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# AVERTING EDUCATIONAL CRISIS: FUNDING CUTS, TEACHER SHORTAGES, AND THE DWINDLING COMMITMENT TO PUBLIC EDUCATION

DEREK W. BLACK\*

## ABSTRACT

*Recent data shows that two-thirds of states are funding education at lower levels than in 2008. Some states are 20% or more below levels of just a few years earlier. The effect on schools has been devastating. States are only exacerbating the problem by reducing teachers' rights and benefits. These attacks, combined with funding decreases, have scared many prospective teachers away from the profession. The net result is an extreme shortage of teachers nationwide. When the school year began in 2015, a large number of public schools opened without enough certified teachers to fill classrooms, relying instead on substitutes and interns on a full-time basis. In other instances, schools stopped offering certain classes. Decades of social science research demonstrate that these funding and teaching policies will have serious academic impacts on students. They will likely widen achievement gaps and impose learning deficits that some students will never overcome.*

*In the face of analogous threats, courts in the past have regularly intervened to protect educational quality and funding. Yet this time around, courts have increasingly refused to intervene and have rarely offered a compelling reason for the refusal. This judicial passivism towards education marks a troubling new trend. It suggests that the constitutional right to education may exist only in theory, and that students are losing the constitutional leverage to demand that states repair the damage that they have caused. Likewise, nothing will prevent states from pursuing similar retractions again in the future.*

*This Article offers a new doctrinal approach to reverse both educational retractions and judicial disengagement. Current trends,*

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\* Professor of Law, University of South Carolina School of Law. I would like to thank Josh Weishart, Ned Snow, Josh Eagle, and Julia Simon Kerr for their comments and contributions, and Dean Robert Wilcox for his support of my research. I would also like to recognize the tremendous research and analysis of the Center on Budget and Policy Priorities. Without it, I do not know whether this paper would have been possible. It surely would not have presented comprehensive facts.

*however, cannot be reversed without acknowledging the potential limits of judicial intervention during crisis. In particular, a serious crisis incites fear and political expediency, which can prompt legislatures to ignore court orders that purport to remedy the crisis. This disregard is inherently problematic for both education rights and the basic legitimacy of judicial authority, regardless of the subject matter. In this respect, the solution to the devaluation of education rights is also a step toward strengthening judicial authority. In education, courts must begin to incorporate prospective doctrines and rules that reduce the likelihood of judicial standoffs with legislatures. In short, future court orders should seek to avert crises by addressing them before they occur. This Article proposes three specific steps courts can take to achieve this end.*

#### INTRODUCTION

In the Fall of 2015, extreme teacher shortages swept the nation, revealing that the education crisis that began during the Great Recession is far from over.<sup>1</sup> From 2008 to 2012, nearly every state imposed budget cuts on education.<sup>2</sup> Cuts of more than \$1,000 per pupil in a single year were routine—the equivalent of an assistant teacher in every classroom or the entire science and foreign language departments combined.<sup>3</sup> Some states experienced massive cuts for multiple years. In North Carolina and Florida, per-pupil funding fell from over \$10,000 to the \$7,000 range in just a few years.<sup>4</sup> These funding cuts affected a wide array of educational services, but the most significant were regarding teachers. Layoffs, pay

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1. Motoko Rich, *Teacher Shortages Spur a Nationwide Hiring Scramble (Credentials Optional)*, N.Y. TIMES (Aug. 9, 2015), <http://www.nytimes.com/2015/08/10/us/teacher-shortages-spur-a-nationwide-hiring-scramble-credentials-optional.html>. Similar shortages resurfaced in the fall of 2016. Linda Darling-Hammond et al., *The Answer To Teacher Shortages: Creating a Sustainable Profession*, HUFFINGTON POST (Oct. 3, 2016) [http://www.huffingtonpost.com/linda-darlinghammond/the-answer-to-teacher-sho\\_b\\_12319698.html](http://www.huffingtonpost.com/linda-darlinghammond/the-answer-to-teacher-sho_b_12319698.html).

2. NOELLE M. ELLERSON, AM. ASS'N OF SCH. ADMINS., *A CLIFF HANGER: HOW AMERICA'S PUBLIC SCHOOLS CONTINUE TO FEEL THE IMPACT OF THE ECONOMIC DOWNTURN* 8 (2010), [https://www.aasa.org/uploadedFiles/Policy\\_and\\_Advocacy/files/CliffHangerFINAL\(1\).pdf](https://www.aasa.org/uploadedFiles/Policy_and_Advocacy/files/CliffHangerFINAL(1).pdf) (66% of districts reported cuts to state and local revenues between 2008 and 2009 and 80% reported cuts between 2009 and 2010).

3. BRUCE D. BAKER ET AL., *IS SCHOOL FUNDING FAIR? A NATIONAL REPORT CARD* 12–13 t.2 (3d ed. 2014), [http://www.schoolfundingfairness.org/National\\_Report\\_Card\\_2014.pdf](http://www.schoolfundingfairness.org/National_Report_Card_2014.pdf); Marguerite Roza, *Breaking Down School Budgets*, 9 EDUC. NEXT 29 (Summer 2009), <http://educationnext.org/breaking-down-school-budgets-2/> (specifying programing costs in public schools).

4. BRUCE D. BAKER ET AL., *IS SCHOOL FUNDING FAIR? A NATIONAL REPORT CARD* 8 (4th ed. 2015), [http://www.schoolfundingfairness.org/National\\_Report\\_Card\\_2015.pdf](http://www.schoolfundingfairness.org/National_Report_Card_2015.pdf).

cuts, and new, high-stakes accountability systems dissuaded the next generation of talent from even pursuing a teaching career.<sup>5</sup>

As states finally began to replenish their teaching ranks in 2015, they found that teachers were in very short supply. In many instances, districts struggled to hire even the most minimally qualified individuals. Just to ensure warm bodies in the classroom, districts resorted to desperate measures—billboard advertising, hiring substitutes and college interns on a full-time basis, and seeking district-wide exemptions from teacher certification requirements.<sup>6</sup> In some districts, these drastic measures were not enough to stop class cancelations and teaching overloads.<sup>7</sup> The teaching demand in California, for instance, is 40% higher than the supply of individuals seeking teaching credentials this year.<sup>8</sup> Current projections indicate the shortage will get worse before it gets better.<sup>9</sup>

This crisis cannot simply be written off to the recession and its after-effects. At the same time that states were making cuts to traditional public education, they were enacting huge increases for charter schools and voucher programs.<sup>10</sup> The recession may have necessitated some cuts and efficiencies in public education, but many states appear to have used the

5. Derek W. Black, *The Constitutional Challenge to Teacher Tenure*, 104 CALIF. L. REV. 75 (2016) (describing new teacher evaluation systems and changes to hiring, firing, and tenure policies); EXEC. OFFICE OF THE PRESIDENT, INVESTING IN OUR FUTURE: RETURNING TEACHERS TO THE CLASSROOM (2012), [https://www.whitehouse.gov/sites/default/files/Investing\\_in\\_Our\\_Future\\_Report.pdf](https://www.whitehouse.gov/sites/default/files/Investing_in_Our_Future_Report.pdf) [hereinafter INVESTING IN OUR FUTURE] (reporting a loss of 300,000 teachers); MARJORIE A. SUCKOW & ROXANN L. PURDUE, CAL. COMM'N ON TEACHER CREDENTIALING, TEACHER SUPPLY IN CALIFORNIA: A REPORT TO THE LEGISLATURE ANNUAL REPORT 2013–2014 16 (2015), <http://www.ctc.ca.gov/reports/TS-2013-2014-AnnualRpt.pdf> (finding a 55% drop over five years in the number of persons pursuing and completing education degrees in California).

6. See, e.g., STATE OF CAL. COMM'N ON TEACHER CREDENTIALING, DISTRICT INTERN CREDENTIALS 3 (2015) (permitting interns to teach after 120 hours of training or six credit hours of course work); Andrea Eger & Nour Habib, *Crisis Hits Oklahoma Classrooms with Teacher Shortage, Quality Concerns*, TULSA WORLD (Aug. 16, 2015), [http://www.tulsaworld.com/news/education/crisis-hits-oklahoma-classrooms-with-teacher-shortage-quality-concerns/article\\_54627559-bcc0-5ae5-b654-9b7eec46ab3c.html](http://www.tulsaworld.com/news/education/crisis-hits-oklahoma-classrooms-with-teacher-shortage-quality-concerns/article_54627559-bcc0-5ae5-b654-9b7eec46ab3c.html) (in a month and a half, the Oklahoma Department of Education received 526 requests for teacher certification exemptions); Kristen A. Graham, *Looking for a Few Thousand Substitute Teachers*, PHILLY (Sept. 1, 2015), [http://articles.philly.com/2015-09-01/news/66074823\\_1\\_retired-teachers-subs-philadelphia-teachers](http://articles.philly.com/2015-09-01/news/66074823_1_retired-teachers-subs-philadelphia-teachers).

7. Eger & Habib, *supra* note 6; Rebecca Klein, *Kansas Underfunded Education and Cut Tenure. Now It Can't Find Enough Teachers to Fill Classrooms*, HUFFINGTON POST (July 31, 2015), [http://www.huffingtonpost.com/entry/kansas-teacher-shortage\\_us\\_55b913ebe4b0074ba5a729d5](http://www.huffingtonpost.com/entry/kansas-teacher-shortage_us_55b913ebe4b0074ba5a729d5) (reporting school district started year with uncertified teachers and had to use substitutes).

8. Rich, *supra* note 1 (state issued 15,000 teaching credentials, which was 6,500 short of the open teaching positions).

9. See TITLE II HIGHER EDUCATION ACT, DATA TOOLS, <https://title2.ed.gov/Public/DataTools/Tables.aspx> (last visited Nov. 23, 2015) (finding a sharp drop in the number of students pursuing education degrees); SUCKOW & PURDUE, *supra* note 5.

10. See *infra* notes 61–91.

recession as a convenient means to redefine their commitment to public education. Indeed, the presence of a substantive shift in commitment is becoming clearer with each passing year. By 2012, state revenues rebounded to pre-recession levels,<sup>11</sup> but as of 2015, thirty-one states were still funding education below pre-recession levels.<sup>12</sup> Compared to the past sixty years of recessions and school funding, the current state of affairs is “unprecedented.”<sup>13</sup>

The negative effects of reducing education funding and teacher quality are well documented. Decades of studies indicate that money does, in fact, matter to educational outcomes.<sup>14</sup> The latest research leaves no doubt: a substantial portion of the achievement gap between middle- and low-income students is attributable to school funding inequality.<sup>15</sup> Even clearer is the social science consensus that teacher quality is the most significant variable in student achievement.<sup>16</sup> Thus, as class size goes up while teacher quality goes down, states threaten to exacerbate an already wide achievement gap, particularly in poorer schools.<sup>17</sup>

Courts’ refusals to seriously entertain constitutional violations, or intervene when they occur, undermines the constitutional right to education itself and makes the reoccurrence of future crises more likely. In past decades, state supreme courts regularly struck down education policies and practices that undermined educational opportunity.<sup>18</sup> All fifty state constitutions obligate the state to provide education to students.<sup>19</sup> A

11. BAKER ET AL., *supra* note 4, at 20.

12. MICHAEL LEACHMAN ET AL., CTR. ON BUDGET AND POL’Y PRIORITIES, MOST STATES HAVE CUT SCHOOL FUNDING, AND SOME CONTINUE CUTTING 1 (Jan. 25, 2016), <http://www.cbpp.org/sites/default/files/atoms/files/12-10-15sfp.pdf>.

13. INVESTING IN OUR FUTURE, *supra* note 5, at 4–5.

14. BRUCE BAKER, THE ALBERT SHANKER INST., REVISITING THAT AGE-OLD QUESTION: DOES MONEY MATTER IN EDUCATION? 3–6 (2012), [http://www.shankerinstitute.org/sites/shanker/files/moneymatters\\_edition2.pdf](http://www.shankerinstitute.org/sites/shanker/files/moneymatters_edition2.pdf).

15. C. Kirabo Jackson et al., *The Effect of School Finance Reforms on the Distribution of Spending, Academic Achievement, and Adult Outcomes*, Nat’l Bureau of Econ. Research, Working Paper No. 20118, <http://www.nber.org/papers/w20118>.

16. Linda Darling-Hammond, *Teacher Quality and Student Achievement: A Review of State Policy Evidence*, 8 EDUC. POL’Y ANALYSIS ARCHIVES 1 (2000); James H. Stronge et al., *What Is the Relationship Between Teacher Quality and Student Achievement? An Exploratory Study*, 20 J. PERS. EVALUATION EDUC. 165, 167 (2007).

17. See EDUC. TR. THEIR FAIR SHARE: HOW TEXAS-SIZED GAPS IN TEACHER QUALITY SHORTCHANGE LOW-INCOME AND MINORITY STUDENTS 2 (2008), <http://edtrust.org/wp-content/uploads/2013/10/TXTheirFairShare.pdf> ([A]ssigning low-performing students to a series of ineffective teachers is ‘education deadly.’).

18. Joshua E. Weishart, *Transcending Equality Versus Adequacy*, 66 STAN. L. REV. 477, 516–21 (2014) (summarizing the history of equity and adequacy litigation).

19. William E. Thro, *To Render Them Safe: The Analysis of State Constitutional Provisions in Public School Finance Reform Litigation*, 75 VA. L. REV. 1639, 1661–70 (1989) (detailing states’

majority of state courts have held that these constitutional clauses include an equity or quality component that obligates the state to do more than just offer minimal basic services.<sup>20</sup> To ensure adequate education opportunity, states must create funding formulas that supply additional funds to meet the needs of disadvantaged students and, among other things, ensure access to quality teachers.<sup>21</sup> While this litigation has not come close to curing all of education's funding and quality ills, courts have emphasized that states' affirmative duties in education are not optional, even during times of financial exigency.<sup>22</sup>

The recession appears to have changed the trajectory of equity and adequacy litigation. Since the recession, courts have rejected school funding and quality challenges at a far higher rate.<sup>23</sup> Even in those instances in which plaintiffs have won since the recession, legislatures have simply defied the courts, refusing to comply with judicial remedies.<sup>24</sup> Thus, even when plaintiffs have received favorable judicial opinions, they have struggled to secure victory outside court.

This legislative resistance also raises concerns that stretch well beyond education rights to the basic legitimacy of judicial decisionmaking itself. If legislatures will defy courts in the education context, defiance in other contexts only becomes more likely. Whether these trends will change in the other education cases currently pending in the courts remains to be seen.<sup>25</sup> But unless courts reengage and alter their approach soon, increased

constitutional clauses regarding education). See *infra* note 162 for a full explanation of how the number of constitutions supporting education has vacillated between 49 and 50.

20. Michael A. Rebell, *Poverty, "Meaningful" Educational Opportunity, and the Necessary Role of the Courts*, 85 N.C. L. REV. 1467, 1500–05 (2007) (discussing plaintiff victories in school funding litigation).

21. See, e.g., *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 219 (Ky. 1989) (Wintersheimer, J., concurring); *Abbott v. Burke*, 575 A.2d 359, 403 (N.J. 1990); *Campaign for Fiscal Equity, Inc. v. State*, 801 N.E.2d 326, 348 (N.Y. 2003) (“[I]nputs should be calibrated to student need and hence that state aid should increase where need is high and local ability to pay is low.”).

22. See, e.g., *Butt v. State*, 842 P.2d 1240, 1243 (Cal. 1992); *Rose*, 790 S.W.2d at 208; *Claremont Sch. Dist. v. Governor*, 794 A.2d 744, 754 (N.H. 2002); *Abbott v. Burke*, 798 A.2d 602, 603–04 (N.J. 2002); *Campbell Cnty. Sch. Dist. v. State*, 907 P.2d 1238, 1279 (Wyo. 1995).

23. See *infra* notes 169–220.

24. See, e.g., John Eligon, *Courts Budget Intensifies Kansas Dispute Over Powers*, N.Y. TIMES (June 6, 2015), <http://www.nytimes.com/2015/06/07/us/courts-budget-intensifies-kansas-dispute-over-powers.html>; Kirk Johnson, *Washington State Faces \$100,000-a-Day Fine Until Schools Plan Is Reached*, N.Y. TIMES (Aug. 13, 2015), <http://www.nytimes.com/2015/08/14/us/washington-state-faces-dollar100000-a-day-fine-until-schools-plan-is-reached.html>.

25. See, e.g., *Conn. Coal. Just. Educ. Funding v. Rell*, No. X07-HHD-CV-14-5037565-S (Conn. Super. Ct. filed Jan. 22, 2014); *Martinez v. State*, No. D-101-CV-2014-00793 (N.M. Dist. Ct. filed Nov. 14, 2014); *Maisto v. State*, No. 8997-08 (N.Y. Sup. Ct. filed Nov. 6, 2008); *William Penn Sch. Dist. V. Pennsylvania*, No. 46-MAP-2015 (Pa. Sup. Ct. filed May 20, 2015); *Hamilton Cty. Bd. of Educ. v. Haslam*, No. 15-1048-III (Tenn. Ch. Ct. filed Mar. 24, 2015).

inequality and inadequacy may become the new norm—a norm that courts and advocates have spent decades trying to unseat.<sup>26</sup>

An erosion of judicial enforcement raises two fundamental questions about the current state of constitutional education rights and duties. First, are education rights and duties contingent on external competing factors? As a matter of doctrine, courts prior to the recession have emphatically said no.<sup>27</sup> Even after the recession, none have dared suggest otherwise, rejecting plaintiffs' claims on other questionable grounds.<sup>28</sup> But if the real measure of a constitutional right is its enforcement rather than its mere doctrinal articulation,<sup>29</sup> education rights are being quickly devalued and becoming, as a practical matter, entirely contingent on external factors. In effect, courts are granting states the power to override education rights, without even demanding that states justify their policies.

This devaluing of education rights leads to the second question: can future overrides of education rights be avoided or minimized? Aggressive judicial intervention at the moment of serious educational crisis is too little too late. Even in good times, motivating legislatures to pass remedial legislation can be challenging.<sup>30</sup> During economic crises, legislatures only grow more recalcitrant and might ignore the court.<sup>31</sup> The practical effect of legislative defiance is to undermine the legitimacy of the judiciary itself, as judicial authority primarily depends on voluntary compliance. Similarly, the constitutional importance of education duties and rights

26. See Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1016 (2004) (arguing that the primary role of school finance litigation has been to destabilize the status quo and earn outsiders a role in the policymaking process); Jill Barshay, *The Gap Between Rich and Poor Schools Grew 44 Percent Over a Decade*, HECHINGER REP. (Apr. 6, 2015), <http://hechingerreport.org/the-gap-between-rich-and-poor-schools-grew-44-percent-over-a-decade/> (finding a new expansion of inequality).

27. See, e.g., *Butt*, 842 P.2d at 1243; *Claremont Sch. Dist.*, 794 A.2d at 754; *Abbott*, 798 A.2d at 603–04.

28. See, e.g., *Dwyer v. State*, 357 P.3d 185 (Colo. 2015) (analyzing state's failure to increase education funding at the rate of inflation per a constitutional amendment, but upholding decreased funding on technical grounds).

29. See Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 904 (1999) (“[A] right without a remedy is worthless”); see also Julia A. Simon-Kerr & Robynn K. Sturm, *Justiciability and the Role of Courts in Adequacy Litigation: Preserving the Constitutional Right to Education*, 6 STAN. J. C.R. & C.L. 83, 87 (2010) (“[T]he state constitutional right to education is in danger of being rendered meaningless”).

30. See generally Laura Kalman, *Law, Politics, and the New Deal(s)*, 108 YALE L.J. 2165 (1999) (analyzing the battle between the judiciary and Congress and the President over the New Deal).

31. 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, 1190 (2003) (characterizing contempt as a symbolic statement in school funding litigation); see also Michael Heise, *Litigated Learning and the Limits of Law*, 57 VAND. L. REV. 2417, 2420 (2004) (questioning the capacity of courts to force positive education reform).

rests on the existence of a judiciary that can enforce them. Operating within these practical constraints, the only effective means of ensuring constitutional compliance in education during crisis is to prepare for crisis before it occurs.

Toward that end, this Article proposes three steps to alleviate the potential further devaluation of education rights in the future. First, moving forward, court orders in school equity and adequacy cases must deter future constitutional violations. In the past, courts have asked no more of states than that they create constitutional systems at some point following the litigation. States have never been asked to repair the damage done to students who suffered from inadequate educational opportunity.<sup>32</sup> Thus, as a practical matter, states face no consequences for violations and are incentivized to repeat them when expedient. Courts must, where appropriate, hold states accountable for the harm they cause. The lack of past accountability all but invited states to cut education spending during the recession and maintain those cuts until forced to act otherwise.

Second, to deter future violations, courts must be more clear in identifying state actions that violate state constitutions. Past decisions have been far too meandering in their analysis of violations.<sup>33</sup> Even conceding that the complexity and ambiguity in measuring educational opportunity will always require some circumstantial analysis, certain bright line rules can mark the outer limits of constitutionally acceptable policy.<sup>34</sup> These bright line rules could then be used in the future to ward off new constitutional violations. Otherwise, states do not know they have violated their education duty—and have no reason to act differently—until a court specifically orders them to do so. Worse still, some states may exploit doctrinal ambiguities in the pursuit of ulterior agendas.

Third, courts must prompt states to improve the structure of their education decisionmaking process and planning. Education budgets must be primarily driven by expert assessments of actual student need, not

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32. See Scott R. Bauries, *A Common Law Constitutionalism for the Right to Education*, 48 GA. L. REV. 949, 986–87, 999–1006 (2014) (characterizing school finance decisions as legislative holdings and pointing out that school funding remedies do not actually address the individual fact-based harms that students suffer and advocating a shift). See also James S. Liebman, *Desegregating Politics: “All-Out” School Desegregation Explained*, 90 COLUM. L. REV. 1463, 1513–17 (1990) (citing as a fundamental flaw in desegregation that court orders did nothing to address the harms that previously segregated students suffered).

33. See James E. Ryan, *Standards, Testing, and School Finance Litigation*, 86 TEX. L. REV. 1223, 1232–38 (2008) (concluding that neither adequacy nor equity neatly capture the analytical frameworks of past decisions).

