Closing the Door on Positive Rights: State Court Use of the Political Question Doctrine to Deny Access to Educational Adequacy Claims

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The United States system of funding schools with local property tax dollars leads to qualitative disparities across school districts. It is crucial that state courts address this problem, since no federal right to education exists. Students and parents have successfully challenged these funding systems in many states, but courts in seven states — citing the political question doctrine — have refused to review these claims. It appears that most of these states lack a coherent political question history and have used the prudential standing doctrine to avoid education claims specifically. This Note argues that the political question doctrine should not be used as an excuse to ignore educational adequacy cases in states with an affirmative constitutional right to education.

I. INTRODUCTION

Beginning with *San Antonio Independent School District v. Rodriguez*,[1] plaintiffs concerned with educational equity have gradually lost access to the federal court system over the past thirty-five years. In response, education plaintiffs have taken their claims to state court. The first wave of state cases aimed to achieve equal education for all, but over time advocates have

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1. 411 U.S. 1 (1973) (holding there was no fundamental right to education).

shifted to claims for a minimum baseline of educational adequacy.[2] State court plaintiffs have framed their arguments on state constitution education clauses, which grant all students a positive right to education and often articulate more specifically what that right requires. In the states where the highest courts have considered educational *adequacy* claims on the merits, plaintiffs have won every single time.[3]

Some state judges, however, have recently refused to address the difficult business of school reform. These courts have ruled that education funding issues belong with the legislature and will not consider adequacy claims on their merits. For those who view the judiciary as the protector of minority rights, closing the door to state litigation is troubling. With education claims out of federal court for the foreseeable future, litigants must find ways back into these state courtrooms. Judges in seven states rely on the rarely invoked federal political question doctrine, explained in *Baker v. Carr*,[4] to reject education claims.[5] In that 1962 case, the Supreme Court set out six possible criteria explaining what would limit courts from hearing claims that belong with another political branch.[6]

This Note investigates why state courts have suddenly resurrected this fifty-year-old Supreme Court doctrine and applied it to educational adequacy claims. On what authority do these courts base their decisions to refuse to consider educational adequacy claims? Do these states have coherent political question doctrines, where courts routinely examine the justiciability of claims before reviewing them? If these states use the political question doctrine widely, consistency may imply some legitimacy to the practice. But if the decisions are targeted only at education, what does that mean for the use of the political question doctrine at the state level? Determining the reasons behind these decisions will reveal ways to challenge them with future litigation.

Part II provides a brief history of recent education reform litigation in the United States, explaining the shift from the federal

2. *See infra* Part II.A.

3. NAT'L ACCESS NETWORK, STATE BY STATE (2008), http://www.schoolfunding.info/states/state_by_state.php3; *see infra* Part II.B.

4. 369 U.S. 186 (1962).

5. *See* discussion *infra* Part III.

6. *Id.*

to the state system. It details the move from equity to adequacy litigation and what this shift means for the role of the courts. It also briefly explains the federal history of the political question doctrine. Part III details new research of the legal history of the seven states that have ruled education finance claims political questions: Oklahoma, Pennsylvania, Nebraska, Florida, Alabama, Illinois, and Rhode Island. It examines how and when the courts in these states have used the political question doctrine in the past, and whether the application of the doctrine in the education context is far from the ordinary. Most of the states rely on one specific criterion of *Baker v. Carr*: that the courts lack "judicially discoverable and manageable standards."[7]

Part IV concludes that these seven states have created anomalies in their jurisprudence by singling out education. It then argues that state courts, because of the positive rights to education in their constitutions and their long history of upholding educational rights, should not follow the federal political question doctrine in education matters. State courts are well-equipped and constitutionally obligated to hear these education claims on the merits. Closing the door on claims protected by positive state constitutional rights denies plaintiffs any redress from legislative majority decisions — the exact problem that creating a constitutional right should prevent. Finally, Part IV explains why separation of powers concerns (that the federal political question doctrine protects against) do not arise in state education claims.

II. BACKGROUND

Education in the United States has a history of local control. From the time public education systems were established during the common schools movement in the mid-nineteenth century, education decisions have been made on the local level.[8] At that time, many state constitutions were amended to include an affirmative right to education for all children of the state.[9] Starting

7. *Baker*, 369 U.S. at 217.

8. *See generally* LAWRENCE CREMIN, AMERICAN EDUCATION: THE NATIONAL EXPERIENCE, 1783–1876 (1980); C. KAESTLE, PILLARS OF THE REPUBLIC: COMMON SCHOOLS AND AMERICAN SOCIETY, 1780–1860 (1983).

9. *See generally* LAWRENCE KOTIN &WILLIAM F. AIKMAN, LEGAL FOUNDATIONS OF COMPULSORY SCHOOL ATTENDANCE (1980); CREMIN, *supra* note 8; KAESTLE, *supra* note 8.

with the first schools in the colonies, education funding came from property taxes of the surrounding areas. Today, funding is based on local property tax dollars in all fifty states.[10]

Funding schemes create differences in the amount of money allocated to each school. Property tax funding has led to per-student spending that varies greatly by district.[11] State constitutions providing an affirmative right to education would seemingly require remediation of inter-district inequities. Courts, however, have categorically refused to require equal per-pupil funding between school districts.[12] For the right to education to have any meaning, some baseline level of funding must exist to ensure adequate education for all students.

Under the Federal and most state Constitutions, an affirmative right creates a constitutional question reviewable by the judiciary. The history of judicial involvement in education is briefly described below, first at the federal and then at the state level. An explanation of the political question doctrine — where courts refuse to take up these issues because of separation of powers — follows.

A. BACKGROUND ON FEDERAL EDUCATION LAW

Beginning with the amendments to the Federal Constitution following the Civil War, federal protection of constitutional rights and social reform increased dramatically. Indeed, in the late nineteenth century Congress greatly expanded the powers of the federal government to protect the rights of its citizens, partially because state governments in the South could not be trusted to do

10. The percentage of school funding coming from property taxes dropped off sharply in 1952, but then stabilized again in the following decades. For statistics on school funding over time and a critical look at this taxation scheme, see DAPHNE A. KENYON, LINCOLN INST. OF LAND POLICY. THE PROPERTY TAX–SCHOOL FUNDING DILEMMA, (2007), *available at* https://www.lincolninst.edu/pubs/dl/1308_Kenyon%20PFR%20Final.pdf. *See also* John Augenblick, *School Finance and Property Taxes, A Continuing, If Changing, Linkage*, National Center on Education Finance, *available at* http://www.ncsl.org/programs/educ/NCEFTaxes.htm.

11. Michael Rebell, *Educational Adequacy, Democracy, and the Courts*, *in* ACHIEVING HIGH STANDARDS FOR ALL 218, 226–27 (2002).

12. *See infra* Part II.B.

the same.[13] This remained true well through the first half of the twentieth century.[14]

Advocates began seeking equal protection of the right to education in the 1940s and 1950s, starting with the NAACP's plan — spanning several decades — to challenge public school segregation.[15] Federal courts first ruled that segregation was forbidden in law school and other graduate programs.[16] The Supreme Court then held that separate was not equal in *Brown v. Board of Education*.[17] In *Brown II*, the Court explained that it expected school districts to "make a prompt and reasonable start toward full compliance" and that "[d]uring this period of transition, the courts will retain jurisdiction of these cases."[18] The federal courts' oversight of education desegregation created an overwhelming amount of federal litigation during the 1950s, 1960s and 1970s.[19]

13. *See* RICHARD H. FALLON ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 466–94 (5th ed. 2003) (discussing the expansion of federal jurisdiction during Reconstruction).

14. William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV 489, 490–92 (1977) (explaining the court decisions over several decades that resulted in the incorporation of the Federal Constitution's protections to the states).

15. *See* RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (1977) (documenting the history of the NAACP plan and the developments leading up to the Supreme Court's unanimous opinion in *Brown*).

16. Mclaurin v. Okla. State Regents for Higher Educ., 339 U.S. 637 (1950) (invalidating, based on Fourteenth Amendment equal protection, the state law that prohibited black students from attending the University of Oklahoma); Sweatt v. Painter, 339 U.S. 629 (1950) (holding that a separate law school facility for blacks at the University of Texas failed to meet constitutional standards because of both quantitative and intangible differences between the schools, decided the same day as *Mclaurin*); Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938) (holding that the state had to provide legal training for black as well as while students, though the schools could be separate).

17. Brown v. Bd. of Educ. (*Brown I*), 347 U.S. 483, 495 (1954).

18. Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294, 300–01 (1955).

19. *See, e.g.*, Bd. of Educ. v. Dowell, 498 U.S. 237 (1991) (allowing courts to consider the intent of the school district and the likelihood of successful integration when deciding whether to lift integration consent decrees); Milliken v. Bradley (*Milliken II*), 433 U.S. 267 (1977) (allowing only intra-district remedies and prohibiting court-ordered inter-district measures to integrate); Milliken v. Bradley (*Milliken I*), 418 U.S. 717 (1974) (requiring plaintiffs to establish that unconstitutional discrimination *caused* the segregation before the court would fashion a remedy); Swann v. Charlotte-Mecklenberg Bd. of Educ., 402 U.S. 1 (1971) (upholding a broad and flexible power of federal courts to remedy segregation); Green v. County Sch. Bd., 391 U.S. 430, 439 (1968) (requiring that district courts develop integration plans that "promise[ ] realistically to work, and promise[ ] realistically to work now").

Over 200 school districts around the United States remain under desegregation consent decrees today.[20]

As federal involvement in the day-to-day workings of local public schools continued, the makeup of the Supreme Court changed, and society became less concerned with integration issues. Slowly but surely, the Supreme Court scaled back its enforcement of the *Brown* decree.[21] In 1968, the Court had held that "the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies."[22] By 1995, the Court required that plaintiffs prove a direct link between government-sponsored segregation and discrimination to receive any remedy.[23]

During this scaling back of federal protection of education integration, plaintiffs brought a federal lawsuit that would deal a crushing blow to future education finance litigants. In *San Antonio Independent School District v. Rodriguez*, the Supreme Court short-circuited attempts at education reform that focused on funding rather than the vestiges of segregation.[24] The lawsuit was initiated by parents of Mexican-American students who resided in the Edgewood, Texas school district, where the median family income was $4,686 per year. The district court certified a plaintiff class of minority and poor schoolchildren who lived in school districts with a low property tax base.[25]

During the trial,[26] plaintiffs compared Edgewood with the nearby Alamo Heights district, where the median family income was more than $8,000 per year and students were overwhelmingly white.[27] The inequalities in funding were clear and staggering. Based on tax schemes and different proportions of state funding,

20. GARY ORFIELD & SUSAN E. EATON, DISMANTLING DESEGREGATION 94, 320–22 (1996).

21. *See supra* note 19.

22. *Swann*, 402 U.S. at 15.

23. Missouri v. Jenkins, 515 U.S. 70, 82 (1995) (approving the "vestiges of discrimination" test adopted by the district court and holding that integration for attractiveness sake is not a valid goal).

24. 411 U.S. 1 (1973).

25. *Id.* at 4–5.

26. A three-judge federal district court panel heard the trial, which had been delayed for two years to allow for extensive discovery and a Texas legislative investigation. *Id.* at 5–6 & n.4.

