities.[153] This can be a great concern where claims that the education of all students in a given state or school district is insufficiently funded for purposes of achieving an adequate education may, in turn, cloud the reality that low-wealth districts with high concentrations of minority and low-income children are facing serious challenges to provide the caliber of education that wealthier plaintiff districts are already offering.[154] Of course, with substantial education budget cuts made by state legislatures in recent years forcing all districts in a given state to cut teachers and educational programs while imposing additional mandates and raising educational demands on students, the delivery of an adequate education to all students may be at risk.[155] However, when courts are receiving evidence of mixed success in public schools based on the performance of non-at-risk students, the compelling case for economically disadvantaged, ELL, and minority students can be lost.

In Colorado, for example, several parents of school children and school districts of all types sued the state for failing to provide a "thorough and uniform" public education system as required under the Colorado constitution. These included parents and school districts from the impoverished, high-minority districts in the San Luis Valley, to the wealthy suburban, majority white districts of Boulder Valley and Cherry Creek. The district court made key findings related to at-risk students, finding that in every area tested, in every grade level, "students who qualify for free or reduced lunch score much lower than students who are not free or reduced lunch eligible."[156] The court determined that the system established in Colorado for providing at-risk funding for low-income children was both "arbitrary and irrational."[157] Similarly, for ELL students, "[a]t

153. *See* Martin R. West & Paul E. Peterson, *The Adequacy Lawsuit: A Critical Appraisal*, *in* SCHOOL MONEY TRIALS: THE LEGAL PURSUIT OF EDUCATIONAL ADEQUACY 1, 3 (Martin R. West & Paul E. Peterson eds., 2007) (discussing that even after judicial relief is ordered there is no guarantee that the funds will reach the students).

154. *See* Buszin, *supra* note 123, at 1627 ("The academic performance of an average black or Hispanic student is equivalent to the performance of an average white student in the lowest quartile of white achievement.").

155. *See, e.g*, Lobato v. State, 304 P.3d 1132, 1150 (Colo. 2013) (en banc) (recognizing the $1 billion cut to education); Patrick Michels, *$5.4 Billion Spending Cut Already Taking a Toll on Schools*, TEX. OBSERVER (Mar. 19, 2012), http://www.texasobserver.org/54-billion-spending-cut-already-taking-a-toll-on-schools/ (describing $5.4 billion cut to the Texas education budget).

156. Findings of Fact & Conclusions of Law, *supra* note 18, at 102.

157. *Id.* at 99-100 (crediting expert testimony that Colorado's school finance formula for at-risk students "has a low set of weights, a low count method because it

all grade levels and in all content areas tested, fewer than ten percent of [beginner ELL] students scored proficient on [Colorado's student assessment test] in reading, writing, and math in 2009."[158] The court went on to explicitly find that "Colorado is not providing adequate funding for basic instructional programs for English language learners and no funding for supplementary programs, thereby making it unlikely the achievement gap will close in the foreseeable future."[159]

By contrast, the performance of non-economically disadvantaged students, non-ELL students, and non-minority students showed a different Colorado. Boulder Valley, for example, is a property-wealthy district and on the whole was a high-performing district, yet the district had "one of the largest achievement gaps in Colorado" when it came to low-income students, ELL students, minority students, and students requiring special education programs.[160] The defendants boasted of Colorado's overall achievement nationally, ranking near the top of the states on nearly every National Assessment of Educational Progress (NAEP) administered in grades four and eight.[161] Despite an overwhelming record contrasting the struggles between property-poor and property-wealthy districts and the struggles between at-risk and non-at-risk students in meeting state and national standards, the trial court perhaps overreached in concluding that the entire system was unconstitutional because "[a]ll School Districts lack the funding necessary to meet the increased expectations of the current revisions to standards-based education."[162] On appeal, the state supreme court overturned the lower's court ruling that the Colorado school finance system was unconstitutional.[163] The Colorado Supreme Court did acknowledge that the lower court had demonstrated that Colorado's school-financing system "might not be ideal," but rested on its conclusion that "the system passes constitutional muster."[164] While it

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only counts [students eligible for] free lunch as opposed to free and reduced lunch, and a low base" resulting in "a system that really doesn't drive substantively any additional resources into the higher-need districts" (internal quotation marks omitted)).

158. *Id.* at 96.

159. *Id.* at 97.

160. *Id.* at 144-45.

161. Defendants-Appellants' Opening Brief at 39-40, Lobato v. State, No. 2012SA25 (Colo. July 18, 2012).

162. Findings of Fact & Conclusions of Law, *supra* note 18, at 178.

163. Lobato v. State, 304 P.3d 1132, 1141 (Colo. 2013) (en banc).

164. *Id.* at 1144 (internal quotation marks omitted).

is not apparent from the opinion that the majority in *Lobato* rested its decision, in part, on the "mixed success" in the record, it is hardly conceivable that a court could ignore the incredible record of vastly deficient educational opportunities and achievement for minority and at-risk students and hold the system constitutional. As Chief Justice Michael Bender stated in his stinging dissent:

> The record, however, reveals an education system that is fundamentally broken. It is plagued by underfunding and marked by gross funding disparities among districts. Colorado's school-age population has exploded, with dramatic increases in the number of Hispanic students, low-income students, English language learners, and students with special needs. The General Assembly has failed to recognize these changes and to fund the increased costs necessary to educate these children. Colorado's education system is, beyond any reasonable doubt, neither thorough nor uniform.[165]

The Texas Supreme Court similarly dismissed an overwhelming record of contrasting achievement between at-risk and minority students and non-at-risk and majority students in a case brought by a range of school districts asserting general adequacy claims. There, over 300 school districts challenged the adequacy of the Texas school finance system, ranging from the property-poor Edgewood ISD plaintiff–intervenor districts to the property-wealthy districts located in Alamo Heights, Plano, and Highland Park.[166] The court acknowledged the wide achievement gaps between white students and their Latino, black, and economically disadvantaged peers, as well as large gaps in dropout and graduation rates.[167] The court also noted that the number of state standardized tests increased, as well as the punitive measures applied to students through the expansion of high-stakes testing.[168] As a result, districts incurred significant costs for remediation, including "summer school, remedial classes, curriculum specialists, [and] reduced class-size."[169] The court then put aside this striking evidence, self-selecting instead evidence of two outputs to hold that the system was adequate, finding that Texas scores on the NAEP had "improved relative to the other states," and Texas Assessment of Knowledge Skills scores showed some improvement in the first two years of testing.[170]

165. *Id.* (Bender, J., dissenting).
166. *Edgewood V*, 176 S.W.3d 746, 751 & n.2 (Tex. 2005).
167. *Id.* at 766-69, 789.
168. *Id.* at 765.
169. *Id.* at 769.
170. *Id.* at 789. The court apparently disregarded the fact that Texas ranked thirty-seventh among states. *Id.* at 768-69.

