A CIVICS ACTION: INTERPRETING "ADEQUACY" IN STATE CONSTITUTIONS' EDUCATION CLAUSES

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The antipathy of federal and state courts toward equal protection arguments in lawsuits challenging the public funding of education have forced education activists to search for alternative doctrinal hooks as they continue to seek reform in states' funding and management of schools. These activists have turned to state constitutions' education clauses, which impose duties on state governments to provide an "adequate" education for all children in the state. However, the art of defining and measuring an "adequate" education has advanced little beyond its state in 1973, when Justice Thurgood Marshall found the term unhelpful. In this Note, Josh Kagan surveys various means of defining and measuring adequacy used by state courts, including the use of existing legislative or executive standards, the use of future legislative or executive standards, a variety of educational outputs (such as standardized test scores), and educational inputs (such as quality of teachers, curricula, or school buildings). Applying scholars' theories of state constitutional interpretation and the history of state education clauses, Kagan argues that state courts should be aggressive in their use of educational inputs to define and measure educational adequacy. Unique factors of state governmental structure justify state court involvement in education policy questions that federal courts would consider inappropriate. These factors, coupled with the history of state education clauses, enable state courts to draw on a wide set of historical and current sources to define educational inputs required by state constitutions, and provide jurisprudential guidelines for this necessarily policy-laden analysis. Such an approach also encourages education activists to seek remedies other than reform to school financing systems; instead, activists can target states' provision of particular educational inputs.

INTRODUCTION

Nearly every state constitution requires the state to provide its children with an education.[1] Vaguely-worded clauses require that this education be "adequate."[2] These nineteenth-century clauses gained little attention until federal court doors were shut to education reformers. After the Supreme Court in *San Antonio Independent*

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[1] See Avidan Y. Cover, Is "Adequacy" a More "Political Question" than "Equality?": The Effect of Standards-Based Education on Judicial Standards for Education Finance, 11 Cornell J.L. & Pub. Pol'y 403, 404 & n.6 (2002) (noting that forty-nine or fifty states have education clauses; Mississippi, not discussed in this Note, causes counting confusion).

[2] See, e.g., infra note 117. While constitutions use varying terms, academics use "adequacy" to describe state constitutions' qualitative guarantees regarding education.

School District v. Rodriguez[3] found no federal constitutional right to an education,[4] advocates seized on state education clauses. But this litigation strategy also has proven difficult. A phrase from Justice Thurgood Marshall's *Rodriguez* dissent still resonates today: Education adequacy standards are "unintelligible and without directing principle."[5]

Education adequacy cases dominate the current wave of school reform litigation.[6] The U.S. Constitution contains no clause directly addressing education, thus state constitutions' education clauses provide plaintiffs with claims that could avoid a federal bench unwilling to hear right to education cases. In 1989, the Kentucky Supreme Court gave plaintiffs their first education-article-based victory in *Rose v. Council for Better Education, Inc.*,[7] finding Kentucky schools constitutionally inadequate and ordering the legislature to ensure that students had the opportunity to achieve seven specific goals.[8]

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[3] 411 U.S. 1 (1973).

[4] Id. at 35.

[5] Id. at 90 (Marshall, J., dissenting). Marshall used this comment to argue for treating education as a fundamental right under the Fourteenth Amendment. I use it to highlight the decades-long quest for a clear definition of an adequate education.

[6] Adequacy cases represent the third wave of school reform suits. The short-lived first wave challenged state school finance systems under federal due process and equal protection law. See, e.g., *Rodriguez*, 411 U.S. 1; Serrano v. Priest, 487 P.2d 1241 (Cal. 1971). Supporters of this approach argued that access to education represents a fundamental right because of its social importance, see, e.g., *Rodriguez*, 411 U.S. at 29-30, and because meaningful exercise of other constitutional rights requires an education, see, e.g., id. at 62 (Brennan, J., dissenting). This approach, first applied by the California Supreme Court in *Serrano*, was rejected by the U.S. Supreme Court in *Rodriguez*, id. at 35. The Court held that wealth was not a suspect classification nor was education a fundamental right, id. at 28, 35-36, and the school funding system at issue passed rational basis review. Id. at 41-42, 54-55.

The second wave of school reform litigation made the same equal protection arguments under state constitutions. See, e.g., Robinson v. Cahill, 303 A.2d 273, 277, 279 (N.J. 1973). State equal protection claims gradually fell from favor as state courts frequently interpreted their state equal protection clauses as providing no protections beyond their federal equivalents. See, e.g., Erin E. Buzuvis, "A" for Effort: Evaluating Recent State Education Reform in Response to Judicial Demands for Equity and Adequacy, 86 Cornell L. Rev. 644, 653-54 & nn.47-48 (2001) (citing eight states which rejected equal protection claims); C. Cora True-Frost, Beyond *Levittown* Towards a Quality Education for All Children: Litigating High Minimum Standards for Public Education: The *CFE* Case, 51 Syracuse L. Rev. 1015, 1024 (2001) (discussing gradual rejection by New York Court of Appeals of equal protection claims over three decisions).

[7] 790 S.W.2d 186, 189 (Ky. 1989).

[8] The seven goals are

> (i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization; (ii) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices; (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation; (iv) sufficient self-knowledge and knowledge of his or her mental and

However, *Rose* did not spark widespread acceptance. Plaintiffs have achieved victories in several other states,[9] but they have done so under inconsistent theories of adequacy. Asked to define the reach of state constitutions' education clauses, state supreme courts have reacted differently. Some pull definitions out of the air,[10] and some ask other branches of government to define adequacy.[11] As a result, initial courtroom victories have become empty in the face of weak

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> physical wellness; (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage; (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and (vii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.

Id. at 212. The seventh goal explicitly defines an adequate education in Kentucky by reference to other states; the jurisprudential value of looking beyond state borders to define adequacy is discussed infra notes 128-41 and accompanying text.

[9] See Sheff v. O'Neill, 678 A.2d 1267, 1285 (Conn. 1996) (holding that extreme racial and socioeconomic isolation in public schools violates education clause, as informed by equal protection clause, of state constitution); McDuffy v. Sec'y of Executive Office of Educ., 615 N.E.2d 516, 519, 553-54 (Mass. 1993) (finding that large class sizes, inadequate teaching of core subjects, poor libraries, lack of guidance counseling, insufficient teacher training, and unpredictable funding all indicate failure to fulfill duty under education clause); Claremont Sch. Dist. v. Governor (*Claremont I*), 635 A.2d 1375, 1381 (N.H. 1993) (suggesting that legislature may look to number of sources to determine parameters of education mandated by constitution, but that ultimate measure of adequacy is production of competent citizens); Leandro v. State, 488 S.E.2d 249, 255 (N.C. 1997) (holding that constitutionally adequate education provides student with ability to read, write, and speak English language; gives sufficient knowledge of fundamental mathematics, physical science, geography, history, economic and political systems; and provides sufficient academic and vocational skills to engage competitively in post-secondary educational or vocational training); DeRolph v. State (*DeRolph IV*), 780 N.E.2d 529, 530 (Ohio 2002) (identifying complete overhaul of school financing system as necessary to meet thorough and efficient education requirements of state constitution); Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 397-98 (Tex. 1989) (holding that extent to which financing scheme relies upon local enrichment will determine constitutionality); Brigham v. State, 692 A.2d 384, 390 (Vt. 1997) (finding current funding system constitutionally inadequate for failure to afford equal educational opportunities); Campbell County Sch. Dist. v. State (*Campbell I*), 907 P.2d 1279 (Wyo. 1995) (holding that legislature must measure constitutional adequacy of education by number of standards and must achieve financial parity among school districts).

[10] See, e.g., *Rose*, 790 S.W.2d at 212 (listing seven elements of education adequacy); see also supra note 8.

[11] See, e.g., Claremont Sch. Dist. v. Governor (*Claremont III*), 794 A.2d 744, 758-59 (N.H. 2002) (reminding legislature of its duty to define and enforce adequacy); DeRolph v. State (*DeRolph I*), 677 N.E.2d 733, 747 (Ohio 1997) (ordering legislature to create new school funding system); *Campbell I*, 907 P.2d at 1279 (ordering legislature to define adequacy in light of court's decision).

remedies,[12] legislative inaction,[13] and legal backtracking in later cases.[14]

This Note presents a theoretical approach to defining and measuring adequacy—what the basic contours of adequacy are, and how schools can achieve it—in order to answer Justice Marshall's complaint about the vagueness of adequacy standards. I argue that courts should take a broad view of history and national education practice to inform state constitutional interpretation. Taking this view leads to a definition of adequacy based on the goal of developing children into productive citizens, and measurement of adequacy based on educational inputs—in terms of dollars, personnel, curriculum, buildings, supplies, and similar factors—required to reach that goal, rather than outputs—such as standardized test scores.

In making these arguments, I explore the central themes that arise in adequacy cases. Part I presents New York's *Campaign for Fiscal Equity, Inc. v. State* litigation[15] as a case study. This Part introduces the facts of a typical education adequacy case and the main legal issues that arise in such litigation. Part I then summarizes and critiques the various options for defining and measuring adequacy that courts and commentators have presented, particularly exploring the questions of legislative deference and adoption of input and output measurements. Part II presents a different theoretical model, rooted in the broad constitutional history of education clauses, using New York's history as a model. Part II argues that state constitutions' adequacy clauses require states to provide children with the educational opportunities sufficient to turn them into productive citizens. Part III discusses the impact that such a model would have on the reasoning and remedies of education clause cases.

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[12] See, e.g., Opinion of the Justices (Reformed Pub. Sch. Fin. Sys.), 765 A.2d 673, 675-76 (N.H. 2000) (declaring legislature's proposed bill to remedy constitutionally inadequate education to be insufficient).

[13] See, e.g., *DeRolph IV*, 780 N.E.2d at 530 (criticizing legislature for failure to "overhaul" school funding system in five years since DeRolph v. State (*DeRolph I*), 677 N.E.2d 733 (Ohio 1997)).

[14] See, e.g., Ex parte James (*James II*), 836 So. 2d 813, 819 (Ala. 2002) (dismissing case on separation of powers grounds). The Alabama Supreme Court had previously entertained a suit similar to *James II*, upholding a trial court ruling for plaintiffs challenging the state's school funding system. See Ex parte James (*James I*), 713 So. 2d 869, 881-82 (Ala. 1997).

