

# INTEREST-BASED ALTERNATIVES TO SCHOOL-FINANCE LITIGATION

by

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## I. INTRODUCTION

Parents are always trying to improve the quality of education their children receive. Many public-school parents will investigate, actively participate in, and even move out of school districts that they believe are not providing the education their kids deserve. In recent decades, increasing numbers of parents have turned to courts to try and force improvements on their schools—especially in the form of increased funding.<sup>1</sup>

Some of these lawsuits have wrought true reform. But many, many school-finance litigations have gone on for years—even decades—without final resolution or real success. And even when plaintiffs “win,” courts have great difficulty implementing remedies through resistant legislatures. Courts order more funding, legislatures balk, and courts reorder in a sometimes-never-ending cycle of wasted tax dollars. In New Jersey, for example, this cycle has repeated for decades, cost taxpayers billions, and resulted in only questionable improvements.<sup>2</sup>

The reasons such lawsuits often fail to create real improvements in education are plentiful and complex, but their ultimate source is clear. When these lawsuits fail to effect change, they do so because of poor interactions between judges, lawmakers, and taxpayers.<sup>3</sup> A court-ordered remedy to improve education simply cannot be implemented effectively without full cooperation from the legislature and full endorsement by the citizens paying for it. If these elements are lacking, school-improvement court orders, in

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<sup>1</sup> Michael A. Rebell & Robert L. Hughes, *Schools, Communities, and the Courts: A Dialogic Approach to Education Reform*, 14 YALE L. & POLICY R. 99, 110 (1996). For one of many overviews of the modern era of equity and adequacy school-finance litigation, see PETER SCHRAG, FINAL TEST: THE BATTLE FOR ADEQUACY IN AMERICA’S SCHOOLS (New York: New Press, 2003).

<sup>2</sup> See Micah J. B. McOwen, *Pushing String Uphill: Lessons in Interbranch Communication from School-Finance Litigation* 22-29, in 2 EDUCATION LAW & POLICY FORUM (Univ. of Ga. Educ. L. Consortium, 2006), <http://www.educationlawconsortium.org/forum/2006/papers/McOwen2006Rev.pdf> (last visited May 22, 2007).

<sup>3</sup> See generally *id. passim* (discussing poor communication during school-finance litigation).

many cases, become no more than symbolic victories for plaintiffs, who must watch ordered changes get watered down or simply go totally unimplemented.<sup>4</sup>

Because school-finance disputes have this need for real, practical, ongoing cooperation with a defendant (the state) and legitimization by unrepresented third-party players (taxpayers, parents, and the other state services fighting for fungible state dollars), it should be no surprise that litigation falls short as a forum in which to solve them. These disputes are classic examples of polycentric disputes ill-suited for litigation.<sup>5</sup> Courtrooms are therefore seemingly destined to fail as reliable fora in which to hash out school-budget disputes, which is precisely why such brawls have traditionally taken place elsewhere—county halls and school-board meetings.

Despite the severe limitations of the forum, it looks as though school-finance disputes will continue to be brought before judges in addition to the traditional methods of petitioning politicians and administrators. Forty-five states have hosted such litigation,<sup>6</sup> resulting in well over one hundred state-supreme-court opinions, and more suits are constantly being filed.<sup>7</sup> Given the prevalence of this litigation and the extreme stakes involved, it is vital that the practice be reevaluated to see whether an efficient and

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<sup>4</sup> These results are so common, in fact, that many plaintiffs' attorneys expect judicial intervention to be ineffectual in their own education-reform efforts. "For example, in a recent survey, almost sixty percent of a group of attorneys involved in desegregation litigation expressed general dissatisfaction with the results of litigation, and almost half of the plaintiffs' attorneys expressed frustration with the results in their own cases." Rebell & Hughes, *supra* note 1, at 111 (citing Paul L. Tractenberg, The View from the Bar: An Examination of the Litigator's Role in Shaping Educational Remedies, in *Justice and School Systems* 390, 406-07 (Barbara Flicker ed., 1990)). See also sources cited *id.* at 111 n.72.

<sup>5</sup> See generally Lon L. Fuller, *The Forms and Limits of Adjudication*, in *THE PRINCIPLES OF SOCIAL ORDER: SELECTED ESSAYS OF LON L. FULLER* (Kenneth I. Winston ed., rev. ed., 2001) (noting the limits of litigation as a forum in which to solve disputes, especially complex ones).

<sup>6</sup> See National Access Network, *Litigations Challenging Constitutionality of K-12 Funding in the 50 states* 1 (February 2007), available at <http://www.schoolfunding.info/litigation/In-Process%20Litigations.pdf>

<sup>7</sup> Five states saw newly filed school-finance lawsuits in 2006: Indiana, Oklahoma, Oregon, South Dakota, and Washington. For individual press releases for each, see National Access Network, *Litigation News*, [http://www.schoolfunding.info/news/lit\\_news.php3](http://www.schoolfunding.info/news/lit_news.php3) (last visited May 22, 2007).

effective method of resolving school-finance disputes is practicable: one in which judges, lawmakers, and parent-taxpayers each feel that they have met their respective duties to the children of their state.

This paper will examine the potential role of alternative dispute resolution (ADR) in school-finance disputes. Part II will examine the various reactions the major players (courts, legislatures, and taxpayers) have displayed to the initiation and impact of school-finance litigation—more importantly, it will examine the respective interests underlying these reactions. Part III will explore the ability of litigation and various ADR mechanisms (including arbitration, negotiation, and mediation) to meet the interests of all three players. After these analyses, a proposal for a custom special-master mediation process is then advanced, which I believe would better meet all the interests involved. Part IV will add practical insights to this proposal by highlighting and evaluating the only known example of a formal ADR response to school-finance litigation—a court-ordered mediation by the Supreme Court of Ohio.<sup>8</sup> Part V then concludes with a summary of the proposal and its benefits for use to resolve school-finance disputes in the future.

## **II. SCHOOL-FINANCE LITIGATION: THE PROBLEMS, PLAYERS, AND INTERESTS**

When a judge rules for a plaintiff in school-finance litigation (or indeed in any suit that questions the way legislators have performed their duties), she has done more than decide a dispute between a plaintiff and a defendant: She has entered a dispute herself. Because judges and lawmakers both take oaths upholding the same constitution, there is now an interbranch dispute over what a “constitutional” system of school-finance

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<sup>8</sup> There have been other attempts by courts to use mediation in school-finance disputes, but this is the only instance involving a state’s highest court.

is. This dispute is different in form than the one adjudicated, but it is just as real and can be just as damning to the success of school-finance dispute resolution.

Of course, Americans decided long ago to allow courts the final word in such disputes.<sup>9</sup> While this default has worked in large part, and society has grown to accept it, intellectual and moral disputes between courts and legislatures can still stretch on far beyond their legal resolution.<sup>10</sup> This should not be surprising—giving one side ultimate power is rarely an effective method of solving a recurring dispute, especially one that involves strong interests.