Ultimately, on the adequacy claim, the court held, "[W]e cannot conclude that the Legislature has acted arbitrarily in structuring and funding the public education system so that school districts are not reasonably able to afford all students the access to education and the educational opportunity to accomplish a general diffusion of knowledge."[171]

Texas may be the proving ground to determine whether bringing stronger, more specific adequacy claims on behalf of economically disadvantaged and ELL plaintiff students can be successful. In 2011, MALDEF filed suit against Texas alleging such narrower claims and, following a three-month trial, the district court held in favor of the at-risk students' adequacy claim.[172] That case, following a three-week hearing after the district court re-opened the evidence to consider legislative changes, again resulted in a ruling in favor of the at-risk students.[173] The state defendants are expected to appeal the ruling, which will ultimately be decided by the Texas Supreme Court.

Some adequacy cases have proven more auspicious to fulfilling the promise of *Brown* by bringing specific claims on behalf of at-risk and minority students. In *Williams v. California*, economically disadvantaged and minority students enrolled in mostly segregated schools filed suit under the California Constitution, arguing that they were being provided unequal tools to acquire a fundamental education.[174] These disparities in resources included a lack of qualified teachers, a lack of adequate facilities in both condition and space, and a lack of instructional materials.[175] After four years of litigation, the case eventually settled with five bills signed into law

171. *Id.* at 789-90.

172. Court's Ruling at 1, Tex. Taxpayer & Student Fairness Coal. v. Williams, No. D-1-GN-11-003130 (Tex. Dist. Ct. Feb. 4, 2013).

173. *See* Press Release, MALDEF, Travis County District Court Declares Current Texas School Finance System Unconstitutional—Again (Aug. 28, 2014), *available at* https://maldef.org/news/releases/tcd_court_declares_finance_system_unconstitutional_again/ (including a link to final judgment and findings of fact and conclusions of law in *Texas Taxpayer & Student Fairness Coalition v. Williams*). In the 2013 legislative session following the court's ruling, the Texas legislature enacted some educational reforms (for example, reducing high-stakes end-of-course exams for high school students) and replaced approximately $3.4 billion of the $5.4 billion previously cut from public education, and the court reopened the evidence. *See id.* The court rejected the state's claims that the legislation mooted and un-ripened the claims and held the public school finance system unconstitutional. *Id.*

174. Oakes & Lipton, *supra* note 10, at 25.

175. *Id.* at 25-26.

that guaranteed California's students "'appropriate teacher assignment, sufficient instructional materials, and facilities in good repair.'"[176] The settlement also created standards and accountability measures, including school district oversight and assistance to the lowest performing schools, which led to increased student performance in those schools.[177]

In North Carolina, plaintiffs representing property-poor school districts and plaintiff–intervenors representing wealthy school districts both alleged that the North Carolina school finance system was inadequate and that North Carolina students were being denied "their fundamental constitutional right to equal educational opportunities."[178] The trial court determined that the North Carolina school finance system "is valid, sound and flexible enough to provide for the delivery of adequate funding to all school systems in North Carolina . . . so that they may provide each child with the equal opportunity to obtain a sound basic education" but, at the same time, recognized that "[e]conomically disadvantaged children, more so than economically advantaged children, need opportunities and services over and above those provided to the general student population in order to put them in a position to obtain an equal opportunity to receive a sound basic education."[179] The trial court specifically identified poverty, racial and ethnic minority status, and "lack of English language proficiency" among the socioeconomic factors that "place students at risk of educational failure."[180] For example, in "1998-1999, the [end of grade] test results for mathematics and reading combined for the third grade by race showed . . . 46.4% (680) of American Indian children scored below Level III; 56.1% (17,728) of Black children scored below Level III;

176. SALLY CHUNG, ACLU FOUND. OF S. CAL., *WILLIAMS V. CALIFORNIA*: LESSONS FROM NINE YEARS OF IMPLEMENTATION 6-7 (2013) (quoting Letter from Tom Torlakson, Superintendent, and Mike Kirst, President, State Bd. of Educ., to California Superintendents and Charter School Administrators (Aug. 7, 2013)), *available at* http://www.publicadvocates.org/sites/default/files/library/williams_v._california_lessons_from_nine_years_of_implementation.pdf.

177. *Id.* at 7 (finding that thousands of textbooks were being provided in the classroom and a decrease in the number of classes taught by "misassigned teachers").

178. Hoke Cnty. Bd. of Educ. v. State, No. 95CVS1158, 2000 WL 1639686, at *1 (N.C. Super. Ct. Oct. 12, 2000), *rev'd on other grounds* 599 S.E.2d 365 (N.C. 2004).

179. *Id.* at *91, *97.

180. *Id.* at *94.

[and] 49.8% (1462) of Hispanic children scored below Level III," while only "25.6% (16,068) of White children scored below Level III."[181] For the same school year, in grades three through eight, "79.2% of white students . . . were performing at grade level (Level III or above) in reading and math as compared to 48.5% of Black students, 55.5% of Native American students and 55.6% of Hispanic Students."[182]

The court next identified quality pre-kindergarten programs as "an effective means of increasing the performance of low-income and otherwise at-risk students."[183] Based on the facts presented, the court ultimately concluded that at-risk children in North Carolina were "being denied their fundamental constitutional right to receive the equal opportunity to a sound basic education" because of "the failure of the State to provide early childhood education in the form of quality pre-kindergarten educational programs."[184] The court ordered that the state provide pre-kindergarten educational programs for all at-risk children that qualify for the program.[185] These cases, among others in New Jersey, Kansas, Wyoming, and South Carolina, demonstrate that more specific claims brought by a more defined plaintiff class may result in more favorable outcomes targeting at-risk students compared to more generalized adequacy claims.

3. *The Problems with Remedies*

A major problem with remedying the lingering inequalities and inadequacies in state school finance systems is the courts' concern with overstepping their judicial power and encroaching upon the legislatures' power to enact laws. Courts typically have broad remedial powers to address legal wrongs.[186] Where a constitutional

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181. *Id.* at *99; *see also id.* at *10 (determining that academic performance less than Level II "is a constitutionally unacceptable minimum standard").

182. *Id.* at *99.

183. *Id.* at *106.

184. *Id.* at *113; *see also id.* at *107 ("The absence of such pre-school intervention for at-risk children materially affects their being able to have the equal opportunity to obtain a sound basic education from the start of their academic ladder."). *But see* Hoke Cnty. Bd. of Educ. v. State, 599 S.E.2d 365, 393-95 (N.C. 2004) (upholding inadequacy finding but reversing remedial order requiring pre-kindergarten for all at-risk students).

185. *Id.* at *113.

186. *See, e.g.*, Wendy Parker, *The Decline of Judicial Decisionmaking: School Desegregation and District Court Judges*, 81 N.C. L. REV. 1623, 1624 (2003) (noting the historical power of the courts in public interest law litigation); *id.*

violation is proven, courts have the power to declare the acts in question unconstitutional, to order injunctive relief, and to ensure that any harms proven are redressed.[187] However, in education-related cases, state courts often defer substantially (if not wholly) to state legislatures in remedying the constitutional violation.[188] Like many federal courts in *Brown* and other school desegregation cases, many state courts in school finance cases are seemingly reluctant to issue injunctions specifying remedies.[189] Although state courts should defer to the legislative branch in enacting a remedy because they are the branch of government principally assigned to establishing public school finance systems, courts can appropriately influence those remedies by: first, issuing more specific declaratory and injunctive relief aimed at the harms shown in court; and second, by reviewing the legislative remedies to ensure that they correct the violations found, as opposed to back-door deals that typically influence remedies. These actions are not uncommon practices of the courts and should help ensure that those students harmed by the inequitable and inadequate school finance systems are provided with relief that will ultimately lead to the provision of equal educational opportunities.