34. See, e.g., *Abbott v. Burke*, 693 A.2d 417, 439 (N.J. 1997) (mandating that per-pupil funding in plaintiffs’ districts be no less than in affluent suburban districts).



political deal-making and random variations in available funds.<sup>35</sup> Also, because future economic downturns are inevitable, the continuing duty to consistently meet student need must include current plans that prepare for future contingencies. While courts lack the power to formally alter the legislative process, they do possess the power to identify those facts and considerations that are important in the process and afford presumptive weight to particular types of evidence. Clear signals in this respect could move legislatures to voluntarily make changes to their processes.

None of these steps ensures that the next educational crisis will be entirely averted, but they do reduce the likelihood of rights devaluation. In best-case scenarios, the deterrence value of earlier decisions and the structures they prompted will make it less likely that courts are drawn into an intractable dispute during an economic crisis in the first place. States will be incentivized to resolve crises through better educational planning and decisionmaking, not through high-stakes and uncertain litigation before a state supreme court. In worst-case scenarios, courts will be called upon to enforce clear doctrine articulated years earlier. Any remedy a court may order will be one a state and its citizens could have reasonably anticipated. Applying clear, existing doctrine rather than vague concepts to nuanced facts would offer courts a defense against assertions that they are making policy and reinforce the notion that courts are acting objectively, both of which should increase the likelihood of legislative compliance. In short, a proactive approach puts courts in the best position to enforce education rights during crisis and reduces the possibility that courts will unjustifiably ignore and sanction gross retractions of the sort seen in this past recession.

This Article proceeds in three parts. Part I explores the details of the current crisis, identifying exactly how much money schools have lost, whether those cuts were necessary, and the practical impacts of those cuts on student achievement, educational quality, and teachers. Part II explores the judicial refusal to intervene in constitutional education disputes during and after the recession, concluding that this shift in the enforcement marks a troubling new era in which the right to education is being significantly devalued. Part II also explores: (a) why courts have disengaged, (b) whether the right to education is contingent, and (c) what analysis courts should have offered during and after the recession. It concludes

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35. See *Montoy v. State*, 138 P.3d 755, 764 (Kan. 2006) (requiring “an equitable and fair distribution of the funding to provide an opportunity for every student to obtain a suitable education”); *Abbott v. Burke*, 971 A.2d 989, 1000–01 (N.J. 2009) (analyzing the extent to which the state’s funding formula was calibrated, consistent with expert analysis, to meet student need).

that, based on available evidence, many of the education cuts imposed in recent years likely violate state constitutions. Part III acknowledges the difficulty in preventing education rights retraction during crisis and develops three strategies by which courts might reengage and avoid repeating past mistakes.

### I. THE CURRENT CRISIS

Over the past decade, public education has reached the point of crisis, much of which is the result of intentional state and federal action. States enacted massive funding cuts to education budgets and services during the 2008 recession. The funding cuts reached levels that would, based on social science research, have substantial negative effects on student achievement.<sup>36</sup> Those funding cuts, along with statutory changes to teacher tenure, evaluation, rights, and pay, destabilized the teaching profession. As a result, access to teachers—regardless of quality—steadily shrunk during the recession. While state revenues have rebounded, education budgets and the teaching profession have not. Education budgets are low and states' efforts to improve them are minimal. The little teacher hiring that has occurred shows that prospective and existing teachers have fled the profession in response to a so-called war on teachers. In the fall of 2015, classes across the nation started with, at best, uncertified fill-in teachers and, at worst, no teacher at all. The same problem occurred again in the fall of 2016.<sup>37</sup> The longer these patterns persist, the more likely it will be that this generation of students will face insurmountable learning deficits.

The recession may have made some level of cuts unavoidable, but the extent of the cuts and their continuing effects are a result of active policy decisions. At the same time states were defunding public education and imposing new requirements on teachers, they were more than doubling funding for charters and vouchers and making a more favorable policy climate for them. Traditional public schools were characterized as a failing and inefficient paradigm. Charters and vouchers were touted as the solution. That these educational alternatives have been readily funded during a time when traditional public schools are asked to make enormous

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36. Compare Jackson et al., *supra* note 15, at 5 (finding that 20% increases in funding can close two-thirds of the achievement gap and 10% increases have proportional effects) with MICHAEL LEACHMAN & CHRIS MAI, MOST STATES STILL FUNDING SCHOOLS LESS THAN BEFORE THE RECESSION, CTR. ON BUDGET & POL'Y PRIORITIES 4 (Oct. 16, 2014), <http://www.cbpp.org/sites/default/files/atoms/files/10-16-14sfp.pdf> (finding continuing funding cuts in excess of 10% in 14 states). See also EDUC. TR., *supra* note 17.

37. Darling-Hammond et al., *supra* note 1.

sacrifices raises serious questions about states' commitment to public schools and whether the recession just offered an excuse to make cuts that were not entirely necessary. The fact that funding for public education has not rebounded following the recession, even in states running budget surpluses, makes this explanation all the more plausible.

### A. Defunded Public Schools

According to the Center on Budget and Policy Priorities—a nonpartisan research and policy institute—“[s]tates are providing less per-pupil funding for kindergarten through 12th grade than they did seven years ago—often far less.”<sup>38</sup> In 2014, thirty states were spending less per pupil than they were before the recession and, in fourteen states, the decrease was substantial.<sup>39</sup> Oklahoma, for instance, is spending almost 25% less now than in 2008.<sup>40</sup> Most states are doing something to address the problem, but their efforts are modest.<sup>41</sup> In other words, funding levels remain well below pre-recession levels by choice, not because states lack the money. By 2012, all but two states had total gross domestic products that met or exceeded 2008 levels,<sup>42</sup> but only eighteen states increased their effort to fund education.<sup>43</sup> States are simply allocating funds to non-education projects or refusing to exert tax effort.

The ten states making the biggest cuts in education following the recession continue to rank in the bottom half of the nation in terms of effort exerted to fund education.<sup>44</sup> The Education Law Center's School Funding Fairness Report ranked the funding effort in five of those ten states as an “F.”<sup>45</sup> Some states even continue to decrease their effort as tax revenues improve.<sup>46</sup> North Carolina may be the worst offender. It cut its education budget by 15% and gave massive new tax cuts to the state's highest income earners.<sup>47</sup> Inexplicably, the state has maintained those

38. LEACHMAN & MAI, *supra* note 36, at 1.

39. *Id.* (fourteen states cut per-student funding by more than 10%).

40. *Id.* at 12.

41. *Id.*

42. BAKER ET AL., *supra* note 4, at 20.

43. *Id.* at 21.

44. Compare LEACHMAN & MAI, *supra* note 36, at 12 tbl.2 with BAKER ET AL., *supra* note 4, at 19 fig.18.

45. BAKER ET AL., *supra* note 4, at 25 tbl.1.

46. *Id.* at 21 fig.19.

47. LEACHMAN & MAI, *supra* note 36, at 2; Patrick Gleason, *North Carolina Lawmakers Build upon Historic Tax Reform*, FORBES (June 10, 2015), <http://www.forbes.com/sites/patrickgleason/2015/06/10/nc-taxreform/#26d8a32d2bf0>; see also MICHAEL LEACHMAN & MICHAEL MAZEROV, STATE

education cuts despite a nearly half-billion dollar surplus in tax receipts in 2015.<sup>48</sup>

Making matters worse, state budget cuts have been felt unevenly across school districts. Alabama, for instance, enacted the second largest cuts to education of any state.<sup>49</sup> But even before the cuts, districts serving large numbers of poor and at-risk students were already operating at a serious disadvantage. In Alabama, districts with the highest-need student populations receive 10% less in state funding than districts serving more advantaged students.<sup>50</sup> In Nevada, the difference is unconscionable. In 2012, Nevada districts with the neediest student populations received only half the funding of more advantaged districts.<sup>51</sup> Georgia, however, may have been the most ruthless in targeting cuts during the recession. In 2010, the state recommended \$112 million in funding cuts to programs specifically designed to assist low-income districts.<sup>52</sup> Based on the most recent data, only twelve states fund districts serving predominantly poor students at the same or higher level than districts serving predominantly middle-income students.<sup>53</sup>

At the local level, massive cuts coupled with inequitable funding practices have driven some districts to the brink of catastrophe. Budget cuts in Pennsylvania caused shortfalls so steep in Philadelphia that the

PERSONAL INCOME TAX CUTS: STILL A POOR STRATEGY FOR ECONOMIC GROWTH, CTR. ON BUDGET & POL'Y PRIORITIES 3 (May 14, 2015), <http://www.cbpp.org/research/state-budget-and-tax/state-personal-income-tax-cuts-still-a-poor-strategy-for-economic> (characterizing NC as one of the biggest tax cutting states in the nation during the past five years).

48. Press Release, N.C. Office of the Governor, Governor McCrory Praises \$445 Million Revenue Surplus (July 28, 2015), <https://governor.nc.gov/press-release/governor-mccrory-praises-445-million-revenue-surplus>.

49. LEACHMAN & MAI, *supra* note 36, at 2 fig.1.

50. BAKER ET AL., *supra* note 4, at 36 tbl.B-2.

51. *Id.*

52. NICHOLAS JOHNSON ET AL., CTR. ON BUDGET & POL'Y PRIORITIES, AN UPDATE ON STATE BUDGET CUTS: GOVERNORS PROPOSING NEW ROUND OF CUTS FOR 2011: AT LEAST 46 STATES HAVE ALREADY IMPOSED CUTS THAT HURT VULNERABLE RESIDENTS AND CAUSE JOB LOSS 11 (2010), <http://www.cbpp.org/sites/default/files/atoms/files/3-13-08sfp.pdf>; Memorandum from Jeffery C. Welch et al., Consortium for Adequate Sch. Funding in Georgia, to Donna Hinton (Jan. 29, 2009) (showing a \$112 million cut to equalization grants, which amounted to a 20% cut of those funds designed to help lower-wealth districts), <https://eboard.eboardsolutions.com/Meetings/Attachment.aspx?S=4172&AID=170553>. See also Michael A. Rebell, *Safeguarding the Right to a Sound Basic Education in Times of Fiscal Constraint*, 75 ALB. L. REV. 1855, 1859–60 (2012) (describing cuts in pre-kindergarten, advanced placement, and other programs that disproportionately affected low-income students).

53. NATASHA USHOMIRSKY & DAVID WILLIAMS, EDUC. TR., FUNDING GAPS 2015: TOO MANY STATES STILL SPEND LESS ON EDUCATING STUDENTS WHO NEED THE MOST 5 (2015) (after accounting for student need).

district began eliminating basic services and closing schools.<sup>54</sup> The situation became bad enough that national civil rights leaders descended on the state in protest, concluding that “Pennsylvania has become a national model of dysfunction in education.”<sup>55</sup>

Two years later, the crisis has not ended. Pennsylvania public schools began the 2015 academic year without a state budget.<sup>56</sup> Halfway through the school year, the state still had no budget.<sup>57</sup> As a result, wealthier school districts were forced to draw on reserves, to operate solely on local funding, and to borrow money.<sup>58</sup> Poor districts asked teachers to work without pay and contemplated closing altogether.<sup>59</sup> Many indicated that pre-kindergarten programs and entire schools would have to close soon.<sup>60</sup> National observers labeled events like those in Pennsylvania, North Carolina, and elsewhere as nothing less than a war on public education.<sup>61</sup>

54. Derek Black, *The Perfect Storm Undermining Philadelphia’s Schools*, EDUC. L. PROF. BLOG (Oct. 15, 2013), [http://lawprofessors.typepad.com/education\\_law/2013/10/the-perfect-storm-undermining-philadelphias-schools.html](http://lawprofessors.typepad.com/education_law/2013/10/the-perfect-storm-undermining-philadelphias-schools.html); SHARON WARD, PENN. BUDGET & POL’Y CTR., A STRONG STATE COMMITMENT TO PUBLIC EDUCATION, A MUST HAVE FOR PENNSYLVANIA’S CHILDREN 5 (Apr. 2014), <http://pennbpc.org/sites/pennbpc.org/files/20140429schoolreport.pdf> (estimating budget cuts to be 35% in Philadelphia).

55. Joy Resmovits, *Tom Corbett Pressured by Civil Rights Groups on Philadelphia School Funding*, HUFFINGTON POST (Oct. 11, 2013) (quoting Wade Henderson, President of the Leadership Conference on Civil and Human Rights), [http://www.huffingtonpost.com/2013/10/11/tom-corbett-philadelphia-schools\\_n\\_4080350.html](http://www.huffingtonpost.com/2013/10/11/tom-corbett-philadelphia-schools_n_4080350.html).

56. Mareesa Nicosia, *The Tenuous Fate of Pennsylvania’s Public Schools*, THE ATLANTIC (Oct. 13, 2015), <http://www.theatlantic.com/education/archive/2015/10/pennsylvania-budget-legislature-school-funding/409936/>.

57. Daarel Burnette II, *In Setback for Hurting Districts, Pa. House GOP Ditches Plan to End Budget Impasse*, EDUC. WK. (Dec. 7, 2015), [http://blogs.edweek.org/edweek/state\\_edwatch/2015/12/in\\_setback\\_for\\_hurting\\_districts\\_pa\\_house\\_gop\\_ditches\\_plan\\_to\\_end\\_budget\\_impasse.html](http://blogs.edweek.org/edweek/state_edwatch/2015/12/in_setback_for_hurting_districts_pa_house_gop_ditches_plan_to_end_budget_impasse.html).

58. PENN. SCH. BD. ASS’N, THE FINANCIAL IMPACT OF THE BUDGET IMPASSE ON PENNSYLVANIA SCHOOL DISTRICTS 1 (Feb. 2016), <https://www.psba.org/wp-content/uploads/2015/02/Budget-survey-results-FINAL-02082016.pdf>.

59. Burnette, *supra* note 57; *Chester-Upland Teachers Agree to Work Without Pay*, ABC ACTION NEWS (Aug. 28, 2015), <http://6abc.com/education/chester-upland-teachers-agree-to-work-without-pay/960004/>.

60. AP, *Pre-K Programs May Close Due to Pennsylvania Budget Battle*, READING EAGLE (Oct. 26, 2015), <http://www.readingeagle.com/news/article/pre-k-programs-may-close-due-to-pennsylvania-budget-battle&template=mobileart>; Nicosia, *supra* note 56; Denisa R. Superville, *Some Penn. Districts May Not Open After Christmas Due to State Budget Impasse*, EDUC. WK. (Dec. 10, 2015), [http://blogs.edweek.org/edweek/District\\_Dossier/2015/12/two\\_pennsylvania\\_districts\\_may.html](http://blogs.edweek.org/edweek/District_Dossier/2015/12/two_pennsylvania_districts_may.html); Kyle Wind, *Carbondale Schools Could Shut Down over PA Budget Impasse*, THE TIMES-TRIBUNE (Sept. 25, 2015), <http://thetimes-tribune.com/news/carbondale-schools-could-shut-down-over-pa-budget-impasse-1.1947881>.

61. Valerie Strauss, *North Carolina’s Step-by-Step War on Public Education*, WASH. POST (Aug. 7, 2015), <https://www.washingtonpost.com/news/answer-sheet/wp/2015/08/07/north-carolinas-step-by-step-war-on-public-education/>.

## B. *The Diversion of Education Funds and Policy*

### 1. *Charter Schools*

While traditional public education has struggled before and after the recession, charter schools, which are run by private groups with public money, have not.<sup>62</sup> State and federal funding for charters has flourished over the past decade. In many instances, the financial shortfalls in public school districts are directly related to the expansion and funding of charters. States made it far easier for charters to open and imposed substantial portions of charter school operating costs on local districts. To be clear, charter schools are relatively few in number compared to traditional public schools and, thus, are far easier to fund. But the fact that their funding has increased while public school funding has decreased calls states' commitment to traditional public education into question.

North Carolina and Pennsylvania, again, provide two of the most poignant examples of the diverging trajectory of charters and traditional public schools. Immediately before the recession, North Carolina spent \$169 million on charter schools.<sup>63</sup> By the 2014–2015 school year, the state had more than doubled its commitment to charters, spending \$366 million a year.<sup>64</sup> In Pennsylvania, not only has the state incentivized charters and increased its financial commitment to them, the state has forced school districts to transfer a portion of their funds to local charters.<sup>65</sup> This transfer of funds has been a critical component of the funding struggles of high poverty districts like Philadelphia and Chester. By 2012, the Chester school district owed the local charter schools \$43 million—almost half of

62. All but a few states have passed statutes governing the creation and operation of charter schools. Those states invite non-governmental entities to file applications with the state, asking for authority and funding to run schools. In many ways, charter schools are similar to public schools. They are publicly funded, open to all, and free to attend. As a general matter, however, they operate outside of states' normal bureaucratic structures, such as school boards and superintendents. Instead, they operate based on the charter or contract they sign with the state. For a more detailed description of charter schools, see Derek W. Black, *Charter Schools, Vouchers, and the Public Good*, 48 WAKE FOREST L. REV. 445 (2013).

63. N.C. DEP'T OF PUB. INSTRUCTION, HIGHLIGHTS OF THE NORTH CAROLINA PUBLIC SCHOOL BUDGET 29 (Feb. 2013), [http://www.ncpublicschools.org/docs/fbs/resources/data/highlights/2013\\_highlights.pdf](http://www.ncpublicschools.org/docs/fbs/resources/data/highlights/2013_highlights.pdf).

64. N.C. DEP'T OF PUB. INSTRUCTION, HIGHLIGHTS OF THE NORTH CAROLINA PUBLIC SCHOOL BUDGET 30 (Feb. 2015), [http://www.ncpublicschools.org/docs/fbs/resources/data/highlights/2015\\_highlights.pdf](http://www.ncpublicschools.org/docs/fbs/resources/data/highlights/2015_highlights.pdf). Funding for charters went up every year of the recession and recovery except one. *Id.*

65. *Chester Upland Sch. Dist. v. Pennsylvania*, 284 F.R.D. 305, 314 (E.D. Pa. 2012) (state law required district to pay charters \$9,800 for each regular education student and \$24,000 for each special education student).

Chester's entire school budget.<sup>66</sup> Similarly, Philadelphia's school district operated at a \$70 million deficit between 2008 and 2013, but the city's charter schools ran a surplus of \$117 million.<sup>67</sup> North Carolina and Pennsylvania, however, are not alone. Several states have increased per-pupil allotments for charter schools and specifically took the funds for those increases from the budget for traditional public schools.<sup>68</sup>

Some of the blame for this divergent trajectory lies with federal policy. Through money and substantive policy, the federal government has promoted, if not forced, the expansion of charters.<sup>69</sup> First, it has drastically increased charter school funding for two consecutive decades,<sup>70</sup> including during the recession when federal charter funding grew by 18.8%.<sup>71</sup> In his 2016 budget, the President called for another 50% increase in charter funding over the prior year—an increase that members of both parties supported.<sup>72</sup>

66. *Id.*; see also *PA's Chester-Upland School District Reaches Settlement in School Funding Lawsuit*, ACCESS (2016), <http://schoolfunding.info/2012/09/pas-chester-upland-school-district-reaches-settlement-in-school-funding-lawsuit/>.

67. CITY OF PHILA. PA. OFFICE OF THE CONTROLLER, *THE IMPACT OF CHARTER SCHOOLS ON THE FINANCES OF THE SCHOOL DISTRICT OF PHILADELPHIA* 3 (Oct. 2014), [http://www.philadelphiacontroller.org/publications/CharterSchool\\_FinancialImpact\\_October2014.pdf](http://www.philadelphiacontroller.org/publications/CharterSchool_FinancialImpact_October2014.pdf).

68. See Tiara Beatty, *Indiana Increases Funding for Charter Schools, Creates New Loan Program*, EDUC. WK. (July 8, 2015), [http://blogs.edweek.org/edweek/charterschoice/2015/07/indiana\\_increases\\_funding\\_for\\_charter\\_schools\\_despite\\_past\\_debt.html](http://blogs.edweek.org/edweek/charterschoice/2015/07/indiana_increases_funding_for_charter_schools_despite_past_debt.html); *Confusing Formula for Ohio Charter School Funding*, IDEASTREAM (Nov. 25, 2015), <http://wcpn.ideastream.org/news/confusing-funding-formula-ohio-charter-schools-0>; *Final NJ Budget: Charter and Private Schools Get More, No Increase for District Schools*, EDUC. LAW CTR. (July 6, 2015), <http://www.edlawcenter.org/news/archives/school-funding/final-nj-budget-charter-and-private-schools-get-more-no-increase-for-district-schools.html>; Howard Fischer, *Arizona Panel Crafting Changes to School Funding System*, ARIZ. DAILY STAR (Sept. 22, 2015), [http://m.tucson.com/news/local/education/arizona-panel-crafting-changes-to-school-funding-system/article\\_dc8abda4-1605-563f-8408-d16effdadc85.html?mobile\\_touch=true](http://m.tucson.com/news/local/education/arizona-panel-crafting-changes-to-school-funding-system/article_dc8abda4-1605-563f-8408-d16effdadc85.html?mobile_touch=true); Timothy J. Shrom, Solanco Sch. Dist., *Pennsylvania Spending Patterns: A Comparison of Charter Schools and School District Spending by Share of Selected Functions*, Presentation at the National Education Finance Conference in Louisville, Kentucky (Apr. 2014), [http://www.solanco\\_sd.org/wp-content/uploads/2014/04/Spending-Patterns-Charter-and-School-District-Comparison.pdf](http://www.solanco_sd.org/wp-content/uploads/2014/04/Spending-Patterns-Charter-and-School-District-Comparison.pdf); Jacqueline Rabe Thomas, *Deal on Charter-School Conflict: More Funding All Around*, CTMIRROR (June 1, 2015), <https://ctmirror.org/2015/06/01/deal-on-charter-school-conflict-more-funding-all-around/>; Ben Wood, *Utah School Districts Eyeing Tax Increases to Cover Charter School Funding Costs*, SALT LAKE TRIBUNE (June 9, 2015), <http://www.sltrib.com/home/2606861-155/utah-school-districts-eyeing-tax-increases>.

69. Jonas Persson, *New Documents Show How Taxpayer Money Is Wasted by Charter Schools—Stringent Controls Urgently Needed as Charter Funding Faces Huge Increase*, PR WATCH (May 8, 2015), [http://www.prwatch.org/files/5-8-15\\_final\\_cmd\\_reporters\\_guide\\_on\\_charter\\_waste\\_and\\_lack\\_of\\_accountability.pdf](http://www.prwatch.org/files/5-8-15_final_cmd_reporters_guide_on_charter_waste_and_lack_of_accountability.pdf).

