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BROKEN SYSTEMS, BROKEN DUTIES: A NEW THEORY FOR SCHOOL FINANCE LITIGATION

AARON Y. TANG*

In May 2010, a coalition of California students, parents, and school districts filed a ground-breaking lawsuit alleging that the state's public school finance system violates the California constitution. The lawsuit, Robles-Wong v. California, is not ground-breaking because of its basic aim; at last count, school finance lawsuits with similar goals have occurred in forty-four states. Instead, the lawsuit is path-breaking because of the novel approach plaintiffs used to frame their constitutional challenge. Historically, plaintiffs have sued state governments using two legal theories: the equity theory and the adequacy theory. Under the equity theory, plaintiffs argue that the states distribute school resources in a disparate manner that violates equal protection of the laws. Under the adequacy theory, plaintiffs assert that the states deny children their right to an adequate level of education as guaranteed under the education clauses in state constitutions. While litigants suing under the equity theory have lost more cases than they have won, adequacy challenges have met some success: plaintiffs in adequacy claims have prevailed in two-thirds of the thirty-three cases in state courts.

In recent years, however, plaintiffs have grown less likely to prevail in their school finance challenges, losing six of eleven cases decided since 2009. Moreover, as I show in an empirical analysis of school spending levels in twenty-two states, even those states that have experienced successful adequacy and equity lawsuits continue to spend less than the amount necessary to provide their children with a quality education.

Responding to these trends, the Robles-Wong plaintiffs allege a new and different form of constitutional violation: that the state's school finance program violates the state's constitutional duty to provide a "system" of common schools because it is not "intentionally, rationally, and demonstrably aligned" with the educational goals described in statewide academic content standards. As this Article explains, this constitutional violation alleged in Robles-Wong, which I call the "broken system" cause of action, represents a significant evolution in the historic journey of school finance litigation. In addition to describing the textual

and legal basis for this new theory, I argue that it builds on the experiences of its two predecessor theories, responds to important trends in education policy reform, and offers courts a manageable framework for ensuring that state school systems are in compliance with the substantive educational guarantees of state constitutions.

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I. INTRODUCTION

State public school systems throughout the country are failing to deliver the quality of education they have promised. In New York State, one out of every three high school freshmen fails to graduate on time,¹ a statistic that is difficult to reconcile with the New York Education Department’s pledge that “[e]veryone will graduate from high school ready for work, higher education, and citizenship.”² Despite the California Department of Education’s declaration that “the public school system must meet the *comprehensive learning needs* of each student to reach *high expectations*,”³ only 22% of California eighth graders are able to read at a proficient or advanced level.⁴ Worse yet, for every California eighth grader who reads at an advanced level, there are nineteen eighth graders whose reading ability is below basic.⁵ As American students fall further behind international peers,⁶ and as poor⁷

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1. U.S. DEP’T OF EDUC., HIGH SCHOOL DROPOUT AND COMPLETION RATES IN THE UNITED STATES: 2007, COMPENDIUM REPORT 21 (2009), *available at* <http://nces.ed.gov/pubs2009/2009064.pdf>.

2. UNIV. OF THE STATE OF N.Y. & N.Y. STATE BD. OF REGENTS, STATE EDUC. DEPT., P-16 EDUCATION: A PLAN FOR ACTION 1 (2006), *available at* http://www.nfschools.net/10561053110315997/lib/10561053110315997/P_16_Education_A_Plan_for_Action_2006.pdf (emphasis added).

3. California Department of Education, Belief & Purpose, <http://www.cde.ca.gov/eo/mn/mv/> (last visited May 18, 2011).

4. NAT’L CTR. FOR EDUC. STATISTICS, THE NATION’S REPORT CARD: READING 2007 STATE SNAPSHOT REPORT: CALIFORNIA GRADE 8 PUBLIC SCHOOLS (2007), *available at* <http://nces.ed.gov/nationsreportcard/pdf/stt2007/2007497CA8.pdf>.

5. *See id.*

6. In math, United States’ twelfth graders were outperformed by their counterparts in sixteen of twenty-one countries that participated in the Third International Math and Science Study. NAT’L CTR. FOR EDUC. STATISTICS, U.S. DEP’T OF EDUC., PURSUING EXCELLENCE: A STUDY OF U.S. TWELFTH-GRADE MATHEMATICS AND SCIENCE ACHIEVEMENT IN INTERNATIONAL CONTEXT 30 (1998), <http://nces.ed.gov/pubs98/twelfth/>. In science, United States’ twelfth graders outperformed only five of twenty-one countries. *Id.* at 36.

7. In 2009, a child born into the highest quartile of families is ten times more likely to

and minority⁸ students continue to encounter devastatingly unequal educational opportunities and outcomes, it is at best a platitude—and at worst an understatement—to observe that state public school systems in America are broken.

Although the end result of the failure of our public school systems is observable in dismal student outcomes, those failures begin with the dysfunctional structures that make up the systems themselves. Nowhere is this dysfunction more obvious than in state school finance schemes, where the amount of money spent on any particular student's education is often the irrational product of an inscrutable web of factors and not the result of a reasoned calculation of the cost to provide children with a quality education. Indeed, in any given state, the amount of money spent on a child's education is typically influenced by a dizzying array of input factors. These factors include: three kinds of local property taxes, each subject to voter approval and state limitations; state tax programs and lotteries directed, to varying degrees, at school spending; state political negotiations over funding appropriation levels relative to state budgetary constraints; state foundation formulas that distribute agreed-upon amounts of money based on daily attendance calculations in each district and various geographic and economic factors; state categorical programs that target money toward specific programs such as transportation, vocational education, professional development, school construction, and special education; and other considerations unique to the various states.⁹

In California, for example, decisions about how much money school districts should receive and where that money should come from are made principally by the state legislature and governor as a result of Proposition 13, which was passed in 1978 to limit the rates at which local

obtain a college degree by age twenty-four than a child born into the lowest quartile of families. *Family Income & Educational Attainment 1970 to 2009*, 221 POSTSECONDARY EDUC. OPPORTUNITY 1, 2 (2010).

8. 1999 National Assessment of Educational Progress (NAEP) scores showed that seventeen-year-old African-American and Latino students read and do math at roughly the same level as white thirteen-year-olds. NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., TRENDS IN ACADEMIC PROGRESS: THREE DECADES OF STUDENT PERFORMANCE 33, 35 (2000), available at <http://nces.ed.gov/nationsreportcard/pubs/main1999/2000469.asp>.

9. For an overview of state-by-state school finance structures, see generally the NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., PUBLIC SCHOOL FINANCE PROGRAMS OF THE UNITED STATES AND CANADA: 1998-99 (2001), http://nces.ed.gov/edfin/state_financing.asp.

property taxes could increase.¹⁰ But to set a statewide education budget, school officials must follow the disjunctive three-part test enacted by voters in Proposition 98, where the particular test to be applied in any given year is often unknown until well after school funding is actually distributed,¹¹ leading to severe unpredictability for students and school leaders. Even after that amount is identified, it must still be divided up among districts in two parts: one part based on general purpose funds tied to “revenue limits” that are the historical byproduct of a 1972 calculation, and a second part based on more than one hundred different categorical programs, each with its own rules.¹² The California Department of Education itself concedes that “the system is extraordinarily complex and difficult to understand.”¹³ Stanford University Professor Michael Kirst concludes, “California’s K-12 education finance system is broken in every way. It has no underlying rationale, is incredibly complex, fails to deliver an equal or adequate education to all children and is a nonsensical historical accretion.”¹⁴

California is not the only state where the school finance system has been widely denounced as broken.¹⁵ The recent economic downturn has underscored the erratic manner in which the vast majority of states set school funding levels, demonstrating that the driving forces behind those levels are political expediency, geography, and short-term economic realities.¹⁶ Only a handful of states have taken what would seem to be

10. For a brief overview of Proposition 13 and its impact on school spending in California, see Education Data Partnership, Proposition 13: Property Tax Amendment (1978), (Mar. 2004), <http://www.ed-data.k12.ca.us/articles/article.asp?title=Proposition%2013>.

11. See Legislative Analyst’s Office, Proposition 98 Requirement for Budget Year Uncertain, http://www.lao.ca.gov/analysis_2009/education/ed_anl09003002.aspx (last visited May 17, 2011).

12. Michael Kirst, *How to Fix California’s Schools: Today’s Method Outdated, Confusing, Inadequate*, SAN JOSE MERCURY NEWS, Nov. 23, 2003.

13. Education Data Partnership, A Guide to California’s School Finance System, (Apr. 2011), <http://www.ed-data.k12.ca.us/articles/article.asp?title=Guide%20to%20California%20School%20Finance%20System>.

14. Kirst, *supra* note 12.

15. See, e.g., Alan J. Borsuk, *MPS to Explore Dissolving District: Money Pressure Brings Board’s Surprising Vote*, MILWAUKEE J. SENTINEL, Sept. 19, 2008, at A1 (quoting Milwaukee superintendent announcing, “The state finance system to fund Milwaukee Public Schools is broken”); Deon Roberts, “Broken” Louisiana Public School System Awaits Leadership Infusion, NEW ORLEANS CITYBUSINESS, Apr. 25, 2005, at 77 (The local chamber of commerce president declared, “the [school] system is broken.”).

16. See, e.g., Tim Martin, *Deadline Nears for Michigan School Budget Cuts*, MLIVE.COM, Nov. 30, 2009, http://www.mlive.com/politics/index.ssf/2009/11/deadline_nears_on_michigan_sch.html.

the self-evident step of setting school funding levels based on the most sensible metric: the cost of actually providing a quality education to children.¹⁷

This Article considers the role of state-level school finance litigation in solving the problem of arcane state school funding schemes that are neither rationally calculated to serve student needs in theory, nor actually serving those needs in reality. In Part II of this Article, I describe the two legal theories traditionally asserted by plaintiffs in school finance lawsuits: the equity and adequacy theories. Unlike the bulk of existing literature already written on the topic, however, the principle concern of this Article is not to advance an argument in favor of either of these theories. I describe instead, in Part III, how recent developments in school reform—the rise of standards-based school reform and associated “costing-out studies” that calculate the cost of providing the education described in state standards—have changed the playing field for school finance litigants. As a result, a new legal approach is necessary to align state education funding systems with the real costs of preparing our children for the challenges of the coming century. In making the case for a new approach, Part III includes a brief empirical analysis of the impact of adequacy and equity litigation in the states thus far, concluding that despite the significant gains that the litigation has produced, a substantial gap still exists between what states actually spend on K–12 public education and what states ought to spend to meet their own academic content standards.

In Part IV, I propose a new legal approach that has the potential to bridge this gap, the broken system theory of school finance litigation. I explain the textual basis for the broken system theory, which is rooted in the text of various state constitutional education clauses, and I also examine relevant case law from state courts that have considered these clauses so far. I then walk through a test case to demonstrate how this broken system claim could be litigated in Part V, using California as an example in light of the recent *Robles-Wong* filing. Finally, I conclude

17. See, e.g., *Abbott ex rel. Abbott v. Burke*, 971 A.2d 989, 996–97, 1009–10 (N.J. 2009) (approving New Jersey’s School Funding Reform Act, which ties state funding levels to the cost of providing children with an adequate education, to be in compliance with the state’s constitutional duty); *Campbell County Sch. Dist. v. State*, 907 P.2d 1238, 1279 (Wyo. 1995) (ordering the Wyoming legislature to adopt a school finance program that was based on the actual cost of providing children the quality of education promised by the state); Access Quality Education, *A Costing Out Primer* (June 1, 2006), http://www.schoolfunding.info/resource_center/costingoutprimer.php3 [hereinafter *A Costing Out Primer*] (explaining costing-out studies, which estimate the actual cost of providing a certain level of education).

with a brief discussion of some of the advantages and challenges of the broken system theory of school finance litigation.

To preview the argument, this new cause of action is firmly rooted in language present in thirty-six state constitutions¹⁸ that imposes a duty on states to provide not just public schools in general, but a system of public schools. I argue that, irrespective of whether a state constitution guarantees any minimally adequate level of education, the command to provide a system of schools requires a legislature to create an educational enterprise composed of programs and policies that are rationally designed to serve a common purpose. State legislatures have made it clear that the common purpose to be served by their public school systems is the achievement of academic content standards.¹⁹ All fifty states have enacted such standards to serve as the foundation of their school systems, and most have passed additional laws expressly tying core school policies regarding testing and accountability, curriculum frameworks, teacher certification, and even textbooks to these standards.²⁰ By connecting these programs to the standards in a calculated and rational manner, states have acted in significant furtherance of their constitutional duty to provide a system of public schools. But they have failed in one crucial respect: school finance, which in most states remains wholly unconnected to the delivery of the standards. A challenge based on a state's constitutional duty to provide a system of schools would thus seek a court remedy requiring the state legislature to align its school funding structure to the actual cost of providing the level and quality of education described in a state's academic content standards.