Critics of school finance cases often argue that courts are ill prepared to oversee school finance reform because of the inherent politics and varying interests involved.[190] They point to protracted litigation as a sign of the ineffectiveness of school finance cases as a

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at 1644 (finding that, in spite of popular belief to the contrary, federal district courts still "have the power and ability to effectuate more meaningful desegregation of public schools than they have undertaken").

187. *See, e.g.*, *Montoy III*, 112 P.3d 923, 931 (Kan. 2005) ("'Nor should doubts about the court's equitable power to spur legislative action or to reject deficient legislation impede judicious over-sight. An active judicial role in monitoring remedy formulation is well-rooted in the courts' equitable powers. As long as such power is exercised only after legislative noncompliance, it is entirely appropriate.'" (quoting Note, *Unfulfilled Promises: School Finance Remedies and State Courts*, 104 HARV. L. REV. 1072, 1088 (1991))).

188. *See* Buszin, *supra* note 123, at 1624-25; *see also* United States v. Texas, 680 F.2d 356, 372-74 (5th Cir. 1982) (holding injunctive relief moot in EEOA language rights case where district court's injunctive relief should have given deference to consideration of new laws passed by Texas legislature in addressing statutory violations).

189. *See* Parker, *supra* note 186, at 1642-44 (discussing the trepidation of courts in directing educational officials in school desegregation cases).

190. *See* Heise, *supra* note 7, at 2438-40 (discussing political reservations by the public and others related to school finance remedies).

remedy to ensuring equal educational opportunities.[191] However, none of these arguments are meritorious. First, virtually every legislative act is subject to political wagering and diverse interests. Whether the issue involves redistricting, regulation of public utilities, driver's licenses, employment, taxes, and the like, these matters are going to be subject to public debate. However, if a state legislature adopts a redistricting plan that purposefully draws boundaries to dilute minority voting strength, should those actions not be subject to judicial review under federal or state constitutions and laws enacted to ensure such does not occur? If a state legislature arbitrarily and unnecessarily regulates private companies offering public utilities, should those actions not be subject to review? Certainly, the answer is "no," and the same logic applies to school finance litigation.

Similarly, the fact that a small minority of states have engaged in protracted school finance litigation does not mean that courts are ill prepared to handle and resolve school-funding cases. If that were the case, we possibly could have seen a reversion to "separate but equal" de jure segregation in public schools. Instead, we have witnessed some courts creating and relying on strong, judicially manageable standards and then enforcing those standards when necessary either in the remedial phase or in separate litigation filed years later.

The Kansas school finance cases illustrate a good example of courts effectively exercising their judicial powers to interpret state actions against the constitution, identifying judicially manageable standards, and enforcing their orders when necessary to ensure equal educational opportunities for at-risk and minority students. The *Mock* case was the first among the contemporary school-funding cases[192] alleging that the State had failed to "make suitable provision" for education, as required by the Kansas constitution, for students in lower-wealth school districts.[193] In a 1991 pre-trial opinion, the district court held that each child must be given an educational

191. *Id.*

192. Kansas has been the subject of approximately eight separate school finance lawsuits, and about ten state supreme court opinions, over the past forty-five years. *See USD 229*, 885 P.2d 1170, 1175-78 (Kan. 1994) (describing history of school finance litigation up to 1994); *see also* John Robb & Alan Rupe School Finance Case File (on file with the author) (describing additional cases of *Montoy/Robinson*, *Gannon*, and *Petrella*).

193. *USD 229*, 885 P.2d at 1187. The Kansas Constitution's education clause provides, "The legislature shall make suitable provision for finance of the educational interests of the state." KAN. CONST. art. 6, § 6(b).

opportunity that is equal to that made available to every other child under the state constitution.[194] The legislature responded by adopting a new school finance system in 1992 that provided low-wealth school districts with additional revenue while cutting taxes,[195] but various groups of plaintiffs again sued, some alleging that the reforms did not go far enough, others that they went too far. In 1994, the Kansas Supreme Court upheld the constitutionality of the school finance system and established standards to weigh future challenges. In defining a "suitable" education, the Kansas Supreme Court relied on the legislature's goals and a constitutional provision requiring the legislature to "provide for intellectual, educational, vocational and scientific improvement by establishing and maintaining public schools."[196] The court also held that "the issue of suitability is not stagnant" and "must be closely monitored."[197]

These standards appropriately guided the Kansas courts in subsequent cases. Each time the legislature defaulted on its constitutional obligation to provide a suitable education, the courts held the state responsible.[198] And each time the courts held the evidence demonstrated that the state had satisfied the standard, the courts denied plaintiffs relief.[199]

The Kansas courts also steadfastly ensured that the remedies targeted the violations. Following the *Mock* case, the legislature's new school finance system dropped property taxes 38% and reduced

194. Mock v. State, No. 91-CV-1009, slip op. at 7 (Shawnee Cnty. Dist. Ct. Oct. 14, 1991).

195. *See USD 229*, 885 P.2d at 1178.

196. *Id.* at 1186; KAN. CONST. art. 6, § 1.

197. *USD 229*, 885 P.2d at 1186; *see also Montoy I*, 62 P.3d 228, 235 (Kan. 2003) (holding that the suitability provision may also be violated when the state funds education "so low that regardless of what the State says about accreditation, it would be impossible to find that the legislature has made 'suitable provision for finance of the educational interests of the state'" (quoting KAN. CONST. art. 6, § 6(b))).

198. *See, e.g.*, Montoy v. State (*Montoy II*), 120 P.3d 306, 308 (Kan. 2005) (holding the system unconstitutional following legislative modifications to the school finance system); Gannon v. State, 319 P.3d 1196, 1204, 1239 (Kan. 2014) (finding system inequitable for its failure to provide school districts with "reasonably equal access to substantially similar educational opportunity through similar tax effort" and remanding the adequacy claim to trial court for further findings).

