

**PUSHING STRING UPHILL:
LESSONS IN INTERBRANCH COMMUNICATION FROM SCHOOL-FINANCE LITIGATION**

by

Micah J. B. McOwen ⁱ

“[A court] can declare a state fiscal structure unconstitutional and order the legislature to fix it, but where the political system is reluctant . . . that can be like trying to push string uphill.”ⁱⁱ

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ⁱ Mr. McOwen is a J.D. candidate at the Georgetown University Law Center (class of 2007). He is currently a visiting J.D. student at Fordham Law School. He wishes to thank Congresswoman Elizabeth Holmes Norton (D—D.C.) for her guidance regarding this paper.

ⁱⁱ PETER SCHRAG, FINAL TEST: THE BATTLE FOR ADEQUACY IN AMERICA’S SCHOOLS 233 (New York: New Press, 2003).

I. INTRODUCTION

The judicial and legislative branches of government have never worked seamlessly together on any level. The conflict is due to many factors, but most fundamentally it is a result of the distinct roles the two play in the tripartite system. The judiciary's duty is to keep check on the representative branches and stave off the tyranny of the majority.¹ The legislature's duty to perform the will of the citizenry, on the other hand, often runs counter to the opinion of an unelected judge.² Thus, each branch's very existence is sometimes to the detriment of the other—hopefully to the overall boon of democracy.

The two branches are, nevertheless, inexorably intertwined, as they have been ever since the judiciary first declared itself the sole mouthpiece of “what the law is.”³ Thus began the constitutional tennis game between legislatures and courts, congresswomen and justices—with matches that both players always hope will end as quickly as possible. However, the batting back and forth of laws across the net of constitutionality is inevitable in a system where one player writes laws but another defines when they are written well enough.

In most cases, no game ever begins: A legislature makes a law that goes uncontested. It passes in session, goes into a code book, and becomes an accepted part of the lives of those it has the potential to affect. In cases where a match does begin, and a suit is brought challenging the validity of a law, it usually ends abruptly with a single ace: A court upholds the law and dismisses the complaint. These short matches begin and end daily in courtrooms across the nation, and they are rarely written about in law reviews and casebooks. It is the extended volley that captures our interest, the case that bounces a law back and forth between court and capital

¹ ALEXANDER HAMILTON, THE FEDERALIST NO. 78.

² I am here merely referring in the abstract to our federal constitutional system, and to the system of the nineteenth-century state judiciaries. Today approximately half of states have elected or partially-elected judiciaries; some judges may even run on party platforms. The problems accompanying an elected judiciary have been addressed by others. See, e.g., Conference transcript, *Judicial Elections: Past, Present, Future*, Manhattan Institute Conf. Series No. 6 (April 18, 2001), available at <http://www.manhattan-institute.org/pdf/mics6.pdf>.

³ *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

twice, thrice, or for decades on end. These are the constitutional matches that draw spectators and commentators.

What a court does when it finds that a legislature is guilty of creating some constitutionally deficient state of affairs depends on the perceived violation. When a court finds a legislative *action* unconstitutional, the outcome is usually a simple ruling against the government or agency. Regardless of whether a judge throws out a simple choice made by an officer or an entire statute, the message for the legislature is the same: “Feel free to go about your business, but you must do so without using this law, or using this law in this way.” In stark contrast, when a court finds a legislature guilty of some unconstitutional *inaction*, the message the court sends is not so benign: “Legislature, you must *change* this law or *create* a new law or *implement* this law according to *our* directions.” When judges—rightly or wrongly—command legislators to do their jobs differently, interbranch tension is ripe to occur.

The types of court orders that seem inevitably to result in especially contentious interbranch clashes are those that order a legislature to appropriate significant additional public funds, to drastically alter popular programs, or otherwise to act in a politically unpopular way. Politicians build their careers on compromise, and whether their intentions are the very best (trying to keep campaign promises and listen to constituents) or something less (merely trying to get reelected), they will never take kindly to an order, especially one they perceive as making them less popular. The result can be a back-and-forth battle of court order → legislative inaction → court order → inadequate legislative effort → court remand, etc. that can sometimes last for decades without ever reaching finality.

No field has hosted more of these landmark matches, no area of litigation has seen more miscommunication and stalemate between judiciary and legislature, than that of debate over the quality of education in America’s public schools.⁴ Above and beyond the typical inefficiencies

⁴ As one Georgetown University Law Center professor put it, “You know you’re in education-law-land when you see such-and-such case *VI*.” James Forman, Lecture, Education Law & Policy, Georgetown University Law Center, Feb. 2, 2006.

omnipresent in our civil litigation system, school-finance litigation, for reasons discussed herein,⁵ results in especially tense and consequently lengthy interbranch conflict. These “super-lawsuits” can be extremely expensive, and often result in little, if any, actual reform.⁶ On the other hand, there are a few examples of school-finance lawsuits where court orders resulted in legitimate, and even relatively swift, legislative action with apparently substantive and lasting results.⁷

Why is a court order heeded and followed swiftly under one set of circumstances, while a similar order is sidestepped or simply ignored elsewhere? Surely politics, generally speaking, accounts for much of the discrepancy; legislators obviously are more willing to follow a court order seen as politically popular than one with particularly nasty fallout for their constituents. However, could the way courts approach the remedy question play a role? If a court is unhappy with how a legislature responded to its edict, how much of the inadequate response could be the court’s own fault? How should legislators react when confronted by an unpopular judicial directive? Such questions are difficult to answer in the abstract (if real answers even exist), and using case studies of concrete examples is helpful in addressing them. The rich field of school-finance litigation, with a nearly nationwide sample pool, provides examples of excellent court orders as well as those that have yet to illicit the desired legislative response despite numerous attempts.

⁵ *Infra*, Sections II-III.

⁶ The example I use in this paper of such a “super-lawsuit” is the school funding litigation of New Jersey, *infra*, Section IV.A, which has cost taxpayers billions of dollars in court fees and implementation costs.

As explained in further detail *infra*, at 13-14, these lawsuits, despite having named plaintiffs, often take the pseudo-form, if not form-in-fact, of “*State Education Board v. State*,” meaning taxpayers are paying the legal fees for both sides. The citizens, in other words, lose money, no matter who, if anyone, ever “wins” the lawsuit.

⁷ The example I use in this paper is the school funding litigation of Washington state. *Infra*, Section IV.C. Another oft-cited example of a relatively smooth interbranch relationship during such litigation is the case of Vermont. See generally MICHAEL A. REBELL & JEFFREY METZLER, RAPID RESPONSE, RADICAL REFORM: THE STORY OF SCHOOL FINANCE LITIGATION IN VERMONT (Campaign for Fiscal Equity, Inc. October 2000).

In this paper, I will use school-finance litigation as a lens through which to analyze interbranch tension and communication.⁸ In Section II I will discuss the political and constitutional problems that face each branch when both attempt to control education, as well as the practical problems this poses to the citizenry at large. In Section III I will discuss recent evolutions in school-finance litigation that have escalated the interbranch tension already inherent in such lawsuits. Finally, in Section IV, I will analyze three of these interbranch contests: One (Washington⁹) reached a relatively easy and speedy resolution; one (Kansas¹⁰) was a vigorous and strongly worded interbranch shouting match; and one (New Jersey¹¹) is one of the lengthiest funding-litigation volleys in history, with only the most tenuous resolution, if any at all. Each of these interbranch matches holds lessons for future courts and legislatures looking to ease tension—examples of what to do as well as what not to, both in the education-funding context and in litigation generally.

II. SOURCES OF INTERBRANCH TENSION

A. ROLES AND TRADITION

The tension between judge and lawmaker has existed from the beginning. Both perform their duties as best they can, and both resent being told that they are violating those duties and acting unconstitutionally. Short of impeachment, judges have little occasion to see such an

⁸ It is important to note at the outset that the purpose of this paper is not to address the myriad school-finance laws or their constitutionality. Whether a given state's public-school-finance system is constitutionally sufficient is an important question, as evinced by the sheer number of state judiciaries (45) and legal commentators (1,000+) that have addressed the issue. The issue's components are diverse, complicated, and multi-faceted, and are worthy of the amount of attention and litigation they have garnered in the legal community. This paper is not an attempt to even enter the many resultant debates (for example, the appropriateness of adequacy over equity as the proper legal theory to address problems in public education, which I discuss generally *infra*, Section III.B), much less to take sides in them. Rather, the focus of this paper is on the *interactions* courts and legislatures have had with each other *when* these debates arise.

⁹ *Infra*, Section IV.C.

¹⁰ *Infra*, Section IV.B.

¹¹ *Infra*, Section IV.A.

accusation leveled at them.¹² On the other hand, legislators effectively face such an accusation every time a law they wrote is struck down. Such is our constitutional system,¹³ but the result can be embarrassing, or at least frustrating, for a lawmaker nonetheless.

This is particularly true when the law in question concerns a subject on which lawmakers consider themselves experts. If a court strikes down a law pertaining to the procedural rights of accused criminals, for example, legislators are typically relatively quick to accept the court's decision and revise the law as necessary, because courts have a long history of shaping and defining criminal rights through their interpretation of the Fourth and Fifth Amendments.¹⁴ However, some tasks have been traditionally considered left to the legislators' discretion—primary among them the “power of the purse”;¹⁵ it is no surprise then that if a court strikes down a legislative action much nearer and dearer to a lawmaker's heart—say, the hard-negotiated budget for her own child's school district—she is much more reluctant to agree with the court wholeheartedly and toss her constituency's wishes (and her own understanding of the separation of powers) to the wayside.

Courts have always been aware of these problems, and over time their traditional preference for deference developed into the “political question” doctrine and varying methods of statutory interpretation. Judges try (with varying degrees of success and perhaps sincerity) to

¹² In many jurisdictions, of course, the people retain ultimate control over all branches of government, and are free to vote members of their judiciary off of the bench during state or local elections. Approximately half the states have elected or partially-elected judicial systems, four have direct gubernatorial appointment systems, and the remainder use some form of commission appointment. Judyth Pendell, Introduction, in *Judicial Elections: Past, Present, Future*, *supra* note 2, at 2. Many factors play a roll in the decision to reelect or oust a sitting judge, and the citizens' view of their constitution—including the judge's adherence to it— is certainly a major one.

¹³ See *Marbury*, *supra* note 3, and text accompanying note 3.

¹⁴ U.S. CONST. AMENDS. IV-V. Professor William Stuntz of Harvard Law School put it succinctly: “[C]ourts alone decide what the law of criminal procedure looks like, since courts are the system's constitutional lawmakers and criminal procedure is the province of constitutional law.” William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 J. CONTEMP. LEGAL ISSUES 1, 1 (1996).

¹⁵ See HAMILTON, *supra* note 1.

The traditional roles of the branches are a powerful influence on how their members view each other and how we view the branches. In my opinion, these traditional roles supersede issues of representation in most citizens' eyes: The fact that a particular judge may be elected in no sense gives her entitlement to decide traditionally legislative issues.

walk that delicate line delineating justiciability from nonjusticiability. That line has always been fine, particularly when a court is facing a claim traditionally brought exclusively, or at least initially, to another branch. Then, if their verdict is “justiciable,” judges must perform the still more difficult feat of stepping on as few legislative toes as possible while still doing their job of interpreting the law. Both of these steps are difficult for judges to negotiate because of the tension they know their decisions can cause the lawmakers who wrote the laws they are examining.

The interbranch tension resulting from often-conflicting roles makes communication between the branches difficult and strained. The closer the question of justiciability, the greater the tension. One of the closest of questions has been the extent to which courts should review school funding. The availability, equality, adequacy, and especially cost of one’s schooling were traditionally issues left up to the parent, student, and teacher alone. As education came to be seen by many as a desired state service, communities and states also took on a substantive role. Courts stayed out of the issue until approximately the 1870s, when state courts began to grant jurisdiction to claims of racial inequality in public schooling. In recent decades, however, judges have broadened their net of justiciability to include claims of unequal spending, unfair inputs, and inadequate outputs. Courts have been more willing than ever to entertain such claims, often to the chagrin of the legislators who created the public education systems being challenged. This growth in the judicial role in the field of education law has increased the tension already present in both branches and created new dilemmas for each.

B. THE JUDGE’S DILEMMAS

To a judge who accepts jurisdiction and proceeds with a claim against her state’s school-finance system, three dilemmas quickly arise: (1) How does she define the state’s obligation? (2) Against what standard does she then measure the state’s performance? and, (3) If she finds that the state has not performed constitutionally, how does she articulate a remedy? None of these questions has an easy answer, and at each step the judge runs the risk of offending the legislative branch.