Few interests are stronger than that in the effective cultivation of children’s minds, and the result is a staggering level of tension between statehouse and courthouse, and some of the lengthiest litigation in history. The remainder of this Part will discuss how the three players in this dispute—that over what makes a good or constitutional system of education—react to and participate in such litigation, as well as their underlying interests.

### **A. Courts**

When such a lawsuit is first presented to a court, a judge has two broad options. She could rebuff the plaintiff on the basis of the separation-of-powers doctrine. She could claim, as the United States Supreme Court has, that to do otherwise would be to “intrude in an area in which [courts] ha[ve] traditionally deferred to state legislatures,”

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<sup>9</sup> See *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

<sup>10</sup> Consider, for example, how many decades the dispute over racial integration raged between southern legislatures and their courts, despite the issue having been legally resolved (fairly unambiguously) by a unanimous Supreme Court in 1954 with *Brown v. Board of Education*.

and that “the ultimate solutions [to school-finance disputes] must come from the lawmakers and from the democratic pressures of those who elect them.”<sup>11</sup>

If, on the other hand, she decides to accept jurisdiction and review the state school budget, she must establish a constitutional metric to measure it against. In most cases, how she defines this metric will determine the outcome, and there are almost always multiple metrics one could legitimately argue for. Take, for example, the education clause of the Kansas Constitution, which obliges the legislature to “make suitable provision for finance of the educational interests of the state.”<sup>12</sup> How would a judge determine whether a legislature has met this burden? Does “suitable provision” imply minimal adequacy or approximate equity? If adequacy, is “adequate” good enough to pass eighth grade or to pass twelfth grade or to get into a college? If equity, does the Kansas constitution necessitate interdistrict, intradistrict or some other type of “equality”? Does current funding protect the “educational interests of the state,” or are exactly \$853 million more needed in order to do so?<sup>13</sup> These are the types of judgment-calls that courts are forced to make when hearing a school-finance lawsuit, and we should

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<sup>11</sup> *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 40, 59 (1973). *Rodriguez* ended all school-finance litigation in federal courts based solely on the adequacy or equity of funding (as opposed to a claim of racial discrimination, for example), shifting all such lawsuits into their respective state fora. *See, e.g., Serrano v. Priest*, 5 Cal. 3d 584 (1971), *rem'd & reh'rd*, 18 Cal. 3d 728 (1976) (presenting an example of a concurrent state school-finance litigation that had to be remanded and re-argued after *Rodriguez* eliminated the possibility of a federal-Constitution school-funding claim); McOwen, *supra* note 2, at 15-19 (discussing how *Rodriguez* shifted school-finance litigation into state courts).

<sup>12</sup> KANSAS CONST., art. VI, §6(b). For an overview of state “education clauses,” see John C. Eastman, *Education and the 20<sup>th</sup> Century’s Rights Revolution: Have We Overlooked Government by Consent?*, in Conference, “Adequacy Lawsuits: Their Growing Impact on American Education” (Harvard University, Oct. 13-14, 2005) (preliminary draft).

<sup>13</sup> Several courts in Kansas (including the Kansas Supreme Court) thought the latter in the 2003-‘04 and ‘04-‘05 school years, and ordered the legislature to appropriate precisely that amount. *See Montoy v. Kansas*, 2003 WL 22902963, at \*38-40 (Kan. Dist. Ct. Dec. 2, 2003) (*Montoy II*), *aff’d in relevant part*, 102 P.3d 1160 (Kan. 2005) (*Montoy IV*).

question whether forcing a court to make these decisions is the best method of solving the dispute in the long run.

When judges determine that constitutional deficiencies exist, they have used a wide variety of responses to this problem. Some have explicitly asked for help from the very political branches they are ordering in defining a constitutional remedy, while others have ordered strict and immediate adherence to a detailed and explicit decree using extreme threats.<sup>14</sup> Many judges have been criticized by their sister-branch legislators as “activist” for their orders.<sup>15</sup> Regardless of the validity of such criticisms, critics often fail to appreciate the interests underlying judicial actions in these cases.

Whether a court orders nothing or a total revamping of the entire school-finance structure, two interests must be assumed to always underlie its decisions: its interests in its own legitimacy and in a constitutional finance structure.

First, courts are interested in their own legitimacy. Judicial legitimacy stems from how outsiders view the court: “Courts are most confident when they are buttressed by other institutions.”<sup>16</sup> The primary result following from this premise is clear: A judge must believe that her order, whatever it may be, is actually possible to fulfill. Though such an observation may seem surplus, in the modern era of occasionally huge school-

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<sup>14</sup> The New Jersey Supreme Court has tried *both* tactics to solve its perceived school-finance system deficiencies. See *Robinson v. Cahill*, 303 A.2d 273, 298 (N.J., 1973) (*Robinson I*) (“[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.”); *Robinson v. Cahill*, 358 A.2d 457 (1976) (*Robinson VI*) (enjoining all funding of public education until the legislature passed a new bill that conformed to the court’s standard).

<sup>15</sup> See, e.g., State Rep. Lance Kinzer, Testimony Before the Special Committee on Judiciary (Sept. 15, 2005), available at <http://www.lancekinzer.com/0905judiciarytestimony.html> (“[T]he [state supreme court’s recent school-finance] decision represents a violation of the separation of powers . . .”).

<sup>16</sup> Joshua Dunn & Martha Derthick, *Who Should Govern?: Adequacy Litigation and the Separation of Powers 2*, in Conference, “ADEQUACY LAWSUITS: THEIR GROWING IMPACT ON AMERICAN EDUCATION” (Harvard University, Oct. 13-14, 2005) (preliminary draft, on file with the Harvard Kennedy School of Government), available at <http://www.ksg.harvard.edu/pepg/PDF/events/Adequacy/PEPG-05-35dunnderthick.pdf>.

finance verdicts, it is not. When the Court of Appeals of New York ordered that the state increase funding to New York City schools by \$1.93 billion,<sup>17</sup> it was not irrational for one to pause and question whether such an order is even possible given the fiscal and political realities the state found itself in. But we must assume that the *court* believed it to be possible, because to believe otherwise would be to harm its own interest in legitimacy.<sup>18</sup>

The other interest we must assume courts wish to protect is their interest in an adhered-to constitution. This is the judiciary's very purpose. Although critics make careers out of questioning whether a court is correct in its assessment of constitutional deficiency in a given matter, what cannot be questioned is the court's belief that it is, in fact, trying to create a constitutionally sound environment for the parties before it and by extension its entire jurisdiction. To do otherwise would be grounds for disrobement.

In seeking to find a better alternative to school-finance litigation, we must keep in mind the interests of the judiciary in its own legitimacy and in the constitutionality of the state school-funding laws. Any potential solution to interbranch school-finance disputes must protect these interests to have any power.

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<sup>17</sup> Campaign for Fiscal Equity, Inc. v. New York, 861 N.E.2d 50 (N.Y. 2006). This has been hailed by the plaintiffs as the "final" decision by the highest court. See Campaign for Fiscal Equity, press release, NY Court Orders Historic \$1.93 billion Additional Funding in Final CFE Ruling, Nov. 20, 2006, [http://www.schoolfunding.info/press\\_releases/11-20-06.php3](http://www.schoolfunding.info/press_releases/11-20-06.php3) (last visited May 22, 2007). Only time will tell whether this will indeed be the last word from the Court.