18. Thirty-six state constitutions require the provision of a "system" of schools: ALA. CONST. art. XIV, § 256; ALASKA CONST. art. VII, § 1; ARIZ. CONST. art. XI, § 1; ARK. CONST. art. XIV, § 1; CAL. CONST. art. IX, § 5; COLO. CONST. art. IX, § 2; DEL. CONST. art. X, § 1; FLA. CONST. art. IX, § 1; HAW. CONST. art. X, § 1; IDAHO CONST. art. IX, § 1; ILL. CONST. art. X, § 1; IND. CONST. art. VIII, § 1; KY. CONST. § 183; LA. CONST. art. VIII, § 1; MD. CONST. art. VIII, § 1; MICH. CONST. art. VIII, § 2; MINN. CONST. art. XIII, § 1; NEV. CONST. art. XI, § 2; N.J. CONST. art. VIII, § 4, cl. 1; N.M. CONST. art. XII, § 1; N.Y. CONST. art. XI, § 1; N.C. CONST. art. IX, § 2; N.D. CONST. art. VIII, § 1; OHIO CONST. art. VI, § 2; OKLA. CONST. art. XIII, § 1; OR. CONST. art. VIII, § 3; PA. CONST. art. III, § 14; S.C. CONST. art. XI, § 3; S.D. CONST. art. VIII, § 1; TENN. CONST. art. XI, § 12; TEX. CONST. art. VII, § 1; UTAH CONST. art. X, § 1; VA. CONST. art. VIII, § 1; WASH. CONST. art. IX, § 2; W. VA. CONST. art. XII, § 1; and WYO. CONST. art. VII, § 1.

19. *See infra* Part IV.B.

20. *See infra* note 168 and accompanying text.

II. THE CURRENT APPROACH: EQUITY AND ADEQUACY SCHOOL FINANCE LAWSUITS

Under the conventional narrative, school finance litigation in America has proceeded in three “waves” covering two distinct theories of legal action.²¹ The first two waves together comprise the “equity theory” of school finance lawsuits, which is premised on the idea that inequitable distribution of school resources violates equal protection of the laws.²² The first wave asserted violations of the federal Equal Protection Clause and ended abruptly with the Supreme Court’s dual declaration in *San Antonio Independent School District v. Rodriguez* that education is not a fundamental right and that wealth is not a suspect class.²³ The second wave commenced thereafter in state courts based on state equal protection guarantees, but was met with only partial success. Of the thirty-one state supreme courts to consider state equal protection challenges, only fourteen invalidated school finance systems.²⁴ The conventional narrative follows that advocates then turned to a third wave of school finance litigation, the “adequacy” wave, distinguished by its focus not on equality of educational opportunity but rather on the state’s duty to provide some absolute, adequate level of education to all.²⁵ What follows is an overview of the equity and adequacy theories, along with a discussion of the benefits and drawbacks inherent in each.

21. See William E. Thro, *Judicial Analysis During the Third Wave of School Finance Litigation: The Massachusetts Decision as a Model*, 35 B.C. L. REV. 597, 598, 600–04 (1994). But see William S. Koski, *Of Fuzzy Standards and Institutional Constraints: A Re-examination of the Jurisprudential History of Educational Finance Reform Litigation*, 43 SANTA CLARA L. REV. 1185, 1188 (2003) (noting how the so-called “waves” of school finance cases are actually not so distinct); James E. Ryan, *Standards, Testing, and School Finance Litigation*, 86 TEX. L. REV. 1223, 1229, 1237 n.9 (2008) (arguing that the conventional story of “school finance litigation is not as neat as the traditional portrait suggests,” because even existing adequacy litigation has focused a great deal on cross-district disparities at the remedial stage).

22. See Thro, *supra* note 21, at 600–02.

23. 411 U.S. 1, 28, 40 (1973).

24. Michael Heise, *Equal Educational Opportunity, Hollow Victories, and the Demise of School Finance Equity Theory: An Empirical Perspective & Alternative Explanation*, 32 GA. L. REV. 543, 571 & n.124 (1998).

25. Janet D. McDonald et al., *School Finance Litigation & Adequacy Studies*, 27 U. ARK. LITTLE ROCK L. REV. 69, 69–70, 75–76 (2004).

A. *The Equity Theory*

At the beginning of the 1960s, the United States Supreme Court began to apply the Equal Protection Clause of the Fourteenth Amendment in a two-tiered fashion, a dichotomy that remains more or less intact to the present day.²⁶ State laws that implicate “suspect classifications” or “fundamental interests” are subject to strict scrutiny, and are struck down absent a governmental showing that there is a compelling interest for the law and that the law is the most narrowly tailored way to achieve that interest.²⁷ State action that does not touch upon suspect classifications or fundamental interests will be evaluated under rational basis review, where the state’s action will be upheld so long as the state possesses a legitimate interest and so long as its action is rationally related to that interest.²⁸

Advocates who sought to equalize the amount of educational resources devoted to low-income and minority children with the amount offered to their wealthier counterparts reacted to this judicial framework quickly, suing in both federal and state courts. Their assertion was two-fold: first, they argued that education is a fundamental right under the Equal Protection Clause (or that wealth is a suspect classification) and second, that when subjected to strict scrutiny, unequal local property tax-based school funding schemes should be struck down for lack of a compelling governmental justification.²⁹ As a result, advocates asserted, different districts within a state should not be able to spend wildly different amounts to educate their children. Plaintiff students in *Rodriguez*, for example, lived in Edgewood Independent School District where only \$356 was spent on their education, compared with students in Alamo Heights School District which had an average annual per-pupil expenditure of \$594.³⁰

The Supreme Court, however, rejected the *Rodriguez* plaintiffs’ argument that education is a fundamental interest and wealth a suspect

26. Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). Note the exception of gender-based discrimination, which is evaluated under an intermediate tier of scrutiny in between strict scrutiny and rationality review. *See, e.g.*, *United States v. Virginia*, 518 U.S. 515, 524 (1996).

27. *See* Gunther, *supra* note 26, at 21, 24.

28. *Id.* at 35.

29. *See* *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973).

30. *Id.* at 12, 13.

class, ending the first wave of school finance litigation under the federal Equal Protection Clause.³¹ Undeterred, school finance advocates renewed their claims under state equal protection provisions, given that state constitutions typically have their own variants of an equal protection clause that could give separate rise to a cause of action.³² But equity litigation met opposition in state courts as well, as a majority of the courts to hear such suits found for state defendants.³³

The equity theory has been undermined by four main problems. First, state courts, like the U.S. Supreme Court, have been reluctant to find education to be a “fundamental interest” for fear that doing so would lead to a slippery slope whereby any important governmental program would be subject to strict scrutiny for even the most benign differential treatment.³⁴ Second, even if a court is willing to rule education a fundamental right, judges—and indeed the plaintiffs themselves—have struggled to define the proper meaning of “equity” in the school finance context.³⁵ For instance, proponents of the equity theory in California’s *Serrano* litigation³⁶ suggested a definition aimed at offering courts what they believed would be a judicially manageable standard: “fiscal neutrality,” or the concept that the revenues available to a school district should depend only on the wealth of the state as a whole and not on the property wealth of the individual district.³⁷ But some advocates responded that disadvantaged children actually need *additional* resources to reach socially desirable levels of educational success—a kind of “vertical equity” that distributes resources according

31. *See id.* at 40.

32. ALLAN R. ODDEN & LAWRENCE O. PICUS, *SCHOOL FINANCE: A POLICY PERSPECTIVE* 29 (2d ed. 2000).

33. *See* Heise, *supra* note 24, at 571.

34. *See San Antonio Indep. Sch. Dist.*, 411 U.S. at 37 (explaining that “the logical limitations on appellees’ nexus theory are difficult to perceive. How, for instance, is education to be distinguished from the significant personal interests in the basics of decent food and shelter?”).

35. *See* William S. Koski & Rob Reich, *When “Adequate” Isn’t: The Retreat from Equity in Educational Law and Policy and Why It Matters*, 56 EMORY L.J. 545, 594 (2006) (describing competing definitions of “equality” in school finance).

36. *Serrano v. Priest*, 557 P.2d 929, 940 (Cal. 1979) (noting defendants argument that “the trial court employed inappropriate criteria insofar as it focused on the notion of so called ‘fiscal neutrality’”).

37. *See* John E. Coons et al., *Educational Opportunity: A Workable Constitutional Test for State Financial Structures*, 57 CAL. L. REV. 305, 319–21 (1969) (promoting the idea of “district power equalizing,” an approach that involves using back-end state level redistribution of school funding to ensure that school expenditures are not determined by district wealth).

to student needs.³⁸ The problem with vertical equity, however, is not only that it is facially unequal in the first instance, but also that it is difficult to administer. For once a court agrees to impose a remedy based upon vertical equity, upon what basis should it rely to authorize or limit *how much* more money a low-income school or student should receive than an affluent one?

Equity lawsuits also encountered a third, related problem: even in states where plaintiffs prevailed on equity grounds, the political fallout was often severe among the states' wealthiest residents who were no longer able to direct their local property tax payments to their local schools. In California, for example, wealthy taxpayers responded to the state supreme court's order in *Serrano v. Priest*³⁹ to redistribute funding equitably among school districts by cutting statewide property tax rates,⁴⁰ effectively reducing the quality of education provided to all children.⁴¹ Thus, the lesson from California is that even if school funding is equalized, the equity theory does nothing to prevent a state from "leveling down" school funding to some equally insufficient amount.⁴² As the California Supreme Court itself recognized:

What the Serrano court imposed as a California constitutional requirement is that there must be uniformity of treatment between the children of the various school districts in the State. . . . If such uniformity of treatment were to result in all children being provided a low-quality educational program, or even a clearly *inadequate* educational program, the California Constitution would be satisfied.⁴³

Lastly, equity litigation has been rejected in many courts in part out of a concern that education is itself a public policy matter over which legislatures, not courts, should be granted plenary authority. As the

38. Koski & Reich, *supra* note 35, at 610.

39. 557 P.2d 929, 940, 958 (1976).

40. William A. Fischel, *How Serrano Caused Proposition 13*, 12 J.L. & POL. 607, 620–21 (1996).

41. JON SONSTELIE ET AL., PUB. POL'Y INST. OF CAL., FOR BETTER OR FOR WORSE? SCHOOL FINANCE REFORM IN CALIFORNIA 4 (2000), available at http://www.ppic.org/content/pubs/report/R_200JSR.pdf (concluding that California children are worse off after the *Serrano* plaintiffs victory).

42. See Koski & Reich, *supra* note 35, at 591.

43. *Serrano*, 557 P.2d at 943 n.28.

Supreme Court observed in *Rodriguez*, to find education a fundamental right would jeopardize separation of powers, usurping the “legislative role . . . for which the Court lacks both authority and competence.”⁴⁴ At the heart of this critique of judicial involvement in equity litigation—a critique that has also been levied against adequacy lawsuits—is the idea that a state’s elected representatives are better suited than judges to make determinations as to desirable educational goals and resource distribution.⁴⁵

B. *The Adequacy Theory*

After losing on state equal protection grounds in many states, advocates turned to a different litigation theory: the adequacy theory.⁴⁶ Rather than relying on state equal protection clauses, the legal hook for adequacy lawsuits is the education clause present in state constitutions, which typically requires states to provide a system of public schools and often characterizes the required system as “thorough” and “efficient.”⁴⁷ The basic argument is that these clauses compel the state to do more than simply open up schools and demand student attendance; the state must actually ensure that some meaningful level of education is offered in the schools. In practice today, adequacy claims are typically raised alongside equity arguments,⁴⁸ and there are strong ties between the two.⁴⁹ But adequacy claims have garnered greater success than equity claims, at least at the liability stage: of the thirty-two state courts to rule on adequacy arguments, twenty-one have found state funding schemes to violate their respective constitutions.⁵⁰

44. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 31 (1973).

45. Matt Brooker, *Riding the Third Wave of School Finance Litigation: Navigating Troubled Waters*, 75 UMKC L. REV. 183, 222–23 (2006).

46. The last equity lawsuits to prevail in state high courts occurred in 1994 in Arizona and North Dakota; since that time, successful school finance suits have come under the adequacy theory instead. See Heise, *supra* note 24, at 579–85; see also Michael Heise, *State Constitutions, School Finance Litigation, and the “Third Wave”: From Equity to Adequacy*, 68 TEMP. L. REV. 1151, 1168–74 (1995) [hereinafter Heise, *State Constitutions*].