Each state's constitutional obligation to provide for its children's education is unique. Of course, all states must follow the United States Constitution and ensure that any system of public schooling is free from race-, religion-, and gender-based discrimination (among other obligations).¹⁶ But looking outside these factors, each state has a unique constitution that has been interpreted by a unique judiciary to develop a unique educational mandate. The specific language in state constitutions that creates these obligations varies widely and is discussed in more detail later,¹⁷ but, generally speaking, most states' judges face three options: The state must provide "equal" education, "adequate" education, or both. It can be very difficult for judges to make this interpretation, and the tension between the branches is palpable because, as the examples at the end of this paper will show, the way a judge chooses to interpret the state's obligation has a profound effect on the current legislature, future lawmakers, and indeed every citizen in the state.

Even assuming the state constitution's authors and current lawmakers agree with the obligation a judge applies to them, there is still the extraordinarily complex question of how to define "equal," "adequate," and even "education." Does "equal" mean equal funding put in or equal test scores emerging? Must minorities in the cities be "equal" to minorities in the suburbs, whites in the suburbs, or whites in the cities?¹⁸ Must schools in one district be "equal" to those in another district, another county, or even another state? Does "adequate" mean good enough for

¹⁶ I am well aware, of course, that these are far from settled matters of constitutional law (particularly the latter two), as every textbook on education law makes clear. See, e.g., MARK G. YUDOF, ET AL., EDUCATIONAL POLICY AND THE LAW 363-540, 4th ed. (Wadsworth Group, 2002) (race); *id.* at 1-55 (religion); *id.* at 541-634 (gender). Still, these questions are more "settled" than the relatively nascent question of school-finance obligations under *state* constitutions, discussed further herein and *infra*, Section III.B.

¹⁷ *Infra*, Section III.B.

¹⁸ The question of pupil categorization is an especially deep and difficult one to address, much less to formulate into a remedy. Further iterations include the following: Must female test scores match male test scores? *Cf.* Sharif by Salahuddin v. New York State Education Department, 709 F.Supp. 345 (S.D.N.Y. 1989) (enjoining the state from using SAT scores to determine public scholarships because the court found that the SAT inherently underscores women); Does the state have the same obligation for learning-disabled students as it does for "normal" students, and, if so, how similar or different must they be treated? See *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982) (discussing the obligations states have under the Federal Individuals with Disabilities in Education Act to educate learning-disabled students in relation to "normal" students).

children to become literate, to become politically conscious citizens, to become auto mechanics, or to become poet laureates? Are children educated “adequately” when they meet that school’s average, the district’s average, the state’s average, or the nation’s average? Does “education” include extracurricular, social, or job-related skills?¹⁹ Many judges may and do, through their interpretation of the state constitution’s language and history as well as through their own individual lens of life-experience, define these terms in a given court opinion. But to the lawmakers who for decades have tried to equalize test scores, who have fought to reduce the number of kids who are inadequately prepared to face life post-high school, and who already thought they *were* educating their children, it is easy for a judge’s interpretation of these keywords to come across as officious.

Related to the problem of inconsistent vocabulary is the inevitable tension caused when a court uses its definition to prescribe a remedy for a legislature. Because the legislature considers itself relatively expert in the field of school finance,²⁰ and because historically these decisions have almost always involved an opinion that more money is needed, any court order is in danger of being interpreted as the meddlesome opinion of not only a nosy neighbor, but a bossy one. This is especially true because although the court determines what constitutes a constitutional educational system, those outside the court often think a judge is merely substituting the word “ideal” for “constitutional,” and *there is no answer* to the question of how to achieve an ideal educational system. Consider the Supreme Court’s own words on the difficulties that make *any* remedy inherently a “best guess”:

¹⁹ I have very purposefully not cited support for the various arguments suggested by the questions in this paragraph, as to do so would result in extremely lengthy and not entirely helpful footnotes. Suffice it to say that at one point or another, each and every one of these positions has been advocated for and against by teachers, academics, lawyers, and lawmakers.

²⁰ See *supra*, Section II.A. See also *supra*, note 15 (discussing the importance in the public’s eyes of this traditional field of expertise).

Education . . . presents a myriad of intractable economic, social, and even philosophical problems. . . . On even the most basic questions in this area the scholars and educational experts are divided. Indeed, one of the major sources of controversy concerns the extent to which there is a demonstrable correlation between educational expenditures and the quality of education Related . . . is the equally unsettled controversy as to the proper goals of a system of public education. . . . *The ultimate wisdom as to these and related problems of education is not likely to be divined for all time even by the scholars who now so earnestly debate the issues.*²¹

Judges run many risks when translating their sincere attempt at this ultimate wisdom into a workable court order. If the remedy is too intricate, cumbersome, and inefficient, it will be decried as an act of wasteful jurisprudence that does not actually help the state's children, or at least not enough to be worth the interference.²² On the other hand, if too simple or rigid a reform mandate is suggested, it will be decried as either a masquerading status quo or a risible impracticality.²³ Judges are used to giving orders that not everyone agrees with; however, they can be more hesitant if they risk invoking the ire of the entire state legislature and school board; it is not surprising then that judges often just leave the remedy details to the legislature.²⁴ The unfortunate bottom-line is that *any* school-finance remedy attempted by a court will be an

²¹ *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 42-43 (1973) (internal quotes and citations omitted) (emphasis added). Milton Friedman, on the other hand, apparently thought that there was a bit more accord among scholarly thought on what constitutes an adequate education in America: "For [elementary] education, there is considerable agreement, approximating unanimity, on the appropriate content of an educational program for citizens of a democracy—the three R's cover most of the ground." Milton Friedman, *The Role of Government in Education*, in *ECONOMICS AND THE PUBLIC INTEREST* (Robert A. Solo ed., 1955). Mr. Friedman may have been exaggerating the unity of thought on public curricula even in his day, and certainly no such unanimity exists today.

²² I make this claim specifically of the New Jersey reform effort, *infra*, Section IV.A. I sympathize with those who would say that *every* effort is both appropriate and requisite when a constitutional insufficiency is found, and therefore that any court-ordered interference to remedy such a violation is "worth it." While this is doubtless true in a constitutional sense, it may not be "worth it" in a practical sense. In other words, most lay citizen-parents would prefer a good, fair, and cheap system of education to a constitutional one, if they believed the former were indeed not possible within the framework of the latter.

²³ Such an example is the recent debate in New York, where a judge ordered the state to increase funding to New York City's school system by \$5.6 billion per year (a 43 percent increase), while giving little guidance as to where or how the money should be spent and none whatsoever on where it should come from. See *generally* Campaign for Fiscal Equity, *Litigation in New York*, http://www.schoolfunding.info/states/ny/lit_ny.php3 (last visited May 9th, 2006). See *also infra*, note 29 and accompanying text.

²⁴ This results in even more problems for legislators. See *infra*, Section II.C; *infra*, at 18.

imperfect one, and subsequently legislatures will always be reluctant and put-off when one is handed to them.

It is easy to see why interbranch tension can escalate as a result of each of these steps, and why judges often do and always should tread carefully when entering the waters of school-finance litigation.²⁵

C. THE LEGISLATOR'S DILEMMAS

Legislators, after more than a century of organizing systems of public education, understand all too well just how complex education is, what their constituencies want for their children, and how much they are willing to pay for it. None of that changes the day a school-finance court order reaches their desks, except that now one opinion—the judge's—matters above all others'.

The legislators are of course duty-bound to follow the court order. However, they still retain their duty to represent their constituents to the best of their ability under *their own* understanding of what a constitutional education is. Although the court's interpretation is the supreme one in this case, this does not necessarily make the politician's job any easier. Politically difficult things do not always become easy merely because one is being ordered to do them. In the real world the result is a tendency towards foot-dragging when lawmakers are ordered by a court to alter the very law they have worked hard to create or preserve. Foot-dragging, as the Kansas example in particular will show,²⁶ only makes a court more frustrated—hence the tense constitutional back-and-forth so common post-order.²⁷

²⁵ This is not to say they should ever shirk their duty to uphold and interpret the constitutions. Much the opposite—I believe they perform that duty most proficiently when they use judicial restraint in order to quell the interbranch tension that can hamper a smooth constitutional system.

²⁶ *Infra*, Section IV.B.

²⁷ Another oft-cited example of judicial frustration at legislative procrastination, coincidentally in the field of public education as well, is Justice Brennan's opinion for the Court in *Green v. County School Board*, 391 U.S. 430 (1968). Obviously fed-up with yet another superficial legislative response to *Brown v. Bd. of Ed.*, the Court did not try and hide its irritation at yet another segregated school system:

Even if a legislator is willing to reform a law, or even eager to change education for the better, she must still perform the task of implementing sometimes impractical, sometimes indecipherable court orders. Because courts have difficulty articulating a proper remedy, sometimes their orders to revise an education funding system seem vague, or even self-contradictory.²⁸ This in turn makes already-reluctant politicians even more hesitant to act—better not to act than to act incorrectly when changing something as important as education, one might say.

The uncertainty lawmakers have in implementing court orders proves just as problematic on the back end: Legislators often do not know how, when, or even if court oversight will end. Court orders, even if expertly crafted, cannot possibly account for the infinite variables in the real world—the world in which they must be implemented. This can result in court-ordered improvements either missing deadlines, or simply not happening at all.

As one example of the dilemmas that face legislatures, consider a court order to increase school funding by more than forty percent per year for one city in a state, in order to balance disparate educational opportunities. The state legislators (those actually under the order) pass

It was such dual systems that fourteen years ago *Brown I* held unconstitutional and a year later *Brown II* abolished The transition to a unitary, nonracial system of public education was and is the ultimate end to be brought about

It is against this background that 13 years after *Brown II* commanded the abolition of dual systems we must measure the effectiveness of respondent School Board's "freedom-of-choice" plan to achieve that end. . . . School boards such as the respondent . . . were . . . clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.

In determining whether respondent School Board met that command . . . it is relevant that this first step did not come until some eleven years after *Brown I* was decided and ten years after *Brown II* directed the making of a "prompt and reasonable start." This deliberate perpetuation of the unconstitutional dual system can only have compounded the harm of such a system. Such delays are no longer tolerable, for the governing constitutional principles no longer bear the imprint of newly enunciated doctrine. . . . The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work now.

391 U.S. at 435-39 (internal citations and quotation marks omitted).

²⁸ As discussed *supra*, Section II.B.

the order on to the city council, suggesting they raise property taxes to accomplish the increase. The city balks, telling the state to apportion it more of the state tax pool. What is the legislature, knowing there is statewide opposition to the order, to do?²⁹ Assume that that obstacle is overcome, and the funding is provided, but after several years it becomes clear that the funding increase was either not enough or the wrong approach to reduce the disparate opportunities. Four years later, another lawsuit is brought, claiming the same disparity in the same city schools, and the court again orders an increase from the state, this time a three-hundred percent annual increase. The legislature, still paying for the political fallout caused by its tax increases four years prior, must now again find more money, with no confidence at all that the court's order will even result in any improvement.

It is clear why these lawsuits can throw legislatures into tense relationships with courts, as lawmakers' initial trepidation at a new interbranch school-finance relationship becomes frustration and bewilderment at constant judicial second-guessing.

D. EVERYONE'S PROBLEM

The tension in both branches of government caused by these lawsuits is a problem for everyone. Even if a court uses clear standards and determines an appropriate remedy, and that remedy is in turn implemented effectively, one still runs the risk of failing to actually provide an equal or adequate education. What if the court orders and the legislature does increase funding, but test scores do not rise? What if it turns out to be impossible to reduce class size without unequal per-pupil expenditure? This uncertainty—of which there is much in the education-policy field—just exacerbates the trepidation of courts in trying to determine what remedy to order and the frustration of legislators in never knowing when they will be free from judicial scrutiny. But this

²⁹ This is a simplified version of what until very recently was happening between New York state and New York City. See Joe Williams, *The Legal Cash Machine: A New York Adequacy Case Tests the Limits of Fiscal Coherence*, in 5 EDUCATION NEXT 27 (Summer 2005). The impasse that followed the initial 2003 order recently reached a tentative resolution when, on April 1st, 2006, the state agreed to provide much of the ordered funding. See Campaign for Fiscal Equity, *supra* note 23. It remains to be seen whether this will indeed end the State's dilemmas.

is not just an abstract constitutional dilemma. Interbranch tension is a real problem, and its result in the school-finance-litigation context is wasted public resources and gambled lives of children.