27. MICHAEL HEISE, THE STORY OF SAN ANTONIO INDEPENDENT SCHOOL DIST. V. RODRIGUEZ: SCHOOL FINANCE, LOCAL CONTROL, AND CONSTITUTIONAL LIMITS 4, 5 (2007), *available at* http://lsr.nellco.org/cgi/viewcontent.cgi?article=1075&context=cornell/lsrp.

the bottom line per-pupil spending was $356 in Edgewood, and $594 in Alamo Heights (in 1970s dollars).[28] While seventy-five percent of students in Alamo Heights graduated high school, fewer than ten percent achieved the same in Edgewood.[29]

The district court found the Texas funding system was unconstitutional under the Federal Constitution's Equal Protection Clause, and stayed the case for two years in order to monitor the state's attempts to modify the funding system.[30] The Supreme Court granted certiorari to address the "far-reaching constitutional questions presented,"[31] and reversed the district court opinion, holding that funding disparities did not violate the Equal Protection Clause because education is not protected in the Federal Constitution.[32] Furthermore, Justice Powell left federal courts with strong language regarding prospects for education reform: "the Equal Protection Clause does not require absolute equality or precisely equal advantages. Nor indeed, in view of the infinite variables affecting the education process, can any system assure equal quality of education except in the most relative sense."[33] Additionally, Justice Powell wrote that because the plaintiffs had not alleged that a minimal level of education was violated, the Court would not rule on the baseline education issue.[34] This grain was picked up later in the educational adequacy cases.

Despite the federal precedent left by *Rodriguez*, the Edgewood plaintiffs were later successful in Texas state courts.[35] Though the Federal Constitution guaranteed no right to education, plaintiffs based their state court arguments on the Texas constitutional provision requiring an "efficient system of public free schools" for the "general diffusion of knowledge [ ] essential to the preser-

28. *Rodriguez*, 411 U.S. at 12–13.
29. HEISE, *supra* note 27, at 5.
30. *Rodriguez*, 411 U.S. at 6, n.5.
31. *Id.* at 6.
32. *Id.* at 6, 17–18.
33. *Id.* at 24.
34. *Id.* at 37.
35. *See* Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist. (*Edgewood III*), 826 S.W.2d 489 (Tex. 1992); Edgewood Indep. Sch. Dist. v. Kirby (*Edgewood II*), 804 S.W. 2d 491 (Tex. 1991); Edgewood Indep. Sch. Dist. v. Kirby (*Edgewood I*), 777 S.W.2d 391 (Tex. 1989). *But see* Edgewood Indep. Sch. Dist. v. Meno (*Edgewood IV*), 893 S.W.2d 450 (Tex. 1995) (holding that the Texas Constitution did not require equal access to funding but a general diffusion of knowledge under the system of funding).

vation of the liberties and the rights of the people."[36] Similar strategies led to state education finance litigation around the country.

B. DEVELOPMENT OF STATE EDUCATION LAW

With the federal courts hostile to any future educational equity claims, litigators turned to local forums. In the 1970s, plaintiffs based their arguments for equal education funding on state constitutions' equal protection clauses. The first successful state educational equity case was *Serrano v. Priest* in California.[37] Plaintiffs argued funding based on property taxes created unequal standards of education and violated the state equal protection clause. The California Supreme Court, agreeing with plaintiffs that education was a fundamental right and that there was no compelling interest in the state's reliance on local property taxes for school funding, invalidated the system.[38] The court required the state equalize funding across all school districts, but offered no guidance on how to develop a replacement system.[39]

The California public opposed the move from local tax control. Parents from wealthier school districts were outraged at the prospect of equalization, believing it meant that their funding would be brought down to a median level.[40] They also feared that their tax dollars would be used to fund other, less wealthy, school districts.[41] California voters subsequently passed Proposition 13 through the ballot initiative process,[42] which limited annual real estate tax on a parcel of property to one percent of its assessed

36. *Edgewood I*, 777 S.W.2d at 393; TEX. CONST. art. VII, § 1.

37. The Supreme Court of California first heard *Serrano v. Priest* in 1971, when it ruled that an unequal system of funding based on local tax revenue violated the Equal Protection clause of the Fourteenth Amendment in addition to the state constitution. 487 P.2d 1241, 1263 (Cal. 1971). *San Antonio* clearly overruled the federal parts of that decision; on remand the Los Angeles County Superior Court reiterated that the system was unconstitutional based on the California Constitution's equal protection clause, and the Supreme Court of California affirmed that holding in 1976. 557 P.2d 929 (Cal. 1976), *cert. denied*, 432 U.S. 907 (1977).

38. *Serrano*, 557 P.2d at 950, 953, 958.

39. *Id.*

40. Rebell, *supra* note 11, at 227.

41. *Id.*

42. William A. Fischel, *Did* Serrano *Cause Proposition 13?*, 42 NAT'L TAX J. 4 (1989).

value.[43] Following *Serrano*, twenty-two states heard educational equity claims, with poor results for plaintiffs.[44]

With these failures, education finance reformers were forced to change their strategy. Instead of arguing that all students were entitled to the same level of education, plaintiffs claimed that all students were entitled to a minimum baseline of educational adequacy. Citing the state constitutional education clauses, plaintiffs sued for enforcement of their positive right to education — with a minimum education at some baseline of adequacy that many students at the time were not receiving.[45]

During the same time, legislative developments in education reform facilitated the move to adequacy claims. The standards-based reform movement of the 1990s provided courts with a floor for education opportunity.[46] At the 1989 National Education Summit, all fifty state governors worked toward articulating specific national goals, culminating in the signing of the Goals 2000 Act.[47] These plans implemented in the states gave the courts judicially manageable standards, and increased the appeal of the adequacy litigation.

Educational adequacy claims eliminated much of the backlash to the equity strategy used in *Serrano*. Bringing all students up to the same base level of funding is more politically palatable than reducing money for some or capping spending, and adequacy claims are less susceptible than equal protection claims to "slippery slope" arguments. An equal protection victory for plaintiffs in schools could be extended to other social programs, such as housing or healthcare. On the other hand, an adequacy claim based on an affirmative constitutional right cannot be replicated for other social issues (i.e., there is no right to housing or to healthcare in state constitutions though there is a right to educa-

43. *Id.*

44. Defendants triumphed in two-thirds of the education equity cases. Notable exceptions were plaintiff victories in Connecticut and Wyoming, but even in those states, court orders provided little guidance on how to implement the equity remedies. NAT'L ACCESS NETWORK, STATE BY STATE (2002), http://www.schoolfunding.info/states/state_by_state.php3; Rebell, *supra* note 11, at 226.

45. *See infra* notes 48–58 and accompanying text.

46. Mid-1980s commission reports warned of the failing American education system and comparative international assessment showed the United States falling behind. In response, between 1980 and 1986, 45 states increased their requirements for earning a standard high school diploma. Rebell, *supra* note 11, at 229.

47. *Id.*; Goals 2000: Educate America Act, 20 U.S.C. §§ 5801–5871 (2006).

tion for all).[48] As a result, West Virginia,[49] Washington[50] and New Jersey had early adequacy claims in the 1970s.[51] The litigants argued for a broad interpretation of their constitutions' education clauses. They contended the constitutions obligated the states to teach students "basic notions of a citizen's role in a democracy" and enough "to prepare the child for competitive employment."[52]

Since then, adequacy litigation has become extremely widespread. The National Access Network[53] maintains statistics on current legislation in all fifty states.[54] No state's highest court currently has an adequacy holding against a plaintiff on the merits. Since *Serrano v. Priest*, plaintiffs in forty-four states have brought some kind of challenge to their education finance systems (equity and adequacy claims).[55] Currently, plaintiffs in sixteen states have lost education funding challenges. In nine of

48. Rebell, *supra* note 11, at 230.

49. Pauley v. Kelly, 255 S.E.2d 859 (W. Va. 1979) (finding that the Constitution required the legislature to develop "high quality statewide education standards").

50. Seattle Sch. Dist. No. 1 v. Washington, 585 P.2d 71 (Wash. 1978) (holding the legislature had a mandatory duty to give substantive content to the education clause that could only be done by reforming the funding system).

51. Robinson v. Cahill, 303 A.2d 273 (N.J. 1973) (striking down the state's funding system as unconstitutional because it had no relationship to providing students a thorough and efficient education as defined in the NJ Constitution), *cert. denied*, 414 U.S. 976 (1973).

52. Rebell, *supra* note 11, at 233. The current dialogue among education advocates centers around how to reframe this definition for the twenty-first century, capitalizing especially on the nexus between education and voting rights. This theory was successful in New York's adequacy litigation, where plaintiffs argued that education included the tools to participate actively in democracy. The court heard experts on what was required to understand a sample voting ballot. *See generally* Campaign for Fiscal Equity v. State of New York, 801 N.E.2d 326 (2003); Ted Shaw, James Ryan & John E. Powell, Remarks at Panel Discussion at The Campaign for Educational Equity: Symposium (Nov. 12, 2007); *see also* Lani Guinier, *Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113, 114–36, 143–59, 213–24 (2003) (discussing the role of public and private universities in our democracy, and the responsibility of education institutions to prepare all students for democratic citizenship); Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953 (1996) (questioning whether current admissions practices maximize democratic opportunity).

53. The National Access Network is maintained by the Campaign for Educational Equity at Columbia University's Teachers College. NAT'L ACCESS NETWORK, ABOUT US (2008), http://www.schoolfunding.info/states/state_by_state.php3.

54. NAT'L ACCESS NETWORK, STATE BY STATE (2008), http://www.schoolfunding.info/states/state_by_state.php3.

55. *Id.*

those states,[56] courts reached the funding issues on the merits,[57] but in the remaining seven they failed to consider the issue on political question grounds. These seven state rulings differ greatly in their reasoning, but all focus on the aspect of separation of powers doctrine known as nonjusticiability. They are rulings from the highest courts in each state.[58]

Without access to the federal courts, and with the equal protection claims having failed in state courts, plaintiffs hoping to challenge the adequacy of their school systems can do little else than pursue state finance claims. It is therefore important to confront any jurisdictional limitations placed on these cases. Before addressing the state court jurisdictional requirements, a discussion of the political question doctrine is necessary.

C. POLITICAL QUESTION DOCTRINE

An understanding of the basic principles behind the political question doctrine will help explain why state courts should not rely upon it in refusing to hear education finance claims. The

56. Of these nine cases, seven were clearly equity cases. One equity decision comes from a lower state court in Louisiana. The ninth case is a Michigan decision where the court ruled the school board lacked jurisdiction to sue the state. *Id.*

57. *See* Vincent v. Voight, 614 N.W.2d 388 (Wis. 2000) (entitling students to equal opportunity for sound basic education, but finding that these plaintiffs had not presented sufficient evidence that they were being denied); Sch. Admin. Dist. No. 1 v. Comm'r, 659 A.2d 854 (Me. 1995) (denying an equity claim but implying that the court would be more receptive to evidence demonstrating that inequities resulted in inadequacies); Bezdicheck v. State, No. 91-209 (S.D. Cir. Ct. 1995) (holding that school districts were not required to provide equal per-pupil spending); Scott v. Commonwealth, 443 S.E.2d 138 (Va. 1994) (denying equity claim because equitable funding was found not to be mandated by the constitution); Skeen v. State, 505 N.W. 2d 299 (Minn. 1993) (holding that, despite inter-district disparities, all students were receiving an adequate education); Lujan v. Colo. State Bd. of Educ., 649 P.2d 1005 (Colo. 1982) (concluding that the state's education clause did not require "absolute equality in educational services or expenditures"); McDaniel v. Thomas, 285 S.E.2d 156 (Ga. 1981) (finding the current funding system constitutional on equity grounds but leaving an opening for adequacy); Jones v. State Bd. of Elementary & Secondary Educ., 927 So. 2d 426 (La. Ct. App. 2005) (granting summary judgment to school board in adequacy claim). After vacating *Milliken v. Green*, 212 N.W.2d 711 (Mich. 1973), Michigan courts also dismissed adequacy claims in 1984 on the grounds that, as creations of the state, the school boards lacked ability to sue the state.