47. William E. Sparkman, *The Legal Foundations of Public School Finance*, 35 B.C. L. REV. 569, 572–73 (1994).

48. See, e.g., *Bonner v. Daniels*, 907 N.E.2d 516, 520–22 (Ind. 2009) (rejecting both adequacy and equity challenges raised simultaneously by plaintiffs).

49. See Laurie Reynolds, *Full State Funding of Education as a State Constitutional Imperative*, 60 HASTINGS L.J. 749, 750 (2009) (arguing “it would be a mistake to exaggerate the doctrinal differences between” equity and adequacy suits).

50. See NATIONAL ACCESS NETWORK, EDUCATION ADEQUACY LIABILITY DECISIONS SINCE 1989 (2009), http://www.schoolfunding.info/litigation/New_Charts/11_2009

The primary difference between equity and adequacy suits is notable in the remedy requested under each theory. Unlike an equity lawsuit, which seeks a remedy that is relativistic in its nature, an adequacy lawsuit asks the state to provide all schools with some absolute, base level of resources sufficient to provide a constitutionally adequate education, however the court may define that level.⁵¹ A situation where wealthy school districts outspend their low-income counterparts thus does not necessarily violate a state's duty under an adequacy lawsuit so long as the low-income schools have adequate educational resources as defined by the court.

By seeking a court order declaring some absolute level of education that the state must offer and providing students and their schools the resources necessary to deliver it, adequacy litigants hoped to avoid many of the legal and practical problems associated with equity litigation.⁵² For instance, a court that finds for plaintiffs on adequacy grounds does not face the same fear that, in doing so, it may open up the door to spillover effects in other social programs because an adequacy ruling can be grounded in the unique text of a state constitution's educational provision as opposed to some open-ended concept of fundamental interests under the Equal Protection Clause.⁵³ Moreover, a court-ordered adequacy remedy does not need to define the thorny concept of "equality" with regard to school resources.⁵⁴ And neither must it necessarily confront the same potential political backlash from wealthy taxpayers who often pay the biggest price in equity remedies as their tax dollars get redistributed to lower-income neighborhoods.⁵⁵

But even as the adequacy theory avoids some of the definitional problems associated with equity lawsuits, it faces a substantial, different definitional challenge. Once a court reaches the merits of an adequacy claim, the court is asked to define that "adequate" level of education to which all children in a state are entitled in the first instance.⁵⁶

ed_ad_equacyliability.pdf.

51. See Thro, *supra* note 21, at 602. *But see* Ryan, *supra* note 21, at 1232 (arguing that remedies in adequacy litigation have not only been about absolute funding levels and have indeed considered relative funding disparities).

52. See Heise, *State Constitutions*, *supra* note 46, at 1168.

53. See Koski, *supra* note 21, at 1233.

54. See Heise, *State Constitutions*, *supra* note 46, at 1169.

55. See Koski, *supra* note 21, at 1233.

56. See Ryan, *supra* note 20 at 1223 ("The basic approach of adequacy cases, at least in theory, is to define the outcomes that constitute an adequate education . . .").

Opponents of the adequacy theory contend that judges are poorly suited to create such a definition, particularly in comparison with legislative bodies that have the ability to conduct hearings and control the purse strings, and who are ultimately accountable to the people via the electoral process.⁵⁷

Acceding to this concern, several state courts have relied upon the U.S. Supreme Court's political question doctrine to reject adequacy suits, ruling that their constitutional education clauses do not create judicially manageable standards absent an initial policy determination, which the separation of powers forbids.⁵⁸ The Rhode Island Supreme Court expressed this view succinctly when it rejected the plaintiffs' adequacy challenge in *City of Pawtucket v. Sundlun*, declaring that "[b]ecause the Legislature is endowed with virtually unreviewable discretion in this area, plaintiffs should seek their remedy in that forum rather than in the courts."⁵⁹

Yet concerns over justiciability have not been persuasive to most of the courts where adequacy litigation has been brought. In fact, only eight of the thirty-two states to consider adequacy challenges have refused to reach the merits of adequacy claims on account of justiciability.⁶⁰ The vast majority of courts have rejected state defendants' non-justiciability arguments, reasoning that to decline to address plaintiffs' challenges would amount to an abdication of the court's essential responsibility to interpret the meaning of the state constitution.⁶¹ The Arkansas Supreme Court explained its rationale for

57. See Brooker, *supra* note 45, at 184 (arguing that courts should respect constitutional separation of powers principles by refusing to entertain school finance claims altogether).

58. See, e.g., *Comm. for Educ. Rights v. Edgar*, 672 N.E.2d 1178, 1191 (Ill. 1996) (citing *Baker v. Carr*, 369 U.S. 186, 217 (1962)) ("To hold that the question of educational quality is subject to judicial determination would largely deprive the members of the general public of a voice in a matter which is close to the hearts of all individuals in Illinois."); see also *Bonner v. Daniels*, 907 N.E.2d 516, 522 (Ind. 2009) (concluding that the framers did not create a constitutional right to be educated to a certain standard and noting that the matter should be handled by the General Assembly, not the courts); *Coal. for Adequacy & Fairness in Sch. Funding v. Chiles*, 680 So. 2d 400, 407-08 (Fla. 1996) (dismissing adequacy claim out of concern for separation of powers).

59. 662 A.2d 40, 45 (R.I. 1995).

60. The eight states are Alabama, Florida, Illinois, Indiana, Nebraska, Oklahoma, Pennsylvania, and Rhode Island. See MICHAEL A. REBELL, *COURTS & KIDS: PURSUING EDUCATIONAL EQUITY THROUGH THE STATE COURTS* 22-29 (2009) (stating that seven of the eight states, excluding Indiana, had denied to reach the merits on the basis of justiciability). After the time of the above publication, Indiana also denied relief on the basis that there did not exist a judicially manageable standard. See *Bonner*, 907 N.E.2d at 518.

61. Michael Rebell offers a thorough account of the general view among state courts

reaching the merits of an adequacy lawsuit by declaring, “[t]his court’s refusal to review school funding under our state constitution would be a complete abrogation of our judicial responsibility and would work a severe disservice to the people of this state.”⁶² Indeed, some legal scholars have gone so far as to observe that the justiciability doctrine is itself inherently flawed for its failure to consider the judiciary’s proper role in our constitutional democracy.⁶³

Nevertheless, even though most state courts have shown a general willingness to consider adequacy challenges, history also demonstrates that once a court jumps into the adequacy thicket, its involvement may be protracted, difficult, and highly politicized. In New Jersey, for instance, the landmark *Abbott v. Burke* line of cases spanned twenty-four years and involved twenty discrete decisions by the state’s courts.⁶⁴ And although the *Abbott* cases have produced significant gains for school children,⁶⁵ not every court to maintain its jurisdiction over a prolonged period is rewarded for its efforts. In Ohio, the state’s high court issued four rulings over thirteen years, each affirming the right to an adequate education and demanding legislative compliance—but each order went unheeded by recalcitrant lawmakers.⁶⁶ The power struggle between the Ohio Supreme Court and General Assembly was so intense that at different points the legislature proposed to strip the court of jurisdiction altogether, ignore the court’s orders outright, and even impeach justices who ruled with the majority.⁶⁷ In the end, Ohio’s high

that adequacy challenges are indeed justiciable in *Courts & Kids: Pursuing Education Equity Through the State Courts*. See REBELL, *supra*, note 60, at 23–29.

62. *Lake View Sch. Dist. No. 25 of Phillips County v. Huckabee*, 91 S.W.3d 472, 484 (Ark. 2002).

63. See Martin H. Redish, *Judicial Review and the “Political Question,”* 79 NW. U. L. REV. 1031, 1059–60 (1984); see also Michael E. Tigar, *Judicial Power, The “Political Question Doctrine” and Foreign Relations*, 17 UCLA L. REV. 1135, 1141–52 (1970).

64. Education Law Center, *Abbott v. Burke Decisions*, <http://www.edlawcenter.org/ELCPublic/AbbottvBurke/AbbottDecisions.htm> (last visited May 18, 2011). The *Abbott* cases concluded in May 2009 when the New Jersey Supreme Court terminated its prior remedial order in response to the New Jersey legislature’s weighted student funding formula. The decision was hailed by some as the long-overdue end of the *Abbott* legacy of cases. See Brian Donahue, *New Jersey Supreme Court Scraps Abbot v. Burke*, NJ.COM, May 28, 2009, http://www.nj.com/ledgerlive/index.ssf/2009/05/new_jersey_supreme_court_scrap.html.

65. For a discussion of the benefits from New Jersey’s *Abbott* cases, see LINDA DARLING-HAMMOND, *THE FLAT WORLD & EDUCATION: HOW AMERICA’S COMMITMENT TO EQUITY WILL DETERMINE OUR FUTURE* 122–30 (2010).

66. For a detailed explication of Ohio’s saga, see Larry J. Obhof, *DeRolph v. State and Ohio’s Long Road to an Adequate Education*, 2005 BYU EDUC. & L.J. 83, 84 (2005).

67. *Id.* at 85.

court threw up its hands and terminated jurisdiction despite finding an ongoing constitutional violation,⁶⁸ with little educational progress to show for its efforts.

The most recent scorecard for adequacy lawsuits suggests that, although the theory is still very much alive, success is far from a foregone conclusion. Since 2009, six of the eleven states to issue decisions on adequacy litigation have ruled against the plaintiffs.⁶⁹ Perhaps the economic downturn has played a role in this development, or perhaps it is just a minor bump in the road and not indicative of any major trend. But this much is for certain: measuring the success of school finance litigation by reference to only pro-plaintiff liability decisions is only a partial metric. As plaintiffs' experiences in Ohio and California demonstrate, persuading a court that a state has violated its constitutional duty to provide an adequate or equitable education is only the beginning of the battle. The true outcome of the battle—whether children are provided with the quality of educational opportunity that they need to prepare them for lasting social, civic, and economic success—depends upon the extent to which the remedy

68. *DeRolph v. State*, 780 N.E.2d 529, 530 (2002).

69. *See Bonner v. Daniels*, 907 N.E.2d 516, 518 (Ind. 2009) (ruling an adequacy challenge non-justiciable for lack of judicially manageable standards); *Montoy v. Kansas*, No. 92-032, slip op. (Kan. Feb. 12, 2010) (rejecting plaintiffs motion to reopen jurisdiction under its prior holding due to new statewide school funding system); *Comm. for Educ. Equality v. State*, 294 S.W.3d 477, 489 (Mo. 2009) (finding that the adequate education owed under the Missouri constitution was limited to the constitution's narrow guarantee that 25% of state revenue be directed towards schools); *Abbott v. Burke*, 971 A.2d 989, 992-93 (N.J. 2009) (releasing the state from its duty to comply with prior court order of increased funding for so-called Abbott districts); *Pendelton Sch. Dist. v. State*, 200 P.3d 133, 141-42, 145 (Or. 2009) (concluding that the state had failed to fund its schools at a constitutionally sufficient level but refusing to issue a judicial order to compel the legislature to comply with its funding duty); *Davis v. State*, No. 06-244, slip op. (S.D. Cir. Ct. 2009), <http://lakeherman.org/coralhei/blogdocs/SchoolFundingRulingProposed2009.pdf> (Circuit court opinion finding the right to an adequate education already fulfilled in South Dakota). In the same time period, plaintiffs in five states experienced positive outcomes: *Lobato v. State*, 218 P.3d 358, 362, 376 (Colo. 2009) (finding plaintiffs' adequacy claims justiciable and remanding to the lower court); *Conn. Coal. for Justice in Educ. Funding v. Rell*, 990 A.2d 206, 253 (Conn. 2010) (finding the Connecticut Constitution to guarantee children an adequate education defined by civic and economic preparedness); *Citizens for Strong Sch. v. Florida Bd. of Educ.*, No. 09-CA-4534, at 6 (Fla. Cir. Ct. Aug. 25, 2010) (rejecting the state's motion to dismiss and holding justiciable the plaintiffs' allegation that the state is denying school children their right to a "high quality education" as promised under a 1998 constitutional amendment); *Olson v. Guindon*, 771 N.W.2d 318, 323-24 (S.D. 2009) (finding school district's adequacy challenge justiciable but remanding for a decision on the merits); *McCleary v. State*, No. 07-2-02323-2, slip op. at 57-65 (Wash. Super. Ct. Feb. 4, 2010) (finding the state's school finance system to be in violation of the state's constitutional duty to provide an adequate education).

ultimately enacted actually meets society's ever-evolving educational demands. It is to this issue that I turn my focus next.

