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The Failure of Education Federalism

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THE FAILURE OF EDUCATION FEDERALISM

Kristi L. Bowman*

ABSTRACT

Since the Great Recession of 2007–09, states have devoted even less money to public education and state courts have become even more hostile to structural reform litigation that has sought to challenge education funding and quality. Yet the current model of education federalism (dual federalism) leaves these matters largely to the states. As a result, state-level legislative inaction, executive acquiescence, and judicial abdication can combine to create a situation in which the quality of traditional public schools declines sharply. This is the case in Michigan, which is an unusually important state not only because the dynamics that are emerging in some other states are mature in Michigan but also because Michigan is the home state of Secretary of Education Betsy DeVos, who has influenced the state’s education policy substantially. Glaring gaps in educational quality like those in Michigan are not the federal government’s problem, and in some ways the federal government’s hands are tied when it comes to being part of the solution. This must change. Dual federalism does not reflect the current reality of many federal-state-local relationships, and it is sorely outdated in the context of public education. Accordingly, I argue for a larger, though by no means exclusive, federal role in K-12 public education with the goal of establishing a floor of educational quality for students across the country. In addition to proposing legislative and agency-based changes, I advance the novel litigation strategy of pairing a minimal educational quality right via Substantive Due Process with rational basis with bite review under the Equal Protection Clause. In these ways and others, we must move to a new model of federalism in education—cooperative federalism. Without this shift, a floor of educational quality will continue to be uneven both among and within states, and in more and more places like Michigan, the floor will rot and students will fall through.

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INTRODUCTION

Education federalism is failing our children. Especially since the Great Recession, states have been increasingly unlikely to invest in public schools and have been even less amenable to structural education reform initiatives. In some states, the executive or judiciary has attempted to counteract this trend. In a small but growing number of other states, checks and balances effectively no longer occur, at least when it comes to financing public education. And because of the relationship between the states and federal government regarding education, the federal government is largely unable to intervene via statute, regulation, or court order.

The debates that emerge from this situation are not new: questions about federalism, courts' ability to produce social change, and the degree to which "money matters" in schools have all been at the heart of American education law and policy for quite some time. In one form or another, these themes are woven throughout more than a half-century of vigorous discussions about education funding

reform by judges, legislators, and researchers.¹ In fact, from 1966—when the Coleman Report,² the fountainhead of modern education research, was produced—through today, ample research has sought to unpack the impact of funding. A new consensus may be emerging, documenting that court orders and legislative reforms that result in increased school spending create short- and long-term gains for students in the affected schools. This finding is especially significant because it is unusual to identify a variable in a problem as complex as educational quality and poverty that one can influence as easily as funding.

To be clear, influencing funding is theoretically simple but practically complex because school funding decisions are at the mercy of political dynamics, and allocating more money for schools is much like cutting a pie—a larger piece here means a smaller piece elsewhere. That said, school funding debates are one way in which abstract ideas about federalism and governance become concrete, and this is where Part II of this Article begins. Because Part II provides the theoretical and practical context that anchors this Article, in it I also summarize research about the importance of judicial and legislative school finance decisions and discuss national trends in school finance. Additionally, I discuss how the ideas of liberty and equality manifest in school funding debates, and why it is important to view liberty and equality not only as both necessary, but also as mutually reinforcing, in the pursuit of educational quality.

Part III builds on that foundation, providing both the national context for educational quality and funding battles and an in-depth analysis of these same issues in one state: Michigan. The reasons for focusing on Michigan are two-fold: First, the dynamics surrounding public education appear to be changing in many states, as noted above. In many parts of the country we may be seeing the emergence of a new normal—and yet the dynamics that are new in some

1. See, e.g., Kristi L. Bowman, *Pursuing Educational Opportunities for Latino/a Students*, 88 N.C. L. REV. 911, 961–63, 962 n.267 (2010) (discussing the majority reasoning and political posturing of *Horne v. Flores*, 557 U.S. 433 (2009), which “weigh[ed] in” about whether “money matters” in school reform); C. Kirabo Jackson, Rucker Johnson & Claudia Persico, *The Effects of School Spending on Educational and Economic Outcomes: Evidence from School Finance Reforms*, 131 Q.J. ECON. 157, 157–58 (2016); see also Christopher A. Suarez, *Courthouse, Statehouse, or Both? Redefining Institutional Roles in School Finance Reform*, 28 YALE L. & POL’Y REV. 539 (2010) (discussing two recent books with different perspectives about courts’ ability to produce social change in the classroom).

2. JAMES S. COLEMAN ET AL., OFFICE OF EDUC., U.S. DEP’T OF HEALTH, EDUC., AND WELFARE, *EQUALITY OF EDUCATIONAL OPPORTUNITY* (1966), <http://files.eric.ed.gov/fulltext/ED012275.pdf>; see also Eric A. Hanushek, *What Matters for Student Achievement: Updating Coleman on the Influence of Families and Schools*, EDUCATIONNEXT, Spring 2016, at 19, http://educationnext.org/files/ednext_XVI_2_hanushek.pdf (discussing the significance of the Coleman Report).

states are already mature in Michigan. Second, U.S. Secretary of Education Betsy DeVos has had a significant impact on education law and policy in her home state of Michigan,³ and it is not unusual for federal education secretaries to draw inspiration from their home states when setting a federal education agenda and incentivizing state-level policies.⁴ Thus, for various reasons, studying Michigan lets us understand a reality that may take root across the country if significant federal protection of education rights remains unavailable. As I discuss in Part III, in Michigan the interplay of judicial abdication, legislative inertia, and executive acquiescence over several decades produced a system in which the education available in many school districts across the states is embarrassingly inadequate. However, this situation has given rise to some of the most creative education reform litigation our country has seen in years, including the 2012–15 “right to read” litigation in Michigan state court and the “right to literacy” case filed in late 2016 in federal court in Michigan.

Bearing in mind Michigan’s cautionary tale of public education, in Part IV, I join others in arguing for a larger (though by no means exclusive) federal role in K-12 public education with to increase educational quality for students across the country.⁵ Specifically, I consider roles that all three branches of the federal government could play—from funding conditions Congress could impose, to enforcement actions the Department of Education could pursue, to ways in which federal interpretations of constitutional claims could evolve. With regard to the latter, I contend that pairing a minimal quality right via Substantive Due Process with “rational basis with

3. See, e.g., William Brangham, *What Will Betsy DeVos’s Focus on School Choice Mean for Public Education?*, PBS NEWS HOUR (Jan. 17, 2017, 6:40 PM), <http://www.pbs.org/newshour/bb/will-betsy-devos-focus-school-choice-mean-public-education/>; Douglas N. Harris, *DeVos and the Education from Michigan*, EDUC. NEXT (Dec. 5, 2016), <http://educationnext.org/devos-and-the-evidence-from-michigan/>; Rebecca Mead, *Betsy DeVos And The Plan to Break Public Schools*, NEW YORKER (Dec. 14, 2016), <https://www.newyorker.com/news/daily-comment/betsy-devos-and-the-plan-to-break-public-schools>; *What You Need to Know About Betsy DeVos*, DET. FREE PRESS (Jan. 18, 2017, 5:04 PM), <http://www.freep.com/story/news/education/2017/01/18/betsy-devos-charter-schools/96718680/> (collecting *Free Press* articles about DeVos’s influence in Michigan education policy).

4. See, e.g., Julianne Hing, *The School Reform Showdown in the Chicago Arne Duncan Left Behind*, COLOR LINES (Sept. 14, 2012, 9:37 AM), <http://www.colorlines.com/articles/school-reform-showdown-chicago-arne-duncan-left-behind> (discussing how a previous Secretary of Education, Arne Duncan, drew inspiration from his home state of Illinois).

5. See, e.g., Kimberly Jenkins Robinson, *Disrupting Education Federalism*, 92 WASH. U. L. REV. 959, 963 (2015) (arguing that a greater federal role in education is necessary to increase educational quality); Kimberly Jenkins Robinson, *The High Cost of Education Federalism*, 48 WAKE FOREST L. REV. 287 (2013) (making a similar argument).

bite review” under the Equal Protection Clause would reunite liberty and equality claims in the pursuit of education rights.

In sum, we must move to a new model of federalism in education—cooperative federalism. Without this shift, a floor of educational quality will continue to be uneven both among and within states, and in more and more places like Michigan the floor will rot and students will fall through.

I. PUBLIC EDUCATION’S RECIPE FOR DISASTER

Discussions about educational quality always come back to funding, and so that is where this Article begins. As with many things, “who decides” is crucial in school finance, and thus that is the focus of the first part of this Section, which discusses both the authority over school funding decisions (state or federal), and the specific structural location of various aspects of state power (in which branch of government different decisions are made). The second part provides a brief discussion of the significance of school finance legislation and litigation, and the reality of school funding trends across the country today. The third part discusses the role of the ideas of liberty and equality in education reform debates and explains why we must view these ideas as mutually reinforcing and not competing going forward.

A. *Education Federalism*

There are many models of federalism,⁶ and law professor Kimberly Jenkins Robinson’s work deserves acclaim for focusing our attention on the specific model of federalism employed vis-à-vis public education. In various pieces, Robinson has analyzed both Supreme Court decisions and Congressional action to conclude that the federal government takes a dual federalism approach regarding public education—specifically, the federal government’s role is quite limited, and state and local authority is much more powerful. A central disadvantage of this approach is the inequality that is allowed to exist both within and among states in the name of local control, so much so that one cannot help but conclude from Robinson’s work that this inequality is a defining feature of the current

6. See Heather Gerken, *Our Federalism(s)*, 63 WM. & MARY L. REV. 1549 (2012) (arguing that there are several theories of federalism); see also Robinson, *Disrupting Education Federalism*, *supra* note 5, at 967 (applying Gerkin’s thesis to educational federalism).

model of education federalism.⁷ Interestingly, there are at least two ways in which the country has changed yet education federalism has not kept pace: first, local school districts' control over key matters has been steadily declining for at least forty years,⁸ and second, in Robinson's words, "since the New Deal, the nation has moved to the increasing jurisdictional partnerships that are oftentimes labeled cooperative federalism."⁹

Cooperative federalism, in the words of scholars Erwin Chemerinsky and Sam Kamin and attorneys Jolene Forman and Allen Hopper, "allows federal and state laws to solve problems jointly rather than conflict with each other. In the interest of cooperation, certain federal statutes permit cooperative agreements between the federal government and the states to solve issues of mutual concern."¹⁰ In cooperative federalism, federal power is not and need not be plenary.¹¹ The authors identify the Clean Air Act,¹² the Clean Water Act,¹³ and the Patient Protection and Affordable Care Act¹⁴ as examples employing this approach of creating a federal substantive floor and permitting states to opt out of a federal plan if they adopt an approach that satisfies the regulations of the governing federal agency.¹⁵ This approach is not radically different in concept from the dual federalism approach currently in place with regard to public education—it is merely a different point on the continuum—but moving to this point is important. Although some notable changes have reduced funding disparities and raised overall funding levels, then-law professor, now-California Supreme Court Justice Goodwin Liu and others have documented that funding disparities within and, even more, among states remain

7. See Robinson, *The High Cost of Education Federalism*, *supra* note 5, at 287–88, 293–314.

8. See *id.* at 312; see also Michael Heise, *The Political Economy of Education Federalism*, 56 EMORY L.J. 125, 130–32 (2006) (arguing that local control over education policy is an illusion).

9. Robinson, *The High Cost of Education Federalism*, *supra* note 5 at 292.

10. Erwin Chemerinsky et al., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74, 116 (2015).

11. Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330, 404 (2006).

12. 42 U.S.C. § 7401–02 (2012); see Chemerinsky et al., *supra* note 10, at 117 n.165.

13. 33 U.S.C. § 1251(b) (2012); see Chemerinsky et al., *supra* note 10, at 117 n.166.

14. 42 U.S.C. §§ 18041–42 (2012); see Chemerinsky et al., *supra* note 10, at 118.

15. Chemerinsky et al., *supra* note 10, at 117–18.

substantial despite decades of legislative and litigation reform efforts.¹⁶ Indeed, the U.S. remains an outlier among developed nations in this regard.¹⁷

Who is to say that a more extensive federal role is a better option, though? Not everyone thinks it would be, in part because the federal government has a mixed record on education reform issues and some would characterize in even less favorable terms.¹⁸ As one scholar notes, “[u]nless state courts prove themselves unwilling and unable to deal with the structural problems created by educational policies, the federal government should assume a role that leaves sufficient space for state courts to operate.”¹⁹ So, are state governments willing and able to perform these functions?²⁰

B. *Constricting State Resources*

Each branch of state government plays a role in school finance. The executive branch is involved through the state’s department of education and on occasion through the advocacy of the state’s governor and the attorney general.²¹ The state legislature determines the amount of the state per pupil grant and the amount of supplemental funding available to districts.²² (On average, state funding comprises slightly less than half of a school district’s budget, and sometimes the budget is not finalized until school districts have already started a new fiscal year.²³) The judiciary functions as a check

16. Liu, *supra* note 11, 332–33 (2006); *see also* BRUCE BAKER ET AL., EDUC. LAW CTR., IS SCHOOL FUNDING FAIR? A NATIONAL REPORT CARD (3rd ed. 2014), http://www.edlawcenter.org/assets/files/pdfs/publications/National_Report_Card_2014.pdf (education funding inequities from state to state); COUNCIL ON FOREIGN RELATIONS, REMEDIAL EDUCATION: FEDERAL EDUCATION POLICY 8 (2016), https://www.cfr.org/sites/default/files/book_pdf/RA-RemedialEducation.pdf; EQUITY & EXCELLENCE COMM’N, FOR EACH AND EVERY CHILD: A STRATEGY FOR EDUCATION EQUITY AND EXCELLENCE 14, 17–20 (2013), <https://www2.ed.gov/about/bd-scomm/list/eec/equity-excellence-commission-report.pdf>; Robinson, *Disrupting Education Federalism*, *supra* note 5, at 973 (describing school funding inquiries).

17. Robinson, *Disrupting Education Federalism*, *supra* note 5, at 980; EQUITY & EXCELLENCE COMM’N, *supra* note 16, at 15.

18. *See* Aaron Lawson, *Educational Federalism: A New Case for Reduced Federal Involvement in K-12 Education*, 2013 BYU EDUC. & L.J. 281, 302 (2013).

19. *Id.* at 286.

20. Kimberly Jenkins Robinson, Charles Barone, and Elizabeth DeBray all answer this question in the negative. Charles Barone and Katherine DeBray, *Education Policy in Congress: Perspectives from Inside and Out*, in CARROTS, STICKS, AND THE BULLY PULPIT (Frederick M. Hess & Andrew P. Kelly, eds., 2011); Robinson, *Disrupting Education Federalism*, *supra* note 5, at 1005 (quoting Barone and Debray).

21. *See infra* Part III(B)(2).

22. *See* FAITH E. CRAMPTON, DAVID C. THOMPSON, AND R. CRAIG WOOD, MONEY AND SCHOOLS 51–53 (6th ed. 2015) (describing how states finance education).

23. *Id.* at 56–57.

on the legislature and the executive by hearing state constitutional claims of funding inequality and insufficiency.²⁴ These claims are generally based on two types of provisions—those that establish a positive right to education and those that guarantee equal protection of the laws more generally.²⁵ Although some have divided school finance litigation into phases described by a focus on adequacy of funds provided or equity of opportunities available, the reality of the claims is more complex than that.²⁶ In total, forty-four states across the country have experienced state-law-based school finance litigation.²⁷

The results of plaintiffs' victories in school finance litigation over time have been said to be both symbolically significant and modest.²⁸ Specifically, these results have been understood to be significant because the majority of school finance victories for plaintiffs impose a quality or equity standard including specific obligations.²⁹ But they have also been viewed as modest, as law professor Scott Bauries' work has articulated, in part because of the conflation between the violation of the right (occurring in the past), and the creation of a remedy (looking towards the future).³⁰ The modesty grows when we realize that courts in Florida, Illinois, Louisiana, Michigan, Pennsylvania, and Rhode Island have declined to review legislative decisions about school finance, citing concerns about separation of powers, justiciability, and other issues.³¹

24. *Id.* at 57–68, 86–101.

25. *Id.*

26. See James E. Ryan, *Standards, Testing, and School Finance Litigation*, 86 TEX. L. REV. 1223, 1229–30 (2008).

27. SCHOOLFUNDING.INFO, <http://schoolfunding.info/> (last visited Oct. 5, 2017) (showing six states, Delaware, Hawaii, Iowa, Mississippi, Nevada, and Utah, that have not had important education-finance litigation court decisions); see also Derek W. Black, *Unlocking the Power of State Constitutions with Equal Protection: The First Step Toward Education as a Federally Protected Right*, 51 WM. & MARY L. REV. 1343, 1360–73 (2010) (recounting successes and failures of school finance cases in state courts).

28. See, e.g., Robinson, *Disrupting Education Federalism*, *supra* note 5, at 979–80.

29. See Michael Rebell, *Poverty, "Meaningful" Educational Opportunity, and the Necessary Role of the Courts*, 85 N.C. L. REV. 1467, 1500–11 (2007).

30. Scott R. Bauries, *A Common Law Constitutionalism for the Right to Education*, 48 GA. L. REV. 949, 967–74 (2014); see also Scott R. Bauries, *Is There an Elephant in the Room?: Judicial Review of Educational Adequacy and the Separation of Powers in State Constitutions*, 61 ALA. L. REV. 701 (2010); Derek W. Black, *Averting Educational Crisis: Funding Cuts, Teacher Shortages, and the Dwindling Commitment to Public Education*, 94 WASH. U. L. REV. 423, 459–62 (2016) (discussing recognition and enforcement of rights to education).