70. Erica Frankenberg & Genevieve Siegel-Hawley, *Choosing Diversity: School Choice and Racial Integration in the Age of Obama*, 6 STAN. J. C.R. & C.L. 219, 244 (2010) (discussing specific federal budget increases for charter schools and their comparison to other programs).

71. Persson, *supra* note 69, at app. 1 (from \$175 million in 2008 to \$208 million in 2013).

72. Melissa Korn & Caroline Porter, *Obama's Proposed Budget Seeks More for Education*,

Second, U.S. Secretary of Education, Arne Duncan, aggressively used his administrative power to ensure pro-charter policies at the state level. Most notably, he conditioned states' ability to obtain competitive grants on their willingness to expand charter schools. Speaking of Race to the Top Program grants, Secretary Duncan cautioned that states that "put artificial caps on the growth of charter schools will jeopardize their [grant] applications."<sup>73</sup> Desperate to secure much-needed education resources during the recession, many states that had long resisted charter schools saw no choice but to lift caps and more freely grant charters.<sup>74</sup>

Third, notwithstanding major increases in charter funding and administrative mandates, Congress continues to push for more of them. Despite the fact that 80% of traditional public schools were facing sanctions under the No Child Left Behind Act,<sup>75</sup> the single piece of new education legislation the House of Representatives managed to move forward during the recession was on charter schools.<sup>76</sup> Five years later, most of the ideas in that bill became part of the Every Student Succeeds Act, which included no meaningful new money for traditional public schools but *did* include substantial new incentives for charter schools.<sup>77</sup>

The net result of Congress, the Administration, and states' actions is impressive by any measure. Charter schools grew throughout the recession, notwithstanding the retraction of almost every other government and private sector in the country. Between 2007 and 2012, the number of charter schools in operation grew from 4,388 to more than 6,000—a nearly 40% increase.<sup>78</sup> The number of students enrolled in charters grew even more, nearly doubling to 2.26 million.<sup>79</sup> In short, while funding and

WALL ST. J. (Feb. 2, 2015), <http://www.wsj.com/articles/obamas-proposed-budget-seeks-more-for-education-1422898651>.

73. David Nagel, *Charter School Support Is a Prerequisite for Race to the Top Funds*, JOURNAL (June 9, 2009), <http://thejournal.com/articles/2009/06/09/charter-school-support-is-a-prerequisite-for-race-to-the-top-funds.aspx>.

74. Derek W. Black, *Civil Rights, Charter Schools, and Lessons to Be Learned*, 64 FLA. L. REV. 1723, 1725 (2012); Erik W. Robelen, *State Picture on Charter Caps Still Mixed*, EDUC. WK. (Aug. 3, 2009), <http://www.edweek.org/ew/articles/2009/08/03/37charter.h28.html>.

75. See generally Sam Dillon, *Overriding a Key Education Law*, N.Y. TIMES (Aug. 8, 2011), [http://www.nytimes.com/2011/08/08/education/08educ.html?\\_r=0](http://www.nytimes.com/2011/08/08/education/08educ.html?_r=0) (predicting that the number of failing schools would reach 80,000 out of 100,000 in 2011).

76. Sam Dillon, *With Bipartisan Support, Law on Expansion of Charter Schools Passes the House*, N.Y. TIMES (Sept. 13, 2011), <http://www.nytimes.com/2011/09/14/education/14educ.html>.

77. Every Student Succeeds Act, Pub. L. 114-95, § 4301, 129 Stat. 1802 (2015).

78. NAT'L CTR. FOR EDUC. STATISTICS, DIGEST OF EDUCATION STATISTICS 204 (2014), <http://nces.ed.gov/pubs2016/2016006.pdf>.

79. *Id.* at 205 (from 1.27 million charter school students to 2.26 million).



general legislative support for traditional public schools has withered, funding and favorable policies for charter schools have flourished.

## 2. Vouchers

State support for vouchers also took off during the recession. This growth is particularly significant because voucher support had been tepid at best for the decade leading up to the recession.<sup>80</sup> The growth was due in part to a change in rationale. Previously, vouchers were touted as a tool for disadvantaged students to escape failing schools and exercise the choice options that others have.<sup>81</sup> Consistent with that mission, states imposed income eligibility caps.<sup>82</sup> More recently, however, states have raised or eliminated those income caps, making vouchers available to the middle-class as well.<sup>83</sup>

Florida was the first state to make this substantive shift. At the same time funds for public education were falling, the state altered and expanded its voucher program. At the outset of the recession, the state spent \$87 million on vouchers.<sup>84</sup> By 2014, the state had all but eliminated income eligibility caps and drastically increased the amount it would fund per voucher.<sup>85</sup> The result was a quadrupling of voucher spending to \$344 million.<sup>86</sup>

Other states followed a similar trajectory, exponentially increasing voucher funds and eliminating or raising income eligibility caps. But some took their support one step further, using regular public education funds to finance the agenda. Wisconsin, for instance, cut public education funding by nearly 15%<sup>87</sup> during the same time that it decided to offer vouchers

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80. See generally James Forman, Jr., *The Rise and Fall of School Vouchers: A Story of Religion, Race, and Politics*, 54 UCLA L. REV. 547 (2007).

81. *Id.*

82. See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639, 646 (2002); *Jackson v. Benson*, 578 N.W.2d 602, 617 (Wis. 1998).

83. See, e.g., Derek Black, *Voucher Movement Finally Coming Clean? New Push Is All About Middle Income Students*, EDUC. LAW PROF BLOG (July 31, 2015), [http://lawprofessors.typepad.com/education\\_law/2015/07/voucher-movement-finally-coming-clean-new-push-is-all-about-middle-income-students.html](http://lawprofessors.typepad.com/education_law/2015/07/voucher-movement-finally-coming-clean-new-push-is-all-about-middle-income-students.html) [<https://perma.cc/UBN7-9BML>].

84. FLA. DEP'T EDUC., CORPORATE TAX CREDIT SCHOLARSHIP PROGRAM: JUNE QUARTERLY REPORT (2009), <https://www.stepupforstudents.org/wp-content/uploads/2015/09/ctc-stats-09-06.pdf>.

85. FLA. DEP'T EDUC., FLORIDA TAX CREDIT SCHOLARSHIP PROGRAM (Nov. 2015), [http://www.fldoe.org/core/fileparse.php/5606/urlt/FTC\\_Nov\\_2015.pdf](http://www.fldoe.org/core/fileparse.php/5606/urlt/FTC_Nov_2015.pdf).

86. *Id.*

87. LEACHMAN & MAI, *supra* note 36, at 2 fig.1.

statewide and to a higher income group of families.<sup>88</sup> In 2015, the increase for vouchers came out of school district budgets.<sup>89</sup> Indiana, however, may be the worst offender, reducing its funding effort for public schools<sup>90</sup> and enacting the most expansive voucher program in our nation's history.<sup>91</sup> Within four years, student enrollment in the program grew by approximately 600% and the state's investment by more than 700%.<sup>92</sup> Again, this growth is in stark contrast to the experience of traditional public schools over the past decade.

### C. *The Educational Impacts of Funding Cuts*

The significance of the foregoing cuts and shifts in funding policy are enormous. Social science research demonstrates that funding levels affect student achievement. Funding cuts of the size experienced over the course of the past eight years easily rise to a level that can depress academic outcomes. Teachers, likewise, matter enormously in the quality of education students receive. In fact, studies consistently cite teachers as the most significant variable in student achievement.<sup>93</sup> Unfortunately, budget cuts hit teachers hard, shrinking their ranks and dis-incentivizing college students—the next generation of teachers—from pursuing education careers. Students are now learning in larger classrooms and from less-qualified teachers, who are too often just substitute teachers, interns, and others who lack full teaching credentials. Together, the funding and teacher deficits suffered during and after the recession imposed harms that cannot easily be undone. States thus far have shown little interest in even

88. Patti Zarling, *10 Things to Know About Private School Vouchers*, GREEN BAY PRESS GAZETTE (AUG. 1, 2015), <http://www.greenbaypressgazette.com/story/news/education/2015/08/01/things-know-private-school-vouchers/30983793/>.

89. See TAMARINE CORNELIUS & JON PEACOCK, WISCONSIN BUDGET PROJECT, AN OVERVIEW OF EDUCATION ISSUES IN THE 2013–15 BUDGET (July 2, 2013), <http://www.wisconsinbudgetproject.org/how-the-amended-2013-15-wisconsin-budget-affects-k-12-education>. North Carolina similarly doubled the size of its voucher program while cutting regular education. Complaint at 9, *Hart v. State*, No. 13CV016771 (N.C. Super. Ct. Dec. 11, 2013), <http://www.ncjustice.org/sites/default/files/VoucherComplaint.pdf>.

90. BAKER ET AL., *supra* note 4, at 21.

91. Michelle Ye Hee Lee, *Mike Pence's Claim That Indiana Has the Largest School Voucher Program*, WASH. POST (Aug. 12, 2016), <https://www.washingtonpost.com/news/fact-checker/wp/2016/08/12/mike-pences-claim-that-indiana-has-the-largest-school-voucher-program/>.

92. INDIANA DEP'T OF EDUC., CHOICE SCHOLARSHIP PROGRAM ANNUAL REPORT: PARTICIPATION AND PAYMENT DATA 7, 26–27 (Apr. 2016), <http://www.doe.in.gov/sites/default/files/news/2015-2016-choice-scholarship-program-report-final-april2016.pdf>.

93. Derek W. Black, *Taking Teacher Quality Seriously*, 57 WM. & MARY L. REV. 1597, 1607–09 (2016) (surveying and referencing the studies on the effects of quality teachers on student outcomes).

attempting a reversal. The following subparts explore each of these points in full.

### *I. Money Matters*

Whether funding inequalities mattered was heavily contested in the 1970s and 1980s, but over the past two decades research firmly establishes that it does matter. The overwhelming percentage of studies demonstrate a positive relationship between school funding and student outcomes.<sup>94</sup> Summarizing the literature in 1996, Rob Greenwald wrote that per-pupil expenditures “show strong and consistent relations with achievement . . . . In addition, resource variables that attempt to describe the quality of teachers (teacher ability, teacher education, and teacher experience) show very strong relations with student achievement.”<sup>95</sup> The specific effect of spending may differ depending on how funds are allocated, but “a broad range of resources were positively related to student outcomes, with effect sizes large enough to suggest that moderate increases in spending may be associated with significant increases in achievement.”<sup>96</sup> Eighteen years later, in 2012, Bruce Baker reviewed more recent studies and found that the research consensus remained the same.<sup>97</sup>

Given the nature of achievement gaps and funding inequities, the more important question may be how money affects disadvantaged students in particular. Examining more than three decades of data, Kirabo Jackson and her colleagues found that a 20% increase in per-pupil funding, if maintained over the course of a student’s education career, results in low-income students completing almost a full additional year’s worth of education.<sup>98</sup> That additional learning eliminates two-thirds of the gap in outcomes between low- and middle-income students.<sup>99</sup> They also found

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94. Rob Greenwald et al., *The Effect of School Resources on Student Achievement*, 66 REV. EDUC. RES. 361, 362, 368 (1996) (finding a broad range of school inputs are positively related to student outcomes, and that the magnitude of the effects are sufficiently large to suggest that moderate increases in spending may be associated with significant increases in achievement).

95. *Id.* at 384.

96. *Id.* at 361. See also ULRICH BOSER, CTR. FOR AM. PROGRESS, RETURN ON EDUCATIONAL INVESTMENT: 2014 (July 2014), <https://cdn.americanprogress.org/wp-content/uploads/2014/07/ROI-report.pdf> (assessing the extent to which schools spend money in ways that improve achievement).

97. BAKER, *supra* note 14, at 6 (New studies “have invariably found a positive, statistically significant (though at times small) relationship between student achievement gains and financial inputs.”).

98. Jackson et al., *supra* note 15, at 5.

99. *Id.* at 44.

proportionally positive outcomes based on just 10% increases in funding across time.<sup>100</sup>

As the various data and reports spelled out above detail, nearly a third of the states are funding schools state-wide at levels 10% below where they were in 2008.<sup>101</sup> Even assuming that funding levels in all or most states were at least minimally adequate in 2008—which is a huge assumption—these widespread cuts are causing real damage. These cuts have been in place for nearly a decade and were much larger a few years ago. This is to say nothing of even deeper and more damaging cuts in particular districts with high need and regressive state funding formulas.

## 2. *Teachers Matter Most*

Money matters, first of all, because roughly 80% of state and local education budgets are spent on teachers.<sup>102</sup> The effect of teachers on student outcomes, unlike other education policies, is not in question. Voluminous social science findings confirm that teacher quality is the most important school resource affecting student achievement.<sup>103</sup> The National Commission on Teaching and America's Future summarized the research this way: "1) What teachers know and can do is the most important influence on what students learn[;] 2) Recruiting, preparing, and retaining good teachers is the central strategy for improving our schools[;] and 3) School reform cannot succeed unless it focuses on creating the conditions in which teachers can teach, and teach well."<sup>104</sup>

100. C. Kirabo Jackson et al., *Boosting Educational Attainment and Adult Earnings*, 15 EDUC. NEXT 69, 72 (2015), <http://educationnext.org/boosting-education-attainment-adult-earnings-school-spending/>. Smaller scale studies of individual states have reached similar conclusions. Michael A. Rebell & Bruce D. Baker, *Assessing "Success" in School Finance Litigations*, EDUC. WK. (July 8, 2009), <http://www.edweek.org/ew/articles/2009/07/08/36rebell.h28.html>.

101. LEACHMAN & MAI, *supra* note 36, at 1.

102. *See, e.g.*, Wyoming v. Campbell Cty. Sch. Dist., 19 P.3d 518 (Wyo. 2001); NAT'L CTR. FOR EDUC. STATISTICS, THE CONDITION OF EDUCATION: PUBLIC SCHOOL EXPENDITURES (2015), [http://nces.ed.gov/programs/coe/indicator\\_cmb.asp](http://nces.ed.gov/programs/coe/indicator_cmb.asp).

103. *See generally* Linda Darling-Hammond, *Teacher Quality and Student Achievement: A Review of State Policy Evidence*, 8 EDUC. POL'Y ANALYSIS ARCHIVES 1 (2000) (finding teacher quality to be strongly related to student achievement); Steven G. Rivkin et al., *Teachers, Schools, and Academic Achievement*, 73 ECONOMETRICA 417 (2005); S. Paul Wright et al., *Teachers and Classroom Context Effects on Student Achievement: Implications for Teacher Evaluation*, 11 J. PERSONNEL EVAL. EDUC. 57 (1997).

104. NAT'L COMM'N ON TEACHING & AMERICA'S FUTURE, WHAT MATTERS MOST: TEACHING FOR AMERICA'S FUTURE 10 (1996), <http://nctaf.org/wp-content/uploads/WhatMattersMost.pdf>.

Consistent exposure to low- or high-quality teaching over the course of years also has a compounding effect for individual students.<sup>105</sup> One prominent study found that “having a top-quartile teacher rather than a bottom-quartile teacher four years in a row would be enough to close the black-white test score gap.”<sup>106</sup> Another found that elementary students assigned to high-performing teachers for three straight years will achieve fifty percentile points higher on standardized tests than students assigned to low-performing teachers.<sup>107</sup> The sad reality, however, is that students attending predominantly poor and minority schools are assigned to novice, unqualified, and “out-of-field” teachers at twice the rate of students in low poverty schools and predominantly white schools.<sup>108</sup> As the following parts demonstrate, recent funding cuts have made access to teachers, much less quality teachers, extremely challenging for many schools.

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105. DANIEL F. MCCAFFREY ET AL., CARNEGIE CORP., RAND EDUCATION, EVALUATING VALUE-ADDED MODELS FOR TEACHER ACCOUNTABILITY (2003), [http://www.rand.org/content/dam/rand/pubs/monographs/2004/RAND\\_MG158.pdf](http://www.rand.org/content/dam/rand/pubs/monographs/2004/RAND_MG158.pdf); John F. Kain, The Impact of Individual Teachers and Peers on Individual Student Achievement, Paper Presented at the Association for Public Policy Analysis and Management 20th Annual Research Conference, New York (Oct. 31, 1998); Robert L. Mendro et al., An Application of Multiple Linear Regression in Determining Longitudinal Teacher Effectiveness, Paper Presented at the 1998 Annual Meeting of the AERA California (Apr. 1998).

106. ROBERT GORDON ET AL., THE HAMILTON PROJECT, THE BROOKINGS INST., IDENTIFYING EFFECTIVE TEACHERS USING PERFORMANCE ON THE JOB 8 (2006), [https://www.brookings.edu/wp-content/uploads/2016/06/200604hamilton\\_1.pdf](https://www.brookings.edu/wp-content/uploads/2016/06/200604hamilton_1.pdf).

107. WILLIAM L. SANDERS & JUNE C. RIVERS, CUMULATIVE AND RESIDUAL EFFECTS OF TEACHERS ON FUTURE STUDENT ACADEMIC ACHIEVEMENT 3, 6–7 (1996), [http://www.cgp.upenn.edu/pdf/Sanders\\_Rivers-TVASS\\_teacher%20effects.pdf](http://www.cgp.upenn.edu/pdf/Sanders_Rivers-TVASS_teacher%20effects.pdf). See also Eric A. Hanushek, *Valuing Teachers: How Much Is a Good Teacher Worth?*, 11 EDUC. NEXT 41, 43 (2011); ROBIN CHAIT, CTR. AM. PROGRESS, REMOVING CHRONICALLY INEFFECTIVE TEACHERS: BARRIERS AND OPPORTUNITIES 2 (2010), [https://cdn.americanprogress.org/wp-content/uploads/issues/2010/03/pdf/teacher\\_dismissal.pdf](https://cdn.americanprogress.org/wp-content/uploads/issues/2010/03/pdf/teacher_dismissal.pdf) (“[D]ismissing the bottom quartile of novice teachers in the district after their first year based on value-added estimates would result in a net increase in student test score gains of 1.2 percentage points annually across the district.”).

108. Charles T. Clotfelter et al., *High-Poverty Schools and the Distribution of Teachers and Principals*, 85 N.C. L. REV. 1345 (2007); HEATHER G. PESKE & KATI HAYCOCK, EDUC. TR., TEACHING INEQUALITY: HOW POOR AND MINORITY STUDENTS ARE SHORTCHANGED ON TEACHER QUALITY 2–3 (2006), <http://edtrust.org/wp-content/uploads/2013/10/TQReportJune2006.pdf>. But see Eric Isenberg et al., Do Low-Income Students Have Equal Access to Effective Teachers? Evidence from 26 Districts (Oct. 2016) (finding that minimal differences in the effectiveness of low-income students’ teachers versus other students’ teachers), <file:///C:/Users/blackdw/Downloads/Access%20to%20Effective%20Teachers%20finalrpt.pdf>. The Isenberg study, however, relies on value-added metrics, which have been subject to strong criticisms of unreliability. See Black, *supra* note 5, at 94–102 (articulating and explaining the flaws of value-added and student growth percentile evaluation systems).

### 3. *Widespread Teacher Shortages*

Between 2009 and 2012, states reduced their teaching staffs by about 300,000.<sup>109</sup> In the first year, 37% of school districts planned to cut teachers in core subjects, with that number growing to 61% the next year.<sup>110</sup> The Los Angeles Unified School District, the second largest school district in the nation, shrunk its teaching force by 15% in three years.<sup>111</sup> The economy and state tax revenues have steadily improved since then, but education jobs have been slow to return—slower, in fact, than any other post-recession period of the past fifty years.<sup>112</sup> In 2015, there were still 236,000 fewer education jobs than there were before the recession.<sup>113</sup> When measured against student growth, the numbers are even worse. The most recent estimates indicate a 410,000 shortfall in teaching and education jobs.<sup>114</sup>

The irony is that now that teaching jobs are slowly coming back, districts cannot fill them. Since the recession, senior and prospective teachers have increasingly fled the profession all together. After hiring a meager forty thousand new teachers nationwide in 2014,<sup>115</sup> districts apparently exhausted the labor pool. When school started in 2015, schools across the nation found themselves unable to fill their vacancies.<sup>116</sup> California, for instance, needed to fill 21,500 teaching positions in 2015, but issued credentials to fewer than 15,000 prospective teachers.<sup>117</sup> Las Vegas needs to hire more than 2,500 teachers a year, but the entire state of Nevada is only producing about 750 new teachers a year.<sup>118</sup>

109. Barbara Martinez, *Teacher Seniority Rules Challenged*, WALL ST. J. (Feb. 19, 2010), <http://www.wsj.com/articles/SB10001424052748703315004575073561669221720> (indicating 60,000 school employees were laid off in 2009 alone); Travis Waldron, *Local Governments Have Cut 130,000 Teaching Jobs in the Last Year*, THINK PROGRESS (July 6, 2012), <https://thinkprogress.org/chart-local-governments-have-cut-130-000-teaching-jobs-in-the-last-year-eb5c1e67f8c3#b4x01rent>; INVESTING IN OUR FUTURE, *supra* note 5.

110. ELLERSON, *supra* note 2, at 14.

111. Dan Goldhaber et al., *Lessons Learned from the Great Recession: Layoffs and the RIF-Induced Teacher Shuffle* 41 tbl.1 (Nat'l Ctr. for Analysis of Longitudinal Data in Educ. Res., Working Paper No. 129, July 2015), <http://www.caldercenter.org/sites/default/files/WP%20129.pdf>.

112. *Id.* at 4.

113. Elise Gould, *Disappointing Jobs Numbers and Not Enough Teachers*, EPI: WORKING ECON. BLOG (Oct. 2, 2015), <http://www.epi.org/blog/disappointing-jobs-numbers-and-not-enough-teachers/>.

114. *Id.*

115. *Id.*

116. See, e.g., Eger & Habib, *supra* note 6 (indicating that Tulsa started the year with 150 teaching and 100 support position vacancies and that 856 public school classes in Oklahoma were completely cancelled due to lack of teachers).