199. *See, e.g.*, *USD 229*, 885 P.2d at 1187, 1197 (finding the system suitable and constitutional); Montoy v. State (*Montoy IV*), 138 P.3d 755, 765 (Kan. 2006) (finding the State substantially complied with the supreme court's mandates).

the equity gaps between property-poor and property-rich districts.[200] By 2003, the state legislature had scaled back its school-funding formulas and the Kansas Supreme Court affirmed a lower court ruling, finding the system inadequate and unsuitable for "middle- and large-sized [school] districts with a high proportion of minority and/or at-risk and special education students."[201] The court also found that the state's decision to base its formulas on "former spending levels and political compromise," instead of actual costs, particularly impacted weighting factors for bilingual-education, special education, and at-risk students, among others.[202] When the state again failed to increase sufficiently the funding and failed to base funding on actual costs, the court ordered the legislature to commit $285 million for the 2005–2006 school year and retained jurisdiction pending a legislative cost study.[203] In 2006, Kansas passed legislation that was intended to increase funding for at-risk and ELL students, among others, and decrease inequities between school districts over a three-year period.[204] The Kansas Supreme Court concluded that these targeted increases, though not perfect, substantially complied with its mandates and relinquished jurisdiction.[205]

The Wyoming courts have also adopted clear judicially manageable standards for the state legislature to follow in order for the state to meet its constitutional obligation of providing an equitable and adequate education and retained jurisdiction when necessary to monitor the remedy. In the Wyoming Supreme Court's 1995 decision in *Campbell County School District v. Wyoming*, the court issued guidelines for the legislature to follow in order to remedy the constitutional violations and ensure students were prepared to fulfill their roles as citizens and participants in the civic,

200. *See* Robb & Rupe, *supra* note 192.

201. *See Montoy II*, 120 P.3d at 310.

202. *See id.* Even when the Kansas Legislature attempted to extract the cases from the courts, the courts responded strongly in judging the legislature's failure to fulfill its constitutional duty. "'The mountain labored and brought forth nothing at all,' the judge wrote on May 11, referring to the Legislature's inaction. 'In fact, rather than attack the problem, the Legislature chose instead to attack the court.'" Winter, *supra* note 89.

203. *Montoy III*, 112 P.3d 923, 940-41 (Kan. 2005) (basing this figure on the 2001 cost study ordered by the legislature and taking into account current budget levels).

204. *See Montoy IV*, 138 P.3d at 760-65.

205. *Id.* at 765.

economic, and intellectual world upon graduation.[206] Based on the trial record, the court specified that educational opportunities should include small class sizes, at-risk programs, and meaningful standards and assessments.[207] The Wyoming courts required the state to base its funding on actual costs and the state, consequently, engaged in a cost study.[208] In 2008, the Wyoming Supreme Court again scrutinized the funding elements, including at-risk formula funding, and concluded the system passed constitutional muster.[209] The Wyoming courts' dutiful job of weighing the actions of the legislature against the constitutional standards, and its persistence in ensuring the legislature's remedy corrected the deficiencies, including opportunities for at-risk students, personifies the potential of school finance litigation in achieving equal educational opportunities.[210]

New Jersey is often criticized for its litigious history, but in fact, it represents a dogged approach by the New Jersey Supreme Court in holding the legislature to its duty of curing constitutional deficiencies identified by the courts based on the evidence.[211] In 1970, poor urban districts raised federal and state equal protection claims, alleging that they were denied "constitutional education[al]

206. *See School Funding Cases in Wyoming*, NAT'L EDUC. ACCESS NETWORK, http://schoolfunding.info/2012/05/school-funding-cases-in-wyoming/ (last updated Apr. 2012) (citing Campbell Cnty. Sch. Dist. v. State, 907 P.2d 1238 (Wyo. 1995)).

207. *See* Campbell Cnty. Sch. Dist., 907 P.2d at 1279.

208. School Funding Cases in Wyoming, *supra* note 206.

209. *Id.*

210. The Washington Supreme Court has also held that its education article, Washington Constitution, article IX, section 1, "imposes a judicially enforceable affirmative duty on the State to make ample provision for the education of all children residing within its borders" and relies, in part, on statutes. McCleary v. State, 269 P.3d 227, 231-32 (Wash. 2012) (en banc). The Washington Court defines education as the means to acquire the basic knowledge and skills needed to compete in today's economy and meaningfully participate in this state's democracy. *Id.* at 231. In describing the substantive content of the knowledge and skills, the court uses the state's "broad educational concepts outlined in *Seattle School District*, the four learning goals in Engrossed Substitute House Bill (ESHB) 1209, 53d Leg., Reg. Sess. (Wash. 1993), and the State's essential academic learning requirements (EALRs)." *Id.* In January 2012, the Washington Supreme Court found the state had not fulfilled its constitutional duty in amply providing an education. *Id.*

211. As the Texas Supreme Court aptly stated,

> [T]he continued litigation over public school finance cannot fairly be blamed on constitutional standards that are not judicially manageable; the principal cause of continued litigation, as we see it, is the difficulty the Legislature has in designing and funding public education in the face of strong and divergent political pressures.

Edgewood V, 176 S.W.3d 746, 779 (Tex. 2005).

guarantees."[212] The New Jersey Supreme Court denied plaintiffs' equal protection claims but upheld a claim that the New Jersey school finance system "violated the New Jersey Constitution's 'thorough and efficient' clause."[213] The *Robinson* cases culminated with the passage of the Public Education Act of 1975, which was intended to address the funding concerns identified by the court.[214] In 1981, poor school districts challenged the Public Education Act of 1975 as insufficiently addressing the disparities between poor and affluent school districts.[215] This challenge ultimately spurred decades of adequacy and equity litigation, known as the *Abbott* cases, in which the Public Education Act of 1975 and two other pieces of school finance legislation, the Quality Education Act of 1990 and the Comprehensive Education Improvement and Financing Act of 1996, were found unconstitutional.[216]

After determining that the Public Education Act of 1975 was unconstitutional, particularly as applied to poorer urban districts,[217] instead of merely delegating the legislature the responsibility of remedying the situation and then approving the remedy, the New Jersey Supreme Court repeatedly assessed the legislature's remedies and called for further action when necessary. For example, in response to the court's previous orders, the New Jersey legislature passed the Comprehensive Educational Improvement and Financing Act (CEIFA) in 1996.[218] Although the New Jersey Supreme Court confirmed that the content standards established under the act were "an essential component of a thorough and efficient education," the Court concluded that "[t]he standards themselves do not ensure any substantive level of achievement,"[219] and that the "standards, therefore, cannot answer the fundamental inquiry of whether the new statute assures the level of resources needed to provide a thorough and efficient education to children in the special needs districts."[220] Specifically, the court admonished the legislature for assessing the level of resources needed to provide a thorough and efficient

212. Deborah L. Sanders, *On School Funding, Remands, and Chosen Wise Men: Judge King and the Remand Option Aimed at Fulfilling the Constitutional Mandate for a Thorough and Efficient Education*, 35 RUTGERS L.J. xlix, l (2004).
213. *Id.* at li.
214. *Id.*
215. *Id.* at xlii.
216. Tractenberg, *supra* note 125, at 419.
217. Abbott v. Burke (*Abbott II*), 575 A.2d 359, 363 (N.J. 1990).
218. Abbott v. Burke (*Abbott IV*), 693 A.2d 417, 425 (N.J. 1997).
219. *Id.* at 420, 428.
220. *Id.* at 429.

education on the basis of a "model district" that did not resemble the characteristics of New Jersey's wealthy districts or its special-needs districts.[221] The court went on to hold CEIFA to be "unconstitutional as applied to the special needs districts" and ordered remedial relief specifically "directed to those constitutional deficiencies."[222] The court "require[d] that funding for regular education in the special needs districts be increased" and "order[ed] the State to study, identify, fund, and implement the supplemental programs required to redress the disadvantages of public school children in the special needs districts."[223] Thus, the New Jersey Supreme Court presents an example of a court not only refusing to equate established standards and legislative assurances with an adequate education, but also demanding that the legislature ensure that adequacy in educational opportunities is achieved across the state's districts.