[15] Campaign for Fiscal Equity, Inc. v. State (*CFE I*), 655 N.E.2d 661 (N.Y. 1995), modifying 619 N.Y.S.2d 699 (App. Div. 1994), modifying 616 N.Y.S.2d 851 (Sup. Ct. 1994); Campaign for Fiscal Equity, Inc. v. State (*CFE II*), No. 74, 2003 N.Y. LEXIS 1678 (June 26, 2003), modifying 744 N.Y.S.2d 130 (App. Div. 2002), rev'g 719 N.Y.S.2d 475 (Sup. Ct. 2001).

I

INTERPRETIVE CHOICES IN EDUCATION ADEQUACY CASES

When deciding an education adequacy case, state courts must define the meaning of a constitutionally adequate education, determine how to objectively measure whether a school system is adequate, and decide upon a remedy. Commentators and state courts have articulated alternative tests to define and measure educational adequacy. This Part first describes education adequacy litigation in New York courts as a case study presenting the themes that arise in each test. Then, by describing and critiquing these tests, this Part argues that their shortcomings demonstrate the need for an adequacy definition with a stronger theoretical grounding and practical applicability. Such a theory, developed in Part II, defines an adequate education as one that provides sufficient opportunity for all children to develop into productive citizens and measures adequacy with the fourth method discussed in this Part—educational inputs. Part I concludes by revisiting the recent *Campaign for Fiscal Equity, Inc. v. State (CFE II)* decision by the New York Court of Appeals, which melds two methods of measuring adequacy—use of inputs and outputs.

A. Substance and Procedure of Education Clause Cases: New York's Campaign for Fiscal Equity, Inc. v. State *Litigation*

Education adequacy claims create complex litigation, raising many legal and factual questions that typically are resolved over the course of several decisions. New York's decade-long *Campaign for Fiscal Equity* litigation followed a typical course. A brief history of this litigation demonstrates the issues raised by adequacy cases and the interpretive choices that one leading court made at various stages of the litigation. The New York Court of Appeals made three crucial interpretive choices: to entertain an adequacy case, to define adequacy in terms of schools' role in preparing children for their role as citizens, and to measure adequacy using educational inputs identified by the court itself, mixed with educational outputs.

In 1993, Campaign for Fiscal Equity, Inc., a new advocacy organization representing families and school districts in predominantly low-income New York City neighborhoods, sued the state of New York. The group alleged violations of both the equal protection and adequacy clauses of the state constitution in an effort to void the state's school finance system, which the group believed did not provide suffi-

cient funds to poor districts.[16] Judge Leland DeGrasse of the state trial court dismissed portions of the case, citing *Board of Education, Levittown Union Free School District v. Nyquist*,[17] a 1982 New York Court of Appeals decision holding that the state equal protection doctrine did not provide plaintiffs with legal claims any stronger than those provided by federal law.[18] The appellate court dismissed the case in its entirety, holding that *Levittown* negated the plaintiff's entire theory.[19]

The Court of Appeals reinstated the case, remanding to Judge DeGrasse for trial. The Court of Appeals, citing *Levittown*, upheld the trial court's dismissal of the equal protection claim,[20] but held that the plaintiffs stated a proper adequacy claim.[21] Making its first crucial interpretive choice, the court held that even without drawing on federal equal protection doctrine, an adequacy lawsuit was not too vague for the court to entertain.[22] In its second interpretive choice, the court offered its own definition of an adequate education as "consist[ing] of the basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury."[23]

In its third interpretive choice, *Campaign for Fiscal Equity, Inc. v. State (CFE I)* gave some additional guidance to the trial court on the evidence that could properly measure an inadequate education. The court considered establishing quantifiable outputs—specifically, statewide standardized test results—as a test for adequacy, but rejected this approach after finding that any output measurement is subject to multiple causation factors.[24] Instead, while the court deemed test scores "helpful," it instructed lower courts to focus on inputs, listing physical facilities, "instrumentalities of learning," and "minimally ade-

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16 See Campaign for Fiscal Equity, Inc. v. State (*CFE I Trial*), 616 N.Y.S.2d at 853.

17 439 N.E.2d 359 (N.Y. 1982).

18 See *CFE I Trial*, 616 N.Y.S.2d at 855 ("[T]he financing system challenged today appears to be identical to the one passed upon by the *Levittown* court." (citing *Levittown*)). *Levittown*, citing *Rodriguez*, denied an equal protection challenge against New York's public school financing system. *Levittown*, 439 N.E.2d at 364-65. However, *Levittown* held that the state's education article required the state to provide a "sound basic education." Id. at 369.

19 Campaign for Fiscal Equity, Inc. v. State (*CFE I App. Div.*), 619 N.Y.S.2d at 701.

20 *CFE I*, 655 N.E.2d at 668-69.

21 Id. at 665-68. This holding is emblematic of the shift from second to third wave education reform cases.

22 Id. at 665.

23 Id. at 666.

24 Id.

quate teaching" as constitutional requirements.[25] Thus, the judiciary's consideration of inputs would form the primary measure of adequacy, rather than pure reliance on outputs or some other legislatively crafted measure.

On remand, Judge DeGrasse ruled for the plaintiffs in a seventy-six-page decision[26] handed down after a trial that spanned seven months and featured scores of witnesses, ranging from academic experts to current and former city and state officials.[27] Defining "productive citizenship" as being capable of civic engagement and significant economic contributions beyond that of low-level jobs,[28] the court found the education provided to New York City public school children inadequate in terms of the quality of teachers,[29] curriculum implementation,[30] school buildings,[31] class size,[32] and instrumentalities of learning.[33] The court ordered the legislature to fix these inadequacies and threatened to intervene if the legislature failed to act.[34]

The intermediate appellate court ruled for the state, applying a more modest definition of adequacy.[35] The court held that *CFE I*'s requirement that a state education enable students to "function productively" included only "the ability to get a job, and support oneself, and thereby not be a charge on the public fisc."[36] The court went on

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[25] Id. Despite listing these inputs, the court acknowledged that it did not "definitively specify" how to measure adequacy in New York City schools, a task it felt better accomplished at trial. Id.

[26] Campaign for Fiscal Equity, Inc. v. State (*CFE II Trial*), 719 N.Y.S.2d 475 (Sup. Ct. 2001).

[27] See, e.g., *CFE v. State of New York* Plaintiff's Witnesses, at http://www.cfequity.org/witnlst.html (last visited Aug. 14, 2003).

[28] *CFE II Trial*, 719 N.Y.S.2d at 485-86.

[29] Id. at 492-500 (measuring teacher quality by "number of uncertified teachers teaching in New York City public schools, teachers' scores on certification exams, and the quality of teachers' undergraduate education").

[30] Id. at 500-01 (finding that inadequate teaching and facilities hamper delivery of adequate curriculum).

[31] Id. at 501-06 (citing "legislative findings that decried the 'deplorable' condition of the City's schools").

[32] Id. at 509-13 ("[L]arge class sizes in New York City's public schools have a negative effect on student performance.").

[33] Id. at 513-15 (listing instrumentalities as including "desks, chairs, pencils, and reasonably current textbooks").

[34] Id. at 550 ("[T]he court's deference . . . is contingent on [the legislature and executive] taking effective and timely action . . . . The court will not hesitate to intervene if it finds that the legislative and/or executive branches fail to devise and implement necessary reform.").

[35] Campaign for Fiscal Equity, Inc. v. State (*CFE II App. Div.*), 744 N.Y.S.2d 130, 134 (App. Div. 2002).

[36] Id. at 138.

to describe an eighth-grade education as sufficient to meet this obligation and found that the state provided such an education.[37]

In 2003, ten years after the plaintiffs originally filed suit, the Court of Appeals ruled in their favor, overturning the appellate division and revisiting and elaborating on its previous interpretive choices. First, the court defined an adequate education as requiring the state to teach "skills fashioned to meet a practical goal: meaningful civic participation in contemporary society."[38] Second, responding to the appellate division's focus on eighth-grade standards, the court clarified that the education article required the state to provide "a meaningful high school education."[39] Third, the court restated its emphasis on educational inputs as the primary measure of adequacy, but clarified the connection of inputs to outputs: The plaintiffs' showing of inadequate inputs creates a presumption of a constitutional violation, but the state may rebut this presumption with a showing of positive outputs.[40] The plaintiffs' showing of both inadequate inputs *and* outputs led the court to presume that the inadequate inputs caused the inadequate outputs.[41] Considering school drop-out rates and test scores, the court found that the state did not successfully rebut this showing.[42]

B. Various Efforts to Define and Measure Adequacy

The New York Court of Appeals could have defined adequacy differently and selected different factors to measure it. While the court did not discuss many alternatives in depth, it could have taken one of four approaches: use existing legislative or executive standards to define and measure adequacy; order the legislature or executive branch to decide upon a definition and measurement; come up with its own list of required outputs; or come up with its own list of inputs. This Subpart discusses these four options, then revisits the *CFE* decisions.

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[37] Id.

[38] *CFE II*, No. 74, 2003 N.Y. LEXIS 1678, at *9 (June 26, 2003).

[39] Id. at *15.

[40] Id. at *27-28 ("[E]ducational inputs in New York City schools are inadequate. . . . A showing of good test results and graduation rates among these students—the 'outputs'—might indicate that they somehow still receive the opportunity for a sound basic education."). The court required that plaintiffs make a showing of both insufficient inputs and outputs in order to succeed: "[P]roof of inadequate inputs is necessary for an Education Article claim, not . . . sufficient for such a claim." Id. at *16.

[41] Id. at *39 (ruling that trial court did not commit reversible error by devoting most of causation inquiry to responding to defendant's rebuttal argument, because plaintiff's evidence relating to inputs and outputs established prima facie case of causation).

[42] Id. at *28-39 (discussing and rejecting state's arguments respecting outputs).

1. *Existing Standards and Established Output Measurements*

As long as education adequacy cases have existed, so has the urge to use existing educational standards to define and measure adequacy.[43] This approach postulates that existing legislative or executive standards—such as standardized tests—define a constitutionally adequate education and uses those tests to measure a school's quality. It also dovetails with the burgeoning standards movement in education and gives politicians and courts a politically palatable basis for advocating for increased funding.[44] Despite these arguments, this approach is deeply flawed. The use of existing standards finds no support in state education clauses nor would it necessarily lead to the instrumentalist goals that its proponents suggest. Instead, this approach suggests an easy way to measure adequacy without truly defining it or identifying appropriate remedies.