31. See Robinson, *The High Cost of Education Federalism*, *supra* note 5, at 315 (discussing the Florida, Illinois, Michigan, and Rhode Island courts' reactions); Lawson, *supra* note 18, at 314 n.166 (citing the Louisiana and Pennsylvania courts' reactions); see *infra* Part III(A)(2) (discussing the Michigan court's reactions in *Milliken v. Green (Governor I)*, 203 N.W.2d 457

That said, scholars are increasingly coming to understand that the impact of these state-level decisions can be far reaching. In 2016, University of California-Berkley and Northwestern University economists Julien Lafortune, Jesse Rothstein, and Diane Whitmore Schanzenbach concluded:

[W]e find that reform events—court orders and legislative reforms—lead to sharp, immediate, and sustained increases in mean school spending and in relative spending in low-income school districts. Using representative samples from the National Assessment of Educational Progress, we also find that reforms cause gradual increases in the relative achievement of students in low-income school districts, consistent with the goal of improving educational opportunity for these students. . . . *Finance reforms are arguably the most important policy for promoting equality of educational opportunity since the turn away from school desegregation in the 1980s.*³²

Two years earlier, in 2014, economists C. Kirabo Jackson, Rucker Johnson, and graduate student Claudia Persico, also from Northwestern University and the University of California-Berkley, similarly determined:

Consistent with prior research, we find that *court-mandated reforms were effective at reducing spending inequality* between high- and low-income districts within a state and that this was achieved by increasing spending for the lowest-income districts. . . . Looking to legislative reforms, our findings differ from many others in that we find that *legislative reforms were somewhat effective at reducing spending gaps*. . . . Event-study and instrumental variable models reveal that a 20 percent increase in per-pupil spending each year for all 12 years of public school for children from poor families [born between 1955 and 1985] leads to about 0.9 more completed years of education, 25 percent higher earnings, and a 20 percentage-point reduction in the annual incidence of adult poverty; we find no effects for children from non-poor families. *The magnitudes of these effects are sufficiently large to eliminate between two-thirds and*

(Mich. 1972), *vacated*, 212 N.W.2d 711 (Mich. 1973), and *Milliken v. Bradley*, 418 U.S. 717 (1974)).

32. Julien Lafortune, Jesse Rothstein & Diane Whitmore Schanzenbach, *School Finance Reform and the Distribution of Student Achievement* 1, 3 (Northwestern Inst. for Policy Research, Working Paper No. WP-16-04, 2016), <https://www.ipr.northwestern.edu/publications/docs/workingpapers/2016/WP-16-04.pdf> (emphasis added).

*all of the gaps in these adult outcomes between those raised in poor families and those raised in non-poor families.*³³

These findings are consistent with earlier work and analysis by leading school finance expert Michael Rebell and others concluding that: first, decisions by courts and legislatures are critically important in equalizing school funding, and second, that school funding increases are especially significant if education is to be anything close to a great equalizer.³⁴ Ideally, state legislatures would fund schools at a level that is both adequate and equitable, but in at least thirty states, total funding for public schools was less in FY 2014 than prior to the recession in FY 2008.³⁵ Furthermore, a 2016 report by the Education Law Center documents that states continue to vary radically in their level of funding fairness within the state.³⁶

For most of the past fifty years, state courts have been the place to challenge these legislative decisions that have contributed to educational disparities, but that does not mean this option remains even as modestly effective as it has been in the past. Indeed, every state has a constitutional provision guaranteeing some sort of right to free public elementary and secondary education. However, in law professor Derek Black's words:

Since the recession, courts have rejected school funding and quality challenges at a far higher rate [than they had previously]. Even in those instances in which plaintiffs have won since the recession, legislatures have simply defied the courts, refusing to comply with judicial remedies. Thus, even when

33. C. Kirabo Jackson, Rucker Johnson & Claudia Persico, *The Effect of School Finance Reforms on the Distribution of Spending, Academic Achievement, and Adult Outcomes* i, 43 (Nat'l Bureau of Econ. Research Working Paper No. 20118, 2014), <http://www.nber.org/papers/w20118.pdf> (emphasis added).

34. See generally BRUCE BAKER, ALBERT SHANKER INST., DOES MONEY MATTER IN EDUCATION? 3–6 (2d ed. 2016), http://www.shankerinstitute.org/sites/shanker/files/moneymatters_edition2.pdf; REBELL, *supra* note 1; Rob Greenwald et al., *The Effect of School Resources on Student Achievement*, 66 REV. EDUC. RES. 361, 362, 368 (1996); Robinson, *The High Cost of Education Federalism*, *supra* note 5, at 317–18 (summarizing research).

35. MICHAEL LEACHMAN ET AL., CTR. ON BUDGET POLICY AND PRIORITIES, MOST STATES HAVE CUT SCHOOL FUNDING, AND SOME CONTINUE CUTTING 1 (2016), <https://www.cbpp.org/research/state-budget-and-tax/most-states-have-cut-school-funding-and-some-continue-cutting>.

36. BRUCE BAKER ET AL., RUTGERS EDUC. LAW CTR., IS SCHOOL FUNDING FAIR? A NATIONAL REPORT CARD 2–11 (5th ed. 2016), <https://drive.google.com/file/d/0BxtYmwryVI00WGEXT3EtVGhDclE/view>; see also Robinson, *The High Cost of Education Federalism*, *supra* note 5, at 320 (discussing the 2012 report).

plaintiffs have received favorable judicial opinions, they have struggled to secure victory outside court.³⁷

Since 2016 when Black's article was published, the Kansas Supreme Court struck down the legislature's public education finance scheme, and the Kansas decision may fit within the trend Black identifies.³⁸ Thus, it is not only state legislatures but also state courts across the country that appear to be increasingly amenable to a skin-and-bones night watchman state in public education.³⁹ It is exactly that sort of minimal government that can exacerbate inequality in countless ways.

Although this is a new dynamic in many states, at least one state—Michigan—has a longer history of judicial abdication dovetailing with legislative inertia and executive inaction regarding school funding and educational quality. The result, as Education Trust reported in 2016, is a “systemic failure . . . [in which] Michigan ranks an abysmal 42nd of 47 states in the fairness of its funding system.”⁴⁰ Furthermore, student achievement in Michigan, regardless of race, ethnicity, poverty and wealth, “in early reading and middle school math [is] not keeping up with the rest of the U.S., much less . . . international competitors.”⁴¹ It is tempting to view the situation in Michigan as idiosyncratic, but doing so would be a mistake. Rather, we should view Michigan as the canary in the coal mine showing us how far a state judiciary can go to avoid engaging the merits of educational quality claims and what can happen when all three branches of government endorse or acquiesce in the “new minimal state”⁴² approach to public education.

37. Black, *Averting Educational Crisis*, *supra* note 30, at 427; *see also* Madeline Davis, Comment, *Off the Constitutional Map: Breaking the Endless Cycle of School Finance Litigation*, 2016 B.Y.U. EDUC. & L.J. 117, 118 (2016) (referencing the fact that there is a tension between the courts and the legislature, with the legislature failing to follow through with court orders).

38. Black, *Averting Educational Crisis*, *supra* note 30, at 456–57; *see also* Rebell, *supra* note 29, at 1500–05. For more on the epic school finance litigation battle in Kansas, *see* Richard E. Levy, *Gunfight at the K-12 Corral: Legislative vs. Judicial Power in the Kansas School Finance Litigation*, 54 U. KAN. L. REV. 1021 (2006).

39. *See* Michelle Wilde Anderson, *The New Minimal Cities*, 123 YALE L.J. 1118, 1181 (2014). Kansas may continue to be an interesting exception. *See, e.g.*, Hunter Woodall, *Finance Legislation Passes, Keeping Kansas Schools Open*, KANSAS CITY STAR (June 24, 2016, 11:30 AM), <http://www.kansascity.com/news/state/kansas/article85773397.html>.

40. AMBER ARELLANO, SUNEET BEDI AND TERRY GALLAGHER, EDUC. TRUST-MIDWEST, MICHIGAN'S TALENT CRISIS: THE ECONOMIC CASE FOR REBUILDING MICHIGAN'S BROKEN PUBLIC EDUCATION SYSTEM 8, 21 (2016), https://midwest.edtrust.org/wp-content/uploads/sites/2/2013/10/MIAchieves2016_5-15-16WEB.pdf.

41. *Id.* at 4 (citations omitted).

42. Anderson, *supra* note 39.

C. Liberty and Equality in Education

Liberty and equality are complex concepts with multiple meanings. Countless scholars have written about both ideas, stretching back to Plato and Aristotle.⁴³ The goal of this subsection is to provide a brief overview of both concepts and to connect them to education reform litigation. Like the concept of education federalism and the ideas of constricting state resources and importance of school finance reform and litigation, liberty and equality form part of the conceptual foundation of this Article and, accordingly, are themes that run throughout it.

At a general level, liberty is commonly understood to mean “freedom from coercion.”⁴⁴ It has both negative aspects (freedom from) and positive aspects (freedom to). In the context of education law, students’ First Amendment free speech rights are a classic example of negative liberty claims—individual speakers have freedom from interference by the school when they seek to express their ideas, although the freedom is not without limitation.⁴⁵ Positive aspects of liberty claims, on the other hand, focus on an individual’s freedom to make meaningful choices about his or her own life—importantly, this is not merely freedom in a formal sense (what the rules say) but also freedom in a substantive sense (what a person’s actual options are in significant situations).⁴⁶ In this respect, an affirmative right to a quality education, for example, is grounded in the idea of liberty because its goal is to empower a person to have meaningful choices about the direction of his or her life. At the state level, language in each state’s constitution creates a right to education and thus theoretically establishes this individual liberty. In the absence of explicit constitutional language about education at the federal level, positive liberty presents itself as an implied fundamental right derived from explicit fundamental rights and also via substantive due process.

Equality is no less complicated than liberty. At its core, it focuses on sameness, but sameness of what—of inputs or outcomes? Should

43. See, e.g., Isaiah Berlin, *Two Concepts of Liberty* in *FOUR ESSAYS ON LIBERTY* 118, 121 (Oxford Univ. Press, 1969) (discussing the many interpretations of the concepts of freedom and liberty); Marjorie E. Kornhauser, *Equality, Liberty, and a Fair Income Tax*, 23 *FORDHAM URB. L.J.* 607, 629–37 (1996) (explaining American conceptions of liberty and equality).

44. Kornhauser, *supra* note 43, at 629.

45. See, e.g., *Morse v. Frederick*, 551 U.S. 393 (2007); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

46. See Kornhauser, *supra* note 43, at 630–31; see also Berlin, *supra* note 43, at 131–34 (explaining the notion of positive freedom).

shares be distributed per capita or proportionally and if proportional then based on what criteria or principles? Should this be measured at the level of the individual or a group?⁴⁷ In the context of educational rights, equality claims have presented themselves most often in the context of racial and ethnic discrimination claims in federal courts, and school funding disparity and insufficiency claims in state courts. In both of these areas of litigation, the focus has been on treating groups the same rather than individuals. In school desegregation, the question has been whether some children were provided different educational opportunities based on their race or ethnicity and, if so, whether such a distinction survived strict scrutiny.⁴⁸ In school finance, the cases in the 1970s began by focusing on equality of inputs in districts within the same state and evolved to a more nuanced approach of also considering whether the funding enabled districts to provide a constitutionally adequate level of education.⁴⁹ Thus, at a very general level, school funding cases have focused both on school-level inputs and outcomes, with the connection to student-level outcomes more attenuated.

These days, liberty and equality claims are often viewed as conflicting, although the extent of a conflict is in part dependent on how one defines both liberty and equality.⁵⁰ In the context of public education, though, liberty and equality are not assumed to conflict as much as they simply seem unrelated. However, when we present the question of the concepts' relationship in the context of

47. Kornhauser, *supra* note 43, at 632 ("Equality has a multitude of meanings including equality of opportunity, of results, of resources, of needs satisfaction, of utility; individual or group equality."). See generally ARISTOTLE, *THE POLITICS* bk. 3, ch. 3 (T.A. Sinclair trans., Penguin Books 1981); PLATO, *THE LAWS OF PLATO*, bk. 6, ch. 757 (Thomas L. Pangle trans., 1980); Ronald Dworkin, *What is Equality? Part 1*, 10 PHIL. & PUB. AFF. 185 (1981); Ronald Dworkin, *What is Equality? Part 2: Equality of Resources*, 10 PHIL. & PUB. AFF., 283 (1981); Ronald Dworkin, *What is Equality? Part 3: The Place of Liberty*, 73 IOWA L. REV. 1 (1987); Ronald Dworkin, *What is Equality? Part 4: Political Equality*, 22 U.S.F. L. REV. 1 (1987).

48. For an overview of some of the most significant school desegregation and integration cases, see *THE PURSUIT OF RACIAL AND ETHNIC EQUALITY IN AMERICAN PUBLIC SCHOOLS: Mendez, Brown, and Beyond* (Kristi L. Bowman ed., 2015).

49. Kristi L. Bowman, *A New Strategy for Pursuing Racial and Ethnic Equality in Public Schools*, 1 DUKE F. FOR L. & SOC. CHANGE 47, 57–58 (2009) (describing the various waves of reform in school finance legislation).

50. See, e.g., Arthur Ripstein, *Liberty and Equality*, in RONALD DWORKIN 82 (Arthur Ripstein ed., 2007); Danielle Allen, *Liberty, Equality Aren't Mutually Exclusive*, WASH. POST (Oct. 17, 2014), https://www.washingtonpost.com/opinions/liberty-equality-arent-mutually-exclusive/2014/10/17/d9df36ba-55fb-11e4-809b-8cc0a295c773_story.html?utm_term=.76a98b140213.

educational quality, the connection and indeed the mutually reinforcing nature of the relationship both become clear.⁵¹ Each student must receive an education of a certain level of quality if she or he is to be able to exercise his or her constitutional rights and to have the real (not merely theoretical) freedom to make choices about the direction of her or his life.⁵² Educational quality often varies radically between neighboring school districts. While this is due in part to factors external to the school system, there is no doubt that substantial disparities exist when one compares neighboring districts' resources and educational quality.⁵³ That conclusion is the natural result of considering equality on a per-capita basis, but disparities are even greater if one considers equality on a needs basis (which, in fact, is how cost studies are done across the nation when assessing the sufficiency of school funding).⁵⁴ Finally, it bears noting that the boundaries dividing neighboring districts such as Detroit and Grosse Pointe, Michigan, for example, are lines of demarcation on the basis of wealth and also race and ethnicity, although school districts are not legally liable for *de facto* school segregation caused by residential racial and ethnic isolation within their boundaries or for racial or ethnic isolation across district lines.⁵⁵

51. See, e.g., Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 749 n.14 (2011) (chronicling many of the key articles discussing the relationship between liberty and equality).

52. See generally AMY GUTMANN, *DEMOCRATIC EDUCATION* (1987).

53. See, e.g., Cory Turner, *The 50 Most Segregating School Borders in America*, NAT'L PUB. RADIO: EDUC. (Aug. 23, 2016, 6:17 AM), <http://www.npr.org/sections/ed/2016/08/23/490513305/the-50-most-segregating-school-borders-in-america> (discussing the difference between the Detroit and Grosse Pointe School Districts in Michigan); Cory Turner, *Why America's Public Schools Have a Money Problem*, NAT'L PUB. RADIO MORNING EDITION (Apr. 18, 2016, 5:00 AM), <http://www.npr.org/2016/04/18/474256366/why-americas-schools-have-a-money-problem> (discussing the difference between Chicago and its suburbs); see also EdBUILD, <https://edbuild.org/> (last visited Oct. 5, 2017) (a nonprofit organization dedicated to more equitable school funding with several interactive features on its website).

54. A recent costing-out study was performed for Michigan public schools. AUGENBLICK, PALAICH & ASSOCIATES, *MICHIGAN EDUCATION FINANCE STUDY* (2016), https://www.michigan.gov/documents/budget/Michigan_Education_Finance_Study_527806_7.pdf. Regarding weighting the funding, the study notes "[t]he study team recommends that funding from state and local sources be available for at-risk and ELL students equivalent to weights of 0.30 for at-risk students and 0.40 for ELL students." *Id.* at xi.

55. See, e.g., Charles Clotfelter, Milliken and the Prospects for Racial Diversity in U.S. Public Schools, in *THE PURSUIT OF RACIAL AND ETHNIC EQUALITY IN AMERICAN PUBLIC SCHOOLS*, *supra*, note 48; Barbara Shircliffe, *The Racialization of Space in Urban America*, H-NET REVIEWS (2004), <https://www.h-net.org/reviews/showpdf.php?id=9951> (reviewing KEVIN FOX GOTHAM, *RACE, REAL ESTATE, AND UNEVEN DEVELOPMENT: THE KANSAS CITY EXPERIENCE* (2002)); Turner, *The 50 Most Segregating School Borders in America*, *supra* note 53.

II. THE ROTTING FLOOR OF EDUCATIONAL QUALITY

The model of federalism employed in K–12 education, dual federalism, gives substantial deference to state-level legislative, executive, and judicial decisions—especially regarding educational quality and school funding. Under this approach, variation among states is not only expected but, in fact, is encouraged. The underbelly of this deference and variation is that the proverbial floor of educational quality is uneven between states. Furthermore, we often seem to assume that although educational disparities exist among districts and states, the gaps have become smaller over time and in general the system of checks and balances at the state level is working as it should.⁵⁶ Unfortunately, this is not the case. In some states, school finance reforms have not gained traction in any branch of state government and, in fact, may be in retrograde. Layer on top of this the disconnect between educational liberty claims and educational equality claims, and it should be no surprise that the evenness and stability of the floor of educational quality across the country have been seriously overestimated.