117. Rich, *supra* note 1.

118. Anthony Reborá, *Faced With Deep Teacher Shortages, Clark County, Nev., District Looks*

Shortages of this magnitude are creating intense competition between and within states. This competition is amplifying the shortages in less competitive states and districts, pushing them further into staffing deficits. Missouri, for instance, raided Kansas of 4,000 teachers this past year—a 70% jump from recent years.<sup>119</sup> Texas and Arkansas are similarly raiding teachers from districts along the Oklahoma border.<sup>120</sup> North Carolina, once a great place for teachers, has seen the rate of departure to other states jump by 30%.<sup>121</sup>

#### 4. Lowering Teacher Quality

The effect on particular districts in these and other states is even greater. Less desirable districts have been forced to cancel classes, combine classes, or just staff them with any warm body available. Doing so conflicts with any number of state laws and has required these districts to seek wide-scale exemptions from state teaching standards. In more practical terms, this crisis just added insult to injury, driving down teacher quality even further in districts that have long struggled to hire and retain highly qualified teachers.<sup>122</sup>

This past fall, for instance, Oklahoma drastically increased the number of emergency exemptions from the basic education and training standards normally required before a teacher enters the classroom.<sup>123</sup> Kansas went even further and waived teacher license requirements for entire school districts.<sup>124</sup> Superintendents in those districts are now relying on substitute

for Answers, EDUC. WK. (Jan. 25, 2016), <http://www.edweek.org/ew/articles/2016/01/27/faced-with-deep-teacher-shortages-clark-county.html>.

119. Katie Ferrell, *Kansas Teacher Shortage Expected to Get Worse if Funding Issues Aren't Resolved*, FOX4KC (Aug. 3, 2015), <http://fox4kc.com/2015/08/03/kansas-teacher-shortage-expected-to-get-worse-if-funding-issues-arent-resolved/>; AP, *Teacher Shortages Spur Districts Nationwide to Try New Tactics*, CBS NEWS (Aug. 12, 2015), <http://www.cbsnews.com/news/teacher-shortages-spur-districts-nationwide-to-try-new-tactics/>.

120. Eger & Habib, *supra* note 6.

121. Arika Herron, *More Teachers Leaving for Other Districts, Other States, Other Jobs*, WINSTON-SALEM J. (Oct. 1, 2015), [http://www.journalnow.com/news/local/more-teachers-leaving-for-other-districts-other-states-other-jobs/article\\_3c7e326a-4b4e-5709-945f-8890280a61b0.html](http://www.journalnow.com/news/local/more-teachers-leaving-for-other-districts-other-states-other-jobs/article_3c7e326a-4b4e-5709-945f-8890280a61b0.html).

122. Charles T. Clotfelter et al., *Who Teaches Whom?: Race and the Distribution of Novice Teachers*, 24 ECON. OF EDUCATION REV. 377–392 (2005); ERICA FRANKENBERG, THE CIVIL RIGHTS PROJECT AT HARVARD UNIV., THE SEGREGATION OF AMERICAN TEACHERS 25–26 (2006), <http://www.racialequitytools.org/resourcefiles/frankenber.pdf>.

123. Eger & Habib, *supra* note 6 (in a month and a half, the Oklahoma Department of Education received 526 requests for exemptions).

124. Coburn Palmer, *New Kansas Education Law Opens Classrooms to Unlicensed Teachers, State Faces Major Teacher Shortage*, INQUISITR (July 17, 2015), <http://www.inquisitr.com/2261038/>

teachers as primary instructors.<sup>125</sup> California is similarly issuing more emergency permits,<sup>126</sup> but has adopted a separate, much larger, program that formalizes the practice of putting previously uncertified individuals in the classroom. The state is placing interested individuals directly into the classroom as “interns,” while they take teacher preparation courses during nights and weekends.<sup>127</sup> In 2013–14, these interns made up 20% of the individuals to whom the state granted teaching credentials.<sup>128</sup>

These noncredentialed teachers are also entering larger classrooms now. Layoffs during the recessions drove up average class sizes.<sup>129</sup> The combination of growth in student population and current teacher shortages are keeping class sizes bigger. Between 2000 and 2008, the national average for class size steadily dropped, but those gains were completely wiped away in just two years of the recession.<sup>130</sup> Since then, the national average class size has remained flat, as teacher hiring has been unable to offset increases in student enrollment.<sup>131</sup> And as suggested above, the shortages are not felt evenly. Class sizes have risen dramatically in less desirable states and districts.<sup>132</sup>

The problem of shortages, lower teacher credentials, and bigger class sizes may get even worse in the coming years. The number of students pursuing careers in education has sharply decreased over the past decade. From 2010 to 2014, California experienced a 55% drop in the number of students pursuing and completing education degrees.<sup>133</sup> Indiana

new-kansas-education-law-opens-classrooms-to-unlicensed-teachers-state-faces-major-teacher-shortage/  
(granting six districts an exemption).

125. Klein, *supra* note 7.

126. Rich, *supra* note 1 (“[T]he number of emergency temporary permits issued to allow noncredentialed staff members to fill teaching posts jumped by more than 36 percent from 2012 to 2013.”).

127. *Id.*; SUCKOW & PURDUE, *supra* note 5, at 5.

128. SUCKOW & PURDUE, *supra* note 5, at 1 (marking 2013–14 as the tenth straight year of decline in teacher certificates).

129. INVESTING IN OUR FUTURE, *supra* note 5, at 2.

130. *Id.*

131. NAT’L EDUC. ASS’N, RANKINGS & ESTIMATES: RANKINGS OF THE STATES 2013 AND ESTIMATES OF SCHOOL STATISTICS 2014 71–75 (2014), <http://www.nea.org/assets/docs/NEA-Rankings-and-Estimates-2013-2014.pdf>.

132. Eger & Habib, *supra* note 6; Klein, *supra* note 7; KAN. CTR. FOR ECON. GROWTH, QUALITY AT RISK: IMPACT OF EDUCATION CUTS 3–4 (Sept. 2014), <http://realprosperityks.com/wp-content/uploads/2014/09/KCEG-school-funding-report3.pdf> (indicating that Kansas currently has 19,000 more students than it did at the beginning of the recession, but 655 fewer teachers); Rebell, *supra* note 52, at 1858 (“[A]verage class sizes in Los Angeles have bumped up toward thirty and were over forty in some high schools.”).

133. TITLE II HIGHER EDUCATION ACT, *supra* note 9; SUCKOW & PURDUE, *supra* note 5, at 17 (from 44,692 in 2008 to 19,933 in 2012).



experienced similarly drastic drops.<sup>134</sup> U.S. Department of Education data reveals that these states are not alone. The number of people pursuing education degrees nationally has dropped 30%.<sup>135</sup> Thus far, these trends have proven immune to market demand.<sup>136</sup>

### 5. *Unmet Student Need*

Larger classes with fewer qualified teachers are also arising at the same time that student need is increasing.<sup>137</sup> Between 2001 and 2011, the South saw a 33% growth in poor students, the West 31%, the Midwest 40% and the Northeast 21%.<sup>138</sup> By 2013, low-income students had become the majority in our nation's public schools.<sup>139</sup> In several states, low-income students are approaching or have become a super-majority.<sup>140</sup>

This growth in poverty also coincided with an increase in poverty concentration and racial segregation in particular schools. At the beginning of the recession, one in five low-income students attended a school whose overall student population was at least 30% poor.<sup>141</sup> By 2012, that number jumped to more than one in three.<sup>142</sup> At the other end of the spectrum, the percent of low-income students attending predominantly middle income schools shrunk considerably.<sup>143</sup> Similar trends in increased racial isolation occurred as well.<sup>144</sup> The average African-American or Latino student

134. In Indiana, Ball State University has experienced a 45% enrollment drop in elementary and kindergarten teacher-preparation, and the state a "63[%] drop in first-time teaching licenses issued by the state over a five-year stretch beginning in 2009." Jeff Wiehe, *Teacher Shortage Worries Schools*, JOURNAL GAZETTE (July 19, 2015), <http://www.journalgazette.net/news/local/Teachershortageworries-schools-7766086>.

135. TITLE II HIGHER EDUCATION ACT, *supra* note 9.

136. *See, e.g.*, SUCKOW & PURDUE, *supra* note 5; Darling-Hammond, Sutchter, & Carver-Thomas, *supra* note 1 (finding the 2015 teacher crisis was repeating itself in 2016).

137. *See, e.g.*, CHRIS DUNCOMBE & MICHAEL CASSIDY, THE COMMONWEALTH INST., MISSING CLASS 1 (Nov. 2015), [http://www.thecommonwealthinstitute.org/wp-content/uploads/2015/11/missing\\_class\\_v4\\_FINAL.pdf](http://www.thecommonwealthinstitute.org/wp-content/uploads/2015/11/missing_class_v4_FINAL.pdf) ("Taking into account growing student enrollment, Virginia's schools are missing over 11,000 positions, including 4,200 teachers" and "the number of economically disadvantaged students has risen by 39 percent.").

138. S. EDUC. FOUND., A NEW MAJORITY: LOW INCOME STUDENTS IN THE SOUTH AND NATION 7 (2013), <http://www.southerneducation.org/getattachment/817a35f1-abb9-4d6a-8c2e-5514d4a6d7d9/Test-Publication-4.aspx>.

139. *Id.* at 5–6.

140. *Id.*

141. BAKER ET AL., *supra* note 4, at 5.

142. *Id.*

143. *Id.*

144. GARY ORFIELD & ERICA FRANKENBERG, THE CIVIL RIGHTS PROJECT, BROWN AT 60: GREAT PROGRESS, A LONG RETREAT AND AN UNCERTAIN FUTURE 10 (2014), <https://civilrightsproject.ucla>.

attended a school that was predominantly minority, whereas the average White student attended a school that was 72.5% white.<sup>145</sup> In short, less qualified teachers are not only being asked to teach more students; they are being asked to teach in environments with far more student need.

#### *D. A War on Public Education and Teachers?*

Many see the foregoing school finance cuts and their effects on teachers as an attack on public education and teachers themselves.<sup>146</sup> The divergent trends in funding between traditional public education and alternatives to traditional public education in the form of charters and vouchers add credence to these suspicions.<sup>147</sup> But money only tells part of the story. Educational policies to control and sanction traditional public schools have flourished over the past decade and a half, while the strings attached to charters and vouchers are minimal.<sup>148</sup> The result is a rhetoric of failing and inherently flawed traditional public schools on the one hand and high achieving charter schools and vouchers on the other.<sup>149</sup> Actual data, however, shows that similarly situated students in charters perform no better than students in traditional public schools.<sup>150</sup> To the contrary, more often they perform worse.<sup>151</sup> Students attending private schools on vouchers do not perform decidedly better either.<sup>152</sup>

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edu/research/k-12-education/integration-and-diversity/brown-at-60-great-progress-a-long-retreat-and-an-uncertain-future/Brown-at-60-051814.pdf.

145. *Id.* at 12.

146. See, e.g., DIANE RAVITCH, *THE DEATH AND LIFE OF THE GREAT AMERICAN SCHOOL SYSTEM: HOW TESTING AND CHOICE ARE UNDERMINING EDUCATION* (2010); Strauss, *supra* note 61; Danny Feingold, *Robert Reich: Elites Are Waging War on Public Education*, SALON, June 18, 2015, [http://www.salon.com/2015/06/18/robert\\_reich\\_elites\\_are\\_waging\\_war\\_on\\_public\\_education\\_partner](http://www.salon.com/2015/06/18/robert_reich_elites_are_waging_war_on_public_education_partner).

147. See *infra* notes 38–92.

148. See generally Kelly Smith, *Minnesota School Districts Begged; Now They Borrow*, MINN. STAR. TRIB. (Nov. 30, 2011), <http://www.startribune.com/minnesota-school-districts-begged-now-they-borrow/134799543/> (indicating that state was holding onto 40% of the education funding until the following year, which would impose huge borrowing costs on districts).

149. See generally JOHN E. CHUBB & TERRY M. MOE, *POLITICS, MARKETS, AND AMERICA'S SCHOOLS* 3 (1990).

150. NAT'L ASSESSMENT OF EDUC. PROGRESS, U.S. DEP'T OF EDUC., *THE NATION'S REPORT CARD: AMERICA'S CHARTER SCHOOLS—RESULTS FROM THE NAEP 2003 PILOT STUDY* 1, 7 (2004), <http://nces.ed.gov/nationsreportcard/pdf/studies/2005456.pdf>; Erik W. Robelen, *NAEP Gap Continuing for Charters*, 27 EDUC. WK. 1 (2008), [http://www.edweek.org/ew/articles/2008/05/21/38charter\\_ep.h27.html](http://www.edweek.org/ew/articles/2008/05/21/38charter_ep.h27.html).

151. NAT'L ASSESSMENT OF EDUC. PROGRESS, *supra* note 150, at 1, 10.

152. Christopher Lubienski & Peter Weitzel, *The Effects of Vouchers and Private Schools in Improving Academic Achievement: A Critique of Advocacy Research*, 2008 BYU L. REV. 447, 448 (2008).

The attack on teachers has been even more direct in recent years.<sup>153</sup> As tax revenues fell, some state governments saw an opportunity to scale back teachers' salaries and exercise their political influence in ways that were previously unacceptable. States made significant changes to teachers' collective bargaining agreements, their relationships with teacher unions, salary structures, and overall teacher benefits, giving teachers nothing in return.<sup>154</sup> In some states, political leaders pitted teachers as the enemy of the public good during a time of financial crisis.<sup>155</sup>

States also took steps to substantively change the teaching profession itself. States began using students' standardized achievement scores to evaluate individual teacher effectiveness.<sup>156</sup> These evaluations then became the basis for making personnel decisions, including tenure, compensation, and termination.<sup>157</sup> Advocates in some states sought to go even further and eliminate tenure altogether,<sup>158</sup> which would leave teachers with almost no protection against discharge when their students performed poorly.

If these evaluation systems were reliable, teachers might have willingly accepted them. But too many factors go into student learning, and the tests for assessing that learning are too imprecise to reliably identify the effects

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153. See, e.g., Valerie Strauss, *The War on Teachers: Why the Public Is Watching It Happen*, WASH. POST (Mar. 12, 2012), [https://www.washingtonpost.com/blogs/answer-sheet/post/the-war-on-teachers-why-the-public-is-watching-it-happen/2012/03/11/gIQAD3XH6R\\_blog.html](https://www.washingtonpost.com/blogs/answer-sheet/post/the-war-on-teachers-why-the-public-is-watching-it-happen/2012/03/11/gIQAD3XH6R_blog.html)[https://www.washingtonpost.com/blogs/answer-sheet/post/the-war-on-teachers-why-the-public-is-watching-it-happen/2012/03/11/gIQAD3XH6R\\_blog.html](https://www.washingtonpost.com/blogs/answer-sheet/post/the-war-on-teachers-why-the-public-is-watching-it-happen/2012/03/11/gIQAD3XH6R_blog.html).

154. See, e.g., *Madison Teachers Inc. v. Walker*, 851 N.W.2d 337 (Wis. 2014) (litigation over legislative changes to collective bargaining rights); NAT'L COUNCIL ON TEACHER QUALITY, *THE RECESSION'S IMPACT ON TEACHER SALARIES 1* (2013), [http://www.nctq.org/dmsView/The\\_Recessions\\_Impact\\_On\\_Teacher\\_Salaries\\_NCTQ\\_Report](http://www.nctq.org/dmsView/The_Recessions_Impact_On_Teacher_Salaries_NCTQ_Report) (finding 80% of districts enacted "a total pay freeze or pay cut in at least one of the school years between 2008–09 and 2011–12" and 95% froze or cut previously automatic cost of living and experience based raises); Deborah R. Gerhardt, *Pay Our Teachers or Lose Your Job*, SLATE (Jan. 5, 2014), [http://www.slate.com/articles/life/education/2014/01/north\\_carolina\\_s\\_assault\\_on\\_teachers\\_has\\_to\\_stop.html](http://www.slate.com/articles/life/education/2014/01/north_carolina_s_assault_on_teachers_has_to_stop.html).

155. Kenneth G. Dau-Schmidt & Winston Lin, *The Great Recession, the Resulting Budget Shortfalls, the 2010 Elections and the Attack on Public Sector Collective Bargaining in the United States*, 29 HOFSTRA LAB. & EMP. L.J. 407 (2012); David A. Gamson, *The Dismal Toll of the War on Teachers*, NEWSWEEK (Oct. 5, 2015), <http://www.newsweek.com/dismal-toll-war-teachers-379951>.

156. See Benjamin M. Superfine, *New Directions in School Funding and Governance: Moving from Politics to Evidence*, 98 KY. L.J. 653, 665 (2010).

157. *Id.*

158. *Vergara v. State*, No. BC484642, 2014 WL 6478415 (Cal. Sup. Ct. Aug. 27, 2014); *N.C. Ass'n of Educators, Inc. v. State*, 776 S.E.2d 1 (N.C. Ct. App. 2015) *cert. granted*, 775 S.E.2d 831 (N.C. 2015) (reversing statute that eliminated tenure and teachers' other statutory protections); Al Baker, *Lawsuit Challenges New York's Teacher Tenure Law*, N.Y. TIMES (July 3, 2014), [http://www.nytimes.com/2014/07/04/nyregion/lawsuit-contests-new-yorks-teacher-tenure-laws.html?\\_r=0](http://www.nytimes.com/2014/07/04/nyregion/lawsuit-contests-new-yorks-teacher-tenure-laws.html?_r=0); Haley Sweetland Edwards, *The War on Teacher Tenure*, TIME (Oct. 30, 2014), <http://time.com/3533556/the-war-on-teacher-tenure/>.

of individual teachers on student outcomes.<sup>159</sup> Evidence shows that teacher effectiveness ratings can inexplicably vary by large margins from year to year and test to test,<sup>160</sup> so much so that a teacher could be recognized as outstanding one year only to be labeled underperforming the next year.<sup>161</sup>

In short, states have asked teachers to do more with less: more students, higher expectations, more accountability, and a lower salary with less security. In addition, teachers' jobs seemingly hang in the balance of students' tests scores and courts' willingness to intervene. During this policy shift, teachers' job satisfaction has steadily decreased, reaching an all-time low in recent years<sup>162</sup> and prompting many to quit the profession altogether.<sup>163</sup> The actual experience of teachers indicates that the profession has become undesirable, if not inhospitable, in certain respects. Thus, it is no surprise that as states begin to hire new teachers there are far too few people willing to accept the offer.

## II. CONSTITUTIONAL IMPLICATIONS OF EDUCATIONAL CRISIS

Were education like any other public service, the drastic retraction during the recession and meager rebound afterward might be acceptable. But education is distinct from any other government activity. All fifty state constitutions specifically obligate the state to provide education for its citizens.<sup>164</sup> The simple operation of schools, however, is not enough.

159. Black, *supra* note 5 at 95.

160. Eva L. Baker et al., *Problems with the Use of Student Test Scores to Evaluate Teachers 2* (Econ. Pol'y Inst. Briefing Paper No. 278, 2, 2010).

161. *See, e.g.*, *Houston Fed'n of Teachers v. Houston Indep. Sch. Dist.*, No. 4:2014cv01189 (S.D. Tex. Apr. 30, 2014) (recounting the experience of a plaintiff teacher in the district who had previously received an award for excellent teaching).

162. The 2012 MetLife Survey of Teachers found that teacher job satisfaction declined from 62% in 2008 to 39% by 2012, the lowest in the 25-year history of the survey. METLIFE, INC., THE METLIFE SURVEY OF THE AMERICAN TEACHER 45 (2012) <https://www.metlife.com/assets/cao/foundation/MetLife-Teacher-Survey-2012.pdf>.

163. Overall teacher attrition has been relatively high for some time and has remained relatively flat over the last decade, but there was a significant change among senior teachers who began exiting at a significantly higher rate. Matthew Di Carlo, *Update on Teacher Turnover in the US*, ALBERT SHANKER INST. (Jan. 22, 2015), <http://www.shankerinstitute.org/blog/update-teacher-turnover-us> (from 27.8% to 38.3%).

164. Thro, *supra* note 19, at 1661 (indicating forty-nine states have a constitutional education duty). The number of state constitutions imposing an education duty or right has shifted between forty-nine and fifty over the past several decades. The shift is attributable to Mississippi. The Mississippi Constitution of 1890 included an education clause, but that clause was erased from the constitution in 1960 in response to *Brown v. Board of Education*. Hon. Michael P. Mills, William Quin, II, *The Right to a "Minimally Adequate Education" As Guaranteed by the Mississippi Constitution*, 61 ALB. L. REV. 1521, 1525–26 (1998); *see also* T.H. Freeland, III et al., *Seeking Educational Funding Equity in Mississippi: "I Asked for Water, You Gave Me Gasoline"*, 58 MISS. L.J. 247, 258–59 (1988). In 1987,

Many of those state constitutions specifically describe education as the state's foremost obligation.<sup>165</sup> Others describe the education to be delivered as high quality, efficient, or thorough to prepare students for their future roles as citizens and competitors in the work place.<sup>166</sup> The legislative histories behind those constitutional clauses are equally strong in setting high expectations and state duties in education.<sup>167</sup>

On the strength of these clauses and their histories, state supreme courts in a majority of the states have forced state legislatures to improve school funding, teacher quality, teacher salaries, and general educational opportunity.<sup>168</sup> In a number of states, supreme courts have done so repeatedly over a course of years.<sup>169</sup> To be clear, some state courts have refused to enforce these education clauses, but their reluctance stems from questions of judicial authority and manageable standards for enforcing the rights, not some sense that a constitutional duty on the part of the state is missing or that students do not have a right to education.<sup>170</sup>

These education clauses and the past judicial enforcement of them raise the question of how education funding, teacher quality, access to teachers, and class sizes could retract so far during and after the recession without judicial intervention. Do courts lack the institutional power and courage to intervene in education during times of financial crisis? Did some flaw in precedent prior to the recession create the conditions for current failures? Or, worst of all, are states' education duties contingent in certain respects? If the answer to any of these questions is yes, constitutional education rights and duties are far weaker than previously theorized by scholars and articulated by courts. This weakness would also signal the need for new

Mississippi amended its constitution to once again include what appeared to be an education duty. MISS. CONST. art. VIII, § 201 ("The Legislature shall, by general law, provide for the establishment, maintenance and support of free public schools upon such conditions and limitations as the Legislature may prescribe."). That change brought the total states under an education duty back to fifty.

