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## Off the Constitutional Map: Breaking the endless cycle of school finance litigation

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# OFF THE CONSTITUTIONAL MAP: BREAKING THE ENDLESS CYCLE OF SCHOOL FINANCE LITIGATION

*School finance litigation has been caught in a never-ending cycle in the United States. At the root of the problem is legislative inaction and judicial withdrawal. A few courts have chosen to stay involved, however—even to the point of holding uncooperative legislatures in contempt or shutting down schools entirely. This Comment examines three states that have been hotbeds for this type of litigation and pushed the perceived boundaries of their constitutional powers. It advocates for a new approach for courts embroiled in a school funding battle. While this approach is unprecedented, this Comment argues it is both constitutional and effective. This is done by way of comparison to similar separation of powers battles, such as those during the prison reform and Civil Rights movements.*

## I. INTRODUCTION

One function of the court system is to provide finality to the parties and to resolve, once and for all, the dispute at hand.<sup>1</sup> This doctrine saves the judiciary time and resources by ensuring the same issues are not rehashed again and again. It gives the parties a sense of resolution. It also promotes fairness, continuity, and predictability in the legal system. This doctrine manifests itself in multiple ways throughout the law: *res judicata*, claim preclusion, double jeopardy, and *stare decisis*, to name a few.

School finance litigation is one area where finality has been incredibly elusive.<sup>2</sup> Litigants in these suits seek to remedy the perceived inadequacies or inequalities in public school funding,

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<sup>1</sup> See James Duke Cameron, *Federal Review, Finality of State Court Decisions, and a Proposal for a National Court of Appeals—A State Judge's Solution to a Continuing Problem*, 1981 BYU L. REV. 545, 556 (1981) (“Without finality, justice is a myth.”); Brandon R. Christian, *If at First You Don't Succeed: Understanding Judicial Doctrines of Finality*, 85 FLA. BAR J. 32, 32 (2011), available at <http://www.floridabar.org/divcom/jn/jnjournal01.nsf/Author/68F14BA4C5C82DD7852578810069CAEE>.

<sup>2</sup> See *infra* Part II.B.

which has been a difficult problem to solve. While this difficulty is due to a complex number of problems, a major root of the problem is legislative inaction.<sup>3</sup> This, in turn, has led some courts to relinquish their involvement in any new school finance cases.<sup>4</sup> Ultimately, this means no one is fighting for children's right to equal or adequate education in those states, which is a troublesome notion and sure to have negative effects years into the future.

A few courts, however, have chosen to fight back—even to the point of holding the legislature in contempt for failing to comply with their orders, or shutting down schools entirely.<sup>5</sup> This Comment examines three states that have not only been hotbeds for this type of litigation, but whose courts have decided to deal with these suits by pushing the perceived boundaries of their constitutional powers. As these states realized, stern and novel judicial approaches, such as holding noncompliant branches in contempt, are an unfortunate necessity in these situations.

This Comment advocates for a new approach for courts embroiled in a school funding battle. Part II provides a broad overview of school finance litigation in the United States. Part III then proceeds with a deeper look at three states in which courts have clashed with legislatures in highly politicized and controversial cases, and examines the separation of powers issues in each. Part IV explores the different remedial trends in school finance litigation and transitions into a recommendation of which may be the most effective. This recommendation is fully developed in Part V, which urges courts faced with legislative inaction not to shirk their constitutional duty, as many have now started to do. Courts can do this by imposing contempt or other sanctions on legislatures that refuse to cooperate. While this approach is relatively unprecedented, I argue that contempt sanctions in these situations are both constitutional and effective. This analysis is accomplished by

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<sup>3</sup> Laurie Reynolds, *Full State Funding of Education as a State Constitutional Imperative*, 60 HASTINGS L.J. 749, 749–52 (2009) (“[L]egislative responses often d[o] little to remedy the inequality . . . [P]laintiff victories rarely produce a systemic overhaul of the school funding formulas. In part, that may be because legislators have not always rushed to implement their court-imposed duty.”).

<sup>4</sup> *Id.* at 761 (“Although a small number of state courts has [sic] long refused to become embroiled in school funding debates, a new round of ‘judicial withdrawal’ is emerging . . .”).

<sup>5</sup> See *infra* Part III.B–C.

way of comparison to similar separation of powers battles, such as those that took place during the Civil Rights movement.

## II. THE STATE OF SCHOOL FINANCE LITIGATION IN AMERICA

More than half a century has passed since the U.S. Supreme Court decided *Brown v. Board of Education*, the seminal case on education inequality in America.<sup>6</sup> It recognized and enforced the idea that “education is perhaps the most important function of state and local governments.”<sup>7</sup> Yet, many believed that inequality and inadequacy continued to exist in schools after this ruling, and not just on racial grounds.<sup>8</sup> Indeed, many continue to believe this problem still exists today.<sup>9</sup> Courts have, at times, agreed, and applied the *Brown* ruling to other types of educational inequality cases since the 1950s.<sup>10</sup> This part will explore the broad historical background of school funding cases in the United States.

### A. *What is School Finance Litigation?*

School finance lawsuits seek to redress this perceived inadequacy or inequality in the way states fund public schools or public school districts.<sup>11</sup> Funding for local education comes from a variety of sources: the federal government, state governments, and local public and private donors.<sup>12</sup> Because of this, the resources available to any given student can vary greatly from state to state and across the country.<sup>13</sup> Due to reliance on local levies and property taxes, low-income districts who cannot afford the extra property taxes perpetually underfund their schools; higher-income districts can not only adequately support their schools, but use the extra money to offer an abundance of resources as well.<sup>14</sup> Even the low-income districts that choose to tax themselves at or above the rates of

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<sup>6</sup> 347 U.S. 483 (1954).

<sup>7</sup> *Id.* at 493.

<sup>8</sup> *National Education Access Network*, NAT'L EDUC. ACCESS NETWORK, <http://schoolfunding.info/> (last visited Jan. 8, 2016).

<sup>9</sup> *Id.*

<sup>10</sup> 1-5 EDUCATION LAW § 5.01 (1984) [hereinafter EDUCATION LAW].

<sup>11</sup> See Michael Griffin, *School Finance Litigation and Beyond*, EDUC. COMM'N OF THE STATES (April 2005), <http://www.ecs.org/clearinghouse/60/26/6026.htm>.

<sup>12</sup> EDUCATION LAW, *supra* note 10, § 5.01.

<sup>13</sup> *Id.*

<sup>14</sup> Reynolds, *supra* note 3, at 752.

comparable wealthy districts do not produce as much funding for schools because of low property values.<sup>15</sup>

### B. *Early School Finance Case Law*

School funding cases technically got their start in 1819,<sup>16</sup> with *Commonwealth v. Inhabitants of Dedham*.<sup>17</sup> In that case, Massachusetts sued the people of Dedham when they did not comply with a state law requiring each town to employ a sufficiently qualified teacher for every twenty households.<sup>18</sup> The town employed qualified teachers in some schools, but not all.<sup>19</sup> The court reasoned that this law was in place to “give all the inhabitants equal privileges, for the education of their children in the public schools,” and that “it is not competent for a town to establish a grammar school for the benefit of one part of the town, to the exclusion of the other; although the money raised for the support of schools may be, in other respects, fairly apportioned.”<sup>20</sup>

While the state commenced the litigation process against its residents in *Dedham*, the party roles have reversed in the present day. Now, plaintiffs are typically students, parents, and school districts, while defendants tend to be the state. That was indeed what transpired in *San Antonio Independent School District v. Rodriguez*, the next significant case in the history of school finance litigation.<sup>21</sup> The plaintiffs came from Texas school districts with large minority and low-income populations.<sup>22</sup> The state school funding formula relied on local property taxes.<sup>23</sup> This funding structure resulted in the plaintiffs’ lower-income district being able to spend \$356 per student; they compared this with the highest-income district that spent \$594 per student.<sup>24</sup> The plaintiffs challenged the constitutional validity of this formula as it created unequal expenditures between children across different districts,

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<sup>15</sup> *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 75 (1973).

<sup>16</sup> *Litigation*, EDUC. JUST. (2014), <http://www.educationjustice.org/litigation.html>.

<sup>17</sup> 16 Mass. 141 (1819).

<sup>18</sup> *Id.* at 144.

<sup>19</sup> *Id.* at 145–46.

<sup>20</sup> *Id.* at 146.

<sup>21</sup> 411 U.S. 1 (1973).

<sup>22</sup> *Id.* at 4–5.

<sup>23</sup> *Id.* at 10–11.

<sup>24</sup> *Id.* at 12–13.

resulting in a lower quality education for the low-income districts.<sup>25</sup>

The district court agreed with the *Rodriguez* plaintiffs and found that the Equal Protection Clause mandated funding equality in their schools.<sup>26</sup> The Supreme Court reversed and upheld the state's funding formula.<sup>27</sup> It found that the system did not discriminate against a "definable category of 'poor' people" and that it did not result in an absolute deprivation of education.<sup>28</sup> Moreover, the Court determined that wealth is not a suspect classification and used rational basis review to reach its decision.<sup>29</sup> According to the Court, holding otherwise would violate basic separation of powers principles by "assuming a legislative role . . . for which the Court lacks both authority and competence."<sup>30</sup> It refused to create positive constitutional rights for the sake of equal protection.<sup>31</sup> Thus, in the eyes of the Powell Court, education is not a fundamental right under the federal Constitution.<sup>32</sup> As Justice Marshall noted in his lengthy dissent, school finance litigants must now look to the states for remedies.<sup>33</sup> This separation of powers dialogue that began in *Rodriguez* has continued at the state level and sparked a heated public debate between branches of government.

### C. *Modern Theories in School Funding Litigation*

State equal protection contests in the same vein as *Rodriguez* have not been terribly successful.<sup>34</sup> Much like the plaintiffs in *Rodriguez*, proponents of school finance reform claim that unequal distribution of funds across districts violates the equal protection clause under their state constitutions.<sup>35</sup> School finance litigation was typically based on

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<sup>25</sup> *Id.* at 23.

<sup>26</sup> *Id.* at 15–16.

<sup>27</sup> *Id.* at 25.

<sup>28</sup> *Id.*

<sup>29</sup> Amanda Marra, Note, *The Right to a Thorough and Efficient System of Education Trumps the Power of the Appropriations Clause in New Jersey*, 43 RUTGERS L. J. 771, 778 (2013).

<sup>30</sup> 411 U.S. at 31

<sup>31</sup> *Id.* at 33.

<sup>32</sup> *Id.* at 35.

<sup>33</sup> MICHAEL A. REBELL, COURTS AND KIDS: PURSUING EDUCATIONAL EQUITY THROUGH THE STATE COURTS 2 (2009).

<sup>34</sup> Aaron Y. Tang, Note, *Broken Systems, Broken Duties: A New Theory for School Finance Litigation*, 94 MARQ. L. REV. 1195, 1204 (2011).

<sup>35</sup> *Id.* at 1202.

these equal protection arguments in the 1960s and 1970s.<sup>36</sup> An estimated fourteen states have seen plaintiff victories under this theory.<sup>37</sup> This may be because courts and parties struggle to define “equity” when it comes to school funding, and because some courts believe education is a purely legislative matter<sup>38</sup>—another argument echoed from *Rodriguez*.<sup>39</sup> One study concluded that states with school funding decisions based on the equity theory actually experience declines in educational funding.<sup>40</sup>

A few plaintiffs have experienced victories under this approach, Wyoming being one example.<sup>41</sup> There, the state requires that school funding be based exclusively on student need and the cost of services; fully funded at the state and not the local level; and completely independent of the property wealth of its district constituents.<sup>42</sup> The impact of this victory is reflected in some studies. For example, the Education Law Center’s annual report card on school funding shows that Wyoming is one of only three states that pays its teachers as much or more than comparable workers (Rhode Island and New York are the other two states).<sup>43</sup> The study also shows that Wyoming has the highest per-pupil spending of any state, at \$17,397 per student—over two and half times what the lowest-spending state spends on its pupils (Idaho, at \$6,753 per student).<sup>44</sup>

While equity arguments have led to limited success, challenges based on the education clause in state constitutions are a somewhat different story. As soon as litigants switched to “adequacy” arguments under these clauses, plaintiffs started seeing greater successes.<sup>45</sup> All states have imposed upon

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<sup>36</sup> Ben Wieder, *Texas Among 10 States Facing Lawsuits Over Education Funding*, WASH. POST (Jan. 2, 2013), [http://www.washingtonpost.com/politics/2013/01/02/4d9a7cca-544d-11e2-8b9e-dd8773594efc\\_story.html](http://www.washingtonpost.com/politics/2013/01/02/4d9a7cca-544d-11e2-8b9e-dd8773594efc_story.html).

<sup>37</sup> Tang, *supra* note 34, at 1202.

<sup>38</sup> *Id.* at 1203–06.

<sup>39</sup> *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 31 (1973).

<sup>40</sup> Michael Heise, *State Constitutional Litigation, Educational Finance, and Legal Impact: An Empirical Analysis*, 63 U. CIN. L. REV. 1735, 1761 (1995).

<sup>41</sup> Reynolds, *supra* note 3, at 787.