58. Recent cases in Indiana and Oregon where lower courts held that education financing was nonjusticiable were overruled. *See* Bonner v. Daniels, 885 N.E.2d 673 (Ind. Ct. App. 2008); Pendleton Sch. Dist. 13A v. State, 345 Or. 596 (2009). In Colorado, the state Supreme Court granted certiorari in September 2008 to a ruling of non-justiciability. *See* Lobato v. State, NO. 06CA0733, 2008 WL 194019 (Colo. Ct. App. Jan. 24, 2008), *cert. granted*, No. 08SC185 (Sept. 15, 2008).

political question doctrine is the judiciary's attempt to respect the structural boundaries between the three branches of federal government as laid out by the Constitution.[59] The Federal Constitution, in its brevity, did not discuss many of the areas of overlap between the legislature, executive and judiciary that would arise in the future.[60] In his renowned explanation of the doctrine, Herbert Wechsler wrote that the political question doctrine requires courts "to judge whether the Constitution has committed to another agency of government the autonomous determination of the issue raised."[61]

Very early on, the Supreme Court used the doctrine to avoid political representation issues under the Guaranty Clause of the Constitution. The earliest Guaranty Clause case, *Luther v. Borden* in 1849, greatly influenced the development of the political question doctrine.[62] In *Luther*, the Court refused to decide who was the rightful governor of Rhode Island.[63] The plaintiffs argued that that the new government failed to meet the Guaranty Clause requirement of republican government.[64] The Court held that no judicially identifiable or manageable standards existed for it to determine whether the government in power was republican, because the Court lacked authority even to say which government rightfully held power. It was left to the legislature to acknowledge one government over the other.[65] This discussion of judicially manageable standards would remain part of the Court's political question jurisprudence.

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59. Baker v. Carr, 369 U.S. 186, 210–11 (1962).

60. *See generally* Clinton v. City of New York, 524 U.S. 417 (1998) (rejecting the congressional delegation of power to the Executive branch under the Line Item Veto Act); Morrison v. Olson, 487 U.S. 654 (1988) (approving Congress' restriction on the Executive's power to remove the judicially-appointed Independent Counsel); INS v. Chadha, 462 U.S. 919 (1983) (disallowing congressional delegation of power to itself to rule on immigration cases in violation of the Constitutional requirements of bicameralism and presentment).

61. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law,* 73 HARV. L. REV. 1, 7–8, 9 (1959) (cited in Louis Henkin, *Is There a Political Question Doctrine?*, 85 YALE L.J. 597, 598 (1976)).

62. 48 U.S. 1 (1849).

63. *Id.* at 46–47.

64. A new Rhode Island charter was not recognized by the then-existent government. When the plaintiff tried to assume the office of governor under the new charter, members of the older government broke into his home to discover evidence that the new charter had been passed fraudulently. *Id.* at 14–15.

65. *Id.* at 41–42.

The Court explained the modern political question doctrine in *Baker v. Carr*, where it held the judiciary could *sometimes* hear issues of political districting.[66] It set forth six standards to determine whether judicial review of a particular issue would violate constitutional separation of powers precepts. If any of the six factors were present, then the case involves a political question and cannot be reviewed by the courts. The factors were: (1) "a textually demonstrable constitutional commitment of the issue to a coordinate political department"; (2) "a lack of judicially discoverable and manageable standards for resolving it"; (3) "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion"; (4) "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government"; (5) "an unusual need for unquestioning adherence to a political decision already made"; (6) "the potentiality of embarrassment from multifarious pronouncements by various departments on one question."[67] The Court applied these standards and held that legislative reapportionment was *not* a political question. Federal courts proceeded thereafter to delve (at least temporarily) into reapportionment issues in great detail.[68]

Besides these political redistricting or "gerrymandering" cases, the Supreme Court has never applied the political question doctrine to an issue of domestic policy. Since *Baker*, major federal political question cases have been limited to matters of political representation or foreign affairs. These few cases are spaced out over several decades. In 1969, just a few years after *Baker*, the Court held in *Powell v. McCormack* that Congress could not develop qualifications for its members other than those specified in

66. 369 U.S. 186, 228-29 (1962). Tennessee residents argued that because of population growth and redistribution since 1901 (the last census), a new allocation should be completed for voting districts. Further, due to the problems with the representation at that time, passing a state constitutional amendment to change the districting patterns would have been impossible. *Id.* at 192.

67. *Id.* at 217.

68. *See, e.g.*, Davis v. Bandemer, 478 U.S. 109, 126 (1986) (allowing jurisdiction to rule that a reapportionment issue denied equal representation to Indiana Democrats); Reynolds v. Sims, 377 U.S. 533 (1964) (holding that the apportionment of seats in the Alabama legislature lacked any rational basis and was therefore invalid under the Equal Protection Clause, especially when sixty years had passed since the last adjustment of the districting for population increases).

the Constitution.[69] This was a political representation issue. As the question only required interpretation of the Constitution, the Court held it was justiciable and not a political question.[70]

In 1979, in *Goldwater v. Carter*, the Court ruled that a foreign affairs issue of treaty abrogation was a political question beyond its jurisdiction.[71] There, the Court refused to review the matter because it fell squarely within the foreign affairs power shared by the executive and legislative branches.[72] The Court again looked at the Constitution and found a clear designation of power to a different political branch. In *Nixon v. United States*, the Court declined in 1993 to resolve a dispute regarding Senate impeachment procedures. The Court held that the Constitution did not give the judiciary authority to review these inner workings of Congress.[73] None of the matters that have been deemed political questions — political reapportionment, congressional power to regulate its own affairs, and foreign policy — were matters of domestic social policy.

The political question doctrine did not return to the Supreme Court until 2004, a decade later, when the fractured Rehnquist Court revisited the matter of political redistricting in *Vieth v. Jubelirer*.[74] Again, this was not a matter of domestic social policy, but of voting and political rights. Despite the Court's consistent earlier holdings that political reapportionment claims *were* justiciable,[75] Justice Scalia's plurality decision held that the "lack of judicially discoverable and manageable standards" prevented the Court from ruling in favor of the plaintiffs. Scalia stated,

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69. 395 U.S. 486, 547–48 (1969) (rejecting as unconstitutional Congress's ability to pass a resolution removing one of its members from his seat due to suspicions about inappropriate use of committee funds).

70. *Id.* at 518–20.

71. 444 U.S. 996, 996 (1979) (refusing to adjudicate a claim by members of Congress for termination of a mutual defense treaty with China because this dispute was a political and not a legal one).

72. *Id.* at 1002.

73. 506 U.S. 224, 236–38 (1993) (denying a former federal judge's argument that a Senate Committee was not allowed to impeach without a full evidentiary hearing).

74. 541 U.S. 267, 318 (2004). The *Vieth* decision was a 4-1-4 opinion, with Justice Kennedy's concurrence weighing much more heavily on the side of the dissenters who believed political gerrymandering claims were justiciable. Joining Justice Scalia's plurality opinion were Justices O'Connor, Thomas and Rehnquist. Justice Stevens pointed out that "five Members of the Court are convinced that the plurality's answer . . . is erroneous." *Id.* at 317 (Stevens, J., concurring).

75. *See supra* note 68.

> [a]s Chief Justice Marshall proclaimed two centuries ago, "[i]t is emphatically the province and duty of the judicial department to say what the law is." . . . Sometimes, however, the law is that the judicial department has no business entertaining the claim of unlawfulness — because the question is entrusted to one of the political branches or involves no judicially enforceable rights.[76]

Thus, in *Vieth*, the plurality abandoned precedent and held that there are no judicially manageable standards for evaluating political redistricting challenges.[77] In his reasoning, Scalia pointed out that in preceding years, lower courts had mostly denied redress to plaintiffs in political redistricting cases.[78]

Scalia convincingly examined and discredited potential standards.[79] Yet, as Justice Kennedy pointed out in his concurring opinion, it is not our tradition to bar future courts from the mere attempt to define standards and remedies.[80] Where the political question doctrine demands that courts look for manageable standards, Scalia's argument "involves a difficult proof: proof of a categorical negative."[81] Scholars regard *Vieth* as a possible resurrection of the political question doctrine, though its reach remains unclear because of the plurality disposition.[82] The Su-

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76. *Vieth*, 541 U.S. at 277.

77. Indeed, Justice Scalia discussed at length his dissatisfaction with the *Bandemer* decision for leaving lower courts without a specific standard by which to evaluate these cases. *Id.* at 279. There is a difference, however, between not finding any standards and allowing lower courts to determine these standards at their own discretion.

78. *Id.* at 279.

79. Scalia considered Justice White's *Bandemer* standard, the plaintiffs' own proposed standards, Powell's *Bandemer* standard, and the standards proposed by the dissenters in *Vieth*. *Id.* at 279, 283, 290.

80. *Id.* at 308 (Kennedy, J., concurring).

81. *Id.* at 311. It remains unclear why Justice Kennedy concurred in this opinion, as he distinguished himself from each of the plurality's arguments.

82. *See* Jesse H. Choper, *The Political Question Doctrine: Suggested Criteria*, 54 DUKE L.J. 1457, 1457–1523 (2005) (arguing for the use of the political question doctrine in questions of constitutional structure); Richard H. Fallon, *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274, 1274–1332 (2006) (arguing that judicially manageable standards are more the result of judicial framing than they are of actual constitutional interpretation); Luis Fuentes-Rohwer, *Reconsidering the Law of Democracy: Of Political Questions, Prudence and the Judicial Role*, 47 WM. & MARY L. REV. 1899, 1899–1952 (2006) (asserting that *Vieth*'s result is implausible and only explainable as the Court's first step away from its entanglement with political matters in recent years).

preme Court has not applied *Vieth*'s substantive holding in any other cases to date.[83]

III. RECENT DECISIONS IN EDUCATION LAW

With the federal courts closed to questions of educational adequacy after *San Antonio v. Rodriguez*, it is irresponsible and impermissible for state courts to abstain from their responsibilities to hear these cases. Nevertheless, state courts have recently used the political question doctrine to do just that. In order to understand the use of the political question doctrine in education, it is instructive to examine the history of the doctrine within each state. If the states have always trusted their legislators to handle these policy matters, perhaps the political question doctrine for education is just part of a larger coherent judicial philosophy. But courts routinely rule on matters of social policy, and there are compelling reasons why courts must stop singling out education cases by failing to address plaintiffs' claims for relief.