165. See, e.g., GA. CONST. art. VIII, § 1, para. 1 ("The provision of an adequate public education for the citizens shall be a primary obligation of the State of Georgia."); FLA. CONST. art. IX, § 1 ("paramount duty of the state" to provide adequate education); Nev. Const. art XII, Sec. 6 (requiring education to be funded before any other programs are funded).

166. Thro, *supra* note 19, at 1663 n.111.

167. INST. FOR EDUC. EQUITY & OPPORTUNITY, EDUCATION IN THE 50 STATES: A DESKBOOK OF THE HISTORY OF STATE CONSTITUTIONS AND LAWS ABOUT EDUCATION (2008), [http://www.pilcop.org/wp-content/uploads/2012/04/EDU\\_50State.pdf](http://www.pilcop.org/wp-content/uploads/2012/04/EDU_50State.pdf) (detailing the history of each state's education clause).

168. Rebell, *supra* note 20, at 1500–05.

169. *Id.*

170. See *id.* at 1485–86 (when states have won these cases it has been "because of either (1) separation of powers principles that hold that these issues should be determined exclusively by the legislative and executive branches, and not by the courts; or (2) the tradition of local control of education.").

doctrinal developments to prevent further retraction and the devolution of education rights and duties into nothing more than political questions. At that point, judicial intervention would, even in good times, place the legitimacy of judicial decision making even further into question.

The following parts take up these questions and problems. Part II.A surveys school funding litigation outcomes during and after the recession, finding that courts have taken a far more pro-defendant approach than they had in the past. Given the egregious facts described above, this stance suggests a growing willingness to tolerate constitutional violations during economic crisis. Part II.B addresses whether education rights are contingent and, if not, whether they may still be subject to certain limits. Based on that analysis, Part II.C theorizes why education duties and rights have been under-enforced in recent years.

#### A. *Judicial Reticence*

In the two decades prior to the recession, state supreme courts consistently affirmed adequacy and equity challenges to state education systems. By Michael Rebell's count, plaintiffs succeeded more than 60% of the time prior to 2008.<sup>171</sup> The post-recession data set is much smaller, but between 2008 and 2012, plaintiffs lost about two-thirds of the time in high courts.<sup>172</sup> Equally troubling is that, notwithstanding the end of the recession, the trend has not substantially improved since 2012. Although only time will tell, the recession potentially triggered a new long-term norm. If so, constitutional education rights and duties in some states could be functionally irrelevant.

Since the recession, plaintiffs have suffered complete or substantial losses before the highest courts in six states.<sup>173</sup> They have won complete

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171. *Id.* at 1500.

172. This calculation excludes initial holdings that plaintiffs can survive a motion to dismiss. The early procedural wins have turned into substantive losses later in some states. *Compare* *Lobato v. State*, 218 P.3d 358 (Colo. 2009) (en banc) (overturning lower court decision that had dismissed plaintiffs' claims as non-justiciable) *with* *Lobato v. State*, 304 P.3d 1132, 1144 (Colo. 2013) (holding that on the merits "the current public school financing system complies with the Education and Local Control Clauses of the Colorado Constitution").

173. *Dwyer v. State*, 357 P.3d 185 (Colo. 2015); *Lobato v. State*, 304 P.3d 1132, 1144 (Colo. 2013); *Bonner v. Daniels*, 907 N.E.2d 516, 522 (Ind. 2009); *Abbott v. Burke*, 20 A.3d 1018 (N.J. 2011); *Davis v. State*, 804 N.W.2d 618 (S.D. 2011); *Woonsocket Sch. Comm. v. Chafee*, 89 A.3d 778, 793–94 (R.I. 2014); *Morath v. Texas Taxpayer & Student Fairness Coal.*, 490 S.W.3d 826 (Tex. 2016). As discussed, *infra*, New Jersey reasonably could have been counted as a victory. The result in the case was mixed. South Carolina's result was similarly mixed, with an initial finding of a constitutional deprivation but a later finding that the state's minimal attention to the issue was sufficient. . *Compare* *Abbeville Cty. Sch. Dist. v. State*, 767 S.E.2d 157, 161 (S.C. 2014) with

victories in only two states and a nominal victory in a third.<sup>174</sup> The mere occurrence of losing does not necessarily signal a shift. After all, state wins could be attributable to states making appropriate improvements in education after earlier losses. The facts and substance of the recent decisions, however, suggests otherwise. For instance, Rhode Island and South Dakota's supreme courts acknowledged their states' affirmative duty to meet student need and deliver quality education opportunities, as well as compelling evidence that the states may have failed in those respects.<sup>175</sup> In fact, South Dakota was amongst the nation's worst in terms of education funding cuts between 2008 and 2015 and was next to last in terms of funding effort.<sup>176</sup> Yet, both courts rejected plaintiffs' claims. The Rhode Island Supreme Court simply indicated that these concerns should be directed to some other branch of government.<sup>177</sup> The South Dakota Supreme Court applied an unusually high burden of proof and indicated that it was "unable to conclude that the education funding system . . . fails to correlate to actual costs or with adequate student achievement"<sup>178</sup> enough to declare the system unconstitutional. The Indiana Supreme Court was the third to outright reject plaintiffs' claims and did not even reach the facts, concluding that state education clause does "not . . . create a constitutional right to be educated to a certain quality or other output standard."<sup>179</sup>

The two other losses, however, may be more significant because they represent, in effect, a direct reversal of education rights. One of those losses was in Colorado and came as a surprise given the positive support education claims had previously received in the state. Most notably, in

Abbeville Cty. Sch. Dist. v. State, Case No. 2007-06519, Order (Sept. 20, 2016). This article counts South Carolina as a nominal victory. Regardless of how one counts these cases, the overall trend in school finance cases remains the same: negative. Although not discussed above the line, it is also worth noting that plaintiffs in Arizona also unquestionably saw their longstanding string of finance wins come to an end and future possibilities cut off. *See, e.g.*, *Horne v. Flores*, 129 S. Ct. 2579 (2009); *Flores v. Huppenthal*, 789 F.3d 994, 997–98 (9th Cir. 2015). But that litigation, while relying in part on state theories, has been litigated based on a federal statute.

174. *Gannon v. State*, 319 P.3d 1196 (Kan. 2014); *McCleary v. State*, 269 P.3d 227 (Wash. 2012); *Abbeville Cty. Sch. Dist. v. State*, 767 S.E.2d 157, 161 (2014). This count does not include procedural victories, as they later turned into losses on the merits in some states.

175. *Davis*, 804 N.W.2d at 641 (recognizing "struggle[s] to provide adequate facilities and qualified teachers," and "serious questions about whether the state aid formula is based on actual costs"); *Woonsocket*, 89 A.3d at 793–94 (claims and evidence of inadequate "funding required to meet state mandates.").

176. BRUCE BAKER ET AL., *IS SCHOOL FUNDING FAIR?: A NATIONAL REPORT CARD* 22 (2d ed. 2012); BAKER ET AL., *supra* note 3, at 27; LEACHMAN & MAI, *supra* note 36, at 2.

177. *Woonsocket*, 89 A.3d at 793–94.

178. *Davis*, 804 N.W.2d at 641.

179. *Bonner*, 907 N.E.2d at 522.

2009, the Colorado Supreme Court had held that an adequacy challenge was justiciable and could move forward to trial.<sup>180</sup> Plaintiffs then presented extensive evidence of inequalities and won at trial. The trial record revealed that rather than providing “qualified teachers, up-to-date textbooks, access to modern technology, and safe and healthy facilities in which to learn,” the Colorado “education system . . . is fundamentally broken[,] plagued by underfunding and marked by gross funding disparities among districts.”<sup>181</sup>

In 2013, notwithstanding strong evidence and its prior decision, the Colorado Supreme Court reversed the lower court and ruled against the plaintiffs.<sup>182</sup> It avoided serious review of educational inequalities by adopting a far more permissive concept of a “thorough and efficient” education than other courts.<sup>183</sup> It was enough, according to the court, that the state maintained a uniform funding formula.<sup>184</sup> In a separate case in 2015, the Colorado Supreme Court went even further, holding that a net reduction in statewide per-pupil expenditures was permissible, despite a recent constitutional amendment that mandated education spending rise at or above inflation annually.<sup>185</sup> In short, Colorado opened the door to school funding litigation in 2009, only to slam it shut twice with tortured reasoning.

The other state to reverse course was New Jersey. Since the 1970s, the New Jersey Supreme Court has been the most aggressive of any in enforcing education rights and duties.<sup>186</sup> But in 2011, its enforcement

180. *Lobato v. State*, 218 P.3d 358 (Colo. 2009) (en banc). This holding was particularly significant given that a much earlier case had rejected a challenge to the state school finance system. *Lujan v. Colorado State Bd. of Educ.*, 649 P.2d 1005 (Colo. 1982) (en banc).

181. *Lobato*, 304 P.3d at 1144 (Bender, C.J., dissenting).

182. *Id.* at 1136.

183. Compare *id.* at 1138–39 with *Pauley v. Kelly*, 255 S.E.2d 859, 865–77 (W. Va. 1979) (surveying other states’ interpretation of thorough and uniform in the context of education). In fact, the court had previously favorably cited to *Pauley* as recently as 2008. *Lobato v. State*, 218 P.3d 358, 372 (Colo. 2009). Also curious is how fast the court reached its decision. The court heard arguments in early March and issued its sixty-six page opinion less than three months later.

184. *Lobato v. State*, 304 P.3d 1132, 1141 (Colo. 2013) (“The public school financing system is . . . ‘thorough and uniform’ . . . because it funds a system of free public schools that is of a quality marked by completeness, is comprehensive, and is consistent across the state. It does so using a multi-faceted statutory approach that applies uniformly to all of the school districts in Colorado.”).

185. *Dwyer v. State*, 357 P.3d 185, 193 (Colo. 2015). In 2000, the voters had amended the constitution to provide per-pupil funding “shall grow annually at least by the rate of inflation plus an additional one percentage point.” COLO. CONST. art. 9, § 17.

186. See generally Alexandra Greif, *Politics, Practicalities, and Priorities: New Jersey’s Experience Implementing the Abbott V Mandate*, 22 YALE L. & POL’Y REV. 615 (2004) (indicating that school finance litigation began in 1973 in New Jersey, continued for a quarter century and



showed signs of weakness. In 2008, in response to prior orders of the court, New Jersey passed a new statewide school funding formula that heavily weighted funding based on the percentage of low-income and special needs students in a district.<sup>187</sup> In 2009, the Supreme Court found that the formula was constitutional, but indicated that the real test of its constitutionality would be whether the state fully funded the formula in coming years and confirmed that those funds were sufficient to meet student need.<sup>188</sup>

Within a year, the state made massive cuts to the funding formula. The state reduced the education budget by \$1.1 billion (15%) from the previous year, leaving funding \$1.6 billion below what formulas projected as optimal.<sup>189</sup> When plaintiffs challenged this reduction, the New Jersey Supreme Court's response turned tepid. It wrote:

Although there was no question that [the School Funding Reform Act] had not been funded at the levels called for by the formula, [the court needs] additional information . . . to consider “whether school funding through SFRA, at current levels, can provide for the constitutionally mandated thorough and efficient education for New Jersey school children.”<sup>190</sup>

On that basis, it remanded the case and delayed any potential remedy.<sup>191</sup>

When the case returned to the Supreme Court following a trial, the court's initial signs of reluctance became clearer. According to the special master, the state had cut \$1000 to \$1500 per pupil (depending on a district's poverty concentrations), “moved many districts further away from ‘adequacy,’” and imposed the greatest burdens on at-risk students.<sup>192</sup> But the Supreme Court could not manage more than one vote to restore statewide funding for at-risk students.<sup>193</sup> Two of five justices would have entirely reversed the trajectory of education rights in the state, writing

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included numerous decisions against the state, major legislative overhauls, and concrete remedial demands).

187. N.J. STAT. ANN. § 18A:7F-46 (West 2008).

188. *Abbott ex rel. Abbott v. Burke*, 971 A.2d 989, 992–93 (N.J. 2009) (“Our holding further depends on the mandated review of the formula's weights and other operative parts after three years of implementation” and “a continued commitment by the Legislature and Executive to address whatever adjustments are necessary”).

189. *Abbott ex rel. Abbott v. Burke*, 20 A.3d 1018, 1025–26 (N.J. 2011).

190. *Id.* at 1034.

191. *Id.*

192. *Id.* at 1034–35.

193. *Id.* at 1101 (Albin, J., concurring) (single judge favoring a state-wide remedy, but joining the majority to ensure a remedy for a narrower group of districts).

“this Court embarked on an initially well-intentioned [in 1973] but now fundamentally flawed and misguided approach to addressing the New Jersey Constitution’s promise that ‘[t]he Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years.’”<sup>194</sup> The final tally was a narrow 3–2 decision that restored funding to a subset of school districts, but not all.<sup>195</sup> In short, the court excused \$600 million in cuts to disadvantaged districts.<sup>196</sup>

With that said, one could reasonably count New Jersey as a victory. The court ordered the state to restore \$500 million in funding to the original plaintiff districts and the governor, in relatively short order, acceded to the directive.<sup>197</sup> In that respect, New Jersey stands alone against all other states since the recession. Moreover, this result was most likely only possible due to the strong precedent and management of the case across several decades. Yet, regardless of whether one characterizes New Jersey as a win or loss, the substance of the opinion revealed a substantial shift away from its more aggressive stances of the past and a failure to provide the full remedy that just a few years earlier the court had seemingly mandated.

The most surprising decision, however, may have been in Texas in 2016. Long after the end of the recession but in the midst of continued budget cuts, the Texas Supreme Court issued a decision that may have move school finance precedent and litigation in an entirely new direction in the state.<sup>198</sup> Prior to that decision, the Texas Supreme Court had consistently required the state to improve its school finance system. Since 1989 alone, the Texas Supreme Court has issued six positive school finance decisions.<sup>199</sup> Most recently, in 2005, the court held that the state’s tax system for supporting education was unconstitutional.<sup>200</sup> It wrote “the

194. *Id.* at 1110 (quoting N.J. CONST. art. VIII, § IV, ¶ 1).

195. *Id.* at 1042–43.

196. *Rebell*, *supra* note 52, at 1879.

197. Chris Megerian, Christie says he won't fight N.J. Supreme Court order to add \$500M in funding for poor school districts, *nj.com*, May 24, 2011, [http://www.nj.com/news/index.ssf/2011/05/christie\\_says\\_he\\_will\\_comply\\_w.html](http://www.nj.com/news/index.ssf/2011/05/christie_says_he_will_comply_w.html).

198. *Morath v. Texas Taxpayer & Student Fairness Coal.*, 490 S.W.3d 826 (Tex. 2016).

199. *See, e.g., Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 754 (Tex. 2005); *W. Orange-Cove Consol. I.S.D. v. Alanis*, 107 S.W.3d 558, 562–63 (Tex. 2003); *Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717, 725 (Tex. 1995), *as modified on Feb. 16, 1995*; *Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist.*, 826 S.W.2d 489, 492 (Tex. 1992); *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 391–92 (Tex. 1989), *vacated in part*, 804 S.W.2d 491 (Tex. 1991); *Edgewood Indep. Sch. Dist. v. Kirby*, 804 S.W.2d 491, 492 (Tex. 1991).

200. *Neeley*, 176 S.W.3d at 800.

public education system has reached the point where continued improvement will not be possible without significant change,” and “it remains to be seen whether the system’s predicted drift toward constitutional inadequacy will be avoided by legislative reaction to widespread calls for changes.”<sup>201</sup>

The 2016 decision offered a very different view. It overturned a trial court decision that had ruled in plaintiffs favor based on evidence that Texas schools were underfunded by \$3.6 billion in 2010 and, after budget cuts, would be \$6.1 billion underfunded in subsequent years.<sup>202</sup> The court justified its holding by arguing that separation of powers concerns prevented it from intervening and that the connection between money and student outcomes was far too uncertain.<sup>203</sup> Both points are troubling. Separation of powers concerns had not prevented the court from intervening numerous times in earlier school finance cases. The point about money ignores modern research and instead cites to arguments and relies on evidence that is fifty years old.<sup>204</sup> In short, while the court recounted its prior decisions, its reasoning largely ignored them so as to reach a new disparate set of conclusions.

Plaintiffs’ only outright victories came in Kansas and Washington. Yet, the aftermath of the cases has been equally troubling, as the legislatures in those states defied or evaded the courts’ orders. In 2006, the Kansas Supreme Court issued its fifth school finance decision in five years, finding that the state had finally implemented an appropriate remedy and could be expected to comply with the constitution in the future.<sup>205</sup> When the recession hit and political leadership changed, the state reversed course and imposed major cuts in education funding.<sup>206</sup> This led to new rounds of litigation and, in 2014, the Kansas Supreme Court again struck down the cuts as unconstitutional.<sup>207</sup> But this time, the legislature simply ignored the courts,<sup>208</sup> and later even threatened them with changes to judicial funding

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201. *Id.* at 790.

202. *Morath*, 490 S.W.3d at 850.

203. *Id.* at 851–53.

204. *Id.* at 851–52.

205. *Montoy v. State*, 138 P.3d 755, 757–60 (Kan. 2006) (discussing the case history).

206. See generally David Sciarra & Wade Henderson, *What’s the Matter with Kansas’ Schools?*, N.Y. TIMES (Jan. 7, 2014), <http://www.nytimes.com/2014/01/08/opinion/whats-the-matter-with-kansas-schools.html>.

207. *Gannon v. State*, 319 P.3d 1196, 1251 (Kan. 2014).

208. Andrew Ujifusa, *Kansas Lawmakers OK Shift to Block-Grant Funding, But Court Fight Looms*, EDUC. WK. (Mar. 17, 2015), [http://blogs.edweek.org/edweek/state\\_edwatch/2015/03/kansas\\_lawmakers\\_ok\\_shift\\_to\\_block-grant\\_funding\\_but\\_court\\_fight\\_looms.html](http://blogs.edweek.org/edweek/state_edwatch/2015/03/kansas_lawmakers_ok_shift_to_block-grant_funding_but_court_fight_looms.html). The most the state has done to acquiesce is to propose a two year “time-out” while it determined the best course of action.

and appointment.<sup>209</sup> Thus, notwithstanding a strong judicial stance, Kansas has become one of the most hostile states toward public education.<sup>210</sup> Not until the court threatened to enjoin public schools from opening in fall 2016 did the governor and legislature partially relent in the ongoing battle.<sup>211</sup>

Washington's legislature has not been as hostile, but it has been recalcitrant. In 2012, the Washington Supreme Court declared the state education system unconstitutional and set 2018 as the deadline for full implementation of a remedy.<sup>212</sup> To ensure compliance and progress, it retained jurisdiction in the case.<sup>213</sup> Two years later, the state had done almost nothing.<sup>214</sup> Thus, in 2014, the court held the state in contempt.<sup>215</sup> A year later in 2015, the state still had not acted, prompting the court to fine the state \$100,000 a day until it came forward with a remedial plan.<sup>216</sup> With fines mounting, the state still had not acted months later.<sup>217</sup> Again, this court's resoluteness has not been enough to ensure that the state will carry out its constitutional duty.

The last decision of note, *Abbeville Cty. Sch. Dist. v. State*, was technically a victory for the students of South Carolina, but the long history of the case has been very disappointing for the plaintiffs. The court's 2014 decision ordering the state to act came more than two decades

Rep. Don Hineman, *House Moves to Repeal School Finance Formula* (Mar. 14, 2015), <http://www.hinemanforkansas.org/newsletters/newsletter-2015-03-14.html>.

209. Edward M. Eveld, *Threat by Kansas Lawmakers to Halt Court Funding Draws a Lawsuit from Four State Judges*, KAN. CITY STAR (Sept. 9, 2015), <http://www.kansascity.com/news/politics-government/article34557753.html>; Eligon, *supra* note 24.

210. *See generally* Ujifusa, *supra* note 208; LEACHMAN & MAI, *supra* note 36, at 12 (finding that from 2008 to 2012 Kansas enacted the sixth largest education cuts).

211. Molly Hunter, *Kansas Legislature Meets Court's Equitable Funding Duty Deadline, Allowing Schools to Open in the Fall*, EDUC. L. PROF BLOG (July 8, 2016), [http://lawprofessors.typepad.com/education\\_law/2016/07/kansas-legislature-meets-courts-equitable-funding-duty-deadline-allowing-schools-to-open-in-the-fall.html](http://lawprofessors.typepad.com/education_law/2016/07/kansas-legislature-meets-courts-equitable-funding-duty-deadline-allowing-schools-to-open-in-the-fall.html).

212. *McCleary v. State*, 269 P.3d 227, 231, 261 (Wash. 2012).

213. *Id.* at 261.

214. Andrew Ujifusa, *Washington State High Court Justices Grill Attorney for State on School Funding*, EDUC. WK. (Sept. 3, 2014), [http://blogs.edweek.org/edweek/state\\_edwatch/2014/09/wash\\_st\\_supreme\\_court\\_justices\\_grill.html](http://blogs.edweek.org/edweek/state_edwatch/2014/09/wash_st_supreme_court_justices_grill.html).

215. Order, *McCleary v. State*, No. 84362-7 (Wash. Sept. 11, 2014), <http://www.courts.wa.gov/content/PublicUpload/Supreme%20Court%20News/84362-7%20order%20-%209-11-2014.pdf>.

216. Order, *McCleary v. State*, No. 84362-7 (Wash. Aug. 13, 2015), [http://www.educationjustice.org/newsletters/ej\\_newsblast\\_150814\\_McClearyOrder.pdf](http://www.educationjustice.org/newsletters/ej_newsblast_150814_McClearyOrder.pdf).