<sup>42</sup> *Id.*

<sup>43</sup> BRUCE D. BAKER ET AL., EDUC. L. CTR., IS SCHOOL FUNDING FAIR? A NATIONAL REPORT CARD 38 (3d ed. 2014), *available at* [http://schoolfundingfairness.org/National\\_Report\\_Card\\_2014.pdf](http://schoolfundingfairness.org/National_Report_Card_2014.pdf).

<sup>44</sup> *Id.* at 11.

<sup>45</sup> Tang, *supra* note 34, at 1206.

themselves positive constitutional duties to maintain education.<sup>46</sup> All fifty state constitutions mandate a “common,” “uniform,” “efficient,” or some other standard of a public school system,<sup>47</sup> and many even say that this is a democratic imperative.<sup>48</sup> Two state constitutions make education the “paramount duty” of the state.<sup>49</sup> Moreover, the most important source of funding for public education has commonly come from states.<sup>50</sup> Adequacy suits argue that, under these state constitution education clauses, the legislature has failed to provide an adequate level of education for all students.<sup>51</sup> One source estimates that twenty-two out of thirty-three, or sixty-seven percent, of adequacy cases decided since 1989 have been victories for the plaintiffs.<sup>52</sup>

Commentators suggest adequacy suits have likely been more successful than equity suits because they stem from a more definite part of a constitutional text and are not subject to the same difficulty in defining “equity” in the education finance concept.<sup>53</sup> While adequacy arguments are sometimes made alongside equity arguments, adequacy claims differ in that they seek an absolute remedy instead of a relative one.<sup>54</sup>

One state where this success has been realized is New Hampshire. Before fruitful school finance litigation took place there, schools relied heavily on local contributions. State contributions only totaled eight percent of funding at that time.<sup>55</sup> Low-income districts spent as little as eight thousand dollars per student and higher-income districts spent more than twenty thousand dollars per student.<sup>56</sup> The New Hampshire Supreme Court found that this funding formula violated the state constitution, because the state had a duty to provide an adequate education to all students under that

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<sup>46</sup> John Dayton & Anne Dupre, *School Funding Litigation: Who's Winning the War?* 57 VAND. L. REV. 2351, 2356 n.13 (2004).

<sup>47</sup> EDUCATION LAW, *supra* note 10.

<sup>48</sup> Molly A. Hunter, *State Constitution Education Clause Language*, EDUC. L. CTR. (Jan. 2011), <http://pabarcr.org/pdf/Molly%20Hunter%20Article.pdf>.

<sup>49</sup> FLA. CONST. art. IX, § 1; WASH. CONST. art. IX, § 1.

<sup>50</sup> EDUCATION LAW, *supra* note 10.

<sup>51</sup> Tang, *supra* note 34, at 1206.

<sup>52</sup> REBELL, *supra* note 33, at 15–29.

<sup>53</sup> Tang, *supra* note 34, at 1202, 1207.

<sup>54</sup> *Id.*

<sup>55</sup> Reynolds, *supra* note 3, at 786.

<sup>56</sup> *Id.*

document, and that “[t]here is nothing fair or just about taxing a home or other real estate in one town at four times the rate that similar property is taxed in another town to fulfill the same purpose of meeting the State’s educational duty.”<sup>57</sup> The court continued, “in order to deliver a constitutionally adequate public education to all children, comparable funding must be assured . . . .”<sup>58</sup> Obviously, an argument about the inequity resulting from a locally-based funding formula convinced the court that the whole formula was inadequate—local control was, to the court, an inadequate means of funding education, and the state was required to play a bigger role.<sup>59</sup>

Since then, New Hampshire has been one of only three states to increase education funding—by more than twenty percent, no less—from 2007 to 2011, despite the troubled economy (Illinois and North Dakota are the other two).<sup>60</sup> The Education Law Center, however, still gave the state an “F” rating for 2014 because of how fairly it distributes funds across districts, suggesting that spending more money does not necessarily mean all students are getting access to it.<sup>61</sup>

Still, the adequacy arguments have been susceptible to the contention that education is a public policy matter better suited for the legislature than the courts. A majority of the courts that have rejected adequacy cases did so on the grounds of justiciability.<sup>62</sup> One example is Illinois. The supreme court there rejected an education finance claim because it would “deprive the members of the general public of a voice in a matter which is close to the hearts of all individuals in Illinois.”<sup>63</sup>

#### *D. Challenges Still Remaining*

Despite the relative trend toward success in school finance litigation, students overall are seeing little in the way of

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<sup>57</sup> *Claremont Sch. Dist. v. Governor*, 703 A.2d 1353, 1357–60 (1997).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 1353, 1360 (“We recognize that local control plays a valuable role in public education; however, the State cannot use local control as a justification for allowing the existence of educational services below the level of constitutional adequacy.”).

<sup>60</sup> *BAKER ET AL.*, *supra* note 43, at 11.

<sup>61</sup> *Id.* at 18.

<sup>62</sup> *REBELL*, *supra* note 33, at 22–29.

<sup>63</sup> *Comm. for Educ. Rights v. Edgar*, 672 N.E.2d 1178, 1191 (Ill. 1996).

positive change. Empirical analyses have shown that successful litigation does not necessarily influence education spending in states.<sup>64</sup> In fact, one study found that successful litigation actually decreases educational spending.<sup>65</sup> Despite proof that reliance on local revenues creates inadequacies and inequalities, and even despite court victories acknowledging this fact, local funding still accounts for 43.5 percent of revenues for elementary and secondary education in the United States.<sup>66</sup> In addition, while the nation reached its highest-ever high school graduation rate in 2012—at eighty percent—the disparities between low-income and higher-income, minority and non-minority, and city and suburban students are still staggering.<sup>67</sup> Also, the United States has fallen behind eleven other countries for college graduation rates, perhaps indicative of the long-term consequences of this problem.<sup>68</sup>

The recession has not helped, either. School funding faces a big risk, and usually suffers during economic decline.<sup>69</sup> School funding cases implicitly assume that more money in schools will cause educational successes to rise to an acceptable level.<sup>70</sup> While this is a contentious issue, courts are starting to understand the connection. As the Wyoming Supreme Court opined, “[i]t is nothing more than an illusion to believe that the extensive disparity in financial resources does not relate directly to quality of education.”<sup>71</sup> Instructively, the United States Supreme Court also observed that “[i]t would be difficult to believe that if the children . . . had a free choice, they would choose to be educated in districts with fewer resources, and hence with more antiquated plants, less experienced teachers, and a less diversified curriculum.”<sup>72</sup>

Overall, court decisions on school finance matters have

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<sup>64</sup> Heise, *supra* note 40, at 1741.

<sup>65</sup> *Id.* at 1761.

<sup>66</sup> *Percentage Distribution of Revenues for Public Elementary and Secondary Education in the United States, By Source: 2008–2009*, EDUC. FIN. STAT. CTR. (2009), [http://nces.ed.gov/edfin/graph\\_topic.asp?INDEX=4](http://nces.ed.gov/edfin/graph_topic.asp?INDEX=4).

<sup>67</sup> Lyndsey Layton, *National High School Graduation Rates at Historic High, But Disparities Still Exist*, WASH. POST (April 28, 2014), [http://www.washingtonpost.com/local/education/high-school-graduation-rates-at-historic-high/2014/04/28/84eb0122-cee0-11e3-937f-d3026234b51c\\_story.html](http://www.washingtonpost.com/local/education/high-school-graduation-rates-at-historic-high/2014/04/28/84eb0122-cee0-11e3-937f-d3026234b51c_story.html).

<sup>68</sup> *Id.*

<sup>69</sup> BAKER ET AL., *supra* note 43, at 11.

<sup>70</sup> EDUCATION LAW, *supra* note 10.

<sup>71</sup> *Washakie Cnty. Sch. Dist. No. 1 v. Herschler*, 606 P.2d 310, 334 (Wyo. 1980).

<sup>72</sup> *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 85 (1973).

been issued in forty-four of the fifty states.<sup>73</sup> The American Civil Liberties Union has threatened to bring such a suit in Nevada, one of the states that has not yet experienced a school funding lawsuit, but it has not followed through at this time.<sup>74</sup> Iowa, another state where no decisions on the topic have been handed down, defended against its only school funding lawsuit in 2002.<sup>75</sup> However, the suit was dropped when the legislature agreed to increase revenue for the complaining districts.<sup>76</sup> In August of 2014, fourteen school districts sued for underfunding education in another no-decision state, Mississippi.<sup>77</sup> The case has grown to include twenty-one districts, which are collectively demanding \$230 million in funding.<sup>78</sup> The state attorney general is seeking a dismissal of the case, and characterized the legislative inaction problem as one of the seminal reasons.<sup>79</sup>

Court rulings in favor of plaintiffs are, of course, only the first step towards remedying these problems. From the results of the empirical analyses mentioned above, it appears that something breaks down after a court victory to cause these troubling outcomes. Some have hinted, and this Comment argues, that legislative inaction or pushback is where the progress towards proper educational funding breaks down.<sup>80</sup> To further this problem, courts have become exasperated with the lack of real change in education funding and are giving up.<sup>81</sup> With that, proponents of school finance reform now have not

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<sup>73</sup> *National Education Access Network*, *supra* note 8.

<sup>74</sup> Andrew Doughman, *Education Advocates Threaten Lawsuit Over Funding Public Schools*, LAS VEGAS SUN (May 1, 2013, 2:00 AM), <http://www.lasvegassun.com/news/2013/may/01/education-advocates-threaten-lawsuit-over-public-s/>.

<sup>75</sup> Tim Anderson, *Full Court Pressure: Recent Supreme Court Ruling In Kansas Serves as a Reminder of the Judiciary's Power to Shape State School Funding*, CSG MIDWEST (Apr. 2014), <http://www.csghmidwest.org/policyresearch/0314schoolfinance-litigation.aspx>.

<sup>76</sup> *Id.*

<sup>77</sup> The Associated Press, *14 School Districts Sue State for Underfunding Mississippi Adequate Educational Program*, GULF LIVE (Aug. 28, 2014, 10:41 AM), [http://blog.gulflive.com/mississippi-press-news/2014/08/14\\_school\\_districts\\_sue\\_state.html](http://blog.gulflive.com/mississippi-press-news/2014/08/14_school_districts_sue_state.html).

<sup>78</sup> Jeff Amy, *Hood Asks Judge to Throw Out School Funding Suit*, HATTIESBURG AMERICAN (Oct. 8, 2014, 12:41 AM), <http://www.hattiesburgamerican.com/story/news/education/2014/10/07/school-funding-lawsuit/16889603/>.

<sup>79</sup> *Id.* (“[Attorney General] Hood’s office wrote that even though a 2006 law says Mississippi’s school aid formula must be fully funded, that guarantee has no power to bind future legislatures.”).

<sup>80</sup> Reynolds, *supra* note 3, at 742.

<sup>81</sup> *Id.* at 761.

one, but two hurdles to clear before they can make positive change—a win in the courts and action in the legislature.

The current education finance litigation trend assumes that courts can influence educational spending. Up until this point, that assumption has not been entirely true.<sup>82</sup> When a funding provision is declared constitutionally inadequate or unequal, there is the potential for disruption of school function, so courts can delay the ruling's effective date to give school officials or the legislature time to fix whatever issues the court deems necessary.<sup>83</sup> This practice may contribute to legislative inaction or pushback as well—give someone an inch and they take a mile, as the saying goes. These challenges are particularly prevalent in the cases discussed in the following section.

### III. SCHOOL FINANCE LITIGATION AND ITS POLITICAL RAMIFICATIONS

This part examines and analyzes three states' school finance litigation stories. It focuses on each state's constitutional debate between its courts, legislature, executive, and public opinion. This part also analyzes the actions that courts took that may have contributed to their relative successes or failures. First, courts in Ohio learned that compromise in the face of negative public opinion resulted in its having to exit the debate. Second, decades of school finance litigation in New Jersey culminated in shutting down schools and, to some, a satisfactory resolution. Finally, the Washington judiciary attempted to combine the lessons learned in both of the previous states in a still-ongoing battle with its legislature, the full results of which are yet unseen.

#### A. Ohio

The Ohio Supreme Court battled with legislators for thirteen years over education finance in its most recent saga of cases, *DeRolph v. State*.<sup>84</sup> Within this time, four different rulings all upheld students' rights to adequately funded

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<sup>82</sup> Heise, *supra* note 40, at 1750.

<sup>83</sup> EDUCATION LAW, *supra* note 10.