The results of the court's targeted efforts speak for themselves. In preschool and early elementary grades, where the *Abbott* reforms were primarily targeted, the *Abbott* school districts have shown impressive improvement.[224] For example, preschool enrollment increased "from 19,000 children served in the 1999-2000 school year to a peak enrollment of over 39,000 in 2004-05 when 76 percent of the estimated eligible population of three- and four-year-olds were being served."[225] Furthermore,

> [t]he percentage of general education students in Abbott elementary schools scoring at least proficient on the language arts literacy test rose from 63 percent in 2000-01 to 77 percent in 2004-05. During the same time period, proficiency levels barely changed in the other poor districts as and in all non-Abbott districts as a whole.[226]

In *Abbott XX*, the New Jersey Supreme Court ruled that a new school finance law, the School Funding and Reform Act of 2008 (SFRA), was constitutional, and that the state was no longer held to

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221. *Id.* at 429-31.

222. *Id.* at 421.

223. *Id.*

224. EDUC. LAW CTR., THE ABBOTT DISTRICTS IN 2005-06: PROGRESS AND CHALLENGES 3 (2006), *available at* http://www.edlawcenter.org/assets/files/pdfs/publications/AbbottIndicatorsReport_2005_06.pdf. According to the Education Law Center, which litigates for the Abbott district plaintiffs, other accomplishments include the "narrowing of the achievement gap between suburban and urban" school districts and substantial improvement in funding for at-risk and high-need school districts. *See Results*, EDUC. LAW CTR., http://www.edlawcenter.org/results.html (last visited Oct. 23, 2014).

225. EDUC. LAW CTR., *supra* note 224, at 3.

226. *Id.* at 4 (footnote omitted).

the court's previous remedial orders.[227] However, merely two years later, the plaintiffs were back in court seeking to enforce their rights pursuant to the *Abbott XX* decision because the state had failed to fully fund the SFRA, as required by the court when it granted the state reprieve from its previous remedial efforts.[228] The New Jersey Supreme Court refused to credit the state's argument that the court must defer to the legislature, finding that "[l]ike anyone else, the State is not free to walk away from judicial orders enforcing constitutional obligations."[229] Instead of allowing adequacy in education to remain a low bar, the New Jersey Supreme Court recognized the disparity in the provision of an adequate education to all school children, particularly those in the special needs districts, as a constitutional deprivation and continues to challenge the legislature to ensure a means for achieving an adequate education in those districts.[230]

North Carolina's courts have perhaps struggled a bit with providing the legislature too much leniency. First, the *Hoke* Court appropriately refused to limit its inquiry of adequacy to a constitutional facial challenge of legislatively established standards.[231] Instead, the court determined, based on the record, that at-risk students required more resources than average students to achieve adequacy and equality in educational opportunities.[232] The court ordered the legislature to develop a specific remedy in order to remediate the constitutional deprivation.[233] Unfortunately, the North Carolina Supreme Court ultimately reversed the trial court's order that the state provide pre-kindergarten educational programs to all at-risk children that qualify.[234] The North Carolina Supreme Court

227. Abbott v. Burke (*Abbott XX*), 971 A.2d 989, 992-93 (N.J. 2009) ("In sum, although no prediction is without some uncertainty, the record before us convincingly demonstrates that SFRA is designed to provide school districts in this state, including the Abbott school districts, with adequate resources to provide the necessary educational programs consistent with state standards.").

228. Abbott v. Burke (*Abbott XXI*), 20 A.3d 1018, 1023-24 (N.J. 2011).

229. *Id.* at 1024.

230. *Abbott IV*, 693 A.2d 417, 434 (N.J. 1997) ("[O]ur jurisprudence has recognized consistently that the exceptional needs of the SNDs [special needs districts] must be addressed if the constitutional deprivation is to be remediated.").

231. Hoke Cnty. Bd. of Educ. v. State, No. 95CVS1158, 2000 WL 1639686, at *91 (N.C. Super. Ct. Oct. 12, 2000), *rev'd on other grounds*, 599 S.E.2d 365 (N.C. 2004).

232. *Id.* at *91, *97.

233. *Id.* at *113.

234. *See* Hoke Cnty. Bd. of Educ. v. State, 599 S.E.2d 365, 393-95 (N.C. 2004).

called the trial court's remedy "premature" and cautioned that "its strict enforcement could undermine the state's ability to meet its educational obligations for 'at-risk' prospective enrollees by alternative means."[235] Essentially, the North Carolina Supreme Court gave in to what the court referred to as "recogniz[ing] our limitations in providing specific remedies for violations committed by other government branches in service to a subject matter, such as public school education, that is within their primary domain."[236]

However, once the state legislature established a pre-kindergarten program to address the needs of at-risk students, and a state budget bill subsequently threatened to limit admittance of eligible at-risk students to the program, the North Carolina Superior Court stepped in to block the challenged section of the bill.[237] Although the North Carolina Supreme Court granted deference to the state legislature to craft a remedy for identified constitutional deprivations, the Superior Court would not allow North Carolina to "walk away" from its obligations under the North Carolina Supreme Court's previous order.[238] Moreover, the North Carolina Superior Court will likely have the opportunity to address the needs of at-risk students once again. Recently, plaintiffs filed a motion alleging that the state has "abandoned many of the remedial commitments [it has] made to the court over the past 10 years."[239] Evidence that "the percentage of at-risk students . . . has increased from 38.9% in 1997-98 to 48.5% in 2006-07" may convince the North Carolina Superior Court that more targeted orders are necessary in order for the state to take its constitutional deprivations seriously.[240]

Other courts have struggled to ensure equal educational opportunities in school finance lawsuits by failing to maintain strong judicial standards or to enforce or apply effectively their standards.

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235. *Id.* at 395 (finding that neither the plaintiffs nor the State had "demonstrated to the satisfaction of this Court that [pre-kindergarten] is either the only qualifying means or even the only known qualifying means" for addressing the needs of at-risk students).

236. *Id.*

237. *See* Memorandum of Decision & Order Re: Pre-Kindergarten Services for At-Risk Four Year Olds at 24, *Hoke Cnty. Bd. of Educ.*, No. 95CVS1158, *available at* http://www.wral.com/asset/news/education/2011/07/18/9875183/ruling.pdf.

238. *Id.* at 23-24.

239. *N. Carolina Plaintiffs File Major Non-Compliance Motion*, NAT'L EDUC. ACCESS NETWORK (May 28, 2014), http://schoolfunding.info/2014/05/n-carolina-plaintiffs-file-major-non-compliance-motion/.