Most citizens, judges and lawmakers included, apparently believe that improvement in education is difficult, or perhaps impossible, without increased funding.³⁰ This instinct can have three detrimental results. First, when judges presume more money is needed, they may simply be wrong. Perhaps the constitutional problem seen by the court cannot be solved no matter the amount of money (this could happen because of hidden factors the court is not aware of or simply because the court made a bad guess at what money would do for the situation³¹). Second, as discussed previously,³² ordering money to appear is far easier than actually making it appear. Even if money is needed, courts increase tension by simply ordering a blanket increase and leaving to others the task of finding a way—a way that inevitably turns out to be an increased burden on the taxpayers.

Third, this preference for money-ordering can disrupt due process. Consider a run-down local school district that wants more money. After repeated requests from state officials are turned down, the schools decide to sue and convince an advocacy group to join as co-plaintiff. The court agrees that they need more money and so orders.³³ Regardless of the merits of the request, this result has disrupted due process in two significant ways. First, the adversarial process can be severely hampered because the State School Board often *wanted* to give the local schools more money all along, but the money simply did not exist. The result: Both plaintiff *and* defendant ask the judge for more money from the state. Second, a violation of due process has been committed against every *other* local school and parent in the state. In the real world of

³⁰ This is certainly not to say that there is no disagreement on the premise. In fact, the subject remains under intense debate even after the Supreme Court pointed out the debate more than thirty years ago. See *supra* note 21 and accompanying block quote. For one of many cogent arguments presented that increased funding generally does *not* improve education, see JAY P. GREENE, EDUCATION MYTHS 7-19 (2005).

³¹ See *supra* at 8-9.

³² *Supra*, Section II.C.

³³ Once again, this is a real example taken from the current New York litigation discussed *supra* notes 23 and 29 and accompanying text. The plaintiffs in that case were the advocacy group Campaign for Fiscal Equity, fourteen New York City community school boards, and twenty-three individual parents with their children.

limited resources, some of the moneys ordered to go to plaintiff school *A* will likely be moneys taken away from non-plaintiff schools *B*, *C*, and *D*, even if additional funding statewide is garnered. Thus, other schools may suffer a decline in funding without ever getting to present *their* case for more money.

The result of each of these three problems is the same: More money is required of taxpayers. Taxpayers are often happy to spend more on their kids, but school-finance litigation means they (apart from the handful who are plaintiffs) are forced to do it without the benefit of political say, and without any guarantees it will actually work. And although change and more money may be necessary, even vital to the success of their own children, citizens still prefer to have a say in how their money is spent and how their children are educated.

III. THE CURRENT TENSION IN SCHOOL-FINANCE LITIGATION

The tension between the branches concerning the funding of American children's education has been palpable since the desegregation era of the 1960s. The post-*Brown v. Board* era saw many court-ordered changes to local school districts, and the courts became even more heavily involved in school oversight after *Milliken II*³⁴ allowed courts to articulate especially specific and detailed remedies, as well as to order the accompanying costs.³⁵ Even at the time *Milliken II* was decided, many thought that courts had overstepped their bounds and "virtually assumed the role of school superintendent and school board."³⁶ Although there remains court oversight of desegregation in several areas of the country even today, racist school-districting is no longer the predominant claim causing interbranch tension in the realm of school funding.³⁷

³⁴ *Milliken v. Bradley*, 433 U.S. 267 (1977) (*Milliken II*).

³⁵ For a good summary of *Milliken II*, see Betsy Levin, *School Desegregation Remedies and the Role of Social Science Research*, 42 LAW & CONTEMP. PROBS. 1, 30-33 (1978) (pt.2). *Milliken II* was itself the result of a state legislature appealing a district court order to increase funding to a city school system by \$5.8 million.

³⁶ *Milliken II* at 297 (Powell, J., concurring in the judgment).

³⁷ Although some school districts remain under *Milliken II*-type orders, the Supreme Court reigned in excessive court involvement considerably in *Jenkins v. Missouri*, 515 U.S. 70 (1995). In

The modern interbranch conflict over school funding has shifted significantly in two ways. First, the *Rodriguez* decision³⁸ effectively limited *federal* court involvement to cases involving claims of poor education due to *de jure* or *de facto* racial segregation. A claim that a child's school is grossly underfunded or otherwise inadequate or unequal for a different reason is now officially a state-law claim. Second, although much of what plaintiffs seek remains some sort of equalization of resources between their schools and others within or outside of their district, there has been a noticeable and fundamental shift in litigation strategy to one of adequacy over equity. Plaintiff parents and schools now usually claim, either in lieu of or in addition to equality, that there exists some educational floor, a level of minimal adequacy or competency, below which their children (and any others in the state) may not constitutionally be allowed to wallow. Both of these shifts have had effects on interbranch tension and communication.

A. THE SHIFT IN JURISDICTION

In 1973, the United States Supreme Court addressed one of the most important questions of constitutional law: Does the United States Constitution contain a fundamental right to public education? In a closely divided 5-4 vote, the Court held in *San Antonio Independent School District v. Rodriguez*³⁹ that it did not. The decision altered the landscape of public-school-finance litigation, and the result has increased interbranch tension.

Texas, like virtually every state, has historically used local property taxes to fund public schooling. Recognizing the disparities that inevitably resulted, the state attempted to alter the system in the 1940s by establishing a state fund to equalize expenditures and by forcing districts with more resources to contribute more. Despite the attempt, "substantial inter-district disparities in school expenditures . . . in San Antonio and in varying degrees throughout the State still

concurrency, Justice Thomas categorized the excessive court oversight as allowing a court to "take[] it upon itself to experiment with the education" of the state's children and "exercise virtually unlimited equitable powers" to do so, a judicial act that "trampled upon principles of federalism and the separation of powers." *Id.* at 114.

³⁸ *Rodriguez*, *supra* note 21.

³⁹ *Id.*

exist[ed].”⁴⁰ Mexican-American parents in a poor urban area initiated the suit, and the Supreme Court decided one primary question: Did the funding system harm a suspect class or impinge upon a fundamental right?

The Court first determined that wealth was not a suspect classification. “[T]he absence of any evidence that the financing system discriminates against any definable category of ‘poor’ people or that it results in the absolute deprivation of education” meant for the court that the poor plaintiff parents could not constitute the type of class necessary for strict scrutiny to apply.⁴¹ Next, the court relatively quickly found education not to be a fundamental right:

Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected: . . . [T]he undisputed importance of education will not alone cause this Court to depart from the usual standard for reviewing a State’s social and economic legislation.⁴²

Plaintiffs argued that education must be a fundamental right because it is a prerequisite to other fundamental rights, but this too fell on unsympathetic ears:

[W]e have never presumed to possess either the ability or the authority to guarantee to the citizenry the most *effective* speech or the most *informed* electoral choice. . . .

Even if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of [other fundamental] right[s], we have no indication that the present levels of educational expenditure in Texas provide an education that falls short⁴³

The Court concluded that only rational basis review of the funding statute was appropriate, and proceeded to uphold the system.⁴⁴

The Court did not hide its reluctance to overturn the way legislatures have been running schools virtually forever: “[I]t would be difficult to imagine a case having a greater potential impact on our federal system than [this one], [where] we are urged to abrogate systems of financing public education presently in existence in virtually every State.”⁴⁵ Throughout its opinion, the

⁴⁰ *Id.* at 15.

⁴¹ *Id.* at 25.

⁴² *Id.* at 35.

⁴³ *Id.* at 36 (emphasis in original).

⁴⁴ *Rodriguez, supra* note 21, at 55.

⁴⁵ *Id.* at 44.

majority made clear it preferred to defer the matter to the legislature: “[The plaintiffs] would have the Court intrude in an area in which it has traditionally deferred to state legislatures”;⁴⁶ “This Court’s lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels.”⁴⁷ The opinion ended with the Court’s recognizing the complex problems of education, but insisting that “the ultimate solutions must come from the lawmakers and from the democratic pressures of those who elect them.”⁴⁸ The Court was clear: Federal courts were now out of the business of reviewing claims of disparate or inadequate public school funding.

The shift of claims from federal Equal Protection clauses to state constitutional clauses⁴⁹ was immediate and dramatic. Most notably, California’s school-finance litigation, already several volleys into its interbranch match,⁵⁰ had to be reworked and reargued solely under the state-law claim. The California Supreme Court paved the way for the future of school-finance litigation in the post-*Rodriguez* world: “The constraints of federalism, so necessary to the proper functioning of our unique system of national government, are not applicable to this Court in its determination of whether *our own state’s* public school financing system runs afoul of *state* constitutional provisions.”⁵¹

Thus began the era of school-finance litigation in the state courts (or, more accurately, the era of school-finance litigation *exclusively* in the state courts). The debate over which system is better equipped to handle these cases remains an open one. Arguments can and have been made in favor of state courts’ handling education funding issues,⁵² including that they are closer (geographically and politically) to the interests of the parties, which makes it easier to oversee

⁴⁶ *Id.* at 40.

⁴⁷ *Id.* at 42.

⁴⁸ *Id.* at 59.

⁴⁹ See *infra*, Section III.B for further discussion of the various state constitution clauses at issue.

⁵⁰ *Serrano v. Priest I*, 5 Cal. 3d 584 (1971). The case had been remanded after its first visit to the California Supreme Court when *Rodriguez*, *supra* note 21, was handed down.

⁵¹ *Serrano v. Priest II*, 18 Cal. 3d 728, 766-67 (1976) (emphasis added).

⁵² Including by the Supreme Court. See, e.g., *Rodriguez*, *supra* note 21, at 42-44.

implementation of court orders, easier to judge of local children's needs, etc.⁵³ Others have argued that federal courts could handle education funding issues more objectively, free from local political pressure.⁵⁴ For better or for worse, however, state courts are the ones with jurisdiction over such claims in the post-*Rodriguez* world.

This shift has brought with it new problems in interbranch communication. At the state level, the judiciary works much closer to the legislature (geographically, and practically).⁵⁵ State judges are more likely to be former lawmakers, and vice versa. Sometimes members in one branch have friends or family members in the other. In many ways, the two branches view each other like siblings, rather than the more paternalistic relationship between state legislatures and federal courts. This closer working relationship has positive and negative results. Because the two branches work closely together, communication can be open and even efficient at times. Conversely, sibling rivalry can rear its ugly head easily, quickly, and intensely. When the branches disagree—as they often do during school-finance litigation—legislators feel too comfortable pooh-poohing or even ignoring a state court's decision, something they would likely never consider doing in response to a federal court order.⁵⁶

Rodriguez and the shift of school-finance litigation to state courts, while undoubtedly well-intentioned by the 1973 Supreme Court, has not made the issue of the proper role of courts in determining public-school funding disappear. Many state courts have not adhered to the explicit preference for deference the *Rodriguez* majority followed and instead, like California, have

⁵³ Cf. Hans A. Linde, *Observations of a State Court Judge*, in JUDGES & LEGISLATORS 117, 118 (1988) (discussing the closer relationship state judges have with local officials and processes).

⁵⁴ Cf. *Rodriguez*, *supra* note 21, at 132 (Marshall, dissenting) (discussing problems of local control over education funding).

⁵⁵ See Linde, *supra* note 53, at 118.

⁵⁶ One recalls here the watershed moment of Governor Wallace's defiance of the federal order to desegregate. See generally DAN T. CARTER, *THE POLITICS OF RAGE: GEORGE WALLACE* (2d ed., 2000). Such open defiance of federal court orders still occurs, but it is certainly rarer.

Such federal-state problems of legitimacy and insolence certainly still exist, however, and they need not cross branch lines. Consider the recent ousting of Alabama Supreme Court Justice Roy Moore for refusing to follow a federal court order to remove the Ten Commandments from his courthouse lobby. See Jeffrey Gettleman, "Alabama Panel Ousts Judge Over Ten Commandments," N.Y. TIMES, Nov. 14, 2003, at A16. For the ousted justice's side of the story, see ROY S. MOORE, *SO HELP ME GOD* (2005).

attempted to determine “whether [their] own state’s public school financing system runs afoul of *state* constitutional provisions.”⁵⁷ The problems of school-finance litigation have now become widespread, with each state court system considering its obligations anew and state legislators feeling at liberty to resist, disagree, or defy the former’s determination. Thus, although the questions asked remain equally difficult no matter which level of government, having them asked exclusively by the states has resulted in even more interbranch tension than was present prior to *Rodriguez*.