<sup>84</sup> *DeRolph v. State*, 677 N.E.2d 733 (Ohio 1997) [DeRolph I]; *DeRolph v. State*, 728 N.E.2d 993 (Ohio 2000) [DeRolph II]; *DeRolph v. State*, 754 N.E.2d 1184 (Ohio 2001) [DeRolph III]; *DeRolph v. State*, 780 N.E.2d 529 (Ohio 2002) [DeRolph IV]; Tang, *supra* note 34, at 1209–10.

education.<sup>85</sup> School finance litigation actually goes back as far as 1923 in Ohio, when the state supreme court made its first attempt at clarifying the education clause in the state constitution.<sup>86</sup> That provision states that the legislature “shall make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the state.”<sup>87</sup> The court in that early case found for the plaintiffs (taxpayers and school districts who challenged unfair funding distributions), a harbinger for what was to come almost seventy years later.<sup>88</sup>

The court’s constitutional power to decide such cases was secured in the interim. In *Board of Education v. Walter*, plaintiffs challenged the Ohio financing scheme once again, but this time made an equity argument.<sup>89</sup> Like the equity cases brought in other states, the *Walter* plaintiffs did not prevail.<sup>90</sup> The majority looked to school finance decisions in New Jersey and Washington, both discussed below, in determining that the issue before the court was justiciable—not a political question beyond its reach, as the defendant State argued.<sup>91</sup>

Then came the first of the *DeRolph* cases in 1991. Five school districts throughout the state asked the court to declare the public school finance system unconstitutional.<sup>92</sup> The trial court found a number of shocking inadequacies in schools. Just seventeen percent of heating systems in these schools were deemed “satisfactory,” and thirty-one percent of fire alarm systems were deemed “adequate.”<sup>93</sup> Almost seventy percent of schools had failed to remove asbestos, directly violating an

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<sup>85</sup> Tang, *supra* note 34, at 1209–10.

<sup>86</sup> See *Miller v. Korn*, 140 N.E. 773 (Ohio 1923).

<sup>87</sup> OHIO CONST. art. VI, § 2.

<sup>88</sup> 140 N.E. at 778–79 (opining that “a man who sends his children to private educational institutions may be required to help support public schools for other children, or that the man who has no children may be taxed to support schools for other men’s families. It is no gratuity, no private gift to an individual, nor to a particular district, to support the schools of the state. It is a contribution to the public, and not to a local purpose; a contribution to the community’s very life, which must be exacted of every citizen.”).

<sup>89</sup> 390 N.E.2d 813, 819 (Ohio 1979).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 824.

<sup>92</sup> *DeRolph v. State*, 677 N.E.2d 733, 734 (Ohio 1997).

<sup>93</sup> *Id.* at 742.

Environmental Protection Agency mandate.<sup>94</sup> One school building was sliding down a hill an inch per month.<sup>95</sup> At another school, students were “subjected to breathing coal dust which [was] emitted into the air and actually cover[ed] the students’ desks after accumulating overnight.”<sup>96</sup> “Obviously,” the court observed, “state funding of school districts cannot be considered adequate . . . .”<sup>97</sup>

Despite these findings, the Ohio Supreme Court only struck down the school finance system by a slim four-to-three majority.<sup>98</sup> The dissent thought school funding questions were nonjusticiable political questions.<sup>99</sup> This disagreement among the justices touched off the constitutional battle that would continue between the majority and the Ohio legislature for years. Perhaps to appease the dissent, the court did not require the legislature to take any specific action, but did ask the legislature to create a new finance system and allowed the trial court to retain jurisdiction until it was satisfied.<sup>100</sup> Based on a survey the legislature itself conducted, the court stated that ten billion dollars was necessary to bring funding to constitutional levels.<sup>101</sup>

The legislature struggled to comply with the court’s order. Some lawmakers did not question the court’s constitutional authority to force compliance on the issue, while others expressed reservations.<sup>102</sup> Ultraconservative legislators suggested stripping the court of jurisdiction or amending the constitution.<sup>103</sup> Some even advocated impeaching the justices who made up the majority.<sup>104</sup> The media made similar recommendations, and urged the legislature to ignore the court’s orders.<sup>105</sup> In the wake of the court’s decision, the legislature appropriated an additional three hundred million

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<sup>94</sup> *Id.* at 743.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 744.

<sup>98</sup> *Id.* at 735.

<sup>99</sup> *Id.* at 782.

<sup>100</sup> *Id.* at 747.

<sup>101</sup> *Id.* at 742, 780.

<sup>102</sup> Larry J. Obhof, *DeRolph v. State and Ohio’s Long Road to an Adequate Education*, 2005 BYU EDUC. & L.J. 83, 111–12 (2005), available at <http://digitalcommons.law.byu.edu/cgi/viewcontent.cgi?article=1198&context=elj>.

<sup>103</sup> *Id.* at 112. See also Tang, *supra* note 34, at 1209–10.

<sup>104</sup> Tang, *supra* note 34, at 1209–10.

<sup>105</sup> Obhof, *supra* note 102, at 111.

dollars for improvements, just three percent of the amount the legislature's survey required.<sup>106</sup> The governor passed a bill purporting to change the school funding formula, but no substantive changes were truly made.<sup>107</sup> The legislature offered up the issue to a vote, as a sales tax increase.<sup>108</sup> This also failed.<sup>109</sup>

As expected, the issue again rose to the Ohio Supreme Court a few years later.<sup>110</sup> The same majority-dissent breakdown found the then-current funding scheme unconstitutional, but acknowledged that progress had been made.<sup>111</sup> It also acknowledged the separation of powers issue, and reasoned that it had been deliberately conservative in allowing the legislature to define the legislation's parameters.<sup>112</sup> The court also upheld its authority to enforce its own orders; otherwise, the "power to find a particular act unconstitutional would be a nullity."<sup>113</sup> If a remedy is never enforced, it is not actually a remedy, the court opined.<sup>114</sup>

Although the second *DeRolph* decision mainly echoed the first, legislative and public opinion was no longer as mixed. Many legislators, the governor, and commentators all disagreed with the holding.<sup>115</sup> The author of the majority opinion managed to win re-election the next year despite a vocal and well-funded campaign to unseat her, with many attacks made specifically about the education decision.<sup>116</sup> The legislature managed to appropriate another one billion dollars to school construction, again falling short of the original ten

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<sup>106</sup> *Id.* at 114.

<sup>107</sup> Anne M. Hayes, *Tension in the Judicial-Legislative Relationship: DeRolph v. State*, 32 U. TOL. L. REV. 611, 637 (2001) ("Changes made to the school funding system under H.B. 650 were a tweaking of the existing system. There were no substantive changes made to the funding system or the formula for disbursing state basic aid.").

<sup>108</sup> Kerry A. White, *Ohio Voters Reject Sales-Tax Hike for Schools*, EDUC. WEEK, May 13, 1998, at 17, available at <http://www.edweek.org/ew/articles/1998/05/13/35ohio.h17.html>.

<sup>109</sup> *Id.*

<sup>110</sup> *DeRolph v. State*, 728 N.E.2d 993 (Ohio 2000).

<sup>111</sup> *Id.* at 1003 ("There are indications that Governor Taft and the General Assembly have taken some of the steps necessary to remedy a situation that has been neglected for more than twenty-five years.").

<sup>112</sup> *Id.* at 1002-03.

<sup>113</sup> *Id.* at 1003.

<sup>114</sup> *Id.*

<sup>115</sup> Obhof, *supra* note 102, at 125-26.

<sup>116</sup> Spencer Hunt, *Anti-Resnick Ad Pulled, Replaced*, CINCINNATI ENQUIRER (Oct. 25, 2000), [http://enquirer.com/editions/2000/10/25/loc\\_anti-resnick\\_ad.html](http://enquirer.com/editions/2000/10/25/loc_anti-resnick_ad.html).

billion dollar order, which likely was much larger by that time.<sup>117</sup> At that point, the court contemplated holding the legislature in contempt.<sup>118</sup> One of the justices, part of the original majority that struck down the Ohio funding plan, publicly commented that a contempt order was one of the possible routes, and that the court does “have some power to do things when groups or individuals do not comply with our orders.”<sup>119</sup> The justice went on to explain that jail terms or fines could result, but did not outline how those penalties would work for an entire legislature.<sup>120</sup>

With that, the Ohio Supreme Court considered the issue a third time in 2001.<sup>121</sup> The plaintiffs suggested the court go the contempt route mentioned previously, along with a number of other controversial remedies.<sup>122</sup> Again, the court found the legislature to be noncompliant, but hedged this by relinquishing its jurisdiction over the matter.<sup>123</sup> Justices and commentators observed that this decision constituted a compromise between members of the court to end its involvement.<sup>124</sup>

The court did, however, take a controversial step in *DeRolph III* by ordering the legislature to make specific modifications to school funding.<sup>125</sup> Many, including some of the original majority members, found this to be a grave breach of constitutional boundaries.<sup>126</sup> The state also felt this was improper judicial lawmaking and asked the court to reconsider.<sup>127</sup> Further, the plaintiffs were unhappy with the decision as well, feeling it was a retreat from the previous

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<sup>117</sup> See Obhof, *supra* note 102, at 131.

<sup>118</sup> James Drew, *Contempt-of-Court Threat Hangs Over School-Funding Case*, TOLEDO BLADE (June 10, 2001), <http://www.toledoblade.com/State/2001/06/10/Contempt-of-court-threat-hangs-over-school-funding-case.html>; Spencer Hunt & Travis James Tritten, *Resnick Explores Enforcing Directive*, ENQUIRER (April 6, 2001), [http://enquirer.com/editions/2001/04/06/loc\\_resnick\\_explores.html](http://enquirer.com/editions/2001/04/06/loc_resnick_explores.html).

<sup>119</sup> Drew, *supra* note 118; Hunt & Tritten, *supra* note 118.

<sup>120</sup> Hunt & Tritten, *supra* note 118.

<sup>121</sup> See *DeRolph v. State*, 754 N.E.2d 1184 (Ohio 2001).

<sup>122</sup> Brief of Petitioner-Appellant at 48, *DeRolph v. State*, 754 N.E.2d 1184 (Ohio 2001) (No. 99-0570), available at <http://www.bricker.com/documents/resources/schoolfund/scderolph518.pdf>.

<sup>123</sup> 754 N.E.2d at 1190.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 1200–01.

<sup>126</sup> *Id.* at 1239–45.

<sup>127</sup> *DeRolph v. State*, 780 N.E.2d 529, 535 (Ohio 2002).

decisions.<sup>128</sup> The Ohio Supreme Court agreed one last time to hear the case. The original majority came together to vacate *DeRolph III*, reinstate *DeRolph II*, find the funding levels unconstitutional yet again, but relinquish jurisdiction for good.<sup>129</sup>

The Ohio Supreme Court did what many other courts have done. It gave up and acquiesced to chronic legislative failure.<sup>130</sup> While it had the opportunity to take lasting measures in *DeRolph III*, it decided to err on the side of compromise, which allowed the problem to continue. Compromise is a hallmark of the legislative branch. The judiciary, on the other hand, is supposed to take the minority position where warranted, despite the potential unpopularity or uncertainty this may cause. Interestingly, *DeRolph* was the first education finance case in the state to attempt adequacy arguments.<sup>131</sup> While that may have helped secure the plaintiffs' victory, that step forward undoubtedly did not result in constitutionally-mandated funding. Scholars have observed that, despite the "culmination" of the *DeRolph* cases, the fight for adequate school funding in Ohio never truly ended.<sup>132</sup> After thirteen years, the court may have simply fallen victim to "battle fatigue."<sup>133</sup>

### B. *New Jersey*

If Ohio's struggle seems exhausting, New Jersey endured the legal equivalent of the Thirty Years' War. That state endured two distinct sets of long-lasting school finance litigation. The first was *Robinson v. Cahill*, which spanned seven different New Jersey Supreme Court opinions within three years.<sup>134</sup> Students and others sued state officials, arguing that the state relied on a funding system that discriminated against low-income districts and imposed unequal burdens on

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<sup>128</sup> Obhof, *supra* note 102, at 135–36.

<sup>129</sup> 780 N.E.2d at 530.

<sup>130</sup> Tang, *supra* note 34, at 1209–10.

<sup>131</sup> Obhof, *supra* note 102, at 84.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 140.

<sup>134</sup> *Robinson v. Cahill*, 303 A.2d 273 (N.J. 1973) [*Robinson I*]; *Robinson v. Cahill*, 306 A.2d 65 (N.J. 1973) [*Robinson II*]; *Robinson v. Cahill*, 335 A.2d 6 (N.J. 1975) [*Robinson III*]; *Robinson v. Cahill*, 339 A.2d 193 (N.J. 1975) [*Robinson IV*]; *Robinson v. Cahill*, 355 A.2d 129 (N.J. 1976) [*Robinson V*]; *Robinson v. Cahill*, 358 A.2d 457 (N.J. 1976) [*Robinson VI*]; *Robinson v. Cahill*, 360 A.2d 400 (N.J. 1976) [*Robinson VII*].

taxpayers.<sup>135</sup> This was an equity claim, similar to that raised in Ohio. The New Jersey Supreme Court rejected it.<sup>136</sup> The court still found the funding scheme unconstitutional under the state education clause, however.<sup>137</sup> That clause provides, “[t]he Legislatures shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years.”<sup>138</sup> The court issued a second opinion soon thereafter, extending the deadline for the legislature to reach an agreement.<sup>139</sup>

Even with the extended deadline, the other branches of New Jersey’s government struggled to comply with the court’s ruling. The governor drew up a plan to change the school funding formula, part of which introduced a state income tax,<sup>140</sup> but his bill did not pass.<sup>141</sup> The governor asked the state supreme court for relief and, in a third ruling, the court agreed to hear the case at a later date.<sup>142</sup> In that fourth ruling, the court devised a remedy that would be put in place if the legislature could not come up with its own by the next school year.<sup>143</sup> With only two days to spare, the legislature passed a law that increased funding to low-income school districts, and the state supreme court upheld the remedy as constitutional in its fifth decision of the case.<sup>144</sup>

The New Jersey legislature did not follow through with the act it created.<sup>145</sup> It failed to actually appropriate any money under the new law.<sup>146</sup> With this overt legislative failure, the court took drastic action. In a sixth ruling, it enjoined the legislature from spending any money on public schools unless it funded the act it had created or found some new way to

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<sup>135</sup> Robinson I, *supra* note 134, at 276.