240. *Id.*

In Texas, the state supreme court established a strong standard for equity claims in *Edgewood v. Kirby*, holding that the efficiency mandate under the education clause of the Texas constitution[241] required that "[t]here must be a direct and close correlation between a district's tax effort and the educational resources available to it; in other words, districts must have substantially equal access to similar revenues per pupil at similar levels of tax effort."[242] The court dutifully applied this standard when the legislature's next school finance plan arbitrarily exempted 132 super-wealthy school districts from the equalized school finance system, holding the system again unconstitutional.[243] But over the years, the Texas Supreme Court seemingly watered down this standard by first requiring equity only up to the cost of providing an adequate education,[244] then accepting a nine-cent tax advantage in favor of property-wealthy school districts as satisfying the equity standard,[245] and exempting a small number of super-property wealthy school districts who were held harmless from the imposition of the *Edgewood I* mandate based on the state's word that it would eventually phase out those school districts' substantial equity advantage.[246] For the substantial number of at-risk and minority school children enrolled in the state's poorest school districts, the promise of competing on a level playing field remains just that—a promise, unfulfilled.

Texas's handling of adequacy claims also provides little recourse due to the courts' application of the standard. Like the Kansas court, the Texas Supreme Court created a strong, judicially enforceable standard for adequacy claims tied to state statutory goals for public education and held that the legislature cannot set the bar for adequacy so low that students do not acquire a general diffusion of knowledge.[247] But, as with the equity claim, the court struggled to

241. TEX. CONST. art. VII, § 1 ("A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools.").

242. *Edgewood I*, 777 S.W.2d 391, 397 (Tex. 1989).

243. Edgewood Indep. Sch. Dist. v. Kirby (*Edgewood II*), 804 S.W.2d 491, 496, 498 (Tex. 1991).

244. *See id.* at 500.

245. *See Edgewood IV*, 917 S.W.2d 717, 731 n.12, 732 (Tex. 1995).

246. *See id.* at 731 n.12.

247. *Edgewood V*, 176 S.W.3d 746, 787-88 (Tex. 2005) ("The public education system need not operate perfectly; it is adequate if districts are *reasonably* able to provide their students the access and opportunity the district court described.").

apply the standard appropriately to the facts in the case. The court first dismissed glaring inequities and inadequacies related to educational inputs, holding that the adequacy of the system depended on outputs.[248] Then, after acknowledging glaring achievement gaps among minority students and special populations and depressing dropout and graduation rates, the court noted slight improvements in student scores on the state and national standardized tests, ultimately ruling "we cannot conclude that the Legislature has acted arbitrarily in structuring and funding the public education system so that school districts are not reasonably able to afford all students the access to education and the educational opportunity to accomplish a general diffusion of knowledge."[249] The court ultimately held the system unconstitutional under a separate constitutional provision outlawing statewide property taxes, but that led to a remedy that cut property taxes but did not necessarily increase access to educational opportunities.[250]

The latest school finance lawsuit filed in Texas may signal whether the Texas Supreme Court intends to emphasize the importance of providing equal educational opportunities for all students. As stated earlier, this case includes a more specific challenge to the arbitrary and inadequate funding for at-risk students filed by the Edgewood ISD plaintiffs, as well as a claim that the system provides inequitable funding for property-poor school districts.[251] The district court already applied the *Edgewood V* standards to the substantial record evidencing large and growing achievement gaps between minority and at-risk students and deepening equity gaps between property-poor and property-wealthy districts. In its February 4, 2013 ruling, following a three-month trial, the state district court held the system unconstitutionally inequitable for property-poor districts and inadequate for at-risk students.[252] And following a three-week evidentiary hearing after reopening of the evidence, the trial court again held the system unconstitutional, issuing over 350 single-spaced pages of findings—the majority highlighting the challenges facing at-risk students and property-poor school districts.[253]

248. *See id.* at 788.
249. *Id.* at 789-90.
250. *Id.* at 794.
251. *See supra* note 172 and accompanying text.
252. *See* Court's Ruling, *supra* note 172, at 2.
253. *See* Press Release, MALDEF, *supra* note 173.

The New York courts' difficulty with ensuring equal educational opportunities through its adequacy ruling resulted largely from its deference to the New York legislature. In *Campaign for Fiscal Equity v. State*, a New York supreme court found that the State violated the state constitution by failing to provide the opportunity for an adequate education to New York City public school students and that the public school financing system "had an unjustified disparate impact on minority students."[254] But, in the same breath, the lower court determined that it would "not at this time prescribe a detailed remedy for these violations" and instead would give the state legislature the first shot at reforming the system.[255] Accordingly, the trial court merely directed the state legislature to determine "the actual costs of providing a sound basic education," provide transparency in the distribution of school-funding assistance, and "[e]nsure[] a system of accountability to measure whether the reforms implemented . . . actually provide the opportunity for a sound basic education."[256] The Court of Appeals affirmed the trial court's finding that the New York school financing system was unconstitutional but further whittled away at the already limited remedy afforded by the trial court.[257] Despite plaintiffs' request that the court "initiate a legislative/judicial dialogue by issuing guidelines to the Legislature for restructuring the system and directing—with strict timetables—that the necessary resources be provided," the Court of Appeals responded by stating that it had "neither the authority, nor the ability, nor the will, to micromanage education financing."[258] The court then revised the trial court's previous remedy by eliminating the transparency directive and limiting the scope of the remedy to New York City public schools, instead of schools statewide.[259]

This general order resulted in a legislative solution that focused on increasing funding to schools over a four-year period but was stymied after only two years because of budget restrictions caused by

254. Campaign for Fiscal Equity v. State, 719 N.Y.S.2d 475, 549 (Sup. Ct. 2001). The trial court's disparate-impact claim was subsequently overturned by the appellate division, and that decision was affirmed by the Court of Appeals. Campaign for Fiscal Equity v. State, 801 N.E.2d 326, 329 (N.Y. 2003).

255. *Campaign for Fiscal Equity*, 719 N.Y.S.2d at 549.

256. *Id.* at 550.

257. *Campaign for Fiscal Equity*, 801 N.E.2d at 341, 347.

258. *Id.* at 344-45.

259. *Id.* at 347-48.

the recession.[260] After ten years, New York's deference to the legislature has yielded little opportunity for New York City's at-risk students to receive an adequate education.[261] In fact, the legislature's failure to address the constitutional violations led to the filing of a new lawsuit in February 2014, alleging that the State of New York has failed to adhere to the court's decisions in the *CFE* cases and continues to deny students in New York their constitutional right to a sound basic education.[262]

Arkansas similarly struggled to effectuate a timely and effective remedy to ensure equal educational opportunities through adequacy litigation. In *Lake View School District No. 25 v. Huckabee*, plaintiff school districts successfully challenged the state's failure to provide the students of Arkansas with an adequate education as guaranteed by the state constitution.[263] However, as in New York, the Supreme Court of Arkansas hesitated in ordering targeted, concrete remedies to address the constitutional deprivation, despite plaintiffs' request for "specific remedies against the State."[264] Moreover, despite the court's own recognition that the school-funding system was in "dire need" of change, and despite the court's "considerable frustration" with the state for failing to assume its responsibilities with respect to school funding as specified in earlier court decisions, ultimately, the court remained steadfast in holding that it was not the "court's intention to monitor or superintend the public schools of the state" and essentially left the creation of a remedy up to the state.[265] In response, the state failed to address the adequacy of its school finance system by the court-imposed deadline of January 2004.[266] In fact, the court recalled its mandate in 2004 and

260. *See* Michael A. Rebell, Safeguarding the Right to a Sound Basic Education in Times of Fiscal Constraint, 75 ALB. L. REV. 1855, 1897 (2012).