<sup>18</sup> One could argue that courts do not, or at least should not, consider political and fiscal realities when determining questions of constitutionality, to which I have two related practical responses. First, courts must make such considerations to protect their legitimacy, because illegitimacy could endanger their ability to effectively govern constitutionality, their primary job. Second, although courts have and will continue to order parties (including legislatures) to do difficult things, jurists are people too, and I highly doubt any judge would pen an opinion she honestly believed impossible to comply with in good faith, even if the constitution mandated it.

## B. Legislatures

Once a court order is issued, the dispute may have ended in a technical, formalistic, legal sense but the real dispute over how to fund schools is quite likely to continue. Lawmakers, after all, still have to implement the order. Legislatures have reacted in a variety of ways to school-finance court orders. Some have reacted swiftly, others more slowly. Washington state's legislature passed an entirely revamped, constitutional school-finance bill within months of a court order.<sup>19</sup> Kansas' legislature totally ignored, then vociferously fought multiple court orders for over a year.<sup>20</sup> The New Jersey legislature has revised, thrown out, and rewritten its school-funding laws multiple times over the past thirty-five years, only to get shot down time and time again by the New Jersey Supreme Court.<sup>21</sup>

Legislators have given various reasons for their sometimes-obstinate responses, but two concerns are always clearly present. First, lawmakers' duties include more than just managing school districts. They must counterbalance the needs of all the people, towns, and businesses in the state, needs that alternatively conflict and conflate with each

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<sup>19</sup> See Diane W. Cipollone, *Defining a "Basic Education": Equity & Adequacy Litigation in the State of Washington*, in 1 STUDIES IN JUDICIAL REMEDIES & PUBLIC ENGAGEMENT 1 (Campaign for Fiscal Equity, 1998) (detailing school-finance litigation of the mid-1970s); McOwen, *supra* note 2, at 40-43 (same); see also Michael A. Rebell & Jeffrey Metzler, *Rapid Response, Radical Reform: The Story of School Finance Litigation in Vermont*, 31 J.L. & EDUC. 167 (2002) (detailing a similarly quick legislative response in Vermont). Note, however, that this one "successful" episode in Washington's school-finance litigation history was soon overshadowed when the "solution" was challenged within six years (*Seattle School District v. Washington, Thurston Co. Super. Ct. No. 81-2-1713-1* (1983)), and that *that* subsequent "solution" was challenged just a few months ago (See Donna Gordon Blankinship, *Federal Way school district sues state over funding*, COLUMBIAN (VANCOUVER, WA), Nov. 22, 2006, at C5).

<sup>20</sup> See generally McOwen, *supra* note 2, at 31-38 (detailing Kansas' school-finance litigation of 1999-2005). This contentious litigation has supposedly now finally drawn to a close. See *Montoy v. Kansas*, 138 P.3d 755, 765 (Kan. 2006) (concluding that the legislature's efforts "constitute substantial compliance" with the court's multiple prior orders). But the court itself still left open the possibility for yet further challenges later on. See *id.* at 765-66 (noting that it will be up to three years before true compliance can be measured).

<sup>21</sup> See generally Paul L. Tractenberg, *The Evolution and Implementation of Educational Rights Under the New Jersey Constitution of 1947*, 29 RUTGERS L.J. 827 (Summer 1998) (discussing efforts of legislature to achieve a constitutional funding system); McOwen, *supra* note 2, at 22-29 (same).

other in a complex quilt of interests. When politicians ignore certain groups and interests to take care of others, there can be direct consequences to their careers; they understandably want to have control over how they balance their constituents' interests. When a court order forces a politician to focus state attention and funds solely on one area without regard to the others, the political consequences can be drastic. For instance, former New Jersey governor Jim Florio and many of his Democratic legislator associates lost their reelection bids after implementing the highest tax increase in state history—despite being forced to do so to comply with a school-finance court order.<sup>22</sup> With careers and reputations at stake, it is no wonder that legislators dislike being told how to balance their state's interests.

The second concern always present is that there has been a violation of the separation of powers. Legislators were given the power of the purse,<sup>23</sup> and take umbrage when they feel this power is being taken away from them.<sup>24</sup> This can lead to lawmakers' uncertainty whether a school-finance court order should be complied with because they might doubt its constitutionality.

These concerns highlight two interests shared by all legislators, interests at risk during a school-finance dispute. Upon comparison, these legislative interests are, in fact, the same interests as those of the courts—legitimacy and constitutionality—but they take different forms.

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<sup>22</sup> Tractenberg, *supra* note 21, at 911-12.

<sup>23</sup> See ALEXANDER HAMILTON, THE FEDERALIST No. 78. Although Hamilton was discussing the federal separation of powers, lawmakers and citizens throughout the country believe that the state governmental structure should parallel the federal branches, at least in purpose. The fact that some states have elected judiciaries is a notable difference, but I would argue that it is not viewed as a difference in kind.

<sup>24</sup> See, e.g., State Rep. Lance Kinzer, Testimony Before the Special Committee on Judiciary, *supra* note 15 (quoting HAMILTON, *supra* note 23, and claiming that a school-finance court order violated the principles espoused by Hamilton and the Constitution).

Legislators are, like judges, also interested in their own legitimacy, but political legitimacy comes not from having power to command potently. Instead, lawmakers gain legitimacy from the trust and support of their constituents. This legitimacy comes from compromises, campaign promises, and other manifestations of the lawmakers' abilities to strike a popular balance in meeting the needs of the state. Legislators are, therefore, concerned about school-finance court orders because they can jeopardize their interest in political legitimacy.

Legislators also have an interest in the constitutionality of their actions. We can assume (for purposes of this paper) that lawmakers hearken to their vows and would not purposefully draft a law they knew to be in violation of the state constitution. However, legislators know *ab initio* that a *court's* opinion of what is constitutional trumps their own. Because of this difference in responsibility, a *lawmaker* who writes an unconstitutional law may simply be ordered to rewrite the law; on the other hand, a state-supreme-court *justice* who issues an unconstitutional edict is committing a grave, irreversible<sup>25</sup> wrong. It might seem, then, that legislatures would have a lesser interest in protecting constitutionality than do judiciaries.

But this is not the case. Aside from the general incentives of public opinion (which favors politicians who act constitutionally) and lawmakers' motivation to uphold their vows of office, legislators have a strong interest in knowing their laws are constitutional for a practical reason—in order to reduce conflict with the judicial branch. Their interest, in other words, is better viewed not as one in constitutionality *per se*, but rather in minimizing judicial second-guessing. Legislators understand that occasionally

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<sup>25</sup> Assuming the matter, like the school-finance schemes under consideration here, is strictly a state matter.

their laws will be successfully challenged in court, and use this knowledge in drafting laws.<sup>26</sup> But this reliance is eviscerated if the same law is subjected to challenge after challenge, and a court orders revision after revision, understandably frustrating the legislature trying in vain to comply with the constitution. The legislature is keenly interested in reducing the amount of judicial oversight of its many duties—their interest in constitutionality can therefore be seen as an interest in reducing interbranch friction.