III. THE NEED FOR A NEW APPROACH TO SCHOOL FINANCE LITIGATION

By most accounts, the past four decades of school finance litigation have produced demonstrable benefits for disadvantaged children. The experience of students in New Jersey after the *Abbott* line of cases offers one positive example. After the state supreme court's 1997 ruling ordering a rough equalization of funding levels between the state's neediest schools and the state's wealthiest schools,⁷⁰ New Jersey's disadvantaged children made substantial gains in narrowing pre-existing academic achievement gaps.⁷¹ Progress of this sort does not appear to be limited to New Jersey. One study of educational expenditure patterns across 10,000 school districts revealed, for instance, that court-ordered remedies substantially diminished inequality among districts while increasing overall school spending.⁷² And though a handful of scholars argue that the additional funding secured by litigation has done little to improve student outcomes—that, in short, money doesn't matter—this is an argument that many in the academic community have rejected.⁷³

70. See *Abbott v. Burke*, 693 A.2d 417, 421, 423 (N.J. 1997).

71. See DARLING-HAMMOND, *supra* note 65, at 122–30.

72. See William N. Evans et al., *The Impact of Court-Mandated School Finance Reform, in EQUITY AND ADEQUACY IN EDUCATION FINANCE: ISSUES AND PERSPECTIVES* 72, 75, 93 (Helen F. Ladd et al. eds. 1999); see also Sheila E. Murray et al., *Education-Finance Reform and the Distribution of Education Resources*, 88 AM. ECON. REV. 789, 789–90 (1998) (studying sixteen states to conclude that “successful litigation reduced inequality by raising the spending in the poorest districts while leaving spending in the richest districts unchanged”).

73. The argument that money does not matter for improving educational outcomes is most commonly associated with Eric Hanushek who suggested in his seminal article in 1986 that school spending has little impact on student learning, and who has renewed that claim on numerous occasions since. See Herbert J. Walberg, *High-Poverty, High-Performance Schools, Districts, and States*, in *COURTING FAILURE: HOW SCHOOL FINANCE LAWSUITS EXPLOIT JUDGES' GOOD INTENTIONS AND HARM OUR CHILDREN* 80, 94 (Erik A. Hanushek & Alfred A. Lindseth, eds. 2006). See generally ERIC A. HANUSHEK & ALFRED A. LINDSETH, *SCHOOLHOUSES, COURTHOUSES, AND STATEHOUSES: SOLVING THE FUNDING-ACHIEVEMENT PUZZLE IN AMERICA'S PUBLIC SCHOOLS* (2009); Eric A. Hanushek, *The Economics of Schooling: Production and Efficiency in Public Schools*, 24 J. ECON. LITERATURE 1141 (1986). For a thorough rebuttal of these arguments, see DARLING-HAMMOND, *supra* note 65, at 99–130; REBELL, *supra* note 60, at 33–35. See generally MICHAEL A. REBELL & JOSEPH J. WARDENSKI, *THE CAMPAIGN FOR FISCAL EQUITY, INC., OF COURSE MONEY MATTERS: WHY THE ARGUMENTS TO THE CONTRARY NEVER ADDED*

Knowing in broad terms that funding inequality has gone down while overall spending has gone up does not, however, tell us much about the extent to which school finance litigation has been truly successful, or even what constitutes “success” at any particular moment.⁷⁴ After all, just what counts as a *quality* education—the ultimate goal of any school finance lawsuit—is a dynamic concept that changes over time as new economic realities and technological developments influence our society.⁷⁵ The meaning of a quality education is also deeply influenced by political actors and policy changes in the education reform arena generally.⁷⁶ Under any meaningful definition of success, therefore, school finance litigation must adapt and evolve with changing notions of educational quality to ensure that children have access to an education that will prepare them for the future. Put another way, a school finance remedy that constitutes success today may be far from sufficient thirty years from now.

Accordingly, the impact of equity and adequacy school finance litigation on today’s students should be evaluated in light of the dominant policy trend over the past two decades of school reform: the rise of the standards-based reform movement. Unlike the school policy arena that existed when school finance litigation was in its early strides, the standards movement has created a present-day policy realm where states actually have defined the quality of education that students are expected to receive and schools are expected to impart. The states have done so by adopting academic content standards, intended largely to define the skills and information that a state’s children “must know to succeed in the knowledge economy of the 21st century.”⁷⁷ These standards have also been accompanied in many states by a new form of economic analysis, the costing-out study, which is designed to determine the cost of providing children with the quality of education promised under a state’s standards.⁷⁸

UP (2004), available at http://www.schoolfunding.info/resource_center/research/MoneyMattersFeb2004.pdf. Conclusively resolving this argument goes beyond the scope of this Article, and so I proceed here under the presumption that money well spent can have a positive impact on student outcomes.

74. For a discussion of possible definitions of success in school finance litigation, see REBELL, *supra* note 60, at 30–39.

75. *See id.* at 35.

76. *See id.* at 62.

77. State of the Union Address, Address Before a Joint Session of the Congress, 1 PUBLIC PAPERS 111 (Feb. 4, 1997).

78. *See A Costing Out Primer*, *supra* note 17.

Yet, as I show below, even in states where equity and adequacy lawsuits have resulted in plaintiffs' liability victories, those victories have not produced the desired results. Across the nation, statewide school expenditure levels overwhelmingly remain lower than the amounts that costing-out studies suggest are necessary to provide children with the education described in state standards. It is this fundamental and persistent gap—between how much states actually spend and how much they *ought* to spend in accordance with their own standards—that creates the need for a new approach to school finance litigation. Before turning to that gap, however, I provide a brief overview of the development of the standards-based reform movement as well as the costing-out studies that have accompanied the standards.

A. Standards-Based Reform and Costing-Out Analyses

In broad strokes, the standards-based reform movement, an approach first articulated in the academic literature by Jennifer O'Day and Marshall Smith in the early 1990s, aims to improve educational outcomes by setting academic standards for what children should learn in school and by focusing educational programs on the attainment of those standards.⁷⁹ Although a few states began to enact standards in a piecemeal fashion in the late 1980s, the 2001 federal No Child Left Behind Act brought the concept of standards-based reform to center stage by requiring all states, in exchange for federal funding, to set standards for what students should learn by grade level and to test students regularly to see whether those standards had been reached.⁸⁰ Although the annual testing requirement has been the cause of considerable consternation among many in the school reform community,⁸¹ and although numerous conservatives have decried the increased federal role in schools,⁸² the core concept of standards and accountability appears to be here to stay.⁸³

79. Jennifer A. O'Day & Marshall S. Smith, *Systemic Reform and Educational Opportunity*, in DESIGNING COHERENT EDUCATION POLICY: IMPROVING THE SYSTEM 250, 251–52, 273–79 (Susan H. Fuhrman ed., 1993).

80. 20 U.S.C. §§ 6301–8803 (2006); *see also*, Ryan, *supra* note 21, at 1227–28.

81. *See, e.g.*, DARLING-HAMMOND, *supra* note 65, at 71–98.

82. *See, e.g.*, Neal McCluskey, *End, Don't Mend, No Child Left Behind*, CATO INSTITUTE, Sept. 24, 2007, http://www.cato.org/pub_display.php?pub_id=8712; Del Stover, *Ravitch Decries Reformers Seeking to Divide*, NSBA.ORG, Feb. 6, 2011, <http://schoolboardnews.nsba.org/category/nclb/>.

83. *See, e.g.*, Sam Dillon, *Obama to Seek Sweeping Changes in "No Child" Law*, N.Y. TIMES, Feb. 1, 2010, at A1 (noting proposed changes to the No Child Left Behind Act but

In drawing up statewide academic content standards, many states have sought to design rigorous and detailed grade-by-grade guidelines that capture the essential knowledge and skills that young people should be expected to learn and educators are expected to teach for students to succeed in their future careers.⁸⁴ State lawmakers, in turn, have proceeded to use the standards as building blocks for other programs that make up the state school systems, tying testing and accountability, teacher certification, curriculum frameworks, and even textbook selection to the achievement of the standards.⁸⁵ But not all states have been so demanding in setting standards; a number of school reform experts argue that quite a few states have actually established middling expectations for what their children should be expected to learn.⁸⁶

In response to this race to the bottom among state standards, a coalition of states, supported by the Obama administration, have set out to create a common core of academic standards that could be applied uniformly across states that choose to participate.⁸⁷ This common core standards initiative aims to create standards “designed to be robust and relevant to the real world, reflecting the knowledge and skills that our young people need for success in college and careers.”⁸⁸ The initiative’s considerable progress in the face of conservative opposition—at last count, no fewer than twenty-seven states have indicated their intent to adopt the national standards—signals just how entrenched standards-based reform has become.⁸⁹

The continued development of state standards has also enabled

that standards and accountability will remain its centerpiece, including a proposal to adopt voluntary national standards).

84. See, e.g., Cal. Educ. Code § 60605(a)(2)(A) (West 2003). The statute orders the State Board of Education to ensure that the state’s academic content standards are “based on the knowledge and skills that pupils will need in order to succeed in the information-based, global economy of the 21st century.” *Id.*

85. See *infra* note 168 and accompanying text.

86. See CHESTER E. FINN, JR. ET AL., THOMAS B. FORDHAM FOUND., 2006: THE STATE OF STATE STANDARDS 9–12 (2006), available at <http://www.thequestinstitute.com/curricdev/docs/support/State%20of%20State%20Standards%202006%20FINAL.pdf>; Paul E. Peterson & Frederick M. Hess, *Few States Set World-Class Standards: In Fact, Most Render the Notion of Proficiency Meaningless*, 8 EDUC. NEXT 70, 70, 72–73 (2008) available at, http://www.aei.org/docLib/20080527_FewStatesSet.pdf.

87. See Common Core State Standards Initiative, <http://www.corestandards.org> (last visited May 18, 2011).

88. See *id.*

89. See Tamar Lewin, *States Embrace Core Standards for the Schools*, N.Y. TIMES, July 21, 2010, at A1.

researchers to produce estimates regarding the cost of providing the education that the standards describe. More than two dozen states have commissioned costing-out studies for this purpose, occasionally in response to court orders.⁹⁰ Although numerous methodological approaches exist for performing the studies, the two major ones have been the “professional judgment” and “successful school district” approaches, which consider the views of expert educators and the amounts spent in a state’s high-achieving schools respectively.⁹¹ Some commentators have criticized the role that costing-out studies have played in recent debates over school spending, arguing that the studies are too imprecise to deserve serious attention.⁹² But even to the extent that these criticisms may have merit, they counsel that policymakers bear in mind the limitations of costing-out studies, not that the studies should be disregarded altogether.

In theory, the rise of statewide academic content standards, combined with empirical analyses of the cost of providing education in accordance with those standards, should have provided proponents of adequacy litigation with a neat and perhaps persuasive answer to that thorny question raised by the courts: what does it mean to provide an adequate education?⁹³ Indeed, plaintiffs in many states suggested in some form that the courts should look to legislatively enacted content standards as a definition of educational adequacy.⁹⁴ But in reality, even though several courts have considered state content standards to be relevant to their ultimate definitions of adequacy,⁹⁵ only one state court

90. For an overview of costing-out analyses see A Costing Out Primer, *supra* note 17. See also McDonald, *supra* note 25, at 79–90.

91. A Costing Out Primer, *supra* note 17.

92. See Robert Costrell et al., *What Do Cost Functions Tell Us About the Cost of an Adequate Education?*, 83 PEABODY J. EDUC. 198, 198, 199–200 (2008). But see James W. Guthrie & Richard Rothstein, *Enabling “Adequacy” to Achieve Reality: Translating Adequacy Into State School Finance Distribution Arrangements*, in EQUITY AND ADEQUACY IN EDUCATION, *supra* note 72, at 228–46 (1999) (explaining the value that costing-out studies have in adequacy litigation).

93. See, e.g., James S. Liebman, *Implementing Brown in the Nineties: Political Reconstruction, Liberal Recollection, and Litigatively Enforced Legislative Reform*, 76 VA. L. REV. 349, 377–78 (1990) (suggesting that states standards should be used in school finance cases as a measure of what is a “minimally adequate education”).

94. See, e.g., Campaign for Fiscal Equity, Inc. v. State, 801 N.E.2d 326, 332 (N.Y. 2003) (rejecting the argument raised by amici that the state’s regent learning standards should be used to define a “sound basic education”).