As law professor Kimberly Jenkins Robinson writes, the costs of a lack of quality are enormous, not only to those individuals who are denied an adequate education, but also to the broader society of which they are a part:

[I]ncreasing the high school graduation rate could save the nation between \$7.9 and \$10.8 billion annually in food stamps, housing assistance and welfare assistance. The nation forfeits \$156 billion in income and tax revenues during the life span of each annual cohort of students who do not graduate from high school. This cohort also costs the public \$23 billion in health care costs and \$110 billion in diminished health quality and longevity. By increasing the high school graduation rate by one percent for men aged twenty to sixty, the nation could save \$1.4 billion each year from reduced criminal behavior. Given this research, ineffective schools inflict high costs upon the nation—costs that it cannot afford as it wrestles with predicted long-term growth in the deficit and significant, yet declining, unemployment.⁵⁷

To illustrate both how and why these results can occur, this section discusses the national context and trends in school finance

56. See, e.g., Lawson, *supra* note 18.

57. Robinson, *Disrupting Education Federalism*, *supra* note 5, at 974 (citations omitted).

while also providing depth by analyzing the situation in Michigan as an example of the danger of the current model of education federalism. The section begins with a brief discussion of states' constitutional provisions regarding education and related litigation, including an unusual case in which the Michigan Supreme Court issued two decisions in rapid order—the second reversing the first soon after an election changed the membership of the court. Then, this section turns to school finance schemes, comparing and contrasting the approach that has been in place in Michigan for the past two decades with the approaches taken in other states. This discussion also includes an analysis of some of the inequities that can come to pass when school finance interacts with other state education policies, including school choice. Finally, this section analyzes unique education reform litigation that emerged as an alternative, but still ultimately unsuccessful, way to conceive of a right to education in state court, Michigan's 2012–15 “right to read” lawsuit.

This Section thus demonstrates the effects of constricting resources and provides an example of the way in which liberty and equality claims form a double helix in education reform litigation. Ultimately, the situation in Michigan—and its proximity to or foreshadowing of the situation in other states—makes the case that education federalism has failed to produce widespread educational quality, and that a greater federal role is necessary.

A. *Judicial Abdication and Executive Politics*

In the vast majority of the forty-four states where school finance litigation has taken place, courts have genuinely grappled with the issues raised by the plaintiffs. In about a half-dozen states, however, courts have declined to review legislative decisions about school finance—and these states' constitutional language about education varies substantially. The express reasons why state courts go to great lengths to avoid school finance issues likely vary significantly from one state to another and the implicit, political reasons may be even more state-specific than that.⁵⁸

58. See Bauries, *Is There an Elephant in the Room?*, *supra* note 30 (discussing the variations of state constitutional provisions in terms of separation of powers and how that impacts state courts decisions in educational adequacy cases); Lawson, *supra* note 18, at 314 n.166 (providing other examples of the variety of approaches state courts take when interpreting constitutional provisions); Robinson, *The High Cost of Education Federalism*, *supra* note 5, at 315 (“[M]any plaintiffs have found the state courthouse doors closed to them by courts who

To demonstrate the complex interaction of the express and implicit reasons that lead a state to abdicate its responsibility to fund schools fairly, this section analyzes the course of events in Michigan in the context of national trends. After discussing the relevant constitutional language in Michigan, this Article analyzes the litigation that followed, focusing in Michigan on the *Governor* litigation in the early 1970s.⁵⁹ The conventional wisdom that Michigan's right to education is a mere access right is, first, built on a very shaky foundation and, second, the result of judicial abdication and executive politics. Unfortunately for the children of Michigan, without access to federal courts or support from the federal legislative or executive branch, the conventional wisdom has become the reality.

1. State Constitutional Provisions

The 1950s and 60s were a time of significant cultural and legal change in the United States, and education reform was a key aspect of the change. At the national level, the Civil Rights Movement gained momentum, the Supreme Court decided *Brown v. Board of Education* in 1954, and southern legislators' resistance throughout the Southern Manifesto and citizens' resistance through violence and other means echoed throughout the country.⁶⁰ At the state level, during the 1950s and 60s (and a few years on either side of these decades), a full quarter of the states revised their state constitutions.⁶¹ Michigan was one of these states, enacting its current constitution in 1963.

As in many states, the history of education rights in Michigan is a long one. Interestingly, federal support for public education in Michigan predates even statehood—it can be traced back to the Confederation Congress's Northwest Ordinance of 1787, which also applied to land that would become Ohio, Indiana, Illinois, Wisconsin, and Minnesota.⁶² Building on the foundation of the Northwest

viewed the determination of school finance systems to be the sole discretion of state legislatures.”).

59. The term “*Governor* litigation” refers to two decisions by the Michigan Supreme Court in the important school finance litigation case involving Michigan Governor William Milliken: *Milliken v. Green (Governor I)*, 203 N.W.2d 457 (Mich. 1972), *vacated*, 212 N.W.2d 711 (Mich. 1973), and *Milliken v. Green (Governor II)*, 212 N.W.2d 711 (Mich. 1973).

60. See generally THE PURSUIT OF RACIAL AND ETHNIC EQUALITY IN AMERICAN PUBLIC SCHOOLS, *supra* note 48, at 57–170.

61. Citizens Research Council of Mich., *A Brief Michigan Constitutional History*, CRC MEMORANDUM, Jan. 2015, at 1, <http://crcmich.org/PUBLICAT/2010s/2010/rpt36002.pdf>.

62. An Ordinance for the Government of the Territory of the United States, North-West of the River Ohio, art. 3 (July 13, 1787) (“Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education

Ordinance, when Michigan became a state in 1837, its admission to the union was conditioned on reserving land for public elementary and secondary schools as well as universities.⁶³ In fact, between the 1803 admission of Ohio and the 1959 admission of Alaska, the federal land grant program created dedicated space for public elementary and secondary schools in nearly all of the thirty-two states that joined the Union during that time.⁶⁴

This history underscores federal support for public education and forms part of the context for states' constitutional language regarding public schools. Again like many states, Michigan's earlier constitutions (those enacted in 1835, 1850, and 1908) all provided for a system of public elementary and secondary schools.⁶⁵ In 1963, Michigan voters approved the state's current constitution, including more extensive provisions regarding education.⁶⁶ These

shall forever be encouraged."); *Milliken v. Green (Governor I)*, 203 N.W. 2d 457, 477 (Mich. 1972) (Brennan, J., dissenting), *vacated*, 212 N.W.2d 711 (Mich. 1973).

63. *Johnson I*, 203 N.W.2d at 477 (Brennan, J., dissenting). As a condition of becoming a state, Congress required Michigan to assent to some requirements including "[t]hat section numbered sixteen in every township of the public lands, and where such section has been sold or otherwise disposed of, other lands equivalent thereto, and as contiguous as may be, shall be granted to the State for the use of schools." Act of June 23, 1836, ch. 121, 5 Stat. 59; Assent of the State of Michigan to the Act of Congress of June 15, 1836, 1837 Mich. Rev. Stat. 31.

64. See CTR. ON EDUC. POLICY, PUBLIC SCHOOLS AND THE ORIGINAL FEDERAL LAND GRANT PROGRAM, 21–26 (2011), <http://files.eric.ed.gov/fulltext/ED518388.pdf> (showing each state's entry into the Union and how it was granted land for education).

65. MICH. CONST. of 1908, art. X, § 23; MICH. CONST. of 1850, art. XIII, § 3; MICH. CONST. of 1835, art. X, §§ 2–3; *Johnson I*, 203 N.W.2d at 477–78 (Brennan, J., dissenting).

66. Article VIII of the 1963 Michigan Constitution is devoted entirely to education. The latter sections of the article focus on higher education, but the first two sections pertain to elementary and secondary education. MICH. CONST. art. VIII. The provisions read:

§ 1 Encouragement of education.

Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.

§ 2 Free public elementary and secondary schools; discrimination.

The legislature shall maintain and support a system of free public elementary and secondary schools as defined by law. Every school district shall provide for the education of its pupils without discrimination as to religion, creed, race, color or national origin.

No public monies or property shall be appropriated or paid or any public credit utilized, by the legislature or any other political subdivision or agency of the state directly or indirectly to aid or maintain any private, denominational or other nonpublic, pre-elementary, elementary, or secondary school. No payment, credit, tax benefit, exemption or deductions, tuition voucher, subsidy, grant or loan of public monies or property shall be provided, directly or indirectly, to support the attendance of any student or the employment of any person at any such nonpublic school or at any location or institution where instruction is offered in whole or in part to such nonpublic school students. The legislature may provide for the transportation of students to and from any school.

provisions contain purposive language and, arguably, due to a greater level of detail than in other aspects of the constitution, also establish education as a high priority for the state. Eight other state supreme courts have concluded that state constitutional language identical or very similar to Michigan's creates substantive educational rights,⁶⁷ despite the lack of an explicit quality provision.⁶⁸

If one accepts a preference for determining the contours of a right to education at the state level, one must accept radically different state supreme courts' interpretations of often very similar provisions about education. Some variation is of course a natural result of differences among states, and indeed it is not reasonable to expect entirely consistent results. However, it is deeply problematic if one state's interpretation is so far out of line when compared its sister states that the renegade state's approach can be classified as judicial abdication.⁶⁹

2. School Finance Litigation: One Step Forward, Two Steps Back

Following the adoption of Michigan's current state constitution in 1963, education reform litigation in Michigan reflected movement on the national scene. The federal Civil Rights Act of 1964 and the Elementary and Secondary Education Act of 1965 opened the door for the federal government to compel school desegregation, and by the late 1960s school desegregation was picking up speed.⁷⁰ Yet school finance litigation lagged behind.

In the late 1960s and early 1970s, school finance litigation was in its infancy. By 1972, courts across the country had issued decisions

Id.

67. Lake View Sch. Dist. No. 25 v. Huckabee, 91 S.W.3d 472 (Ark. 2002); Rose v. Council for Better Ed., Inc., 790 S.W.2d 186 (Ky. 1989); Claremont Sch. Dist. v. Governor, 703 A.2d 1353 (N.H. 1997); Campaign for Fiscal Equity, Inc. v. State, 655 N.E.2d 661 (N.Y. 1995); Abbeville Co. Sch. Dist. v. State, 515 S.E.2d 535 (S. Car. 1999); Tenn. Small Sch. Sys. v. McWherter, 851 S.W.2d 139, 150–51 (Tenn., 1993); Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71 (Wash. 1978); Pauley v. Kelly, 255 S.E.2d 859 (W. Va. 1979).

68. LM v. State, 862 N.W.2d 246, 267–69 (Mich. Ct. App. 2014) (Shapiro, J. dissenting), cert. denied, 869 N.W.2d 273 (Mich. 2015). Constitutional law scholar William Thro classifies Michigan's education provisions as robust. William E. Thro, *A New Approach to State Constitutional Analysis in School Finance Litigation*, 14 J.L. & POL. 525, 539–40, 540 n.39 (1998). Scott Bauries has determined that constitutional text is not correlated with educational adequacy claims. Bauries, *Is There an Elephant in the Room?* *supra* note 31, at 746.

69. See Thro, *supra* note 68, at 529–32.

70. Gary Orfield, *Education and Civil Rights: Lessons of Six Decades and Challenges of a Changed Society*, in THE PURSUIT OF RACIAL AND ETHNIC EQUALITY IN AMERICAN PUBLIC SCHOOLS, *supra*, note 48.

in only ten school finance cases.⁷¹ The first decision was issued in 1968 in Illinois,⁷² and what would become the famous *Rodriguez v. San Antonio Independent School District* litigation was on its way from Texas to the U.S. Supreme Court.⁷³ In Michigan, Governor William Milliken and Attorney General Frank Kelley were inspired by school finance plaintiffs' 1971 watershed victory via the California Supreme Court's *Serrano v. Priest* decision and intrigued by the political popularity of school finance reform efforts.⁷⁴ Together, Milliken and Kelley designed a plan in which the Michigan Attorney General would sue the state treasurer and a group of wealthy school districts on behalf of both of their offices. In the words of Elwood Hain, a law professor who was co-counsel for intervenors in the Michigan case *Milliken v. Green* (the *Governor I* litigation),⁷⁵ the case was "built upside down" because "[t]he two plaintiffs logically should have been defendants."⁷⁶ Furthermore, as Hain argued convincingly, both plaintiffs' standing to bring suit was "tenuous."⁷⁷

Nevertheless, the case moved forward with astonishing speed and the Michigan Supreme Court entered the realm of education reform litigation on December 29, 1972 when it struck down the school finance system that had been in place when the litigation began.⁷⁸ Although *Governor I* was a very early decision in this type of institutional reform litigation, the facts in the Michigan case told a now-familiar story that has since been echoed in school finance cases all across the country. The *Governor I* majority summarized the disparities in Michigan school districts:

[A]mong approximately one eighth of Michigan School districts, the 48 richest districts had at least 4 times or more the property tax ability to support their students as 32 of the

71. See e.g. *Milliken v. Green* (*Governor I*), 203 N.W. 2d 457, 476, 476 n.1 (Brennan, J., dissenting) (Mich. 1972) (listing similar actions in other state courts), *vacated*, 212 N.W.2d 711 (Mich. 1973). This decision is known as "*Governor I*" and the subsequent decision vacating it is known as "*Governor II*," in contrast to the well-known school desegregation litigation proceeding at the same time and also bearing Governor Milliken's name, *Milliken v. Bradley*, 418 U.S. 717 (1974). See *LM v. State*, 862 N.W.2d 246, 261 n.11 (Mich. Ct. App. 2014) (using the case names "*Governor I*" and "*Governor II*"), *cert. denied*, 869 N.W.2d 273 (Mich. 2015); *E. Jackson Pub. Sch. v. State*, 348 N.W.2d 303, 304-05 (Mich. Ct. App. 1984) (same).

72. *McInnis v. Shapiro*, 293 F. Supp. 327 (N.D. Ill. 1968); *Id.* at 484-85.

73. 337 F. Supp. 280 (W.D. Tex. 1971), *rev'd*, 411 U.S. 1 (1973); *Governor I*, 203 N.W.2d at 476, 476 n.2 (Brennan, J., dissenting).

74. 487 P.2d 1241 (Cal. 1971); Elwood Hain, *Milliken v. Green: Breaking the Legislative Deadlock*, 38 L. & CONTEMP. PROBS. 350, 351 (1974).

75. 203 N.W.2d 457 (Mich. 1972), *vacated*, 212 N.W.2d 711 (Mich. 1973).

76. Hain, *supra* note 74, at 352.

77. *Id.*

78. 203 N.W.2d at 474.

poorest districts. . . . [A]mong approximately two-thirds of Michigan school districts serving about two-thirds of Michigan school children the property tax power favors the richer half of the districts by a ratio of at least 3 to 2. . . . [T]he inequalities between school districts in their ability to finance an education for their school children are sufficiently common and severe to conclude that even with the equalizing efforts of the Michigan school aid formula, the inherent differences in the property tax bases of the school districts prevent equal resources for the education of Michigan school children in a substantial number of school districts.⁷⁹

In *Governor I*, the court analyzed alleged violations of state and federal Equal Protection Clauses. The *Governor I* court determined, based on state constitutional language and the constitutional convention, that education was a fundamental right.⁸⁰ Combined with the wealth-based classification, recognition of education as a fundamental right triggered strict scrutiny.⁸¹ The state's compelling interest asserted in this case, as in so many other school finance cases, was local control—namely, the rate of local taxation.⁸² Because the state's annual changes to equalization funding suggested alternatives to the current system, the court determined that the current system was not the only one able to preserve the state interest of local control.⁸³ The system failed strict scrutiny, and furthermore, the court held that the “substantial inequalities” of the system would fail even under rational basis review.⁸⁴ However, the victory was short-lived.

Unlike in *Serrano* and *Rodriguez*, in *Governor I* the justices' internal decision process was significantly influenced by judicial elections. In short, correctly anticipating that the November 1972 elections

79. *Id.* at 463, 467 (majority opinion).

80. *Id.* at 469 (the Court quoted from the 1961 Michigan constitutional convention debates, summarizing the 1963 constitution's education provisions, and emphasizing the provisions' specificity in contrast to “[t]he majority of articles in the Constitution [which] are devoted to the operation of general government.”).

81. *Id.* at 469–70.

82. *Id.* at 470.

83. *Id.*

84. *Id.* at 470–71. Finally, the court noted limitations of its opinion, the most important being: absolute equality in funding is not required; local control of curricular and other decisions is unaffected by the decision; the court assumes no direct relationship between a district's property wealth and its students' educational achievement; and, flirting with mootness, only the school funding system in place when the litigation started was analyzed, not the rather different system in place when the litigation ended. *Id.* at 474. Because of this last caveat, the decision did not alter the law on the books in 1972, but it created precedent that was a substantial victory for the children of the state, nonetheless. *Id.*

had shifted the majority, the court issued its 4-3 decision in *Governor I* two days before the new justices took office.⁸⁵ The two outgoing justices were split between the majority and the dissent, but the two incoming justices both aligned with the *Governor I* dissenters.⁸⁶ In January 1973, the new court lost no time granting rehearing.⁸⁷

Roughly two months later, in March 1973, the U.S. Supreme Court decided *San Antonio Independent School District v. Rodriguez*.⁸⁸ The facts in *Rodriguez* were similar to the facts in the *Governor* litigation. Both reflected norms in school finance across the country: vast disparities in districts' taxable property values resulted in substantially different revenues among school districts in a system heavily reliant on local property taxes.⁸⁹ In *Rodriguez*, the Court applied the federal Equal Protection Clause and held that strict scrutiny was not triggered because no suspect class had been identified and students had not been completely deprived of education. Furthermore, the Court held that education was not a fundamental federal constitutional right.⁹⁰ The Court concluded that Texas's system of financing schools bore a rational relationship to the state's legitimate interest of providing all children with education while deferring to local control and thus was constitutional.⁹¹ Not surprisingly, *Rodriguez* is

85. *Id.* at 474–75 (Brennan, J. addendum). The complete story is a bit more complicated. In an addendum preceding his dissent in *Governor I*, Justice Thomas Brennan reported that after the case was argued in early June 1972, he was assigned to draft the opinion by the process of “blind rotation.” *Id.* at 475. Accordingly, he circulated a draft to his colleagues in late July 1972, eventually receiving only one draft concurrence—leaving him two votes shy of the three votes in addition to his own that he would need to secure a majority. *Id.* In November 1972, two supreme court justices were voted out of office as part of the state's regular judicial elections, although the membership of the court would not change until the new year. *Id.* (It is uncertain to what extent the *Governor* litigation influenced the election, although the elections were highly politicized—for example, one of the justices elected that year created a new political party for the sole purpose of enabling him to be a candidate in the state's partisan supreme court elections after his own party refused to nominate him. About six weeks after the election, in mid-December 1972, Justice G. Mennen Williams circulated his own draft opinion in *Governor I* with an outcome reportedly contrary to Brennan's earlier draft. *Id.* Williams' opinion secured the agreement of three of the other justices and became the opinion in *Governor I*. *Id.*; see Elizabeth Wheat & Mark S. Hurwitz, *The Politics of Judicial Selection: The Case of the Michigan Supreme Court*, JUDICATURE, Jan.–Feb. 2013, at 8 (providing the political context of the Michigan Supreme Court at the time of *Governor I*).