261. *See* Michael A. Rebell, CFE v. State of New York*: Past, Present and Future*, NYSBA GOV'T, L. & POL'Y J., Summer 2011, at 24, 27-28, *available at* http://schoolfunding.info/wp-content/uploads/2011/07/CFE-Past-Present-and-Future.pdf.

262. *See Michael Rebell Files Major New Advocacy Case in New York State*, NAT'L EDUC. ACCESS NETWORK (Feb. 12, 2014), http://schoolfunding.info/2014/02/michael-rebell-files-major-new-advocacy-case-in-new-york-state/.

263. Lake View Sch. Dist. No. 25 v. Huckabee, 91 S.W.3d 472, 495 (Ark. 2002).

264. *Id.* at 507.

265. *Id.* at 511.

266. *See* Lake View Sch. Dist. No. 25 v. Huckabee, 142 S.W.3d 643, 644 (Ark. 2004) (per curiam); *School Funding Cases in Arkansas*, NAT'L EDUC. ACCESS

again in 2005 to address claims brought by plaintiffs that the state was not complying with its constitutional duty to provide an adequate education to Arkansas' school children.[267] The court appointed special masters to investigate and report on the state's compliance with the court's orders.[268] However, even though the court adopted the findings of fact reported by the special masters with respect to concrete deficiencies found in the state's school-funding system, including that the legislature's "fr[eezing] the categorical funding for 2005–2006 and 2006–2007 for Alternative Learning Environment and English Language Learners" would, in part, have a "direct impact on remedial and mentoring programs, literacy and math coaches, counselors, school nurses, teachers, and homework hotlines,"[269] the court refused to "direct the General Assembly to appropriate a specific increase in foundation or categorized funding amounts," leaving such decisions up to the discretion of the legislature.[270] Finally, in 2007, based on another report issued by special masters appointed by the court, the court concluded that the legislature "[had] now taken the required and necessary legislative steps to assure that the school children of [Arkansas] are provided an adequate education."[271] However, this mere determination that the state had taken "the required and necessary steps" once again would not prove to be sufficient in guaranteeing an adequate education to all Arkansas school children.[272]

NETWORK, http://schoolfunding.info/2011/12/school-funding-cases-in-arkansas/ (last updated Dec. 2012).

267. *See* Lake View Sch. Dist. No. 25 v. Huckabee, 220 S.W.3d 645, 656-57 (Ark. 2005).

268. *Id.* at 647.

269. *Id.* at 656.

270. *Id.* at 657.

271. Lake View Sch. Dist. No. 25 v. Huckabee, 257 S.W.3d 879, 883 (Ark. 2007).

272. The State of Arkansas is under scrutiny once again as a small rural school district filed suit alleging that the state has failed to implement Act 57 of the Second Extraordinary Session of the Arkansas Legislature in 2003, which requires the Arkansas General Assembly to "assess continually 'what comprises an adequate education in Arkansas'" by "assess[ing], evaluat[ing], and monitor[ing] the entire spectrum of public education across the state and . . . evaluat[ing] the amount of state funds needed based on the cost of educational opportunity and adequacy." *Lake View Sch. Dist. No. 25*, 220 S.W.3d at 654 n.4 (quoting H.R. 1111, 84th Gen. Assemb., 2d Extraordinary Sess. (Ark. 2003)). Specifically, the Deer/Mt. Judea school district claims that the state knows that such small rural school districts are underfunded, but instead of funding them properly, the state seeks to close the

Leaving remedies exclusively to the discretion of the state entities originally responsible for the constitutional violations, especially after repeated violations, often perpetuates the problem of unequal educational opportunities. To make matters worse, state courts like those in New York and Arkansas failed to ensure that the remedies directly address the outstanding violations affecting special populations. In places like Arkansas, it is particularly troubling that the court hired special masters and adopted their findings as to particular areas requiring attention in order for the state to meet the constitutional requirement of an adequate education for all school children, and yet, the court fails to use this information to craft targeted remedies that could prevent repeated trips to the courthouse.

When courts retreat from targeted remedial orders, they stand the risk that state legislatures will fail to address the true disparities that keep school finance systems from providing the constitutional guarantees of an adequate education to all public school children, particularly at-risk students, and worse, that these unaddressed disparities will increase the divide between those students receiving an adequate education and those left behind—leading to more litigation.[273] This is why, perhaps, state courts should consider conducting fairness hearings to allow various affected students and school districts an opportunity to object to a legislative remedy. The objectors could still be held to meeting traditional standing requirements in order to avoid purely political interests seeking to delay action; the objectors would need to present evidence and argument on why the remedy does not address the constitutional violations found previously by the courts. Although this may temporarily delay a final solution, given the substantial investment of the states and the parties, it may seem like a viable alternative and keep the politics of the legislative remedial process more honest and open to advocates of at-risk students.

Nevertheless, even those courts that have deferred remedies to state legislatures have recognized that if a state legislature fails to

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schools without considering the effect on a student's ability to obtain an adequate education given the new excessive transportation time. *School Funding Cases in Arkansas*, *supra* note 266. The Supreme Court of Arkansas overturned the circuit court's decision dismissing the case, and a final decision on the merits remains pending. *See* Deer/Mt. Judea Sch. Dist. v. Kimbrell, 430 S.W.3d 29, 42 (Ark. 2013).

273. *N. Carolina Plaintiffs File Major Non-Compliance Motion*, *supra* note 239 (demonstrating that the percentage of at-risk students in North Carolina has increased over the time period that the state has failed to fulfill its remedial commitments).

remedy constitutional deprivations "or ha[s] consistently shown an inability to do so, [then] a court is empowered to provide relief by imposing a specific remedy and instructing the recalcitrant state actors to implement it."[274] By doing so, courts can help finally achieve the equality of educational opportunity promised in *Brown* and the constitutional right to an adequate education for all school children, regardless of race or background, as guaranteed by the states.

III. ¿DONDE VAMOS? (WHERE DO WE GO FROM HERE?)

Many commentators would likely agree that if we had both integrated schools and equalized and adequately funded school finance systems, achievement and opportunity gaps would close, and we would be closer to realizing the dream of *Brown* more than ever before.[275] Unfortunately, given the current precedents in both school desegregation and school finance litigation, that is not likely to occur. However, none of the efforts should be abandoned, either.

When a Dallas ISD school principal used English as a second language classes as a proxy to segregate Latino and African-American students in Preston Hollow Elementary School in 2006, it was *Brown*, *Hernandez*, and the progeny that stopped the within-school segregation.[276] And when the states of Kansas and Texas, among others, cut education funding and funded students differently based on the zip code they lived in—irrespective of race—it was, and will be, the state courts through the state education clauses that

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274. Hoke Cnty. Bd. of Educ. v. State, 599 S.E.2d 365, 393 (N.C. 2004).