Any solution to school-finance disputes must take into account legislatures' interests in their own legitimacy and in nipping interbranch squabbling in the bud. Because legislators are typically those who have the largest day-to-day involvement in managing the school budget statewide, these interests must be met or any court edict risks becoming moot.

### C. Parents and Taxpayers-at-Large

The taxpayers of the state may be split into two groups: the named plaintiff-parents to the suit,<sup>27</sup> and everyone else.<sup>28</sup> Plaintiffs obviously care a great deal about the outcome of the suit because they are paying for it and because they believe their children's futures to be at stake. But non-plaintiff citizens also have ties to the suit—they

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<sup>26</sup> Cf. Maurice R. Dyson, *Playing Games with Equality: A Game Theoretic Critique of Educational Sanctions, Remedies, and Strategic Noncompliance*, 77 TEMP. L.R. 577, 636 (Fall 2004) (“[Judicial] influence is necessarily derived from the legislature’s strategic anticipation of the use of the[] prerogatives [of courts to strike down laws].”).

<sup>27</sup> Virtually all of these lawsuits include plaintiffs other than just parents in underperforming schools. In the current school-finance litigation in New York, for example, an advocacy group and fourteen school boards are also plaintiffs. See Campaign for Fiscal Equity, press release, *supra* note 17. This is nothing new. New Jersey’s lengthy string of school-finance litigation was begun in the early 1970s by the mayor of Jersey City, “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.” Tractenberg, *supra* note 21, at 896. Because the focus of this paper is the interests at stake for the major players, I will ignore this distinction and assume that the interests of plaintiff advocacy groups and school boards align (as is typically purported) with those of plaintiff parents.

<sup>28</sup> I have argued elsewhere that this division endangers the due-process rights of the latter group. See McOwen, *supra* note 2, at 13-14. This distinction is less relevant to this paper, since the focus here is on the interests of plaintiff and non-plaintiff taxpayer alike.

pay the salaries of both lawmakers and judges, the lengthier the interbranch school-finance battle becomes, the more costly it is to taxpayers-at-large.

If a court order actually improves the education of the plaintiffs' schools, then they will of course be pleased, and will likely consider the litigation to have been worth its price.<sup>29</sup> If a court order improves education throughout the state, everyone will be happy and may consider the litigation to have been worth it. But if a court order improves education at the expense of *certain* school districts, or at the expense of the myriad other government services struggling for fungible state aid, then somewhat less than everyone will be happy. Sometimes, such reactions are enough to stymie implementation of a court order indefinitely. In fact, the success or failure of a school-finance court order usually rests in the hands of popular opinion, which greatly influences the interests (already discussed above) of both the judiciary and legislature in legitimacy.<sup>30</sup>

All taxpayers in the state, diverse as they are—corporation or individual, parent or teacher, plaintiff and non-plaintiff alike—could be said to share two interests: in wise stewardships over both their money and their children's futures.

First, they have an interest in effective and efficient government spending. People are generally happy to pay taxes if they feel their money is not being wasted or

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<sup>29</sup> Note that I say "improves" and not "makes constitutional." I think there is an important distinction, which I discuss again *infra*, note 34.

<sup>30</sup> For example, Washington's school-finance litigation ended remarkably quickly and smoothly, with relatively few interbranch volleys, in large part because public opinion was already strongly behind increased funding and drastic reform. See McOwen, *supra* note 2, at 43, 44-45. On the other hand, recall the poor public opinion of a former governor's court-ordered tax hikes, which eventually apparently ousted him from office. *Supra* note 22 and accompanying text.

mismanaged.<sup>31</sup> Citizens may even tolerate increases in taxes for improved roads and schools, or even for increased public service salaries, if only they can be assured such improvements will actually happen and will cost a reasonable amount. School-finance litigation has given no such guarantees.<sup>32</sup>

The second interest all taxpayers share is in a good system of public education. Put bluntly, nobody wants dim-witted kids in their state. Generally, the smarter the population base, the better the economy, the lower the crime, and the higher the spirit of the citizenry. Parents and corporations alike therefore want tax dollars to pay for quality public education.

In addition to considering the interests of the court and legislature, any school-finance dispute must finally also meet the interests of the parents and other taxpayers ultimately requesting the improvements and responsible for them. If taxpayers sense their interests in efficient use of resources and in effective education are in jeopardy, they will never fully endorse a school-finance remedy, rendering it defeasible and likely feckless in the long run.

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<sup>31</sup> Perhaps “happy” is the wrong word, although according to one survey 15% of adults are “tax advocates.” Dru Sefton, *Enthusiasts Don’t Mind Having to Pay Taxes*, NEW ORLEANS TIMES PICAYUNE, Mar. 24, 2002, available at [http://www.responsiblewealth.org/press/rwnews/2002/tax\\_fairness\\_new\\_orleans.html](http://www.responsiblewealth.org/press/rwnews/2002/tax_fairness_new_orleans.html). But as one wise-spending advocate put it, “assuming we’re going to spend that money, we want to make sure it’s not being mismanaged.” *Id.*

<sup>32</sup> “Simply stated, it is not clear that judicial intervention has resulted in meaningful reform.” Rebell & Hughes, *supra* note 1, at 111.

### **III. SCHOOL-FINANCE DISPUTE RESOLUTION MECHANISMS:**

#### **AN INTEREST-BASED ANALYSIS**

If any of the three major players fears that one of their fundamental interests will not be met, they will not agree to a proposed remedy, no matter which player proposes the solution or how attractive it may be to the other two. If judges fear that their order will go totally unheeded, they will either alter the order or use extreme tactics to try and ensure its legitimacy. If they do not believe a solution to be constitutional, they will neither order nor endorse it. If legislators believe that implementing a given solution will reduce their constituents' support and therefore their legitimacy, they will undermine the plan or simply refuse to follow it. If they believe that a given "solution" is not a solution at all but merely a step that will increase second-guessing by the judiciary, the same result will follow. If taxpayers believe a proposed remedy to be a waste of money or a misappropriation of the trust they have placed in their leaders, they will find representatives (and judges, in states with judicial elections) who will agree with them. And finally, if parents and other citizens of the state believe that a solution will not actually improve education, they will fight until it is either struck or altered to their liking.

In order for a school-finance dispute to reach true resolution then, a resolution that is actually effective and relatively permanent, all three major players must have each of their primary interests met. If any of these six interests are not likely to be met by the mechanism hosting the school-finance dispute, it is unlikely that true resolution will be achieved through its use. In this Part, I examine the inability of litigation to meet these

six interests, and explore possible ADR mechanisms as alternative fora that would be better-able to meet them.