<sup>136</sup> *Id.* at 283.

<sup>137</sup> *Id.* at 298.

<sup>138</sup> N.J. CONST. art. VIII, § IV.

<sup>139</sup> Robinson II, *supra* note 134, at 66.

<sup>140</sup> Alexandra Greif, *Politics, Practicalities, and Priorities: New Jersey’s Experience Implementing the Abbott V Mandate*, 22 YALE L. & POL’Y REV. 615, 619 (2004).

<sup>141</sup> *Id.*

<sup>142</sup> Robinson III, *supra* note 134, at 7.

<sup>143</sup> Robinson IV, *supra* note 134, at 198.

<sup>144</sup> Robinson V, *supra* note 134, at 129.

<sup>145</sup> Greif, *supra* note 140, at 620.

<sup>146</sup> *Id.*

appropriate funds under the constitution.<sup>147</sup> The legislature did nothing.<sup>148</sup> In response, the court shut down schools for eight days because of the legislature's failure to comply.<sup>149</sup> The legislature then decided to act. It came together to approve a state income tax, which would fund the act it created.<sup>150</sup> In the seventh and final ruling of the *Robinson* saga, the state supreme court withdrew the injunction and schools reopened.<sup>151</sup> As mentioned earlier, though, this did not end school finance litigation in New Jersey.

Next came *Abbott v. Burke*, a line of cases that lasted twenty-four years and resulted in more than twenty opinions by the state's courts.<sup>152</sup> The case started in 1981, when the Education Law Center challenged the state's public education funding scheme.<sup>153</sup> The first ruling from the state supreme court came four years later, when the court transferred the case to an administrative law judge.<sup>154</sup> That judge held the school funding law unconstitutional with respect to twenty-eight low-income, urban school districts in the state.<sup>155</sup> The state supreme court upheld this finding when it was challenged in the second *Abbott* decision.<sup>156</sup>

Thereafter, the legislature and supreme court engaged in extensive back and forth litigation, with the legislature proposing funding schemes and the supreme court rejecting them.<sup>157</sup> Finally, in its twentieth decision on the case, the court

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<sup>147</sup> *Robinson VI*, *supra* note 134, at 459.

<sup>148</sup> Greif, *supra* note 140, at 620.

<sup>149</sup> *History of Funding Equity*, STATE OF N.J., DEPT OF EDUC., <http://www.state.nj.us/education/archive/abbotts/chrono/> (last visited Jan. 8, 2016).

<sup>150</sup> Greif, *supra* note 140, at 620.

<sup>151</sup> *Robinson VII*, *supra* note 134, at 400 (N.J. 1976).

<sup>152</sup> Tang, *supra* note 34, at 1209.

<sup>153</sup> *The History of Abbott v. Burke*, EDUC. L. CTR., <http://www.edlawcenter.org/cases/abbott-v-burke/abbott-history.html> (last visited Jan. 8, 2016).

<sup>154</sup> *Abbott v. Burke*, 495 A.2d 376, 393 (N.J. 1985) [Abbott I].

<sup>155</sup> *The History of Abbott v. Burke*, *supra* note 153. Despite a more official designation as "SDA Districts" (Schools Development Authority), these districts have become known as "Abbott districts," which is now a common phrase in New Jersey news and politics. See Matt Friedman, *Sweeney Suggests Making Atlantic City an Abbott District*, THE STAR-LEDGER, (July 23, 2014), [http://www.nj.com/politics/index.ssf/2014/07/sweeney\\_suggests\\_making\\_atlantic\\_city\\_an\\_abbott\\_district.html](http://www.nj.com/politics/index.ssf/2014/07/sweeney_suggests_making_atlantic_city_an_abbott_district.html). The colloquialism even has its own Wikipedia page. *Abbott District*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Abbott\\_district](http://en.wikipedia.org/wiki/Abbott_district) (last visited Jan. 8, 2016).

<sup>156</sup> *Abbott v. Burke*, 575 A.2d 359, 383 (N.J. 1990) [Abbott II].

<sup>157</sup> *The History of Abbott v. Burke*, *supra* note 153. See also *Abbott v. Burke*, 643 A.2d 575 (N.J. 1994) [Abbott III]; *Abbott v. Burke*, 693 A.2d 417 (N.J. 1997) [Abbott IV]; *Abbott v. Burke*, 710 A.2d 450 (N.J. 1998) [Abbott V]; *Abbott v. Burke*, 748 A.2d 82

was satisfied.<sup>158</sup> It found the new legislative formula, designated the “School Funding Reform Act” (SFRA), to be constitutional.<sup>159</sup> When the 2010 legislature then adopted Governor Chris Christie’s \$1.1 billion cuts to the SFRA, however, the court again ordered the legislature to fully fund its proposal.<sup>160</sup>

Surely, the need for finality is no greater anywhere else than here. New Jersey withstood almost three decades of non-stop school finance litigation. Even if some feel that the *Abbott* litigation was ultimately successful, other states contemplating solutions to school finance disagreements would surely object to undertaking an expensive, exhausting, decades-long argument with the legislature to reach that ultimate goal. New Jersey took the long road to reach a resolution; judicial resources can likely be used more efficiently to solve such problems. Still, it must be acknowledged that a resolution was reached. When the court acted on its orders and shut down schools, the legislature came together to find a solution.

### C. Washington

The Washington judiciary had no interest in replicating New Jersey’s school finance quagmire. Beginning with *Seattle School District v. State*, the state supreme court held that schools’ forced reliance on local levies for funding was unconstitutional and required the legislature to shoulder the burden for education funding, as per the state constitution.<sup>161</sup> That document states, “It is the paramount duty of the state to make ample provision for the education of all children residing

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(N.J. 2000) [Abbott VII]; *Abbott v. Burke*, 751 A.2d 1032 (N.J. 2000) [Abbott VII]; *Abbott v. Burke*, 790 A.2d 842 (N.J. 2002) [Abbott VIII]; *Abbott v. Burke*, 798 A.2d 602 (N.J. 2002) [Abbott IX]; *Abbott v. Burke*, 832 A.2d 891 (N.J. 2003) [Abbott X]; *Abbott v. Burke*, 832 A.2d 906 (N.J. 2003) [Abbott XI]; *Abbott v. Burke*, 852 A.2d 185 (N.J. 2004) [Abbott XII]; *Abbott v. Burke*, 862 A.2d 538 (N.J. 2004) [Abbott XIII]; *Abbott v. Burke*, 889 A.2d 1063 (N.J. 2005) [Abbott XIV]; *Abbott v. Burke*, 901 A.2d 299 (N.J. 2006) [Abbott XV]; *Abbott v. Burke*, 1 A.3d 602 (N.J. 2006) [Abbott XVI]; *Abbott v. Burke*, 935 A.2d 1152 (N.J. 2007) [Abbott XVII]; *Abbott v. Burke*, 956 A.2d 923 (2008) [Abbott XVIII]; *Abbott v. Burke*, 960 A.2d 360 (2008) [Abbott XIX].

<sup>158</sup> Jessica Corbett, *Thorough and Efficient Education: An Act Ending Wealth-Based School Funding in New Jersey is Constitutional*, 41 RUTGERS L.J. 1027, 1027–28 (2010).

<sup>159</sup> *Abbott v. Burke*, 971 A.2d 989, 992 (N.J. 2009) [Abbott XX].

<sup>160</sup> *The History of Abbott v. Burke*, *supra* note 153.

<sup>161</sup> 90 Wash. 2d 476, 483–86 (1978).

within its borders . . . .”<sup>162</sup> The court found this clause unique amongst other state constitution education clauses, requiring that education funding be the legislature’s foremost concern.<sup>163</sup>

The court also found that the state’s “duty goes beyond mere reading, writing and arithmetic.”<sup>164</sup> “Ample provision” meant that the state must provide opportunities to ready children for their role as citizens and competitors in the job market.<sup>165</sup> Despite these strong edicts, the court did not retain jurisdiction over the case, trusting that the legislature would comply.<sup>166</sup> One justice dissented, finding the legislative “ultimatums” inappropriate for separation of powers reasons.<sup>167</sup> The majority ruling, however, just resulted in further litigation of the same issue thirty-four years later.

The *Seattle School District* court’s deference to the Washington legislature ultimately led to *McCleary v. State* in 2012.<sup>168</sup> The majority opinion echoed many of the sentiments from its precursor case.<sup>169</sup> The state supreme court again found that the legislature was underfunding state schools.<sup>170</sup> It held that the words “ample provision” required more than just minimum levels of funding, and “paramount duty” meant education comes before all else.<sup>171</sup> This time, however, the court decided it would not be fooled twice, and retained jurisdiction over the case.<sup>172</sup> Two justices concurred in part with the finding of a constitutional violation, but dissented in part over the retained jurisdiction.<sup>173</sup> Overall, though, public opinion seemed largely in favor of the court’s ruling.<sup>174</sup>

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<sup>162</sup> WASH. CONST. art. IX, § 1.

<sup>163</sup> 90 Wash. 2d at 498–500 (“The duty to make ‘ample provision’, as opposed to merely providing for a ‘general and uniform’ school system, is the *only* instance in which our constitution declares a specific state function to be a ‘paramount duty’ of the State.”).

<sup>164</sup> *Id.* at 517.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 484 (“We do not retain jurisdiction over the parties or the action being confident the Legislature will comply fully with its constitutionally mandated duty.”).

<sup>167</sup> *Id.* at 579 (Rossellini, J., dissenting).

<sup>168</sup> 173 Wash. 2d 477 (2012).

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 484.

<sup>171</sup> *Id.* at 515–20.

<sup>172</sup> *Id.* at 484.

<sup>173</sup> *Id.* at 547–50.

<sup>174</sup> See Peter Callaghan, *State’s McCleary Report Skips the Hard Questions*, THE BELLINGHAM HERALD (Sep. 5, 2013), <http://www.bellinghamherald.com/2013/09/05/3185915/states-mccleary-report-skips-the.html>; Editorial Board,

Retaining jurisdiction meant the legislature was required to provide the court with ongoing progress reports.<sup>175</sup> The court still “deferred to the legislature’s chosen means of discharging its constitutional duty,” but vowed that it would hold the legislature to any reforms it decided to adopt.<sup>176</sup> State officials estimated they would need at least four billion dollars to make up their deficit.<sup>177</sup> In its third report, though, the legislature candidly admitted that it had stopped making progress towards the “program of basic education as directed by the Court.”<sup>178</sup> Because the legislature failed to implement its own plan to increase funding to appropriate levels, the *McCleary* plaintiffs asked the court to do something in response.<sup>179</sup> At this point, the legislature seemed to go on the defensive. As one journalist wrote, legislators began issuing “[a]mateur treatises on separation of powers and condescending reports explaining . . . how the budget works . . . . Oh, and snarky tweets about pounding sand.”<sup>180</sup> The writer continued, likely echoing public sentiment: “[Q]uit whining. No one cares.”<sup>181</sup>

In response to all of this, the court did do something. It issued a unanimous “show cause” order to the legislature, asking it to explain why it should not be held in contempt for

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*Washington State Must Embrace a New Vision for Education*, THE SEATTLE TIMES (Sep. 8, 2012, 4:00 PM), [http://seattletimes.com/html/editorialopinionpages/2019095920\\_washingtonstatemustembraceanewvisionforeducation.html](http://seattletimes.com/html/editorialopinionpages/2019095920_washingtonstatemustembraceanewvisionforeducation.html). *But see*, Brian M. Rosenthal, *Conservatives Cry “Activism” After Losing Pair of Major Court Cases*, THE SEATTLE TIMES (Mar. 23, 2013, 7:00 PM), [http://seattletimes.com/html/localnews/2020628808\\_supremecourt.xml.html](http://seattletimes.com/html/localnews/2020628808_supremecourt.xml.html).

<sup>175</sup> Order, *McCleary v. State*, 173 Wash. 2d 477 (2012) (No. 84362-7), available at <http://www.courts.wa.gov/content/PublicUpload/Supreme%20Court%20News/84362-7%20order%20-%209-11-2014.pdf>.

<sup>176</sup> Order to Show Cause, *McCleary v. State*, 173 Wash. 2d 477 (2012) (No. 84362-7), available at [http://www.courts.wa.gov/content/publicUpload/supreme%20Court%20News/84362-7\\_McCleary\\_ShowCauseOrder\\_201406124.pdf](http://www.courts.wa.gov/content/publicUpload/supreme%20Court%20News/84362-7_McCleary_ShowCauseOrder_201406124.pdf).

<sup>177</sup> John Stang, *Blurred Lines In Olympia: Is It Time to Start Arguing About the 2015 Budget?* CROSSCUT (Dec. 18, 2013), <http://crosscut.com/2013/12/18/politics-government/117966/inslee-budget-governor/>.