86. Hain, *supra* note 74, at 354.

87. *Milliken v. Green (Governor II)*, 212 N.W.2d 711, 712 (Mich. 1973) (the rehearing was granted on January 30, 1973).

88. 411 U.S. 1 (1973).

89. See Robinson, *The High Cost of Education Federalism*, *supra* note 5, at 309 (discussing *Rodriguez*).

90. See *Rodriguez*, 411 U.S. at 29–39 (Was the class indigent students? Students who are poorer than others? Students in poor districts?).

91. See *id.* at 44–55.

perhaps best known for bringing an end to school finance litigation in federal courts.⁹²

Nationally, advocates refocused on state courts and legislatures. Back in Michigan, the *Governor* litigation continued and at the end of 1973 the state Supreme Court issued its decision in *Governor II*. The entire opinion was a vague one-paragraph amended order dismissing the case and vacating *Governor I* on arguably unpersuasive procedural grounds.⁹³ The *Governor I* majority had—the *Governor II* majority concluded—“improvidently granted” Governor Milliken’s request that the litigation proceed on an expedited schedule. In other words, according to the majority in *Governor II*, their predecessors should not have heard argument in *Governor I* at all.⁹⁴

Two justices wrote a lengthy concurring opinion which supplied the only substantive discussion in the *Governor II* decision.⁹⁵ The concurrence effectively conducted a rational basis analysis,⁹⁶ assuming that the state’s constitutional obligation was to “maintain and support a system of public schools that furnishes adequate educational services to all children.”⁹⁷ Foreshadowing much of the school finance litigation and related debate that would occur across the country over the following decades, the concurrence considered the relative merits of the theories presented by the parties about how to measure educational opportunity, summarizing what they viewed as the problems with each approach:

The reduction of the sum total output to the accomplishment of the pupils on a few achievement tests would be grossly unjust to both the educators and the pupils, for education must extend far beyond the limits of verbal facility or mathematical

92. See, e.g., MARK G. YUDOF ET AL., *EDUCATIONAL POLICY AND THE LAW* 813 (5th ed. 2012); Bowman, *A New Strategy for Pursuing Racial and Ethnic Equality in Public Schools*, *supra* note 49, at 57.

93. *Milliken v. Green (Governor II)*, 212 N.W.2d 711 (Mich. 1973); Hain, *supra* note 74, at 359.

94. See Hain, *supra* note 74, at 359.

95. *Governor II*, 212 N.W.2d at 711–21 (Kavanagh and Levin JJ., concurring). In *Governor I*, Kavanagh dissented from the Williams majority, *Milliken v. Green, (Governor I)* 203 N.W.2d 457, 488 (Mich. 1972) (Kavanagh, J. concurring) (concurring with dissent from Brennan, J.); Levin did not take part in deciding *Governor I* because he did not join the court until January 1973. To make it even more confusing, two justices by the name of Thomas Kavanagh simultaneously served on the Michigan Supreme Court. They were not related to each other. Thomas M. Kavanagh wrote the order in this case. Thomas G. Kavanagh co-authored the concurrence. The concurrence disposed of the federal claims on the basis of *Rodriguez. Governor II*, 212 N.W.2d at 713–14 (Kavanagh and Levin JJ., concurring).

96. The concurrence noted that the State’s Equal Protection Clause focused on prohibiting “invidious discrimination,” not on guaranteeing absolute equality. *Governor II*, 212 N.W.2d at 715 (Kavanagh and Levin JJ., concurring).

97. *Id.* at 720.

proficiency. With respect to the input received by a school, the level of taxable resources within a district is only one of the myriad inputs into an educational system.⁹⁸

Furthermore, in a passage that seemed to anticipate Michigan's recent "right to read" litigation, the concurrence stipulated:

[I]t is important to note that we are not presented with a concrete claim by either individual students or by school districts that they are suffering from particular specified educational inadequacies because of deficiencies in the school financing system. Such concrete claims, when and if raised, will stand or fall on their own merits and not on account of anything we say here.⁹⁹

Interestingly, even though the *Governor II* majority did not engage the merits of the case, Michigan courts and others, ever since, have incorrectly stated that the right to education in Michigan is not a fundamental right.¹⁰⁰

Although the *Governor* litigation pitted the executive against the legislature and judiciary, since *Governor II*, the three branches have been aligned. In the early 1980s, twenty Michigan school districts again sued the state and the Michigan Court of Appeals affirmed the trial court's grant of summary judgment for the state, holding that the question presented was essentially the same as in the *Governor* litigation.¹⁰¹ In 1985, long-serving and still-revered Michigan Attorney General Frank Kelley—who, in his official capacity, had been a plaintiff in *Governor I*—issued an Opinion Letter concluding that school districts did not need to provide alternative education for a student facing a long term suspension or expulsion because "public education is not a fundamental right under either the

98. *Id.* at 716.

99. *Id.* at 713. Reflecting on the evidence presented by the parties, the two concurring justices did find one point of commonality with the majority from *Governor I*: all agreed that the parties to the litigation had not presented evidence that financial disparities led to educational disparities. *Id.* at 719; *Governor I*, 203 N.W.2d at 473.

100. See, e.g., *LM v. State*, 862 N.W.2d 246 (Mich. Ct. App. 2014), *cert. denied*, 869 N.W.2d 273 (Mich. 2015); *E. Jackson Pub. Sch. v. State*, 348 N.W.2d 303 (Mich. Ct. App. 1984); *Sutton v. Cadillac Area Pub. Sch.*, 323 N.W.2d 582 (Mich. Ct. App. 1982). The error is not uniform; in the legislation authorizing the recent costing-out study, the legislature referred to the right to education.

101. *E. Jackson Pub. Sch.*, 348 N.W.2d at 304. Thus, noting its agreement with the two concurring justices in *Governor II*, the appellate court affirmed the grant of summary judgment in favor of the state and closed the case. *Id.* at 305–06. Additionally, the appellate court held that because school districts are "creations of the state," the districts themselves have no authority to contest the school finance framework created by state statute. *Id.* at 306–07.

United States or Michigan Constitutions.”¹⁰² The Opinion Letter significantly overstated the certainty of its conclusion, and yet that letter is part of the conventional wisdom that there is no fundamental right to education under the state constitution.

B. *Legislative Inertia and Executive Acquiescence*

In any state, the lack of a meaningful judicial remedy would be a theoretical but not practical concern if public education were delivered at an acceptable level of quality across the state; however, educational inequality and lack of quality both run rampant throughout the nation. For the past twenty years, *Education Week* has generated what it describes as an annual “report card on the state of education for the nation and states.”¹⁰³ The key criteria are K-12 achievement, school finance (both spending patterns and equity), and the positive impact of education on child and adult outcomes.¹⁰⁴ In January 2016, the nation on the whole earned a grade of C: a C- for student achievement, a C for school finance, and a C+ for positive impact.¹⁰⁵ Michigan ranked below average, earning an overall grade of C-; just 16 states ranked lower.¹⁰⁶ It earned a D on achievement; eight states ranked lower.¹⁰⁷ It earned a C on school finance; twenty-five states ranked lower and two more were excluded from the analysis.¹⁰⁸ It earned a C on positive impact; sixteen states ranked lower.

102. Mich. Att’y Gen., Opinion Letter No. 6271 (Feb. 7, 1985). To support the statement about the absence of a fundamental right to education in state law, the Opinion Letter relied on Michigan appellate courts’ then-recent decisions in *East Jackson Public Schools*, discussed above, and in *Sutton*. In *Sutton*, a state appellate court held that the state constitution’s education provision did not require districts to provide resident students with free transportation to and from school—the case did not engage fundamental finance or educational quality issues. *Sutton*, 323 N.W.2d at 583–85 (Mich. Ct. App. 1982) (quoting *Bond v. Pub. Sch. of Ann Arbor*, 178 N.W.2d 484 (Mich. 1970)). The Attorney General’s Opinion Letter does not mention the *Governor* litigation, but such an omission is in part understandable—it is not clear what one should make of the court’s cryptic one-sentence reversal of *Governor I*.

103. Press Release, Educ. Week, *Quality Counts Marks 20 Years: Report Explores New Directions in Accountability* (Jan. 26, 2016) http://www.edweek.org/media/qualitycounts2016_release.pdf.

104. *Id.*

105. *Grading Summary*, EDUC. WEEK, <http://www.edweek.org/media/grading-summary-education-week-quality-counts-2016.pdf> (last visited Oct. 5, 2017).

106. *Id.*

107. *K-12 Achievement*, EDUC. WEEK, <http://www.edweek.org/media/k12-achievement-education-week-quality-counts-2016.pdf> (last visited Oct. 5, 2017).

108. *School Finance*, EDUC. WEEK, <http://www.edweek.org/media/school-finance-education-week-quality-counts-2016.pdf> (last visited Oct. 5, 2017). Hawaii and the District of Columbia were excluded from the school finance evaluation because they are single-district

This snapshot conveys two crucial pieces of contextual information: first, many states struggle to provide a quality education, including financing their public schools at a level that is both adequate and equitable. Second, according to analysis by *Education Week*, school finance is *better* in Michigan than in many other states¹⁰⁹—which is important because this subpart discusses the web of state policies in Michigan that impact school funding and the many fiscal crises that are the natural result of those policies.

1. The Policy Web

Each state has a set of interconnected policies enacted via statutes that dictate or influence school funding. A state's school finance scheme is the most consistent piece in the web from one state to another; although states make various choices about how to fund schools and at what level, all states provide significant funding for education. Additionally, states can choose to authorize many, some, or no charter schools;¹¹⁰ to permit open enrollment across district lines or not;¹¹¹ to centralize financing of teachers' pension and legacy costs system or not;¹¹² to subsidize capital improvements or not.¹¹³ Although the contours of these policies and the relationship among them will differ significantly from one state to another, a consistent theme is that these legislative choices interact to impact the health of a state's public school system in significant ways. While remaining mindful of the national context, this subpart explores Michigan's interconnected policy choices to illustrate many of the roots of the educational crisis in Michigan and also the natural consequences of a system of unusually permissive school choice.

The first piece is the state's school finance scheme. From around the time of the *Governor* litigation in the early 1970s through the mid-1990s, Michigan had a school finance system that was heavily

jurisdictions, thus it is impossible to evaluate equity across school districts when the jurisdiction has only one school district. *Id.*

109. *Id.* (ranking Michigan twenty-fourth out of forty-nine eligible states in school finances in 2016).

110. See CRAMPTON, WOOD & THOMPSON, *supra* note 22, at 39 (defining charter schools); *Charter Schools—Does the State Have a Charter School Law?*, EDUC. COMMISSION ST. (Jan. 2016), <http://ecs.force.com/mbdata/mbquestNB2?rep=CS1501> (listing the states with charter schools and relevant state law authorizations of charter schools).

111. *Open Enrollment 50-State Report—All Data Points*, EDUC. COMMISSION ST., <http://ecs.force.com/mbdata/mbquest4e?rep=OE1605> (last updated Nov. 2016).

112. See *infra* notes 131–136.

113. See, e.g., CTR. FOR CITIES & SCH., UNIV. OF CAL. BERKELEY, *STATE FUNDING FOR K-12 SCHOOL FACILITIES: A SURVEY OF THE STATES* (2014), http://citiesandschools.berkeley.edu/reports/Vincent_2014_State_K12%20fac_funding_final.pdf.

reliant on local property taxes, so much so that Michigan's property taxes were among the highest in the nation.¹¹⁴ Michigan made national headlines when, in 1994, it enacted its current school finance system and lowered local property tax rates substantially.¹¹⁵ The new system offset school districts' reduction in local tax revenues by significantly increasing state support via the state's per-pupil foundation grant, and supplementing this with equalization funding to school districts that were especially property-poor.¹¹⁶ Soon after this modified foundation grant system was implemented in 1994, the amount of school funding received by Michigan's most property-poor districts increased noticeably.¹¹⁷ But, over time, several demographic and statutory changes combined to complicate this school finance system, creating direct and substantial fiscal hardship for districts across the state and contributing to a decline in the quality of education provided to the many children who live and attend school in those districts.¹¹⁸

The second piece of the web is state law regarding school choice. Between 2002–03 and 2012–13, enrollment in Michigan's traditional public schools dropped by more than 13%.¹¹⁹ In part this is due to a decline in the state's school-age population, some of which is because Michigan, a former titan of industry, has been in an economic nose dive and was the only state in the nation with a smaller population in 2010 than in 2000.¹²⁰ However, the other key variable is that Michigan has some of the most permissive school choice statutes in the country, an approach that Secretary of Education Betsy

114. William Celis III, *Michigan Votes for Revolution in Financing Its Public Schools*, N.Y. TIMES (Mar. 17, 1994), <http://www.nytimes.com/1994/03/17/us/michigan-votes-for-revolution-in-financing-its-public-schools.html>. Not surprisingly, this caused significant dissatisfaction among property-owning taxpayers and eventually prompted legislative reform. See DAVID ARSEN & DAVID N. PLANCK, EDUC. POLICY CTR. AT MICH. STATE UNIV., MICHIGAN SCHOOL FINANCE UNDER PROPOSAL A: STATE CONTROL, LOCAL CONSEQUENCES 3–5 (2003), http://education.msu.edu/epc/forms/Arsen_et_al_2003_Proposal_A.pdf; *id.*

115. *E.g.* Celis, *supra* note 114.

116. ARSEN & PLANCK, *supra* note 114, at 7; Marya Sieminski, *Michigan's Constitutional Protection for Education: Legal Rights or Empty Promises*, 40 WAYNE L. REV. 1309, 1314–15, 1314 n.36 (1994).

117. ARSEN & PLANCK, *supra* note 114, at 9–11; Leslie Papke, *The Effects of Changes in Michigan's School Finance System*, 36 PUB. FIN. REV. 456, 456–57 (2008).

118. See generally Papke, *supra* note 117, at 456–57.

119. An examination of the NCES data reveals the following: In the 2012–13 school year, Michigan's student enrollment was 1,555,370. In the 2002–03 school year, Michigan's total student enrollment was 1,785,160. Common Core of Data, *State Nonfiscal Public Elementary/Secondary Education Survey Data*, NAT'L CTR. FOR EDUC. STAT., <https://nces.ed.gov/ccd/stnfis.asp> (last visited Oct. 5, 2017) (comparing the total students enrolled in each school year's respective data set).

120. Matt Pearce, *Why Michigan Has Been Lurching from Crisis to Crisis*, L.A. TIMES (May 4, 2016, 3:48 PM), <http://www.latimes.com/nation/la-na-michigan-dysfunction-20160503-snap-story.html>.

DeVos, a long-time Michigan philanthropist, has supported.¹²¹ Michigan's school choice statutes enact two policies: charter schools and open enrollment.

Michigan authorized charter schools in 1994 as part of the state-wide school finance overhaul¹²² and created the state's current open enrollment policy (known as "schools of choice") in 1996.¹²³ Since that time, charter schools have grown rapidly across the country, and the growth has been especially significant in Michigan.¹²⁴ By 2015–16, Michigan's charter schools educated almost 10% of the state's children, compared to 5.1% of children nationally.¹²⁵ Additionally, in 2015 Michigan had three of the eleven school districts nationally with the highest percentage of students enrolled in charter schools.¹²⁶ Due to the lack of oversight and the permissive nature of the charter school enabling statute, many of Michigan's charters are academically quite weak. Thus a significant number of charters perform worse than the home schools the students leave to attend them.¹²⁷ Many Michiganders have taken advantage of the state's unusually permissive open-enrollment policy, as well; in 2015–16, 13% of Michigan public school students attended school in a district other than the one in which they lived.¹²⁸

As a result, enrollment levels at the district level can be quite volatile from year to year, which is troubling for a district that is

121. Allie Gross, *Betsy DeVos's Accountability Problem*, ATLANTIC (Jan. 13, 2017), <https://www.theatlantic.com/education/archive/2017/01/betsy-devos-accountability-problem/513047/>; *How Betsy DeVos and Her Money Has Shaped Education in Michigan*, MLIVE (Nov. 29, 2016), http://www.mlive.com/news/index.ssf/2016/11/how_betsy_devos_has_shaped_edu.html.

122. Dustin Dwyer, *The Day Michigan Killed Public Schools (and Then Created the System That We Have Today)*, MICH. PUB. RADIO: ST. OPPORTUNITY BLOG (June 9, 2014), <http://stateofopportunity.michiganradio.org/post/day-michigan-killed-public-schools-and-then-created-system-we-have-today>.