The seven states fall into three different categories. First are the states that cite *Baker v. Carr* and the political question doctrine, but break with their own anti-political question doctrine precedent. The educational adequacy cases are their first use of the political question doctrine to abdicate a question of policy. Next are the states whose court decisions do not cite any federal or state precedent at all, but vaguely refer to separation of powers or political question as their reason not to rule in the case at hand. Finally, there are two states with a history of political question doctrine jurisprudence outside of education.

A. DECISIONS USING FEDERAL, BUT NO STATE, PRECEDENT

1. *Illinois*

The Illinois Constitution is far-reaching in its grant of education, providing that: "[a] fundamental goal of the People of the

83. *See* League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 399 (2006) (holding that justiciability was not at issue in holding that a redistricting plan violated the Voting Rights Act); Cox v. Larios, 542 U.S. 947, 949 (2004) (ruling on the merits, and holding that any standards *Vieth* might have adopted would have been violated on the facts of this case).

State is the educational development of all persons to the limits of their capacities. The State shall provide for an efficient system of high quality public educational institutions and services."[84] Despite this, in *Committee for Educational Rights v. Edgar* in 1994, the Illinois Supreme Court held that matters of education policy were political questions reserved for the legislature.[85]

Before educational adequacy issues reached the courts, the Illinois Supreme Court had never deemed a case nonjusticiable. In Illinois' leading political question doctrine case, *Donovan v. Holzman*,[86] the Illinois Supreme Court stated the general rule in this area as follows:

> While we cannot exercise legislative powers or compel their proper action, the judiciary has always had the right and duty to review all legislative acts in the light of the provisions and limitations of our basic charter. *The mere fact that political rights and questions are involved does not create immunity from judicial review*.[87]

Later, the Illinois Supreme Court specifically adopted the *Baker* standards in the 1988 case of *Kluk v. Lang*.[88] This case directly applied the *Baker* standards, and held that voters could challenge the authority of a political party's committee to appoint an individual to fill a vacant legislative seat. The court strongly emphasized that the judiciary had a responsibility to intervene when other branches of government interfered with the rights of individuals.[89]

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84. ILL. CONST. art. X, § 1.

85. 672 N.E.2d 1178, 1191–93 (Ill. 1996).

86. 132 N.E.2d 501, 506 (Ill. 1956). In his dissent in *Edgar*, Justice Freeman cited the above quote from *Donovan* to support his position that educational adequacy is justiciable. *Edgar*, 672 N.E.2d at 1203 (Freeman, J., dissenting).

87. *Donovan*, 132 N.E.2d at 506 (emphasis added).

88. 531 N.E.2d 790 (Ill. 1988).

89. Specifically, the court held:

> [A] determination by a court that if an integral part of the legislative branch of government is permitted to proceed in a particular manner the result will be a deprivation of a constitutional right of an individual, does not constitute a lack of respect due a coordinate branch of the government, but it is an exercise of one of the duties committed to the judiciary.

Id. at 797 (citing Murphy v. Collins, 312 N.E.2d 772, 783–84 (Ill. App. Ct. 1974)).

The Illinois courts continuously applied the principles of *Kluk* and *Donovan* and rejected attempts to declare a range of issues political questions.[90] Educational adequacy cases are the only cases in which the Illinois Supreme Court has invoked the political question doctrine to preclude judicial review. Applying these two *Baker* criteria to the claims of educational inadequacy in *Edgar*, the court specifically acknowledged that courts in most other states had held otherwise.[91]

In *Edgar*, plaintiffs filed suit on the grounds that during the 1986–87 school year, the property tax funding gap between the richest and poorest ten percent of the school districts was staggering.[92] At trial, the court found that "the gap for the poorest elementary districts is 571% greater than their tax revenues; the gap for the poorest high school districts is 366% greater than their revenues; and the gap for unit districts is 428% greater than their revenues."[93] This was because Illinois, like many other states, bases school funding on local taxable property wealth. The statistics above demonstrate that the Illinois state aid formula did not equalize the situation; in fact, it was counter-equalizing because it also allowed a grant (seven percent of the tax revenue) to the wealthiest districts.[94]

In their complaint, the plaintiffs alleged that disparities among wealthy and poor districts were reflected in various ways: "percentage of teachers with master's degrees, teacher experience, teacher salaries, administrator salaries and pupil/administrator ratios . . . comparison of the facilities, resources and course offerings in two neighboring school districts with

90. *See, e.g.*, People v. Lawton, 818 N.E.2d 326, 336 (Ill. 2004) (permitting appellant to challenge effectiveness of his attorney in proceedings under the Sexually Dangerous Persons Act); City of Elmhurst *ex rel.* Mastrino v. City of Elmhurst, 649 N.E.2d 1334, 1341 (Ill. App. Ct. 1994) (allowing taxpayers to seek injunction to prevent city from paying for alderman's legal defense in a libel case); Roti v. Washington, 500 N.E.2d 463 (Ill. App. Ct. 1989) (reviewing city council request for declaration that council resolutions were improperly enacted).

91. The court cited cases from New York, New Hampshire, Massachusetts, Tennessee, New Jersey, Kentucky, Idaho, Kansas, Georgia, and Washington where the courts held it was the responsibility of the judicial branch to consider education claims. *Edgar*, 672 N.E.2d at 1191–92.

92. *Id.* at 1182.

93. Brief of Plaintiffs-Appellants, Comm. for Educ. Rights v. Edgar, 641 N.E.2d 602 (Ill. App. 3d 1994) (No. 1-92-2379), 1993 WL 13135616.

94. *Edgar*, 672 N.E.2d at 1180–82.

dramatically disparate tax bases."[95] Beyond the comparative argument, plaintiffs hoped to show that students in low taxable property districts were deprived of a "high quality" education in normative terms.[96] Because education is a fundamental right in the Illinois Constitution, they argued, its protection must be subject to strict scrutiny.[97]

After dismissal at the trial and appellate court levels, the Illinois Supreme Court affirmed that matters of educational adequacy were not justiciable.[98] They relied on the second and third of the *Baker* standards, and held that "[w]hat constitutes a 'high quality' education, and how it may best be provided, cannot be ascertained by any judicially discoverable or manageable standards" and that the question of education quality is impossible to decide "without an initial policy determination of a kind clearly for nonjudicial discretion."[99]

2. *Florida*

As one of the state constitutions that actually uses an adequacy standard, the Florida Constitution's education clause requires that "[a]dequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education."[100] Historically, Florida state courts have heard few cases involving the political question doctrine or in which justiciability was even considered. In *Harden v. Garrett*, the Florida Supreme Court held that under the Florida Constitution, the business of examining the qualifications of legislative representatives rested solely with the legislature.[101]

In *Coalition for Adequacy and Fairness in School Funding v. Chiles*, however, the Florida Supreme Court held that separation

95. *Id.* at 1182.
96. *Id.*
97. *Id.*
98. *Id.* at 1178.
99. *Id.* at 1191.
100. FLA. CONST. art. IX, § 1.
101. Harden v. Garrett, 483 So. 2d 409, 411 (Fla. 1985). In *Harden*, the plaintiff was the losing candidate in an election. *Id.* The Florida Constitution reads that "[e]ach house shall be the sole judge of the qualifications, elections, and returns of its members." FLA. CONST. art. III, § 2. *See also* McPherson v. Flynn, 397 So. 2d 665, 667 (Fla. 1981) (ruling the court had no right to inquire into a candidate's ability to run for office).

of powers principles prohibited it from granting relief to plaintiff schoolchildren.[102] Eleven Florida students and their parents sued the Florida government for failure to provide an adequate education.[103] Their complaint argued that the Florida government's funding scheme prohibited local school districts from raising sufficient revenue to provide adequate educational opportunities, failed to compensate personnel adequately, and failed to provide funding for necessary capital.[104] Again, because education is a fundamental right under the Florida Constitution, plaintiffs claimed that the state had an obligation to uphold this right for individuals.[105] Plaintiffs cited prior Florida education cases that demonstrated the court's willingness to enforce the constitutional right to education.[106] The Florida Supreme Court, however, affirmed the lower court decision that the claim was nonjusticiable based on a general separation of powers argument.[107]

The Florida Constitution has a uniform system clause that allows the judiciary to review actions of the other branches, but the court refused to exercise that jurisdiction in *Chiles*.[108] In its discussion of the political question doctrine, the Florida Supreme Court cited *Baker v. Carr*.[109] It rested its ruling on the lack of judicially discoverable and manageable standards available to apply in cases of educational adequacy, because "[t]o decide such an abstract question of 'adequate' funding, the courts would necessarily be required to subjectively evaluate the Legislature's value judgments as to the spending priorities."[110] The court agreed with appellees' contention that adequacy lacks straightforward content, citing the dictionary definition: "enough or good enough for what is required or needed; sufficient; suitable."[111] The court did not cite any Florida cases to support this position.

102. 680 So. 2d 400, 408 (Fla. 1996).
103. *Id.*
104. Brief of Plaintiff-Appellant, Coalition for Adequacy and Fairness in Sch. Funding v. Chiles, 654 So. 2d 130 (Fla. 1995) (No. 85,375), 1995 WL 17015875.
105. *Id.* at 13.
106. *Id.* at 13–15.
107. *Chiles*, 680 So. 2d at 408.
108. *Id.* at 407.
109. *Id.* at 406–07.
110. *Id.*
111. *Id.* at 408 n.8.

3. *Rhode Island*

The Rhode Island Constitution grants to the legislature all means it "may deem necessary and proper to secure to the people the advantages and opportunities of education."[112] But in *City of Pawtucket v. Sundlun* in 1995, the Rhode Island Supreme Court cited the Federalist Papers in its decision holding that education funding was a matter for the legislature.[113]

Rhode Island courts had historically avoided many questions of policy, citing the principle that "equity is without jurisdiction to decide purely political questions."[114] Prior to *Sundlun*, the only case in which the Rhode Island Supreme Court considered the political question analysis was *Roch v. Garrahy*, in which the court heard a claim that the governor had failed to consider all necessary criteria when appointing members of the Board of Elections.[115] In ruling that this matter was justiciable, the court fleshed out what it saw as the implications of *Baker*.[116]

In *Sundlun*, students and their parents challenged the funding scheme, which was based on taxable wealth.[117] The Rhode Island Supreme Court found various facts supporting the plaintiffs' argument: "variation in the taxable wealth of different communities had resulted in disparate revenue per pupil; the low level of state funding failed to ensure 'substantial equality' and 'adequacy' of resources for children in all communities" and "the state failed to ensure that differences in funding were based upon factors relevant to education."[118]

The Rhode Island Supreme Court overturned the interpretation of the state constitution's education clause, which the trial judge had found to be "the right to receive an 'equal, adequate

112. R.I. CONST. art. XII, § 1.

113. 662 A.2d 40, 58 (R.I. 1995).

114. McCarthy v. McAloon, 83 A.2d 75, 77 (R.I. 1951) (holding that court would not preemptively invalidate a tax law that had been recently enacted but that had not yet been applied, and therefore, had not harmed any potential plaintiff); *see also* Roch v. Garrahy, 419 A.2d 827 (R.I. 1980) (dismissing a complaint that sought the court's ruling on the qualifications of public officers); Boss v. Sprague, 162 A. 710 (R.I. 1936) (refusing to embroil the court in matters of legislative campaigning requirements).