B. THE SHIFT IN ARGUMENT

Judges have been asked by plaintiffs to review state school-finance systems under several different claims. In decades past, the claim was virtually always one of a denial of equal opportunity: “My kids are receiving lesser educational opportunities than other kids in the state.” However, this claim has evolved over time, and in fact is giving way to a more popular argument—adequacy—as the following passage summarizes:

Historically, [equal] educational opportunity has been defined primarily in resource (or input) terms; its elements included a universally available and free education, a common curriculum, and equality of resources—teachers, texts, and the like—within a given school district. In the last thirty years, however, the contending definitions of equal opportunity have multiplied, with increasing sensitivity to spending variations across and among school districts. Others have perceived this critical issue as one of adequacy and not equity.⁵⁸

The equity claim is basically that school funding (or some other metric of educational opportunity) should be made equal among schools and districts.⁵⁹ A claim of adequacy is one that seeks that all schools in the State be funded (or otherwise supplied) so as to meet some minimal level of quality (even if this level is higher than that at which most schools in the State currently rest). After *Rodriguez*, either claim must originate in the state constitution (instead of the federal equal

⁵⁷ *Serrano II*, *supra* note 49, at 766-67 (emphasis added).

⁵⁸ YUDOF, ET AL., *supra* note 16, at 767 (internal citations omitted).

⁵⁹ In reality, inner-city plaintiffs rarely claim that they should receive identical spending to that in richer suburbs: Typically the claim is that inner-city schools need *more* funds, because it will take more money to make the schools truly “equal” to the historically better-funded suburban schools. When judges rule in favor of plaintiffs, they usually concede the reality of this point as well.

protection clauses), and hence increasing attention has been paid to state “education clauses.” Both the equity and the newer adequacy lines of argument present problems of interbranch tension, but the latter even more so.

A claim based on the so-called “education clause” of a state’s constitution is a relatively novel legal invention. Education clauses are nearly as varied as the fifty states, with variation not just in language but in the fundamental principle or right being articulated.⁶⁰ Until the Civil War, these clauses were almost exclusively considered merely aspirational, optional, or hortatory: The legislature “ought” to pursue statewide public education, for example.⁶¹ Even in states that did have early mandatory language, it was not interpreted or enforced as such until much later.⁶² With the shifts in education practices, in class distinctions, and in life in general since the Civil War has come a gradual shift (either in the interpretation of an old education clause or in its amendment) toward viewing a state’s obligation as providing education open to all and at no cost. Currently, approximately half the states still retain the view “that the provision of public education [is] inherently a policy judgment best left to the discretion of the political branches, primarily the legislature.”⁶³ Courts in the other half of the states interpret their constitutions to require some level of public education, though the duration, quality, and type of education required is hotly contested, including such fundamental debates as whether the constitution mandates equal schools, adequate schools, or both.

Interestingly, the terms “equal” and “adequate” do not appear in many, in fact most, education clauses. Many do have some kind of language implying fairness and equity, and a few

⁶⁰ For an excellent history of education clauses and their gradual integration into education equity and adequacy litigation, see John C. Eastman, *Education and the 20th Century’s Rights Revolution: Have We Overlooked Government by Consent?*, Conference, “Adequacy Lawsuits: Their Growing Impact on American Education” (Harvard University, Oct. 13-14, 2005) (preliminary draft), available at http://finance.tc-library.org/DefaultFiles/SendFileToPublic.asp?ft=pdf&FilePath=c%3A%5CWebsites%5Crockefeller%5Ftclibrary%5Fforg%5Fdocuments%5C197%5F8361%2Epdf&fid=197_8361&aid=2&RID=8361.

⁶¹ Vermont Const. of 1786, ch. II, §38.

⁶² For example, Georgia’s constitutional mandate that “schools shall be erected in each county, and supported at the general expense of the State, as the legislature shall hereafter point out” went totally unheeded for over a century. Eastman, *supra* note 60, at 3.

⁶³ *Id.* at 6. Once a state decides to provide such an education, of course, the state and federal Equal Protection Clauses, the Bill of Rights, etc. apply.

have wording closely analogous to “adequate.” Relatively often, however, a lay court observer could easily accuse a court of stretching or just outright creating an obligation on the state legislature from ambiguous and centuries-old language. As examples of various education clauses, consider the education clauses of the three states highlighted later in this paper:

- New Jersey “shall provide for the maintenance and support of a thorough and efficient system of free public schools.”⁶⁴
- Kansas “shall make suitable provision for finance of the educational interests of the state.”⁶⁵
- Washington “shall provide for a general and uniform system of public schools”⁶⁶

Does “thorough and efficient” imply equality? Does “general and uniform” imply a state minimum? Courts have struggled to change these words into something meaningful for modern legislators, and no matter how they interpret them, they know that every word of their opinion can have powerful political and fiscal ramifications for the legislature that must implement it.

Plaintiffs in school-finance litigation made a key realization somewhere in the past few decades: A claim that *some* kids need help is not nearly as palatable as a claim that *all* kids need help. Who can say no, if asked in the abstract whether she thinks education in her state should be better? With this powerful, nearly unassailable proposition, plaintiffs now use adequacy as their theory of choice, finding it easier to get a court to define the state’s obligation as one of adequacy than one of equity. This theory, however, also makes it easier for plaintiffs to manipulate a remedy to include a higher dollar amount, and results in more interbranch tension.

While both equity and adequacy as theories of a state’s educational obligation present interbranch communication problems and tension for the general reasons discussed thus far, adequacy presents particular problems for the branches and for the citizenry at large. The primary problem is that adequacy involves even more guesswork. It is relatively easy for a court to look at *School A* and *School B* and compare class size, per-pupil expenditures, teacher

⁶⁴ NEW JERSEY CONST. of 1844, art. IV, §7, cl. 6 (amended 1875). A number of other states use the term “thorough and efficient” or some similar variant.

⁶⁵ KANSAS CONST., art. VI, §6(b).

⁶⁶ WASHINGTON CONST., art. IX, §2.

certification, or test scores and judge their equality. On the other hand, adequacy requires the court to create an artificial baseline to measure against, and to compare *School A* to a manufactured and theoretical *School Adequate*. Deciding what such a theoretical adequate education in its state should look like requires the types of impossibly tough calls discussed earlier:⁶⁷ How much should kids know, and how much should be spent to accomplish that? Well-intentioned and under pressure often from both sides in the suit,⁶⁸ courts are understandably inclined err on the side of demanding too high a standard instead of risking subjecting children to an inadequate education. Adequacy claims mean more guesswork, hence a higher dollar amount—hence even more interbranch tension.

IV. LESSONS IN (MIS)COMMUNICATION

A. THE LONG, LONG ROAD TO NOWHERE: NEW JERSEY

Anyone studying education law within the past thirty years has almost certainly read a case or two from New Jersey.⁶⁹ School-finance litigation has a history there that stretches back well over a century.⁷⁰ It is no surprise then that probably the most lengthy and complex school-finance interbranch entanglement in history started there more than 35 years ago, with closure still not in sight. Examples of many of the problems discussed in this paper are evident throughout this epic constitutional interbranch match.

⁶⁷ *Supra*, Section II.B.

⁶⁸ *See supra*, at 13.

⁶⁹ For example, in a typical education law textbook from 1970 (the year the cases discussed herein began), more than one in ten state-court case studies were from New Jersey courts. *See* E. EDMUND REUTTER, JR. & ROBERT R. HAMILTON, *THE LAW OF PUBLIC EDUCATION* 160-65, 303-06, 350-54, 440-46, 484-86, 523-27, 637-42 (New York: Foundation Press, 1970) (highlighting seven case studies from New Jersey Supreme and appellate courts).

⁷⁰ *See* *Landis v. School Dist. No. 44*, 31 A. 1017 (N.J. Sup. Ct. 1895) (setting an adequacy standard for public funding of schools).

The current series of related lawsuits extends back to 1970, when the first *Robinson v. Cahill* suit was filed.⁷¹ A perfect example of the way plaintiffs sometimes try to use these lawsuits to accomplish what cannot be done through traditional channels, “[t]he original impetus for the case came from Jersey City and its mayor, who was anxious to find a way to obtain more state funding for Jersey City, or at least to deflect the public’s attention from the high local property tax rate.”⁷² Relatively early in the litigation the state chapter of the American Civil Liberties Union and the Newark chapter of the National Association for the Advancement of Colored People joined as amici curiae, and all were represented by Rutgers Law School professors.⁷³

The plaintiffs claimed that the public-school-financing system violated the education clause requirement that the state provide a “thorough and efficient system” of public education, the state tax uniformity requirement, and the federal Equal Protection Clauses. The trial judge quickly ruled in their favor, though solely on the last two claims. Upon appeal, a unanimous New Jersey Supreme Court set the stage for all future interbranch conflict:

In ruling on the state defendants’ appeal, the New Jersey Supreme Court agreed that the statute was unconstitutional, but its reasoning was the converse of the trial judge’s. The Education Clause became the sole basis of its decision. With only minor detours, that has continued to be the constitutional route for trying to reach equality [and adequacy] of educational opportunity ever since.⁷⁴

Although the court purported to define the obligation of the state, its definition of “thorough and efficient” was not exactly clear. At first, the Court defined it in terms of equal educational opportunity; later in the opinion, however, the Court relied heavily on a nineteenth-century case defining the state’s obligation as one of adequacy.⁷⁵ The Court finally settled on a definition of the “thorough and efficient” requirement that was more aspiration than workable doctrine: “The Constitution’s guarantee must be understood to embrace *that educational opportunity which is*

⁷¹ Though obviously filed and heard in lower courts, the first time the case was addressed by the New Jersey Supreme Court, the court where (for sheer brevity’s sake) the majority of the focus will be in this section, was in *Robinson v. Cahill*, 303 A.2d 273 (1973) (*Robinson I*).

⁷² Paul L. Tractenberg, *The Evolution and Implementation of Educational Rights Under the New Jersey Constitution of 1947*, 29 RUTGERS L.J. 827, 896 (Summer 1998).

⁷³ *Id.*

⁷⁴ *Id.* at 897.

⁷⁵ See *id.* at 898-99. The earlier case was *Landis*, *supra* note 70.

*needed in the contemporary setting to equip a child for his role as a citizen and as a competitor in the labor market.*⁷⁶ Using this more-than-slightly-vague standard, the Court then declared the most recent education-funding act unconstitutional on several levels. The Court faulted the state for not prescribing curriculum content (i.e., defining what “equip[s] a child for his role as a citizen and competitor in the labor market”⁷⁷), and for relying too heavily on local taxes, which resulted in funding disparities (in fact positing that no system relying on local taxes could meet its definition of a “thorough and efficient system”⁷⁸).

Now that the Court had struck down the state’s school-finance system, a replacement had to be ordered, and all the problems of court-ordered remedies that come with one.⁷⁹ First, the Court limited itself to prospective relief. Then, much to its credit, the Court recognized the potential interbranch tension and sought advice for how best to proceed: “[The Court asks for the views of the parties and amicus regarding] the content of the judgment, including . . . whether the judiciary may . . . order that moneys appropriated by the Legislature . . . shall be distributed upon terms other than the legislated ones.”⁸⁰ The interbranch discussion, at times collegial, at times ugly, had begun.

The back-and-forth between the branches was intense. Five additional Supreme Court opinions, each spurred by legislative action or inaction, emerged in the first three years. After receiving feedback from the parties and amicus, the Court (several months after *Robinson I*, still in 1973) told the legislature to develop a new funding statute by the end of the following year. The new law was to take effect by July 1, 1975.⁸¹ The legislature did try, but making a new funding system was extremely treacherous politically:

⁷⁶ *Robinson I*, *supra* note 71, at 295 (emphasis added).

⁷⁷ *Id.* at 295.

⁷⁸ *Id.* at 297.

⁷⁹ Discussed *supra*, Sections II.B-C.

⁸⁰ *Robinson I*, *supra* note 71, at 298.

⁸¹ *Robinson v. Cahill*, 306 A.2d 65 (1973) (*Robinson II*).