123. 1996 Mich. Pub. Acts 876.

124. See Black, *Averting Educational Crisis*, *supra* note 30, at 435; Julie Mack, *23% of Michigan Public School Students Opt for School Choice*, (Aug. 29, 2016, 9:11 AM), http://www.mlive.com/news/index.ssf/2016/08/charters_schools_of_choice_enr.html; Kate Zernike, *A Sea of Charter Schools in Detroit Leaves Students Adrift*, N.Y. TIMES (June 28, 2016), https://www.nytimes.com/2016/06/29/us/for-detroits-children-more-school-choice-but-not-better-schools.html?_r=0.

125. *Table 216.90 Public elementary and secondary charter schools and enrollment, by state*, NAT'L CTR. FOR EDUC. STAT. (Sept. 2015), http://nces.ed.gov/programs/digest/d15/tables/dt15_216.90.asp (September 2015); see also Zernike, *supra* note 124; Mack, *supra* note 124.

126. NAT'L ALL. FOR PUB. CHARTER SCH., *A GROWING MOVEMENT: AMERICA'S LARGEST CHARTER SCHOOL COMMUNITIES 3* (10th ed. 2015), http://www.publiccharters.org/wp-content/uploads/2015/11/enrollmentsshare_web.pdf.

127. See generally SUNIL JOY & AMBER ARELLANO, *ACCOUNTABILITY FOR ALL: 2016: THE BROKEN PROMISE OF MICHIGAN'S CHARTER SECTOR* (2016), http://3revla28wgij23c9gkypof0d-wpengine.netdna-ssl.com/wp-content/uploads/sites/2/2013/10/The-Education-Trust-Midwest-Accountability-for-All-2016_February-11-2016.pdf.

128. Mack, *supra* note 124.

losing students because school funding in Michigan is unusually centralized at the state level. When a student leaves a district, roughly \$7,500 of state per-pupil funding follows that student out of that district, and often out of the traditional public school system entirely.¹²⁹ Thus, a major drop in enrollment district-wide can trigger a sort of death spiral because school districts have substantial fixed costs and cannot simply reduce their expenditures in proportion to the number of students they lose. Yet, school districts with precipitously declining enrollments (and thus falling revenue) must close schools and cut services for the students who remain, even though doing so often encourages those students to consider leaving, as well.¹³⁰

The third piece in the web, the state teachers' pension system, is significant enough to stand alone and yet also part and parcel of the second piece. Like many states' pension systems for teachers and other public employees, Michigan's teachers' pension system is severely underfunded. The legacy costs continue to grow because the total number of retirees across the state is growing and many of them are former school district employees.¹³¹ This is even more of a challenge than in many states because of the way the pension system interacts with charter schools. Specifically, the high and growing number of employees in charter schools do not contribute to the pension system, and because of the declining enrollment in traditional public schools, the growing legacy costs are borne by a statewide public school system that is smaller and smaller.¹³²

129. David Arsen et al., *Which Districts Get into Financial Trouble and Why: Michigan's Story* 6, (Educ. Policy Ctr. at Mich. State Univ., Working Paper No. 51, 2015), <http://education.msu.edu/epc/library/papers/documents/WP51-Which-Districts-Get-Into-Financial-Trouble-Arsen.pdf> (explaining that funds move with students when they transfer to other districts and that, in 2014, the per pupil funding allowance was at or within \$500 of the minimum foundation allowance of \$7,076). Not surprisingly, the decline in student enrollment and thus the drop in per-pupil funding are not felt evenly across districts. Joshua M. Cowen, *A Look at Michigan's Schools of Choice*, GREEN & WRITE (Apr. 6, 2016), <http://edwp.educ.msu.edu/green-and-write/2016/a-look-at-michigans-schools-of-choice-what-do-we-know-and-what-do-we-need-to-learn/> (supporting the notion that enrollment levels can be volatile from year to year, negatively impacting a district's ability to plan for fixed costs); *id.*

130. Citizens Research Council of Mich., *Managing School District Finances in an Era of Declining Enrollment*, CRC MEMORANDUM, Jan. 2015, at 6, http://crcmich.org/PUBLICAT/2010s/2015/managing_school_district_finances_in_era_of_delining_enrollment-2015.pdf; Arsen et al., *supra* note 129, at 12–13, 26.

131. See RACHEL WHITE ET AL., KNOWLEDGEABLE NAVIGATION TO AVOID THE ICEBERG: CONSIDERATIONS IN PROACTIVELY ADDRESSING SCHOOL DISTRICT FISCAL STRESS IN MICHIGAN 2–6 (2015), http://msue.anr.msu.edu/uploads/236/64601/MI_School_Fiscal_Health_Indicator_System_2015-01-20.pdf (discussing fiscal problems in Michigan school districts).

132. Lauren Camera, *America's Bankrupt Schools—Pension plans could be the culprit behind broke big-city school districts*, U.S. NEWS (Mar. 18, 2016, 6:00 AM), <http://www.usnews.com/news/the-report/articles/2016-03-18/why-big-city-school-systems-are-going-broke>.

Not surprisingly, the state's increases in education funding in recent years often have been dwarfed by districts' growing mandatory contributions to the pension system (rising from 13% of employee salaries in 2004 to almost 25% in 2012¹³³). The result is a net per-pupil loss to districts when calculated in terms of classroom dollars.¹³⁴ A 2016 costing-out study determined that the base level of funding the state should provide per student is \$8,667.¹³⁵ However, in FY 2010, \$6,350 of the state of Michigan's \$7,316 foundation grant remained after districts met retirement obligations. By FY 2014, only \$5,882 of the \$7,409 foundation grant was available to districts.¹³⁶

The fourth and final major piece in this web is that, like only fourteen other states, Michigan requires that each school district fully fund capital improvements rather than the state and the local district sharing these costs.¹³⁷ The greatest facility needs are often in property-poor districts, which are often also districts that lose an unusually high portion of their students to charter schools and to other districts through the schools of choice program. This suggests limited support for a local referendum. The shrinking districts are often the least able to raise the needed funds, though they may be the ones that need to invest in facilities the most.¹³⁸

133. MICH. HOUSE FISCAL AGENCY, MICHIGAN PUBLIC SCHOOLS' EMPLOYEES RETIREMENT SYSTEM 36 (2015), http://www.house.mi.gov/hfa/PDF/Retirement/MPERS_Briefing_July_2015.pdf. A system that used to look like a triangle right side up (a limited amount of legacy costs at the top supported by a much larger base of revenue) is on its way to looking more like a triangle inverted. School districts' and the state's inability to financially grapple with these challenges, too, connect back to the precipitous decline of the manufacturing industry in Michigan. Pearce, *supra* note 120.

134. Citizens Research Council of Mich., *Making Sense of K-12 Funding*, CRC MEMORANDUM, Oct. 2014, at 5 tbl.1 (2014), <http://www.crcmich.org/PUBLICAT/2010s/2014/memo1130.pdf>; *see also* Citizens Research Council of Mich., *Detroit Public Schools' Legacy Costs and Indebtedness*, CRC MEMORANDUM, Jan. 2016, http://crcmich.org/PUBLICAT/2010s/2016/Detroit_schools_legacy_costs_indebtedness_2016.pdf.

135. Michael Addonizio & David Arsen, *Study a Step to Getting Michigan School Funding Right*, DET. FREE PRESS (July 21, 2016, 10:15 PM), <http://www.freep.com/story/opinion/contributors/2016/07/21/michigan-school-funding/87395920/>.

136. These figures account for additional state funds intended to offset the growing mandatory contributions and adjust for inflation. Citizens Research Council of Mich., *School District Fiscal Health Improves, but Some Long-Term Challenges Remain*, CRC MEMORANDUM, June 2014, at 6-7, http://crcmich.org/PUBLICAT/2010s/2014/district_fiscal_health_improves_long_term_challenges_remain-2014.pdf.

137. CTR. FOR CITIES & SCH., *supra* note 113, at 5.

138. *See, e.g.*, Sarah Dewees, *Improving Rural School Facilities for Teaching and Learning*, ERIC DIG. NO. ED438153 (1999), <http://files.eric.ed.gov/fulltext/ED438153.pdf> (discussing the connection between rural school districts' lower property values, limited ability to generate revenue, and facility needs); Beth Hawkins, *Detroit's Educational Catastrophe*, ATLANTIC (May 10, 2016), <https://www.theatlantic.com/education/archive/2016/05/detroits-school-crisis/482010/>; Arsen et al., 20-22, *supra* note 129; David Arsen & Mary Mason, *The Role of State Courts in Securing School Facility Adequacy and Equity*, (Educ. Policy Ctr. at Mich. State Univ.,

2. School Districts in Fiscal Crisis

The overlay of all of these factors on Michigan's existing school finance scheme exposed the system's flaws and pushed it to the breaking point. From FY 2011 through FY 2014, roughly fifty of Michigan's school districts were in deficit. The number was down to fourteen in June 2017,¹³⁹ but for most of the post-recession period, Michigan had the largest number of deficit districts of any state in the country including California¹⁴⁰ even though the California school system has also been in financial trouble, and California educates roughly four times as many students as Michigan (the raw number of deficit districts in California surpassed Michigan only in

Working Paper No. 31, 2010), http://education.msu.edu/epc/documents/Mason_Arsen_2010_The_Role_of_State_Courts_in_Securing_School_Facility_Adequacy_and_Equity_policy_report_31.pdf. The Fiscal Year 2017 minimum foundation grant was \$7511. STATE BUDGET OFFICE, STATE OF MICH., SCHOOL AID HIGHLIGHTS EXECUTIVE BUDGET FISCAL YEARS 2017 AND 2018 1 (2016), http://www.house.mi.gov/hfa/PDF/SchoolAid/School_Aid_Subcmte_Testimony_2-16-16_SecHighlights_fy17.pdf.

It may also be that Michigan's graying population plays a role in this, with older adults potentially less willing to vote for a local referendum and subsidize the cost of public education when their children are grown and thus their families receive no direct benefit. *Michigan Population Trends, 1990–2015*, MICH. DEPT. HEALTH & HUM. SERV., http://www.mdch.state.mi.us/pha/osr/CHI/POP/DP00_t1.asp (last updated July 19, 2016); see RACHEL WHITE ET AL., *supra* note 131, at 2–3.

139. Michigan enrolls 1.5 million children in 900 school districts (601 districts not including public school academies, or school districts). MICH. DEP'T OF EDUC., FAST FACTS 2016–2017 (2017), https://www.michigan.gov/documents/mde/MDE_Fast_Fact_379573_7.pdf. As of June 2017, fourteen school districts were in deficit; one year earlier that number was twenty-nine, two years earlier the number was forty-one, and three years earlier it was over fifty. Memorandum from Brian Whiston, State Superintendent, to the Mich. House and Senate K-12 Appropriations Comm. Attach. B (June 14, 2017), http://www.michigan.gov/documents/mde/June_2017_Quarterly_Report_577111_7.pdf; Nicquel Terry, *Mich. School District Deficit List Cut to 23*, DET. NEWS (June 19, 2016, 2:40 PM), <http://www.detroitnews.com/story/news/education/2016/06/19/michigan-school-district-deficit-list-cut/86126364/>; see also Citizens Research Council of Mich., *Managing School District Finances in an Era of Declining Enrollment*, *supra* note 130, at 3 (describing Michigan school districts' recent fiscal history).

140. California schools enroll 6.2 million children in about 1000 school districts. *California Public K-12 Graded Enrollment and High School Graduate Projections by County—2016 Series*, CAL. DEP'T FIN., http://www.dof.ca.gov/Forecasting/Demographics/Projections/Public_K-12_Graded_Enrollment/; *Fingertip Facts on Education in California*, CAL. DEP'T EDUC., <http://www.cde.ca.gov/ds/sd/cb/ceffingertipfacts.asp> (last updated Sept. 29, 2016). The state's approximately 1200 charter schools, which educate over 600,000 children, are not designated as independent school districts. CAL. DEP'T OF EDUC., QUICKQUEST, <http://dq.cde.ca.gov/dataquest/content.asp> (last visited Oct. 5, 2017) (the search must first be set to "charter schools" to view the relevant information). Forty-three of the state's districts are in or projected to be in deficit. *Second Interim Status Report, FY 2016–17*, CAL. DEP'T EDUC., <http://www.cde.ca.gov/fg/fi/ir/second1617.asp> (last updated May 25, 2017).

mid-2017).¹⁴¹ The heterogeneity of Michigan's deficit districts demonstrates that the system's flaws run deep.¹⁴² These districts are urban, suburban, and rural. They have varying levels of students with disabilities and students who are English language learners. While the deficit districts are disproportionately poor and minority, not all are so. And they range from very small districts to the state's largest and many in between.¹⁴³

Between 2009 and 2016, four school districts were taken over by emergency managers who effectively displaced the superintendent and school board.¹⁴⁴ Two districts were liquidated and their students channeled into surrounding districts (it is still not entirely clear who owns the liquidated districts' debt).¹⁴⁵ The emergency managers in Detroit's public schools were eventually phased out via a radical reconfiguration of the district inspired by private-sector bankruptcy in late 2016.¹⁴⁶ Michigan continues to try to figure out how to best assist districts in anticipating, averting, and managing

141. See Sharon Noguchi, *K-12: 'Tidal wave of Expenses' in Looming California School Budget Crisis*, MERCURY NEWS (July 6, 2017, 9:23 AM), <http://www.mercurynews.com/2017/07/02/tidal-wave-of-expenses-in-looming-california-school-budget-crisis/>.

142. In mid-2015, forty-one Michigan districts were in deficit. In December 2016, only twenty-two districts remained in deficit. Terry, *supra* note 140; Memorandum from Brian Whiston, *supra* note 140, attach. B.

143. Kristi L. Bowman, *MI School Districts in Fiscal Crisis*, Sept. 2014 (FY2014) (on file with author) (table developed from Common Core of Data 2011–12 school year, and Michigan school districts in fiscal crisis as of Sept. 2014); Memorandum from Mike Flanagan, State Superintendent, to Mich. House and Senate K-12 Appropriations Comm. (Sept. 11, 2014), https://www.michigan.gov/documents/mde/Quarterly_Deficit_District_Report_FINAL_9_11_14_468492_7.pdf.

144. See *Emergency Financial Manager/Emergency Manager Appointment History*, MICH. DEP'T TREASURY, https://www.michigan.gov/documents/treasury/EM-EFM_Appointment_History_2-12-16_514604_7.pdf (last visited Oct. 5, 2017) (providing details of emergency manager appointments in Michigan since 1990, including the Inkster, Detroit, Highland Park, and Muskegon Heights school districts); Kristi L. Bowman, *State Takeovers of School Districts and Related Litigation: Michigan as a Case Study*, 45 URB. LAW. 1, 7–8 (2013).

145. Lindsey Knake, *Gov. Snyder Signs Buena Vista, Inkster Schools Dissolution Process Into Law*, MLIVE (July 2, 2013, 5:26 PM), http://www.mlive.com/news/saginaw/index.ssf/2013/07/gov_snyder_signs_buena_vista_i.html; Jake Neher, *Buena Vista, Inkster School Districts To Be Dissolved*, MICH. RADIO (July 22, 2013), <http://michiganradio.org/post/buena-vista-inkster-school-districts-be-dissolved#stream/0>; Brian Smith, *Senate Narrowly Approves School Dissolution Bills on Buena Vista, Inkster Districts*, MLIVE (June 19, 2013, 7:10 PM), http://www.mlive.com/education/index.ssf/2013/06/senate_narrowly_approves_schoo.html.

146. Associated Press, *Rhodes Could Exit School System Post Early If Legislation Stalls*, CRAIN'S DET. BUS. (Mar. 3, 2016 12:00 PM), <http://www.crainsdetroit.com/article/20160303/NEWS/01/160309950>; Curt Guyette, *After Six Years and Four State-Appointed Managers, Detroit Public Schools' Debt Has Grown Even Deeper*, DET. METRO TIMES (Feb. 25, 2015), <http://www.metrotimes.com/detroit/after-six-years-and-four-state-appointed-managers-detroit-public-schools-debt-is-deeper-than-ever/Content?oid=2302010>; see also Kathleen Gray, *Legislature OKs \$617m Detroit Public Schools Rescue Plan*, DET. FREE PRESS (June 9, 2016, 10:33 AM), <http://www.freep.com/story/news/politics/2016/06/09/dps-package-wins-gop-support-headed-gov-snyder/85630880/>.

fiscal crises.¹⁴⁷ Not surprisingly, school districts in fiscal crisis are hardly places of educational achievement and innovation.¹⁴⁸

Although a limited amount of school districts' fiscal troubles may be due to local mismanagement or malfeasance, the fiscal crisis in these districts is largely the natural result of state policies enacted through statute and executive action.¹⁴⁹ In many states—and indeed in other states with constitutional language similar to Michigan's—plaintiffs could challenge the state action through what would likely be protracted school finance litigation.¹⁵⁰ As the recent research by economists Lafortune, Rothstein, Schanzenbach, Jackson, Johnson, and Persico demonstrates, a judicial remedy could reduce school finance inequality across the state and improve educational quality for some students.¹⁵¹ And as philosopher Anne Newman suggests, a judicial remedy coupled with community support could lead to long-lasting, positive, far-reaching change.¹⁵² But, that has not happened in Michigan because the conventional wisdom is that the right to education in the state constitution is a thin access right. Neither the legislature, executive, nor judiciary has been willing and able to create a higher floor.

In 1986, the U.S. Supreme Court noted when deciding *Papasan v. Allain* that *Rodriguez* and *Plyler* left open the question of whether there was a federal right to an education of a minimum quality.¹⁵³ If so, even a thin federal quality right would exceed the contours of the right to education, such as it is, in a state like Michigan. State law in Michigan has not established the floor that we have assumed exists. If this failure is happening in a state ranked on the low side of average by many indicators, it is troubling to think about what must be happening in states ranked even closer to the bottom.