217. Betsy Hammond, *Washington Schools Chief Won't Run for Re-election, Blasts Others for Low School Funding*, THE OREGONIAN (Oct. 22, 2015), [http://www.oregonlive.com/education/index.ssf/2015/10/washington\\_schools\\_chief\\_wont.html](http://www.oregonlive.com/education/index.ssf/2015/10/washington_schools_chief_wont.html).

after the plaintiffs first filed their case.<sup>218</sup> This delay, in large part, was due to the court's refusal to decide the case. The court took more than two years to decide whether plaintiffs could proceed to trial in 1999.<sup>219</sup> When the case returned to the court in 2008, the court waited nearly six years to issue an opinion on the merits of a potential remedy—so long that at one point it scheduled a rehearing to refresh itself on the case.<sup>220</sup>

At the very least, the case represents a court reluctant to enforce education rights until well after the recession had passed. If justice delayed is justice denied, the decision is surely a loss. Moreover, the long delayed final decision was ambiguous in its mandate, indicating that “[t]he Defendants and the Plaintiff Districts must identify the problems facing students in the Plaintiff Districts, and can solve those problems through cooperatively designing a strategy to address critical concerns and cure the constitutional deficiency . . . .”<sup>221</sup> The court then allowed almost another full year to pass before issuing a timetable for the parties to devise a remedy,<sup>222</sup> which it inexplicably withdrew just weeks later.<sup>223</sup> Finally, notwithstanding its original demand that the state “design[] a strategy to address critical concerns and cure the constitutional deficiency evident in this case,”<sup>224</sup> the court in September 2016 found the state had complied with its order by simply studying educational deficiencies in the state and approving minor increases in resources.<sup>225</sup>

In sum, school quality and funding may have entered a new era at the start of the recession. Prior to the recession, evidence of stark inequities and inadequacies suggested a strong chance of victory before a state supreme court. Moreover, those outcomes produced a rich body of precedent favoring future enforcement when necessary. Since the recession, stark inequality, deep educational cuts, and precise statutory and constitutional language have not been enough to produce positive outcomes in any more than a few cases. Even when plaintiffs have won in court, they have most often lost before legislatures that have refused to respond. Whether this trend holds in the coming years is uncertain. Many

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218. *School Funding Cases in South Carolina*, ACCESS (Dec. 2015), <http://schoolfunding.info/2011/11/school-funding-cases-in-south-carolina/> (last visited Sept. 17, 2016).

219. The case was appealed in 1997 and decided on April 22, 1999. *Abbeville Cty. Sch. Dist. v. State*, 515 S.E.2d 535, 536 (S.C. 1999).

220. *Abbeville Cty. Sch. Dist. v. State*, 767 S.E.2d 157, 161 (S.C. 2014).

221. *Id.* at 180.

222. *Abbeville Cty. Sch. Dist. v. State*, 777 S.E.2d 547 (S.C. 2015) (setting a timeline).

223. *Abbeville Cty. Sch. Dist. v. State*, 780 S.E.2d 609 (S.C. 2015) (withdrawing timeline).

224. *Abbeville Cty. Sch. Dist. v. State*, 767 S.E.2d 157, 180 (2014).

225. *Abbeville Cty. Sch. Dist. v. State*, Case No. 2007-06519, Order (Sept. 20, 2016).

other cases are pending and will provide courts new opportunities to intervene,<sup>226</sup> but the judicial impotence in recent years has created institutional and enforcement problems that will not easily be overcome.

### *B. Contingent Rights and Duties?*

None of the decisions rejecting adequacy or equity claims in recent years have indicated or directly suggested that the constitutional duties or rights in education are contingent or somehow afforded less weight during times of exigency. But the practical implication has been to do just that. Michael Rebell responded directly to this notion and persuasively argued that “[c]onstitutional rights are not conditional and they do not get put on hold because there is a recession.”<sup>227</sup> The entire point in enshrining a right in a constitution is to remove it from economic, social, and political pressures. Whereas the value of a statutory right may be subject to variance and retraction over time, a constitutional right and the enforcement of it should remain constant.<sup>228</sup> Federal decisions across numerous constitutional contexts confirm this principle.<sup>229</sup> State supreme courts, moreover, have reached this same conclusion in the specific context of education funding. Older cases have held that the financial burden of providing education is not a basis for relieving the state of its constitutional obligation.<sup>230</sup> Rather, education’s special constitutional

226. See, e.g., Conn. Coal. Just. Educ. Funding v. Rell, No. X07-HHD-CV-14-5037565-S (Conn. Super. Ct. filed Jan. 22, 2014); Martinez v. State, No. D-101-CV-2014-00793 (N.M. Dist. Ct. filed Nov. 14, 2014); Maisto v. State, No. 8997-08 (N.Y. Sup. Ct. filed Nov. 6, 2008); Hamilton Cty. Bd. Of Educ. v. Haslam, No. 15-1048-III (Tenn. Ch. Ct. filed Mar. 24, 2015).

227. Rebell, *supra* note 52, at 1861.

228. McCarthy v. Manson, 554 F. Supp. 1275, 1304 (D. Conn. 1982), *aff’d*, 714 F.2d 234 (2d Cir. 1983) (“It is a fundamental principal of constitutional law that constitutional obligations cannot be avoided because of a lack of funding.”).

229. Rebell, *supra* note 52, at 1869 (quoting *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 392 (1992)). See also *Watson v. Memphis*, 373 U.S. 526, 537 (1963) (“[C]onstitutional rights cannot be made dependent upon any theory that it is less expensive to deny than to afford them.”); *Stone v. City & Cnty. of San Francisco*, 968 F.2d 850, 858 (9th Cir. 1992) (“[F]ederal courts have repeatedly held that financial constraints do not allow states to deprive persons of their constitutional rights.”); *Wyatt v. Aderholt*, 503 F.2d 1305, 1315 (5th Cir. 1974) (“[C]onstitutional requirements are not, in this day, to be measured or limited by dollar considerations.”) (citations omitted).

230. *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 208 (Ky. 1989) (“[T]he financial burden entailed in meeting [education] responsibilities in no way lessens the constitutional duty”); *Campbell Cty. Sch. Dist. v. State*, 907 P.2d 1238, 1279 (Wyo. 1995) (“All other financial considerations must yield until education is funded.”).

status requires that states put education ahead of other priorities,<sup>231</sup> including during financial crisis.<sup>232</sup>

Both Rebell and the courts on which he relies proceed under an absolutist approach to education rights. In an absolutist framework, either a constitutional right is inviolate and trumps all countervailing interests or the right does not exist.<sup>233</sup> This understanding of constitutional rights is conventional wisdom in the United States<sup>234</sup> and finds support in the fact that both federal and state constitutions speak in absolute terms.<sup>235</sup> This is also specifically true of many state education clauses.<sup>236</sup> From this absolutist concept follows the notion that constitutional rights “cannot be limited or overridden by competing considerations.”<sup>237</sup>

231. *Campbell Cty. Sch. Dist.*, 907 P.2d at 1279; *Brigham v. State*, 692 A.2d 384, 391–92 (Vt. 1997) (“Only one governmental service—public education—has ever been accorded constitutional status in Vermont”); *West Virginia Educ. Ass’n v. State*, 369 S.E.2d 454 (W. Va. 1988) (emphasizing education’s preferred constitutional status in striking down the state’s across the board cuts to state programs). See also NEV. CONST. art XII, Sec. 6 (requiring education to be funded before any other programs are funded).

232. Rebell, *supra* note 52, at 1871–73 (detailing the history of litigation in Washington and the final trial court decision holding that the state’s constitutional education duty “is not suspended in any part during periods of fiscal crisis, even where the existing tax revenue is not sufficient to fund [all of the] programs that the Legislature believes are necessary to meet the needs of the people”); *Claremont v. Governor*, 794 A.2d 744, 754 (N.H. 2002) (“[F]inancial reasons alone [do not excuse] the constitutional command that the State must guarantee sufficient funding to ensure . . . a constitutionally adequate education”); *Butt v. State*, 842 P.2d 1240, 1251–52 (Cal. 1992) (“The State argues that even if the District’s fiscal problems threatened its students’ basic educational equality, any State duty to redress the discrimination must be judged under the most lenient standard of equal protection review. . . . However, both federal and California decisions make clear that heightened scrutiny applies to State-maintained discrimination whenever the disfavored class is suspect or the disparate treatment has a real and appreciable impact on a fundamental right or interest.”); *Abbott v. Burke*, 798 A.2d 602, 603–04 (N.J. 2002) (rejecting state’s request for budgetary cap on education to ease other constraints).

233. See generally RONALD DWORIN, *Rights as Trumps*, in THEORIES OF RIGHTS 153 (Waldron ed., 1984); RONALD DWORIN, *TAKING RIGHTS SERIOUSLY* (1977). But see Frederick Schauer, *A Comment on the Structure of Rights*, 27 GA. L. REV. 415, 422–25 (1993) (critiquing absolutist theories of rights).

234. Stephen Gardbaum, *The Myth and the Reality of American Constitutional Exceptionalism*, 107 MICH. L. REV. 391, 416–19 (2008); See also Hugo Black, *The Bill of Rights*, 35 NYU L. REV. 865, 874, 879 (1960) (arguing that the First Amendment is absolute and the courts have no power to change it).

235. For instance, the U.S. Constitution states that “Congress shall make no law . . . abridging the freedom of speech” and makes no allowance for exceptions. U.S. CONST. amend. I.

236. GA. CONST. art. VIII, § 1, para. I (“primary obligation of the State of Georgia”); N.J. CONST. art. VIII, § 4, para. 1 (“The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools . . . .”); FLA. CONST. art. IX, § 1 (“paramount duty of the state to make adequate provision for the education of all children residing within its borders”).

237. Gardbaum, *supra* note 234, at 417.

The absolutist framing of education rights as non-contingent, however, owes more to rhetoric than reality.<sup>238</sup> First, while state and federal constitutions are phrased in absolutist terms, courts do not apply them as such.<sup>239</sup> From free speech and freedom of religion to privacy, liberty, and bodily autonomy, federal courts have inferred limits on those rights and instances where the government might infringe them.<sup>240</sup> The same is true, albeit less litigated, at the state level. At best, constitutional rights carry a strong presumption against interference. But not all rights even carry this presumption.<sup>241</sup> Thus, as a practical matter, constitutional rights are not absolute.

Second, the assumption that rights are absolute raises the stakes of new rights recognition and enforcement. The assumption makes courts more reluctant to wade into rights analysis and recognition for fear that doing so eliminates external governmental limits on those rights.<sup>242</sup> Moreover, affirmative constitutional rights, like education, would place immense and unflappable obligations on the government.<sup>243</sup> In this respect, absolutist framing of rights may actually undermine the recognition and enforcement of rights. In other words, advocates who make too strong of a claim on behalf of education rights and duties may actually harm their own position.

The more appropriate framing is not whether education rights are contingent, but the extent to which those rights are subject to limits. One

238. Scott Bauries seems to advocate for a more absolute recognition of education rights, but laments that “an individual right to education under state constitutions is more rhetoric than reality.” Bauries, *supra* note 32, at 953 (emphasis omitted). See also Barry Friedman, *When Rights Encounter Reality: Enforcing Federal Remedies*, 65 S. CAL. L. REV. 735, 738–39 (1992) (“[R]ights receive far less respect than the rhetoric would suggest.”).

239. Gardbaum, *supra* note 234, at 416–19; Stephen Gardbaum, *Limiting Constitutional Rights*, 54 UCLA L. REV. 789, 803–04 (2007); Schauer, *supra* note 233, at 417–18. Even Dworkin allows that his absolute framing of rights must give way to certain limits. DWORKIN, *supra* note 233, at 184–205.

240. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306 (2003) (educational value of diversity overrides prohibitions on consideration of race); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (promoting the life of child justifies burdens on woman’s bodily autonomy); *New York v. Quarles*, 467 U.S. 649 (1984) (public safety justifies failure to appraise defendant of rights); *New York v. Ferber*, 458 U.S. 747, 756–58 (1982) (protection of children overrides First Amendment right).

241. Gardbaum, *supra* note 234, at 416–19.

242. See generally Mark Tushnet, *Social Welfare Rights and the Forms of Judicial Review*, 82 TEX. L. REV. 1895 (2004); see also Helen Hershkoff & Stephen Loffredo, *State Courts and Constitutional Socio-Economic Rights: Exploring the Underutilization Thesis*, 115 PENN. ST. L. REV. 923, 929 (2011) (noting how the recognition of affirmative rights narrows the scope of legislative discretion and power).

243. Tushnet, *supra* note 242; Hershkoff & Loffredo, *supra* note 242, at 932 (noting opposition to constitutionalizing rights because of “the demands that such rights will place on governing institutions.”).



can allow that constitutional rights, by their very nature, are not conditional in any formal or structural sense, but still acknowledge that real-world circumstances arise in which those rights cannot be fully enforced.<sup>244</sup> Thus, the ultimate measure or nature of a right is not its formal or categorical framing, but the way in which it is implemented. Consistent with this notion, Joshua Weishart has minimized the distinctions in the precise language state courts use to describe education rights or duties.<sup>245</sup> He correctly argues that what matters is whether and how the court enforces the constitutional clause in a given state.<sup>246</sup> In other words, a focus on whether rights are formally contingent misses the more important points regarding how the actual enforcement and non-enforcement of education rights shape the meaning and scope of those rights.

As a practical matter, the constitutional rights and duties of education were frequently and vigorously enforced within a majority of states prior to the recession.<sup>247</sup> Thus, education was recognized as a substantiated and an expansive right. Yet, with few exceptions, those cases were not tasked with identifying the circumstances under which education rights and duties might be limited or tempered. If education rights are not absolute, limits must exist. The recession provided ample opportunity for courts to engage this question, but none have. Instead, they have under-enforced rights without any transparent explanation. Moreover, the practical effect of judicial disengagement and under-enforcement is to undermine and retract previously established education rights and duties themselves—even if that is not the judiciary’s intent. More bluntly, rights are of little practical value if there is no remedy for their violation,<sup>248</sup> and judicial disengagement makes the reemergence of those rights more difficult later.<sup>249</sup>

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244. Schauer, *supra* note 233, at 419–21.

245. Joshua E. Weishart, *Reconstituting the Right to Education*, 67 ALA. L. REV. 915, 924 (2016).

246. *Id.* See also Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1221, 1263–64 (1978) (discussing normative value of constitutional rights).

247. Rebell, *supra* note 20.

248. KARL LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* 94 (1960) (“Absence of remedy is absence of right. Defect of remedy is defect of right. A right is as big, precisely, as what the courts will do.”); Levinson, *supra* note 29, at 888–89 (“[T]he practical value of a right is determined by its associated remedies”).

249. A right has often emerged after an initial rejection. Compare *Plessy v. Ferguson*, 163 U.S. 537 (1896) with *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). But the reestablishment of a right does not tend to occur after a longstanding withdrawal of that right. Compare *Milliken v. Bradley*, 418 U.S. 717 (1974) with *Missouri v. Jenkins*, 515 U.S. 70 (1995).

*C. Theorizing the Under-Enforcement of Education Rights and Duties*

The current under-enforcement of education rights and duties is a product of their past under-theorization by courts. As leading scholars have emphasized, the right to education is ill-defined in precedent and operates more on assumption and conjecture than analysis and implementation.<sup>250</sup> The first step in addressing this problem is to clearly separate—in doctrine, assumptions, and conceptions—the right and duty of education from the remedies it might warrant. While rights without remedies are practically meaningless and the two cannot be entirely separated, rights and remedies are conceptually distinct.<sup>251</sup> Rights involve matters of constitutional principle, whereas remedies can implicate public policy.<sup>252</sup> Courts have primary responsibility for articulating the former, while legislatures are tasked with implementing the latter.<sup>253</sup> But when courts incorporate remedial concerns into the separate question of rights identification, courts tend toward an absolutist concept of the right in question, and one in which courts may incorrectly perceive themselves as potentially asserting dominance in both constitutional principle and public policy.

In educational adequacy and equity cases, state supreme courts have long feared the possibility that they might overstep the boundaries of their authority.<sup>254</sup> As the Illinois Supreme Court wrote:

[T]his court has assumed only an exceedingly limited role in matters relating to public education, recognizing that educational policy is almost exclusively within the province of the legislative branch. . . . [Moreover, t]o 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.<sup>255</sup>

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250. Bauries, *supra* note 32, at 977–89; Weishart, *supra* note 245.

251. See Friedman, *supra* note 238, at 738–39; Levinson, *supra* note 29, at 870–72.

252. DWORKIN, *supra* note 233, at 82–84, 90 (“Arguments of principle are arguments intended to establish an individual right; arguments of policy are arguments intended to establish a collective goal. Principles are propositions that describe rights; policies are propositions that describe goals.”); RONALD DWORKIN, *LAW’S EMPIRE* 220–24 (1986) [hereinafter *EMPIRE*].

253. DWORKIN, *EMPIRE*, *supra* note 252, at 220–24.

254. Scott R. Bauries, *Is There an Elephant in the Room?: Judicial Review of Educational Adequacy and the Separation of Powers in State Constitutions*, 61 *ALA. L. REV.* 701, 705–06 (2010); William S. Koski, *The Politics of Judicial Decision-Making in Educational Policy Reform Litigation*, 55 *HASTINGS L.J.* 1077, 1093–96 (2004).

255. *Comm. for Educ. Rights v. Edgar*, 672 N.E.2d 1178, 1189, 1191 (Ill. 1996).

A recession only further exaggerates those underlying concerns, particularly for those holding an absolutist concept of education. An absolute right would insist that legislative interests in dealing with economic crisis are of minimal, if any, importance.<sup>256</sup> If so, the judicial recognition or enforcement of education rights would, in effect, lead to the judicial dominance over policy.

This absolutist demand creates serious problems for courts. The absolutist right might either require more resources from a state than it could reasonably deliver during a time of crisis,<sup>257</sup> or legislatures would rebuke and ignore the courts altogether. The practical effect of the former is untenable and, thus, courts would likely avoid cases raising that problem.<sup>258</sup> The effect of the latter would be to undermine judicial authority itself.<sup>259</sup> Recent legislative refusals to implement court ordered school funding reform in Kansas demonstrate that the latter is a real possibility.<sup>260</sup>

Under-enforcing education rights and duties, however, carries equally serious consequences. First, under-enforcement undermines education rights themselves. As indicated above, the scope and practical value of a right is dictated by its enforcement, not its facial articulation.<sup>261</sup> Thus, courts that espouse the existence of rights but under-enforce them are retracting, and potentially eviscerating, those rights.<sup>262</sup>

Second, under-enforcement deprives marginalized stakeholders of a role in the education decisionmaking process and reinforces the status quo. As Charles Sabel and William Simon explain, the primary effect of

256. See Rebell, *supra* note 52.

257. See Tushnet, *supra* note 242, at 1895–97 (discussing the judicial disincentives for recognizing and enforcing social welfare rights). Adam Winkler emphasizes the prevalence of this thinking and debunks it in *Fundamentally Wrong About Fundamental Rights*, 23 CONST. COMMENT. 227, 227–28 (2006).

258. Tushnet, *supra* note 242.

259. This concern, for instance, played prominently in the delayed enforcement of *Brown v. Board of Education*. See generally Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 624–26 (1983) (discussing the Court’s tolerance for delays following *Brown v. Board of Education*).

260. See *supra* notes 205–10 and accompanying text. See also Weishart, *supra* note 245, at 920 (discussing “increasing reluctance of courts to order remediation in the face of legislative deficiencies or outright defiance”).

261. Levinson, *supra* note 29, at 888–89 (“Finally, note that the limiting case of remedial substantiation is the absence of any remedy at all, rendering a constitutional right essentially worthless.”); Weishart, *supra* note 245.

262. See Weishart, *supra* note 245 (arguing that the right to education is in danger due to lingering doubts about its justiciability and the increasing reluctance of courts to order remediation in the face of legislative deficiencies or outright defiance). See also Simon-Kerr & Sturm, *supra* note 29, at 83–84 (discussing courts’ increasing reliance on separation of powers concerns to withdraw from school finance litigation).

plaintiff victories in adequacy and equity cases is not necessarily an order mandating a specific increase in funding or remedy.<sup>263</sup> Rather, the primary effect is instrumental. It often forces states to offer disadvantaged constituencies a seat at the decisionmaking table and seriously consider their substantive points.<sup>264</sup> Thus, judicial intervention does not guarantee specific outcomes; it guarantees process. Moreover, by ensuring meaningful policy participation for otherwise excluded interests, school finance litigation destabilizes the status quo.<sup>265</sup> But when courts withdraw from rights enforcement, they signal that the state can deny legitimate stake holders a meaningful role in policy formation and revert to the status quo.<sup>266</sup> In education, this means funding structures that preference wealthy districts and middle-income students.<sup>267</sup>

Third, under-enforcement excuses the state from justifying an override of its constitutional education duties. This excuse rests either on an unfounded assumption that the state has a sufficient override or on the notion that the state can assess the sufficiency of an override itself.<sup>268</sup> Both are highly problematic. The former flies in the face of reasoned judicial decisionmaking and the notion that states cannot violate constitutional rights, save special circumstances. In other words, it amounts to a judicial abdication of duty. The latter is inconsistent with a constitutional scheme of governmental checks and balances, and eliminates any hope of impartial respect for constitutional rights and duties, as the legislature's natural tendency is self-serving expedient policy. As the Kentucky Supreme Court wrote in justifying its first intervention in school finance: "To allow the General Assembly (or, in point of fact, the Executive) to decide whether its actions are constitutional is literally unthinkable."<sup>269</sup>

263. Sabel & Simon, *supra* note 26.

264. *Id.* at 1067–71.

265. *Id.* at 1075–76, 1100.

266. *See id.* at 1075 (indicating that "[t]he liability determination reverses the normal presumption in favor of the status quo").

267. Drawdowns in central state support for education mean that local districts are forced to support education themselves. Advantaged districts are relatively well suited to continue to support education during recession, whereas poorer districts are not. This then explains why the gap in education funding between wealthy and poor districts has grown so drastically over the past decade. *See generally* Barshay, *supra* note 26. This was, of course, the dominant funding paradigm that prompted school quality and funding litigation in the first instance in the 1970s. *See, e.g.*, *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

268. Under either an absolutist or limited concept of education rights, this is problematic. The absolutist generally rejects the very notion of overrides, and the limited rights approach requires reasoned and substantiated justifications for overrides. *See generally* Gardbaum, *Limiting*, *supra* note 239, at 791–93.

269. *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 209 (Ky.1989). *See also* *Lake View Sch.*

Fourth, the practical effect of the foregoing is a reordering of preferences in direct opposition to constitutional text and precedent in many states.<sup>270</sup> Education, either explicitly or implicitly, holds first order status under most constitutional schemes.<sup>271</sup> This status may not excuse education from overrides, but it is meant to ensure that, at the very least, education is the first among equals in state obligations. Flat statewide reductions in spending in all government programs, for instance, would violate this first order status, as would more egregious cuts to education designed to avoid cuts in other areas where the government has less of an obligation.<sup>272</sup> In short, while education cuts could theoretically be justified by some overriding interest—maybe financial exigency—those cuts cannot be justified by a reordering of political preferences that ignore education’s first order status.