<sup>178</sup> Order, *McCleary v. State*, *supra* note 175.

<sup>179</sup> Plaintiff/Respondents’ 2013 Post-Budget Filing at 47, *McCleary v. State*, 173 Wash. 2d 477 (2012) (No. 84362-7), available at [http://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/84362-7Plaintiff-Respondents2013\\_PostBudgetFiling.pdf](http://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/84362-7Plaintiff-Respondents2013_PostBudgetFiling.pdf).

<sup>180</sup> Peter Callaghan, *What Contempt for the Legislature Might Look Like*, THE NEWS TRIBUNE (May 29, 2014), <http://www.courts.wa.gov/content/publicupload/eclips/2014%2005%2029%20Peter%20Callaghan%20What%20contempt%20for%20the%20Legislature%20might%20look%20like.pdf>.

<sup>181</sup> *Id.*

violating a court order.<sup>182</sup> At the plaintiffs' urging, the court asked the legislature to ponder ordering the sale of state property to fund compliance, invalidating education funding cuts, or prohibiting any funding of education at all (which would mean shutting down schools, reminiscent of *Robinson v. Cahill*).<sup>183</sup> A very controversial and public debate ensued until the time of the hearing. Opposing editorials poured into newspapers across the state,<sup>184</sup> as many recognized the court was entering "uncharted waters."<sup>185</sup>

In its briefs, the legislature asked the court not to impose sanctions. "[W]e have found no case where any state's highest court issued or affirmed contempt sanctions against that state's own legislature. All of the cases Plaintiffs cite are federal cases and none involve[] a state legislature or implicate[] separation of powers . . . ." <sup>186</sup> The legislature simply said that it needed more time for its warring factions to come to an agreement.<sup>187</sup> A contempt order, it assured, was not necessary to get its attention.<sup>188</sup>

This assurance, however, did not sway the court and what happened next was unprecedented.<sup>189</sup> After finding the

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<sup>182</sup> Order to Show Cause, *McCleary v. State*, *supra* note 176.

<sup>183</sup> *Id.*; Plaintiff/Respondents' 2013 Post-Budget Filing, *McCleary v. State*, *supra* note 179.

<sup>184</sup> Lauren Drake, *Local Lawmakers Split on Supreme Court's Role in Education Funding*, THE COLUMBIAN, Sep. 3, 2014, available at <http://www.courts.wa.gov/content/publicupload/eclips/2014%2009%2005%20Local%20lawmakers%20split%20on%20Supreme%20Courts%20role%20in%20education%20funding.pdf>; Editorial Board, *State AG's Refresher on Separation of Powers Welcome*, UNION BULLETIN (Aug. 29, 2014), <http://union-bulletin.com/news/2014/aug/31/state-ags-refresher-separation-powers-welcome/>; Chris Gregoire and John Spellman, *Guest: Supreme Court Should Tread Carefully With Legislature Threats in McCleary Education Case*, SEATTLE TIMES (Sep. 1, 2014, 5:13 PM), [http://seattletimes.com/html/opinion/2024422197\\_chrisgregoirejohnspellmanopedmccleary02xml.html](http://seattletimes.com/html/opinion/2024422197_chrisgregoirejohnspellmanopedmccleary02xml.html).

<sup>185</sup> Daniel Jack Chasan, *How Far Will the State Supreme Court Go on McCleary?* CROSSCUT (Feb. 5, 2015), <http://crosscut.com/2015/02/05/community-idea-lab/123704/how-do-you-solve-problem-mccleary/>.

<sup>186</sup> State of Washington's Reply at 15, *McCleary v. State*, 173 Wash. 2d 477 (2012) (No. 84362-7), available at [http://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/843627\\_StateOfWashingtonsReply.pdf](http://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/843627_StateOfWashingtonsReply.pdf).

<sup>187</sup> State of Washington's Opening Brief Addressing Order to Show Cause at 1-2, *McCleary v. State*, 173 Wash. 2d 477 (2012) (No. 84362-7), available at [http://www.courts.wa.gov/content/publicUpload/supreme%20Court%20News/84362-7\\_McCleary\\_OpeningBrief\\_20140711.pdf](http://www.courts.wa.gov/content/publicUpload/supreme%20Court%20News/84362-7_McCleary_OpeningBrief_20140711.pdf).

<sup>188</sup> Order, *McCleary v. State*, *supra* note 175.

<sup>189</sup> Washington State Supreme Court, *Oral Arguments: McCleary, et al. v. State of Washington*, TVW.ORG, at 24:00 (Sep. 3, 2014), [http://www.tvw.org/index.php?option=com\\_tvwplayer&eventID=2014090001](http://www.tvw.org/index.php?option=com_tvwplayer&eventID=2014090001).

legislature's reasons unpersuasive, the court did what the Ohio Supreme Court had previously threatened to do: It held the entire state legislature in contempt.<sup>190</sup> Despite the court's prior lack of agreement about how to proceed with the case, the decision was unanimous.<sup>191</sup> The question of sanctions that it posed to both sides remained unanswered at that time.<sup>192</sup> "[I]n the interest of comity," the court gave the legislature time to purge its contempt.<sup>193</sup> If no agreement was reached by the end of the 2015 legislative session, the court stated it would reconvene to decide on sanctions or other remedies.<sup>194</sup>

By this time, public opinion ranged from relief that the court decided to defer,<sup>195</sup> to feeling that the court was "out of control."<sup>196</sup> This latter sentiment must have waned a bit, however. Two months later, a referendum requiring the legislature to "allocate funds to reduce class sizes and increase staffing support"<sup>197</sup> passed, albeit by less than two percent.<sup>198</sup> The referendum was commonly referenced alongside the *McCleary* case.<sup>199</sup> While this may have put more pressure on legislators to act according to the court's order, some argued this will actually make it harder to fund the *McCleary* order

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<sup>190</sup> Order, *McCleary v. State*, *supra* note 175.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> Editorial Board, *Editorial: State Supreme Court's Contempt Ruling Makes Point on Education, Not Obstacles*, THE SEATTLE TIMES (Sep. 11, 2014, 4:49 PM), [http://seattletimes.com/html/editorials/2024517832\\_mcclearyeditxml.html](http://seattletimes.com/html/editorials/2024517832_mcclearyeditxml.html); Editorial Board, *Legislature Correctly Gets More Time for School Solution*, THE YAKIMA HERALD, Sep. 14, 2014, available at <http://www.courts.wa.gov/content/publicupload/eclips/2014%2009%2015%20Legislature%20correctly%20gets%20more%20time%20for%20school%20solution.pdf>.

<sup>196</sup> Editorial Board, *High Court's Threat to Punish Legislature Goes Too Far*, UNION BULLETIN (Sep. 15, 2014), <http://union-bulletin.com/news/2014/sep/15/high-courts-threat-punish-state-legislature-goes-t/>. See also, Richard S. Davis, *Court Finesses Crisis It Created*, THE HERALD (Sep. 17, 2014, 12:01 AM), <http://www.heraldnet.com/article/20140917/OPINION04/140919187>.

<sup>197</sup> Liv Finne, *Citizens' Guide to Initiative 1351: To Reduce Class Sizes*, WASH. POL'Y CTR., Sep. 2014, available at <http://www.washingtonpolicy.org/publications/brief/citizens-guide-initiative-1351-reduce-class-sizes>.

<sup>198</sup> *November 4, 2014 General Election Results: Initiative Measure No. 1351 Concerns K-12 Education*, WASH. SEC'Y OF STATE ELECTIONS AND VOTING, <http://results.vote.wa.gov/results/20141104/State-Measures-Initiative-Measure-No-1351-Concerns-K-12-education.html> (last visited Jan. 8, 2016).

<sup>199</sup> John Higgins, *I-1351: Proposal Would Cut Class Sizes, Cost Billions*, THE SEATTLE TIMES (Oct. 11, 2014, 5:11 PM), [http://seattletimes.com/html/localnews/2024758146\\_electclasscostsxml.html](http://seattletimes.com/html/localnews/2024758146_electclasscostsxml.html).

because the initiative funding must come from already existing education budgets, instead of appropriating new money.<sup>200</sup>

As of this writing, the *McCleary* story continues to unfold. In August of 2015, the Washington Supreme Court finally decided to answer its open-ended question about sanctions and imposed fines of \$100,000 per day against the state.<sup>201</sup> The fines are held “for the benefit of basic education,” although questions remain as to how the court will enforce the payment of those fines.<sup>202</sup>

The Washington legislature seemed to be plagued by an especially deep-seated form of resistance. While it seemed as if it had made changes to the school finance laws at first, it never actually placed itself under any statutory obligation to fully fund education.<sup>203</sup> The legislature’s “reforms” allowed it to simply adjust its formula to account for short-term political goals, while feigning compliance with the state constitution.<sup>204</sup> The court clearly learned that the kind of deference it gave the legislature in *Seattle School District* only allowed the problem to arise again at a later date, and that lack of finality is beneficial to no one. That kind of solution is simply a surface bandage for an issue requiring deeper surgery. The contempt citation, however, may prove effective. The State of Washington has generally fallen below the national average in education spending per student,<sup>205</sup> and the question remains as to whether the legislature will be able to change that and purge its contempt by crafting a real, sustainable solution to the problem.<sup>206</sup>

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<sup>200</sup> Finne, *supra* note 197.

<sup>201</sup> Joseph O’Sullivan, *School Funding Back on Table as Court Fines State \$100,000 A Day*, THE SEATTLE TIMES (Aug. 13, 2015, 10:51 AM), <http://www.seattletimes.com/seattle-news/education/supreme-court-orders-100000-per-day-fines-in-mccleary-case/>.

<sup>202</sup> *Id.*

<sup>203</sup> Daniel C. Stallings, Comment, *Washington State’s Duty to Fund K–12 Schools: Where the Legislature Went Wrong and What It Should Do to Meet Its Constitutional Obligation*, 85 WASH. L. REV. 575, 593–94 (2010).

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* at 575.

<sup>206</sup> Kansas underwent a separation of powers struggle over school funding strikingly similar to Washington’s. See REBELL, *supra* note 33, at 31; Richard E. Levy, *Gunfight at the K–12 Corral: Legislative vs. Judicial Power in the Kansas School Finance Litigation*, 54 KAN. L. REV. 1021 (2006). Given the substantial overlap, I decided not to include an analysis of the case.

#### IV. IDENTIFYING THE ISSUES AND SOLUTIONS TO THE NEVER-ENDING CYCLE

This part proceeds in two main sections. First, it brings together both the broad and specific school finance history examined previously to identify the true issue behind continued failures. While many factors can contribute to this continued inadequacy in state schools, this part argues that legislative inaction is the culprit and must be targeted. Second, this part will compare the possible solutions to this issue, transitioning into a discussion of which solutions may be the most effective. Continued litigation, special masters, public votes, and court-ordered sanctions are discussed as possible solutions.

##### A. *The Issues*

From an examination of these three representative states, one can see the basic issue is legislative inaction.<sup>207</sup> Despite increasingly successful lawsuits, great strides are not being made because legislatures rarely follow through and assign additional new funding to schools.<sup>208</sup> They are the only ones that have the power to do so,<sup>209</sup> so the burden falls fully on them. Essentially, this renders courts ineffective. Their rulings are no more than empty words if they never enforce their mandates. Because of this perceived inability, a secondary problem has arisen: many courts are giving up on the issue and refusing to do anything.<sup>210</sup>

This judicial weariness is troublesome. Some courts have rejected suits under the political question doctrine or other justiciability grounds.<sup>211</sup> Others have blatantly stopped

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<sup>207</sup> Reynolds, *supra* note 3, at 749–52 (“[L]egislative responses often d[o] little to remedy the inequality . . . [P]laintiff victories rarely produce a systematic overhaul of the school funding formulas. In part, that may be because legislators have not always rushed to implement their court-imposed duty.”).

<sup>208</sup> See *supra* Part III.

<sup>209</sup> See Ronald Snell, *The Power of the Purse: Legislatures that Write State Budgets Independently of the Governor*, NAT’L CONF. OF STATE LEGIS. (March 2008), <http://www.ncsl.org/research/fiscal-policy/the-power-of-the-purse-legislatures-that-write-st.aspx> (“All state constitutions require that the state legislature enact appropriations in order for money to be spent from the treasury.”).

<sup>210</sup> Reynolds, *supra* note 3, at 761 (“Although a small number of state courts has long refused to become embroiled in school funding debates, a new round of ‘judicial withdrawal’ is emerging . . .”).

<sup>211</sup> Tang, *supra* note 34, at 1208.

trying.<sup>212</sup> This problem is likely exacerbated in states where judges face election. School funding cases like those in Ohio, New Jersey, and Washington are highly controversial, highly politicized, and garner lots of media attention. Judges striving for re-election do not want to be the target of scathing op-eds and radio or television commercials if they want to keep their jobs. It is a difficult position in which to find oneself. Those judges cannot continue to protect rights if they lose their positions to candidates unsympathetic to school finance plaintiffs. Venturing off the well-trodden constitutional path to protect those rights could result in undesirable, very public backlash.