Commentators have recently argued that existing standards can provide plaintiffs with a means to avoid countermajoritarian concerns often raised in education cases.[45] For instance, one commentator argued that existing standards represent "a voter-validated definition of minimum educational standards."[46] Others have argued that

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[43] The appeal of using existing standards dates at least as far back as 1987, two years before *Rose* and the advent of the third, adequacy-based wave of school reform litigation. See supra note 6. That year, Julius Chambers, then director-counsel of the NAACP Legal Defense Fund, argued that reformers should push an adequacy approach based on existing standards (especially graduation rates and standardized test scores). See Julius Chambers, Adequate Education for All: A Right, An Achievable Goal, 22 Harv. C.R.-C.L. L. Rev. 55, 60-61 (1987) (noting increased use of standards and arguing that "these standards present us with an affirmative opportunity to define a right to a minimally adequate education" (emphasis omitted)).

[44] See infra notes 46-47 and accompanying text.

[45] State defendants often raise countermajoritarian concerns in education adequacy cases. See, e.g., Reply Brief for Defendants-Appellants at 1, Campaign for Fiscal Equity, Inc. v. State, 744 N.Y.S.2d 130 (App. Div. 2002) (No. 111070/93) (arguing that however strong court's motivation to improve schools, "this temptation leads the judiciary to substitute its own vision of good and just policy for that of the popularly elected Legislature"), available at http://www.cfequity.org/REPLYBRIEFFINAL.html.

[46] Molly S. McUsic, The Law's Role in the Distribution of Education: The Promises and Pitfalls of School Finance Litigation, in Law and School Reform: Six Strategies for Promoting Educational Equity 88, 117 (Jay P. Heubert ed., 1999) [hereinafter McUsic, The Law's Role]; see also William F. Dietz, Manageable Adequacy Standards in Education Reform Litigation, 74 Wash. U. L.Q. 1193, 1215-16 (1996) (arguing that "the existing standards approach strikes the proper balance of powers because a court can help resolve the inadequacy . . . without immersing itself in the creation and implementation of policy"); Molly McUsic, The Use of Education Clauses in School Finance Reform Litigation, 28 Harv. J. on Legis. 307, 329 (1991) [hereinafter McUsic, Education Clauses] (arguing that measuring adequacy with outputs is "likelier to ensure the education of disadvantaged youth").

existing standards are advantageous because they are comprehensive and state-specific.[47]

These arguments do not rest on solid constitutional analysis. Adopting such a definition makes no sense without a constitutional delegation of definitional power to the legislative or executive branch. As the judiciary typically defines constitutional terms, one would expect a particularly clear delegation of power were this the case.[48] No state constitution contains such a delegation.

The clearest judicial rejection of the existing standards approach came from the New York Court of Appeals in *CFE I*.[49] The court rejected the suggestion that it use Regents exams (statewide standardized tests for high school students) to measure adequacy.[50] The court reasoned that Regents exams do not necessarily relate to constitutional requirements and indeed set performance goals above the minimum levels required by the education clause.[51] Additionally, the court considered outputs too facile a measurement of adequacy because poor test scores themselves do not identify the causes of poor performance.[52]

Revisiting the issue in *CFE II*, the Court of Appeals rejected the renewed suggestion by amici that the Regents exams should define and measure adequacy by asserting the court's power to define constitutional terms: "[T]o enshrine the Learning Standards would be to cede to a state agency the power to define a constitutional right."[53] A concurring judge tried to contradict this point by arguing that the state legislature had channeled the court's interpretive authority when it established the Regents standards. He argued that Regents standards are tied to the constitution because the Board of Regents (which set the standards) also appointed the state education commissioner, a position created by the constitution.[54] The majority rightly paid this

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47 Martha I. Morgan et al., Establishing Education Program Inadequacy: The Alabama Example, 28 U. Mich. J.L. Reform 559, 589 (1995).

48 In the federal government, "[i]t is emphatically the province and duty of the judicial department to say what the law is." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). Factors distinguishing state courts from Article III courts make the *Marbury* presumption even stronger at the state level. See infra Part II.A (applying theory of state constitutional interpretation that pushes courts to aggressively enforce positive state constitutional rights, partly based on idea that countermajoritarian concerns are less problematic in such cases).

49 655 N.E.2d 661 (N.Y. 1995).

50 Id. at 666.

51 Id.

52 Id. ("Performance levels on such examinations are helpful but should also be used cautiously as there are a myriad of factors which have a causal bearing on test results.").

53 No. 74, 2003 N.Y. LEXIS 1678, at *14 (June 26, 2003).

54 Id. at *78-84 (Smith, J., concurring).

curious argument little heed; the concurrence would endow the actions of any official mentioned in the constitution with constitutional significance and reduce the role of courts to interpreting the meaning and sufficiency of these actions rather than the constitution.

Some courts have cited existing standards more appropriately. The Wyoming Supreme Court, in *State v. Campbell County School District (Campbell III)*, applied a state executive report on school building standards and a state executive definition of "inadequate" school buildings.[55] The measurement cited in *Campbell III* arose from the legislature's response to a court mandate to define adequacy.[56] The court thus accorded constitutional status to a legislative definition crafted with the goal and requirement of creating a constitutional standard. Whether the Wyoming court should have delegated the power and duty to define adequacy to another branch is the next question this Note will address.

2. *Future Legislative Definition*

Closely related to the existing standards approach is one that has gained more favor among courts: Order the legislature to define adequacy, and accept the result of the legislature's work. This approach fails for the same reason as the existing standards approach—it delegates judicial authority to the legislature without constitutional basis. Both approaches also lack a link between their definition of adequacy and remedy for inadequacy. Accepting legislative enactments as the definition of adequacy presumes that the legislature has the power to alter that definition in a manner contrary to the fundamental purposes of the education article. More broadly, using standardized tests (a likely result of deferring to the legislature, in an era of increased use of standardized tests) to define adequacy makes a sweeping policy judgment—that those tests are based on appropriate educational goals and are crafted to accurately measure progress towards those goals.[57]

In the 1990s, two state supreme courts—Ohio and Alabama—requested definitions of adequacy from the state legislature and later reevaluated these requests. The reevaluations indicate the theoretical and practical problems with the future legislative definition approach.

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[55] 32 P.3d 325, 328, 337 (Wyo. 2001).

[56] See *Campbell I*, 907 P.2d 1238, 1279 (Wyo. 1995).

[57] C. Scott Trimble & Andrew C. Forsaith, Achieving Equity and Excellence in Kentucky Education, 28 U. Mich. J.L. Reform 599, 618-19 (1995) (expressing concerns regarding increased use of standardized tests); cf. Paul Weckstein, School Reform and Enforceable Rights to Quality Education, in Law and School Reform, supra note 46, at 306, 350 (describing how process of setting standards can create problems if standards are too low, vague, or not informed by experts).

In 1997, the Ohio Supreme Court found that the state's funding system led to an inadequate education in poor school districts[58] and ordered the legislature to "create an entirely new school financing system," including a definition of adequacy.[59] Four years later, the court addressed a challenge to the legislature's response and deferred to the legislature.[60] The court largely upheld the legislature's definition of adequacy,[61] but still took it upon itself to tweak the legislature's formula.[62] The court later vacated that ruling, returning to its previous judgment: It declared the school finance system to be unconstitutional and gave the legislature a vague command to reform the system.[63] Thus, the Ohio court's message to the legislature became incoherent: Maybe we'll defer to you, maybe we won't. The court decided these three separate rulings by four-to-three votes and two justices who voted for the plaintiffs in 1997 switched their votes in 2001 and again in 2002.[64] However, the court brought its fatigue upon itself by granting the legislature power to define adequacy. Once it made that decision, it had little choice but to accept the legislature's result or repeatedly tell the legislature to try again. Had the court provided more guidance to the legislature, it would have had firmer ground for requiring the legislature to go back to the drawing board.

The fate of Alabama's delegation of the duty to define adequacy presents an even starker result. Five years after the Alabama Supreme Court ordered the legislature to write and implement a definition of adequacy,[65] plaintiffs brought a renewed suit challenging the legislative result. The court cited justiciability concerns and dismissed the case.[66] If nothing else, this turn of events demonstrates the prac-

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58 *DeRolph I*, 677 N.E.2d 733 (Ohio 1997), aff'd 728 N.E.2d 993 (Ohio 2000), modified by 754 N.E.2d 1184 (Ohio 2001), vacated by 780 N.E.2d 529 (Ohio 2002).

59 *DeRolph I*, 677 N.E.2d at 747.

60 DeRolph v. State (*DeRolph III*), 754 N.E.2d at 1189-90.

61 Id. at 1191. The legislature employed an average per-pupil expenditure as a proxy definition of adequacy. Id.

62 Id. at 1200. This change increased the per-pupil average by $110. Id. at 1207 (Douglas, J., concurring).

63 *DeRolph IV*, 780 N.E.2d 529. The Ohio court suffered from battle fatigue with the legislature. See *DeRolph III*, 754 N.E.2d at 1190 ("We have concluded that no one is served by continued uncertainty and fractious debate.").

64 Compare *DeRolph I*, 677 N.E.2d at 747, with *DeRolph III*, 754 N.E.2d at 1201, and *DeRolph IV*, 780 N.E.2d at 532.

65 *James I*, 713 So. 2d 869, 882 (Ala. 1997) ("[I]t is the legislature that bears the *primary* responsibility for devising a constitutionally valid public school system." (quotation and citations omitted)).