### **A. Litigation**

First let us examine to what extent typical school-finance litigation meets the interests of the players, as compared to the status quo. In other words, for each interest we simply ask “Is this interest better-served or disserved by entering into school-finance litigation than by doing nothing more at all?”<sup>33</sup>

Litigation’s effect on a court’s interest in legitimacy is mixed. Judicial legitimacy could be alternatively increased or decreased depending on the outcome. Simply put, if a court order “works” and works quickly, it will be seen as a boon to the state and to constitutionality, and consequently the confidence in the ability of the court to solve disputes will go up. Alternatively, if it does not work, or if a lengthy interbranch back-and-forth begins to ensue, faith in the court’s power to do anything quickly diminishes, along with its legitimacy. On the other hand, the court’s interest in a constitutional system of school-finance here has its maximum protection. In litigation, the court has ultimate control over the definition and satisfaction of constitutional standards.

The legitimacy of the legislature is surely decreased by school-finance litigation. The litigation is accompanied by public doubt in lawmakers’ abilities to draft constitutional laws, just as any litigation inherently causes apprehension at a defendant’s ability to comply with the law. “After all,” a citizen might think (rightly or not), “those politicians must not be running the school system correctly—if they had, they wouldn’t

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<sup>33</sup> By “litigation” (here and generally throughout the paper) I mean adjudication, the typical method employed in litigation currently. By “doing nothing more at all” I simply mean continuing to pressure politicians, to raise awareness, to get involved in school activities and administration—to do anything other than seek a formal legal solution.

be in court.” Further, once a school-finance dispute is addressed via litigation, the legislature loses the near-plenary control it typically held over the education and funding issues of the state. This impotence reduces the legislature’s legitimacy in its members’ eyes, but also in the eyes of the public, who know that they can no longer go exclusively to their representatives if they wish to alter the school-finance structure. And of course, the legislature’s second interest—in reduced judicial oversight—is satisfied here least of all. School-finance litigation is the most direct form of judicial second-guessing, and the more protracted the litigation, the stronger the negative effect on this interest.

As for the public’s interest in efficient spending, although theoretically possible that court intervention could increase the wisdom of government spending, in reality this rarely occurs.<sup>34</sup> The court, by taking over a school budget and basing it entirely on party-submitted evidence and party-hired experts, taking it entirely out of the context of balancing the other needs of the state, reduces the efficiency of spending.<sup>35</sup> The actual effect litigation has on education is mixed. In some instances, education has improved, in

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<sup>34</sup> By “wisdom” I mean the ability to carefully balance the various needs of the state. No doubt the plaintiffs and court might think that truly “wise” use of funds includes significantly more spending on education. Sometimes they are correct, but most often this argument conflates the term “constitutional” with “wise”; the former term has one legal definition (decided by the court), while the latter has many definitions, of which (I would argue) the legislature’s and its constituents’ are primary.

<sup>35</sup> See, e.g., Rebell & Hughes, *supra* note 1, at 129 (“[Judicial] decrees . . . , even with input from the parties or a group of experts, often lack a clear understanding of the context of needed education reform or an understanding of how the remedy to a particular problem will affect other aspects of school district functioning.”). One specific example of the limitations of the litigation forum was seen in the Kansas school-finance litigation. Feeling forced to make an order to the legislature explicit, and wanting to base that order on something more than their own opinion, judges grasped onto the only dollar-figure evidence before them—one consultant’s suggestion of \$853 million—and made implementing this report their order. *Montoy v. Kansas*, 2003 WL 22902963, \*38-\*40 (Kan. Dist. Ct. 2003), *aff’d in relevant part*, 102 P.3d 1160, 1165 (Kan. 2005). The court ignored the fact that the report, commissioned by the legislature after *prior* school-finance litigation, had already been looked over by lawmakers and thought “unwise” to implement, in part due to what some commentators thought was faulty methodology. See Denis Boyles, *We’re All in Kansas Now, Toto*, National Review Online (July 8, 2005), <http://article.nationalreview.com/?q=YWVjY2ExMjAxZDE5MzI0OWE2ZDU3NjIxZTMwNjc5NjY>. This is a perfect example of courts substituting their “wisdom” for the legislature’s.

others, funding has increased without improvements in education, and in others the litigation has gone on for years with no change whatsoever.<sup>36</sup>

## **B. Arbitration**

Given the difficulty litigation has in meeting several of the key players' interests, let us now turn to alternative dispute resolution fora, beginning with arbitration. Because litigation is the standard formal legal method now employed in school-finance disputes, each of these alternatives should be examined in terms of its effectiveness to meet interests vis-à-vis litigation.<sup>37</sup> In other words, for each interest we ask "Is this interest better-served or disserved by entering into this school-finance dispute alternative than by entering typical litigation (adjudication)?"<sup>38</sup>

The ability of arbitration to meet a court's interests is mixed in both cases. Judicial legitimacy would be uncertain for the same reason as in litigation: If it worked, then legitimacy would increase as the public trusted the court's use of arbitration; otherwise, legitimacy would decrease. Similarly, it is unclear how well arbitration would protect the court's interest in constitutionality; it would largely be under the court's own control. If the court ordered arbitration but gave instructions to the arbitrator to follow an explicit, constitutional mandate, then its interest may be protected. However, arbitrators are typically permitted to acknowledge factors other than constitutionality in rendering decisions, and, further damaging to this interest, no matter how explicit its arbitral

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<sup>36</sup> See Rebell & Hughes, *supra* note 1, at 111 (citing various sources on both sides of the argument that school-finance court orders actually improve education).

<sup>37</sup> It should be noted that, with the exception of a few rare attempts discussed in the next Part, no ADR mechanisms have been utilized in school-finance disputes. Therefore, the ability or disability of any of these fora to meet the interests discussed is currently just my postulation.

<sup>38</sup> The one exception to this formulation is the court's interest in assuring constitutionality. Because litigation is the forum in which a court has the maximum power to assure constitutionality, arbitration, negotiation, and mediation each necessarily represent a lesser forum in which to meet this interest. Therefore, for this interest, the proper view is to compare it against no legal action.

instructions, a court would still be giving up the right of the state supreme court to have the final say in the constitutionality of the funding scheme.

Legislators, similarly to litigation, would feel their legitimacy to be at risk because they would still be being told by another branch what to do. However, lawmakers' interest in reducing judicial oversight should be better protected than in litigation. So long as the court made clear and explicit the grounds allowed for bringing school-finance claims in the future, binding arbitration should theoretically do a better job of finally silencing the dispute and ending the interbranch debate because it is final and unappealable.

Finally, the interests of taxpayers in efficient spending and effective results would likely both be mixed in terms of arbitration's protection. Each would simply depend on the factors the arbitrator considered in her (or their) decision and its subsequent effects.

### **C. Negotiation**

Ordering negotiation would theoretically decrease judicial legitimacy because the move would likely be seen as simply kicking the dispute further down the procedural trail. If negotiation were going to solve anything, one could argue, it would have already been solved through the typical political channels. If the court is not willing to interfere in the dispute, then it would be more efficient and effective to make this reluctance clear in the first instance by simply calling the dispute nonjusticiable. Protection of the second interest, the court's ability to judge constitutionality, would be mixed. If negotiations broke down, the court would have left open the possibility that the dispute will again come before them, giving them full control. However, if negotiations managed to

succeed, but did so based on factors other than constitutionality, this interest would be damaged.