Along those same lines, voters will not necessarily step into the fray either. While Washington's vote was more or less successful, the referendum in Ohio to bolster its supreme court ruling failed.<sup>213</sup> The latter result is predictable and understandable; raising taxes, for however noble a cause, is rarely a popular idea.<sup>214</sup> Even at the local level, school levies are notorious failures, which is what prompts many school finance litigation cases at the outset.<sup>215</sup> Clearly, part of the problem cannot also be a solution. Where the facts and the law warrant, the most vital role of the judiciary is to protect the unpopular, but absolutely necessary, civil rights of the minority.<sup>216</sup>

All of this ultimately means that students across the country continue to underachieve despite successful rulings and reforms.<sup>217</sup> Moreover, court decisions in some states are actually associated with subsequent declines in educational funding, suggesting a serious lack of judicial efficacy.<sup>218</sup> So, what can a court do when faced with a recalcitrant legislature and unconstitutionally inadequate levels of education funding?

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<sup>212</sup> See *supra* Part III.A.

<sup>213</sup> See *supra* Parts III.A, III.C.

<sup>214</sup> See *Fewer Want Spending to Grow, But Most Cuts Remain Unpopular*, PEW RES. CTR. (Feb. 10, 2011), available at <http://www.people-press.org/2011/02/10/fewer-want-spending-to-grow-but-most-cuts-remain-unpopular/>.

<sup>215</sup> Reynolds, *supra* note 3, at 751–52. See, e.g., Terra Goodnight, *All Ten School Levies for New Operating Funds Fail*, INNOVATION OHIO (Aug. 7, 2013), <http://innovationohio.org/2013/08/07/all-ten-school-levies-for-new-operating-funds-fail/> (“Typically 35% of requests for additional funds succeed.”).

<sup>216</sup> Terrance Sandlow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162, 1164 (1977). See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

<sup>217</sup> Heise, *supra* note 40, at 1741.

<sup>218</sup> *Id.* at 1761.

## B. *The Solutions*

### 1. *Further litigation*

One possible solution is to simply continue allowing plaintiffs to bring school funding cases to the courts, and continuing to rule in their favor. Proponents of judicial deference and conservatism argue this is, in fact, all that a court can do. Separation of powers and consideration for a co-equal branch of government require that a court not exercise the legislature's "power of the purse." This, however, is a massive waste of judicial time and resources. New Jersey, discussed above, is a prime example. While this is the "safe" option, unlikely to cause any constitutional conflicts, it can be exhausting and eventually unfruitful. It encourages quick fixes to the problem instead of a deeper overhaul of faulty systems. Further, there are ways to appropriately use judicial power without interfering with the legislature's power of the purse. Most importantly, this solution directly violates that important principal of finality revered throughout the legal system.

### 2. *Special masters*

Some have advocated for appointing a special master to handle the specifics of school funding cases,<sup>219</sup> and courts have certainly used them for this purpose in the past.<sup>220</sup> Special masters are appointed by courts to manage aspects of a case, typically when they are very complex or fact-heavy. Both parties must consent to the appointment of a special master.<sup>221</sup> Special masters cannot make any binding budget changes or force the legislature to comply in any way, however.<sup>222</sup> They typically just conduct research, make findings of fact, or oversee proceedings.<sup>223</sup> Even if they were to outline a proposal for increasing school funding, the legislature has likely heard plenty of "proposals." It is agreeing on one that is the problem. Unfortunately, special masters are by no means enforcement

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<sup>219</sup> Lisa MacFarlane, *Court Should Appoint a K-12 "Special Master"*, THE OLYMPIAN (Sep. 14, 2014), <http://www.theolympian.com/2014/09/14/3313427/court-should-appoint-a-k-12-special.html>.

<sup>220</sup> David F. Herr, *State Court Rules and Practices Regarding Special Masters*, SL083 ALI-ABA 19, 33 (Nov. 2005).

<sup>221</sup> *Id.* at 25.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.* at 27-31.

mechanisms when it comes to legislative rebuffs.

### 3. *Public vote*

Courts could also take the “hopeful” route: hope that the media speaks kindly of their decision; hope that public opinion is on their side; hope that someone puts education funding up to a vote of the people; and hope that the measure passes. This, of course, means the court has no power over anything, and the fate of students is entirely left up to voters. Knowing that these are the same voters that put hesitant legislators in office to begin with does not bode well. As in Ohio, even if this route takes the state up to the point of a referendum, getting the required number of votes in favor can be a challenge. Again, tax hikes are not popular items at the ballot box, and the chronic failure of school levies is often the basis for school finance litigation anyway.<sup>224</sup> Even if all the pieces were to fall into place, the legislature may fail to appropriate new money to schools, and simply reallocate the current budget. Further, the serendipitous occurrence of winning a public vote once will likely only solve the funding issues for a period of time. With inflation, the increasing educational competitiveness of other nations, and the advancing complexity of skills students need as a baseline for entering the adult world, the baseline for “adequate funding” will surely change over time.

### 4. *Sanctions*

As we have seen, some courts did not turn their backs on students. They kept fighting, even in the face of opposition, to protect constitutional rights. In Washington, this meant holding the legislature in contempt to enforce their ruling.<sup>225</sup> In New Jersey, this meant acting on that contempt and shutting down schools.<sup>226</sup> These sanctions are clearly drastic, last-resort measures—but when civil rights are continually being violated, those kinds of measures may be the only way to elicit a resolution.

Contempt is “conduct that defies the authority or dignity of a court or legislature. Because such conduct interferes with the administration of justice, it is punishable, usually by fine or

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<sup>224</sup> See sources *supra* note 212.

<sup>225</sup> See *supra* Part III.C.

<sup>226</sup> See *supra* Part III.B.

imprisonment.”<sup>227</sup> Contempt is the court’s power to bolster its authority, and it is an important mechanism by which it can enforce its orders.<sup>228</sup> It originates in the English common law, but Blackstone writes that it is “as antient [sic] as the laws themselves.”<sup>229</sup> This power of the court, Blackstone wrote, “must be an inseparable attendant upon every superior tribunal,” because “laws without a competent authority to secure their administration from disobedience and contempt, would be vain and nugatory.”<sup>230</sup>

Contempt is a valuable tool in a court’s toolbox when it comes to noncompliance. The effectiveness of contempt orders for nonpayment of support obligations in family law, for example, has been analyzed in a number of states.<sup>231</sup> A Michigan study found that contempt was a powerful deterrent against this nonpayment, with counties that used contempt incarceration as an enforcement tool increasing their collections by a greater percentage than counties that did not.<sup>232</sup> A Massachusetts study found that less than 0.3 percent of cases where contempt was used for nonpayers resulted in jail time.<sup>233</sup> In Oregon, civil contempt resulted in a two hundred percent increase in collections.<sup>234</sup> Oklahoma and Minnesota reported that contempt, while a last resort, is highly effective in extracting child support from nonpayers.<sup>235</sup> The threat of jail time often means contemnors “discover” resources to pay their obligations.<sup>236</sup> But will this work with legislative bodies? Because of a lack of actual occurrences, no comprehensive studies have been undertaken, but time will tell as Washington’s legislature now attempts to purge its contempt.<sup>237</sup> Similarly drastic measures worked during New Jersey’s first

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<sup>227</sup> BLACK’S LAW DICTIONARY 360–61 (9th ed. 2009).

<sup>228</sup> Jennifer Fleischer, *In Defense of Civil Contempt Sanctions*, 36 COLUM. J.L. & SOC. PROBS. 35, 35 (2002).

<sup>229</sup> 4 BLACKSTONE 285.

<sup>230</sup> *Id.* at 284–85.

<sup>231</sup> *Contempt Can Be an Effective Enforcement Tool*, THE PUNDIT (Friend of the Court Bureau, Lansing, Mich.), Nov. 2011 at 1, available at <http://courts.mi.gov/Administration/SCAO/OfficesPrograms/FOC/Documents/Pundits/2011%20Pundit.pdf>.

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> *Turner v. Rogers*, 131 S. Ct. 2507, 2572 (2011).

<sup>237</sup> *See supra* Part III.C.

round of school finance cases.<sup>238</sup>

Courts are adversarial in nature with respect to the parties before them, and can even be adversarial when dealing with other branches of government.<sup>239</sup> Courts should use their full powers to enforce their orders and push uncooperative legislatures to comply; ordering compliance with the constitution is, after all, the court's duty just as much as it is the legislature's.<sup>240</sup> A noted school finance scholar recommends vigilance on the part of courts.<sup>241</sup> They should not sit idly by as the other branches ignore their orders. In order to bring finality to the school finance issues states face, courts should treat legislatures just like normal individuals who ignore court orders. The next part will expand on this recommendation and discuss how courts should address common counter-arguments.

#### V. RECOMMENDATION FOR STATE COURTS IN SCHOOL FUNDING STANDOFFS

Many have aptly wondered: are such drastic measures, like holding an entire state legislature in contempt, even constitutional? Beyond the cases discussed, no known instances of this exact situation exist.<sup>242</sup> While state courts have held individual legislators in contempt,<sup>243</sup> an entire branch of state government has apparently not been thusly sanctioned outside New Jersey and Washington. Those two courts' specific sanctions appear to be unprecedented, as one state's counsel argued.<sup>244</sup> It even appears to be unprecedented when it comes to other kinds of cases, not just education finance.

Surely, there are separation of powers and other

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<sup>238</sup> See *supra* Part III.B.

<sup>239</sup> Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181 (2005). The judiciary is "adversarial" with other branches all the time; they often order the legislative or executive branches to take certain actions. This is the whole point of our system of checks and balances.

<sup>240</sup> *McCleary v. State*, 173 Wash. 2d 541 ("[T]his court cannot stand on the sidelines and hope the State meets its constitutional mandate to amply fund education. Article IX, section 1 is a mandate, not to a single branch of government, but to the entire state. We will not abdicate our judicial role.").

<sup>241</sup> James E. Ryan, *Standards, Testing, and School Finance Litigation*, 86 TEX. L. REV. 1223, 1260 (2008).

<sup>242</sup> Chasan, *supra* note 185.

<sup>243</sup> *Spallone v. United States*, 493 U.S. 265 (1990).

<sup>244</sup> State of Washington's Reply, *McCleary v. State*, *supra* note 186.

constitutional questions inherent in one branch sanctioning another. Editorial boards across the state in Washington rebuked the court for this very reason when it threatened to hold the legislature in contempt.<sup>245</sup> The executive branch in New Jersey also voiced these concerns during its constitutional row.<sup>246</sup> Commentators in both states (often despite lack of legal training) were sure that such actions were beyond the powers of a court.<sup>247</sup> I submit that it is constitutional.<sup>248</sup> I recommend that courts choose this route when faced with situations similar to those above. Because this solution lacks any legal precedent, however, the recommendation will be by way of the closest comparable situations. The rest of this section looks at the text of contempt statutes and draws comparisons to the most similar situations in history, in order to recommend how courts should go about redressing their own dilemmas. It also addresses some common counter-arguments that are raised during these constitutional crises and suggests how courts may rebut them.

#### A. *Courts Should Look to State Statutes and Constitutions for Support*

In Washington, contempt of court means intentional

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<sup>245</sup> Editorial, *State AG's Refresher on Separation of Powers Welcome*, UNION-BULLETIN (Aug. 29, 2014), <http://union-bulletin.com/news/2014/aug/31/state-ags-refresher-separation-powers-welcome/>; Editorial, *State Supreme Court Should Be Cautious in McCleary School-Funding Case*, THE SEATTLE TIMES (Aug. 30, 2014), [http://seattletimes.com/html/editorials/2024422163\\_mcclearyedit31.xml.html](http://seattletimes.com/html/editorials/2024422163_mcclearyedit31.xml.html); Tracy Warner, *The Washington Supreme Court is Within Inches of Overstepping Its Constitutional Powers*, WENATCHEE WORLD, Aug. 29, 2014, available at <http://www.courts.wa.gov/content/publicupload/eclips/2014%2009%2002%20The%20Washington%20Supreme%20Court%20is%20within%20inches%20of%20overstepping%20its%20constitutional%20powers.pdf>.

<sup>246</sup> Marra, *supra* note 29, at 789–90 (“The Abbott XXI decision has drawn the attention of many critics, the most vocal of which has arguably been New Jersey Governor Chris Christie. The Governor, intent on reworking the educational structure of New Jersey on every level, wishes to establish that the power to make decisions regarding appropriations lies solely in the hands of the executive and legislative branches of the state government.”).

<sup>247</sup> See *State AG's Refresher on Separation of Powers Welcome*, *supra* note 245.

<sup>248</sup> REBELL, *supra* note 33, at 92; Phil Talmadge, *Legal Analysis: Constitutional Implications of Washington Supreme Court's Remedy in McCleary vs. State*, WASH. POLY CTR. (Apr. 2014), <http://www.washingtonpolicy.org/publications/brief/legal-analysis-constitutional-implications-washington-supreme-courts-remedy-mcCle>. *Contra* Erwin Chemerinsky, *The Essential But Inherently Limited Role of the Courts in Prison Reform*, 13 BERKELEY J. CRIM. L. 307, 314 (2008) (“[A court] cannot realistically—and probably not legally—hold the members of the legislature in contempt of court for failing to provide adequate funding.”).