66 *James II*, 836 So. 2d 813, 815 (Ala. 2002) ("Compelled by the [separation of powers] and a concern for judicial restraint, we hold . . . that this Court's review of the merits of [this case] has reached its end, and [that] . . . it is the Legislature, not the courts, from which any further redress should be sought.").

tical problem of giving the legislature authority: Years-long battles may ensue and plaintiffs may fail to obtain a timely or meaningful remedy if the legislature—the very institution responsible for the constitutional violation—declines to work to fix it. As one commentator wrote, "[L]eaving the solution . . . in the hands of the very people who violated the constitution in the first place is asking the lion to mind the lamb."[67]

The Alabama litigation also exemplifies how turning over definitional responsibilities to the legislature can mask theoretical problems with the court's decision. Specifically, the Alabama Supreme Court in an advisory opinion found a violation of the state education clause without first defining the rights entailed by that clause or explaining how it could identify a breach of a right it could not define. The lower court had applied "basic, common-sense standards," without explaining how those "standards" defined or measured adequacy.[68] Rather than uphold the trial court's order that the state provide a definite set of educational inputs,[69] the court ruled that it would "assume" that the legislature would fulfill its duties, obviating the need for any remedial order.[70] The legislature was thereafter left with no guidance on how to measure adequacy nor any consequences if it failed to act.

Not all decisions that referred some tasks to the legislature led to such results. The Wyoming Supreme Court gave the legislature guidance and showed its willingness to enforce those guidelines. In 1995, the court found the state school funding system unconstitutional and ordered the legislature to identify how to measure adequacy in a manner that includes several key inputs: small schools, small class sizes, appropriate curriculum, sufficient services for at-risk and talented students, sufficient standards for students to gain college admis-

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[67] Justin R. Long, Enforcing Affirmative State Constitutional Obligations and *Sheff v. O'Neill*, 151 U. Pa. L. Rev. 277, 306 (2002).

[68] Opinion of the Justices, 624 So. 2d 107, 129 (Ala. 1993). The court took most of those standards from existing state guidelines. See id. at 136 ("[T]he Court finds the evidence is compelling that many Alabama schools fall below standards of minimal educational adequacy . . . that have been adopted by the state itself."). The court did review the history of Alabama's education clause to establish the state's duty "to take affirmative steps to provide education to Alabama's children," id. at 151, but did not connect that history to the output standards applied.

[69] The trial court had issued a remedy order in 1993 that would have imposed a set of inputs, including standards for student achievement and teacher qualifications, the input of parents, teachers and principals in instruction decisions, sufficient salaries and support for staff, efforts to minimize external barriers to learning, provision of early childhood programs, sufficient infrastructure, special education services, and equitable funding. See *James I*, 713 So. 2d at 923-35.

[70] Id. at 882.

sion, and assessment of student progress.[71] Thus, Wyoming is distinguishable from Ohio and Alabama because its court defined adequacy and only asked the legislature to decide how to measure it. The court could then compare the legislative response to the court's own definition. After an uneven legislative response,[72] the plaintiffs won a ruling holding the state funding system for school capital construction inadequate and demanding a new legislative plan.[73]

3. *A Laundry List of Outputs*

The *Rose* decision initiated the current wave of education article cases with a decision requiring the state to improve seven outputs.[74] Even advocates of adequacy challenges have questioned the basis upon which *Rose* listed these outputs.[75] Despite criticisms, *Rose* has attracted at least one follower among state courts. The New Hampshire Supreme Court cited *Rose*'s seven criteria "as benchmarks of a constitutionally adequate public education."[76] The New Hampshire court further strengthened those output requirements in *Claremont School District v. Governor* (*Claremont III*)[77] by requiring the state to adopt a system of accountability to ensure that the court's definition of adequacy is "subject to meaningful application."[78] This conclusion implies that future cases will require the state to test whether students meet the *Rose* output criteria in order for a school to be deemed adequate.

While the *Rose* criteria may form an attractive statement of school policy goals, it is difficult to connect them to state educational clauses. When clauses focus on building productive citizens,[79] the *Rose* court's inclusion of health education represents the constitutionalization by mere assertion of areas with attenuated connections to

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71 *Campbell I*, 907 P.2d 1238, 1279 (Wyo. 1995).

72 The legislature had ordered a study which identified school buildings in need of repair, but not all repairs occurred. The court ordered these projects completed. Campbell County Sch. Dist. v. State (*Campbell III*), 32 P.3d 325, 327 (2001).

73 Id.

74 Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 212 (Ky. 1989). See supra note 8 for *Rose*'s list of output requirements.

75 Dietz, supra note 46, at 1211-12 ("[A]n efficient system of education must . . . provide each and every child with . . . sufficient self-knowledge and knowledge of his or her mental and physical wellness . . . .").

76 Claremont Sch. Dist. v. Governor (*Claremont II*), 703 A.2d 1353, 1359 (N.H. 1997).

77 794 A.2d 744 (N.H. 2002).

78 Id. at 751.

79 See infra Part II.C.

citizenship.[80] The *Claremont School District v. Governor (Claremont II)* dissent addressed this theme, arguing that only three of the *Rose* criteria could find support in New Hampshire's constitution.[81]

Additionally, any focus on educational outputs raises remedial problems. Although quantifiable tests may create relatively easy means for courts to identify inadequacy,[82] they will find themselves without satisfactory remedies for inadequate schools. Faced with chronic inadequacy in particular schools, a court could order the state to increase test scores, but would have no basis for ordering any particular steps to reach that goal.

4. *Educational Inputs*

If educational outputs do not effectively define an adequate education, courts logically can look to educational inputs—the factors that states must provide to ensure an adequate opportunity to learn. Courts in New York and Wyoming have attempted to define constitutionally required inputs. The New York Court of Appeals listed several inputs—"physical facilities and pedagogical services and resources," "minimally adequate instrumentalities of learning," and "minimally adequate teaching."[83] However, the only guidance that this list provides to a state legislature is that physical facilities, school supplies, and teachers must all be "adequate."

The Wyoming Supreme Court provided a more detailed list,[84] including a requirement that the state implement some form of assessment of student performance as an educational input.[85] It identified these assessments—output measurements—as one element of adequacy *inputs* because the court made the pedagogic judgment that setting goals and holding students and schools to those goals has constitutional significance. Low test scores by themselves would not indicate inadequacy, but the complete failure to assess student pro-

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[80] See Rose v. Council for Better Educ., Inc., 790 S.W.2d at 212 ("[A]n efficient system of education must . . . provide each and every child with . . . sufficient self-knowledge and knowledge of his or her mental and physical wellness . . . .").

[81] *Claremont II*, 703 A.2d at 1362 (listing ability to function in complex world, make informed choices, and become civic participant as finding constitutional support).

[82] The *Claremont III* accountability requirement, see text accompanying notes 77-78, fails even this goal because it does not provide a clear description of what output tests should measure.

[83] *CFE I*, 655 N.E.2d 661, 666 (N.Y. 1995).

[84] *Campbell I*, 907 P.2d 1238, 1279 (Wyo. 1995) (requiring adequacy definition to include: small schools, small class sizes, "substantially uniform substantive curriculum," "ample, appropriate provision for at-risk students, special problem students [and] talented students," sufficiently high standards to allow students admission to college, and assessment of students' progress).

[85] Id.; see supra notes 71-73 and accompanying text.

gress would. New Hampshire's *Claremont* litigation also required standardized tests, but the two courts' use of such tests could not be more different. *Claremont* described output measurements as the definition of adequacy,[86] which suggests that if a school's test scores are too low, the school must not be providing an adequate education.[87] Therefore, while a New Hampshire court faced with low test scores could do little more than order the legislature to do something to raise scores,[88] a Wyoming court could order the state to meet the other adequacy inputs (on the belief that this would raise test scores). If the adequacy inputs were already being met, the Wyoming court could hear arguments on whether the definition of adequacy through those inputs needed revision.[89]

5. CFE II: *Requiring Proof of Inputs and Outputs*

In *CFE II*, the New York Court of Appeals clarified its use of inputs and outputs to measure education inadequacy: A plaintiff must show that the state provided inadequate teaching facilities or instrumentalities of learning *and* correlate these failures to inadequate outputs.[90] From the state defendant's perspective, even with a showing of inadequate inputs, the state can absolve itself of liability with a showing of sufficient outputs.

Although the state was not able to make such a showing in *CFE II*,[91] the court's statement that such a showing would lead to a judgment in the state's favor raises troubling questions regarding the court's adequacy measurements. If the state can absolve itself of liability solely through a showing of sufficient test scores, then the court has elevated those test scores to constitutional status. For reasons discussed in Part I.B.1—the very reasons the court cited for not adopting Regents Learning Standards as the definition and measurement of adequacy—this is an improper use of test scores. Once a court has

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[86] *Claremont III*, 794 A.2d 744, 745 (N.H. 2002).

[87] See supra notes 77-78 and accompanying text.

[88] See supra notes 76-78, 82.

[89] Cf. True-Frost, supra note 6, at 1028-29, 1041 (arguing that plaintiffs should seek definition based on inputs and outputs). True-Frost argues that output measurements can establish constitutional inadequacy if schools do not perform well. Id. at 1041 (describing *CFE* plaintiffs' case). If adequacy is defined by inputs *and* output measurements, then measuring inadequacy solely based on outputs makes little sense.

[90] Despite the criticisms of this Subsection, the Court of Appeals deserves credit for relying primarily on a showing of inadequate inputs. In *CFE I*, the Court of Appeals opined that existing standards are "helpful," especially when connected to an independent adequacy definition, but did not explain how they were helpful. See 655 N.E.2d 661, 666 (N.Y. 1995). The court clarified this statement in *CFE II*. See supra note 40 and accompanying text.

[91] See supra note 42 and accompanying text.

identified the educational inputs required by an education article, it should have sufficient confidence in its ruling to find a constitutional violation in *any* failure to provide these inputs. If strong output results exist despite inadequate inputs, the court may want to reconsider its list of educational inputs, but the state should not be able to rely on outputs alone to prove constitutional compliance.

II
THE HISTORICAL AND THEORETICAL ROOTS OF STATE EDUCATION CLAUSE INTERPRETATION

This Section begins by summarizing the various theoretical approaches presented by judges and commentators to interpreting state constitutional clauses that, like education clauses, create positive guarantees of rights. It then applies a national contextual approach to education articles, drawing on the broader history of education articles and public schools to argue that a proper definition of an adequate education begins by connecting education to its role in a functioning democracy. This connection is evident in the intent of constitutional framers and in the broader history and development of education clauses since the 1800s. I again use New York as a case study, and then apply a broader interpretive framework to establish this definition beyond New York's borders.