The Legislature's most difficult problem was money. Given the extent of the disparities in local property wealth, any funding system that substantially equalized school spending . . . would require an enormous increase in state aid. . . . The only possible solution was adoption of a new broad-based state tax. The main contenders were a statewide property tax and an income tax. Both posed serious political problems for elected officials.⁸²

Lawmakers initially responded to the political pressure by attempting to mask the old way of doing things by sticking it in a new bill. The executive and legislative branches started "by making a political/fiscal judgment about the level of state education aid that was *feasible*," and then "use[d] that amount to construct a school finance system" that met the Court's demand.⁸³ The Court, however, would not accept a definition of what kids needed that was based on what the state was willing to pay—it required the inverse. After the legislature missed the original deadline, two more opinions were handed down laden with increasing threats of judicial school takeover.⁸⁴ Nine months later, the legislature finally passed a new funding statute.⁸⁵

While lawmakers waited with bated breath, the Supreme Court considered the flurry of motions from various parties on the validity of the new law.⁸⁶ Although it upheld the facial constitutionality of the statute, the per curiam Court gave anything but a ringing endorsement:

[T]he best [the Court] could do was announce that decision [of facial constitutionality] in a tepid and tentative majority opinion. Only four of the seven justices signed on to the full opinion and two of those . . . felt the need to write their own concurring opinions. Two other justices joined only a part of the court's opinion, and one of those dissented [in large part]. [Another justice] dissented in a strong and lengthy opinion. In fact, even a quick perusal of the justices' various opinions . . . clearly indicated the court's misgivings about the statute⁸⁷

⁸² Tractenberg, *supra* note 72, at 901.

⁸³ *Id.* at 902 (emphasis added). This was common knowledge, "[s]ince it was well-known that the state had never done a study of actual program costs, [and the proposed costs in the new legislation simply] resulted from dividing the number of students in each category into the amount of money the state had [already] determined it was able or willing to commit for that purpose." *Id.* at 902 n.415.

⁸⁴ *Robinson v. Cahill*, 335 A.2d 6 (1975) (*Robinson III*); *Robinson v. Cahill*, 351 A.2d 713 (1975) (*Robinson IV*).

⁸⁵ Public School Education Act of 1975, N.J. STAT. ANN. §18A:7A-1-20 (West 1998).

⁸⁶ *Robinson v. Cahill*, 355 A.2d 129 (1976) (*Robinson V*).

⁸⁷ Tractenberg, *supra* note 72, at 903.

The problem was that the Court did not think the statute would be fully funded or implemented in a constitutional way. It explicitly retained jurisdiction to determine the constitutionality of the law as applied, and gave the legislature a clear order: “[E]nact a provision for the funding *in full* of the state aid provisions of the [new] act for the school year 1976–1977.”⁸⁸

The legislature’s bluff was called; the act went unfunded. The Court, addressing this issue for the sixth time, decided drastic action was needed to get the legislature’s cooperation. It announced that the state would be enjoined from funding public schools, period, until the new law was funded.⁸⁹ Feeling forced to comply, lawmakers passed the state’s first income tax to pay for the new education act. It seemed the issue was laid to rest, and, at least as far as the Supreme Court was concerned, New Jersey’s children were finally attending a “thorough and efficient” school system.

For more than five years, plaintiffs waited and gathered evidence, hoping to prove that the new act had indeed failed the constitutional standard as applied. A new challenge was brought, and the Supreme Court again considered the issue of the state’s school-finance system.⁹⁰ In a move unique not only to New Jersey but to any school-finance litigation, the Court imposed a requirement that the case first be heard by an administrative law judge, saying that education was a particularly fact-sensitive field that should be expounded by educators and experts in an administrative setting in order to provide a sufficient record for the judiciary to then use in addressing the constitutional issues.⁹¹ This process took several more years, and by the time the issue wound its way back to the Supreme Court, it was 1990, a full fifteen years after the legislature’s attempt at satisfying a now seventeen-year-old court order.

Like the original Supreme Court decision, this one was also unanimous, and it reached the same conclusion:

⁸⁸ *Robinson V*, *supra* note 86, at 139 (emphasis added).

⁸⁹ *Robinson v. Cahill*, 358 A.2d 457 (1976) (*Robinson VI*).

⁹⁰ *Abbott v. Burke*, 495 A.2d 376 (1985) (*Abbott I*).

⁹¹ *Id.* at 393.

We find that under the present system the evidence compels but one conclusion: [T]he poorer the district and the greater its need, the less the money available, and the worse the education. That system is neither thorough nor efficient. We hold the act unconstitutional as applied to poorer urban school districts. . . . [F]unding cannot be allowed to depend on the ability of local school districts to tax . . . [and] must also be adequate to provide for the special educational needs of these poorer urban districts⁹²

Much of the opinion was strikingly similar to the original seventeen years earlier: The Court still spoke in terms of both equity and adequacy. But there was one key difference in this newest court intrusion into school funding: It limited the holding to “poorer urban school districts.” The reason the Court gave for dividing the children of the state into these categories was that the plaintiffs’ evidence had been lacking for other school district categories,⁹³ but some have postulated that the Court was trying to seem less intrusive on the legislative domain by limiting the reach of the decision.⁹⁴ Regardless, the Court had now renewed the dual-branch oversight of public-school funding, at least for some of the state’s schools, which many thought had been laid to rest.

The Court’s discussion of remedy was at times stern and at times deferential. The court made clear what ultimate yardstick it would use to measure compliance: “[I]n order to provide a thorough and efficient education in these poorer urban districts, the State must assure that their educational expenditures per pupil are substantially equivalent to those of the more affluent suburban districts, and that, in addition, their special disadvantages must be addressed.”⁹⁵ The Court left much of the detail, however, up to the legislature, including the supremely important definition of “poorer urban districts.”⁹⁶ The legislature was free to “devise any remedy, including one that completely revamps the present system, in terms of funding, organization, and management”⁹⁷

⁹² *Abbott v. Burke*, 575 A.2d 359, 363 (1990) (*Abbott II*).

⁹³ *Id.*

⁹⁴ See Tractenberg, *supra* note 72, at 907.

⁹⁵ *Abbott II*, *supra* note 92, at 408.

⁹⁶ *Id.* at 409. Leaving this definition up to the legislature seems to me an especially odd move by the Court. How can a court declare unconstitutional the treatment of a class that not only has not been identified, but will be identified by someone other than itself?

⁹⁷ *Id.*

Anticipating an *Abbott II* ruling against the State, Democratic Governor Jim Florio and Democratic legislators had been working on a reform bill. The majority of lawmakers had been generally supportive of the plaintiffs, and they reacted to the court order with unprecedented speed and vigor, enacting a new law within months.⁹⁸ This reaction, however, came at a steep political price:

Not only was a new statute enacted with extraordinary speed, but funding was assured through what was widely characterized as the largest tax increase in New Jersey's history. This prompted a political backlash that, in rapid succession, led to an enormous decline in Florio's ratings, the election of a Republican-controlled State Legislature, and major erosion of the [new statute]'s equalizing potential. In the longer-term, it probably led to [a new Governor's] narrow election in 1993, and to Jim Florio's political demise.⁹⁹

Even more unfortunate for those involved, the sacrifice was for nothing; the new statute was again challenged, and again found wanting by the Supreme Court four years later.¹⁰⁰ This time, however, the Court was brief—it simply reiterated much of the *Abbott II* decision and gave the legislature three years to come up with yet another new law.

The legislature did come up with another statutory attempt,¹⁰¹ the fourth since the commencement of the *Robinson* litigation now decades in the past.¹⁰² The legislature, however, still had not listened, and had calculated future funding based on a hypothetical model district, and not current funding levels in rich suburban schools, as *Abbott II* demanded. Although the state argued that this did not matter, because the law also held all schools to the same achievement standards, the Court disagreed and insisted that equal funding was what was

⁹⁸ Quality Education Act of 1990, Ch. 52, N.J. STAT. ANN. §§18A:7D-1 to -37 (West Supp. 1998).

⁹⁹ Tractenberg, *supra* note 72, at 911-12.

¹⁰⁰ *Abbott v. Burke*, 643 A.2d 575 (1994) (*Abbott III*).

¹⁰¹ Comprehensive Educational Improvement and Financing Act of 1996, Ch. 138, N.J. STAT. ANN. §§18A:7F-1 to -33 (West Supp. 1998).

¹⁰² It is worth mentioning now that it was during the years this law was being developed that the next challenge was brought against the state, basically claiming that the legislature was already on the path towards missing its deadline for new legislation. *Abbott v. Burke*, 693 A.2d 417 (*Abbott IV*). The New Jersey Supreme Court held the case while lawmakers were “actively considering legislation.” *Id.* at 425.

needed.¹⁰³ Then the Court did something that would change the constitutional balance in New Jersey in a way still felt today:

Children in the special needs districts have been waiting more than two decades for a constitutionally sufficient educational opportunity. . . .

. . . .
Presented with no alternative remedy by either the plaintiffs or the State, and without a realistic alternative arising out of the new act itself, the Court must resort to judicial relief. . . . Although it remains our hope that needed comprehensive relief eventually will come from those branches of government more suited to the task, there can be no responsible dissent from the position that the Court has the constitutional obligation to do what it can to effectuate and vindicate the constitutional rights of the school children in the poverty-stricken urban districts.¹⁰⁴

The Court's patience had run out.

The Supreme Court began its reluctant reign over public-school funding by remanding the case to a lower-court judge to calculate what the poor, inner-city schools needed to rise to the level of rich suburban schools.¹⁰⁵ Although the judge spent most of the opinion talking about specific programs that were required—including full-day kindergarten, improved security, and school-to-work programs—rather than dollar amounts, the cost to the State was estimated at \$2-3 billion.¹⁰⁶ The case went back up to the Supreme Court, which agreed to most of the lower-court recommendations for needed programs.¹⁰⁷

The Court has been working with educators and lawmakers to implement these changes in the special-needs districts ever since. Decisions continue to be handed down by the Supreme-Court-as-school-district-board, with the latest being just this past summer.¹⁰⁸ Unfortunately, the results so far have been billions of dollars in state funds,¹⁰⁹ accusations of extensive corruption,¹¹⁰ and only marginal improvements, if any at all, in education.¹¹¹

¹⁰³ *Abbott IV*, supra note 102.

¹⁰⁴ *Id.* at 437, 445.

¹⁰⁵ *Id.* at 445.

¹⁰⁶ The lower court opinion is appended to *Abbott v. Burke*, 710 A.2d 450, 474 (1998) (*Abbott V*), as Appendix I.

¹⁰⁷ *Abbott V*, supra note 106.

¹⁰⁸ *Abbott ex rel. Abbott v. Burke*, -- A.2d --, 2006 WL 1388958 (N.J.) (May 22, 2006).

¹⁰⁹ New Jersey's state budget for education is hundreds of millions of dollars per year, a huge percentage of which is due to implementing the *Abbott* rulings. See, e.g., Division of Finance,

* * * * *

What lessons can we learn from the New Jersey experience? First of all, imprecise language in a court order can lead to confusion, evasion, and a generally tense interbranch relationship. While legislators may resent a court order that is detailed and explicit in specifying how education must change, far more frustrating is the court order that lulls the legislature into thinking it has great leeway only to have the court say “No, try again” over and over again. The initial opinions of the early 1970s were generally vague in terms of their remedy, and the New Jersey Supreme Court has subsequently forced the legislature into its now-fifth statutory attempt at satisfying the Court. This has needlessly escalated tension and made communication between the branches strained.

Reciprocally, a second takeaway point is that legislatures should try their utmost to follow court guidance when crafting a statutory response, and not purposefully attempt a different or knowingly inadequate remedy. Certainly by the fourth statutory attempt, the second one since the *Abbott* litigation began, lawmakers knew that the court wanted to see equalized funding in *real* dollars. By presenting another funding law seeking to improve education in some other way, lawmakers should have known they were seriously trying the Court’s patience.

Third, constituents can be a powerful hindrance to interbranch comity. The initial trepidation of lawmakers to follow the court order to increase funding to certain schools was due to their fear of reprisal for doing the only constitutional thing: raising taxes. This fear was not irrational, as ousted Governor Florio and several other former New Jersey legislators can attest. Political pressure cannot be overestimated as a powerful factor affecting whether lawmakers in fact follow a court order.

New Jersey Department of Education, *2006-07 State Aid and 2005-06 State Aid, excluding Debt Service* (2006), available at http://www.state.nj.us/njded/stateaid/0607/cash_state.pdf.