95. See REBELL, *supra* note 60, at 62–64 (noting that “[a]t times, legislatively enacted state academic standards have strongly influenced, without fully determining, the content of the constitutional standards that were ultimately formulated by the state courts”).

has formally defined the adequate level of education owed to children under the state's constitution explicitly in terms of the legislative standards.⁹⁶ Most courts that have created definitions of educational adequacy have instead done so on their own, typically basing their definitions on comparative assessments of successful school districts within a state.⁹⁷ But the bottom line, as Professor James Ryan observes, is that “[c]ourts have not yet taken advantage of the standards movement in school finance cases.”⁹⁸

The fact that the courts have not defined educational adequacy in terms of legislative standards would not be a problem for advocates and children if the judicially-fashioned definitions promised a higher quality of educational opportunity than the standards provided by state legislatures. Unfortunately, that has not been the case. To begin with, the eleven state courts that have ruled against plaintiffs in their adequacy cases⁹⁹ and the eighteen states yet to hear adequacy challenges have, of course, not ordered any relief to children along any definition of educational adequacy. Even in states where plaintiffs have prevailed, the courts have generally fashioned definitions of educational adequacy that, as a normative matter, fall beneath the quality of education state policymakers have otherwise enshrined in state standards. For instance, many courts have described the nature of the state's duty to provide an adequate education using relatively undemanding terms such as a “minimally adequate education”¹⁰⁰ or a “sound basic education.”¹⁰¹

96. See *Montoy v. State*, 112 P.3d 923, 939–40 (Kan. 2005) (per curiam); see also Ryan, *supra* note 21, at 1233.

97. See Ryan, *supra* note 21, at 1238 (observing that standards have not gained traction as a legal definition of educational adequacy because courts would have to fundamentally change their concept of school finance litigation from one concerned with comparability to one concerned with absolute resource distribution). It should be noted, however, that the relationship has occasionally gone in the other direction; some state legislatures have considered judicial adequacy definitions in fashioning their own content standards in turn. The Kentucky legislature responded to the state supreme court's definition of educational adequacy issued in *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186 (Ky. 1989), by enacting the Kentucky Education Reform Act, which set for statewide learning goals largely based on the court's decision. See REBELL, *supra* note 60, at 60–62.

98. Ryan, *supra* note 21, at 1233.

99. See EDUCATION ADEQUACY LIABILITY DECISIONS, *supra* note 50.

100. *Abbeville County Sch. Dist. v. State*, 515 S.E.2d 535, 540–41 (S.C. 1999).

101. *Campaign for Fiscal Equity, Inc. v. State*, 655 N.E.2d 661, 664–67 (N.Y. 1995); *Leandro v. State*, 488 S.E.2d 249, 255, 258 (N.C. 1997); see also *Hornbeck v. Somerset County Bd. of Educ.*, 458 A.2d 758, 776 (Md. Ct. App. 1983) (holding that the state constitution's “thorough and efficient” clause creates a legislative duty to provide the state's youth with a “basic public school education”).

Some courts have construed state education clauses to require such a minimal bar of adequacy that no relief is necessary at all. In Texas, for example, the state's high court ruled in 2005 that although the state constitution did impose a duty upon the state to guarantee students the right to an adequate education, the nature of that duty was so minimal that the state had already satisfied it.¹⁰² As the court noted, "[t]he public education system need not operate perfectly; it is adequate if districts are *reasonably* able to provide their students the access and opportunity the district court described."¹⁰³

*B. An Empirical Analysis: What States Need to Spend vs.
How Much They Actually Spend*

The proof that adequacy and equity victories have not increased educational resources sufficiently lies not just in the guarded definitions of adequacy that many courts have issued, but also in the empirical data. Put succinctly, school funding levels, both in states where plaintiffs have prevailed and in states where they have not, continue to fall beneath the amount that experts conclude is needed to offer children the education that the states' own standards require. To demonstrate this, I have compiled data in the table below from twenty-two states where costing-out studies have been performed over the past decade.¹⁰⁴ The table lists for each state the estimated per-pupil cost in 2008-adjusted dollars of providing a state's children with the quality of education described in the state's standards. The table then compares those estimates against each state's actual 2008 per-pupil spending amount.¹⁰⁵ As the table

102. *Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 762, 799 (Tex. 2005).

103. *Id.* at 787; *see also* *Comm. for Educ. Equality v. State*, 294 S.W.3d 477, 489 (Mo. 2009) (holding that the state did have a duty to provide an adequate free public education, but that this duty was satisfied so long as the state abided by a provision in the state constitution requiring that no less than twenty-five percent of the state revenue be appropriated to public education).

104. The data in the table is derived from two main sources. For costing out estimates of the per-pupil spending levels needed to provide an education in line with state standards I drew on studies available on the National Access Network's website. *See* National Access Network, Costing Out: Fact Sheets, <http://www.schoolfunding.info/policy/CostingOut/factsheetslist.php3> (last visited May 18, 2011). I then adjusted these estimates into 2008 dollars using a Bureau of Labor Statistics Consumer Price Index inflation calculator. For the actual 2008 school spending data I relied on the Census Bureau's June 2010 Public Education Finances report. *See* U.S. CENSUS BUREAU, PUBLIC EDUCATION FINANCES 2008, at xiii (2010), *available at* <http://www2.census.gov/govs/school/08f33pub.pdf>.

105. Comparing the totals in 2008 dollars ensures that the analysis allows each state a

shows, in nineteen out of the twenty-two states analyzed, current spending is less than the amount necessary to provide children with an education that would comply with the state's own standards.

State	Plaintiffs Victory?	Year Studied	Estimated Cost of Adequate Education (year of study)	Estimated Cost of Adequate Education (2008 Dollars)	Actual Per Pupil Spending in 2008	Gap ?
Arizona	Mixed	2002–2003	\$7,628	\$8,925	\$7,608	yes
Arkansas	Yes	2000–2001	\$7,461	\$9,070	\$8,541	yes
California	Yes	2003–2004	\$9,912	\$11,297	\$9,863	yes
Colorado	No	2004–2005	\$9,798	\$10,801	\$9,079	yes
Connecticut	Yes	2003–2004	\$14,974	\$17,066	\$13,848	yes
Hawaii	No	2004–2005	\$10,117	\$11,153	\$11,800	no
Indiana	No	2001–2002	\$7,142	\$8,547	\$9,036	no
Kansas	Yes	2005–2006	\$8,529	\$9,721	\$9,667	yes
Kentucky	Yes	2003–2004	\$9,112	\$10,385	\$8,686	yes
Maryland	Yes	1999–2000	\$10,390	\$12,990	\$12,966	yes
Minnesota	No	2004–2005	\$11,008	\$12,135	\$10,140	yes
Montana	Yes	2006–2007	\$12,646	\$13,131	\$9,666	yes
Nevada	No	2003–2004	\$9,385	\$10,696	\$8,285	yes
New Mexico	Yes	2006–2007	\$9,887	\$10,266	\$9,068	yes
New York	No	2003–2004	\$15,910	\$18,133	\$17,173	yes
North Dakota	Yes	2001–2002	\$8,814	\$10,548	\$9,675	yes
Oregon	No	1999–2000	\$7,954	\$9,944	\$9,558	yes
Pennsylvania	No	2005–2006	\$11,926	\$12,736	\$12,035	yes
South Dakota	No	2003–2004	\$10,273	\$11,708	\$8,367	yes
Texas	Yes	2003–2004	\$7,920	\$9,027	\$8,320	yes
Washington	Yes	2006–2007	\$11,678	\$12,126	\$9,099	yes
Wisconsin	Yes	2006–2007	\$9,820	\$10,197	\$13,840	no

To be sure, estimates of how much it would cost to provide the education enshrined in a state's own standards vary in quality depending on the rigor of the state costing-out studies themselves. All of the estimates are also susceptible to the general critique that costing-out estimates carry some margin of error and should not be tied to a precise

period of time to try to raise funding in accordance with the findings of their respective costing-out study.

dollar figure. Accordingly, one meta-study that sought to produce an estimate of the overall national gap between actual spending and required spending under state standards did so in a range. The study concluded that it would cost between twenty-four percent and forty-six percent *more than states currently spend* to provide children with an education in line with state standards.¹⁰⁶

The data in the table may also suffer from the critique raised by Eric Hanushek and others: that costing-out studies as a general matter tend to overestimate the cost of providing an education in line with state standards.¹⁰⁷ But this bias, to the extent it exists, may be offset, at least in part, by the fact that the actual expenditure data used in the table comes from the 2007–2008 school year, and that school spending in the years since has been adversely affected by budget cuts resulting from the economic crisis.¹⁰⁸

In any event, the take-away point to be gleaned from the estimates and the above table is not the particular dollar amount by which any particular state is under-funding its schools,¹⁰⁹ but rather whether the states are spending roughly what they need to be spending to provide children with the education that the states have defined as necessary to succeed in the twenty-first century. And on this front the scorecard is quite stark; by and large, the states are failing to provide children with the educational resources they need. That thirteen of the states in the above table have already experienced plaintiffs' liability victories in school funding lawsuits—and that twelve of these states still show a funding shortfall¹¹⁰—underscores that equity and adequacy may have advanced the ball without yet reaching the endzone of educational opportunity. The strength of this conclusion is all the more buttressed by the recent effort to develop a common core of rigorous academic standards to be applied across the states in line with the actual demands

106. William J. Mathis, *No Child Left Behind: Costs and Benefits*, 84 PHI DELTA KAPPAN 679, 682 (2003).

107. See, e.g., Eric A. Hanushek, *Science Violated: Spending Projections and the "Costing Out" of an Adequate Education*, in *COURTING FAILURE*, *supra* note 73, at 257, available at <http://edpro.stanford.edu/hanushek/admin/pages/files/uploads/hanushek.pdf>.

108. See Alyson Klein, *States' Fiscal Outlook Is Still Gloomy: Report Finds More Cuts to Education Budgets Are Looming in 31 States*, EDUC. WK., June 9, 2010, at 23, 23.

109. See Costrell et al., *supra* note 92.

110. To be fair, one of these states, Connecticut, experienced its plaintiffs' liability decision in 2010, years after the costing-out study had been performed. It remains to be seen whether the legislature will order a remedy that actually aligns state funding to the cost of delivering the state's standards.

of the twenty-first century.¹¹¹ If this effort succeeds, state school systems would require even greater resources to offer children the quality of education set out in the new, more demanding standards.

At bottom, the need for an additional approach to school finance litigation thus encompasses two separate elements. First, in states where adequacy and equity suits have already met some success, the rise of the standards movement and costing-out analysis shows that there is much more work to be done before all children have the opportunity to learn the knowledge and skills that the states have defined as necessary to ensure future civic, social, and economic success. To the extent that a new school finance litigation theory can persuade the courts to go where they have preferred not to go under traditional adequacy claims—that is, to order their legislatures to provide sufficient resources consistent with these state standards and not some lower bar of educational adequacy—litigation can build on the gains that the earlier theories have staked so far. Second, as a pragmatic matter, in states where plaintiffs have already lost challenges premised on the equity and adequacy theories, an additional legal theory is useful simply if it has a chance to succeed where the other theories have not. I describe next how the broken system theory addresses both of these concerns.

IV. THE NEW APPROACH: THE BROKEN SYSTEM THEORY OF SCHOOL FINANCE LITIGATION

It is a commonplace observation among close observers of school finance litigation that the actual text of state constitutional education clauses is not predictive of litigation outcomes.¹¹² Consider that out of all the fifty state constitutions, only two actually use the word adequate in describing the state's educational duty: Florida and Georgia.¹¹³ Strikingly, neither state is among the twenty-one that have agreed with plaintiffs that a state education clause imposes a duty on the legislature to provide an adequate education; Georgia's high court rejected an adequacy suit in 1981 and the Florida Supreme Court did the same fifteen years later.¹¹⁴

111. See sources cited *supra* notes 86–88.

112. William E. Thro, *The Role of Language of the State Education Clauses in School Finance Litigation*, 2 WEST'S EDUC. L.Q. 277, 280 (1993) (noting that “the distinctions between education clauses . . . have not made a difference in [the outcome of] school finance cases”).

113. FLA. CONST. art. IX, § 1; GA. CONST. art. VIII, § 1.

114. See *Coal. for Adequacy & Fairness in Sch. Funding v. Chiles*, 680 So. 2d 400, 408

The absence of a systematic textual approach to evaluating the meaning of state constitutional education clauses in adequacy challenges has led some practitioners to go so far as to conclude that “disembodied parsing of constitutional terminology may be of limited or no value.”¹¹⁵ One result of the weak textual basis for defining educational adequacy in state constitutions may be the reluctance that many courts have shown to create an ambitious definition of adequacy. For in the general absence of clear constitutional text obligating the states to provide first-rate educational opportunities to all children, many courts have ruled that the state’s educational duty is limited to meeting a “sound basic education” or “minimally adequate education” standard, rejecting plaintiffs’ requests to defer to the more robust adequacy concept embodied in state academic content standards.¹¹⁶

In contrast to adequacy lawsuits, the broken system claim I describe here calls on courts to construe a specific term present in thirty-six state constitutions that has, as yet, not been the focus of claims rooted in education clauses—the term system.¹¹⁷ In doing so, the broken system theory offers courts a firm textual grounding that the existing litigation theories have yet to capture. In addition, this theory places courts in a position to order state legislatures to align their school finance structures with the cost of providing the education set out in academic content standards as opposed to the lower standards that prior adequacy suits have typically engendered. Construing the term system to reach this result is, however, far from a self-evident exercise, and so I take up the task presently.