A. Drawing on a National Set of Authorities to Aggressively Enforce Education Articles

State courts have a vital role in enforcing education articles and aggressively should seek to fulfill this role. Aggressiveness is warranted by the unique nature of state constitutions' positive rights guarantees, the structural elements of state governments, and the factors that distinguish state and federal constitutional interpretation.

1. State Courts' Institutional Role in an Aggressive Defense of State Constitutions' Positive Rights Guarantees

As opposed to many new federalism[92] issues, education clause cases address constitutional provisions with no federal paral-

[92] New federalism seeks to develop judicial protection of rights under state constitutions that go beyond protections offered by courts in federal constitutional cases. See generally William J. Brennan, Jr., State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489 (1977) (arguing that more attention should be paid by litigants and judges to state constitutional protection for individual rights, given Supreme Court's trend of limiting federal protection of civil liberties). For a sampling of new federalism cases that establish state constitutional rights that extend beyond their federal counterparts, see generally Nina Morrison, Curing "Constitutional Amnesia": Criminal Procedure Under State

lel.[93] These clauses create positive state duties (such as the legislature's obligation to provide an adequate education), rather than negative rights (such as freedom from government regulation of speech) guaranteed by the U.S. Constitution. This Section argues that state courts ought to take an aggressive role to ensure that state legislatures live up to their constitutional obligations.[94]

Nearly every state constitution includes what Professor Helen Hershkoff calls "due process of lawmaking" requirements.[95] Besides obligating the legislature to do certain tasks, state constitutions create structures that effectively limit legislative power.[96] Such structures display a relative lack of faith in the legislative branch. State governments require aggressive judicial checks because state and local governments—due to their smaller size and smaller amount of media attention—are more vulnerable to factions twisting the results of a democratic process.[97] Moreover, the legislature's comparative advantage over courts in addressing complex policy questions is less pronounced in many states than in the federal system, because state legislatures often lack the research resources that Congress has.[98]

Further structural considerations indicate how countermajoritarian concerns are less prominent in state courts, thus justifying an aggressive state court role in interpreting constitutional guarantees. State court decisions are best viewed as part of an ongoing process of constitutional interpretation by citizens and all three branches of a state government, rather than pronouncements of fixed principles.[99] Unlike federal judges, who enjoy lifetime tenure, many state judges

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Constitutions, 73 N.Y.U. L. Rev. 880, 898-919 (1998) (describing state cases extending state protections beyond reigning federal interpretations of Fourth, Fifth, and Sixth Amendments).

[93] *Rodriguez* established that the U.S. Constitution provides little or no right to an education. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 36 (1973).

[94] See generally Helen Hershkoff, Positive Rights and State Constitutions: The Limits of Federal Rationality Review, 112 Harv. L. Rev. 1131 (1999) (recommending that state courts reject deferential rationality review in order to enforce welfare rights judicially).

[95] Helen Hershkoff, State Courts and the "Passive Virtues": Rethinking the Judicial Function, 114 Harv. L. Rev. 1833, 1894 (2001).

[96] Id. at 1894-96 (describing state referenda and various local agencies, such as zoning boards, that limit legislative power by mixing legislative, executive, and judicial functions).

[97] Id. at 1924.

[98] Hershkoff, supra note 94, at 1176.

[99] See id. at 1162-63 ("State court decisions, however, often lack the finality that is associated with Article III review. . . . [T]heir judgments comprise only the opening statement in a public dialogue with the other branches of government and the people."); Paul W. Kahn, Interpretation and Authority in State Constitutionalism, 106 Harv. L. Rev. 1147, 1147-48 (1993) (describing state constitutional interpretation as "an ongoing debate" about meaning of vague terms like "equality" and role of government structures).

must continue to win re-election.[100] This creates a form of "popular veto" on the judiciary.[101] Perhaps most importantly, state constitutional decisions are relatively easy to overturn through amendments or a constitutional convention, especially when compared to the arduous federal amendment process.[102] As Professor Burt Neuborne has argued, the common structures of state judicial elections and easy amendment procedures dissolve countermajoritarian concerns by serving as "a form of majoritarian ratification" of judicial decisions.[103]

2. *Drawing on the National "Discursive Context" of Education Articles*

The special role of states in our federal system also helps delineate the most appropriate mode of state constitutional interpretation—one that considers the history and evolution of related clauses in all states. Citing Justice Brandeis's famous dissent in *New State Ice Co. v. Liebmann*,[104] Justice Robert F. Utter of the Washington Supreme Court argued that an innovative state court can create a "laboratory" for constitutional interpretation applicable to other states.[105] Beyond Justice Utter's practical point about state experimentation, courts should consider the national context for any question whose importance transcends state boundaries (as does the question of what kind of education our society will guarantee its children). On such questions, as with political questions generally, the

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[100] Robert F. Utter, State Constitutional Law, the United States Supreme Court, and Democratic Accountability: Is There a Crocodile in the Bathtub?, 64 Wash. L. Rev. 19, 34-35 (1989).

[101] Hershkoff, supra note 94, at 1158.

[102] Id. at 1162-63; Utter, supra note 100, at 34-35; see *DeRolph IV*, 780 N.E.2d 529, 534 (Ohio 2002) (Resnick, J., concurring) (describing constitutional amendment—possibly defining state's education obligation to include specific per-pupil spending requirement—as "the only practical solution" to legislature's failure to follow court orders).

Some structural factors limited to certain states are also relevant. For instance, several states allow their courts to offer advisory opinions, an option that can spur other branches of government to act without dictating results. See Hershkoff, supra note 95, at 1845-46, 1851. The New Hampshire Supreme Court used its advisory opinion power to inform the state legislature that its proposed educational reforms did not satisfy the state constitution. See Opinion of the Justices, 765 A.2d 673 (N.H. 2000). In the early stages of an education adequacy case, the Alabama Supreme Court used an advisory opinion to encourage the legislature to comply with a trial court's ruling. See Opinion of the Justices, 624 So. 2d 107 (Ala. 1993); see also Hershkoff, supra note 94, at 1165-66.

[103] Burt Neuborne, State Constitutions and the Evolution of Positive Rights, 20 Rutgers L.J. 881, 900 (1989).

[104] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

[105] Utter, supra note 100, at 45.

nation, more than the state, is the focal point of the debate. Americans are a mobile people, regularly crossing state lines.[106] The result is that "public life is experienced in and through the national community,"[107] and an individual forms a stronger connection with American history than with the history of his or her state.[108]

In other words, courts should not view states as fifty separate sovereigns with fifty unique constitutional theories. Some commentators have argued that a state's unique history and identity justify a break with the Supreme Court on similar issues, and instead rely on local texts and histories.[109] Such an approach only is partly correct. State constitutions provide independent bases of authority, but they do not exist in an interpretive vacuum, especially in education adequacy cases. All state constitutions but one include a clause guaranteeing an adequate education,[110] thus presenting similar interpretive challenges to all states at once. While one state's interpretation may legitimately vary from another's based on a different history, state courts would lose valuable resources if they did not look beyond their borders to the history and interpretation of other states' similar clauses.[111] The origins of most state constitutions derive from a desire to "realize for their own communities the ideals that are the common heritage of the nation."[112] This argument leads to the conclusion reached by Paul W. Kahn that state courts should interpret any constitutional question in context: "[S]tate constitutional debate cannot close its eyes to the larger discursive context within which it finds itself."[113]

The "discursive context" of state education clauses lies in other states' clauses, the shared history that led states to adopt such clauses, and subsequent development of those clauses. Defining the scope of the inquiry in this manner is easy for those who adhere to Kahn's view of state constitutional interpretation—a view that this Note adopts. Even for skeptics, the history of education articles leads to the conclusion that Kahn's contextual approach is appropriate for these clauses.

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106 Kahn, supra note 99, at 1150.

107 Id. at 1149.

108 Id. at 1162.

109 See, e.g., Hans A. Linde, State Constitutions Are Not Common Law: Comments on Garner's Failed Discourse, 24 Rutgers L.J. 927, 930 (1993). Linde was an Oregon Supreme Court Justice.

110 See Cover, supra note 1, at 404 & n.6.

111 Indeed, state courts often cite (favorably and unfavorably) other states' decisions. See John Dayton, *Serrano* and its Progeny: An Analysis of 30 Years of School Funding Litigation, 157 West's Educ. L. Rep. 447, 457-58 (2001) (listing "review of other judicial interpretations of similar language" as one of three primary methods of constitutional interpretation in school funding cases).

112 Kahn, supra note 99, at 1166.

113 Id. at 1153.

State constitutional drafters operated in the context of education clauses developing in other states, and referenced these other clauses in their deliberations.[114] Accordingly, even the uniqueness approach still will require the use of a national set of materials to help define the intended meaning of a state constitution's guarantee of an "adequate education."

B. How New York's Education Clause History Demands an Interpretive Framework Looking Beyond New York Borders

New York provides a useful example of how an analysis of local and national constitutional history establishes the meaning of an adequate education as one that prepares children for a productive role in a democracy. New York is a state with respected legal traditions,[115] and other state courts and commentators likely will pay a great deal of attention to the final outcome of the *CFE* cases.[116] New York's constitutional language is also relatively weak.[117] Thus, the plaintiffs' victory in New York should bode well for plaintiffs in other states who

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[114] See, e.g., infra notes 128-41 and accompanying text.

[115] See Linde, supra note 109, at 928.

[116] New York's legal developments—and those of other states—also may have international effects if some nations that have included positive rights guarantees in their relatively new constitutions look to American law as a model. See Hershkoff, supra note 94, at 1141-42.

[117] Grouping education clauses into four categories, one commentator classified New York's in the weakest group, providing a "bare minimum" of protection. McUsic, Education Clauses, supra note 46, at 334-38. The laconic language of New York's Education Clause does not describe the level of education that must be provided. N.Y. Const. art. XI, § 1 ("The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated."). New York lacks the "thorough and efficient" requirement of clauses used by Ohio and Wyoming. See Ohio Const. art. VI, § 2 ("The general assembly shall make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the State . . . ."); Wyo. Const. art. VII, § 9 ("The legislature shall make such further provision by taxation or otherwise, as with the income arising from the general school fund will create and maintain a thorough and efficient system of public schools, adequate to the proper instruction of all youth of the state, between the ages of six and twenty-one years, free of charge . . . ."). New York similarly lacks the flowery language of Massachusetts's eighteenth-century clause:

> Wisdom, and knowledge, as well as virtue, diffused generally among the body of the people, being necessary for the preservation of their rights and liberties; and as these depend on spreading the opportunities and advantages of education in the various parts of the country, and among the different orders of the people, it shall be the duty of legislatures . . . to cherish the interests of literature and the sciences . . . especially the university at Cambridge, public schools and grammar schools in the towns . . . to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and frugality, honesty and punctuality in their dealings; sincerity, good humor, and all social affections, and generous sentiments among the people.

then could argue that the stronger language of their constitutions cannot provide less protection than New York's.[118] Finally, the constitutional convention record for New York's education clause is fairly thin, highlighting the importance and role of history from outside the state.