147. See Kyle Feldscher, *Gov. Snyder Signs Early Warning Bills That Could Increase State's Role in Fixing Districts' Finances*, MLIVE (July 7, 2015, 10:46 AM), http://www.mlive.com/lansing-news/index.ssf/2015/07/gov_snyder_signs_early_financi.html. See generally WHITE ET AL., *supra* note 138.

148. Del Stover, *Take It to the Limit*, AM. SCH. BOARD J., Nov. 2007, at 33 (“Limited financial resources, coupled with the effects of poverty and high populations of limited English-proficient students, make significant academic gains challenging to any school leadership, regardless of its composition or governance structure.”).

149. Arsen et al., *supra* note 129, 24.

150. See generally *Litigation*, EDUC. FIN. STAT. CTR., <https://nces.ed.gov/edfin/litigation.asp> (last visited Aug. 16, 2017) (providing a “listing of many school finance cases with citations.”); SCHOOLFUNDING.INFO, *supra* note 27 (providing a state by state examination of education finance litigation and happenings).

151. See generally Lafortune, Rothstein & Schanzenbach, *supra* note 32; Jackson, Johnson & Persico, *supra* note 33, at 15–17.

152. See ANNE NEWMAN, *REALIZING EDUCATIONAL RIGHTS* 69–70 (2013) (describing the community reaction to *Rose v. Council for Better Ed., Inc.*, 790 S.W.2d 186 (Ky. 1989)).

153. *Papasan v. Allain*, 478 U.S. 265, 283–85 (1986); see also *Plyler v. Doe*, 457 U.S. 202, 221–23 (1982); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 36–37 (1973).

C. More Judicial Abdication

Michigan's school finance system has remained largely unchanged for the past twenty years.¹⁵⁴ This stagnation is unusual, as school funding reform efforts have remained active across the country during this time.¹⁵⁵ Although preserving the status quo may be acceptable in some states, maintaining the status quo in Michigan means preserving a broken system. In addition to the nationally record-setting number of school districts that have operated in deficit, student achievement levels and physical conditions of school buildings in many parts of Michigan are abysmal.¹⁵⁶

Because traditional school finance litigation has been unsuccessful, a few years ago the Michigan ACLU tried an innovative approach. In 2012, the organization filed suit on behalf of children in the small, high-poverty, mostly African-American school district of Highland Park, bringing claims that were grounded in both liberty and equality.¹⁵⁷ A crucial premise in the plaintiffs' amended complaint was that the state and local defendants failed to comply

154. See MICH. CONST. art. IX, § 11 (the text of proposal A was amended to the Michigan constitution in 1994 and has not been modified since); Arsen et al., *supra* note 129, at 25.

155. See, e.g., Daniel Thatcher, *School Finance Litigation Citations*, NAT'L CONF. ST. LEGISLATORS, <https://docs.google.com/spreadsheets/d/1-RSkKDG1qUOpxpZ2DoKvN-cHFKIk53LWLCgXTEpAqY/edit#gid=0> (last visited Oct. 6, 2017) (providing an online spreadsheet listing over 170 major school finance decisions from state courts the 1970s through 2017).

156. See, e.g., Julie Bosman, *Crumbling, Destitute Schools Threaten Detroit's Recovery*, N.Y. TIMES (Jan. 20, 2016), <http://www.nytimes.com/2016/01/21/us/crumbling-destitute-schools-threaten-detroits-recovery.html>; Press Release, Educ. Tr.—Midwest, *Michigan Students Fall Further Behind Nation in Early Literacy* (Oct. 28, 2015), https://midwest.edtrust.org/press_release/2015-naep-release/.

157. Amended Complaint & Petition for Writ of Mandamus, S.S. *ex rel.* LM v. State, No. 12-009231-CZ (Cir. Ct. Wayne Cty. 2013) (denying summary disposition), <https://www.clearinghouse.net/chDocs/public/ED-MI-0002-0003.pdf> [hereinafter Amended Complaint], *rev'd*, LM v. State, 862 N.W.2d 246 (Mich. Ct. App. 2014) (No. 317071, 317072, 317073, 2013 Term; renumbered No. 15680), *cert. denied*, 869 N.W.2d 273 (Mich. 2015), (Complaint was filed on May 8, 2012); see also *The Right to Read*, ACLU MICH., (Sept. 23, 2015), <http://www.aclumich.org/article/right-read>. This case is also reminiscent of unsuccessful education malpractice claims. See, e.g., *O'Brien v. Pennington Sch.*, No. 06-2101, 2008 WL 160588, at *6 (E.D. Pa., Jan. 15, 2008); Press Release, ACLU, *Highland Park Students File Class-Action "Right to Read" Lawsuit* (July 12, 2012), <https://www.aclu.org/news/highland-park-students-file-class-action-right-read-lawsuit>.

In 2012, the Highland Park district enrolled fewer than 1000 students and, as of summer 2016, enrolled just over 310. Amended Complaint, *supra* note 157, ¶ 78 (noting 973 student enrolled as of 2012); Curt Guyette, *The Disappearing District: What's Happened to Highland Park Schools?*, DET. METRO TIMES (July 6, 2016), <https://www.metrotimes.com/detroit/the-disappearing-district-shredded-democracy-lost-students-and-unanswered-debt-questions-in-highland-park/Content?oid=2453382> (saying there were 311 students in the district as of June 2016). In 2015 the district closed the high school program. Kyle Feldscher, *Highland Park Schools to No Longer Offer Classes to High School Students*, MLIVE (May 28, 2015, 7:04 PM), http://www.mlive.com/lansing-news/index.ssf/2015/05/highland_park_schools_to_no_lo.html.

with a state statute that requires “special assistance reasonably expected to enable [a] pupil to bring his or her reading skills to grade level within 12 months” when a student “does not score satisfactorily on the fourth or seventh grade reading test.”¹⁵⁸ To illustrate the reality of students reading far below grade level, the complaint quoted several named plaintiffs’ written responses when asked what they would like to tell the Governor about their school. The following statement by a seventh grader is representative:

My name is [redacted] and you can make the school gooder by getting people that will do the jod that is pay for get a football tame for the kinds mybe a baksball tamoe get a other jamtacher for the school get a lot of tacher.¹⁵⁹

As the complaint noted: “in this writing sample, [the student] spelled his own name incorrectly.”¹⁶⁰ At the time the complaint was filed, the student (then in seventh grade) read at a first-grade level. Like the other named plaintiffs, he was not hampered by a disability nor was he an English language learner.¹⁶¹ Reading significantly below grade level is not only a reading problem for this child and others across the country: it has compounding consequences because students reading below grade level are unable to absorb content across the curriculum. At the time the complaint was filed, the dropout rate in Highland Park was 23% (double the statewide rate) and of those students who did remain in school through their senior year, 90–100% failed the state’s final tests in reading, writing, math, social studies, and science.¹⁶²

158. Mich. Comp. Laws Ann. § 380.1278(8) (West Supp. 2017); *see also* Amended Complaint, *supra* note 157, ¶ 4. Because this provision implicates state and local actors, the named defendants in the litigation included the state itself, the state board of education, the state superintendent, the district’s emergency manager, the district, the new incarnation of the school district as a charter school district, and the charter school management company. Amended Complaint, *supra* note 157, ¶ 11. Plaintiffs sued the named individuals in their official capacity; they sued the state because it had consented to be sued for alleged violations of its statutes and constitution; they sued the charter operator as a Michigan LLC. *Id.* ¶ 17. This statute, plaintiffs contended, was enacted to execute the Michigan constitution’s education provisions. *Id.* ¶ 3; MICH. CONST. art. VIII, §§ 1–2.

159. Amended Complaint, *supra* note 157, ¶ 35.

160. *Id.*

161. *Id.* ¶¶ 19, 36.

162. *Id.* ¶ 82. A study in persuasive advocacy, the complaint also noted that the district rarely had enough books so that students could take home their own copy and many school buildings were so poorly heated that children wore winter coats and gloves in class. *Id.* ¶ 86. Furthermore, classrooms sometimes held more students than they had chairs, school bathrooms were “often smeared with feces, lack of toilet paper and paper towels, and missing stall doors and other features,” and the security was so poor that a homeless man lived in a school building undetected by school officials. *Id.* Additionally, roughly one-third of teachers held a

The ACLU publicized this case as being about a “right to read,” and in that way it was a relatively modest companion to education rights litigation victories across the country. The *Rose v. Council for Better Education* litigation in Kentucky, for example, resulted in establishing seven learning goals for each child.¹⁶³ The right to read lawsuit also echoed a national shift from the 1970s litigation focusing on equality in inputs towards more recent litigation examining whether schools are financed at a level that they can provide a constitutionally adequate education. In contrast to the *Governor* litigation, though, the ACLU case was not explicitly an education finance case.

Like the *Governor* litigation, the right to read case was initially successful. About one year after the case was filed, the trial court denied defendants’ motion to dismiss the state statutory and other constitutional claims, concluding that the state constitution established a duty to provide public schools at a certain level of quality.¹⁶⁴ Also like the *Governor* litigation, plaintiffs’ success did not last. In 2014, the Michigan Court of Appeals rejected all of plaintiffs’ claims.¹⁶⁵ Reflecting the complexity of education structural reform

Masters degree or higher compared to 77% in Detroit Public Schools, and students’ official records were woefully incomplete. *Id.* The complaint culminated in four causes of action and plaintiffs requested a declaratory judgment that defendants violated the statutory provision requiring special assistance to fourth and seventh grade students who were not proficient in reading. *Id.* ¶¶ 102, 116–25. Plaintiffs contended that the state and local defendants denied the students’ right under the state constitution “to a basic and adequate education affording them elemental literacy skills and knowledge appropriate to their age and development,” and that defendants violated the students’ equal protection right under the state constitution to receive educational opportunities provided to students in other districts. *Id.* ¶¶ 118–21. Plaintiffs also requested that the court order a writ of mandamus directing the defendants to provide the reading assistance required under the statute. *Id.* ¶¶ 122–25.

163. *Kentucky: Historical Background*, SCHOOLFUNDING.INFO, <http://schoolfunding.info/litigation-map/kentucky/#1484023070798-ae032cc2-e640> (last visited Oct. 5, 2017).

164. Notably, the trial court first held that although there was no express private right of action in the statute, an implied private right of action existed because the students who alleged wrongdoing are the individuals whom the statute was created to protect. *S.S. ex rel. LM v. State*, No. 12-009231-CZ (Cir. Ct. Wayne Cty. 2013), (Complaint was filed on May 8, 2012); <https://www.clearinghouse.net/chDocs/public/ED-MI-0002-0004.pdf> [hereinafter Trial Court Opinion], *rev’d*, *LM v. State*, 862 N.W.2d 246 (Mich. Ct. App. 2014) (No. 317071, 317072, 317073, 2013 Term; renumbered No. 15680), *cert. denied*, 869 N.W.2d 273 (Mich. 2015). It also held granted defendants’ motion to dismiss the equal protection claim due to lack of comparative evidence in the pleadings. *Id.* at 7–9. The trial court also found that the statutory duty and the trigger for exercising the statutory duty were sufficiently specific that they were ministerial, thus a writ of mandamus could be an appropriate remedy. *Id.* at 10–11. Additionally, the trial court determined that the Michigan emergency manager statute, which contained an immunity provision, did not shield the defendants from liability because plaintiffs did not allege a violation of that statute and, furthermore, a statute cannot immunize the state for a constitutional violation. *Id.* at 12–13.

165. *LM v. State*, 862 N.W.2d 246, 257–58 (Mich. Ct. App. 2014), *cert. denied*, 869 N.W.2d 273 (Mich. 2015).

litigation nationwide over the past half-century, the appellate judges' opinions channeled disputes about federalism, school finance, liberty, and equality that echo over decades. In some ways, the opinions seem timeless. Ultimately, the majority opined that the case was nonjusticiable despite the grievous harms to the children in the district.¹⁶⁶ The dissent began by quoting *Brown v. Board of Education's* famous statement that "education is perhaps the most important function of state and local governments" and accused the majority of judicially repealing Michigan's constitutional provisions regarding education.¹⁶⁷ While the lawsuit wound its way

166. *Id.*

While there is little genuine controversy that the district defendants have abysmally failed their pupils, the mechanism to correct this failure is not through the court system, particularly given the remedy sought by plaintiffs. The problem is multifaceted, comprised of deficiencies in the manner and type of academic instruction received, but also impacted by a variety of social and economic forces unique to the circumstances of each student. Consequently, there is no one-size-fits-all solution and the greatest impact for each student will be one that is made up of several components and addresses his or her individual needs. Such a solution is not available through judicial intervention.

Id.

The appellate majority also reiterated the conventional wisdom about the extremely limited nature of the right to education in Michigan's constitution, relying like others had done primarily on federal law and secondarily on the *Governor II* concurrence. *See id.*, at 252–53 ("[T]he Michigan Constitution require[s] only that the legislature provide for and finance a system of free public schools. [It] leaves the actual intricacies of the delivery of specific educational services to the local school districts."). The majority also held that the state defendants had no duty under the statutory provision and furthermore that the school districts were not liable for this alleged statutory violation. *See id.*, at 254–57.

The concurring opinion picked up where the majority left off, citing U.S. Supreme Court decisions for the proposition that "judges are not equipped to decide matters of educational policy," then emphasizing this point and illustrating it in detail. *Id.* at 259 (Murray, J. concurring). The concurrence also distinguished persuasive authority from other states. *See id.* at 259–60 (Murray, J., concurring).

For an explanation of how the majority and concurrence opinions echo larger, long-standing education law and policy debates, see Yudof et al., *supra* note 92, at 957–64. *See generally* GERALD ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (2d ed. 2008); *THE PURSUIT OF RACIAL AND ETHNIC EQUALITY IN AMERICAN PUBLIC SCHOOLS supra* note 48; Christine M. O'Neill, *Closing the Door on Positive Rights: State Court Use of the Political Question Doctrine to Deny Access to Educational Adequacy Claims*, 42 COLUM. J.L. & SOC. PROBS. 545 (2009).

167. *LM*, 862 N.W.2d at 262 (Shapiro, J., dissenting) (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)); *see also id.* at 263 ("While the judiciary is not suited to selecting and executing educational policy, it is suited to determining whether defendants are complying with their constitutional and statutory duties and ordering them to take timely action to do so."). The dissent offered its own robust interpretation of Michigan's constitutional provisions which it supported by summarizing state supreme court decisions in eight other states that interpreted state constitutional language similar to Michigan's and uniformly held that the language established a constitutional right to a certain minimum quality level of education. *See id.* at 264–66; *see also id.* at 267–69 (discussing decisions relating to the state constitutions and a minimum quality level of education in Arkansas, Kentucky, including the

through the courts and received national media attention,¹⁶⁸ Highland Park remained an educational wasteland.¹⁶⁹ In 2015, almost one year after the appellate decision, the Michigan Supreme Court declined to hear the appeal and the case came to a close.¹⁷⁰ That same year, students in the two Highland Park K-8 charter schools that had replaced the district's traditional public schools a few years prior demonstrated 6% and 9% proficiency in third grade Language Arts and 16% and 12% proficiency in seventh grade Language Arts.¹⁷¹

Although the right to read case did not raise school finance issues directly, it seems that even the two concurring justices in the

famous *Rose v. Council for Better Ed., Inc.*, 790 S.W.2d 186 (Ky. 1989), litigation, New Hampshire, New York, South Carolina, Tennessee, West Virginia, and Washington). The dissent also rejected the majority's conclusion that the statutory claims should be dismissed and held that that mandamus is proper when, as here, it will compel the mandatory exercise of discretion. *See id.* at 271–74.

168. *E.g.* Lyndsey Layton, *ACLU Alleges Michigan School District Violated Students' Right to Learn to Read*, WASH. POST (July 12, 2012), https://www.washingtonpost.com/local/education/aclu-alleges-michigan-school-district-violated-students-right-to-learn-to-read/2012/07/11/gJQArfIjeW_story.html; Eyder Peralta, *ACLU Files 'Groundbreaking' Lawsuit Claiming Right To Learn To Read*, NAT'L PUB. RADIO: TWO-WAY BLOG (July 13, 2012, 12:48 PM), <http://www.npr.org/sections/thetwo-way/2012/07/13/156728852/aclu-files-groundbreaking-lawsuit-claiming-right-to-learn-to-read>.

169. *See, e.g.*, Lori Higgins, *Highland Park Losing Its High School to Low Enrollment*, DET. FREE PRESS (May 28, 2015, 7:05 PM), <http://www.freep.com/story/news/local/michigan/wayne/2015/05/28/highland-park-high-school-closing-emergency-manager/28094165/>; Layton, *supra* note 168; Peralta, *supra* note 168.

170. *SS v. State*, 869 N.W.2d 273 (Mich. 2015).