Because few courts have required states to justify education cuts since the recession, the extent to which the foregoing problems exist in any given state is uncertain. States’ motivations could have surely varied. Possible motivations for education cuts could have included (but are not limited to): averting state insolvency, protecting the basic integrity of other

Dist. No. 25 v. Huckabee, 210 S.W.3d 28, 31 (Ark. 2005) (quoting *Rose*, 790 S.W.2d at 208–210)

270. See, e.g., CAL. CONST. art. IX, § 1 (“A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement.”) (emphasis added); FLA. CONST. art. IX, § 1 (“The education of children is a fundamental value of the people of the State of Florida. It is, therefore, a paramount duty of the state to make adequate provision for the education of all children residing within its borders.”); GA. CONST. art. VIII, § 1, ¶ 1 (“The provision of an adequate public education for the citizens shall be a primary obligation of the State of Georgia,[] . . . [the expense of which] shall be provided for by taxation.”); Nev. Const. art. XII, Sec. 6 (requiring the state to fund education before any other program); R.I. CONST. art. XII, § 1 (“The diffusion of knowledge, as well as of virtue among the people, being essential to the preservation of their rights and liberties, it shall be the duty of the general assembly to promote public schools . . . and to adopt all means which it may deem necessary and proper to secure to the people the advantages and opportunities of education . . .”) (emphasis added); Seattle Sch. Dist. No. 1 of King Cty. v. State, 585 P.2d 71, 91 (Wash. 1978) (en banc) (“By imposing upon the State a *paramount duty* to make ample provision for the education of all children residing within the State’s borders, the constitution has created a “duty” that is supreme, preeminent or dominant.”); Campbell Cty. Sch. Dist. v. State, 907 P.2d 1238, 1257, 1259 (Wyo. 1995) (“By establishing education first as a right in the Declaration of Rights article and then detailing specific requirements in a separate Education article in the state constitution, the framers and ratifiers ensured, protected and defined a long cherished principle” that “was viewed as a means of survival for the democratic principles of the state.”).

271. See, e.g., FLA. CONST. art. IX, § 1 (“paramount duty”); GA. CONST. art. VIII, § 1, ¶ 1 (“primary obligation of the State”); WASH. CONST. art. IX, § 1 (“paramount duty of the state”).

272. This is, of course, assuming that the cuts resulted in a problematic impairment of educational quality. Only systemic and substantial education harms would give rise to constitutional concerns. See, e.g., Sheff v. O’Neill, 678 A.2d 1267 (Conn. 1996); Serrano v. Priest, 226 Cal. Rptr. 584, 606–07 (Cal. Ct. App. 1986); Sheff v. O’Neill, 678 A.2d 1267 (Conn. 1996); *Rose*, 790 S.W.2d at 196–97. Thus, minor statewide cuts would not necessarily be unconstitutional.

government projects, efficient use of resources, balancing the budget, keeping taxes low, or political compromise or preference.<sup>273</sup> The first two are the only interests that, on their face, even come close to justifying an override. The remaining interests are more akin to policy preference or convenience, rather than the types of overriding interests that courts typically require.<sup>274</sup>

Regardless of what interest a state was pursuing, the recent cuts would likely fail on a means analysis. A state would face the problem of demonstrating that the level of education cuts was necessary. Many recent cuts have been broad based and flat, with little attention to nuance in regard to education, other programs, or alternatives.<sup>275</sup> This is the exact opposite of the narrow tailoring or careful cuts constitutions would typically require. Cuts specifically targeting education would fare worse. The only cuts that could possibly survive means analysis would be those where education was spared the level of cuts that other programs suffered. But even then, the question would arise whether the state exerted sufficient effort to protect education. In short, good faith cuts based on

273. See, e.g., Michael Leachman et al., *supra* note 12, at 7–9 (discussing the reasons states cut education, including closing budget gaps as a result of the recession, the exhaustion of federal emergency aid for schools, rising costs, and tax cuts); PHIL OLIFF ET AL., CTR. ON BUDGET & POL’Y PRIORITIES, STATES CONTINUE TO FEEL RECESSION’S IMPACT (June 27, 2012), <http://www.cbpp.org/sites/default/files/atoms/files/2-8-08sfp.pdf> (discussing states’ balanced budget requirements). See also JIM HULL CTR. FOR PUB. EDUC., CUTTING TO THE BONE: HOW THE ECONOMIC CRISIS AFFECTS SCHOOLS (Oct. 7, 2010), <http://www.centerforpubliceducation.org/Main-Menu/Public-education/Cutting-to-the-bone-At-a-glance/Cutting-to-the-bone-How-the-economic-crisis-affects-schools.html> (describing state and local responses to the recession).

274. As the Court in *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973), wrote:

[A]lthough efficacious administration of governmental programs is not without some importance, “the Constitution recognizes higher values than speed and efficiency.” And when we enter the realm of “strict judicial scrutiny,” there can be no doubt that “administrative convenience” is not a shibboleth, the mere recitation of which dictates constitutionality. On the contrary, any statutory scheme which draws a sharp line between the sexes, solely for the purpose of achieving administrative convenience, necessarily commands “dissimilar treatment for men and women who are . . . similarly situated,” and therefore involves the “very kind of arbitrary legislative choice forbidden by the [Constitution] . . . .”

*Id.* (internal citations omitted).

275. Rebell, *supra* note 52, at 1862–63 (“[T]he response of most governors and legislatures to current budgetary pressures has been to . . . impose mandatory cost reductions—often, across-the-board percentage reductions—without taking any steps to analyze the actual impact of these cuts . . . .”). North Carolina has gone so far as to drastically reduce education spending during the same time in which it was enacting new tax cuts. Leachman & Mazerov, *supra* note 47, at 2 (finding that North Carolina was one of the biggest tax cutting states). As Sabel and Simon explain, by securing disadvantaged groups a role in the decisionmaking process, school finance litigation has improved the deliberative process. Sabel & Simon, *supra* note 26, at 1076. It is the seeming absence of this process that has contributed to recent cuts.

serious exigencies is not enough. Constitutional analysis would also require that those cuts be thoughtful and minimal.<sup>276</sup>

### III. AVERTING RIGHTS RETRACTION

Even if education rights have retracted over the past decade, serious questions remain as to whether courts could have done anything to prevent the retraction and whether education rights are doomed to suffer the same fate again in the future. The institutional power of courts has its limits, particularly during national economic crisis. The financial and political pressures of the recession made judicial intervention dangerous and potentially futile. From this perspective, the retraction of education rights may have been inevitable. This thinking, however, suffers from a conceptual flaw that incorrectly narrows the scope of rights articulation and enforcement. It rests on the notion that the delivery of education, and the judicial oversight and enforcement of rights, occurs at singular moments in time rather than over the course of years.

The enforcement or non-enforcement of education rights today will have both short- and long-term effects. And those long-term effects may be even more important. The judiciary's capacity to enforce education rights today is heavily influenced by past enforcement. Thus, today's enforcement challenges are partially explained by poor enforcement strategies of the past, and tomorrow's challenges will be exacerbated by what courts have done recently. The solution for education rights and duties during economic crisis is not to ignore them and assume that more convenient interventions will come later. Instead, education rights are best protected by enforcing them prior to the onset of exigency. Earlier, less contested intervention points offer courts the opportunity to adopt principles and structures that help ensure the vitality of education rights during later crisis. This involves courts evaluating education rights both prospectively and retrospectively and requiring that states not only cure existing deficiencies, but also plan for future exigencies. The following subparts further explore the justification for prospective analysis and the specific judicial responses it should generate, including deterrence-based remedies, prophylactic rules, and prophylactic decisionmaking structures, all of which decrease the likelihood of constitutional violations in the first instance.

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276. Rebell, *supra* note 52, at 1908–09.

### A. *The Educational Imperative for Long-Term Compliance*

School finance decisions tend to analyze educational opportunity at particular moments in time and order remedies in response to that moment. In other words, the question before a court in 2005 would have been whether the education system challenged in 2002 violated the state constitution. The remedy, should a court order one, is in response to that temporal violation. While this temporal framing is inherent to litigation, the constitutional duty to deliver education—or a failure in regard to it—does not occur at a finite moment in time. Not even a single year captures the duty or rights at stake.

In this respect, education is relatively unique. Other constitutional rights, such as free speech, privacy, and due process are violated at particular moments in time.<sup>277</sup> For the same reason, they are susceptible to narrower remedies.<sup>278</sup> But education is an ongoing project that requires constant vigilance—the failure of which can span over years and decades. In addition, given the nature of learning, educational harms and failures are not easily remedied after the fact.<sup>279</sup> For that reason and potentially as a matter of convenience, past courts typically do almost nothing to remedy the education harms that precede litigation.<sup>280</sup> Rather, the past violations serve as the basis for insisting on current constitutional compliance.

Consider, for instance, that plaintiffs sued South Carolina in 1997, secured the right to proceed to trial from the Supreme Court in 1999, but did not secure an order for a remedy until 2014.<sup>281</sup> By then, not a single student on whose behalf the case was initially brought ever saw a remedy, even though it was the violation of their rights that justified the court's order. Moreover, even had the court wanted to provide a remedy for those individuals, it is far from clear what an appropriate remedy would be. Or

277. See, e.g., *Lee v. Weisman*, 505 U.S. 577 (1992) (challenge to a prayer offered at middle school graduation ceremony in 1989); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288 (1984) (involving fight to have access to protest in national park area during winter of 1982).

278. See, e.g., *Lee*, 505 U.S. at 599 (simply holding that the prayer was forbidden); *Carey v. Phipus*, 435 U.S. 247, 248 (1978) (awarding only nominal damages for deprivation of due process because no actual injury occurred).

279. See generally Derek W. Black, *Civil Rights, Charter Schools, and Lessons to Be Learned*, 64 FLA. L. REV. 1723 (2012).

280. See, e.g., Liebman, *supra* note 32; Black, *supra* note 279, at 1764–67 (examining the difficulty of pinpointing and remedying harm in education cases). See also John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 79 (1998) (“Nonretroactivity facilitate[s] the creation of new rights by reducing the costs of innovation.”).

281. *Abbeville Cty. Sch. Dist. v. State*, 767 S.E.2d 157 (S.C. 2014); *Abbeville Cty. Sch. Dist. v. State*, 515 S.E.2d 535 (S.C. 1999).



to put it more bluntly, education rights cannot be effectively fulfilled after they are breached. Rather, courts only ensure full constitutional compliance by insisting on it in advance and deterring later relapses. This practical reality, thus, demands that courts not only shape remedies to bring states into current compliance, but also require the state to take steps to ward off the possibility of new state violations.

### *1. Detering Constitutional Violations*

One of the most obvious ways courts can ensure future compliance is to deter violations themselves. While the notion of deterrence is inherent in the concept of law and the issuing of judicial opinions, actual deterrence rests on awareness of what the law proscribes, certainty of its consequences, and the gravity of those consequences.<sup>282</sup> Constitutional education clauses do not “speak for themselves” in any of these deterrence factors. Rather, courts have an enormous role to play in this deterrence function. But most have failed to step up. Too many equity and adequacy decisions of the past have been vague as to what the law proscribes, when they will actually impose consequences, and what those consequences will entail.

First, as explored in detail in the next part, orders and standards in equity and adequacy cases often come more in the form of general guidelines. Scott Bauries, for instance, critically characterizes them as nothing more than “legislative holdings” that include broad policy goals for the legislature to pursue.<sup>283</sup> Putting aside for the moment exactly how these orders might become more definite, the fact remains that states rarely have clear notice of how to comply with their constitutions.<sup>284</sup> As a result, the deterrent value is minimal.

Second, a state must, at the very least, believe it will be held accountable at some point and in some way for constitutional education rights to serve as any deterrent. Courts substantiate this belief by consistent and firm enforcement of education rights. They do the opposite with uncertain and sporadic enforcement. On the other hand, courts can enhance the long-term value of a right and the likelihood of future compliance by the very act of current accountability. In the absence of

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282. See generally Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 CRIME & JUST. 199, 205–07 (2013).

283. Bauries, *supra* note 32, at 986–87.

284. Bauries argues that education opinions produce a learned helplessness on the part of legislatures. *Id.* at 987.

current accountability, a state becomes more likely to push, if not transgress, the boundaries of permissible action.<sup>285</sup> States' actions during and, more importantly, following the recession show that they increasingly believe that they can get away with violating education rights.

Third, a belief in accountability alone is not enough to deter violations. To be effective, the cost of a violation must be sufficiently high that it significantly discounts the perceived benefits of neglecting the right.<sup>286</sup> With educational equity and adequacy, however, states do not face any real cost for depriving students of educational opportunity. To the contrary, significant incentives exist for states to violate education rights and delay compliance. Education courts have never asked that states actually remediate past harms in any significant way. The burden of lost educational opportunities in previous years falls squarely on students, not on the state.<sup>287</sup> Thus, a state, for matters of convenience or policy prerogative, can divert education resources with no consequences and, in fact, reap the benefits of that diversion without any threat of reparation.<sup>288</sup>

The threat and imposition of remedies for sustained injuries, not just generalized system-wide injunctions, would change states' entire orientation toward constitutional compliance.<sup>289</sup> Even short of completely retroactive remedies, courts could impose costs on the failure to comply after an initial finding of liability. Dealing with the most recalcitrant of legislatures, at least two school finance courts have imposed daily fines on

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285. See Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: The Courts' Role*, 81 N.C. L. REV. 1597 (2003) (reasoning that resegregation was hastened by the Supreme Court's holdings); Levinson, *supra* note 29, at 904–05; GARY ORFIELD & CHUNGMEI LEE, THE CIVIL RIGHTS PROJECT, HISTORIC REVERSALS, ACCELERATING RESEGREGATION, AND THE NEED FOR NEW INTEGRATION STRATEGIES 5 (2007), <https://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/historic-reversals-accelerating-resegregation-and-the-need-for-new-integration-strategies-1/orfield-historic-reversals-accelerating.pdf> (arguing resegregation took hold because the Court countenanced it).

286. See Aaron Xavier Fellmeth, *Civil and Criminal Sanctions in the Constitution and Courts*, 94 GEO. L.J. 1, 53–56 (2005) (discussing the economics of deterrence).

287. See Bauries, *supra* note 32, at 999–1006 (pointing out that school funding remedies do not address the individual harms that students suffer). See also Liebman, *supra* note 32, at 1513–18 (citing as a fundamental flaw in desegregation that court orders did nothing to address the harms that previously segregated students suffered).

288. Voting offers analogous problems. See *Giles v. Harris*, 189 U.S. 475, 483, 488 (1903). (“Unless [the Court were] prepared to supervise the voting in that State by officers of the court, it seems to us that all that the plaintiff could get from equity would be an empty form.”)

289. See Liebman, *supra* note 32, at 1513–17 (analyzing the problem of under-corrective remedies in school desegregation and the need for complete remedies of the harms suffered); Bauries, *supra* note 32.

legislatures that failed to enact remedies for existing violations.<sup>290</sup> The cost of non-compliance produced a relatively quick and effective response.<sup>291</sup> Fines may be but a small fraction of the cost of the constitutional violation and, as such, fall far short of imposing a complete deterrent cost. But they still clearly indicate some cost for current and future non-compliance and serve, at least, as moderate deterrents. Extending this approach to future lower court opinions, putting states on notice that equivalent fines will be imposed on future legislatures that delay remedies through appeals following adverse decisions in lower courts would offer additional deterrents.<sup>292</sup> The point here is simple: states have an ongoing obligation to deliver a constitutional education and the failure to do so should carry a cost.

## 2. *Adopting Clear and Prophylactic Rules*

Without awareness that its action is clearly a constitutional violation, there is almost no reason to expect that a legislature would forego policies that it otherwise favors. This problem is particularly acute in education because demonstrating deprivations of educational adequacy and equity are so fact intensive.<sup>293</sup> Per se violations simply do not exist. This leaves an enormous gray area in which a state operates without any clear expectation that it will be held accountable. This problem exists regardless of exigencies. A state may only know that it has violated its education duty when the court informs the state of its violation.<sup>294</sup>

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290. *Flores v. Arizona*, 405 F. Supp. 2d 1112, 1120–21 (D. Ariz. 2005) *vacated and remanded*, *Flores v. Rzeslawski*, 204 F.App'x 580 (9th Cir. 2006). *But see* Koski, *supra* note 31, at 1190 (characterizing contempt as a symbolic statement in school funding litigation).

291. *Flores v. Arizona*, 516 F.3d 1140, 1151 (9th Cir. 2008), *rev'd*, *Horne v. Flores* 557 U.S. 433 (2009) (indicating the state enacted a complete remedy within a few months of the fines). The New Jersey Supreme Court, in effect, issued an inverse fine, indicating it would enjoin all education spending unless the state met the court's deadline. *Robinson v. Cahill*, 358 A.2d 457, 459 (N.J. 1976). *But see* Order, *McCleary v. State*, No. 84362-7 (Wash. Sept. 11, 2014), <http://www.courts.wa.gov/content/PublicUpload/Supreme%20Court%20News/84362-7%20order%20-%209-11-2014.pdf> (imposing fines on the state for inaction); Hammond, *supra* note 217 (indicating that months after the fines were imposed the state of Washington had still not acted).

292. The cost of litigation itself has been sufficient to deter certain actions by state legislatures. *See, e.g.*, Molly A. Hunter, *Maryland Enacts Modern, Standards-Based Education Finance System: Reforms Based on Adequacy Cost Studies*, ACCESS (May 2002), [http://www.schoolfunding.info/resource\\_center/research/MDbrief.pdf](http://www.schoolfunding.info/resource_center/research/MDbrief.pdf).

293. Black, *supra* note 5.

294. This reality also challenges courts' institutional authority. While the Court may be the ultimate arbiter of the Constitution, its arbitrations should not appear arbitrary to other branches of the government or the citizenry. Rather, its holdings should include standards by which the state could

School finance adjudications should not appear arbitrary to other branches of government or the citizenry. Such a perception challenges courts' institutional authority, even when the outcomes in a case are correct. A move toward judicial holdings that include standards that allow the executive or legislative branch to judge the constitutionality of their own actions would reinforce the notion that the states' constitutional education duty is governed by legal principles not simply judicial wisdom or judgment. None of this is to suggest equity and adequacy opinions have not been decided on principle. Nor is it to suggest that the formulation and enforcement of education standards are easy. History shows that clearly is not the case.<sup>295</sup>

Select prophylactic rules, however, would make the management of these standards easier for both courts and states.<sup>296</sup> Criminal law and free speech doctrine are instructive on this point. For instance, as the Court explained in *Miranda v. Arizona*, “without proper safeguards the process of in-custody interrogation” would undermine individuals' right against self-incrimination.<sup>297</sup> The solution was to mandate that the state “effectively apprise[.]” suspects of their rights in advance.<sup>298</sup> Free speech doctrine is similarly grounded in the notion of prophylactic safeguards. For instance, the Court has held that it will strike down state attempts to limit speech outside the zone of protected speech because doing so is necessary to protect speech that lies at the core of First Amendment concerns.<sup>299</sup>

Compared to self-incrimination and free speech, educational equality and adequacy are admittedly more amorphous rights and, thus, do not as easily lend themselves to prophylactic rules. Nonetheless, meaningful

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judge its own actions and believe that constitutional duty in regard to education is governed by legal principles not simply judicial wisdom.

295. The difficult implementation of No Child Left Behind is an obvious example. The Act required “challenging” academic standards and full student proficiency, neither of which were met. Paul E. Peterson & Frederick M. Hess, *Few States Set World-Class Standards*, 8 EDUC. NEXT 70, 71–73 (2008); Dillon, *supra* note 75 (predicting that the number of failing schools would reach 80,000 out of 100,000 in 2011).

296. See generally David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 191 (1988).

297. *Miranda v. Arizona*, 384 U.S. 436, 467 (1966).

298. *Id.*

299. See, e.g., *Young v. Am. Mini Theatres*, 427 U.S. 50, 59–60 (1976) (indicating the Court permits “a defendant whose own speech was unprotected . . . to challenge the constitutionality of a statute” that discourages individuals from “constitutionally protected speech or expression.”); see also *Chicago v. Morales*, 527 U.S. 41 (1999) (striking down a loitering statute directed at gang activity because of its incidental effects on individuals' liberty right to remain in place or move from place to place).

rules are within courts' reach. In fact, relatively recent changes to two states' constitutional education clauses include such rules. Florida's new constitution articulates a broad right to high quality education, but then specifies the exact classroom sizes that the right requires.<sup>300</sup> Colorado's constitution, likewise, mandates a minimum percentage of yearly increases in state education funding.<sup>301</sup> Imposing that level of specificity would most likely be beyond courts, but the New Jersey Supreme Court has managed analogous results by mandating that disadvantaged districts be funded at a level no lower than the average per-pupil expenditure in high-performing suburban districts.<sup>302</sup> This prophylactic rule is defensible because the substance of funding levels remains with the state—the level at which the state unilaterally decides to fund suburbs—and effective because the state has been issued a clear and definite requirement.

Similar rules could have helped manage education cuts during and following the recession. The easiest is an absolute bar on reductions. Unfortunately, such a rule would be illegitimate because it rejects the possibility of a state override and the possibility the state might reduce costs through efficiency or identify wastes to eliminate.<sup>303</sup> Thus, the challenge is devising prophylactic rules that reasonably distinguish efficiency reductions from quality reductions.

With additional tweaking, basic parity rules analogous to those previously used in New Jersey could navigate these distinctions. First, a rule could prohibit unequal retrogression in education resources. A state would remain free to reduce its education budget, but those reductions could not be flat because the effect of flat reductions works to the per se disadvantage of needy districts.<sup>304</sup> This principle would be defensible under the premise that low-wealth districts and those serving predominantly high-need students have never operated with substantially more teachers and resources than necessary to deliver appropriate educational opportunities.<sup>305</sup> At best, these districts' resources were just

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300. FLA. CONST. art. IX, § 1.

301. COLO. CONST. art. IX, § 17.

302. *Abbott v. Burke*, 693 A.2d 417, 439 (N.J. 1997).

303. Even *Rebell* allows that careful efficiency cuts can be made without sacrificing educational quality. *Rebell*, *supra* note 52, at 1893–94.