275. *See, e.g.*, PETER SCHRAG, FINAL TEST: THE BATTLE FOR ADEQUACY IN AMERICA'S SCHOOLS 1 (2003) (stating that integration and equalized funding programs would lead to closing the achievement gaps).

276. Mayorga Santamaria v. Dall. Indep. Sch. Dist., No. Civ.A.3:06CV692-L, 2006 WL 3350194, at *38 (N.D. Tex. Nov. 16, 2006). Indeed, the court took on defendants' "separate but equal" defense head on, stating:

> Defendants' conten[d] that no constitutional violation is taking place, since non-LEP minority students in ESL classes are receiving an equal educational opportunity as non-LEP Anglo students in General Education classrooms, because all classes at Preston Hollow follow DISD's mandated curriculum, and the same scope and sequence. The court is baffled that in this day and age, Defendants are relying on what is, essentially, a "separate but equal" argument. The court cannot help but be reminded of the Supreme Court's decision over one hundred and ten years ago in *Plessy v. Ferguson* . . . .

Id.

restored their rights to an equitable and adequate education for impoverished and minority students.[277]

Both camps must also understand their limitations, while still trying to impress upon the courts the importance of their mission to equalize educational opportunities. In school desegregation, other alternative race-neutral efforts to integrate schools must be considered alongside active school desegregation cases where race-conscious plans are permissible. Although the Supreme Court's decision in the *PICS* and *Louisville* cases was a major setback undermining school-integration efforts, the Court left open the possibility of race-conscious measures.[278] Justice Kennedy recognized in his concurrence that public school districts have a compelling interest in avoiding racial isolation and achieving a diverse student population.[279] Methods specifically endorsed by Justice Kennedy in his concurrence included "i. [s]trategic site selection of new schools; ii. [d]rawing attendance zones with general recognition of the demographics of neighborhoods; iii. [a]llocating resources for special programs; iv. [r]ecruiting students and faculty in targeted fashions, and v. [k]eeping track of enrollments, performance, and other statistics by race."[280]

Other efforts may include "[a]mending transfer policies [under the Elementary and Secondary Education Act]; . . . [l]inking housing

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277. *See, e.g.*, TEX. CONST. art. VII, § 1; KAN. CONST. art. 6, § 1. Although equity and adequacy cases are, for the most part, discussed in this Article separately, there should be no mistake that the preferred method of advocacy is to push for both equitable and adequate education in order to arrive closer to *Brown*'s doorstep. Texas, Kansas, Washington, New Jersey, Wyoming, Montana, and Kentucky—among others—have the precedent to ensure an equitable and adequate education. The only question remains whether the right plaintiffs will marshal forward the right claims and get the court to enforce a favorable judgment.

278. Bowman, *supra* note 81, at 63. *But see* Kimberly Jenkins Robinson, *The Constitutional Future of Race-Neutral Efforts to Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary Schools*, 50 B.C. L. REV. 277, 277 (2009) ("[A]fter Parents Involved, school districts will focus on race-neutral efforts to create diverse schools because the decision leaves very little room for racial classifications that would survive strict scrutiny. . . . [But] that governments should be given wide latitude to adopt race-neutral efforts to avoid racial isolation and create diverse schools because these efforts will help school districts accomplish the goals of the Equal Protection Clause while avoiding many of the potential harms of racial classifications.").

279. MEXICAN AM. LEGAL DEF. & EDUC. FUND & THE CIVIL RIGHTS PROJECT, PRESERVING INTEGRATION OPTIONS FOR LATINO CHILDREN: A MANUAL FOR EDUCATORS, CIVIL RIGHTS LEADERS, AND THE COMMUNITY 5 (2008), *available at* http://maldef.org/assets/pdf/6.1.3_Integration.Options.Manual.pdf.

280. *Id.* at 7.

mobility programs with educational counseling; and [i]ncreasing city-suburban transfer options in metropolitan areas."[281] The National Coalition for School Diversity has also urged Congress and the Department of Education to consider including diversity as a goal or a factor when awarding competitive grants such as Race to the Top, expanding charter schools, or supporting magnet schools.[282] Still others suggest using socioeconomic status as a means to achieve more racially diverse schools.[283]

And while the impact of school finance litigation cases may be improved by being tried by those students truly injured and remedied more appropriately by the courts as described further above, practitioners and advocates must begin to think beyond the box of dollars and cents. MALDEF recently filed a promising educational-opportunity case: *Martinez v. New Mexico*. The claims marshaled by the *Martinez* plaintiffs, who are comprised of fifty-one parents and at-risk public school students, include quantitative and qualitative adequacy claims centered on economically disadvantaged, ELL, and special education students; substantive due process claims, based on the lack of preparation to meet graduation requirements and the lack of access to a fundamental sufficient education; equal protection claims; claims based on the deprivation of a multicultural education, which is part and parcel to a sufficient education; claims calling for the monitoring of expenditures for at-risk students; and claims targeting teacher evaluations and school-accountability systems that are driving quality teachers and administrators away from high-need students and schools.[284] If successful, the *Martinez* lawsuit could result in the most comprehensive remedy to date.

CONCLUSION

Sixty years following *Brown*, equal educational opportunities remain elusive and achievement gaps remain a grave concern. There has been limited progress in both desegregating schools and

281. FRANKENBERG, LEI & ORFIELD, *supra* note 85, at 6.

282. *See National Coalition on School Diversity: Reaffirming the Role of School Integration in K-12 Education Policy*, NAT'L COALITION ON SCH. DIVERSITY, http://www.school-diversity.org/full_text.php (last visited Oct. 23, 2014).

283. Bowman, *supra* note 81, at 65-70 (acknowledging the limitation of such means to integrate in high minority, high poverty school districts).

284. *See* First Amended Complaint for Declaratory & Injunctive Relief, Martinez v. State, No. D-101-CV-2014-00793 (N.M. Dist. Ct. June 12, 2014), *available at* http://www.maldef.org/news/releases/maldef_amends_landmark_suit_to_address_eo_for_nm_students/.

improving educational opportunities through both types of cases. But neither school finance litigation nor school desegregation litigation, standing alone, was ever meant to close the achievement gaps. The fact is that the courts can only do so much in creating opportunities, and much more must be done by policymakers, advocates, civil rights leaders, educators, and parents—in conjunction with litigation when necessary—to prioritize public education and level up the playing field so that all students have the opportunity to compete fairly and reach their full potential. As Dr. Maria "Cuca" Robledo Montecel, president of the Intercultural Development Research Association, stated:

> Our future depends on us having an excellent public educational system, where all students graduate from high school prepared for college or the world of work, no matter what the color of their skin, the language they speak, or where they happen to be born. And this is a goal I believe we can achieve.[285]

285. Maria "Cuca" Robledo Montecel, *Back Cover* to COURAGE TO CONNECT: A QUALITY SCHOOLS ACTION FRAMEWORK (Maria "Cuca" Robledo Montecel & Christie L. Goodman eds., 2010).