A brief history provides the first elements of the interpretive approach. New York state passed its first common school law in 1795.[119] Thousands of small school districts soon covered the state.[120] During the 1846 constitutional convention, delegates noted the insufficient number of qualified teachers and poor supervision of classrooms and districts as the most pressing problems in the public schools.[121] Delegates drafted an education clause—using language close to that enacted a half-century later—but the clause was tabled without recorded explanation.[122] Evidently, the unregulated school system did not satisfy delegates at the 1894 constitutional convention, who passed the education clause as part of the "children's Bill of Rights" that emerged from that convention.[123]

Several themes are displayed in the few debates over the education clause that exist in the records of the 1894 convention. First, and most importantly for this Note, delegates described the clause as providing a minimum standard of quality. The clause made it "imperative on the State to provide adequate free common schools."[124] The con-

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Mass. Const. pt. II, cl. 5, § 2. This clause, cited by Horace Mann as the epitome of the common school ethos, see infra note 147 and accompanying text, is echoed in the New Hampshire Constitution's similar language:

> Knowledge and learning, generally diffused through a community, being essential to the preservation of a free government; . . . it shall be the duty of the legislators . . . to cherish the interest of literature and the sciences, and all . . . public schools . . . ; to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and economy, honesty and punctuality, sincerity, sobriety, and all social affections, and generous sentiments, among the people . . . .

N.H. Const. pt. II, art. 83.

[118] The converse—if the state defendants had won in New York—would not have hurt plaintiffs in other states too greatly. Such plaintiffs could distinguish any New York decision based on the relatively weak language of New York's constitution.

[119] 3 Charles Z. Lincoln, The Constitutional History of New York 503 (1906).

[120] By 1846, 742,433 children attended school in 11,008 districts, an average of just sixty-seven children per district. Id. at 524.

[121] Id. at 525.

[122] 2 Lincoln, supra note 119, at 205-06.

[123] Id. at 206-07. The "children's Bill of Rights" consisted of the education clause discussed in this Note and several sections establishing funds for various educational purposes. See N.Y. Const. art. IX. At the time the education clause was enacted, about 11,000 districts still existed, leading to great variety in the quality of education. See Bd. of Educ., Levittown Union Free Sch. Dist. v. Nyquist, 439 N.E.2d 359, 368 (N.Y. 1982).

[124] 3 Revised Record of the Constitutional Convention of the State of New York 695 (William H. Steele rev. 1900) [hereinafter Revised Record].

vention's education committee described the foundation of this adequacy requirement in even stronger terms: "The public problems confronting the rising generation will demand accurate knowledge and the highest development of reasoning power more than ever before . . . ."[125] Second, delegates intended the clause to place an affirmative burden on the state government to ensure that the scattered system of small local schools provided education to all children in New York.[126] Third, the education clause was expected to bring some sort of uniformity and organization to the unregulated system of schools.[127]

Finally, the convention record makes clear that the framers intended New York's education clause to provide strong guarantees similar to those in other states. The committee that drafted the clause explicitly equated its clause with the older Massachusetts clause.[128] The committee also compared New York to the many other states that adopted similar clauses.[129] One delegate at the 1894 convention expanded on this theme, noting that New York bore the shame shared by only two other states of not having a constitutional guarantee of a free public school system.[130] Another delegate noted that the education guarantee "is substantially the same" as that provided by other states.[131]

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125 Report of the Committee on Education and the Funds Pertaining Thereto, in Documents and Reports of the Constitutional Convention of the State of New York, 1894, at 4 (Argus 1895) [hereinafter Education Committee Report].

126 One delegate described the clause as "directing" the legislature to provide "universal" education. 3 Revised Record, supra note 124, at 691. Another delegate and a leading commentator of the time described the clause's purpose as "to impose on [the legislature] the absolute duty to provide a general system of common schools." 2 Lincoln, supra note 119, at 554. Lincoln served as a delegate to the 1894 convention, twelve years before publishing his history. 1 Revised Record, supra note 124, at 3.

127 As the Education Committee reported,

> This requires, not simply schools, but a system; not merely that they shall be common, but free, and not only that they shall be numerous, but that they shall be sufficient in number, so that all the children of the State may, unless otherwise provided for, receive in them their education.

Education Committee Report, supra note 125, at 4.

128 See id. at 3 ("But for its quaint phraseology and prolixity we have no doubt that the people of this State would emphatically ratify the adoption by this Convention of the article of the constitution of Massachusetts, which has been a model for many other state constitutions . . . ."). The Massachusetts language is among the most powerful of any state constitution. See supra note 117; see also infra note 147 and accompanying text.

129 See Education Committee Report, supra note 125, at 4 ("[I]t is a significant fact that within the last half century of constitutional revision no other State of the Union has considered it superfluous or unwise to make such an affirmation in its fundamental law.").

130 See 3 Revised Record, supra note 124, at 690.

131 See id. at 695.

Levittown, *CFE I*, and *CFE II* show that the New York Court of Appeals has not delved deeply into its own constitutional history.[132] Nor has the court analyzed the national history of the spread of common schools and education articles, even though New York's history points directly to it. New York courts should apply a different interpretive method by analyzing the national context of New York's education clause.[133] Just as convention delegates looked to other states' education clauses, so should modern New York courts. Similarly, New York courts should look to the history of the spread of common schools during the mid-1800s, when most then-existing states passed their education clauses, to determine what the public that ratified those clauses considered to be a minimally adequate education.[134]

C. *Looking Past State Borders to Interpret Education Clauses*

State constitutional theory can justify relying on sources beyond the traditionally limited notions of founders' intent. Following Kahn's

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[132] The New York Court of Appeals, in *Levittown* and *CFE I*, only briefly discussed this history. The *Levittown* majority described the purpose of the education clause as requiring some minimal amount of adequacy beyond what was in place at the time of drafting. Bd. of Educ., Levittown Union Free Sch. Dist. v. Nyquist, 439 N.E.2d 359, 368 (N.Y. 1982). The court then went on to announce the constitutional guarantee of a "sound basic education," but described that guarantee with vague references to the per-pupil expenditures in other states, not in reference to the education clause's intent in historical context. Id. at 369. Justice Fuchsberg, writing in dissent, gave more attention to the constitutional history, but seemingly only for the purpose of bolstering his rhetorical claim that education is "the first great duty of the State." Id. at 371 (Fuchsberg, J., dissenting). The majority in *CFE I* made no mention of the education clause's history, merely holding that the clause is not just "hortatory." See 655 N.E.2d 661, 665 (N.Y. 1995). The dissent cited the relatively thin record behind the education clause, noting that only one delegate spoke of an adequacy requirement. Id. at 677 (Simons, J., dissenting). The *CFE II* majority did not mention history at all. A concurring justice noted that public high schools existed at the time of the education article's adoption to bolster his claim that the constitution required a high school education. See *CFE II*, No. 74, 2003 N.Y. LEXIS 1678, at *76 (N.Y. June 26, 2003) (Smith, J., concurring).

[133] Accordingly, whether one adopts Kahn's contextual approach, supra notes 113-14 and accompanying text, or the more traditional state uniqueness approach, the broader history becomes relevant. In states in which the adoption of education clauses occurred without such direct references to other states, one would be hard-pressed to cite such general history without adopting a contextual approach.

[134] Telling the full history of the common school's spread across the nation is a task well beyond the scope of this Note. Readers familiar with that history surely will notice what I have omitted in the brief history that follows—namely, struggles between professional reformers and working class families over control within schools and the narrow, often bigoted, conception of American identity that motivated many reformers to use schools to Americanize immigrant children in the late 1800s and beyond. My intention is not to whitewash history. Rather, I cite only that history which is relevant to inform the question of what sort of minimum standards framers of the education clause envisioned. For a fuller telling of education history in this period, see generally David B. Tyack, The One Best System: A History of American Urban Education (1974).

admonition to interpret state constitutions in their broader historical and national context,[135] the past and present interpretations of education clauses by other states should provide persuasive authority to a state court attempting to define the contours of its education clause. All but one state constitution contains an education clause and such clauses have relatively little state-to-state variance.[136] As New York delegates' specific references to other states' clauses[137] and the broader history of the spread of common schools and the spread of education clauses indicate, states adopted these clauses in reference to each other. These clauses have evolved in reference to each other as well. Trends in education show a remarkable tendency to follow national patterns. Whether we discuss the spread of coeducation two centuries ago,[138] or the spread of the standards movement today,[139] most educational developments did not occur in individual states, but spread across the country. Courts, therefore, should look to generally-accepted trends in education occurring at the time states adopted education clauses until the present. Preadoption statements on behalf of common schools and education articles should inform courts' analyses. To help define adequacy, courts should consult well-known postadoption works describing the importance of schools to the preparation of citizens, such as John Dewey's *Democracy and Education*.[140] Additionally, courts should look to adequacy cases in other states to help define their own education clauses. This is not to say that education clauses have identical meanings in all states—textual distinctions and the unique educational needs of each state could warrant differing interpretations—but a level of similarity greater than

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135 See supra text accompanying notes 113-114.

136 See Dayton, supra note 111, at 457 (placing education clauses in four categories but finding "no consistent pattern" between strength of clauses and results of court cases). Education clauses range from New York's spartan clause to the flowery clauses of New Hampshire and Massachusetts. See supra note 117.

137 See supra notes 129-31.

138 See, e.g., David Tyack & Elisabeth Hansot, Learning Together: A History of Coeducation in American Public Schools 28 (1992) (describing late eighteenth- and early nineteenth-century "Protestant-republican ideology" supporting girls' education because "the new nation required a new kind of educated woman").