(Fla. 1996) (plaintiffs “failed to demonstrate . . . an appropriate standard for determining ‘adequacy’ that would not present a substantial risk of judicial intrusion into the powers and responsibilities [of] the legislature”); *McDaniel v. Thomas*, 285 S.E.2d 156, 165–66 (Ga. 1981) (declaring that “it is primarily the legislative branch of government which must give content to the term ‘adequate’”).

115. Paul L. Tractenberg, *Education*, in 3 *CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: THE AGENDA OF STATE CONSTITUTIONAL REFORM* 293 n.137 (G. Alan Tarr & Robert F. Williams eds., 2006).

116. See *supra* notes 101–02 and accompanying text.

117. See Paul L. Tractenberg, *Beyond Educational Adequacy: Looking Backward and Forward Through the Lens of New Jersey*, 4 *STAN. J. C.R. & C.L.* 411, 425–26 (2008) (suggesting that litigation relying on the meaning of “system” in state education clauses has been the “road less traveled” than reliance on adjectives such as “thorough” and “efficient”).

A. *The Plain-Text Meaning of “System” in State
Constitutional Education Clauses*

As a starting point, observe the difference between a typical state education provision that uses the term system and a provision that does not. California’s education clause sets forth, “The Legislature shall provide for a *system of common schools* by which a free school shall be kept up and supported in each district”¹¹⁸ In contrast, fourteen state constitutions do not impose a requirement on the state to provide for a system of public schools.¹¹⁹ For example, Missouri’s education clause declares, “[T]he general assembly shall establish and maintain *free public schools* for the gratuitous instruction of all persons in this state within ages not in excess of twenty-one years as prescribed by law.”¹²⁰

What, if anything, should be made of the presence of the word system in California clauses where it is absent in Missouri’s provision? It would be a stretch, undoubtedly, to argue that the mere absence of the word system in some state constitutions automatically elevates the term where it is present to some paramount status immediately worthy of strict judicial enforcement; there are too many possible explanations for the term’s absence for such a simple accounting.¹²¹

However, what is apparent is that where the term is used, it must carry *some* meaning. The surplusage canon of constitutional interpretation, used two centuries ago in *Marbury v. Madison*, demands that “[i]t cannot be presumed that any clause in the constitution is intended to be without effect”¹²² The application of this rule is particularly sensible in the context of state education clauses given that

118. CAL. CONST. art. IX, § 5 (emphasis added).

119. The fourteen state constitutional provisions are CONN. CONST. art. VIII, § 1; GA. CONST. art. VIII, § 1; IOWA CONST. art. IX, § 3; KAN. CONST. art. VI, § 1; ME. CONST. art. VIII, § 1; MASS. CONST. ch. V, art. III, § 2; MICH. CONST. art. VIII, § 2; MISS. CONST. art. VIII, § 201; MO. CONST. art. IX, § 1(a); NEB. CONST. art. VII, § 1; N.H. CONST. art. LXXXIII; R.I. CONST. art. XII, § 1; VT. CONST. ch. II, § 68; and WIS. CONST. art. X, § 3.

120. MO. CONST. art. IX, § 1(a) (emphasis added). Note that the distinction between “public” schools and “common” schools as used in the various state constitutions is a byproduct of the historical eras in which the respective documents were drafted and is of no moment to this analysis. *See generally*, CARL F. KAESTLE, PILLARS OF THE REPUBLIC: COMMON SCHOOLS AND AMERICAN SOCIETY 1780–1860 (Eric Foner ed., 1983).

121. Neither should this Article be understood as arguing that plaintiffs lack a colorable claim in the fourteen states that do not impose a state constitutional duty to provide for a system of public schools. Such a claim may still exist, albeit in a weaker form that lacks the clear textual underpinnings present in the thirty-seven states that expressly create a system duty.

122. 5 U.S. 137, 174 (1803).

these provisions were hotly debated, revised, and adopted at constitutional conventions wherein key elements of the respective clauses, including the system of common schools language, were subject to close scrutiny.¹²³ As George Sands, a delegate to Maryland's 1864 constitutional convention insisted, "I want a public school *system* established, and I want here in my place to do my share towards making it absolutely impossible that the people of Maryland shall be deprived of it."¹²⁴ In fact, the use of the term system emerged in most state constitutions as an intentional product of the nineteenth century common schools movement, where lawmakers sought to constitutionalize the requirements for a system of common schools to make sure that opponents of public education could not backslide on the concept of universal, free public education in the future.¹²⁵

So what constitutional standard should a court apply in a broken system challenge—that is, what conditions must a legislature satisfy to meet its duty to provide a system of common schools? There are three possible standards, each one associated with a different definition of system that a court could adopt: a weak definition, a strong definition, and a definition in between that I will refer to as the "rational–actual" definition.

B. The Weak Definition of System: Interconnected Constituent Parts

State defendants will argue for a weak meaning of system and thus an undemanding duty. To buttress their argument, the states may point to a dictionary wherein one definition of system is given as "a regularly interacting or interdependent group of items forming a unified whole."¹²⁶ A state defendant will argue that, under this definition, what makes an enterprise a system is simply interconnectedness among its constituent parts. Because the state's schools are all functionally interrelated by virtue of basic state policies governing curriculum frameworks, high school graduation requirements, school finance, and other programs, the

123. For a detailed description of the history behind these clauses in state constitutions see generally John Dinan, *The Meaning of State Constitutional Education Clauses: Evidence from the Constitutional Convention Debates*, 70 ALB. L. REV. 927 (2007).

124. 1 THE DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF MARYLAND 1233 (1864) (emphasis added).

125. For a thorough discussion of this historical development, see generally Michael A. Rebell, *Adequacy Litigations: A New Path to Equity?*, in BRINGING EQUITY BACK: RESEARCH FOR A NEW ERA IN AMERICAN EDUCATIONAL POLICY 291 (Janice Petrovich & Amy Stuart Wells eds., 2005).

126. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1269 (11th ed. 2003).

state will argue that it already meets its duty to provide not just common schools generally but an interconnected system of common schools.

The problem with this definition is that it defies our ordinary understanding of what makes something a system. Indeed, a second dictionary definition more accurately captures the ordinary meaning of system, particularly with respect to human-made structures and organizations such as schools. That definition describes a system as “an organization forming a network [especially] for distributing something or serving a *common purpose*.”¹²⁷

An example may be helpful to illustrate why a system must be made up of interconnected parts that serve a “common purpose,” as opposed to just interconnected parts without some unifying goal. If interconnectedness is all that is required, the United States highway system could be referred to as a “national hiking system” because it is interconnected in a manner such that a person could hike from Maine to California along it. But to call our highways a national hiking system would flout the ordinary meaning of the word system. The highways do make up a road system, however, because that is the common purpose for which they are designed.

The state could respond, of course, that it already meets this interconnectedness, plus common-purpose definition because all of its schools are aimed at educating children and it has even enacted standards laying out a common purpose for its schools. The problem with this argument, as I explore below, is that the ordinary meaning of system requires more than the mere proclamation of some common purpose unifying a system’s constituent parts; it also requires a means-end relationship between those parts and the purpose to be served.

1. The Strong Definition of System: Interconnected Parts That Actually Accomplish the System’s Common Purpose

If the meaning of system requires both interconnectedness among a system’s parts and some common purpose to be served by those parts, the logical follow-up question is what kind of relationship must exist between the system’s parts and purpose. Put another way, is it enough for a system merely to announce a common purpose even if it is incapable of achieving it, or must the system be designed to achieve—or actually achieve—its purpose?

An example will help to illustrate this point: the New York City

127. *Id.* (emphasis added).

subway system. Imagine that the New York City Transit Department is to start from scratch and design a new citywide subway system, completely demolishing the current one. The transit department announces and makes public its new design—a state-of-the-art, clean, and efficient subway with the purpose of enabling New Yorkers to get from any place in the city to another in an expedient fashion. But after the department builds the track, it has only enough money left to construct one station where passengers can get on and off trains. As a result, passengers can get on the beautiful new subway at that one location and they can ride around beneath the city for however long they want—but they can disembark only right back at the same location where they started.

Has the New York City Transit Department created a subway system? Our intuition is to answer that it has not. Under a second definition of system, call it the “strong” definition, our intuition may be guided by the sense that for a human-made structure to constitute a system the parts of the system must be (1) interconnected with (2) a common purpose, and (3) the system must *actually achieve* that common purpose. The one-station subway satisfies the first two criteria but not the third because it completely fails to transport New Yorkers to their desired destinations, which, after all, is the purpose of any subway system.

Drawing on this ambitious, strong definition of system, plaintiffs might argue that even though the state has created programs and policies governing its public schools that are interconnected in pursuit of a common purpose (the academic content standards),¹²⁸ it fails to meet the third criterion of what makes up a system until students actually attain the standards. Indeed, this outcome-oriented definition of system may be embedded in commonplace observations that the school system is broken, particularly where such comments are accompanied by statistical evidence of lagging student achievement.¹²⁹

A challenge predicated on the strong definition of system could request a court to hold unconstitutional any state school system where students are not actually achieving the standards set out by the state as

128. For the present sake of argument, I assume that the purpose of a state’s public school system is the achievement of academic content standards. I return to this question below, providing evidence of state legislatures’ intent to treat the standards as the overarching purpose for their public school systems. *See infra* notes 164–65.

129. *See, e.g.,* Roberts, *supra* note 15, at 77 (local chamber of commerce president declared, “the [school] system is broken”).

evidenced by test scores.¹³⁰ Such a challenge could also request a court order to remedy the school funding system so that the standards may be achieved. This argument may be most persuasive where state constitutions demand the provision of an efficient or thorough system of schools,¹³¹ because those terms connote some degree of actual success in achieving a goal.¹³²

Such an argument, although potentially far-reaching in its impact on the lowest-achieving students, comes with a major problem: a challenge predicated on the strong definition of system will surely encounter a response from state defendants that it demands judicial policymaking on a public policy issue for which manageable standards may be elusive at best. That is, for a strong system challenge to succeed, plaintiffs must ask the court to determine a *degree of student success* relative to the standards that is enough to qualify a state's schools as a system. Does the state provide a system only once its educational programs have enabled a majority of its students to reach the standards? When *all* of the students meet standards? Or must there be only an opportunity for all students to meet the standards? These vexing questions may well be of a nature best left to a democratically accountable legislature, and a judge may reject the strong definition accordingly.¹³³

130. It is important to note that a challenge under the strong definition of system would not be the same as an adequacy claim. That is, that the thrust of the strong system challenge would *not* be that the standards constitute a definition of the adequate education owed under a state constitution, but rather that a state does not provide a system of public schools until its schools actually satisfy their purpose as set out by the legislature.

131. Six states use both of the terms "thorough" and "efficient" to describe the system of schools to be provided. *See* MD. CONST. art. VIII, § 1; MINN. CONST. art. XIII, § 1; N.J. CONST. art. VIII, § 4; OHIO CONST. art. VI, § 2; PA. CONST. art. III, § 14; and W. VA. CONST. art. XII, § 1. Six more states use the term "efficient" alone in describing the system of schools to be provided, *see* ARK. CONST. art. XIV, § 1; DEL. CONST. art. X, § 1; FLA. CONST. art. IX, § 1; ILL. CONST. art. X, § 1; KY. CONST. § 183; TEX. CONST. art. VII, § 1. Two states use the term "thorough" alone. *See* COLO. CONST. art. IX, § 2; and IDAHO CONST. art. IX, § 1.

132. Note that under traditional adequacy arguments, the terms thorough and efficient have been interpreted as qualifying the minimum level of education that a state owes—not the kind of *system* that a state is constitutionally required to provide. *See* Tractenberg, *supra* note 117, at 427 (describing how a potential claim in New Jersey arguing for a duty to create an "efficient system" of common schools could require the state to provide funding sufficient to ensure that students are actually meeting the outcomes required in state standards).

133. *But see supra* notes 62–64 and accompanying text for the view that it might be inappropriate for judges to avoid this claim on justiciability grounds.

2. The “Rational–Actual” Definition of System: Interconnectedness Among Parts of the System that Are Actually and Rationally Designed to Serve a Common Purpose

Where the weak definition says too little in considering any interconnected collection of objects to be a system even where they lack a common purpose, the strong definition says too much by requiring a system to actually achieve its common purpose.¹³⁴ Situated in between is a third possible definition of system—a definition that is at once reasonable given the ordinary meaning of the word and suggestive of an appropriate and manageable judicial standard for adjudication. This third definition is evident upon closer examination of the dictionary definition given above for human-made structures, that a system is “an organization forming a network *especially for . . . serving a common purpose.*”¹³⁵ To constitute a system under this definition, the interconnected parts of an enterprise must simply be rationally designed with a particular goal in mind: serving, or making achievable, a common purpose.