115. Roch v. Garrahy, 419 A.2d 827 (R.I. 1980).

116. *Id.* at 830.

117. *Sundlun*, 662 A.2d at 42–43.

118. *Id.* at 54.

and meaningful education.'"[119] It held that according to the State Constitution, the General Assembly was the proper forum for this deliberation.[120] Like in Illinois and Florida, the Rhode Island Supreme Court cites no state political question precedent in its analysis, relying instead on *Baker* and other federal cases.[121] The court conducted a confusing analysis, which conflated the political question and separation of powers doctrines.[122] Citing the Federalist Papers for authority, the court reasoned that reaching a decision in this case would be to take on the powers of the legislature, and "[w]ere the power of judging joined with the legislative *the judge* would then be *the legislator*."[123] Despite its ultimate ruling that the question was not one for the court to consider, the opinion included pages of hypothetical equal protection analysis.[124] If the question is not justiciable, it is unclear why the court would even examine these issues.

B. DECISIONS USING NO STATE OR FEDERAL PRECEDENT

1. *Alabama*

The Alabama Constitution requires that the Board of Education establish "one or more schools at which all the children of the State, between the ages of five and twenty-one years, may attend free of charge."[125] This education clause is admittedly the most limited, lacking any qualitative language. A complicated procedural history precedes the Alabama Supreme Court's 2002 hold-

119. *Id.* at 58.

120. *Id.*

121. The court looked also to the separation of powers questions resolved in *INS v. Chadha*, 462 U.S. 919 (1983) (invalidating the one-house legislative veto used to consider a reversal of an alien's deportation hearing decision) and *Myers v. United States*, 272 U.S. 52 (1926) (addressing whether the President has sole power to remove his appointees when they must be confirmed by the advice and consent of the Senate).

122. *Sundlun*, 662 A.2d at 59.

123. *Id.*

124. After acknowledging that "[u]nder the minimal-scrutiny standard of review, a funding system must be upheld if it is rationally related to a legitimate state interest," the court went on to agree with defendants that local control of schools is a legitimate state interest. *Id.* at 59–62.

125. ALA. CONST. art. XI, § 6.

ing that education funding is not justiciable in *Ex parte James II*.[126]

Outside of education cases, the Alabama courts have rarely used the political question doctrine. As in Illinois,[127] Alabama courts have applied the *Baker* standards in order to find that a claim was nonjusticiable in areas besides education.[128] For example, a matter of Alabama congressional procedure has been ruled a political question that must remain with the legislative branch.[129] Most recently, the Alabama Supreme Court reevaluated the *Baker* standards and its short political question precedent when it granted jurisdiction to claims of overcrowding and inadequate state prison facilities in *Allen v. Barbour County*.[130]

Plaintiffs originally challenged the education funding in 1992, and in 1993, the trial court delivered a plaintiff victory on the liability and remedy issues.[131] The parties negotiated, and the court enforced, a remedy of performance-based education, professional development, early childhood programs, inclusive special education, and equitable and adequate funding within six years.[132] In 1997, the Alabama Supreme Court overruled the court's decision to oversee the remedy, but upheld the liability decision and specifically held that the matter was justiciable.[133] But in 2002, the Alabama Supreme Court returned with extraordinary measures to vacate the decision.[134]

126. *Ex parte* James v. Ala. Coalition for Equity (*Ex parte James II*), 836 So. 2d 813, 819 (Ala. 2002).

127. *See* discussion *supra* Part III.A.1.

128. *See e.g.*, Brooks v. Hobbie, 631 So. 2d 883 (Ala. 1993) (holding that, under *Baker*, a political reapportionment question was one for the courts); State *ex rel.* James v. Reed, 364 So. 2d 303 (Ala. 1978) (allowing judicial involvement in determining fitness of legislative members when the issue was one committed to the State Constitution).

129. Birmingham-Jefferson Civic Ctr. Auth. v. City of Birmingham, 912 So. 2d 204 (Ala. 2005) (determining how many votes constitute a legislative majority is a matter for the legislature alone).

130. 981 So. 2d 1072, 1076 (Ala. 2007).

131. Ace v. Folsom, No. 90-883-R (Ala. Cir. Ct.) (Mar. 31, 1993).

132. *Id.*

133. *Ex parte* James v. Ala. Coalition for Equity (*Ex parte James I*), 713 So. 2d 869, 877–78 (Ala. 1997).

134. *Ex parte* James v. Ala. Coalition for Equity (*Ex parte James II*), 836 So. 2d 813, 815–16 (Ala. 2002). The court reopened the case on its own accord, and vacated the precedent on political question/separation of powers grounds.

The Alabama Supreme Court reopened the case long after its appellate jurisdiction had expired, and held the judiciary never should have ruled on adequate education funding.[135] The court held it must be "the Legislature, not the courts, from which any further redress [is] sought."[136] The court rested its holding on separation of powers much more than the political question doctrine. It did not mention *Baker*, and did not rely upon any state cases — instead it invoked subjective interpretations of the Alabama Constitution and Washington's Farewell Address.[137] In fact, in this case the Alabama Supreme Court declared its decision to be *sui generis*, and counseled that it should not be "seen as establishing some new formula for determining when this Court will decline to rule on an issue or to exercise its inherent appellate and supervisory powers."[138]

2. *Oklahoma*

The Oklahoma Constitution requires that the legislature "establish and maintain a system of free public schools wherein all the children of the State may be educated."[139] In their 1992 decision *Oklahoma Educational Association v. State*, the Oklahoma Supreme Court held that *Baker v. Carr* made it clear the court could not hear education funding issues.[140]

Oklahoma case law includes several cases that touch upon the principles of the political question doctrine, though *OEA* does not mention them.[141] For example, in its most recent political reapportionment case (before *Vieth*), the Oklahoma Supreme Court decided in 2002 that courts must hear challenges regarding political representation issues.[142] The only other time *Baker* was used in Oklahoma was in 2000, when the court refused to hear a case

135. *Id.*
136. *Id.* at 815.
137. *Id.* at 861–65.
138. *Id.* at 816–17.
139. OKLA. CONST. art. XIII, § 1.
140. 158 P.3d 1058, 1065–66 (Okla. 2007) [hereinafter *OEA*].
141. *See id.*
142. "It is clear to us that *Baker v. Carr* . . . stand[s] for the proposition that Art. 1, § 4 does not prevent either federal or state courts from resolving redistricting disputes in a proper case." Alexander v. Taylor, 51 P.3d 1204, 1208 (Okla. 2002).

in which the plaintiffs challenged a rule requiring pre-vote readings in the state congress.[143]

In *OEA*, the plaintiffs were employees — rather than students — of the Oklahoma school districts.[144] There was no fact-finding on the record because the district court dismissed the claim with prejudice for lack of standing.[145] The plaintiffs amended their complaint and sought a declaration that the legislature's current funding system prevented educators from meeting the promise of a sound, basic education in the Oklahoma Constitution.[146] Though the Oklahoma Supreme Court agreed the plaintiffs lacked standing, they addressed the important public law question of whether the issue of education funding is justiciable.[147]

The court held there was no authority for the judiciary to consider matters of fiscal legislation, because the powers to create schools and to determine fiscal policy rested squarely with the legislature.[148] The court also prohibited plaintiffs from trying to circumvent the legislative process by asking the judiciary to "invade the legislature's power to determine policy."[149] At the same time, however, the court acknowledged the judicial responsibility to interfere with the legislature when a constitutional principle is violated,[150] thereby tacitly holding that the unequal state of education in Oklahoma did not violate any constitutional principles.

For the logic behind its decision, the Oklahoma Supreme Court did not cite *Baker* or any state cases, and instead asserted a vague political question claim without using any of the normally invoked language.[151] Like Rhode Island, Oklahoma has historically held that "courts of equity cannot enforce or protect purely political rights."[152] The court decided very early on that education

143. Dank v. Benson, 5 P.3d 1088 (Okla. 2000).
144. *OEA*, 158 P.3d at 1062.
145. *Id.* at 1065.
146. *Id.* at 1062.
147. *Id.* at 1065.
148. *Id.* at 1066.
149. *Id.*
150. *Id.* at 1065.
151. In explaining why the issue is a political question, the court only said: "the Legislature has few constitutional restraints in carrying out its duty to establish and maintain a free public educational system. The Legislature's method in carrying out this duty is largely within its discretion." *Id.* at 1066.
152. *See* Walker v. Oak Cliff Volunteer Fire Prot. Dist., 807 P.2d 762 (Okla. 1990) (holding that a challenge to an election that created a new fire district could proceed in equity); State *ex rel.* Robinett v. Jarrett, 196 P.2d 849 (Okla. 1948) (granting state applica-

was a matter for the legislature and that "it is not for the courts to say that the legislation is good, bad, advisable or inadvisable in whole or in part." [153] Rather, the courts may only determine whether the legislature acted within its delegated scope of authority.[154]

C. DECISIONS USING BOTH FEDERAL AND STATE PRECEDENT

1. *Nebraska*

In another short constitutional provision, Nebraska requires that "[t]he Legislature shall provide for the free instruction in the common schools of this state of all persons between the ages of five and twenty-one years."[155] In the 2002 case, *Nebraska Coalition for Educational Equity v. Heineman*, the Nebraska Supreme Court relied upon *Vieth* as a basis for its political question decision.[156]

The scope of Nebraska's political question doctrine historically has been narrower than the Supreme Court implies in *Nebraska Coalition*. Since 1897, the Nebraska Supreme Court has refused to become involved with discretionary issues of state education.[157] At the turn of the century, the plaintiffs in *Affholder v. State* appealed to the court for a writ of mandamus to require that school boards provide textbooks to students.[158] Even then the court held that decisions of this nature were left to the legislature.[159]

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tion for writ to enjoin a lower court judge from hearing a claim of citizen who wished to enjoin the state from allowing a particular candidate on an election ballot); Gulick v. Linn, 216 P. 460 (Okla. 1923) (considering the merits of a case where the question was not purely political, but involved some issues of use of public funds which fell under the court's jurisdiction).

153. Sch. Dist. No. 25 of Woods County v. Hodge, 183 P.2d 575, 579 (Okla. 1947) (denying the claim that an Act detailing education funding was unconstitutional because it did not apply equally throughout the state). *See also* Spencer Dev. Co. v. Ind. Sch. Dist. No. I-89, 741 P.2d 477 (Okla. 1987) (limiting a court's review of school district boundaries to whether the proper statutory procedures were followed when the boundary was created).

154. *Hodge*, 183 P.2d at 579.

155. NEB. CONST. art. VII, § 1.

156. 731 N.W.2d 164 (Neb. 2007).

157. Affholder v. State, 70 N.W. 544 (Neb. 1897).

158. *Id.* at 544–45.

159. *Id.* at 545 ("What methods and what means should be adopted in order to furnish free instruction to the children of the state has been left by the constitution to the legislature.").