139 See, e.g., Diane Ravitch, The Search for Order and the Rejection of Conformity: Standards in American Education, in Learning from the Past: What History Teaches Us About School Reform 179 (Diane Ravitch & Maris A. Vinovskis eds., 1995) (reporting that by 1987-88 school year, forty-five states and District of Columbia applied some form of statewide test, with twenty-five states using nationally-normed exam).

140 John Dewey, Democracy and Education: An Introduction to the Philosophy of Education 87 (1997) ("[A] government resting upon popular suffrage cannot be successful unless those who elect and who obey their governors are educated. Since a democratic society repudiates the principle of external authority, it must find a substitute in voluntary disposition and interest; these can be created only by education.").

the current state of the law would represent a marked improvement in state constitutional analysis. Looking beyond state borders would satisfy Kahn's recommendation to view state constitutions in their "discursive context."[141] Courts would look to the history, application, and interpretation of other states' education clauses while applying any concerns unique to their state in defining their education clauses.

1. *How the General History of the Common School Supports a Strong Citizenship-Based Interpretation of Education Articles*

More than any other individual, Horace Mann defined the theory behind public schools in the 1800s, advocating schools' role as building citizens and articulating a strong interpretation of education articles. At a time when many states, responding to Mann's movement, passed such clauses, Mann believed that education clauses mandated an education adequate enough to prepare citizens. This observation does much to establish Mann's position as the founder of a historical understanding of adequacy.[142]

As Massachusetts Secretary of Education, Mann produced writings that captured the development of public school structures around the country. His writings have such longevity that some courts have cited Mann as persuasive authority.[143] Believing that schools were "indispensable to the continuance of a republican government,"[144] Mann defined an adequate education as one that prepares all individuals to carry out complex civic duties, far beyond meeting the formal requirements of voting or jury service. Mann believed that "under our republican government, it seems clear that the minimum of this education can never be less than such as is sufficient to qualify each citizen for the civil and social duties he will be called to discharge," including the roles of parents, voters, jurors, and witnesses, "and con-

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[141] Kahn, supra note 99, at 1153; see also supra text accompanying notes 113-114.

[142] See Tyack, supra note 134, at 5 (listing Mann as one observer who understood school systems' modernizing changes); id. at 43 (presenting Mann as intellectual leader in American education until his death in 1859); see also David Tyack & Larry Cuban, Tinkering Toward Utopia: A Century of Public School Reform 16 (1995) (describing Mann as the representative of "a pervasive Protestant-republican ideology that held that proper education could bring about a secular millennium, could make the United States quite literally God's country").

[143] See, e.g., McDuffy v. Sec'y of Executive Office of Educ., 615 N.E.2d 516, 555 (Mass. 1993) (quoting Mann on connection between schools and democracy); Serrano v. Priest, 487 P.2d 1241, 1266 (Cal. 1971) (quoting Mann on individuals' "absolute right to an education" (emphasis omitted)).

[144] Horace Mann, The Ground of the Free School System (1846), in 5 Old South Leaflets 177, 178 (Old South Ass'n 1902) (excerpting Mann's Tenth Annual Report as Secretary of the Massachusetts State Board of Education).

scientious discharge of all those duties which devolve upon the inheritor of a portion of the sovereignty of this great republic."[145] Mann also explicitly connected education to the First Amendment and to broader democratic principles. He described branches of government and other constitutional rights as "only constituent parts" of education because education forms the basis of effective institutions and meaningful exercise of rights.[146] Finally, Mann argued that his views found voice in Massachusetts's eighteenth-century education clause.[147]

Mann represented the ideology of many other school reformers who successfully pushed for common school laws and education clauses in the nineteenth century.[148] These reformers saw American democracy "as an *experiment* in self-government whose success depended largely on the common school."[149] From 1830 through 1860, common schools and related laws spread throughout the Northeast and Midwest.[150] In this era, reformers, and the publics they convinced, believed that "[m]orality was the most important goal of common education" and that "[m]oral education . . . overlapped citizenship education."[151] Reformers in multiple states echoed statements by Mann quoted above.[152] Spurred on by economic growth, urbanization, increased connection between rural areas and cities, and public debate connecting morality and unity to republican ideals

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145 Id. at 180.

146 Horace Mann, Lectures on Education 50 (1845). The *Rodriguez* dissenters echoed this point. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 62-63 (1973) (Brennan, J., dissenting); id. at 111 (Marshall, J., dissenting) ("[T]he fundamental importance of education is amply indicated . . . by the close relationship between education and some of our most basic constitutional values.").

147 Mann, supra note 144, at 193.

148 See supra note 142.

149 Tyack, supra note 134, at 75.

150 See generally Carl F. Kaestle, Pillars of the Republic: Common Schools and American Society, 1780-1860 (1983). The title of this classic work of education history nicely summarizes the views of many in America toward schools during this formative era. The common school largely did not develop in the antebellum South, id. at 182, but some states began central regulation through constitutions and statutes in the same era. Alabama's constitution of 1819 declared that "[s]chools, and the means of education, shall forever be encouraged in this state," and by 1865 required affirmative steps by the state to establish a system of free schools. See Opinion of the Justices, 624 So. 2d 107, 151-52 (Ala. 1993).

151 Kaestle, supra note 150, at 96-97.

152 For example, the Pennsylvania superintendent said in 1842: "The foundations of our political institutions rest upon man's capacity for self-government . . . . Enlightened public opinion will be a wall of fire around our free institutions, and preserve them inviolate forever." Id. at 97. In 1862, the Illinois superintendent of public instruction noted, "The chief end is to make GOOD CITIZENS. . . . [N]ot to qualify directly for professional success . . . but simply to make good citizens." Id. at 98.

(especially in the face of a diversifying populace), these reformers achieved significant victories.[153]

State regulation became an important force in education.[154] In the mid-nineteenth century, states passed statutes and state constitutions' education clauses to codify an ideology that saw uniform, quality public schools as a crucial element of a state government's job and as inextricably linked to America's continued growth and success. The central policy changes pushed in this era revolved around increasing state control and consolidating small school districts in order to ensure at least a minimum level of quality and consistency.[155]

The ideology of later reformers further supports an interpretation of New York's 1894 education clause (and all such clauses passed in the late 1800s and beyond) as providing strong protections. Late-nineteenth-century reformers sought to transform the highly varied system of small rural school districts into consolidated representations of "the one best system."[156] Administratively, these reformers successfuily established and enforced common minimum standards for all schools.[157] Uniformity—that is, minimum standards applied across a state or the whole country—was necessary to "transmit[ ] the dominant culture through public education," a key element of building democratic citizens.[158] Similarly, even if one pedagogy was not appropriate for all children, uniform standards were appropriate for "buildings and equipment, professional qualifications of staff, administrative procedures, social and health services and regulations, and other educational practices."[159]

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153 See id. at 62-74.

154 Id. at 73.

155 See id. at 111-13, 134-35. The results of these reforms would not strike modern-day policy analysts familiar with school finance cases as strange: Increasing state power and setting higher state standards increased education costs. Id. at 122 (describing how high costs began with construction of new school buildings to serve more children in less cramped conditions).

156 See generally Tyack, supra note 134.

157 Id. at 28-29 ("Efficiency, rationality, continuity, precision, impartiality became watchwords of the consolidators."); id. at 126 (describing turn-of-the-century school reform as placing control in small groups of "business and professional elites" with similar viewpoints).

158 Id. at 84. For a discussion of the antiforeigner and anti-Catholic biases that underlay some of this desire, see id. at 85-88. While modern readers naturally have visceral reactions against such motivations, the broader point regarding the necessity of uniform standards to ensure a minimum standard of citizen education remains powerful.

159 Tyack & Cuban, supra note 142, at 17.

2. *How Other States' Case Law Supports a Strong Reading of Education Articles*

Courts can find significant support for a definition of adequacy that begins with education as civic preparation. The connection surfaced in federal courts in *Rodriguez*, where plaintiffs sought to connect education to the exercise of free expression.[160] The Wyoming Supreme Court's detailed analysis of Wyoming's internal constitutional history found that an adequate education is one that prepares children for the duties of citizenship.[161] Similarly, New Hampshire traced its history back to town schools among early Puritan settlements in New England.[162] In Ohio, a concurring justice in *DeRolph v. State (DeRolph I)* established the importance of public schools in building and settling the West by noting land set-asides for schools in the Land Ordinance of 1785 and encouragement of public schools in the 1787 Northwest Ordinance.[163] One judge in the New York Court of Appeals *CFE I* majority briefly described the history of the education clause as placing an affirmative duty on the state.[164]

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[160] Justices Marshall and Brennan embraced this argument in their dissents, arguing for heightened scrutiny for school funding disparities. See supra notes 5-6. This argument has arisen in other federal cases. Striking down a state's denial of education to illegal immigrant children, Justice Brennan wrote for the majority that "some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system." Plyler v. Doe, 457 U.S. 202, 221 (1982) (citing Wisconsin v. Yoder, 406 U.S. 205, 221 (1972)). The Court previously had connected education to civics by holding First Amendment protections to be especially important in universities. See Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) ("No one should underestimate the vital role in a democracy that is played by those who guide and train our youth."). Justice Marshall, dissenting in *Rodriguez*, cited *Sweezy* on this point. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 112-13 (1973) (Marshall, J., dissenting).

[161] *Campbell I*, 907 P.2d 1238, 1257 (Wyo. 1995). Noting that compulsory education laws dated from when Wyoming achieved territory status, *Campbell I* discussed the "constitutional framers['] . . . great regard for education at the 1889 constitutional convention." Id. The purpose of the education clause relates to democracy because of "the contemporary sentiment that education was a vital and legitimate state concern, not as an end in itself, but because an educated populace was viewed as a means of survival for the democratic principles of the state." Id. at 1259.

[162] The court sampled quotes from early leaders, such as a legislative assertion that "the encouragement of Literature is a sacred and incumbent Duty upon the Legislature." *Claremont I*, 635 A.2d 1375, 1380 (N.H. 1993) (quotation omitted).
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[163] 677 N.E.2d 733, 768-70 (Ohio 1997). Delegates to the Ohio constitutional convention connected education to civics, declaring that education breeds intelligence, "the foundation-stone upon which this mighty Republic rests." Id. at 771 (Douglas, J., concurring) (citing 2 Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Ohio, 1850-51, 14-15 (1851)). Five years later, a plurality of the Ohio court cited a number of convention delegates. See *DeRolph IV*, 780 N.E.2d 529, 531-32 (Ohio 2002).