“disobedience of any lawful judgment, decree, order, or process of the court.”<sup>249</sup> The New Jersey contempt statute says that courts have the power to punish for contempt in cases of “[d]isobedience or resistance . . . by any party . . . or any person whatsoever to any lawful writ, process, judgment, order or command of the court.”<sup>250</sup> Ohio punishes a person for contempt if he or she is guilty of “[d]isobedience of, or resistance to, a lawful writ, process, order, rule, judgment, or command of a court or officer.”<sup>251</sup>

Courts should use contempt statutes like these as a basis for the legislature’s contempt.<sup>252</sup> Many of these statutes in some way mention that the sanctions may apply to “people” or “persons.”<sup>253</sup> A legislature likely falls within the meaning of “people,” though none of the cited contempt statutes have a definition section that would aid in answering that question outright.<sup>254</sup> Surely, a “legislature” is comprised of people by the ordinary definition of the word. Single legislators have been held in contempt.<sup>255</sup> So, what would stop a court from sanctioning an entire group of them? Further, if legislators are representatives of the people, and courts may hold ordinary people in contempt, why not the legislature? If it is because legislatures are an entity of people, and not an individual, that is unpersuasive as well. Companies can be held in contempt.<sup>256</sup> On the face of the statutes, it would seem that legislators, or a group of them, could likely be subject to the contempt laws.

As one court observed, “[t]he ultimate power to interpret, construe and enforce the constitution of this State belongs to the judiciary . . . . [T]he courts have ample power, and will go to any length within the limits of judicial procedure, to protect such constitutional guaranties.”<sup>257</sup> If a certain degree of

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<sup>249</sup> WASH. REV. CODE § 7.21.010(1)(b) (2015).

<sup>250</sup> N.J. STAT. ANN. § 2A:10-1 (West 2015).

<sup>251</sup> OHIO REV. CODE ANN. § 2705.02(A) (West 2015).

<sup>252</sup> Missouri, however, has expressly prohibited courts from using their contempt power to enforce civil rights. MO. ANN. STAT. § 476.150 (West 2015).

<sup>253</sup> WASH. REV. CODE § 7.21.010 (2015); N.J. STAT. ANN. § 2A:10 (West 2015); OHIO REV. CODE ANN. § 2705 (West 2015).

<sup>254</sup> WASH. REV. CODE § 7.21.010 (2015); N.J. STAT. ANN. § 2A:10 (West 2015); OHIO REV. CODE ANN. § 2705 (West 2015).

<sup>255</sup> *Spallone v. United States*, 493 U.S. 265 (1990).

<sup>256</sup> Zack Whittaker, *Microsoft Refuses to Hand Over Foreign Data, Held in Contempt of Court*, ZDNET (Sep. 10, 2014), <http://www.zdnet.com/article/microsoft-refuses-to-hand-over-foreign-data-held-in-contempt-of-court/>.

<sup>257</sup> *Seattle Sch. Dist. v. State*, 90 Wash. 2d 476, 496, 501 (1978) (quoting

education funding is guaranteed in a state constitution (as it is in every state), it is then a positive constitutional right, instead of a negative one. Therefore, the court's analysis should be different than the typical rational basis test.<sup>258</sup> This is not an arena in which the court is concerned with whether the state has done too much. Rather, it must consider whether the state has done enough.<sup>259</sup> Positive constitutional rights require courts to ask if the state action or inaction achieves, or is reasonably likely to achieve, the desired ends.<sup>260</sup> If the answer is "no," then the court has the responsibility, not just the option, to remedy the situation.<sup>261</sup>

Legislative immunity should not be persuasive to courts considering contempt as a solution to the school finance problem. Washington's legislature brought this up in its briefing, stating it would be immune from any contempt order as per the state constitution's "speech and debate clause."<sup>262</sup> The federal constitution and forty-three other state constitutions provide similar protection for their legislators.<sup>263</sup> A closer look at the texts show these constitutional guarantees typically only protect what legislators say in their work from criminal or civil sanctions. Hence, it protects their words. It does not protect their actions, especially omissions that violate a citizen's civil rights. Many state courts have interpreted this privilege even more narrowly than the one given to Congress.<sup>264</sup> As some have argued since the Civil Rights Era, "the judicial power necessary to enforce court orders and command respect overrides the policy supporting the immunity doctrine."<sup>265</sup> Further, as will be revealed below, the privilege usually extends only to individual members of the legislative body, not

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Gottstein v. Lister, 88 Wash. 462, 493 (1915).

<sup>258</sup> See *McCleary v. State*, 173 Wash. 2d at 519; Recent Case, *Colorado Supreme Court Upholds State's School Finance System as Rationally Related to the "Thorough and Uniform" Mandate of the Colorado Constitution's Education Clause*, 127 HARV. L. REV. 803, 807 (2013).

<sup>259</sup> 173 Wash. 2d at 519.

<sup>260</sup> *Id.*

<sup>261</sup> REBELL, *supra* note 33, at 48.

<sup>262</sup> State of Washington's Opening Brief Addressing Order to Show Cause, *McCleary v. State*, *supra* note 187.

<sup>263</sup> Steven F. Huefner, *The Neglected Value of the Legislative Privilege in State Legislatures*, 45 WM. & MARY L. REV. 221, 224 (2003).

<sup>264</sup> *Id.*

<sup>265</sup> *Legal Sanctions to Enforce Desegregation in the Public Schools: The Contempt Power and the Civil Rights Act*, 65 YALE L.J. 630, 641 (1956).

to the body as whole, which is typically the party to an education finance action.<sup>266</sup> Therefore, courts can likely impose sanctions against the entire legislative body if necessary to protect students' civil right to an adequately funded education.

*B. Courts Should Look to Federal Contempt Proceedings Against the President for Precedential Value*

Court attempts to enforce their rulings against co-equal branches of government bring to mind *Worcester v. Georgia*.<sup>267</sup> In that 1832 case, the U.S. Supreme Court invalidated Georgia laws that expanded the state's jurisdiction over the Cherokee nation.<sup>268</sup> The laws were part of an attempt to remove the Native Americans from the state.<sup>269</sup> Chief Justice John Marshall held that Native American nations were independent, sovereign states.<sup>270</sup> Although they were under the United States' protection, he wrote, "[p]rotection does not imply the destruction of the protected."<sup>271</sup>

Georgia ignored this ruling, however, and continued its campaign to remove the Cherokees.<sup>272</sup> President Andrew Jackson also ignored the ruling and allowed Georgia to proceed with removal.<sup>273</sup> Moreover, President Jackson actually asked the Cherokees to leave the state or submit to Georgia's rule.<sup>274</sup> In response to the Supreme Court opinion, President Jackson purportedly said, "John Marshall has made his decision. Now let him enforce it."<sup>275</sup> Unfortunately, the Justice did not.<sup>276</sup> This ultimately led to the Trail of Tears, an incident in which the federal government forced the Cherokees from their territory

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<sup>266</sup> See Part V. See also Huefner, *supra* note 263, at 262.

<sup>267</sup> 31 U.S. 515 (1832).

<sup>268</sup> *Id.* at 595 (1832) ("The act of the State of Georgia, under which the plaintiff in error was prosecuted, is consequently void, and the judgment a nullity.").

<sup>269</sup> Tim Alan Garrison, *Worcester v. Georgia (1832)*, NEW GA. ENCYCLOPEDIA (Oct. 1, 2014), <http://www.georgiaencyclopedia.org/articles/government-politics/worcester-v-georgia-1832> ("In the 1820s and 1830s Georgia conducted a relentless campaign to remove the Cherokees . . . An infuriated Georgia legislature responded by purporting to extend its jurisdiction over the Cherokees . . .").

<sup>270</sup> 31 U.S. at 561.

<sup>271</sup> *Id.* at 518.

<sup>272</sup> Garrison, *supra* note 269.

<sup>273</sup> *Id.*

<sup>274</sup> *Id.*

<sup>275</sup> *Id.*

<sup>276</sup> *Id.*

and relocated them to Oklahoma.<sup>277</sup> So, if the U.S. Supreme Court had no enforcement power against the President, why would any state court have similar powers against its own legislative body?

The courts do have enforcement powers against the executive branch, although they have only recognized this ability in recent years. In fact, courts have held the executive branch in contempt. President Clinton was the first president held in contempt of court, for willfully giving false testimony about his romantic relationship with Monica Lewinsky.<sup>278</sup> The federal judge in that case noted that, despite the lack of precedent for her ruling, no constitutional barrier existed to imposing sanctions.<sup>279</sup> These sanctions included payment of the plaintiff's legal fees and reimbursement of court costs.<sup>280</sup> The monetary sanctions are similar to those considered by courts in the school funding context.<sup>281</sup>

A federal court also found President Obama's administration in contempt in 2011 when the administration reinstated a deep water drilling moratorium that a court had previously invalidated.<sup>282</sup> The court then ordered the government to pay the plaintiff's legal fees.<sup>283</sup> As plaintiff's counsel noted, "[t]he government was not at liberty to impose its own will after the court struck down the policy."<sup>284</sup> "The government, like any citizen, had to obey the ruling, even if it didn't like it," he continued.<sup>285</sup> This is similar to an education finance situation like the three discussed: one branch of government continually failed to act according to a co-equal court's order, and was consequently sanctioned. State courts should therefore be confident knowing that their actions have precedent in this federal context.

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<sup>277</sup> *Id.*

<sup>278</sup> John M. Broder & Neil A. Lewis, *Clinton is Found to be in Contempt on Jones Lawsuit*, N.Y. TIMES, Apr. 13, 1999, available at <http://www.nytimes.com/1999/04/13/us/clinton-is-found-to-be-in-contempt-on-jones-lawsuit.html>.

<sup>279</sup> *Id.* Perhaps ironically, the judge that found President Clinton in contempt was a former law student of his. *Id.*

<sup>280</sup> *Id.*

<sup>281</sup> See Part III.C.

<sup>282</sup> Laurel Calkins, *U.S. In Contempt Over Gulf Drill Ban, Judge Rules*, BLOOMBERG BUS. (Feb. 3, 2011, 12:53 PM), <http://www.bloomberg.com/news/articles/2011-02-03/u-s-administration-in-contempt-over-gulf-drill-ban-judge-rules>.

<sup>283</sup> *Id.*

<sup>284</sup> *Id.*

<sup>285</sup> *Id.*

C. *Courts Should Look to Federal Contempt Proceedings Against Legislative Officials for Precedential Value*

Federal courts have attempted to spearhead reforms much like those needed for school funding in the prison reform context.<sup>286</sup> In 1972, a Texas inmate filed a handwritten petition against the Texas Department of Corrections.<sup>287</sup> This petition detailed the constitutional violations that were taking place in his jail: unlawful solitary confinement, overcrowding, harassment, and lack of medical care.<sup>288</sup> The massive opinion that resulted, totaling more than one hundred pages,<sup>289</sup> was the basis for “a complete overhaul of the Texas prison system.”<sup>290</sup> The case continued for decades as the judge took an active role in the reform.<sup>291</sup>

At one point, the judge held the Texas Department of Corrections in contempt for failing to implement provisions of a settlement agreement, threatening fines up to twenty-four million dollars per month.<sup>292</sup> The judge who oversaw the case and issued the contempt citation “incurred the wrath of many” for his activism, but was “one of four forces which converged to force legislative action.”<sup>293</sup> California recently witnessed a similar series of prison reform cases.<sup>294</sup> The governor and other state officials were threatened with contempt unless the state released certain inmates.<sup>295</sup> Like students, prisoners are a voiceless minority needing the staunch protection of courts. Federal judges, however, have a much easier time taking these actions than state judges, due to the job security factor.<sup>296</sup> This is likely a reason they have been more comfortable using

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<sup>286</sup> REBELL, *supra* note 33, at 4.

<sup>287</sup> *Prison Reform: Ruiz v. Estelle*, THE WILLIAM WAYNE JUSTICE PAPERS (2014), [http://tarlton.law.utexas.edu/exhibits/ww\\_justice/ruiz\\_v\\_estelle.html](http://tarlton.law.utexas.edu/exhibits/ww_justice/ruiz_v_estelle.html).

<sup>288</sup> *Id.*

<sup>289</sup> *Ruiz v. Estelle*, 503 F. Supp. 1265, 1265–1390 (S.D. Tex. 1980).

<sup>290</sup> *Prison Reform: Ruiz v. Estelle*, *supra* note 287.

<sup>291</sup> Chantale Fiebig, *Legislating from the Bench: Judicial Activism in California and Its Increasing Impact on Adult Prison Reform*, 3 STAN. J.C.R. & C.L. 131, 147 (2007).

<sup>292</sup> RICHARD L. ABEL, THE LAW AND SOCIETY READER 271 (1995).

<sup>293</sup> FRANK KEMERER, WILLIAM WAYNE JUSTICE: A JUDICIAL BIOGRAPHY 396 (2010).

<sup>294</sup> *See Fiebig*, *supra* note 291.

<sup>295</sup> Paige St. John, *Federal Judges Order California to Free 9,600 Inmates*, L.A. TIMES (June 20, 2013), <http://articles.latimes.com/2013/jun/20/local/la-me-ff-brown-prisons-20130621>.

<sup>296</sup> U.S. CONST. art. 3, § 1.

controversial powers to enforce their orders. With this precedent, though, state courts should take advantage of their given enforcement mechanisms.