171. Michigan's Department of Education measured two charter school systems in Highland Park in 2015: (i) the Highland Park Public Academy School System, which ran Barber Elementary School, and (ii) the George Washington Carver Academy, which ran George Washington Carver Elementary and Middle Schools. *See Database: Search M-STEP Results by School or District*, DET. FREE PRESS (Dec. 17, 2015), <http://www.freep.com/story/news/local/michigan/2015/12/17/database-search-m-step-results-school-district/77421474/> (a database listing the 2015 results of student proficiency in Michigan schools). Students at Barber Elementary School showed a 5.88% proficiency in Third Grade English and a 16.22% proficiency in Seventh Grade English. *Id.* (select the county "Wayne RESA" and the district "Highland Park Public School Academy System" and click the "Details" tab next to the "Districtwide" option). Students at George Washington Carver Elementary and Middle Schools showed an 8.82% proficiency in Third Grade English and a 12.31% proficiency in Seventh Grade English. *Id.* (select the county "Wayne RESA" and the district "George Washington Carver Academy" and click the "Details" tab next to the "Districtwide" option). In the 2011–12 school year, roughly one-third of fourth graders and one-quarter of seventh graders in Highland Park satisfied the state standard for grade-level reading proficiency, and only about one-tenth of students in either of those grades demonstrated proficiency in math. This makes Michigan's statewide scores of 50% proficiency in third grade Language Arts and 49% proficiency in seventh grade Language Arts look good by comparison. *See Amended Complaint*, *supra* note 157, ¶¶ 6, 79; MICH. STUDENT TEST OF EDUC. PROGRESS, SPRING 2015 STATEWIDE M-STEP RESULTS (2015), http://www.michigan.gov/documents/mde/S15_M-STEP_Statewide_Results_504573_7.pdf.

Governor II decision would have been open to hearing this case. After all, they noted that it was significant that they were not “presented with a concrete claim by either individual students or by school districts that they are suffering from particular specified educational inadequacies because of deficiencies in the school financing system.”¹⁷² The state’s school finance system—and the web of related policies—contributed to the failure of public education in Highland Park.

* * *

Early in this article, another commentator’s question was raised as something to be answered before making the case for a greater federal role in education: are states “unwilling and unable to deal with the structural problems created by educational policies”?¹⁷³ If they are willing and able, the commentator’s argument continued, then a larger federal role is not needed. Although an exhaustive state-by-state analysis is beyond the scope of this Article, this Article has demonstrated that at least in the case of Michigan, the answer is sadly clear.

Additionally, although Michigan is only one state, its experience operates as an outsized caution against the specific policy of unfettered school choice and the more general model of education federalism (dual federalism) that involves great deference to state and local authorities.¹⁷⁴ Regarding the federalism model, if the ability to define a “right to education” remains exclusively with the states, then state courts—the backstop for education rights—can interpret this right so minimally that they effectively refuse to consider the question of educational quality at all. Moving forward, the form of federalism in education must shift to a cooperative one, and reforms must be grounded in both liberty and equality. In September 2016, some of the attorneys who brought the “right to read” case in state court filed a complaint in federal court with just this approach.¹⁷⁵ As of October 2017, the complaint awaits the federal district court’s ruling on the state’s motion to dismiss.

172. *Milliken v. Green (Governor II)*, 212 N.W.2d 711, 713 (Mich. 1973).

173. Lawson, *supra* note 18, at 286.

174. See Robinson, *Disrupting Education Federalism*, *supra* note 5, at 972–83.

175. Complaint, Gary B. v. Snyder, No. 2:16-CV-13292 (E.D. Mich. Sept. 13, 2016), 2016 WL 4775474.

III. COOPERATIVE FEDERALISM

Fortunately for the children of this country, education federalism does not fail all states—some states have robust school finance systems and related policies that produce education of an acceptable level of quality (or higher), and do so more or less uniformly. In other states, judicial intervention has remedied constitutionally and functionally inadequate systems. However, as the previous section demonstrated, not all states are willing and able to address structural problems in public education. Because the Trump Administration is likely to support school choice nationwide, it is important to consider a range of federal legal protections that could create and maintain a meaningful federal floor of educational quality.

This Section first discusses action that Congress and the U.S. Department of Education could take, with the idea that legislative and agency-driven reforms are theoretically easier to enact and also have the long-term potential to be more effective, at least in some ways, than judicial reforms. That said, this Article also acknowledges that the reforms proposed here are unlikely to be supported by the Trump Administration or the current Congress and thus may be more viable in the long-term than in the short-term. Because judicial reforms sometimes occur when legislative and executive reforms cannot, and because judicial reforms are more difficult to undo, this Section then turns to the courts. Specifically, by coupling the concepts of liberty and equality, this Section ultimately proposes a *de facto* federal constitutional amendment through interpretation that engages both the Equal Protection Clause and Substantive Due Process.¹⁷⁶ At the heart of each of the approaches considered in this section is, as law professor Kimberly Jenkins Robinson has advocated, a shift in our approach to public education from dual federalism to cooperative federalism.¹⁷⁷

A. Federal Legislation and Agency Action

Congress has legislated about public education regularly since the 1960s, and for good reason. As California Supreme Court Justice Goodwin Liu articulated in 2006, the Citizenship Clause is one

176. See generally Michael D. Sant'Ambrogio, *Agency Delays: How a Principal-Agent Approach Can Inform Judicial and Executive Review of Agency Foot-Dragging*, 79 GEO. WASH. L. REV. 1381 (2011) (arguing for a “coordinated effort” between branches as an effective way to solve agency problems).

177. Robinson, *Disrupting Education Federalism*, *supra* note 5, *passim*.

source of authority for Congress's involvement in education policy, and of course the Fourteenth Amendment is connected to this.¹⁷⁸ For various reasons, Congress seems quite willing to continue legislating about public education. Additionally as Robinson convincingly argues, even after the Court's 2012 decision limiting Congress' authority under the Spending Clause in *National Federation of Independent Business v. Sebelius*,¹⁷⁹ Congress retains substantial authority to legislate about education—and the legislative and executive branch are in some ways better suited to education reform than the judiciary.¹⁸⁰

Congressional Acts often go hand-in-hand with federal agency enforcement, and thus the U.S. Department of Education has substantial experience by this point in time interpreting and enforcing statutory and constitutional law. This role is nothing new either in the specific context of education or in the general context of the federal government,¹⁸¹ and in fact federal agencies are especially important today in what law professor Karen Tani calls the “age of cooperative federalism.”¹⁸² Accordingly, the combination of Congressional action and agency enforcement can be a powerful tool in the pursuit of educational quality. Examples of that partnership include:

- Title IV and VI of the Civil Rights Act of 1964, which address race discrimination;¹⁸³
- The Bilingual Education Act of 1968 (repealed in 2002) and the Equal Educational Opportunities Act of 1974,¹⁸⁴ which establish rights for non-native English-speaking students;

178. Liu, *supra* note 11, at 339, 348–67.

179. 567 U.S. 519 (2012).

180. Robinson, *Disrupting Education Federalism*, *supra* note 5, at 1006–13.

181. See, e.g., Karen M. Tani, *Administrative Equal Protection: Federalism, the Fourteenth Amendment, and the Rights of the Poor*, 100 CORNELL L. REV. 825, 827–32 (2015) (providing a history of administrative enforcement of equal protection since 1936).

182. *Id.* at 837; see also *id.* at 837–41.

183. 42 U.S.C. §§ 2000d–2000d-7 (2012).

184. Equal Educational Opportunities Act of 1974; Pub. L. No. 93-380, § 204, 88 Stat. 484, 515 (codified as amended at 20 U.S.C. § 1703 (2012)); Elementary and Secondary Education Amendments of 1967, Pub. L. No. 90-247, 81 Stat. 783 (1968) (codified as amended in scattered sections of 20 U.S.C.).

- The Education for All Handicapped Children Act of 1975,¹⁸⁵ which was superseded by the Individuals with Disabilities in Education Act of 1990;¹⁸⁶ Section 504 of the Rehabilitation Act of 1973;¹⁸⁷ and Title II of the Americans with Disabilities Act of 1990,¹⁸⁸ which all serve to make schools accessible to students with disabilities;
- Title IX of the Education Amendments of 1972,¹⁸⁹ which provides for sex and gender equity in schools; and
- The McKinney Vento Homeless Assistance Act of 1987,¹⁹⁰ which ensures educational access for homeless children.

In short, the Department of Education is involved in enforcing a wide range of statutes, and has been for quite some time.

Of course, the federal government's broadest regulation of education remains the 1965 Elementary and Secondary Education Act (ESEA).¹⁹¹ Since its enactment, ESEA has been reauthorized and amended roughly every five years.¹⁹² Although ESEA began as part of President Johnson's war on poverty, and thus provided supplemental funds for the education of students in poverty, it has grown substantially since then. The most well-known rendition of the law may be the 2001 variation, the No Child Left Behind Act (NCLB).¹⁹³ NCLB was notable because it required states to develop proficiency standards, test students' proficiency on a regular basis,

185. Pub. L. 94-142, § 4, 89 Stat. 775 (1975).

186. Pub. L. 101-476, 104 Stat. 1103 (1990) (codified as amended in 20 U.S.C. §§ 1400-1409 (2012)).

187. Pub. L. 93-112, 87 Stat. 355 (1973) (codified as amended in 29 U.S.C. § 794 (2012)).

188. Pub. L. 101-336, § 204, 104 Stat. 327, 337 (1990) (codified as amended in 42 U.S.C. §§ 121301-12165 (2012)).

189. Pub. L. 92-318, 86 Stat. 235 (1972) (codified as amended in 20 U.S.C. §§ 1681-1688 (2012)).

190. Pub. L. 100-77, 101 Stat. 482 (1987) (codified as amended in 42 U.S.C. §§ 11431-11489); see 42 U.S.C. § 11432(g)(1)(J)(iii)(I) (2012) (ensuring educational access for homeless children).

191. Elementary and Secondary Education Act of 1965, Pub. L. 89-10, 79 Stat. 27 (1965) (codified as amended in 20 U.S.C. §§6301-6578 (2012)).

192. Kristi L. Bowman, *Before School Districts Go Broke: A Proposal for Federal Reform*, 79 U. CINCINNATI L. REV. 895, 901 (2011); see also Alyson Klein, *ESEA Reauthorization: The Every Student Succeeds Act Explained*, EDUC. WEEK (Nov. 30, 2015, 10:59 AM), http://blogs.edweek.org/edweek/campaign-k-12/2015/11/esea_reauthorization_the_every.html (referring to the "typical five" years between reauthorization and amendment).

193. No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified as amended in scattered sections of 20 U.S.C including, 20 U.S.C. §§ 1041-1044, 3427, 6052, 6053e, 6054b, 6055h, 6056a (2012)).

and make regular progress towards uniform proficiency.¹⁹⁴ The goal was noble, and the Act sought to incorporate the current model of education federalism, dual federalism, deferring significantly to state and local authorities.¹⁹⁵ However, many problems emerged, not the least of which was schools' inability to make sufficient progress toward the goal of uniform proficiency even though the states themselves determined what was proficient.¹⁹⁶

Had Congress reauthorized the Act on the usual timeline, lawmakers could have revised the statute to include more realistic goals. By the time the Act was reauthorized as the Every Student Succeeds Act in December 2015,¹⁹⁷ though, nearly all states seemed to need waivers to comply with NCLB so that they could continue to receive the federal funding that makes up roughly 10% of an average school district's budget.¹⁹⁸ As law professor Derek Black chronicles, under Secretary of Education Arne Duncan's direction, the Department took the unprecedented step of conditioning its granting of waivers on states adopting certain policies.¹⁹⁹ This approach is only permissible if the authorizing statute provides sufficient notice—which NCLB did not, but future iterations of ESEA could.²⁰⁰ Interestingly, at the same time that NCLB unfolded nationwide, states' standards became increasingly uniform: as of 2016, forty-two states and the District of Columbia had adopted the Common Core State Standards.²⁰¹

Theoretically, this may open a political window for federal involvement in establishing a minimum quality level via the next (post-ESSA) iteration of ESEA. Before continuing this conversation, however, it is important to note that neither the new Congress nor the new Administration seem likely to want to pursue this course of

194. Martin R. West, *No Child Left Behind: How to Give it a Passing Grade*, POL'Y BRIEF (Brookings Inst., Washington, DC), Dec. 2005, at 1–4, <https://www.brookings.edu/wp-content/uploads/2016/06/pb149.pdf>.

195. *Id.* at 4 (“Because NCLB allows states to create their own tests and to define the level of achievement required for students to be deemed proficient, states vary widely in their expectations of what students should know.”).

196. *Id.* at 3–5.

197. Pub. L. 114-95, 129 Stat. 1802 (2015) (codified as amended in scattered sections of 20 U.S.C. and 42 U.S.C.).

198. Derek W. Black, *Federalizing Education by Waiver?*, 68 VAND. L. REV. 607, 611 (2015).

199. *Id.*

200. *Id.* at 611. For a more general treatment of the waiver issue, see David J. Barton & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265 (2013).

201. *Standards in Your State*, COMMON CORE ST. STANDARDS INITIATIVE, <http://www.corestandards.org/standards-in-your-state/> (last visited Oct. 5, 2017). Admittedly, the federal government's Race to the Top Grant assisted in this process. Black, *Federalizing Education by Waiver?*, *supra* note 198, at 650–51. For a fascinating discussion of the role of the Gates Foundation and other philanthropic organizations in this change, see SARAH RECKHOW, *FOLLOW THE MONEY: HOW FOUNDATION DOLLARS CHANGE PUBLIC SCHOOL POLITICS* (2013).

action. But for a Congress or an Administration so inclined, this option would be attractive because although the ESEA regulations are conditions on the receipt of funding rather than mandates, no state has yet been able to opt out of receiving this funding and thus opt out of abiding by these conditions.²⁰² Even more significantly, imposing a uniform floor of educational quality in part through national standards (opportunity-to-learn²⁰³ or otherwise) could still allow states some options but limit the choice to the two or three sets of standards widely adopted nationally, assuming those are at a sufficient level. Additionally, the enforcement would not be via lawsuit but would be through the executive branch (the Department of Education) via the potential loss of the funds to which the policy strings were attached.²⁰⁴ Funding cutoff is a tool that has given the federal government significant and effective persuasive authority throughout history, including during the very difficult process of school desegregation beginning in the 1960s.²⁰⁵ Furthermore, such enforcement would provide political cover to state legislatures who need to raise taxes, repurpose funding streams, or enact other understandably unpopular policies in order to comply with the conditions of receiving ESEA funding.

There are disadvantages to congressional action and executive enforcement, of course. If actually enforced, funding cutoffs are not particularly helpful in a situation of constrained resources.²⁰⁶ A legislative policy is much easier to overturn than a judicial one, thus education would remain politicized, albeit at a different level. Perhaps even more significantly, though, some political actors believe the federal government should have an incredibly limited role in social welfare services such as education. Indeed, the 2015 version of ESEA (ESSA) pulled back from NCLB's highly regulatory approach, deferring more to the states.²⁰⁷ Relatedly, it is not unusual to hear a politician propose eliminating the U.S. Department of

202. See, e.g., West, *supra* note 194, at 1.

203. See Robinson, *Disrupting Education Federalism*, *supra* note 5, at 988–94 (explaining how to incentivize development of common opportunity-to-learn standards).

204. See Eloise Pasachoff, *Agency Enforcement of Spending Clause Statutes: A Defense of the Funding Cutoff*, 124 YALE L.J. 248 (2014) (describing why funding cutoffs should be used as policy levers).

205. *Id.* at 252; see Orfield, *supra* note 70, at 407 (explaining the context of school desegregation in the 1960s and how funding cutoff fit in); Tani, *supra* note 181, at 838–41 (describing the extent to which states rely on federal agencies' purse strings).

206. Sant'Ambrogio, *supra* note 176, at 1419 (“[C]utting the budget of an agency is likely only to exacerbate the problem of delay.”).

207. See Alyson Klein, *The Every Student Succeeds Act: An ESSA Overview*, EDUC. WEEK (Mar. 31, 2016), <http://www.edweek.org/ew/issues/every-student-succeeds-act/index.html>; Sarah D. Sparks, *NCLB Rewrite Sets New Path on School Research*, EDUC. WEEK (Jan. 5, 2016), <http://www.edweek.org/ew/articles/2016/01/06/nclb-rewrite-sets-new-path-on-school.html>.

Education altogether, and in fact a member of Congress introduced such a bill in February 2017.²⁰⁸ Thus, while ease of statutory repeal is one disadvantage, inability to enact a statutory reform in the first place may be an even more significant one, especially in today's political climate. Finally, the more directive federal education legislation becomes, the closer it gets to the trigger the Court established in *NFIB v. Sebelius* when it struck down legislation as having "crossed the line distinguishing encouragement from coercion."²⁰⁹ It appears highly likely that current federal education legislation remains compliant with Spending Clause requirements, but future legislation must be mindful of this decision.²¹⁰

The impact this approach could have for local districts is uncertain because the contours of Congressional action and executive enforcement could vary so widely. However, if any real federal quality floor for public education is created, it would seem that states would be compelled to assist local districts in a meaningful manner so that every school offers students an education at a certain basic level of quality. Many schools across Michigan, and indeed across the entire country, would benefit.

B. A Federal "Amendment" by Interpretation

At last, this article turns to the idea of a change via federal courts. This is not a perfect solution so much so that it is also a last resort—although given the education policy to which Congress, Secretary of Education Betsy DeVos, and the rest of the Trump Administration seem receptive, common law change may be the most likely vehicle for progress in the short term. While courts are the backstop for legislative and executive (and lower court) action gone awry, unlike legislatures, they hear only issues brought to them and

208. See Anya Kamenetz, *About That Bill Abolishing the Department of Education*, NAT'L PUB. RADIO: EDUC., (Feb. 9, 2017, 12:41 PM), <http://www.npr.org/sections/ed/2017/02/09/514148945/about-that-bill-abolishing-the-department-of-education> (mentioning Representative Thomas Massie's bill to eliminate the Department of Education at the end of 2018); Alyson Klein, *Which GOP Presidential Candidates Want to Abolish the Education Department?*, EDUC. WEEK (Oct. 19, 2015, 7:00 AM), <http://blogs.edweek.org/edweek/campaign-k-12/2015/10/which-gop-presidential-candidates-want-to-abolish-education-department.html> (noting that Senator Ted Cruz of Texas said he would abolish the Department of Education if elected President of the United States).

209. 567 U.S. 519, 579 (2012) (plurality opinion) (citing *New York v. United States*, 505 U.S. 144, 175 (1992)).