Half a century later, the court again abstained from adjudicating a case it saw as a matter of legislative discretion: a request from parents that the court compel the school board to provide kindergarten.[160] The court held, significantly, that constitutional provisions directed toward the legislature are not self-executing, concluding that plaintiffs "must find statutory authority to sustain their contention."[161] Finally, in 1993, Nebraskans brought their first adequacy claim in *Gould v. Orr*.[162] The court granted summary judgment for the defendants, holding that plaintiffs failed to state a claim. Though the plaintiffs had strong factual evidence of funding inequality, the Nebraska Supreme Court disagreed so strongly with the plaintiffs' argument — unequal funding equals inadequate education — that the case was dismissed without leave to amend.[163] Though the *Nebraska Coalition* plaintiffs argued that *Gould* was a decision on the merits and that education claims were thus justiciable, the Nebraska Supreme Court disagreed.[164]

Plaintiffs in *Nebraska Coalition* sought a declaratory judgment that the funding system did not provide sufficient funds for an adequate and quality education.[165] The plaintiffs again argued that the system was funded by inadequate property tax bases.[166] In addition, plaintiffs argued that the school system as a whole was deficient, failing to "adequately pay and retain teachers," "purchase necessary textbooks," and provide English language services; "a significant number of students did not graduate" and

160. The dispute centered around whether a 1934 Act that set the minimum age for kindergarten and first grade students in turn implied that all schools were actually required to provide a kindergarten program. State *ex rel.* Shineman v. Bd. of Educ., 42 N.W.2d 168, 169–70 (Neb. 1950). Additionally, in a 1972 labor dispute the same court held that "[w]hether or not the Legislature has acted wisely in the premises is not a matter for judicial determination. The courts are not arbiters of legislative wisdom, but function as a check upon unauthorized and unconstitutional assumptions of power." Sch. Dist. of Seward Ed. Ass'n v. Sch. Dist. of Seward, 199 N.W.2d 752, 759 (Neb. 1972).

161. *State ex rel. Shineman*, 42 N.W.2d at 169–70.

162. 506 N.W.2d 349 (Neb. 1993).

163. "[W]hen it is clear that no reasonable possibility exists that plaintiff will, by amendment, be able to state a cause of action, leave to amend may be denied." *Id.* at 353.

164. Because the majority did not give a detailed explanation for its ruling in *Gould*, the *Nebraska Coalition* court was free to assume that "the *Gould* majority's conclusion that the plaintiffs could not amend their petition to state a cause of action indicates that it probably determined the claim presented a nonjusticiable issue." Neb. Coal. for Educ. Equity & Adequacy v. Heineman, 731 N.W.2d 164, 175 (Neb. 2007).

165. *Id.* at 169.

166. *Id.* at 170.

were "academically deficient."[167] Unlike in *Gould*, here plaintiffs pursued funding for non-discretionary issues of state education.

Nebraska Coalition was the only one of the seven cases decided after *Vieth*.[168] In addition to citing *Vieth* for support, the *Nebraska Coalition* court also relied upon other Nebraska political question doctrine cases, such as *Rath v. City of Sutton*.[169] Though *Rath* contains useful political question language, the case was about more common justiciability issues, timing and mootness.[170] *Rath* dealt with a taxpayer claim about pending city construction that was completed by the time the appeal reached the Nebraska Supreme Court.[171] Indeed, almost all Nebraska cases referencing *Baker* have nothing to do with the political question doctrine.[172]

Resting upon this history, the strongest part of the Nebraska Supreme Court's holding is its thorough analysis of *Baker*. Rather than simply citing the case for its basic principles, the court carefully examines each of the six *Baker* criteria for a political question.[173] After *Vieth*, "lack of judicially discoverable and manageable standards for resolving the issue" is much more impor-

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167. *Id.*

168. *Id.* at 174–75.

169. "A justiciable issue requires a present, substantial controversy between parties having adverse legal interests susceptible to immediate resolution and capable of present judicial enforcement." *Id.* at 173 (citing Rath v. City of Sutton, 673 N.W.2d 869 (Neb. 2004)). *Nebraska Coalition* also cited *DeCamp v. State* for the principle that "determining that an issue presents a nonjusticiable political question is not an abdication of the judiciary's duty to construct and interpret the Nebraska Constitution." *Id.* at 176 (citing DeCamp v. State, 594 N.W.2d 571 (1999)). *DeCamp*, however, is a case about the court refusing to get involved with various rules of legislative procedure, something which is often cited as a justiciability issue.

170. Indeed, the court decided on mootness grounds: "because we have concluded that the instant appeal is moot . . . we dismiss." *Rath*, 673 N.W.2d at 889.

171. "[A] declaration by this court on the legality of the contract between Van Kirk and the City would be advisory because it would have no effect on the parties in this case. And, as we have said before, 'declaratory relief cannot be used to obtain a judgment which is merely advisory.'" *Id.* at 880.

172. *See, e.g.,* Greater Omaha Realty Co. v. City of Omaha, 605 N.W.2d 472 (Neb. 2000) (construction case where the claim had become moot); Putnam v. Fortenberry, 589 N.W.2d 838 (Neb. 1999) (request for declaratory injunction moot); Boyles v. Hausmann, 517 N.W.2d 610 (Neb. 1994) (timing issue); Koenig v. Se. Cmty. College, 438 N.W.2d 791 (Neb. 1989) (mootness).

173. *Neb. Coal. for Educ. Equity*, 731 N.W.2d at 178–83. The court also cites *Coalition for Adequacy & Fairness in School Funding v. Chiles*, 680 So. 2d 400 (Fla. 1996), *Commission for Educational Rights v. Edgar*, 672 N.E.2d 1178 (Ill. 1996), and *Ex parte James v. Alabama Coalition for Equity*, 836 So. 2d 813 (Ala. 2002) as it goes through the other *Baker* tests.

tant. Nebraska's legislature, however, has intentionally avoided enacting standards for educational adequacy.[174] Voters rejected a constitutional amendment in 1996 (no doubt proposed in response to the failed attempt to equalize funding in *Gould*) that would have defined a quality education as a fundamental right, and a thorough and efficient education as the paramount duty of the state.[175]

2. *Pennsylvania*

With another broad-reaching constitutional provision, the Pennsylvania Constitution calls for "the maintenance and support of a thorough and efficient system of public education to serve the needs of the Commonwealth."[176] Despite this clear language, the Pennsylvania Supreme Court, in *Marrero v. Commonwealth*, relied on years of political question decisions to reject the plaintiffs' education funding claim.[177]

Pennsylvania has strong political question doctrine precedent. It is the only state of the seven to explicitly adopt the *Baker* doctrine, which it did in a case called *Sweeney v. Tucker*.[178] Pennsylvania also used *Baker* to find matters nonjusticiable long before *Marrero*.[179] *Sweeney* dealt with a question of legislative political procedure, which most states find outside the jurisdiction of the courts. The Pennsylvania Supreme Court delved into the 1970s scholarship on the political question doctrine and found that despite the separation of powers problems, the question (whether the court could review expulsion of a legislative member from his

174. When Nebraska became a state, the proposed education article of the state constitution included a uniformity clause that "legislature shall provide by law for the establishment of district school *which shall be as nearly uniform as practicable*." *Neb. Coal. for Educ. Equity*, 731 N.W.2d at 180. The clause was omitted. *Id.* In 1972, the provision that "an equitable distribution of the income of the fund set [a]part for the support of the common schools, among the several school districts" was removed from the constitution as well. *Id.*

175. *Id.*

176. PA. CONST. art. III, § 14.

177. 739 A.2d 110, 113–14 (Pa. 1999).

178. 375 A.2d 698, 706 (Pa. 1977).

179. Nebraska had political question/justiciability cases but did not adopt the *Baker* criteria in them before *Nebraska Coalition*. *See supra* Part III.C.1. Illinois adopted the *Baker* criteria in *Kluk v. Lang*, but never used them previously to keep a matter out of the court's hands. *See supra* Part III.A.1.

seat) remained justiciable because it implicated constitutional rights.[180]

In later cases, the courts used *Sweeney* to hold many different matters nonjusticiable.[181] This line of cases conflates separation of powers and political question issues, sometimes citing back to *Baker* and other times citing only the Pennsylvania Constitution. Most of these cases deal with traditional politics. In 1996, the Pennsylvania Supreme Court held that a suit about city council rules for discharge of a former special assistant was nonjusticiable.[182]

On the other hand, the Pennsylvania Supreme Court has ruled frequently that political matters are justiciable. In *Zemprelli v. Daniels*, for example, the court held that although the power to set rules of legislative procedure rested solely with the legislature, the judiciary still retained its role as a check on the other political branches.[183] Similarly, the court in *Thornburgh v. Lewis* decided whether a governor was required to supply requested information to the legislature.[184] The defendants' arguments in *Thornburgh* previewed what courts would see later in educational adequacy cases: they argued that since the Pennsylvania Constitution discusses only the legislative and executive roles in adopting the budget, the matter was already assigned to

180. *Sweeney*, 375 A.2d at 705–06, 712.

181. *Sweeney* was cited only twice for these principles in the 1980s, becoming more popular later. *See, e.g.*, Grimaud v. Commonwealth, 865 A.2d 835 (Pa. 2005) (citing *Sweeney* directly in its holding that a challenge to power committed solely to the legislature is nonjusticiable); Perzel v. Cortes, 870 A.2d 759 (Pa. 2005) (holding that the state secretary's decision to reject a writ issued by majority leader encroached upon the judiciary and violated separation of powers); Commonwealth v. Stern, 701 A.2d 568 (Pa. 1997) (holding that a criminal statute prohibiting attorney payment for referrals violated separation of powers because the state supreme court had exclusive control over attorneys).

182. Blackwell v. City of Philadelphia, 684 A.2d 1068, 1073 (Pa. 1996).

183. "Unquestionably the Senate has exclusive power over its internal affairs and proceedings. However, this power does not give the Senate the right to usurp the judiciary's function as ultimate interpreter of the Constitution under the guise of rulemaking, or for that matter, to make rules violative of the Constitution." 436 A.2d 1165, 1170 (Pa. 1981).

184. "We will not refrain from resolving a dispute which involves only an interpretation of the laws of the Commonwealth, for the resolution of such disputes is our constitutional duty." 470 A.2d 952, 956 (Pa. 1983). *See also In re* Jones, 476 A.2d 1287 (Pa. 1984).

those branches and not to the judiciary.[185] The court rejected the argument as too vague.[186]

In addition to its strange history with the political question doctrine, Pennsylvania has a confused history of education litigation leading up to *Marrero*.[187] Like in Nebraska, the Pennsylvania courts have tried to remain outside the issue of education reform, at least officially. First, in 1934, the court decided that it would not rule on a teacher contract issue, but would instead restrict its inquiry to whether the new law was reasonably related to the constitutional purpose of providing a thorough and efficient education system.[188] In doing this, however, the court still agreed the new contract law had a reasonable relation to the legislature's constitutional charge, which clearly constituted a ruling on the merits.[189] Next, the court rejected plaintiffs' equity claim in *Danson v. Casey*.[190] According to the court the challenge was too broad and general, and lacked — once again — judicially manageable standards.[191] The opinion pointed out that the complaint did not allege that children were being denied an adequate, minimum or basic education, but only that they were denied a "normal program of educational services" available to other children.[192]

The plaintiffs in *Marrero* were parents and students from the Philadelphia school district.[193] They argued two points: first, that the district had a disproportionately high number of students who live in poverty, and those students have special educational

185. *Thornburgh*, 470 A.2d at 954–55.