Restated, the third definition thus holds that an organization should be considered a system if its core parts are (1) interconnected with (2) a common purpose, and (3) the parts are *rationally* and *actually* designed to achieve that purpose. This “rational-actual” definition recognizes that the parts of a system must be designed with the goal of achieving a common purpose, but also recognizes that the system as a whole may not always meet this purpose—the U.S. highway system is still a highway system despite periodic traffic delays. In other words, the rational–actual definition contemplates a looser degree of means-end fit than the strong definition. Where the strong definition demands that the system actually achieve its purpose, this third definition says that the system must be only reasonably designed to achieve it.

Thus, despite its many flaws, the present-day New York City subway system is indeed a system if it is interconnected with a shared transportation purpose and if its core parts are rationally and actually designed to achieve that purpose. Consistent with ordinary usage, we

134. By analogy, the strong definition may overstate what is necessary for an enterprise to qualify as a system. We consider a railroad system to be a system even if there are occasional delays and accidents on the tracks that prevent the system from always accomplishing its transportation purpose.

135. MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY, *supra* note 126, at 1269 (emphasis added).

still consider the NYC subway to be a system despite occasional service delays. And what makes the hypothetical new one-stop-only subway above *not* a system under the rational–actual definition is not the fact that it fails wholesale to transport people but rather that a subway structure with miles and miles of track and only one station cannot be considered *rationally* designed to meet its purpose. Similarly, we do not consider the U.S. highway system to be a “national hiking system” because it was not designed for the actual purpose of hiking.

The rational–actual definition best captures the ordinary meaning of the term system in the education context. When educators and policymakers observe that a school system is broken, the crux of their meaning is that the system is irrationally or not actually designed to accomplish its purpose. Of course, if a core part of a school system—such as school funding—is not designed so as to make state standards achievable, it should not surprise lawmakers when large numbers of students fail to meet those standards. But what stops the state’s educational enterprise from being called a system in this scenario is the irrational way in which the state’s program is designed, not the fact that students have fallen short of the standards.¹³⁶

Using the rational–actual definition of system, plaintiffs can argue that the duty to provide a system of common schools requires the state to design educational programs in a manner that is rationally and actually calculated to achieve the shared purpose of the academic content standards. The state will have to satisfy both prongs of the definition to show that it has fulfilled its duty. First, for its educational programs to be rationally calculated to achieve academic standards, the state will have to demonstrate that its core educational programs have been designed in a manner that would reasonably further the achievement of state content standards.¹³⁷ Most states have, it turns out, already tailored core educational programs such as school accountability, curriculum, teacher certification, and so on to the standards.¹³⁸ Plaintiffs would simply request that states do the same for their school funding structures. Second, for a challenged state policy to

136. Whether or not students are achieving the standards according to statewide test scores may, however, factor into a judicial determination of whether a particular aspect of the state school system was rationally and actually designed for the purpose of achieving the state’s standards.

137. See *infra* Part IV.C for a more detailed discussion of what it would mean for a state to have a rationally calculated school system.

138. See *infra* note 160.

fulfill the “actually calculated” element of the rational–actual definition, the state policy must actually, or deliberately, be designed to serve state standards—an imaginary, ex-post justification will not do.¹³⁹

C. How State Courts So Far Have Construed the Meaning of System

It may be useful to pause for a moment and consider whether any of the definitions of system that I have posited here align with the manner in which state courts have construed the term in litigation thus far. Although the courts have given scant attention to the term system to date, the little analysis that does exist suggests that the rational–actual definition is consistent with what courts may be likely to think; that is, the courts that have discussed the meaning of system so far have recognized that a state school system must serve a common purpose and that the state’s educational programming must bear some reasonable, actual relationship to that purpose.

Before turning to the decisions that have considered the meaning of the term system, however, it is important to appreciate how courts have tended to overlook the term in school finance litigation thus far. Professor Paul Tractenberg, a leading voice in school finance litigation over the past four decades, recently observed in the context of twenty-plus years of litigation in the New Jersey *Abbott* line of cases that consideration of the meaning of the word system has been a part of the road less traveled in the long journey of school finance litigation to date.¹⁴⁰ According to Tractenberg, New Jersey’s high court relied instead on the meaning of the word thorough, which modifies system in the state’s education clause.¹⁴¹ Idaho’s Supreme Court fashioned a definition of adequacy based largely upon the same term.¹⁴² Similarly, state high courts in Texas, West Virginia, Kentucky, and Arkansas have also found it unnecessary to define the term system in their respective school finance decisions. Each of these courts has instead reached a pro-plaintiff liability ruling by focusing predominantly on a different term that modifies system in each state’s constitution—the word

139. See *infra* Part IV.C for a more detailed discussion of what it would mean for a state to actually design its school finance system for the purpose of achieving state standards.

140. See Tractenberg, *supra* note 117, at 412.

141. *Id.* at 420; see also N.J. CONST. art. VIII, § 4, cl. 1 (“The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools . . .”).

142. Idaho Sch. for Equal Educ. Opportunity v. Evans, 850 P.2d 724, 734 (Idaho 1993) (focusing on the definition of thorough in the state constitution).

efficient.¹⁴³

Court decisions in three states, however, have given more than passing attention to the presence and meaning of the term system in state education clauses. In *Campbell County School District v. State*, Wyoming's school finance case, the state's high court looked to a dictionary definition to understand the meaning of the state constitution's guarantee of a "system of public instruction."¹⁴⁴ Notably, the court chose to rely upon a definition that is markedly similar to the one referenced above in my rational-actual definition of system: "a regularly interacting or interdependent group of items forming a unified whole; a group of artificial objects or an organization forming a network especially for distributing something or serving a common purpose."¹⁴⁵ Indeed, the court construed the entire state education clause in a manner strikingly similar to that which plaintiffs in a broken system challenge might seek:

[W]e can define "a thorough and efficient system of public schools adequate to the proper instruction of the state's youth" as an organization forming a network for *servicing the common purpose of public schools* which organization . . . is *reasonably sufficient for the appropriate or suitable teaching/education/learning of the state's school age children*.¹⁴⁶

If state standards represent "suitable teaching/education/learning" for the state's children,¹⁴⁷ then it is easy to see how the Wyoming court's description of the state's system duty could represent precisely the holding that plaintiffs to a broken system challenge would want. But because plaintiffs raised equity and adequacy challenges in *Campbell*

143. See *Lake View Sch. Dist. No. 25 of Phillips County v. Huckabee*, 91 S.W.3d 472, 484 (Ark. 2002); *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 211-13 (Ky. 1989); *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 394-96 (Tex. 1989) *Pauley v. Kelly*, 255 S.E.2d 859, 876 (W. Va. 1979).

144. See 907 P.2d 1238, 1258 (Wyo. 1995); see also WYO. CONST. art. VII, § 1.

145. Compare *supra* text accompanying note 135, with *Campbell County Sch. Dist.*, 907 P.2d at 1258 (emphasis added). Note that the court also considered an 1889 definition of the term system that was more similar to the weak definition of system, but the court ultimately relied upon the contemporary "common purpose" definition in fashioning its description of the state's duty. *Id.*

146. *Id.* at 1258-59 (emphasis added).

147. See *supra* Part IV.B.

and not a broken system challenge, the court in that case did not consider whether this definition of system would necessitate a rational and actual connection between the state's school finance system and state content standards.

Like the Wyoming Supreme Court, New York courts have also interpreted the meaning of system in a fashion that evokes the rational–actual definition. Justice Hopkins first construed the term in his partial concurrence to the New York Appellate Division's opinion in *Levittown Union Free School District v. Nyquist*, which found the state's school finance structure to violate the state equal protection clause and the state's education article.¹⁴⁸ Agreeing with the majority opinion's conclusion that the state's school finance program violated the education article in the New York Constitution, Justice Hopkins wrote, “[t]he word ‘system’ has large implications . . . a system is a whole composed of parts *in orderly arrangement according to some scheme or plan*.”¹⁴⁹ Justice Hopkins also referred to an applicable “more specialized” definition: “A system is a group of components *integrated to accomplish a purpose*.”¹⁵⁰ The state's system of funding schools, however, in the justice's view, had become a “patchwork mounted on patchwork, an Ossa of confusion piled on a Pelion of disorder.”¹⁵¹ In short, the state was in violation of its duty to provide a system of free common schools because its funding program was such a “maze of . . . convoluted intricacies” that its irrationality “negate[d] the existence of a basic Statewide fiscal *system* for education.”¹⁵²

Later, however, in a dissenting opinion from the state's landmark 1995 adequacy case *Campaign for Fiscal Equity v. State*, Judge Simons described the meaning of the state constitution's system guarantee in an arguably less demanding manner than the rational–actual definition.¹⁵³ Describing the court's prior holding in *Levittown*, Justice Simons observed,

[T]he *Levittown* Court concluded that the system of which the Constitution speaks is a framework of

148. 443 N.Y.S.2d 843, 861 (N.Y. App. Div. 1981).

149. *Id.* at 873–74 (Hopkins, J., concurring in part and dissenting in part) (citing OXFORD ENGLISH DICTIONARY (1971)) (emphasis added).

150. *Id.* at 874 n.7 (emphasis added).

151. *Id.* at 875.

152. *Id.* at 874.

153. See 655 N.E.2d 661, 678 (N.Y. 1995) (Simons, J. dissenting).

educational programming and, implicitly, regulatory oversight of compliance with that framework. We concluded further that the State manifestly had “supported and maintained” the system because State appropriations for the New York public school system, judged by the fiscal contributions of other States, far exceeded those of all but two others. . . . In sum, we fully interpreted the Education Article, concluding that the State had met its constitutional obligation because it had created a system—it had defined a sound basic education and the facilities necessary to provide it¹⁵⁴

In other words, Judge Simons agreed that a system properly understood must evince some common purpose, which he found the state to have accomplished through its definition of a “sound basic education.”¹⁵⁵ But rather than looking for evidence that the state’s school finance structure was deliberately and rationally designed to meet that common purpose, Judge Simons instead argued that the state’s system duty was fulfilled simply because New York spent more money on education than most other states.¹⁵⁶ One wonders whether Judge Simons might have interpreted the state’s system guarantee to require a more rationally designed school finance formula if New York’s school expenditure levels had been lower and not greater than those of all but two states. But, in any case, his views are expressed in only a dissenting opinion and thus would not be dispositive for a broken system claim raised in New York or elsewhere.¹⁵⁷

Finally, California’s own high court has considered the meaning of system in a manner consistent with the rational–actual definition. First, in an 1893 decision, *Kennedy v. Miller*, the court observed, “The term ‘system,’ itself, imports a *unity of purpose*, as well as an entirety of operation; and the direction to the legislature to provide ‘a’ system of common schools means *one* system, which shall be applicable to all the common schools within the state.”¹⁵⁸ Later, in *Piper v. Big Pine School District*, the California Supreme Court elaborated on the state’s calculated, rational creation of a school system aimed at achieving a

154. *Id.* at 678–79.

155. *See id.*

156. *Id.* at 679.

157. *Id.* at 675–82.

158. 32 P. 558, 559 (Cal. 1893) (emphasis added).

common purpose, stating, “The public school system of this state is a product of the *studied thought* of the eminent educators of this and other states of the Union, perfected by years of trial and experience.”¹⁵⁹ *Kennedy* and *Piper* are thus consistent with the proposition that the state’s educational programs must share a common purpose, and the state must affirmatively and studiously design the school system so as to achieve that purpose—it is not enough for the state to enact a mishmash of educational policies and programs that incidentally share some common goal.¹⁶⁰

With this language from the California Supreme Court in view, and also considering the persuasive force of the definitions of system given in Wyoming and New York, I turn now to a blueprint for how a broken system claim might be litigated in California.

V. A CALIFORNIA CASE STUDY FOR LITIGATING THE BROKEN SYSTEM CLAIM

Litigating the broken system claim encompasses at least three essential challenges that plaintiffs will have to surmount. First, plaintiffs must establish the scope of the duty created by the term system in their respective state constitutional education provisions. Second, plaintiffs must show that the system duty extends to the state’s academic content standards; that is, that the common purpose to be served by the school system is the standards and not some lesser goal. Third, plaintiffs must prove that the state has failed to meet its duty to provide a system of common schools as they have defined the duty in the first two steps.¹⁶¹ I walk through these challenges presently using California as an example in light of the recent *Robles-Wong* filing.