210. See Samuel R. Bagenstos, *The Anti-Leveraging Principle and the Spending Clause After NFIB*, 101 GEO. L.J. 861, 887–92 (2013); Eloise Pasachoff, *Conditional Spending After NFIB v. Sebelius: The Example of Federal Education Law*, 62 AM. U. L. REV. 577, 651 (2013); Robinson, *Disrupting Education Federalism*, *supra* note 5, at 1010.

opine about cases and controversies. Additionally, scholars have raised important questions about courts' limited ability to produce social change.²¹¹ Finally, changing federal common law is certainly not for the faint of heart. However, the central benefits of this approach are that when constitutional change is accomplished, it is applicable nationwide and profoundly difficult to undo.

The conventional manner of amending the Constitution is via a proposal from Congress to the states under Article V.²¹² In today's hyper-politicized environment, it is all but impossible to imagine a proposed federal constitutional amendment about a social welfare issue over which states have historically had so much authority being successful via this route.²¹³ Another way of effectively amending the Constitution, though, is through judicial interpretation.²¹⁴ This approach is far more likely to succeed than an amendment through ratification, though the chances may still be slim. That said, the Court's jurisprudence has left a door cracked open in Substantive Due Process.²¹⁵ Coupling this interpretation with the Court's increasing use of rational basis with bite in Equal Protection (which is connected to the slow disintegration of the scrutiny categories²¹⁶) creates the potential for federal courts to reenter the education reform arena in a meaningful way, engaging liberty and equality simultaneously.

1. Education and Liberty: Substantive Due Process

Numerous scholars have noted that the Court's decisions in *Rodriguez*, *Plyler*, *Papasan*, and *Kadrmas* have left open the question of whether there is a federal fundamental right to an education of a

211. See, e.g., ROSENBERG, *supra* note 166, at 10–21.

212. U.S. CONST., ART. V.

213. See, e.g., Russell Berman, *What's the Answer to Political Polarization in the U.S.?*, ATLANTIC (Mar. 8, 2016), <https://www.theatlantic.com/politics/archive/2016/03/whats-the-answer-to-political-polarization/470163/> (speaking to the depth of American political polarization).

214. See Sanford Levinson, *Accounting for Constitutional Change (Or, How Many Times Has the United States Constitution Been Amended?)* (A) <26; (B) 26; (C) 27; (D) All of the Above), 8 CONST. COMM. 409, 418–21 (1991) (describing judicial interpretation as a form of “amendment” to the underlying text).

215. See, e.g., *Papasan v. Allain*, 478 U.S. 265, 283 (1986); *Plyler v. Doe*, 457 U.S. 202, 221–223 (1982) (quoting *Rodriguez*'s discussion of education as a fundamental right); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 36–37 (1973) (discussing education as a fundamental right for which there may be a substantive floor).

216. See, e.g., Susannah Pollvogt, *Beyond Suspect Classifications*, 16 U. PA. J. CONST. L. 739, 788–96 (2014) (providing a review of the relevant literature).

minimum quality.²¹⁷ These discussions have occurred in the context of the Equal Protection Clause and, perhaps as a result, a commonly proposed alternative in a rich resulting literature is to recognize education as a positive federal right that would then trigger strict scrutiny.²¹⁸ Indeed, this approach is similar to the positive right approach taken both in American states and in the international context. Interestingly, many of the Court's education cases, as law professor Kenji Yoshino notes, involve intertwined liberty and equality claims.²¹⁹ Thus, in this discussion of educational quality, it is both ambitious and practical to revisit the discussion of education as a focus of Substantive Due Process by explicitly engaging liberty concerns.²²⁰

As law professor Susan Bitensky wrote in 1992, two of the Court's earliest cases involving schools, *Meyer v. Nebraska* and *Pierce v. Society of Sisters*,²²¹ both based their reasoning in part on Substantive Due Process liberty interests of parents' ability to direct the education of their children.²²² The architecture of Substantive Due Process has changed considerably since the *Lochner* era, but *Pierce* and *Meyer* remain good law, at least for the core liberty principles noted here. Additionally, a key Substantive Due Process consideration is tradition, and the importance of education in states' constitutions, statutes, and common law, coupled with the federal law was "enormous" in Bitensky's estimation in 1992.²²³ It has only grown since then.

If one accepts that Substantive Due Process is a sensible forum in which to discuss education rights, the contours of a right still remain unclear. Perhaps the most commonly suggested option is that the right would be to a minimum level of quality as discussed in the Court's four Equal Protection Clause cases mentioned above.²²⁴ That option is a solid one, and it would enable courts to draw from state school finance litigation interpreting state constitutions' rights

217. See, e.g., Susan H. Bitensky, *Theoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the End of the National Educational Crisis*, 86 NW. L. REV. 550, 551–54 (1992); James E. Ryan, *The Supreme Court and Public Schools*, 86 VA. L. REV. 1335, 1392–94 (2000); Robinson, *Disrupting Education Federalism*, *supra* note 5, at 1003.

218. See Joshua E. Weishart, *Reconstituting the Right to Education*, 67 ALA. L. REV. 915, 918–19, nn. 4–10 (collecting much of the scholarship in this area).

219. Yoshino, *The New Equal Protection*, *supra* note 51, at 788–89.

220. See Bitensky, *supra* note 217, at 581–96 (discussing the substantive due process right to schooling).

221. *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925).

222. See Bitensky, *supra* note 217, at 580–81.

223. *Id.* at 586–96.

224. See, e.g., Black, *Unlocking the Power of State Constitutions with Equal Protection*, *supra* note 27, at 1378–1382.

to education—although dollars are a part of these discussions, a quality education analysis focuses first on outcomes and then backs into the financial obligation by calculating the cost of providing the opportunity to achieve those outcomes. In other words, the content of the right would not change, although the right would be framed as a positive right in the Substantive Due Process context rather than a negative right in the Equal Protection context. However, that is not the only option. A variation on this approach is to define a right to education as equating with or including a right to literacy (or, similarly, a right to numeracy).²²⁵

The literacy hook in the Highland Park, Michigan right to read case in state court was created by necessity, and it laid the conceptual groundwork for a Substantive Due Process claim. Thus, on September 13, 2016, the nation's largest pro bono firm sued the state of Michigan on behalf of five students in some of Detroit's lowest performing traditional public and charter schools.²²⁶ Many things are noteworthy about this case, and perhaps most significantly the case is filed in federal, not state, court. Although the plaintiffs present a variety of claims, the case is based on the theory that the state has violated the plaintiffs' right to literacy.²²⁷ Of course, the catch is that federal courts have not recognized a right to literacy—at least not yet. It is far too early to know what the impact of this case will be, but the potential is great. In a nutshell, the case could reopen federal courts as a venue for litigating educational quality and, eventually, school funding.

Focusing on a right to literacy as a specific manifestation of a right to education is appealing for several reasons. First, recognizing the importance of literacy is not new, narrow, or partisan. As human rights scholar and law professor Lea Shaver noted in her detailed argument that a robust right to read is part of international human rights law, both Kofi Annan and Richard Nixon have been among literacy's many champions.²²⁸ Second, literacy has both "thin" and "thick" aspects. A "thin" definition would conceive of literacy as something an individual has if she or he can read, and lacks if she or he cannot. However, a "thick" definition would focus on a student's proficiency compared to his or her grade level peers with the understanding that what it takes to be literate grows as the

225. Indeed, the literacy approach was embraced by a lawsuit filed in federal court in Michigan in fall 2016. Complaint, *supra* note 175, at 1.

226. *Id.* (noting Public Counsel as firm representing plaintiffs); *see also* PUB. COUNS. <http://www.publiccounsel.org/> (last visited Oct. 5, 2017).

227. Complaint, *supra* note 175, at 1.

228. Lea Shaver, *The Right to Read*, 54 COLUM. J. TRANSNAT'L L. 1, 3–4, 30 (2015).

child grows.²²⁹ Third, focusing on literacy rather than on the broad range of things that constitute educational quality is more manageable for courts. Fourth, as Yoshino suggested in 2011, a liberty focus “can be a ground on which to create coalitions that embody broader, more inclusive forms of ‘we’” and thus “it may be that individuals who are experiencing the most ‘equality fatigue’ are those who embrace the liberty argument most eagerly.”²³⁰ An education rights coalition is an example of such an alliance that might, in Yoshino’s words, “beneficially cut across traditional ‘involuntary’ groups such as those based on race or sex.”²³¹

2. Education and Equality: Rational Basis With Bite

A related approach would be to work within the confines of the Equal Protection Clause and apply “rational basis with bite” based on the unique importance of education.²³² Courts may be more comfortable with an Equal Protection Clause analysis than with other approaches to education reform, and the rational basis test appears politically neutral.²³³ On one hand, this approach has been applied so far only in situations where group-based animus operated.²³⁴ On the other hand, the Court has applied it as recently as 2015 in *Obergefell v. Hodges* and multiple factors seem to animate the application of the test.²³⁵

229. *Id.* at 25–26, 30–34.

230. Yoshino, *The New Equal Protection*, *supra* note 51, at 794.

231. *Id.* at 794–95 n.330. Finally, yet another possibility is that rather than looking to state school finance litigation for inspiration and focusing on funding specifically, a federal court could ask whether the web of statutes regulating education in each state create a system in which individual school districts can be successful in the goal of providing education at a certain level of quality. This sort of approach would require a court (and, ultimately a legislature) to engage in profoundly wide-ranging, deep reform, and like the other approaches it could be beneficial in Michigan. The likelihood of a court going down this path willingly, however, seems profoundly low.

232. Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 18–19 (1972) (setting forth the argument that would lead to the coining of the term); *see also* Michael Waterstone, *Disability Constitutional Law*, 63 EMORY L.J. 527, 540 (2014) (using “rational basis with teeth,” which is used interchangeably with “rational basis with bite”); Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of “Don’t Ask, Don’t Tell,”* 108 YALE L.J. 485, 488 n.5 (1998) (“Legislation has also been struck down on rational review, leading some commentators to believe that a fourth tier of review—the so called ‘rational basis with teeth’ standard—has been created.”) (internal citations omitted).

233. Bambauer & Massaro, *supra* note 224, at 285.

234. Robert S. Chang, *Will LGBT Antidiscrimination Law Follow the Course of Race Discrimination Law?*, 100 MINN. L. REV. 2103, 2135 (2016).

235. 135 S.Ct. 2584 (2015).

So, what is this standard and when does it apply? In the words of law professors Jane Bambauer and Toni Massaro, the rational basis with bite cases are “the misfits of constitutional law” because they “correct government conduct that implicates no recognized fundamental or specifically enumerated right, and deploys no judicially recognized suspect classification.”²³⁶ Although there is not a formula for determining when rational basis will bite, a 2015 piece by commentator Raphael Holoszyc-Pimintiel analyzed all cases in which the Court had applied this slightly-elevated form of review and determined that it was used most often when the government classification was based on an immutable characteristic or when the government action burdened a significant right.²³⁷ This is good news for education rights plaintiffs.²³⁸ Children’s access to educational quality is, especially for younger children, a function of where their parents choose to live, not the result of something they (children) can control. Therefore, to the extent the right is vested in the child, residence is something beyond his or her control and thus immutable.²³⁹

Immutability was important to the Court in *Plyler v. Doe*,²⁴⁰ which focused on children’s immigration status as the product of their parents’ choices. The key language stated, “Legislation imposing special disabilities upon groups disfavored by virtue of circumstances beyond their control suggests a kind of ‘class or caste’ treatment that the Fourteenth Amendment was designed to abolish.”²⁴¹ The *Plyler* court also discussed the importance of children’s interest in education in language that has been quoted often since:

Public education is not a “right” granted to individuals by the Constitution. *San Antonio Independent School Dist. v. Rodriguez*,

236. Bambauer & Massaro, *supra* note 224, at 282.

237. Raphael Holoszyc-Pimintiel, *Reconciling Rational Basis Review: When Does Rational Basis Bite?*, 90 N.Y.U. L. REV. 2070, 2072 (2015) (the other factors were history of discrimination, political powerlessness, capacity to contribute to society, animus, federalism concerns, discrimination of an unusual character, and inhibiting personal relationships); *see also* Pollvogt, *supra* note 216, 780 (2014) (applying the “rational basis with bite” analysis to *Plyler v. Doe*, 457 U.S. 202 (1982)).

238. *See* Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through Romer v. Evans*, 32 IND. L. REV. 357, 382–87 (1999) (summarizing the Court’s eventual adoption of a “hybrid” rational basis test in education cases from *Rodriguez* in 1973 through *Papasian* in 1986).

239. *See* Holoszyc-Pimintiel, *supra* note 237, at 2085 (defining immutability).

240. 457 U.S. 202 (1982).

241. *Id.* at 217 n.14 (1982); *see* Holoszyc-Pimintiel, *supra* note 237, at 2086; *see also* Pollvogt, *supra* note 216, at 780–81 (explaining how *Plyler* examines certain classifications of people as a concern).

411 U.S. 1, 35 (1973). But neither is it merely some governmental “benefit” indistinguishable from other forms of social welfare legislation. Both the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child, mark the distinction. The “American people have always regarded education and [the] acquisition of knowledge as matters of supreme importance.” *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923). We have recognized “the public schools as a most vital civic institution for the preservation of a democratic system of government,” *Abington School District v. Schempp*, 374 U.S. 203, 230 (1963) (Brennan, J., concurring), and as the primary vehicle for transmitting “the values on which our society rests.” *Ambach v. Norwick*, 441 U.S. 68, 76 (1979). “[A]s . . . pointed out early in our history, . . . some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence.” *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972). And these historic “perceptions of the public schools as inculcating fundamental values necessary to the maintenance of a democratic political system have been confirmed by the observations of social scientists.” *Ambach v. Norwick*, *supra*, at 77. In addition, education provides the basic tools by which individuals might lead economically productive lives to the benefit of us all. In sum, education has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests.²⁴²

Based on this language, it would seem difficult to argue that rational basis should *not* bite in a case focused on an uneven and partially rotten floor of educational quality.²⁴³

The question, too, remains what it means to apply rational basis with bite. Interestingly, that is not entirely clear. The state interest might need to be important, not just legitimate (and educational quality surely is). It could be that the government action would have to *significantly* further (not just minimally further) the interest and/or, it is possible that the government action must be necessary

242. *Plyler*, 457 U.S. at 221.

243. *But see* Dan Soleimani, Note, *Plyler in Peril: Why the Supreme Court’s Decision in Plyler v. Doe Is at Risk of Being Reversed—and What Congress Should Do About It*, 25 *GEO. IMMIGR. L.J.* 195, 198–201, 206–208, 211–17 (2010) (arguing that “rational basis with bite” was wrongly applied in *Plyler*).

to achieve the government interest.²⁴⁴ It may also be that a court's focus is on the nexus between the government's interest and its policy, without judicial speculation as to additional permissible government purposes.²⁴⁵ Or, it could be some combination of these various elements. But whatever rational basis with bite is, it is more than a free pass for the government—and when considering the state of public education in some parts of the country, any level of serious judicial engagement with questions of educational quality is a victory for students.

* * *

If a federal constitutional amendment by interpretation or federal legislation and agency enforcement raise the bar at all so that a right to education is more than a mere access right, it will move educational opportunity in a positive direction across the country. Right now, children in a limited number of states may share Michigan children's position as victims of education federalism. However, because of education policy changes that have occurred nationwide since the Great Recession, the trend of state courts' increasing hostility to education reform litigation, and recent changes at the highest levels of the federal government, the number of impacted states seems likely to grow. If it does, the need for federal legal protections will become increasingly acute nationwide.

CONCLUSION

Unlike many countries around the world, in the United States there is no positive right to education in federal law.²⁴⁶ Such a right exists only at the state level and it varies from one state to another. Part of this variation occurs because similar language in state constitutions has been interpreted as creating moderate to robust education rights in one state and weak to nonexistent education rights in another.²⁴⁷ The blame is not entirely at the feet of state courts though—in a state with a failing level of educational quality, all three branches of government are complicit. Michigan shows us

244. See, e.g., Ian Bartrum, *The Ninth Circuit's Treatment of Sexual Orientation: Defining "Rational Basis Review with Bite,"* 112 MICH. L. REV. FIRST IMPRESSIONS 142, 146 (2014) (analyzing a Ninth Circuit opinion grappling with this question); see also Gayle Lynn Pettinga, Note, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779, 784–85 (1987).

245. Gunther, *supra* note 232, at 48.

246. See Scott R. Bauries, *The Education Duty*, 47 WAKE FOREST L. REV. 705, 708–09 (2012) (discussing the relationship of positive and negative rights).

247. See *id.* at 738–40, 738–40 nn.165–73 (detailing diverse interpretations of similar language by various states).

precisely what it looks like when the proverbial floor rots and children fall through: in one small district, a native English speaker without a learning disability matriculates to seventh grade while reading only at first grade level and sometimes misspelling his or her own name, and in a neighboring major district, the percentage of eighth graders proficient in reading is in the single digits.²⁴⁸

Under the current model of education federalism, these glaring gaps in educational quality are not the federal government's problem, and in some ways the federal government's hands are tied when it comes to being part of the solution. This must change. The model of dual federalism does not reflect the current reality of many federal-state-local relationships, and it is sorely outdated in the context of public education. The interest of having a population across the country with at least a minimal level of education—indeed, the interest in avoiding creating a permanent underclass through our own public schools—is an interest all citizens and all levels of government share. It is grounded in both liberty and equality, and especially since the Great Recession, it is threatened. The present reality of public education in Michigan shows us what is likely to occur in a growing number of states unless at least one branch of the federal government intervenes. Adopting a model of cooperative federalism in education would enable us to avoid a dystopic future by establishing a federal floor of minimal educational quality. The children of this country deserve no less.

248. *See supra* Section III.