¹¹⁰ See e.g., Mitchel Maddux, “Paterson schools face state probe,” NorthJersey.com, Apr. 13, 2006, <http://www.northjersey.com/print.php?qstr=ZmdiZWw3Zjd2cWVIRUV5eTM4Mjc0NzAmEXJpcnk3ZjcxN2Y3dnFIZUVFeXky> (last visited Nov. 6, 2006).

¹¹¹ See e.g., Abbott Indicators Project, Education Law Center, *The Abbott Districts in 2005-06: Progress and Challenges* (Spring 2006), available at http://www.edlawcenter.org/ELCPublic/elcnews_060313_AbbottIndicatorsReport_2005_06.pdf (highlighting improvements in education at some grades, declines in other grades).

Finally, interbranch tension can lead to incredible inefficiency and waste of limited taxpayer money, as well as legislative and judicial time. Litigation is always costly, but when the taxpayer pays the plaintiffs' costs, the defendant's costs, and the court's costs, it should be used sparingly and efficiently. Imagine if the same billions of dollars spent on thirty-three years' worth of litigation had instead been spent in the inner-city school districts—where the Court says it is needed. Also, when a supreme court order hangs over lawmakers' heads (including the heads of new representatives and judges entering service with that order already in effect), it is a distracting and time-consuming tumor obstructing all other work. Most would say, however, that the most tragic result of this tense interbranch relationship has undoubtedly been the decades in which children in the state grew up without a constitutional education.¹¹² Hopefully it will not take another thirty-three years to get real results.

B. A CONSTITUTIONAL CHICKEN MATCH:¹¹³ KANSAS

Surely few people, if asked several years ago, would have guessed that Kansas would be the setting for one of the separation-of-powers doctrine's greatest showdowns in recent history. Yet this is precisely what happened in 2005 when members of the state legislature attempted openly to defy and even overturn a unanimous decision of the state supreme court.

Kansas' first exposure to school finance litigation began in the 1970s, but it extended well into the early 1990s, with most of the lawsuits prompting either a new school-finance system or amendments to existing laws.¹¹⁴ The current wave of litigation began in 1999 with *Montoy v.*

¹¹² But see my remarks, *supra*, note 22.

¹¹³ For those who are not familiar with the child's game of "chicken," it usually involves two children cycling headlong toward each other, with the first to flinch and veer declared the loser. See Merriam Webster on-line dictionary, <http://www.m-w.com/dictionary/chicken> (last visited May 9, 2006) (defining it as "any of various contests in which the participants risk personal safety in order to see which one will give up first").

¹¹⁴ *Caldwell v. State*, No. 50616 (Kan. Dist. Ct. Aug. 30, 1972); *Knowles v. State Bd. of Educ.*, 547 P.2d 699 (Kan. 1976); *USD 229 v. State*, 885 P.2d 1170 (Kan. 1994). For a concise summary of school-finance litigation in Kansas through the mid-1990s, see Bruce D. Baker & Preton C. Green, III, *History of School Finance Reform and Litigation in Kansas*, 27 KANSAS POL'Y REV. 2 (Policy Research Institute, Fall 2005).

Kansas.¹¹⁵ As with the New Jersey line of cases,¹¹⁶ *Montoy I* was itself an extension of the earlier cases (the Kansas school financing system had already been declared unconstitutional twice¹¹⁷). Plaintiffs this time around claimed that the latest funding act violated (among other things) the state Equal Protection and education clauses.¹¹⁸ Although Shawnee County District Court Judge Terrence Bullock (the same judge who had overseen the previous spat of school-finance litigation, and a man whose name would eventually become quite well-known) initially dismissed the case as already resolved under the previous litigation, the Kansas Supreme Court reversed and allowed the suit to proceed because the funding statute had changed since the litigation of the mid-1990s.¹¹⁹ Judge Bullock was now (in late 2003) free to reexamine the state's school-finance system.

His reexamination was sharp and critical. Although first acknowledging that the test to be applied to determine the constitutionality of the funding system was mere rational basis, he continued "the legislature [still] must be prepared to justify spending differentials based on actual costs incurred in furnishing all Kansas school children an equal educational opportunity."¹²⁰ Judge Bullock then declared that the funding act "was never based upon [actual] costs or even estimated costs to educate children," but had instead been grandfathered by a system that had previously been declared unconstitutional—merely "freezing the inequities of the old law into the new."¹²¹ He seemed particularly upset at a disparity in per-pupil funding that occasionally reached as high as 300 percent, "for which no rational basis has been shown or proved."¹²² He concluded that the funding system therefore violated the state education clause.¹²³

¹¹⁵ *Montoy v. Kansas*, 62 P.3d 228 (Kan. 2003) (*Montoy I*)

¹¹⁶ *Supra*, Section IV.A.

¹¹⁷ In both *Caldwell*, *supra* note 114, and in *Knowles*, *supra* note 114.

¹¹⁸ *Montoy I*, *supra* note 115, at 230. Kansas' education clause reads: "[The legislature shall] make suitable provision for finance of the educational interests of the state." Kansas Constitution, art. VI §6(b).

¹¹⁹ *Montoy I*, *supra* note 115, at 236.

¹²⁰ *Montoy v. Kansas*, 2003 WL 22902963, at *18 (Kan. Dist. Ct. Dec. 2, 2003) (*Montoy II*).

¹²¹ *Id.* at *30.

¹²² *Id.* at *37.

¹²³ *Id.*

In 2002 (partially in response to previous litigation), the state legislature had commissioned a report to estimate the total cost necessary to achieve an “adequate education,” as the legislature had defined it. The now-infamous report (by the education consulting firm Augenblick & Myers) concluded that an additional \$853 million was required. Such reports are often requested by legislators, who understand the context in which to take them: that is, with a grain of salt. As one commentator later put it, “Consultants like A & M are notorious for their methodology—findings are often heavily influenced by simply going to school administrators and asking, ‘How much money do you need[?]’”¹²⁴ The State Department of Education endorsed the report, of course, but after receiving it the Kansas legislature did with it exactly what legislatures routinely do with such reports (even those *not* suggesting a nearly \$1 billion budget increase): nothing at all. “The legislature didn’t even bother saying, ‘Forget it!’ before tossing it aside.”¹²⁵

Judge Bullock, however, reminded the legislature of the report.¹²⁶ He also made crystal clear that he believed money to be the key to resolving the disparity of test results and other education outputs: “[The state] simply argue[s] ‘money doesn’t matter.’ . . . ‘Money doesn’t matter?’ [sic] That dog won’t hunt in Dodge City!”¹²⁷ Judge Bullock gave the legislature until the end of the 2004 legislative session to address the constitutional deficiencies, primarily the discrepancy in funding.¹²⁸

Whether they were deliberately defiant, confused by the “Dodge City” reference, or simply pressed with other matters, the legislature did nothing about Judge Bullock’s order during that legislative session.

Clearly disappointed and annoyed with the fact that the legislature continued to ignore him, Judge Bullock ensured he would be ignored no longer. “[The legislators have] openly

¹²⁴ Denis Boyles, *We’re All in Kansas Now, Toto*, National Review Online (July 8, 2005), <http://article.nationalreview.com/?q=YWVjY2ExMjAxZDE5MzI0OWE2ZDU3NjIxZTMwNjc5NjY=> (last visited Nov. 6, 2006).

¹²⁵ *Id.*

¹²⁶ *Montoy II*, *supra* note 120, at *38-*40.

¹²⁷ *Id.* at *40. For an argument (from a Dodge City outsider) that funding is not necessarily correlated to educational success, see GREENE, *supra* note 30, at 7-19.

¹²⁸ *Montoy II*, *supra* note 120, at *52.

declared their defiance of the Court and refused to meaningfully address the many constitutional violations [they created].”¹²⁹ While admitting that “ordinarily it is not the Court’s role to direct the legislature on how to levy taxes or on how to spend the funds it does collect,” he made clear that “this case is the exception,” and even went so far as to scold the elected representatives for passing tax cuts: “As a result of the significant tax cuts passed by the Kansas legislature during the past ten years, the state has forfeited nearly \$7 billion in funds The depletion for 2005 alone is \$918 million!”¹³⁰ On May 11, 2004, Judge Bullock ordered public schools closed unless the legislature increased funding by a minimum of \$143 million. Still, he attempted to soften somewhat the harsh tone of the order: “[T]here must be literally hundreds of ways the Legislature could constitutionally structure, organize, manage, and fund public education in Kansas,” so long as the legislature determined the most efficient manner to do so, determined the actual costs of doing so, actually provided those funds, and explained to the Court’s satisfaction any discrepancies in different per-pupil expenditures.¹³¹

While the congress was still reeling from what seemed like an absurd demand from a district court judge, the Kansas Supreme Court, sensing the gravity of the situation, stepped in one week later and stayed all further proceedings pending its own review of the case.¹³² Any relief felt by the legislature, however, quickly dissipated when, seven months later, the Court unanimously (and per curiam) upheld Judge Bullock’s conclusion that the state of Kansas failed to provide its children with a suitable education.¹³³ Using the fact that the state had failed to meet its own accreditation standards and student-performance measures, which the legislature had used to define its constitutional requirement to “make suitable provision for finance of the

¹²⁹ *Montoy v. Kansas*, 2004 WL 1094555, at *5 (Kan. Dist. Ct. May 11, 2004) (*Montoy III*).

¹³⁰ *Id.* at *15.

¹³¹ *Id.* at *11-*12.

¹³² John Hanna, “Supreme Court Blocks Lower Court Order Closing Schools,” *Associated Press* (May 19, 2004), <http://www.kctv.com/Global/story.asp?S=1880299> (last visited Nov. 6, 2006).

¹³³ *Montoy v. Kansas*, 102 P.3d 1160, 1163 (Kan. 2005) (*Montoy IV*). The Supreme Court disagreed, however, with several of Judge Bullock’s other conclusions, including the unconstitutionality of the disparate per-pupil expenditures. The Court said that not only was the per-pupil funding system (so far as it resulted in discrepancies) rationally related to a legitimate purpose, but also that any disparate treatment analysis fails because there is no discriminatory purpose on the part of the legislature. *Id.* at 1162-63.

educational interests of the state,¹³⁴ and, again bringing up the A & M report, the Court demanded that the congress repair the constitutionally deficient school-finance formula.¹³⁵

This time lawmakers acted. House Bill 2247 was passed within several months, making several changes to the per-pupil expenditure calculation algorithms, which resulted in a planned \$142 million boost in education for the 2005-06 school year; the bill also commissioned a new study (replacing the A & M report) to determine the cost of an adequate education.¹³⁶ The Kansas Supreme Court reviewed the bill in the now-fifth iteration of *Montoy*.¹³⁷ Over the strong objection of the state, the Court refused to be guided by any metric other than the now-three-year-old A & M report. The Court made it clear that H.B. 2247 was not going to “cut it” constitutionally, and made clear what would: a spending boost of at least \$285 million, double what the bill called for.¹³⁸ The Court also noted that at least the remainder of the A & M report recommendation, \$568 million, would be ordered for the following year, if not more, unless the new study was complete and found suitable by the court in time.¹³⁹

Apparently the *Montoy V* order was the proverbial straw that broke the Kansas Legislature’s back. The backlash was immediate and extreme. Legal commentators, millions of Kansans, and legislators from both parties decried the decision as a blatant overstepping of the bounds of the court.¹⁴⁰ The disagreement with the Court was fundamental: “[Our schools] are not unconstitutionally underfunded.”¹⁴¹ The remarks of Kansas Representative Lance Kinzer serve as an example of the sentiment flowing through many of the capital corridors, as well as highlight some of the most common arguments presented by those opposed to the *Montoy V* court:

¹³⁴ KANSAS CONST., art. VI §6(b).

¹³⁵ *Montoy IV*, *supra* note 133, at 1165.

¹³⁶ 2005 House Bill 2247 (March 30, 2005), modified by 2005 Senate Bill 43, passed during the veto session (collectively H.B. 2247).

¹³⁷ *Montoy v. Kansas*, 112 P.3d 923 (Kan. 2005) (*Montoy V*).

¹³⁸ *Id.* at 940.

¹³⁹ *Id.* at 941.

¹⁴⁰ For example, state senator Dennis Pyle (R-Hiawatha) said “Why do we have a center line on the highway? Somebody has crossed over the center line, and it’s the courts.” *Schools viewed skeptically, Need for more money questioned*, TOPEKA CAPITAL J., June 9, 2005, at A1, available at http://www.findarticles.com/p/articles/mi_qn4179/is_20050609/ai_n14779774.