159. *Piper v. Big Pine Sch. Dist. of Inyo County*, 226 P. 926, 930 (Cal. 1924) (emphasis added).

160. The California courts did not depart from the *Kennedy* and *Piper* construction of the term system in the two school finance lawsuits that have taken place in California since: the *Serrano* equity decision and a more recent case, *Williams v. State*, No. 312236, slip op. (Cal. Super. Ct. July 10, 2003). In *Serrano*, the court did observe that it had never interpreted the phrase “system of common schools” to “require *equal* school spending,” but that is not material for the broken system theory since it does not demand equity in spending but rather a rational alignment with the state content standards. *Serrano v. Priest*, 487 P.2d 1241, 1248–49 (Cal. 1971).

161. Note that a fourth step will be necessary, though not terribly challenging: plaintiffs will have to show that California children have been harmed by the state’s violation of its duty to provide a *system* of common schools. Ample evidence of the educational harm wrought by insufficient school funding is discussed, for example, in DARLING-HAMMOND, *supra* note 65, at 99–130.

A. *The State's Duty to Provide a School System that is Rationally and Actually Designed to Achieve a Common Purpose*

The first step for plaintiffs litigating a broken system claim is to establish the scope of the duty as it is used in their state constitution. As discussed above, the key legal question in this task concerns the meaning of the word system. The State will argue for a weak definition, and plaintiffs must counter that the term's meaning is more accurately captured in either of the two stronger definitions. Between the two stronger definitions, the definition that best captures the ordinary meaning of system is the rational–actual definition, and that the State accordingly owes a duty to provide a school system that is made up of interconnected core educational programs that are rationally and actually designed to serve a common purpose.¹⁶² The *Robles-Wong* complaint chooses precisely this definition in describing the nature of California's duty under the system of common schools clause where it asserts:

Defendants have violated their constitutional duty to provide and support the “system of common schools” by failing to provide and sufficiently fund an education finance system that is *intentionally, rationally, and demonstrably aligned* with the goals and objectives of the State's prescribed educational program and the costs of ensuring that all children of all needs have the opportunity to become proficient according to the State's *academic standards . . .*¹⁶³

To persuade the court to adopt this rational–actual definition of system, plaintiffs should rely on the textual arguments and analogies discussed above,¹⁶⁴ and also on case law, both from the previously described California cases (*Kennedy* and *Piper*) as well as other state

162. For substantive or even strategic reasons, plaintiffs could argue in the alternative for the strong definition of system which creates a more demanding state duty—a duty to actually ensure student success in meeting the school system's common purpose. See Tractenberg, *supra* note 117, at 427.

163. Complaint for Declaratory and Injunctive Relief at 53, *Robles-Wong v. State*, No. RG10515768 (Cal. Super. Ct. May 20, 2010) (emphasis added), available at http://fixschool.finance.org/~media/CSF/Files/Complaint_052010.ashx.

164. See *supra* Part III.A.

court decisions in New York and Wyoming as persuasive authorities.¹⁶⁵

*B. The Common Purpose of the State's System of Common Schools:
Achieving the State's Academic Standards*

To secure a remedy ordering the State to align school funding with the actual cost of providing the quality of education described in state standards, plaintiffs must establish that the standards are indeed the common purpose that unifies the various elements of the State's school system. For if the common purpose that the system is designed to serve is something less than the standards—such as keeping kids off the streets or providing some minimally basic level of education—a court may well find that the State's educational programs are already designed to serve that purpose in full compliance with its constitutional system duty.

Fortunately for plaintiffs, the actions taken by state legislatures themselves confirm the achievement of academic content standards represents the paramount purpose of state school systems today. The clearest indication of this intention lies in the language state legislatures used in authorizing the development of standards. In ordering the creation of standards in 1995, California lawmakers issued a clear statement about the purpose those standards would serve: “[California shall] develop and adopt a set of statewide academically rigorous content standards and performance standards in all major subject areas to serve as the basis for . . . the California education system as a whole.”¹⁶⁶

The California legislature did not stop there. Once the standards were promulgated, lawmakers proceeded to tie educational program after program to the standards, further demonstrating that the standards are the overarching purpose of the entire system. California ordered its textbooks and instructional materials, accountability, standardized tests, graduation requirements, and teacher credentialing all to be tied to its standards.¹⁶⁷

The state's defense that the common purpose driving its school systems is something other than the standards is thus severely undercut

165. See *supra* Part III.B.

166. CAL. EDUC. CODE § 60602(a)(2) (West 2003) (emphasis added).

167. See *id.* § 60422(a) (connecting textbooks and instructional materials to state standards); *id.* §§ 60602(a)(2), 60605(a)(1)(A) (linking school accountability to standards); § 60640(f)(3)(A) (tying standardized testing to standards); *id.* § 60850 (tying the state's high school exit examination to state achievement standards); and *id.* § 44259(b)(3) (West 2006) (linking teacher certification requirements to state standards).

by a litany of legislative enactments that demonstrate how the standards are, both in law and practice, the common purpose of its school systems. And while the state may suggest that the standards are meant to serve only an aspirational function, such an argument is of no moment because an aspirational purpose for a school system is a common purpose nonetheless.¹⁶⁸

C. State School Finance Formulas are Neither Rationally nor Actually Designed to Enable Students to Meet State Academic Standards

Once it is established that California has a constitutional duty to provide a system of common schools composed of programs and policies rationally and actually designed to effectuate their academic content standards, the last task for plaintiffs is to show that the State's school funding system stands in violation of this duty. Here, the way in which school funding is distributed in California speaks for itself. Unlike its policies concerning curriculum, accountability, testing, textbooks, teacher certification, and graduation requirements, which are all set in relation to state standards, California uses school finance formulas that are based on a hodgepodge of factors including the disjunctive three-part test in Proposition 98: revenue limits, categorical programs, and political expediency in general.¹⁶⁹ Thus, the one factor that the state must consider to meet its duty to provide a system of common schools is one it simply does not account for in disbursing state school aid: the actual cost of providing the state's children with an education that would satisfy statewide academic standards. Underscoring the irrationality of the system, a 2007 costing-out study found that California spent 40% less in statewide school funding than the amount that would be necessary to meet the state's own standards.¹⁷⁰ Moreover, the basic structure of California's school finance was enacted prior to state standards.¹⁷¹ As a result, the funding scheme cannot meet the state's system duty to be *actually* calculated for the common purpose of

168. To be sure, nothing in the broken system claim forecloses a state from lowering or watering down standards as a response to a court order, thereby lowering its funding duty. Ultimately, however, political safeguards are likely to prevent politicians from lowering their standards beneath a level that is acceptable to the voting public.

169. See Kirst, *supra* note 12.

170. JON SONSTELIE, PUB. POL'Y INST. OF CAL., ALIGNING SCHOOL FINANCE WITH ACADEMIC STANDARDS: A WEIGHTED-STUDENT FORMULA BASED ON A SURVEY OF PRACTITIONERS, at iii (2007).

171. See Kirst, *supra* note 12.

achieving of state standards.¹⁷²

So strong is the evidence on these counts, in fact, that the state's best counter-argument may be to concede the irrational design of its funding scheme *vis-à-vis* the standards and to argue instead that the duty to create a system of common schools does not give rise to a duty to align every state educational program with state standards. Under this argument, the state could contend that it has discharged its system duty by setting standards as the common purpose for its system and by aligning only core instructional and accountability programs with those standards. After all, the state will argue, it cannot be the case that *every* state law concerning public schools must align with the standards. And if laws concerning fuel-efficient drivers' education, agricultural education, and staff fingerprinting requirements¹⁷³ need not align with the standards, then likewise, neither should school funding.

This counter-argument is unlikely to prevail for two reasons. First, a court could simply disagree and decide that the system duty does in fact require every state educational program to be designed to rationally serve the standards. Second, a court could draw a line between core state policies and programs and trivial ones, requiring only those state policies that have a substantial impact on the achievement of state standards, such as school funding, to be aligned to those standards. Under either rationale, the state's duty to create a system of common schools would extend to school finance, requiring the state to align its funding structure to its standards.

VI. CONCLUSION

Like any untested legal theory, the cause of action I have proposed here, rooted in a state's constitutional duty to provide a system of common schools, is not without potential pitfalls and challenges. I have attempted to address some of the major challenges by using California case law and statutes to fashion a case study above, although different challenges may well exist in other jurisdictions.

For plaintiffs who raise a broken system cause of action, however, there may be substantial benefits to taking on these challenges. First off, in the fourteen states where previous school finance lawsuits raised

172. *See supra* Part III.A.

173. Cal. Educ. Code § 51854 (West 2006) (fuel efficient driver education law); *id.* § 8982 (agricultural education program); *id.* § 10911.5 (fingerprinting of employees having contact with minors).

under equity and adequacy grounds have failed,¹⁷⁴ but where the state constitutions obligate the state to provide a *system* of public schools, the ability to challenge the state's school funding program under a new theory of liability can provide advocates with a sorely needed tool to advance the plight of disadvantaged school children. Second, in the states where adequacy and equity litigation has already resulted in plaintiffs' liability decisions, the ability to plead a broken system cause of action can prove useful to the extent that the remedy from such a claim—the alignment of state school aid with the cost of meeting state standards—would exceed the existing remedies from the prior suits. As Part II.B demonstrated above, thirteen of the fourteen states analyzed that experienced a pro-plaintiff liability decision still spend less on K–12 education than would be necessary to provide their children with the quality of education that state lawmakers themselves have described as essential to civic, economic, and social success in the twenty-first century. It is precisely this gap that the broken system theory of school finance litigation aims to fill.

Third, the potential utility of the broken system cause of action is strengthened inasmuch as it represents a plausible legal theory. To be sure, only time will tell just how persuasive the courts find the theory to be, and perhaps the fate of *Robles-Wong* will provide an early indication. But to the extent the theory is firmly grounded in the ordinary meaning of the term system present in the text of state constitutions, and to the extent that the few courts to consider the meaning of system have shown a willingness to construe the term in a manner that would grant plaintiffs relief, perhaps there is reason for advocates to be optimistic.

Lastly, where one of the primary factors that has motivated some courts to reject adequacy and equity claims is the concern that the task of defining educational adequacy or equity is a non-justiciable, political question for which legislatures, not courts, are best suited,¹⁷⁵ the broken system cause of action leaves solely to the legislature the responsibility of defining the quality of education that a state should provide. The theory neither requires nor allows the court to make initial policy determinations as to the qualitative level of education that a state must

174. These states include: Alabama, Arizona, Florida, Illinois, Indiana, Louisiana, Michigan, Minnesota, Missouri, Oklahoma, Oregon, Pennsylvania, South Dakota, and Virginia. See *supra* note 99 (explaining eleven states have declined to reach the merits of challenges based on adequacy grounds).

175. See EDUCATION ADEQUACY LIABILITY DECISIONS, *supra* note 50.

provide or the kind of equity that is necessary to satisfy the equal protection clause.

Thus, rather than requiring a court to consider complex evidence of comparative educational need and spending across districts as in equity litigation, or to weigh competing definitions of educational adequacy that are unmoored from the text of actual state constitutional provisions as in adequacy litigation, the work that the broken system cause of action asks courts to do is far simpler. A judge deciding the broken system claim needs only to construe the meaning of the term system and whether it means what plaintiffs assert it means in line with the rational–actual definition described above.¹⁷⁶ Once the meaning of system is decided, a judge’s remaining task is simply to ensure that whatever educational programs and policies the legislature chooses to adopt are rationally and actually designed to serve whatever common standards the state chooses for its schools. In performing this role, the court is asked to apply an eminently familiar and manageable judicial standard: a version of rationality review¹⁷⁷ where a legislature’s actions are presumed constitutional so long as its policies are both reasonably calculated to serve state content standards and actually designed with that purpose in mind.

Under this standard, a court’s task may be straightforward in comparison to the protracted and controversial work done by courts in school finance lawsuits past: only a policy that is either completely unjustifiable in view of the state’s standards or that was not in fact designed to serve the standards will be struck down. By and large, school finance formulas used in states throughout the nation fail on both counts, rendering the broken system argument a potentially powerful tool in the hands of advocates who seek a day where academic standards are more than a pipedream for the nation’s least fortunate children.

176. As I have shown above, this is a plausible result especially given that courts in Wyoming, New York, and California have already interpreted the term system to reach a similar conclusion. *See supra* Parts III.A–B.

177. The rationality review employed in the broken system claim differs from traditional rationality review in two key respects. Instead of asking whether the challenged state policy is *rational* related to *any* legitimate state end, the broken system claim would first require both a rational and actual relationship. Second, it would prevent the state from asserting *any* end. A court would look for a relationship between the challenged policy and only the actual end that the state has set for its schools, which I have argued above is the achievement of academic content standards.