In fact, the U.S. Supreme Court has specifically endorsed federal judges holding local governmental bodies in contempt for noncompliance with an order to enact necessary legislation. In *Spallone v. United States*, a district court found the city of Yonkers, New York, to be purposefully engaging in housing segregation and enjoined it from continuing the practice.<sup>297</sup> The city council, which had sole legislative power, did not comply.<sup>298</sup> The court held the city as a whole, and each individual council member, in contempt and imposed sanctions.<sup>299</sup>

The Court of Appeals rejected the contemnors' legislative immunity argument, holding that it "does not insulate them from compliance with a consent judgment . . . which has been approved by their legislative body."<sup>300</sup> The U.S. Supreme Court agreed that contempt was proper against the city as a whole, but not the individual councilmembers, as they had not been found individually liable in the holding below.<sup>301</sup> Therefore, courts faced with legislative pushback against an education finance order, would likely be wise to impose sanctions against the entire legislative body, unless individual representatives had been a party to the original action.

Another illustrative historical separation of powers struggle is found in the school desegregation cases during the Civil Rights Era. Following the Supreme Court's *Brown v. Board of Education* decisions,<sup>302</sup> which mandated desegregation of the nation's schools, some state officials vehemently resisted federal court orders to start implementing their rulings.<sup>303</sup> A prominent example was the "Little Rock Crisis."<sup>304</sup> A federal court ordered Little Rock Central High School to integrate, but

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<sup>297</sup> 493 U.S. 265, 268 (1990).

<sup>298</sup> *Id.* at 272.

<sup>299</sup> *Id.*

<sup>300</sup> *Id.* at 273.

<sup>301</sup> *Id.* at 276.

<sup>302</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) [Brown I]; *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955) [Brown II].

<sup>303</sup> ANDREW J. DUNAR, *AMERICA IN THE FIFTIES 219–20* (2006); *Bush v. Orleans Parish School Board and the Desegregation of New Orleans Schools*, FED. JUD. CTR., [http://www.fjc.gov/history/home.nsf/page/tu\\_bush\\_narrative.html](http://www.fjc.gov/history/home.nsf/page/tu_bush_narrative.html) (last visited Jan. 8, 2016).

<sup>304</sup> DUNAR, *supra* note 303, at 219.

Arkansas Governor Orval Faubus disagreed with the ruling.<sup>305</sup> To block African-American students from attending, the governor sent the state National Guard to the school every day.<sup>306</sup> The federal court then held Governor Faubus in contempt of its ruling.<sup>307</sup> This caused the governor to dismiss the National Guard and allow the children to attend.<sup>308</sup> While President Eisenhower was forced to dispatch federal troops to quell the citizen mob that ensued afterward,<sup>309</sup> the contempt power was successful in bringing about the court's decree.

At the time these state officials were fighting against desegregation, many now-familiar arguments surfaced: judges were violating separation of powers, and the social problems were too complex for the judiciary to handle.<sup>310</sup> The situation became much easier for courts to handle with Title VI of the 1964 Civil Rights Act, when Congress reserved the right to withdraw funding from school districts that refused to desegregate.<sup>311</sup> These arguments then became moot.

In the context of school funding, access to an adequate education is a civil right.<sup>312</sup> It is enumerated in every state's constitution and guaranteed positively to the children of the state, just like freedom of speech, religion, and the like. There is bipartisan support for the statement that "education is the civil rights issue of our time."<sup>313</sup> Some see the Supreme Court's more recent cases, such as *Parents Involved in Community*

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<sup>305</sup> *Id.*

<sup>306</sup> *Id.*

<sup>307</sup> *Id.*

<sup>308</sup> *Id.*

<sup>309</sup> *Id.* at 220.

<sup>310</sup> REBELL, *supra* note 33, at 9.

<sup>311</sup> *Id.* at 5.

<sup>312</sup> See generally, Julio C. Gomez, *A Child's Civil Right to a Thorough and Efficient Education*, 286 N.J. LAW. 65 (2014).

<sup>313</sup> Nicole Cobler & Pete Stroud, *In Speech, George W. Bush Says Education is Today's Most Important Civil Rights Issue*, THE DAILY TEXAN (Apr. 17, 2014, 8:51 PM), <http://www.dailytexanonline.com/news/2014/04/10/in-speech-george-w-bush-says-education-is-today%E2%80%99s-most-important-civil-rights-issue>; Helene Cooper, *Obama Takes Aim at Inequality in Education*, N.Y. TIMES (Apr. 6, 2011), [http://www.nytimes.com/2011/04/07/us/politics/07obama.html?\\_r=0](http://www.nytimes.com/2011/04/07/us/politics/07obama.html?_r=0) ("Describing education and education equality as the 'civil rights issue of our time,' President Obama called Wednesday for a renewed effort to eliminate the achievement gap between African-American students and others."); Kayleigh Skinner, *Education Called Civil Rights Issue of Today*, CLARION-LEDGER (June 26, 2014), <http://www.clarionledger.com/story/news/2014/06/26/education-called-civil-rights-issue-today/11445809/> ("Education is the civil rights [issue] of our time,' McDonald said.").

*Schools v. Seattle School District*,<sup>314</sup> as an unfortunate retreat from the strong pro-educational stance it took with *Brown* and subsequent rulings.<sup>315</sup> State courts have followed the Supreme Court's withdrawal in their increasing unwillingness to hear education finance cases.<sup>316</sup> Interestingly, the United States' ranking in high school graduation rates relative to other countries has dropped in that time from first to twenty-first.<sup>317</sup> It takes a confident judge indeed to hold a legislature in contempt. That was, however, the exact solution necessary in the *Brown* desegregation era. It is equally necessary in the school finance dilemma the country faces today. Courts should therefore view this issue as urgently as other civil rights violations and use their contempt powers to halt them.

#### D. *Common Critiques and How Courts May Rebut Them*

Of course, the issue with comparing the instant case to the precedent described in the above sections is that none involve the exact separation of powers issue: a disagreement between co-equal branches of state government. They are all approximations. The federal government operates under its unique set of laws, so a federal court sanctioning federal executive officials does not provide an exact roadmap. Likewise, a federal court sanctioning local officials implicates the unequal federalist power structure. There is simply no precedent to make this an easy case. With the above reasons and arguments in mind, however, I urge state courts to use their full power to hold recalcitrant legislatures in contempt, and impose sanctions pursuant to that holding, for failing to comply with their constitutional duties.

Critics of this position argue that allocating more money toward the school funding problem will not actually solve anything. Instead, critics say, schools need to learn to use the money they are given more wisely and frugally.<sup>318</sup> Courts have no need, therefore, to get involved—let alone to sanction a legislature that they believe rightfully ignored the decree. As

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<sup>314</sup> 551 U.S. 701 (2007).

<sup>315</sup> REBELL, *supra* note 33, at 2.

<sup>316</sup> *Id.* at 3.

<sup>317</sup> *Id.* at 43.

<sup>318</sup> Justin Owen et al., *Education Funds Not Being Spent Wisely*, THE BEACON CTR. OF TENN. (Sep. 4, 2013, 9:24 AM), <http://www.beacontn.org/2013/09/education-funds-not-being-spent-wisely/>.

one court concluded, though, “[i]t is nothing more than an illusion to believe that the extensive disparity in financial resources does not relate directly to the quality of education.”<sup>319</sup> It is hard to imagine that the almost medieval state of Ohio schools in the 1990s, discussed above, could not have been brought to at least some minimum health and safety standards with money for a functioning heating system or fire alarms. One study found that “[i]nadequate education also dramatically raises crime rates and health costs, denies the nation substantial tax revenues, and raises serious questions about the civic competence of the next generation to function productively in a complex democratic society.”<sup>320</sup> Courts can easily counter such monetary objections with the knowledge that this investment will yield greater monetary and societal returns.

Another critique that surfaces frequently is a more populist separation of powers concern. A common sentiment is that only the voters and elected officials can exercise their voice to make education finance decisions.<sup>321</sup> This could be because courts do not have sufficient resources to make proper decisions in this area, or because such decisions would be “judicial activism” taken too far. State judges are often elected too,<sup>322</sup> however, so the importance of having a representative of the people to make decisions is already fulfilled. Further, courts are supposed to protect the rights of the minority, even if that is not a popular decision.<sup>323</sup> The right to a certain level of basic education is specifically laid out in every state’s constitution.<sup>324</sup> The implications of restricting courts from enforcing their orders when dealing with a co-equal branch of government could be grim for voiceless minorities. As plaintiffs’ counsel in *McCleary* queried the court, “[w]hat is the purpose of separation of powers? Is it to protect government officials who violate the constitutional rights of citizens?”<sup>325</sup>

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<sup>319</sup> *Washakie Cty. Sch. Dist. No. 1 v. Herschler*, 606 P.2d 310, 334 (Wyo. 1980).

<sup>320</sup> REBELL, *supra* note 33, at 6.

<sup>321</sup> See *State AG’s Refresher on Separation of Powers Welcome*, *supra* note 245.

<sup>322</sup> *Fact Sheet on Judicial Selection Methods in the States*, A.B.A., [http://www.americanbar.org/content/dam/aba/migrated/leadership/fact\\_sheet.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/leadership/fact_sheet.authcheckdam.pdf) (last visited Jan. 8, 2016) (“[A] total of 38 states have some type of judicial elections.”).

<sup>323</sup> Sandlow, *supra* note 216, at 1164.

<sup>324</sup> Dayton & Dupre, *supra* note 46, at 2356 n.13.

<sup>325</sup> Washington State Supreme Court, *Oral Arguments: McCleary, et al. v. State*

A related argument states that courts do not have the “power of the purse.”<sup>326</sup> That power belongs to the legislature. Courts attempting to rule on education finance issues, and moreover enforce them, are overstepping that boundary. Admittedly, some courts have overreached.<sup>327</sup> Multiple courts, however, have successfully refrained from telling the legislature how much money to spend.<sup>328</sup> They left that up to the legislature, and let the representatives define the parameters by which it should be bound.<sup>329</sup> In sum, the court simply tells the legislature that they are violating the constitution using boundaries the legislature set for itself.<sup>330</sup> Therefore, it is possible to stay within the proper bounds of judicial oversight and still enforce an order.

### *E. Summary of Lessons Learned*

Based on the trials and successes of our exemplary education finance cases, and the analogous contempt proceedings throughout history, a few practical points can be gleaned. First, courts should not back down when constitutional violations of the state education clause are found. This likely means retaining jurisdiction of the case to ensure the order is followed. Second, courts must allow the legislature to define specific formulas and monetary amounts. Doing otherwise would mean overreaching into legislative functions. Allowing the party in violation to set their own rules also ensures less resistance when compliance is mandated.

Third, courts should not afford legislatures too many chances. This was exemplified in the New Jersey saga.<sup>331</sup> Ordering a party to show cause, backed by the specter of contempt sanctions or school shutdown, may be more effective in the second or third rehearing than waiting until the seventh or eighth. The court will lose a lot of its perceived power so late in the case. Finally, a court must take into account the larger issues that may result from whatever sanctions it decides to

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of *Washington*, TVW.ORG, at 36:00 (Sep. 3, 2014), [http://www.tvw.org/index.php?option=com\\_tvwplayer&eventID=2014090001](http://www.tvw.org/index.php?option=com_tvwplayer&eventID=2014090001).

<sup>326</sup> See *State AG's Refresher on Separation of Powers Welcome*, *supra* note 245.

<sup>327</sup> See Part III.A.

<sup>328</sup> See Part III.C.

<sup>329</sup> See Part III.C.

<sup>330</sup> See Part III.C.

<sup>331</sup> See Part III.B.

impose. Shutting down schools in the middle of summer, as New Jersey did, may have little actual impact on students. Likewise, holding the legislature in contempt may be a sufficient scare tactic, with little actual negative impacts on the rest of society, to solve the problem.

## VI. CONCLUSION

The stories related above are those of conflicts that have happened time and time again. These separation of powers scuffles between branches of government are not new. From the Trail of Tears to the Little Rock Crisis, governing counterparts have tried to map out the boundaries of their constitutional duties and roles. While this battle has been seen throughout different legal areas, school finance litigation is one such area that seems to be caught in a never-ending cycle. Even if plaintiffs in these cases manage to win, a lack of legislative compliance with judicial orders is a significant roadblock to the desired outcomes. Courts' deference to, or exhaustion with, this legislative inaction means that even novel litigation approaches or legal theories from the parties themselves have proven useless. The government must do its job to implement the remedies. That responsibility falls not only on the legislative and executive branches, but on the judicial branch as well.

When presented with this issue, courts should not walk away from school finance cases. Courts have it within their power to enforce their orders and bring about finality to the dispute. That is a choice they must make, however. If "last resort" remedies are required, they should uphold students' right to an adequate education under their state constitutions. Children are remarkably resilient in the face of adversity, but ensuring a safe, quality learning environment is paramount to developing an informed citizenry that can contribute to the world in which we all must live. As a noted education finance scholar said, "[t]here is broad consensus among business leaders, government officials, and educators that achieving both excellence and equity in this manner is critical to the nation's future."<sup>332</sup> The time has come for state courts to join in

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<sup>332</sup> REBELL, *supra* note 33, at 5.

that consensus.

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