¹⁴¹ *Id.* (quoting Representative Eric Carter (R-Overland Park)).

[T]he [*Montoy V*] decision represents a violation of the separation of powers In our system, the Legislature alone may spend the peoples' [sic] money, because it is the Legislature that is accountable to them. . . .

. . . .
 . . . "The Legislature . . . commands the purse The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever." . . . [Quoting ALEXANDER HAMILTON, THE FEDERALIST No. 78.]

. . . The Kansas Constitution, in its current form places the appropriation power under Art. 2, the section that sets forth legislative powers. Section 24 of Art. 2 provides that, "No money shall be drawn from the treasury except in pursuance of a specific appropriation made by law." . . .

. . . .
 . . . [I]f the Court can order us to spend one dollar it can order us to spend a billion dollars. If we concede the Court's authority to direct appropriations in principle then the only lawful choice must be to obey. . . .

. . . .
 [C]ourts lack the authority to compel a co-equal branch of government to pass specific statutes in the future. . . . [They] can create a void in the law by striking down particular statutes; but they cannot seize the reins of legislative power and attempt to fill that void. That is why the Supreme Court of the United States has never ordered Congress to pass a law. . . .¹⁴²

Six days after the Court handed down *Montoy V*, Governor Kathleen Sebelius called the Legislature into a "Special Session for Kansas Schools," and, although her tone was not as defiant as Representative Kinzer's, she understood the remarkable situation facing the state: "The ruling of the Kansas Supreme Court in [*Montoy V*] has created an extraordinary occasion, in which the Legislature must meet its constitutional responsibility"143 Five days after Governor Sebelius' special-session announcement, the Attorney General, Phill Kline, issued a special statement addressed to the Governor and legislature:

I know the *Montoy V* decision has serious implications regarding the various powers afforded the three equal branches of government; however I firmly believe it is our duty to act in a manner to ensure schools will be open this fall and our children will receive the education they deserve. I encourage all three branches of government to use the appropriate powers at their disposal to ensure this result.

. . . .

¹⁴² Lance Kinzer, Testimony before the Special Committee on Judiciary (Sept. 15, 2005), available at <http://www.lancekinzer.com/0905judiciarytestimony.html>.

¹⁴³ Kathleen Sebelius, Proclamation Calling the Legislature into the Special Session for Kansas Schools, June 9, 2005, available at <http://www.governor.ks.gov/news/NewsRelease/2005/nr-05-0609a.html>.

This office will . . . defend the authority of the Governor and the Legislature to allow for low enrollment weighting to assist rural school districts [a method struck down by the court]. *I also encourage the Legislature and Governor to, through statutory change, attempt to prevent a judicial shut down of schools by limiting the Court's remedial authority in the case.* Kansas children should not suffer from the inability of the executive, legislative and judicial branches to agree on the definition of "suitable" funding.¹⁴⁴

The Attorney General went on to list each of the legal conclusions of the Court, each accompanied by his express disagreement and counterargument, noting several conflicts with the Court's own precedent, as well as internal conflicts he saw in the *Montoy V* opinion itself. He stated that the Office of the Attorney General would, immediately upon the close of the upcoming special session, "file a motion with the Court asking that it not take action to shut down schools. Teachers, parents and students deserve to know that schools will be open. . . . Other remedies are available to the judiciary than one that prejudices the school children of Kansas."¹⁴⁵ Attached to the letter was a memorandum detailing suggested responses, including methods of overturning or otherwise nullifying the decision: defying the order, amending the constitution, further defining a "suitable" education, commissioning additional studies, etc.

During the special session, a number of these ideas were tossed around. Representative Kinzer pushed hard for a constitutional amendment explicitly removing the power of the purse from the judiciary's hands: "By this method a constitutional crisis can be avoided [and] balance can be restored among the branches of government . . ."¹⁴⁶ A variety of resolutions were introduced. Consider House Concurrent Resolution No. 5007, introduced by the Select Committee on School Finance:

¹⁴⁴ Letter from Kansas Attorney General Phill Kline to Governor Kathleen Sebelius and Members of the Kansas Legislature, "Attorney General on *Montoy*," June 14, 2005 (emphasis added).

¹⁴⁵ *Id.*

¹⁴⁶ Kinzer, *supra* note 142. The colorful Judge Bullock did not leave himself out of the debate even still. At a Rotary Club meeting, the Judge said the proposed amendment would transform Kansas into "a toothless debating society." John Hanna, *Judge Blasts Amendment to Limit Courts' Powers*, WICHITA EAGLE, July 15, 2005, at 1B. When asked about the controversy his opinions had stirred, he added "[The Commission on Judicial Qualifications] can defrock me if I do anything 'unjudicial.' How many of you have that kind of oversight?" *Id.*

WHEREAS, It is the legislature's judgment that the Kansas supreme court's order [in *Montoy V*] intrudes upon the exclusive constitutional authority of the legislature to make appropriations; and

WHEREAS, The legislature respects the authority of the [Court] to interpret the constitution, and the legislature has recognized and acted in good faith to fulfill its constitutional obligation to make suitable provision for finance of the educational interests of the state . . . ; and

WHEREAS, The legislature must balance its constitutional duty to fund schools with the competing demands of other fundamental state interests . . . ; Now, therefore,

[T]he legislature hereby reaffirms and reserves its exclusive constitutional authority to make appropriations on behalf of the state; and

[T]he legislature hereby declares its view that the [C]ourt lacks the constitutional authority to order the legislature to make a specific appropriation in sum certain by a specific date; and

[T]he legislature hereby declares that any appropriation of additional funds for schools does not represent an acceptance of the court's authority to order the legislature to make an appropriation.¹⁴⁷

As the last clause of the introduced resolution portended, despite all the panic and defiant rhetoric emanating from state lawmakers, it was they, and not the court, who blinked first. In the end, Democrats (including Governor Sebelius) and moderate Republicans joined to block all the attempts at drastic action. Despite the fiery resolution, eventually, after the Court's initial deadline, a new bill was passed making more changes to the funding scheme and providing an additional \$148 million—\$5 million *more* than the judiciary deemed necessary as a starting sum.¹⁴⁸

However, to a great extent the conflict remains. The Court merely accepted the legislature's plan as a good-faith effort, a sixth *Montoy* decision (which added concurring opinions to *Montoy IV*, strangely enough) has been handed down since then,¹⁴⁹ and it remains to be seen whether this legislative session will also follow the A & M report's recommended budget increase or—the alternative no one wants—yet another constitutional crisis will emerge later this year.

¹⁴⁷ Kansas House Committee on School Finance, House Concurrent Resolution 5007, *available at* <http://www.kslegislature.org/bills/2005special/5007.pdf>.

¹⁴⁸ Some credited Governor Sebelius with building a bi-partisan consensus to finally overcome the many obstacles keeping the additional money from coming. See David Broder, *Governors prevail by building consensus*, QUAD-CITY TIMES, *available at* <http://www.qctimes.net/articles/2006/03/02/opinion/opinion/doc44068a6b79512454434809.txt>.

¹⁴⁹ *Montoy v. Kansas*, 120 P.3d 306 (Kan. 2005) (*Montoy VI*).

* * * * *

What does the Kansas experience teach us about interbranch communication? First and foremost, the legislature made the impending conflict exponentially more intense by ignoring a District Court order. Regardless of the fact that most legislators obviously disagreed with Judge Bullock’s conclusions and his order, they helped no one by simply continuing to ignore him. This only increased the Judge’s need to press his point. Of course there is no way to be certain, but perhaps the judiciary would not have been so quick to choose such a measure as drastic as threatening the cessation of all education had it felt like there was an active dialogue with the other branch in addressing the problem. Similarly, the court likely might not, at least initially, have felt compelled to issue an actual dollar amount had the legislature appeared actively engaged in searching for a solution to its self-created dilemma: It had defined its own obligation under the state’s education clause, and yet it repeatedly failed to say how it would meet that obligation. Only then did the judiciary search for an explicit way to enforce another branch’s obligation.

Second, upon finding itself in the midst of this dilemma, the legislature could arguably have been clearer and more decisive in its handling of commissioned data directly related to a court-mandated task. The now-infamous A & M report is infamous only because the legislature felt tricked and coerced into adopting recommendations it never agreed with. The judiciary, at both the District- and State-Supreme-Court levels, stressed that it was using these data because the legislature commissioned the report to determine its constitutional obligation, received the data, and presumably took the report under advisement, never publicly denouncing its conclusions or asking for a reevaluation. Though it seems extreme to ask lawmakers to officially repudiate every suggestion that comes their way, they could use extra caution when dealing with *commissioned* suggestions in notably litigious areas.

Third and finally, courts should be sensitive to the desires and best interests of the citizenry. This is certainly not to say that courts should ever be swayed by the will of the people as a legislator or the executive is—that is anathema to the stability of our tripartite system. However, courts should be wary not to use a paintbrush when a pen will do. A threat so drastic

that it would almost surely not be enforced—such as canceling all education statewide—does nothing but harm the reputation and respectability of both conflicting branches, even if it turns out to be effective in the short term.¹⁵⁰

C. A TEAM EFFORT: WASHINGTON

Not all school-finance litigation has been so drawn out or so contentious. The Washington legislature and judiciary showed the rest of the nation in 1977 that foresight and clear communication can reduce the time and tension (and subsequent cost to taxpayers) of such lawsuits.

Washington's first school-finance lawsuit, an equity suit based on the federal Equal Protection clauses and the state education clause, was brought in 1974 by twenty-five school districts.¹⁵¹ The claim was based on well-researched funding disparities between the state's school districts as a result of the funding algorithm's reliance on property wealth. The Washington Supreme Court disposed of the state and federal Equal Protection claims relatively easily under the then-recent and clearly controlling *Rodriguez* decision.¹⁵² The Court then moved on to the claim under the state education clause, a "paramount duty" on the legislature "to make

¹⁵⁰ As I explained *supra*, Section IV.A, the New Jersey Supreme Court attempted a similar shutdown of schools. There, this occurred only after years and years of legislative responses had proven inadequate, while here, the legislature refused to respond at all and the judiciary reacted more quickly. It is interesting to note the similarities between the two: both courts got the attention of their respective legislatures quickly and effectively with the threat.

Despite its effectiveness, I argue that such judicial actions lessen the respectability of both branches simply because the lay citizen-parent does not see a judge or politician who cares for children. Rather, she sees a judge who thinks no school is better than poor school, a ridiculous proposition when viewed outside of the microscope of constitutional scrutiny. Depending on how lawmakers react, she sees a politician who either raises taxes against her wishes, or breaks the law by defying a court order. In other words, no matter the outcome, extreme judicial threats such as these have the potential to disillusion citizens and lessen their faith in the stability of the tripartite system.

¹⁵¹ *Northshore School District No. 417 v. Kinnear*, 530 P.2d 178 (1974)

¹⁵² *Rodriguez*, *supra* note 21, had been decided just over one year prior and is discussed *supra*, Section III.A.

ample provision for the education of all [resident] children” by “provid[ing] for a general and uniform system of public schools . . .”¹⁵³:

[Plaintiffs cannot prove that either the “ample provision” or “general and uniform” requirements were violated, because t]here was no evidence that any child had been [harmed] because his district failed to meet state standards The entire case is thus not based upon curriculum deficiencies and lack of educational opportunity, but rather upon financial and property valuation comparisons derived from statistical data.¹⁵⁴

In other words, the plaintiffs presented property-tax data, not education data. The state had won its case.

In most situations, the state would have then gone on with business as usual and forgotten about the whole thing. To the later benefit of the entire state, however, the issue did *not* disappear from the capitol halls. Two justices concurred in the judgment and two dissented, all hinting that a stronger evidentiary showing would have swung the Court against the state.¹⁵⁵ William Freund, a staffer on the Senate Ways & Means Committee, said the dissents “raised a red flag”¹⁵⁶; they prompted certain politicians to look beyond the short-term victory and notice warning signs.

Although *Northshore* upheld the constitutionality of the state funding system despite its heavy reliance on local levies, the Supreme Court’s multiple opinions led many policy makers and advocates to believe that a strong evidentiary showing of educational inadequacy might lead to a different result in the next challenge. In fact, then[-]Attorney General Gorton sent a letter to the legislature outlining the vulnerability of the education finance system. In 1975, after 65 school districts failed to pass their levies, the legislature contracted with . . . a former state budget director . . . to conduct an extensive study of public education finance and reform.¹⁵⁷

¹⁵³ WASHINGTON CONST. Art. 9, §§1-2.