304. See generally Bruce D. Baker, *Evaluating the Recession's Impact on State School Finance Systems*, 22 EDUC. POL'Y ANALYSIS ARCHIVES 1 (2014), <http://epaa.asu.edu/ojs/article/view/1721>.

305. See generally USHOMIRSKY & WILLIAMS, *supra* note 52 (finding a substantial nation funding gap before and after factoring in student need).

adequate prior to the recession.<sup>306</sup> Thus, any state reductions would need to be disproportionately weighted against advantaged districts, particularly given that they can offset those reductions.<sup>307</sup> Such a rule would not ensure absolute equality or adequacy, as any loss of any funds might be problematic in needy districts, but it would amount to a clear rule that operates well within the boundaries of prohibiting presumptively unconstitutional action.

A simpler second rule might, during instances of recession, prohibit class sizes in disadvantaged districts from rising higher than the prevailing class sizes and expenditures in some other subset of advantaged or high-performing districts. Similarly, a rule might prohibit total per-pupil expenditures in disadvantaged districts from declining more than other districts. These comparative thresholds would achieve an important substantive qualitative end, without calling on courts to specifically define the substance. Advantaged school districts may cut resources during recession, but they are unlikely to cut to the point of seriously jeopardizing the quality of the children's education.<sup>308</sup> Thus, during times of economic crisis, successful districts offer a reasonable measure of efficient and minimum education requirements.<sup>309</sup> The practical result of requiring parity of this sort may be just to hold resources and class sizes constant in needy districts. If so, budget cuts might fall almost entirely on other districts. In other instances, it would set a floor that mandates a finite and smaller set of reductions in needy districts.

### 3. *Encouraging Structural Changes to Decisionmaking*

The most effective means of avoiding problematic judicial intervention during moments of crisis may not involve rules at all. Instead, the most effective solution is to have prophylactic structures already in place to help guide states in decisionmaking and planning. A better decisionmaking process can help move states toward equality and adequacy during good times and ward off retrogression during bad times. To be clear,

306. A funding fairness study of 2006–07 expenditures found that only fourteen states were even arguably distributing funds fairly and only nineteen were making reasonable efforts to raise adequate education funds. BRUCE D. BAKER, ET AL., *IS SCHOOL FUNDING FAIR? A NATIONAL REPORT CARD* 19, 26–27 (2010), [http://www.schoolfundingfairness.org/National\\_Report\\_Card.pdf](http://www.schoolfundingfairness.org/National_Report_Card.pdf).

307. *Id.*

308. Michael Rebell argues that parents in advantaged districts know that money matters, which is why they devote appropriate funds to their schools. Rebell, *supra* note 20, at 1478–79.

309. Studies regularly use successful districts as baselines for assessing adequacy. *See* Superfine, *supra* note 156, at 665–67 (describing the successful school district model for assessing the necessary education costs).

prophylactic structures do not guarantee substantively acceptable outcomes, but they make optimal outcomes more likely and reversion to the traditional inadequate and inequitable status quo less likely. Avoiding the latter is a central aspect of delivering constitutionally appropriate educational opportunities. Moreover, the failure to plan for exigencies today is a concession to the fact that the state will at some point fail to maintain a constitutional education system in the future. Thus, imposing structures that force the state to plan ahead are not necessarily prophylactic at all but part of a state's current duty to ensure educational opportunities.

First, states must, as a matter of routine, incorporate expert knowledge into funding decisions. Education budgets and funding formulas typically follow one of two paths: a majority rules democratic process that tends toward inequitable results, or a process driven by expert analysis that tends toward meeting student need. Absent judicial oversight, the former has been the *de facto* rule in nearly all states. Based on this reality, courts could reasonably mandate a structure in line with the latter, requiring annual or biannual expert assessments of educational need and cost.<sup>310</sup>

While significant, such a mandate would still be relatively mild and not involve the judiciary encroaching on the legislature's substantive decisionmaking—which is often the critique of school funding opinions.<sup>311</sup> Rather, the mandate would be for the state to determine the real cost of education in the state. In other words, if the state has a constitutional duty to deliver an adequate education, it necessarily has a duty to determine, rather than guess at, the cost of that education. Per this reasoning, a number of courts have previously ordered states to conduct cost-out studies.<sup>312</sup> The difference in the current proposal would be the permanency of the expert judgment and its structural role in informing the state's policymaking.

Second, even with expert assessments structurally in place, courts would still need to ensure that states act reasonably based on that knowledge. Knowledge alone does not guarantee the state will act accordingly based on that knowledge. Some states have statutory schemes for costing out education, but still consistently fail to fund the programs,

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310. *See, e.g.,* *Lake View v. Huckabee*, 91 S.W.3d 472, 510–11 (Ark. 2002) (affirming the lower court's order for the state to conduct an adequacy funding study); *Campaign for Fiscal Equity v. New York*, 2005 WL 5643844, at \*2 (discussing special masters' recommendation that the state "undertake periodic studies to determine the costs of providing the opportunity for a sound basic education to all students of the New York City schools").

311. *Bauries, supra* note 254.

312. *See Superfine, supra* note 156, at 664–65.

even during good economic times.<sup>313</sup> Courts could counteract states' tendency to abandon expert judgment by giving the expert assessments presumptive weight in later disputes.<sup>314</sup> Or this presumption could be built into the structure of the budget building process and challenges to it.

A state could fund education below the experts' proposed level, but bear the burden of showing why a lower level was still adequate.<sup>315</sup> And districts or populations negatively affected by those cuts might also be ensured an opportunity to counter the state's position. As precedent stands, the judicial presumption is that current education systems are constitutional.<sup>316</sup> While that presumption might still be appropriate as a general matter, a state that acted against expert judgment and failed to substantiate its actions would not necessarily be owed that deference if the dispute later made its way to court. Putting the state on notice of a presumption would incentivize the state to include this presumption in its own decisionmaking.

Third, a state's decisionmaking process and structure must ward off situations in which continued educational quality is seemingly the enemy of a state's financial stability or its ability to deal with crisis. No structure is likely to dissuade problematic education cuts when a state lacks or believes it lacks the resources to fund education at appropriate levels. In this instance, many states will ignore the results of any year-to-year budget making process a court might urge into place. Thus, the solution is, again, structural reform that moves states to plan against future exigency, emphasizing that planning for the future is part of a state's current education duty.

In particular, states must set aside sufficient rainy-day funds or make other provisions for circumstances in which the state might otherwise be

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313. See, e.g., Arielle Dreher, *108 Mississippi United Methodist Pastors Endorse Initiative 42*, JACKSON FREE PRESS (Oct. 22, 2015), <http://www.jacksonfreepress.com/weblogs/jackblog/2015/oct/22/108-mississippi-united-methodist-pastors-endorse-i/> (indicating that Mississippi fails to fully fund its statutory funding formula nearly every year).

314. One of the problems in New York is that the court did not apply such a presumption, but simply assessed the state's adequacy judgment from a reasonableness standard. See *Campaign for Fiscal Equity v. State*, 861 N.E.2d 50, 59–60 (N.Y. 2006).

315. This exact type of reasoning is what justified the New Jersey Supreme Court's major intervention in 1990. "[N]o amount of money may be able to erase the impact of the socioeconomic factors that define and cause these pupils' disadvantages. . . . [But] even if not a cure, money will help, and . . . these students are constitutionally entitled to that help." *Abbott v. Burke*, 575 A.2d 359, 403 (N.J. 1990).

316. See, e.g., *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 209 (Ky. 1989) ("The presumption of constitutionality is substantial."); *Leandro v. State*, 488 S.E.2d 249, 261 (1997) (requiring "a clear showing" that students have not received an adequate education before intruding on the other branches of government).



unable to meet its education obligations.<sup>317</sup> Only the rarest state will carry out its long-term duty during times of stress if it has not planned ahead.<sup>318</sup> Exactly how it plans ahead should be left to the state's discretion. A state might set aside a certain percentage of funds each year to cover future education shortfalls or develop a bond system to draw upon during recession. But given states' past practices and the nature of funding cycles, whether the state plans ahead cannot be left to chance; it is part of its duty.

Finally, forcing structural decisionmaking changes on states is possible without specifically defining or dictating that structure. Formal structural changes to the legislative process are beyond the power of the judiciary and would be inappropriate in any event. But sub-legislative changes are well within the judiciary's power and can be achieved indirectly. The most poignant example comes from the U.S. Supreme Court's attempt to limit Congress's use of remedial power under the 14th and 15th Amendments.

In a series of cases, the Court reaffirmed that it was the final arbiter of the meaning of constitutional guarantees and that Congress needed to justify its exercise of power under the 14th and 15th Amendments with evidence consistent with the Court's interpretation.<sup>319</sup> Putting aside substantive critiques of the Court's agenda in those cases,<sup>320</sup> the effect was for Congress to change its approach to legislating in this area.<sup>321</sup> Rather than just passing legislation it believed to be good policy, it held extensive hearings and gathered specific types of evidence—all of which went to the issues the Court had identified.<sup>322</sup> When legislation was later litigated, the

317. Some school districts already have funds, but the size of those reserves have not been enough to offset massive statewide cuts. *See generally* Thomas Jefferson Classical Acad. Charter Sch. v. Cleveland Cty., 763 S.E.2d 288 (N.C. Ct. App. 2014) (case involving the proper use of a district's rainy day funds and a charter schools ability to access those funds).

318. Within two years of the recession, thirty-four states had already cut K-12 education funding. NICHOLAS JOHNSON ET AL., CTR. ON BUDGET & POL'Y PRIORITIES, AN UPDATE ON STATE BUDGET CUTS: AT LEAST 46 STATES HAVE IMPOSED CUTS THAT HURT VULNERABLE RESIDENTS AND CAUSE JOB LOSS 1 (Feb. 9, 2011), <http://www.cbpp.org/sites/default/files/atoms/files/3-13-08sfp.pdf>. The only programmatic area cut more often was higher education. *Id.*

319. *United States v. Morrison*, 529 U.S. 598 (2000) (finding legislation was not a proportional and congruent remedy for gender discrimination); *Boerne v. Flores*, 521 U.S. 507 (1997) (articulating a congruence and proportionality test to assess the constitutionality of individual rights legislation).

320. The critique here is not that the Court made Congress (i.e., the government) respect rights, which would be the case in an analogous state education case, but that the Court restricted Congress's independent ability to protect individual rights. *See, e.g.*, Evan H. Caminker, "Appropriate" Means-Ends Constraints on Section 5 Powers, 53 STAN. L. REV. 1127, 1129 (2001).

321. *See, e.g., Morrison*, 529 U.S. 598 at 619–20 (evaluating the extensive congressional record, which was a response to the Court's holding in *Boerne*).

322. *See, e.g., id.*; *Shelby Cty. v. Holder*, 811 F. Supp. 2d 424, 435–38 (D.D.C. 2011) (describing the vast legislative record and hearings supporting the Voting Rights Act of 2006, which then became the basis for the Supreme Court's later decision in the same case at 133 S. Ct. 2612 (2013)).

congressional record became the conclusive evidence in the case and drawn-out battles over new and additional evidence were avoided.<sup>323</sup> A state court that was similarly clear about the elements and issues that should be involved in positive lawmaking, the restrictions and justifications it would place on retrogressive law making, and the weight it would afford to certain types of evidence would impose constitutional discipline on states without actually dictating the specific decisionmaking reforms the state must incorporate.

*B. The Virtues and Vices of Proactive Intervention*

A legislative or administrative structure incorporating these elements, although far from fool-proof, would come with several advantages. It would, in effect, set up a process for testing a state's override of its educational duties—the key constitutional issue noted above that has evaded serious judicial review. It would also speed a potential lawsuit toward a judgment on the merits and a remedy, as opposed to the current drawn-out litigation that permits states to enact budget cuts on a whim and dare courts to reprimand them years after the fact.<sup>324</sup> New Jersey has many background factors that make favorable education outcomes more likely, but the reality of an analogous structure (in the form of special masters, direct review and original jurisdiction before the state supreme court) surely played no small role in plaintiffs' ability to block massive cuts to at least the neediest districts during the recession.<sup>325</sup> In fact, New Jersey was the only state that, as a matter of constitutional law, reversed cuts.

In response to clear and consistent prior enforcement of prophylactic measures, the New Jersey legislature had enacted new legislation to fundamentally alter the way it funded schools in 2008.<sup>326</sup> Rather than just guess at the cost of education, New Jersey set up “a careful and deliberative process [to] . . . determin[e] the educational inputs necessary to provide a high-quality education” and “the actual cost of providing” it.<sup>327</sup> It then also created a funding formula that was tied to those costs, but that also accounted for “the unique problems and cost disadvantages faced

323. *Morrison*, 529 U.S. 598; *Shelby Cty. v. Holder*, 133 S. Ct. 2612 (2013).

324. See generally Black, *supra* note 5 (detailing the extensive evidence and issues involved in school funding cases).

325. *Abbott ex rel. Abbott v. Burke*, 20 A.3d 1018 (N.J. 2011) (striking down state's failure to fully fund the formula for the plaintiff districts).

326. *Abbott ex rel. Abbott v. Burke*, 20 A.3d 1018, 1023–24 (2011).

327. SCHOOL FUNDS—PUBLIC SCHOOLS—MAINTENANCE AND SUPPORT, 2007 NJ Sess. Law Serv. Ch. 260 (ASSEMBLY 500) (WEST).

by districts with high concentrations of at-risk students.”<sup>328</sup> When the state later in 2011 reduced funding levels substantially below what its own legislation would have indicated was appropriate, it put the New Jersey Supreme Court in a far better position than most other courts to intervene. To be sure, the court did not order a remedy as broad as the plaintiffs had requested,<sup>329</sup> but it did, despite the recession, successfully compel the legislature to restore substantial funds to education.<sup>330</sup> In short, New Jersey offers a prime example of how structural shifts in decisionmaking and their interaction with prophylactic rules can put plaintiffs in a position to enforce constitutional rights to education that would otherwise go unenforced during times of crisis.

These virtues aside, however, forcing a state to act in addressing the possibility of constitutional violations before they occur can trigger critiques that the judiciary is acting beyond its authority. If one accepts the premise that the judicial enforcement of constitutional clauses is appropriate, which a majority of states do,<sup>331</sup> these prophylactic measures are no more a problem than any prior remedies. They may even be less so. First, exigency invites constitutional violations and those violations are difficult to stop or remedy after the fact.<sup>332</sup> In fact, in the context of education, courts have rarely remedied past harms or even prevented imminent ones.<sup>333</sup> Unless courts are willing to expressly demand remedies for past students, the only feasible remedy is to demand that the state plan ahead. Moreover, from an equitable perspective, planning ahead is a small burden for the state to shoulder and the only one that will prevent the reoccurrence of future inadequacies that would otherwise go un-remedied.

Second, random deprivations of education across time are indefensible in a constitutional system. A quality education is something a student receives over the course of his or her academic career and the obligation that state constitutions impose on states is the summative whole of a

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328. *Id.*

329. *Abbott ex rel. Abbott v. Burke*, 20 A.3d 1018, 1045 (2011) (only ordering that funds be restored to the Abbott districts, not statewide).

330. *Megerian*, *supra* note 197.

331. *See generally* *Rebell*, *supra* note 20, at 1484–87 (discussing plaintiff victories in a majority of states).

332. *See, e.g.*, *McDonald v. United States*, 335 U.S. 451, 456 (1948) (“Power is a heady thing; and history shows that the police acting on their own cannot be trusted,” nor excused from warrant requirements).

333. *See generally* *Liebman*, *supra* note 32 (critiquing the failure to remedy the past harms of segregation); *Decade After Ruling, State Struggles to Fulfill the Promise of Leandro*, *THE DISPATCH* (Lexington, N.C.), July 6, 2004, at 3A (indicating that the lead plaintiff in the case was now in law school and that state still had not implemented a remedy).

student's career.<sup>334</sup> A state that fails its elementary students for a period of years may be unable to make up reading, learning, and other deficits later in time.<sup>335</sup> As one study of the recession shows, the students in two states suffered sustained cuts of more than 20% between 2008 and 2014.<sup>336</sup> A separate study of student achievement gaps indicates that these results are equivalent to an entire year's worth of learning.<sup>337</sup> Five other states cut education by 15% or more.<sup>338</sup> These students may very well finish their education and work careers a step behind what the state constitution requires.<sup>339</sup>

If state constitutional education mandates mean anything, they mean that the quality of education a student receives is not based upon the random year in which the student was born and attended school. While a statutory right to education might alleviate states of that burden, constitutional rights do not. Thus, absent some compelling justification or proposed alternative solution by the state, the state, cannot as a practical matter, deny its responsibility to plan ahead.

Third, the quality and quantity of teachers—the most important aspect of a quality education—that exist at any given moment are a product of a much larger and longer teacher pipeline that stretches across several preceding years.<sup>340</sup> The shortages experienced this past fall were neither surprising, nor susceptible to immediate remedy.<sup>341</sup> The signs of that impending shortage had been apparent for years and the result of various

334. As the New Hampshire Supreme Court extensively detailed, the constitutional mandate “extends beyond mere reading, writing and arithmetic. It also includes broad educational opportunities needed in today’s society to prepare citizens for their role as participants and as potential competitors in today’s marketplace of ideas.” *Claremont Sch. Dist. v. Governor*, 635 A.2d 1375, 1381 (N.H.1993). Or as the state’s legislature indicated as early as 1647, students should “be instructed ‘so far as they may be fitted for the University.’” *Id.* (quoting legislative history).

335. *See, e.g.*, GORDON MACINNES, *IN PLAIN SIGHT* 101 (2009) (“[P]riority must go to teaching primary grade students to read and write English well . . . [because] schools only have a few years to make certain that children can read by age nine,” a critical point of development); *Rebell, supra* note 52, at 1861.

336. MICHAEL LEACHMAN ET AL., *CTR. ON BUDGET AND POL’Y PRIORITIES, MOST STATES FUNDING SCHOOLS LESS THAN BEFORE THE RECESSION 1* (May 20, 2014), <http://www.cbpp.org/research/most-states-funding-schools-less-than-before-the-recession>. It is the same author but with a slightly earlier publication date.

337. Jackson et al., *supra* note 36.

338. Leachman et al, *supra* note 12.

339. *Rebell, supra* note 52, at 1861.

340. *See generally* LINDA DARLING-HAMMOND, *THE FLAT WORLD AND EDUCATION: HOW AMERICA’S COMMITMENT TO EQUITY WILL DETERMINE OUR FUTURE* 163–93 (2010) (comparing our system for developing and recruiting teachers to other countries).

341. *See, e.g.*, SUCKOW & PURDUE, *supra* note 5; *THE METLIFE SURVEY OF THE AMERICAN TEACHER: CHALLENGES FOR SCHOOL LEADERSHIP* 4 (2013) (indicating teachers’ job satisfaction was at its lowest point in twenty-five years).

education policies that preceded it.<sup>342</sup> And once these policies moved people out of the teaching pipeline, curing teacher shortages in the short-term became impossible. Thus, the solution to inconsistent access to education's most valuable resources is to develop and protect the teaching pipeline.<sup>343</sup>

Finally, prospective remedial directives are not entirely new. Past judicial remedies are prospective in so far as they have been aimed at securing a constitutional system moving forward. The only meaningful difference is how far into the future this Article's proposed prophylactic structures would ask states to plan. These structures would extend the prospective timeline, but do so only with the certainty that the greatest crises require the greatest planning. In short, prophylactic structures may be different in scope, but not in kind.

#### CONCLUSION

Deprivations of the constitutional right to education are not new, but over the course of four decades preceding the Great Recession, courts intervened to hold these deprivations in check. In some states, legislatures responded with massive remedies. More often, plaintiffs brought states into court several times before seeing something akin to a reasonable remedy. Within a few years of enacting a remedy, some states backslid into inequitable and inadequate funding. A few states were seemingly scared straight, never to return to court, changing their entire approach to education funding and management.

All of this is to acknowledge that school funding litigation is not a panacea. The litigation flaws, however, are more a product of separation of powers limitations and the complexity of educational quality than they are judicial timidity. If there was one constant between the 1970s and 2008, it was a willingness of most courts to recognize and stand up for the constitutional right to education. This reality kept legislatures more honest than they otherwise would have been, ensured students had a venue to

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342. See, e.g., Valerie Strauss, *The Real Reasons Behind the U.S. Teacher Shortage*, WASH. POST (Aug. 24, 2015), <https://www.washingtonpost.com/news/answer-sheet/wp/2015/08/24/the-real-reasons-behind-the-u-s-teacher-shortage/> (citing challenges to tenure, and the pressures stemming from unreliable teacher evaluation systems as cause of shortage).

343. School finance litigation has almost entirely ignored the teaching pipeline. Given the complexities of teacher labor markets and pipelines, a complete explanation of maintaining teaching quality is beyond the scope of this Article. It suffices to say here that courts could, as they might with the education budgeting process, direct states to focus on the long term pipeline of teacher development and retention, not just the question of current teacher salaries and inequities. See generally DARLING-HAMMOND, *supra* note 340.

challenge deplorable educational offerings, and destabilized the status quo of inequality enough that progress became possible.

The Great Recession seriously threatened all these new norms, not because violations were more likely to occur, but because courts were no longer willing to defend the constitutional rights they previously recognized. In effect, courts exited from the education rights enforcement business over the past decade. This judicial withdrawal seemingly emboldened states to make unnecessarily deep cuts to education and ignore the need to remedy the cuts when state revenues rebounded. Now, nearly a decade removed from the beginning of the recession, the state constitutional right to education and the governmental commitment to public education have been cast in serious doubt.

This experience offers a hard lesson in promises and pitfalls of the constitutional right to education: serious crises make education rights enforcement dangerous and potentially irrelevant in the short term. But the answer cannot be to wait until legislatures are more amenable to judicial enforcement of rights. This route only further undermines the judiciary and the rights it seeks to enforce, now and in the future. The solution is for courts to consistently enforce education rights with one eye on current violations and the other on the ability to avoid future crisis. From this perspective, the judicial flaw of this past recession was that the judicial opinions and enforcements that preceded the recession had never served as deterrents against constitutional violations, never articulated clear rules, never forced the state to plan ahead, and never prompted the state to change the way it made education decisions. The solution moving forward is for courts to immediately pursue these ends. Only then might they reconstitute the right to education and avert the next education crisis.