186. To adopt this "generality 'obscure[s] the need for case-by-case inquiry, and ignores this Court's responsibility as the ultimate arbiter of the Constitution.'" *Id.* at 955 (quoting Baker v. Carr, 369 U.S. 186, 211 (1962)) (internal citations omitted).

187. Marrero v. Commonwealth, 739 A.2d 110, 110 (Pa. 1999).

188. Malone v. Hayden, 197 A. 344, 352–53 (Pa. 1938).

189. *Id.* at 353.

190. 399 A.2d 360, 367 (Pa. 1979) (dismissing the argument that the education clause within the Pennsylvania Constitution guaranteed plaintiff students the same levels of funding as students in other parts of the state); *see supra* Part II.A.

191. The court noted that the only manageable standard it could adopt would be to mandate that each pupil receive the same dollar amount of expenditures (what plaintiffs asked for) but that "expenditures are not the exclusive yardstick of educational quality . . . product is dependent upon many factors, including the wisdom of the expenditures as well as the efficiency and economy with which available resources are utilized." *Danson*, 399 A.2d at 366.

192. *Id.* at 365.

193. Marrero v. Commonwealth, 709 A.2d 956 (Pa. 1998).

needs; and second, that the district also had a disproportionately high tax burden for its urban area.[194] Thus, the district was unable to rely on the local tax base for its funding needs.[195] The plaintiffs asked that the court declare the state had not fulfilled its constitutional promise.[196] Instead, the Pennsylvania Supreme Court affirmed the lower courts' decisions that the matter was not justiciable.[197] It held based on *Baker* and *Sweeney* that education finance lacked judicially manageable standards and was therefore a political question.[198]

IV. PROPOSAL

State courts cannot continue to reject education finance claims as nonjusticiable. Although the separation of powers in the Federal Constitution allow for the argument that unarticulated functions belong with other branches, the right to education is positively recognized in every state constitution. State legislatures, moreover, have passed education standards that qualify as judicially manageable standards under *Baker v. Carr*. Finally, state court judges are elected and politically accountable. Putting matters in their hands does not create federal separation of powers concerns.

The results from the studies above show that courts are singling out education for special treatment. None of these states use the political question doctrine routinely to decide their cases. None of these courts have refused to hear other social policy issues. In Nebraska, Illinois and Alabama, education cases marked the first instance where these state courts ruled *any* issue was nonjusticiable.[199] The highest courts in the remaining four states have held some claims nonjusticiable in the past, but these cases were limited to issues of legislative procedure and representation.[200]

194. *Id.* at 958.
195. *Id.*
196. *Id.*
197. One judge dissented at the Supreme Court, writing that "[b]ecause this case involves questions as to whether the General Assembly carried out its constitutional mandates, I believe it is justiciable." *Id.* at 967 (Pelligrini, J., dissenting).
198. *Id.* at 966 (majority opinion).
199. *See supra* Parts III.C.1, III.A.1, and III.B.1.
200. *See supra* Part III.

Some have questioned whether it matters at all how the courts reject these claims: "what in fact is the functional difference between declaring a constitutional provision is not judicially enforceable and upholding a legislative act as constitutional?"[201] The difference might be that the former violates state constitutional requirements to protect certain rights. If a court rejects a plaintiff's evidence on the merits, the party can gather more witnesses, experts and research in order to return to court with a new claim. But when a court rules a claim nonjusticiable, plaintiffs have no further recourse. So far when courts have considered education finance claims on the merits, plaintiffs have often prevailed.[202] Plaintiffs are only losing in those states where members of the judiciary refuse to fulfill their responsibilities to uphold their state constitutions

Vieth v. Jubelirer undercuts the easy answer that the political question doctrine lacks legitimacy because it no longer exists.[203] The decision revived the use of the "judicially identifiable or manageable standards" requirement, overruling precedent and keeping questions of political "gerrymandering" out of the courts. There is also the argument that states hear these matters of policy all the time in other areas and its not fair to reject education claims — but this does not provide any sound legal reasoning to take to the courts. The reasons why state courts should not use the political question doctrine in education finance cases are outlined below.

A. THE POLITICAL QUESTION DOCTRINE DOES NOT APPLY TO EDUCATION FINANCE CASES BECAUSE EVERY STATE CONSTITUTION HAS A RIGHT TO EDUCATION

The political question doctrine was born of federal law. Though it persists on in *Vieth v. Jubelier*,[204] no principled explanation has been offered for why it should extend to state courts as well. The fundamental differences between state and federal

201. Avidan Y. Cover, *Is "Adequacy" a More "Political Question" than "Equality?": The Effect of Standards-Based Education on Judicial Standards for Education Finance*, 11 CORNELL J. L. & PUB. POL'Y 403, 414 (2002).

202. *See supra* notes 53–58 and accompanying text.

203. *See supra* notes 74–83 and accompanying text.

204. 541 U.S. 267, 318 (2004); *see also supra* notes 74–83 and accompanying text.

courts and their constitutions demonstrate the illegitimacy of state courts following federal court political question doctrine. State constitutions offer positive protections for the rights of their citizens. State courts are closer to the state legislatures, more democratically accountable and more familiar with the problems of the state than the federal courts could ever be with broad ranging national issues. Most importantly, all states have positive rights to education in their constitutions.[205]

Prior to the slow incorporation of the Bill of Rights under the Fourteenth Amendment, citizens were already guaranteed many of these rights under their state constitutions.[206] Many state constitutions existed before the enactment of the Federal Constitution, and the Framers drew upon these state guaranteed rights when creating the Bill of Rights; every right protected in the Bill of Rights was already contained in at least one state constitution.[207] Throughout the twentieth century, advocates appealed for federal constitutional protections in all different areas, not just education. What was first seen as a revolution by advocates ended abruptly.[208] One by one over the past thirty years, the federal courts have rejected legal claims for better welfare, housing, medical care and public education.[209] There are no positive rights to these things in the Federal Constitution, as the Bill of Rights lists only what the federal government cannot do. Justice Brennan and others urged reformers to move their battles back to the states, and encouraged state judges to step into the gap left open by the federal courts.[210] This was what happened in the area of education litigation.[211]

Structural differences between state constitutions and the Federal Constitution reinforce this argument. While the Federal Constitution explains the limits on federal power, state constitutions provide details of the daily function of state government and services. It does not follow that the same barriers (political ques-

205. William E. Thro, *The Role of Language of the State Education Clauses in School Finance Litigation*, 79 EDUC. L. REP. 19 (1993).

206. Brennan, s*upra* note 14, at 492.

207. *Id.* at 501–02.

208. *See supra* Part II.A.

209. Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1132–33 (1999).

210. Brennan, *supra* note 14, at 491.

211. *See supra* Part II.A.

tion doctrine) would apply to state court access. State courts have no Article III case and controversy requirement, so they could even offer binding advisory opinions while leaving it to state legislatures to develop and implement their own remedies.[212] As Justice Brennan pointed out, "state courts that rest their decisions wholly or even partly on state law need not apply federal principles of standing and justiciability that deny litigants access to the courts."[213]

More recently, scholars argue that the problem with state court decisions is that they depend too much on federal court decisions when interpreting their own state constitutions.[214] "[P]rotection of individual rights in the mind of the body politic has become synonymous with the United States Supreme Court and the Federal Constitution."[215] Four of the seven state court results examined here cite to *Baker v. Carr* without explaining why this case should have any bearing over interpretations of their state constitutions.[216]

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212. Cover, *supra* note 201, at 419.

213. Brennan, *supra* note 14, at 501.

214. Michael Blanchard, *The New Judicial Federalism: Deference Masquerading as Discourse and the Tyranny of the Locality in State Judicial Review of Education Finance*, 60 U. PITT. L. REV 231, 291 (1998); *see also* Kelly Thompson Cochran, *Beyond School Financing: Defining the Constitutional Right to an Adequate Education*, 78 N.C. L. REV. 399, 426–30 (2000) (arguing that states apply the federal due process and equal protection analyses to their cases while ignoring some of the key assumptions underlying that federal law: that all rights are negative and that constitutional limitations only apply to government actions).

215. Blanchard, *supra* note 214, at 288–89.

216. No universal standard exists among judges regarding their involvement in education cases. For example, Judge John Greaney, Associate Judge to the Supreme Judicial Court of Massachusetts, suggests courts are obligated to intervene when the language in their state constitution compels it. John Greaney & Albert Rosenblatt, Remarks at Panel Discussion at The Campaign for Educational Equity: Symposium (Nov. 13, 2007). If the education provision in the constitution is merely aspirational, he argues, courts should not become involved. *Id.* Judge Greaney dissented from the Massachusetts decision where the Supreme Judicial Court withdrew from its role in enforcing education finance remedies, suggesting he is among the more activist judges when it comes to education. Hancock v. Comm'r of Educ., 822 N.E.2d 428 (Mass. 2005) (holding Massachusetts schools had progressed sufficiently so that the courts no longer had to supervise their reform) (Greaney, J., dissenting). The Massachusetts Supreme Judicial Court had ruled in favor of plaintiffs in 1993 and overseen the implementation of remedies. McDuffy v. Sec'y of the Office of Educ., 615 N.E.2d 516 (Mass. 1993). Judge Albert Rosenblatt, former Associate Judge to the New York State Court of Appeals, who sanctioned a more moderate approach in New York, simply thought when lawyers file a cases courts have a responsibility to hear the claim on its merits. John Greaney & Albert Rosenblatt, Remarks at Panel Discussion at The Campaign for Educational Equity: Symposium (Nov. 13, 2007).

B. EVEN IF THE POLITICAL QUESTION DOCTRINE APPLIES, JUDICIALLY MANAGEABLE STANDARDS EXIST FOR STATE EDUCATION REFORM

The state political question decisions rely on the second of the *Baker* standards, holding that education finance claims lack judicially identifiable and manageable standards. In this sense the decisions are fundamentally flawed. The seven political question doctrine states *have* judicially identifiable and manageable standards.[217] As discussed above,[218] the 1980s standards-based reform resulted in education standards in almost every state. The *Baker* Court called the judicially manageable standards in that case "well developed and familiar."[219] In *Vieth*, the majority seized upon this characterization. They reasoned that since Supreme Court justices were unable to agree on standards for political reapportionment in the past, the standards were not familiar enough to fulfill the *Baker* requirement.[220]

By adopting standards, legislators and local school boards commit to achieving these requirements. The legislative branch fulfills its responsibility to the state constitution's education clause by doing so. Failing to provide each student with the opportunity to meet the standards denies their right to adequate education. Some advocates for the role of the judiciary even argue that if courts find the standards unclear, they are obligated to identify the standards themselves based on the constitutional language.[221] Others argue that at the very least, a vague judicial

217. These standards are available at each state's department of education website. *See, e.g.*, Nebraska Department of Education, *available at* http://www.nde.state.ne.us/ndestandards/AcademicStandards.htm; Florida Standards, *available at* http://etc.usf.edu/flstandards/index.html; Oklahoma State Department of Education, *available at* http://sde.state.ok.us/home/defaultns.html; Alabama Department of Education, *available at* http://www.alsde.edu/html/home.asp; Rhode Island Department of Elementary and Secondary Education, *available at* http://www.ridoe.net/Instruction/frameworks/default.aspx; Pennsylvania Department of Education, *available at* http://www.pde.state.pa.us/stateboard_ed/cwp/view.asp?Q=76716; Illinois State Board of Education, *available at* http://www.isbe.net/ils/.