¹⁵⁴ *Northshore*, *supra* note 151, at 184-85.

¹⁵⁵ See *id.* at 203-04 (Rosellini, Assoc. J., concurring in the result), 204 (Weaver, Assoc. J. pro-tem, concurring in the result), 204-224 (Stafford, Assoc. J., dissenting), 224-25 (Utter, Assoc. J., dissenting).

¹⁵⁶ Diane W. Cipollone, *Defining a “Basic Education”: Equity & Adequacy Litigation in the State of Washington*, in 1 STUDIES IN JUDICIAL REMEDIES & PUBLIC ENGAGEMENT 8 n.15 (Campaign for Fiscal Equity, 1998).

¹⁵⁷ *Id.* at 8.

In short, the legislature was proactive. The Attorney General and others listened to what the dissents and concurrences had to say, saw a legal weakness in the state's school-finance laws, and decided to do something about it.

In fact, such proactive interbranch communication was not a new thing to these lawmakers. Just a few years prior, lawmakers had seen their West-Coast neighbor California's funding system struck down and had immediately formed a committee to investigate Washington's related weaknesses.¹⁵⁸ Several new funding initiatives followed, though all had failed at the ballots.¹⁵⁹ If all this attention to education reform after a court decision in another state seems unusual, it was because more was going on than just the California case. Washington for several years had witnessed a growing crisis in local school funding,¹⁶⁰ and it knew reform was needed. It was in this vein that the newest report, post-*Northstar*, was commissioned. The actual fiscal recommendations are beyond the scope of this paper, but the report was another step in the legislature's path to reform—and to preparedness for another legal attack.

That attack came four years later in *Seattle School District No. 1 v. Washington*.¹⁶¹ Although wide disparities in funding were evident, the District Court interpreted the state's constitutional obligation to make "ample provision for the education of all children" as one of adequacy, not equity. The Court carefully gave not one but three possible definitions of an adequate Washingtonian education: One extrapolated from existing statutes and regulations, one based on state accreditation standards, and one calculated on state averages (the average cost spent on the average student). After calculating the costs associated with each of its definitions,

¹⁵⁸ *Id.* at 10 n.20.

¹⁵⁹ *Id.* at 6-7 n.14.

¹⁶⁰ In keeping with the focus of this paper (see *supra* note 8), I will not expound on the details of the Washington school-finance system or the problems it encountered (or engendered). An oversimplified explanation is that the state had relied too heavily on variable and optional local levies, with the result being inconsistent funding. Funding was so inconsistent that several schools in Seattle were forced to shut down in the 1975-76 school year solely for budget reasons.

¹⁶¹ The citation to the Supreme Court opinion is 90 Wash.2d 476 (1978) (*Seattle I*).

the Court told the legislature that reliable funding for the Seattle schools did not reach *any* of these three levels, and ordered a new funding system.

The District Court opinion came down at the beginning of the 1977 legislative session, and instead of ignoring it while on appeal, the House and Senate leadership created an ad-hoc committee to address the decision and how to proceed presuming the Supreme Court upheld the decision.¹⁶² This remarkable reaction was due not only to good interbranch communication, but also to citizen involvement in the recent school-finance crisis. Both the post-*Northshore* report and an organized group of concerned Seattle parents had been burning on the legislators' agendas; lawmakers "knew the funding system was 'defective' and had considered changing the system for some time. The lower court ruling was enough of a catalyst to spur quick action."¹⁶³ Based largely on the report, with insight and compromise from concerned parents, the legislature had a new definition of an adequate education and a complete reform package practically ready and waiting when the State Supreme Court upheld the lower court decision several months later.¹⁶⁴ The result was one of the smoothest ends to school-finance litigation ever.

No reform effort is perfect, and the 1977 legislation was no different. A mere five years later, during more economic hard times¹⁶⁵ and a \$200 million education budget cut over two years, another suit was brought challenging the cuts. The original District Court judge of *Seattle I* overturned the budget cut and made further modifications to the legislation's definition of an adequate education in *Seattle II*.¹⁶⁶ The legislature did not even appeal the decision, and subsequently made the requested alterations.

The dual-branch oversight of school funding in Washington has likely not ended. After a major education reform act in 1993¹⁶⁷ and continuing research by legislative committees even today, the question of whether the state is providing an adequate education remains open. One

¹⁶² Cipillone, *supra* note 156, at 19.

¹⁶³ *Id.* at 19 n.42.

¹⁶⁴ *Seattle I*, *supra* note 161.

¹⁶⁵ See discussion of earlier hard times *supra* note 160.

¹⁶⁶ *Seattle et al. v. Washington*, No. 81-2-1713-1 (Super. Ct. Thurston Cty., 1983) (*Seattle II*).

¹⁶⁷ Washington Education Reform Act of 1993, WASH. REV. CODE ANN. §28A.630 et seq.

legislator summed it up with frankness: “I don’t honestly know whether we’re funding [adequate] education—it depends on your definition of [adequate] education. I do know we’re paying too much and we’re not getting enough results.”¹⁶⁸ An honest statement. At least he can say that the branches in his state are working together relatively well toward those results.

* * * * *

What does the Washington experience teach us about interbranch communication? First, the judiciary can play a key role in communicating its concerns to the state lawmakers—regardless of whether it sides with them in the end. Through the use of clarifying concurrences and one particularly lucid dissent, several State Supreme Court justices sent a clear message to the legislature: “Watch out, you will confront this again.” Such clear communication reduces tension between the branches both by building a congenial atmosphere and by simply reducing the number of volleys involved in the litigation.

Second, lawmakers do themselves and their constituents great service by carefully listening to such judicial clues. Although the state emerged victorious from the first round of school-finance litigation, politicians did not turn their backs on the lurking problem. Instead, they recognized the message and acted proactively. Contrast this *proaction* with the Kansas legislature’s *inaction* and *reaction*.¹⁶⁹ Simply by listening, Washington lawmakers showed that they were cognizant of their responsibilities (and even possible future responsibilities), so the courts never felt the need to drive the point home with harsh words and drastic action.

Third, a few key people can indeed make a difference. Some state lawmaker has to introduce the legislation, form the committee, and commission the report; some concerned parent has to call her representative, form a grassroots campaign, and demand attention. Even a few people motivated to attack a problem head-on can make an entire tripartite state government function more smoothly. Consider the foresight of Attorney General Gorton, who raised the problem with the legislature and in turn saved the state money and time that could have

¹⁶⁸ State Senator Harold Hochstater, *quoted in* Chester Allen, *School Funding Flaws Are Clear, Solution Is Not*, THE OLYMPIAN, May 19, 1998, at A1.

¹⁶⁹ *Supra*, Section IV.B.

otherwise been wasted on further (presumably losing) rounds of litigation and expedited report commissions. Contrast this with Attorney General Kline of Kansas, who did not react at all until the fifth round of litigation, and then reacted by suggesting ways of stretching out the debate even longer.¹⁷⁰ One person can indeed make a difference in the level of interbranch tension present during such litigation, as well as in how quickly the lawsuit is resolved.

Fourth and perhaps most important, the Washington story tells us that perhaps good communication really is impossible without unity of purpose. Although both branches did demonstrate good communication during the chain of litigation, one gets the impression that this may have been only because the state already had citizens up in arms demanding school reforms by the time *Northshore* came down. Even if this is true, however, it only supports the previous observation that a few key individuals can make the entire system run more smoothly. If it is true that the only difference between Washington's success and so many others' failures was the citizens' backing of the court-ordered reform, let this be a reminder that the power of political pressure can affect the productivity of *all* branches of government—representative and judiciary alike.

V. CONCLUSION

Are the cases of New Jersey, Kansas, and Washington representative of the typical paths school-finance litigation takes in other states? Yes and no. Every state that has sprinted, jogged, or crawled through such interbranch wars has taken its own path under different circumstances.¹⁷¹ But these cases do represent some of the extremes seen in the field: extremes

¹⁷⁰ *Supra*, at 36-37. I do not mean to demonize or belittle Mr. Kline. He did what he thought best under the circumstances, and surely there was legal merit to his suggested tactics. However, his opinion—whether to fight the judiciary, to compromise, or to kowtow—would certainly have been of more benefit to the Governor and other lawmakers earlier in the course of the litigation, where it possibly could have saved the state money and time and saved parents the stress of not knowing whether schooling would in fact exist for their children in the fall.

¹⁷¹ For the paths of Kentucky, Ohio, North Carolina, and several other states through their school-finance litigation, see SCHRAG, *supra* note ii.

of duration (New Jersey), extremes of meteoric interbranch tension (Kansas), and extremes of interbranch communication (Washington). When a serious issue is influenced by complicated, indefinable factors, and when that issue is arising in amazingly diverse settings, sometimes all one can do is step back and look at highlights. These three case studies are meant to do just that: to “offer not a recipe, but rather a resource” for voters, for reformers, for legislators, and for judges seeking better interbranch communication and education in their states.¹⁷²

Our founders’ vision of individual states experimenting with social policy¹⁷³ has in many ways been clouded by the explosive growth of the national administrative state. The federal government has played an ever-increasing role in attempting to ensure the educational success of its citizens from their earliest years.¹⁷⁴ However, anyone thinking that federalist experimentation is dead needs look no further than the myriad state education clauses and their still more varied interpretations by respective state courts. What it takes to achieve an “adequate,” “equal,” or just-plain-decent system of public education is something every student and parent could claim some expertise in. The current state legislators and justices have their own opinions as well, not to mention the legislators who originally wrote those education clauses. Mixing these strong opinions with one of the most important charge of governance—caring for our children—and with one of the most deep-rooted of tensions—that between state legislatures and judiciaries—has created a less-than-ideal era of school-finance litigation embedded in interbranch tension. Sometimes the interbranch clashes have resulted in improvements; sometimes they have not. In Washington, Kansas, and New Jersey, arguably improved education (certainly

¹⁷² This phraseology is taken from a collection of anecdotes and analyses of successful charter schooling efforts made in various states. John B. King, Jr., *Fulfilling the Hope of Brown v. Board of Education*, in *THE EMANCIPATORY PROMISE OF CHARTER SCHOOLS* 61 (Eric Rofes & Lisa M. Stulberg eds., 2004). These editors hoped their examples could be helpful in ultimately helping to improve education for the students in the United States who need the most help. *Id.* at 3-5. How fortunate if this paper could somehow serve in a similar capacity, using examples from school-finance litigation.

¹⁷³ See JAMES MADISON, *THE FEDERALIST* NO. 46.

¹⁷⁴ A discussion of the No Child Left Behind Act, the latest such venture, is well beyond the scope of this paper and is best left to those more knowledgeable than the author. For some discussion of how the act may encroach on federalist principles, see Note, *No Child Left Behind and the Safeguards of Federalism*, 119 *HARV. L. REV.* 885 (Jan. 2006).

more-expensive education) emerged from wildly different baselines of interbranch communication.

These examples, though unique in many respects, have collectively highlighted two types of conflicts: necessary and unnecessary. Each state has a legislature; each state has a supreme court. Some interbranch conflict has been built into the system and is inevitable, even necessary. When politicians eradicate or eviscerate state constitutional rights, the courts must stand up and emancipate the victims. When legislators do their best to provide for the well-being and -means of their constituents, the courts have a duty to avoid obstructing them in that task as much as possible. These are the constitutional conflicts that are necessary for a democratic republic to provide for its people.

But there is also much unnecessary conflict. First and foremost, an easy way to increase tension is to simply pretend that there is none. Ignored problems do not get solved. Whatever the reasons—pride, trepidation, or inertia—a legislature help no one, least of all itself, by ignoring a district court order. This type of reaction to interbranch conflict merely exacerbates the tension and decreases the legitimacy and the peoples' trust of *both* branches of government.¹⁷⁵ Similarly, when a court imprecisely defines the burden of its sister branch, the confusion and multiple litigation volleys that result expand the tension of the branches: It is easy for initial miscommunication to blossom into a drawn-out battle over methodology and terminology.

Instead, courts and legislatures should keep in mind the similarities and differences of their roles, and be more mindful of how they can work together, instead of butt heads, to accomplish the common goal of a thriving democracy. With such a mindset, communication between the branches during school-finance and similarly-complex litigation will hopefully improve and interbranch tension will ease. Our children's futures may depend on it.

¹⁷⁵ See my discussion *supra*, note 150.