Political legitimacy would likely be increased by the use of negotiation. It would be seen as a reaffirmation of the political process, putting legislators back in the budgetary driver's seat, but also would give the positive image that they are being responsive to the plaintiffs' concerns. Negotiation's ability to meet the second legislative interest and reduce judicial oversight, however, as already mentioned, is unclear. If an agreement is reached that completely satisfies the plaintiffs, oversight may end. But if negotiations break down, or even if a compromise agreement is reached, lawmakers have no guarantees that plaintiffs will not simply decide to sue again and restart the dispute.<sup>39</sup>

As for the interests of the citizenry, theoretically, the use of negotiation would increase both the efficiency of spending and the quality of education, if only marginally. Forcing legislators to listen to the proposals of the plaintiffs and increasing media attention paid to state school budget issues, should result in lawmakers taking a hard look at their budget and reevaluating its wisdom. This simple increase in the attention paid by lawmakers and the media to the plaintiffs' concerns should also result in some betterment in education.<sup>40</sup> Although plaintiffs certainly have no guarantee of satisfaction, it is highly doubtful that negotiation would result in education being *worsened*—some improvement should result.

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<sup>39</sup> Even if negotiations could be structured so as to be “final” and binding on the parties, the interest would still not be met because there would be no limitation preventing similarly situated plaintiffs from bringing suit against the state for the identical school-finance scheme.

<sup>40</sup> In fact, publicity is one of the primary reasons school-finance litigation is so popular: Plaintiffs purposefully “keep[] school spending inescapably before the legislature when otherwise it might fall from view.” Dunn & Derthick, *supra* note 16, at 3. Plaintiffs believe that they “‘have to continue to litigate. Only through litigation will we capture attention.’” *Id.* (quoting No Child Left Behind co-author George Miller). Court-ordered negotiation or mediation (discussed next) would accomplish the same goal.

#### D. Mediation

We turn finally to mediation as a general alternative. If mediation were chosen as the dispute resolution forum, the effect on the court's interest in legitimacy would be unclear. The move could be seen as a "punt" by the judiciary to a third party because it knows of no other way to handle the problem, hence hurting its reputation.<sup>41</sup> On the other hand, as with every other mechanism, if mediation resulted in a solution, it would be seen as a boon to the legitimacy of the court. The affect on the interest of the court in the assured constitutionality of the result would also be unclear. Because many factors other than the constitution are in play during a mediation, the result could not be guaranteed constitutional unless the court retained the right to approve the resultant agreement; that agreement would likely not be approvable without explicit constitutional guidelines to the parties *ab initio*.

As in negotiation, mediation would be close enough to the typical legislative process to increase political legitimacy above that now present in litigation. Also as in negotiation, the ability of mediation to reduce judicial oversight would be unclear.<sup>42</sup> So long as the court retained jurisdiction over the final mediated agreement, and so long as plaintiffs had the option of going back to court to begin the dispute again if they later changed their minds, the threat of judicial second-guessing would remain.

Finally, as mentioned for negotiation, both interests of the plaintiffs and taxpayers-at-large would likely be improved. If not due to a mediated agreement itself,

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<sup>41</sup> As will be discussed *infra*, Part IV, when one court ordered school-finance mediation, it was accused of doing precisely that. Editorial, "The Court Punts Again," CINCINNATI POST, Nov. 21, 2001, at 16A.

<sup>42</sup> However, mediation, as an assisted and guided process, would likely result in a longer-term resolution than negotiation.

both the efficiency of spending and the quality of education would likely improve merely by forcing the legislature to listen to the concerns of some of its constituents.

**E. Proposal for a Custom Mechanism: Special-Master Judicial-Representative Mediation**

The abilities of litigation, arbitration, negotiation, and mediation to meet the interests under pressure in school-finance disputes are summarized in the Table at the end of this article.<sup>43</sup> It is clear that litigation has proven a poor forum to support several of these interests—namely both of the legislative interests and the taxpayers’ interest in efficient spending. Further, mandated arbitration and negotiation each might improve on litigation in meeting some interests, but not all. Arbitration would arguably better support the legislature’s interest in reduced oversight and taxpayers’ interest in more efficient spending, but would poorly meet the court’s interest in assuring constitutionality. Negotiation would arguably improve all the interests of the legislature and the taxpayers, but at the expense of meeting both of the judiciary’s interests.

Mediation is the only proposed alternative to litigation that improves or holds steady the meeting of all the interests of the key players. Mediation better protects legislative legitimacy, as well as taxpayers’ interests in efficient spending and improved education; it protects the remaining interests at least no less than does litigation. Therefore I propose mediation as an improved mechanism, one that protects more of the interests under attack in school-finance disputes than litigation can. However, I believe it is also possible to structure such mediation in a manner that improves upon litigation in protecting *all six* interests in play.

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<sup>43</sup> See Table *infra* at 29.

The comprehensive solution is special-master judicial-representative mediation. Such a mediation could be ordered under the state's special-master rules (analogous to Federal Rule of Civil Procedure 53) by any judge facing school-finance litigation. This mediator should be an experienced complex mediator, most likely a current or former judge, who would have explicit instructions from the court to "represent" the interests of the judiciary in the mediation.

Although mediators are typically neutral, in certain complex disputes, commentators have argued that it is appropriate for mediators to represent the interests of otherwise unrepresented players.<sup>44</sup> Special-master mediation has been proposed as a solution to intractable education disputes; however, the role suggested is one of a community representative.<sup>45</sup> In other words, the unrepresented group included was non-plaintiff taxpayers. While it is important to include this group in reaching finality,<sup>46</sup> there are three reasons why having the special-master mediator "represent" judicial interests instead is superior.

First, because the interests of non-plaintiff taxpayers will nearly always align with plaintiff-parents, the legislature, or both, a mediator will violate neutrality during mediation if she attempts to defend their interests; guarding the judiciary's interests is more completely a third-party role. Second, while representing community interests may improve long-term mediated agreement viability, it will not help short-term viability; in

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<sup>44</sup> See, e.g., Lawrence Susskind, *Environmental Mediation and the Accountability Problem*, 6 VT. L. REV. 1, 18 (1981) (proposing that mediators protect the interests of unrepresented parties in evaluating the fairness of environmental agreements).

<sup>45</sup> Rebell & Hughes, *supra* note 1, at 132 (suggesting that "community dialogue organizers" be called as special-master mediators during school disputes).

<sup>46</sup> I discuss the need to include non-plaintiff taxpayers further *infra* at 28.

contrast, judicial-representative mediation would help improve short-term viability as well simply by generating an initial agreement that the court is more likely to approve.