218. *See supra* Part II.

219. Baker v. Carr, 369 U.S. 186, 226 (1962).

220. Vieth v. Jubelirer, 541 U.S. 273, 278–81, 327–29 (2004).

221. William E. Thro, *A New Approach to State Constitutional Analysis in School Finance Litigation*, 14 J.L. & POL. 525 (1998) (asserting that courts should follow a three step approach in order to identify rights and standards for educational reform: (1) whether the state constitution creates a quality standard or establishes education as a fundamen-

verdict could spur state governments into adopting more comprehensive standards.[222]

Even without the legislative standards that have been passed for education, gaps often exist between constitutional rights and judicially manageable standards. Standards are often derived through adjudication, rather than extracted from constitutions themselves.[223]

C. JUDICIAL REVIEW OF EDUCATION FUNDING DOES NOT CREATE SEPARATION OF POWERS CONCERNS

Inherent in separation of powers concerns is the idea that one political branch is better equipped than another to handle certain issues. Thus, when the Supreme Court holds there are no judicially manageable standards, it is holding that it is not equipped to decide the issue and that the legislature or executive would be better suited to do so. This Proposal — that state courts must address matters of education finance — must respond to the argument that courts are not equipped to make these decisions. Commonly, the critique is that the courts are isolated from the democratic will of the people, and should not be permitted to make these decisions in their countermajoritarian role. There are several different reasons why separation of powers concerns do not apply in this area and in these venues.

First, many agree that state courts are safer from this criticism. Specifically, institutional competency and implementation concerns facing the federal courts do not extend to state courts.[224] The positive rights to education in state constitutions "are not simply structural limits on governmental power; they are also prescriptive duties compelling government to use such power to achieve constitutionally fixed social ends."[225]

Second, the separation of powers arrangements set up by state constitutions differ from the exact balance of power set up by the

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tal right; (2) if a quality standard or fundamental right exists, what is the nature of that standard or right; and (3) if there is a violation, how should that violation be remedied).

222. George D. Brown, *Binding Advisory Opinions: A Federal Courts Perspective on the State School Finance Decisions*, 35 B.C. L. REV. 543, 544, 549–50 (1994).

223. Fallon, *supra* note 82, at 1278.

224. Hershkoff, *supra* note 209, at 1134–35.

225. *Id.* at 1155.

Federal Constitution.[226] This is a structural argument. These differences in structure support an interplay between the branches that is impossible in the federal system. State court decisions are not beyond the reach of the public. Additionally, state constitutions are much easier to amend; citizens can control what they might see as overreaching by the courts. As one scholar explains, "[s]tate court decisions are best viewed as part of an ongoing process of constitutional interpretation by citizens and all three branches of a state government, rather than pronouncements of fixed principles."[227] As it stands now, affirmative rights to education remain present in state constitutions with no present challenges to their existence.

Third, the judiciary may be at least as institutionally competent as the legislature at protecting certain matters of social welfare. Arguments for the legislature are that legislators can consider whatever evidence they choose, give it whatever weight they wish, and need not rely on one individual (a judge) for his decision. Critiques of the role of the courts in education reform fall short because they fail to offer any comparative analysis: perhaps courts have limited success implementing reform, but how good are legislators?[228] Research may demonstrate that courts are institutionally *better* equipped to create and enforce adequacy remedies than are other branches of government. Two comprehensive studies completed in the 1980s[229] (one general and one education-specific) reveal the comparatively superior informational capacity of the judiciary: despite concerns about the li-

226. G. Alan Tarr, *Interpreting the Separation of Powers in State Constitutions*, 59 N.Y.U. ANN. SURV. AM. L. 329 (2003).

227. Josh Gupta-Kagan, Note, *A Civics Action: Interpreting "Adequacy" in State Constitutions' Education Clauses*, 78 N.Y.U. L. REV. 2241, 2257–58 (2003). Michael Blanchard also argues that in state court judges are more democratically accountable than their federal counterparts. "Assuming that questions of education finance are determinations appropriately made by 'the public,' judicial determination of constitutional standards in no way impedes that discussion." Blanchard, *supra* note 214, at 274.

228. *See generally* DONALD L. HOROWITZ, THE COURTS AND SOCIAL POLICY (1977); ERIC HANUSHEK, COURTING FAILURE: HOW SCHOOL FINANCE LAWSUITS EXPLOIT JUDGES' GOOD INTENTIONS AND HARM OUR CHILDREN (2006).

229. MICHAEL A. REBELL & ARTHUR R. BLOCK, EDUCATIONAL POLICY MAKING AND THE COURTS: AN EMPIRICAL STUDY OF JUDICIAL ACTIVISM (1982); Neil L. Komesar, *A Job for the Judges: The Judiciary and the Constitution in Massive and Complex Society*, 86 MICH. L. REV. 657 (1988).

miting qualities of evidentiary rules in the adversarial system,[230] factual data in evidentiary records were more complete and had more influence than in legislative records.

Part of the institutional competency arguments are challenges to the abilities of judges, on an individual level, to make these decisions. Judges' generalist backgrounds may be viewed as a hindrance to making policy choices.[231] Judges, however, often have experience with a broad range of policy problems and are called upon to consider specific and detailed evidence.[232] Since remedies will take years rather than months to implement, judges will become more expert as the situation progresses. Members of the judiciary are not perfectly removed from the interests involved, but are more accustomed than legislators or governors to remaining neutral arbiters when making difficult choices. Courts can recommend flexible remedies, and modify their decisions to respond to unanticipated changes along the way.[233]

The court's staying power[234] has proven absolutely crucial to implementation in the remedies phase, which can take many years.[235] More specific criticism of this new type of judicial fede-

230. Horowitz conducted four case studies that he believes reveal the deficiencies of the adversarial process in fact-finding. As opposed to legislatures, courts cannot take judicial notice of facts that are disputed or not widely accepted. He criticizes the use of expert witnesses as dependent on the hearsay of their statistical studies, and questions the ability of the courts to find neutral expert witnesses to represent the facts fairly. The legislature, on the other hand, can just examine directly the books and studies that these witnesses into evidence during the adversarial process. HOROWITZ, *supra* note 228, at 280–82.

231. *Id.*

232. MATTHEW BOSWORTH, COURTS AS CATALYSTS: STATE SUPREME COURTS AND PUBLIC SCHOOL FINANCE EQUITY 14–17 (2001).

233. Another more general critique of the courts raised by Horowitz and others is that the court cannot set its own agenda and must respond only to the complaints that it receives from potential plaintiffs. This limits their abilities as agents of social reform. HOROWITZ, *supra* note 228, at 294–95.

234. An important counterargument is that in all states except Rhode Island, judges are elected, so the staying power argument has less force than it might in the federal system. However, state court judges still remain in office longer than the average state court legislator.

235. The Eastern District of New York's three decade long involvement in *Jose P. v. Ambach* demonstrates this advantage. 557 F. Supp. 1230 (E.D.N.Y. 1983). The case was a class action lawsuit involving the rights of handicapped students to be referred, evaluated, and placed in a timely fashion into appropriate educational programs. *Id.* at 1232. Plaintiffs won a victory which spawned decades of smaller battles over how best to serve handicapped children. *Id.* at 1233. The judicial oversight in *Jose P.* was certainly not flawless, but one can imagine the alternative for the special education movement in New York City

ralism centers on the idea that judicial policy decisions are undemocratic. Again, this is not a critique of how courts define rights but, rather, how they implement remedies.[236] This debate stretches across all substantive areas of law. Critics argue that the shift from one political branch to another is more than just a change from legislators to judges.[237] The power is also transferred from elected officials to other members of the judicial process such as public interest lawyers, since they are the ones defining the problem and possible solutions rather than their aggrieved clients.[238]

Judges who pursue remedies in areas of social policy are often tagged as "judicial activists": judges that step out of their appropriate role to rule in order to pursue a personal agenda.[239] To characterize judges as activist just because they agree to hear cases or find in favor of plaintiffs, however, would be overly simplistic. As Richard Epstein explains, "[t]he choice is never between restraint and activism; it is, rather, a question of whether the attack against a piece of legislation makes sense in light of constitutional text and structure."[240] Thomas Sowell questions the prevailing image of "liberal, activist judges" and argues that "judicial activists have historically come in various political varieties."[241] Judges can also be activists by not acting, and use of the political question doctrine can be an activist means of avoiding certain reform that the constitution requires.

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had the court abdicated its responsibility by leaving too soon or never entering the process at all. Without the court's presence, the reform likely would have disintegrated sometime in the 1980s. The presiding judge served as a stabilizing force to whom the plaintiffs could return when their needs were not being met.

236. *See* ROSS SANDLER & DAVID SCHOENBROAD, DEMOCRACY BY DECREE (2003).

237. *Id.* at 92–94.

238. *Id.* at 8–10.

239. *See generally* HANUSHEK, *supra* note 228; Thomas L. Jipping, *From Least Dangerous Branch to Most Profound Legacy: The High Stakes in Judicial Selection*, 4 TEX. REV. L. & POL. 365 (2000); Michael J. Klarman, Brown *and* Lawrence *(and* Goodridge*)*, 104 MICH. L. REV. 431 (2005).

240. Richard Epstein, *Undue Restraint: Why Judicial Activism has its Place*, NAT'L REV., Dec. 31, 2000.

241. Thomas Sowell, *Judicial Activism Reconsidered*, originally published in ESSAYS IN PUBLIC POLICY NO. 13 (1989), *available at* http://www.amatecon.com/etext/jar/jar.html.

V. CONCLUSION

For better or for worse, the battle for education reform will be waged only in state courts for the foreseeable future. Where exactly the baseline of education standards should be set in each state remains in the hands of the legislature. Once the standards are set, however — through the state constitution or through explicit achievement standards — state courts must become involved in the question of whether its students are being denied their rights to education. For these reasons, state courts must stop using the federal political question doctrine to abdicate their responsibility to children.

State courts rarely rely on *Baker* or other cases to keep matters out of their jurisdiction. Historically when they have done so, the nonjusticiable matters have been relegated to the inner workings of the legislature, such as determining the qualifications of holding public office or agreeing on election procedures. State courts do not use the political question doctrine to keep other social problems, such as welfare and health care, beyond their grasp. The courts in Illinois, Florida, Pennsylvania, Rhode Island, Alabama, Nebraska and Oklahoma have nevertheless singled out education as a constitutional right they refuse to uphold. On the merits, the answer might not be favorable for plaintiffs in any of these seven states, and it is entirely feasible that the basic level of education is being met. Other states' experience in adequacy litigation implies, however, that the opposite will be true. Whatever the answer is, in light of the rights to education detailed each of these state constitutions, courts can no longer continue to ignore the question.

From a legal realist perspective, judges will decide these cases based on varying policy considerations; to many, it does not matter how firm a ground their logic rests upon. This research into the laws of seven different states, however, may inspire plaintiffs on how to approach attempts around these decisions. It adds further support to the argument that the political question doctrine does not belong in state courts.