Third and most important, by guiding the course of the mediation with an eye not only to the interests of the plaintiff-parents and the legislature, but also to the interests of the court, *all* interests can be better protected, including those not improved by resort to general mediation. Mediation's weakness is in meeting the interests of the court in legitimacy and securing constitutionality, and in meeting the interest of the legislature in reduced interbranch conflict. But with a special judicial representative mediating the agreement, lawmakers and taxpayers could more-easily come to a compromise agreement that would meet these interests as well. The mediator would be able to guide the compromises made towards an agreement that the court would find realistic enough to protect its own legitimacy, as well as constitutional.<sup>47</sup> This would, in turn, allow the court to easily approve the resulting mediated agreement and move straight into implementation. Implementation would proceed smoothly because the legislature and taxpayers would have already agreed how to solve the school-finance problems. Judicial oversight would end because the court has already declared the agreement constitutionally adequate, thus heavily discouraging future claims. In short, it would be possible to meet every player's interests.

Deciding on court-ordered mediation with a special-master judicial-representative mediator as the interest-based path to school-finance dispute resolution is not alone

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<sup>47</sup> Whether this should be done by establishing a mediator veto power over the final agreement, or rather by allowing the mediator to encourage or discourage certain ideas during the mediation is a choice I would leave up to the various state courts (or even individual mediators). However, if pressed, I would suggest the latter method as preferable. Of course, if multiple courts utilized my proposal, useful principles could be developed to guide special-master mediators in executing their role as judicial representatives in school-finance disputes.

enough to ensure success, however. Such an approach must take into account practical concerns to be effective. In the following Part, I will briefly discuss and draw lessons from the only extant example of state-supreme-court-ordered mediation in a school-finance dispute, one which can offer guidance to future attempts at special-master judicial-representative mediation.

#### IV. IMPLEMENTING SCHOOL-FINANCE MEDIATION: LESSONS LEARNED IN OHIO

The Supreme Court of Ohio had, like many states, experienced extended school-finance litigation over the course of many years and multiple judicial opinions:<sup>48</sup>

The school finance case presented complex legal, political, public policy, and administrative issues and had dragged on for a decade. The [Ohio] Supreme Court had declared the constitutional rights and obligations of the parties almost five years earlier, but implementation of a remedy for the violation of state constitutional rights remained elusive. The court deemed the case to be “the most difficult challenge” it had faced in all the years the case had been pending.<sup>49</sup>

After two court orders, and two legislative reactions dubbed inadequate by the Court, the dispute seemed at a gridlock. The dispute seemingly reached a head as the Court considered arguments between legislature and plaintiff-taxpayers for the third time:

Political and media pressure on the court had become intense. The court was widely blamed for budget cuts in popular state programs. The General Assembly seemed incapable of making the structural changes in the system envisioned in [the Court’s two prior rulings], and the task of

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<sup>48</sup> New Jersey (see sources cited *supra* note 21) and Texas (see Dyson, *supra* note 26, at 633-34) had produced the lengthiest school-finance litigations, disputes the Supreme Court of Ohio was well aware of even before it knew it would join their ranks as a beleaguered interbranch conflict. See *DeRolph v. State*, 677 N.E.2d 733, 786-87 (Ohio 1997) (Moyer, C.J. dissenting) (reminding the majority that “[t]he experiences of other states provide ample proof of the troubled history of litigation that ensues when the judiciary deems itself to be the ultimate authority in setting educational funding mechanisms and standards,” citing, among others, the “years of protracted [school-finance] litigation” in New Jersey and Texas).

<sup>49</sup> Molly Townes O’Brien, *At the Intersection of Public Policy and Private Process: Court-Ordered Mediation and the Remedial Process in School Funding Litigation*, 18 OHIO ST. J. ON DISP. RESOL. 391, 391-92 (2003) (footnotes omitted).

overseeing incremental revisions—tinkering toward a constitutional funding system—appeared endless.<sup>50</sup>

Realizing that its legitimacy was in question and that no ruling would have effect without better cooperation between the parties, and even explicitly complaining of the lack of any other viable options,<sup>51</sup> the Court took an unprecedented<sup>52</sup> move and ordered mediation between the parties.

The Court appointed a special master as a mediator and ordered both sides to participate.<sup>53</sup> The order to mediate included no guidance at all, and, because the proceedings were ordered confidential, none but those present know what options were discussed.<sup>54</sup> But what *is* known is that the mediation was a resounding failure. In the final report by the mediator—all of four sentences long—he reported simply that the “mediation has not produced a resolution.”<sup>55</sup> Within months, the parties were back in court, forcing the Ohio Supreme Court to pick up right where it left off.<sup>56</sup>

<sup>50</sup> *Id.* at 413-14 (footnote omitted).

<sup>51</sup> The Court threw its proverbial hands in the air after years of frustration and impasse with the legislature: A climate of legal, financial, and political uncertainty concerning Ohio’s school-funding system has prevailed at least since this court accepted jurisdiction of the case. . . . [N]o one is served by continued uncertainty and fractious debate. In that spirit, we have [decided to] terminate the role of the court in this dispute.

*DeRolph v. State*, 754 N.E.2d 1184, 1190 (Ohio 2001) (*DeRolph III*) (plurality opinion). *See also id.* at 1216 (Stratton, J. concurring in the judgment) (“[I concur in the judgment only as] a pragmatic compromise to resolve an impasse that I believe has been divisive for too long . . .”).

<sup>52</sup> Although no other state supreme court has ordered mediation in the school-finance context, a few lower courts have. *See* Jim Tarpey, *ADR Forum: One Step in an Evolving Process*, 30 COLO. LAW. 53, 53 (June 2001) (noting a school-finance ADR attempt by a lower Colorado court).

<sup>53</sup> *See DeRolph v. State*, 758 N.E.2d 1113, 1116-19 (*DeRolph Mediation Order*) (Ohio 2001).

<sup>54</sup> *Id.* at 1119 (ordering confidentiality). Confidentiality was desired by the mediator and the parties, which feared that public communication would be destructive and damning to the success of the mediation attempt. *See* Stephanie Brenowitz, Note, *Deadly Secrecy: The Erosion of Public Information Under Private Justice*, 19 OHIO ST. J. ON DISP. RESOL. 679, 697 (2004). Proven by the failure of the mediation to end the dispute, I argue (with the benefit of hindsight) that this view was wrong. Public communication is vital to the stability of the resulting agreement. The argument against the use of confidentiality in the Ohio school-finance dispute was presented cogently in *id.*

<sup>55</sup> Howard S. Bellman, Master Commissioner’s Final Report, March 21, 2002, <http://www.sconet.state.oh.us/derolph/bellman3-21.pdf>.

<sup>56</sup> This included issuing yet another court order, *DeRolph v. State*, 780 N.E.2d 529 (Ohio 2002) (*DeRolph IV*), which is still unheeded.

Despite so little being known about why the mediation failed to meet the parties' interests, several reasons can be posited and hopefully lessons learned. First, it is possible that, after a decade of litigation, the parties were simply too entrenched in their positions to effectively mediate.<sup>57</sup> For court-ordered mediation to be effective, it must happen first or very soon after a problem looks to be intractable for the court.<sup>58</sup> Second, the parties had no clear motive for mediating; each party knew that if the mediation failed, they would simply revert back to typical litigation as if nothing had occurred.<sup>59</sup> The court must give the parties incentive to mediate; for example, the court could alternatively threaten to set the school budget itself or to dismiss the case if no agreement is met. Third, there was a paucity of guidance, including any definition of the constitutional rights the court was supposedly protecting.<sup>60</sup> "[C]ourts should provide the legislative and executive branches [and plaintiffs] with clear guidelines on expected directions and a workable framework for organizing and monitoring the results."<sup>61</sup> Fourth and most importantly, key third-party players—notably the judiciary itself and non-plaintiff taxpayers—were purposely left out of the mediation. It is absolutely necessary to involve all the potentially interested players in order to have an agreement that will truly end judicial oversight—consensus-building is necessary.<sup>62</sup> Even if the

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<sup>57</sup> As pointed out by one justice in his dissent from the order to mediate. See *DeRolph Mediation Order*, *supra* note 53, at 1122-23 (Resnick, J. dissenting).

<sup>58</sup> For an argument that court-ordered mediation is better used late than not at all, see Mori Irvine, *Better Late Than Never: Settlement at the Federal Court of Appeals*, 1 J. APP. PRAC. & PROCESS 341 (1999) (positing reasons why "the most difficult, most intractable" cases may still reach resolution when pending before the U.S. Court of Appeals).

<sup>59</sup> O'Brien, *supra* note 49, at 419-25.

<sup>60</sup> *Id.* at 426-29.

<sup>61</sup> Michael A. Rebell & Robert L. Hughes, *Efficacy and Engagement: The Remedies Problem Posed by Sheff v. O'Neill—and a Proposed Solution*, 29 CONN. L. REV. 1115, 1147 (1997).

<sup>62</sup> See O'Brien, *supra* note 49, at 429-30 ("Lengthy discussions and difficult compromises will count for nothing if . . . [unrepresented parties later] appear and decide to oppose implementation of the resolution. . . . [A]ssent of the most vocal activists and the most difficult opponents of reform is key . . .").  
[Footnote continued on next page]

mediator had reached a compromise between the parties in Ohio, the lack of full consensus by *all* interested parties would have rendered it impotent—as such an oversight has done in lower-court school-finance mediation attempts.<sup>63</sup>

## V. CONCLUSION

It is time for a new approach to addressing school-finance disputes; litigation does not work as a mechanism. If we look at the primary players in such disputes—courts, legislatures, plaintiffs and other taxpayers—we can see that their fundamental interests come under threat during such disputes. Any approach to solve these difficult, even intractable dilemmas, must stem from an institutional forum with the ability to protect all of these interests. I propose that court-ordered mediation is the best-possible alternative to school-finance litigation, so long as several conditions are met.

First, the judiciary's interests in legitimacy and a constitutional solution will be better protected if it reserves rights to approve the agreement and appoints a special-master mediator to preside who will also represent these judicial interests. This approach would also improve the efficiency and effectiveness of mediation and solidify the finality of the resultant agreement, hence protecting the legislature's interest in reducing further judicial oversight.

Second, the order to mediate must be given swiftly and with clear guidance. If a court attempts other solutions two or three times before ordering mediation, parties will become too entrenched to effectively mediate; further, the legitimacy of the court will appear weak, grasping at straws to find a solution. Also, if a court orders mediation

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*See generally* THE CONSENSUS BUILDING HANDBOOK (Lawrence Susskind et al., eds. 1999) (outlining the consensus-building technique, with its methods of involving unrepresented parties).

<sup>63</sup> *See* Rebell & Hughes, *supra* note 61, at 1157 (describing the derailment of an Alabama district court's school-finance mediation by politicization of unrepresented interests).

without giving the mediator and parties clear guidance for what is acceptable and what the constitutional standards are, it may appear to simply be punting the issue to a third party. Further, without explicit guidelines, it is likely the dispute will just end up before the court again (either with the same plaintiffs or new ones).

Finally, the mediation must involve all interested parties—including the unrepresented taxpayers and the judiciary itself. Taxpayers other than merely the filing plaintiffs must be involved, including representation for all of the school districts who have to implement the resulting agreement and all of the citizen groups protecting the rights of children, parents, schools, and taxpayers. Notifying all such interested players and allowing them to participate (either directly or by public comment or petition) is a daunting task for a court, but it is necessary. As mentioned first above, the judiciary's interests must be represented to achieve lasting closure to school-finance disputes. The special-master mediator can fulfill this role and improve the efficiency and efficacy of the mediation process. Anything short of full involvement of all interested parties, as several examples have shown, will result in the school-finance dispute either never or only temporarily ending. And courts, legislatures, and taxpayers all have an interest in these disputes ending quickly, fairly, comprehensively, and finally.

If mediation meeting these conditions is attempted, all three players with vital stakes in school-finance disputes—courts, legislatures, and citizens—will have their interests protected, and successful remedies will more-easily be found and implemented than if the players involved continue to utilize the current form of choice, litigation. But not only would their interests would be better-served; with any luck, the states' children could finally attend quality, efficient, *and* constitutional schools.

**TABLE:**  
**Effects of dispute-resolution mechanisms on the interests of the major  
 players in school-finance disputes.**

| Player:<br><br>Interests:                              | Court                  |                                   | Legislature             |                      | Parents,<br>Plaintiffs, &<br>Taxpayers |                      |
|--|------------------------|-----------------------------------|-------------------------|----------------------|--|----------------------|
|  | Judicial<br>Legitimacy | Assurance of<br>Constitutionality | Political<br>Legitimacy | Reduced<br>oversight | Efficient<br>spending                  | Quality<br>education |
| Litigation   | ↔*                     | ↑*                                | ↓*                      | ↓*                   | ↓*                                     | ↔*                   |
| Arbitration  | ↔                      | ↔*                                | ↓                       | ↑                    | ↔                                      | ↔                    |
| Negotiation  | ↓                      | ↔*                                | ↑                       | ↔                    | ↑                                      | ↑                    |
| Mediation  | ↔                      | ↔*                                | ↑                       | ↔                    | ↑                                      | ↑                    |
| Mediation<br>by Special<br>Master<br>Judiciary<br>Rep. | ↑                      | ↑*                                | ↑                       | ↑                    | ↑                                      | ↑                    |

**Key:**    ↑ = *Increased chance of meeting interest;*  
              ↓ = *Decreased chance of meeting interest;*  
              ↔ = *Mixed or uncertain chance of meeting interest*

\* = These measures are vis-à-vis the status quo (*see supra* at 17 n.38), while the others are vis-à-vis use of litigation as a dispute-resolution mechanism (*see supra* at 17). For example, the legislature’s interest in political legitimacy has less of a chance of being satisfied when school-finance litigation is pursued than if nothing had been done at all, while that same interest has a greater chance of being satisfied when school-finance mediation is pursued than if litigation had been pursued instead.