[164] 655 N.E.2d 661, 672 (N.Y. 1995) (Levine, J., concurring).
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State courts' use of history to describe adequacy in terms of civic education is striking for several reasons. First, many courts have found sufficient historical support for this claim without looking beyond their borders, meaning courts which do look to other states will still find strong cumulative support. Second, the courts reached nearly identical conclusions, indicating substantial similarity in their constitutional histories and in present constitutional interpretations. Courts going one step further would use this conclusion to justify wider use of historical sources and more strongly-worded holdings on the duties imposed by education clauses. Even bolder courts would use this conclusion to justify comparisons to contemporary decisions in other states and to harness modern knowledge of education to flesh out the educational inputs required to fulfill adequacy obligations.

III
FROM EDUCATION FOR DEMOCRACY TO ACHIEVABLE REMEDIES

A. Addressing Educational Theory and Identifying What Educational Inputs Are Required for the Preparation of Citizens

In order for any definition of adequacy to provide much help to courts, it must do more than establish the goal of helping children develop into productive citizens. A constitutionally adequate education consists of those inputs necessary to give a child the opportunity to become a productive citizen; the issue becomes what the state must do in order to reach that result. Some may raise the concern that answering this question would involve courts in education theory, a domain better left to the legislature. However, courts make policy judgments in public benefit cases regularly.[165] Practice also shows that courts have the capability to make policy judgments regarding educational adequacy with the help of expert testimony.[166]

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[165] If one group receives more funds than another, courts apply a well-known equal protection analysis. As James E. Ryan argues, this presumes the policy judgment, implicit in equal protection doctrine, that equality of funding will lead to equality of services and equality of whatever benefit comes from such services. James E. Ryan, *Sheff*, Segregation, and School Finance Litigation, 74 N.Y.U. L. Rev. 529, 547-48 (1999). State education clauses imply that adequacy will lead to a better education for all, but leave the term as undefined, just like "equality" in the Fourteenth Amendment.

[166] Martha I. Morgan et al., supra note 47, at 578 (describing Alabama plaintiffs' successful use of expert witnesses in education reform litigation); see also supra note 27 and accompanying text. Wyoming in particular has put experts to good use, hiring a panel to develop a cost estimate of adequacy based on a legislative agreement of what constituted adequacy. See James W. Guthrie & Richard Rothstein, Enabling "Adequacy" to Achieve Reality: Translating Adequacy into State School Finance Distribution Arrangements, in

Most importantly, defining adequacy in terms of preparing democratic citizens provides significant guidance to courts in determining what evidence of adequacy is most valuable—evidence of inputs. To fulfill the goals of education clauses, citizens must have the capability to understand the various complexities of public issues. The complexity of such issues is more probative than the level at which they are typically discussed. Thus, in a point properly overturned on appeal, the appellate division in *CFE II* erred in giving any weight to the state defendant's assertion that an eighth-grade education was adequate because most jury instructions and newspaper stories about elections and political issues were written at an eighth-grade level.[167] Evaluating whether the United States should go to war with a particular country, for example, calls for an understanding beyond that of an eighth grader, regardless of the level at which newspapers present the issues.[168] Constitutional adequacy demands educational inputs sufficient to give children such understanding.

An adequate education for younger children entails teaching fundamental skills, such as reading, writing, and basic math, and the critical thinking skills necessary to understand complex adult issues. Similarly, an adequate education for older children must present subject-area material that enables them to think critically about related issues beyond school walls. With this in mind, courts can better analyze curricula offered by schools. The supreme court judge in *Campaign for Fiscal Equity v. State (CFE II Trial)* criticized the "defunding" of arts and physical education, although even he acknowledged that neither the state constitution nor the Court of Appeals had said anything regarding those subjects in reference to educational adequacy.[169] A claim connecting arts education to adequacy could potentially survive constitutional scrutiny if the factual record connected such classes to developing critical thinking skills or an understanding of public issues.[170]

Finally, education clauses did enshrine a certain model of schools into state constitutions. While the point may seem too obvious to

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Equity and Adequacy in Education Finance: Issues and Perspectives 209, 230-31 (Helen F. Ladd et al. eds., 1999).

167 *CFE II App. Div.*, 744 N.Y.S.2d 130, 138 (App. Div. 2002) (citing evidence indicating that "jury charges are generally at a grade level of 8.3, and newspaper articles on campaign and ballot issues range from grade level 6.5 to 11.7").

168 See *CFE II*, No. 74, 2003 N.Y. LEXIS 1678, at *12-13 (June 26, 2003) (distinguishing requirements for voting and jury service from "productive citizenship").

169 *CFE II Trial*, 719 N.Y.S.2d 475, 500 (Sup. Ct. 2001).

170 Judge DeGrasse's unsupported claim contrasts with evidence that adequacy is related to a teacher's certification, experience, college attended, and degree obtained, especially when aggregated across a large school system. Id. at 491-98.

belabor, the framers envisioned a set of school buildings set off from the rest of society where children would go to learn. This much is clear from the history of common schools.[171] This leads to the conclusion that adequacy entails decent school buildings, a requirement that many courts have recognized.[172]

The cases also show that existing governmental reports can be powerful evidentiary tools. Here, it is important to distinguish the use of such evidence to prove independently-established markers of adequacy from its use as a definition of adequacy. Existing state standards have little relevance to defining the broad goals of an adequate education.[173] However, once state constitutional analysis has established that decent school buildings form part of adequacy, state reports detailing the poor state of school buildings in certain districts go a long way towards proving inadequacy.[174]

B. A Variety of Available Input Remedies

Once a court has defined educational adequacy, both in terms of broad constitutional goals and required specific inputs (such as buildings, teachers, curricula, etc.), crafting a specific remedy should present little difficulty: The court should order the state to provide whatever input it found inadequate.

The above framework also should encourage plaintiffs to think creatively about desired remedies. Some plaintiffs likely will want to attack statewide funding systems, but others with more modest goals also should be able to achieve success. Schools unable to provide decent school buildings or textbooks reflecting a modern curriculum can sue seeking sufficient funds to provide such resources. Schools unable to pay sufficient salaries to attract qualified teachers can sue for teacher recruitment and retention funds.[175] Seeking such specific

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171 See, e.g., John Demos, A Little Commonwealth: Family Life in Plymouth Colony 143 (1970) (describing early transition from home schooling and apprenticeship to separate town schools in colonial Massachusetts, about one century before Massachusetts and New Hampshire adopted education clauses).

172 See, e.g., *CFE I*, 655 N.E.2d 661, 666 (N.Y. 1995) (listing "physical facilities" as one constitutionally mandated input); *DeRolph I*, 677 N.E.2d 733, 744 (Ohio 1997) (holding funding system inadequate when schools lack money for safe buildings); *Campbell III*, 32 P.3d 325, 327 (Wyo. 2001) ("[C]apital construction financing critically impacts the quality of education.").

173 See supra Part I.B.1.

174 See, e.g., *CFE II Trial*, 719 N.Y.S.2d at 501-03 (citing repeated reports by legislature, state education department, and New York City Board of Education on old and unsafe school buildings).

175 A recent Tennessee case decided on equal protection grounds presents an instructive counterexample to adequacy litigation. When a group of rural school districts sued the state over its school funding formula, the Tennessee Supreme Court held that the state

remedies allows education clauses to evolve to ensure adequacy based on contemporary needs, not nineteenth-century practices.

Crafting appropriate remedies rests on the crucial understanding that education clauses place responsibility on the state for ensuring that each school provides an adequate education.[176] Plaintiffs can then target both state funds and state power over school districts as remedial sources. Regarding state funds, for example, the New Hampshire Supreme Court took this theme to its logical extension, holding that any education tax must be statewide.[177]

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constitution's education clause required equal educational opportunity for all students. Tenn. Small Sch. Sys. v. McWherter (*Small Schools I*), 851 S.W.2d 139, 140-41 (Tenn. 1993); see also Tenn. Const. art. XI, § 12. After years of legislative and court struggles, the court issued a limited holding that it was only the legislature's failure to *equalize* teacher salaries across the state that violated the state constitution. Tenn. Small Sch. Sys. v. McWherter (*Small Schools III*), 91 S.W.3d 232, 233-34 (Tenn. 2002) (describing issue as whether legislature's plan "equalize[s] teachers' salaries"). The court refused to entertain plaintiffs' argument that the Tennessee legislature had failed to set adequate minimum salaries to ensure poor districts could hire quality teachers, citing justiciability concerns. Id. at 242 ("It is not the business of the courts to decide how salaries are funded or at what level teachers should be compensated . . . .").

Constrained by its equality holding in *Small Schools I*, the remedy of equalizing salaries did not coincide with the court's logic in *Small Schools III*. The court found that teacher salaries "are a significant factor" that determines where qualified teachers teach and that educational opportunity does not require "identical" teacher salaries in every district. Id. at 240, 242. A court adopting the adequacy model outlined above would first find an adequate education to include the presence of sufficient numbers (defined, for instance, as more than ninety percent of a faculty of sufficient size to provide adequately small class sizes) of qualified teachers (defined, for instance, as teachers with some requisite amount of certification, education, or experience). An adequacy court would then have required the state to spend whatever necessary to ensure all districts had such a breakdown of teachers; such a remedy likely would result in a more dramatic increase in teacher salaries (and thus teacher quality) in rural Tennessee districts.

176 See supra note 126 and accompanying text.

177 *Claremont II*, 703 A.2d 1353, 1354 (N.H. 1997) (holding that property tax levied to fund education must be proportionate across state). The New Hampshire court relied on the tax clause of the state constitution, which had been interpreted to require that "all taxes be proportionate and reasonable." Id. at 1355 (citing Opinion of the Justices, 379 A.2d 782, 786 (N.H. 1977)). The Alabama Supreme Court held similarly. Opinion of the Justices, 624 So. 2d 107, 120 (Ala. 1993) ("By law, all public school taxes are state taxes, and all public school funds are state funds, whether collected at the state or local level."). The Alabama court, however, failed to explain how taxes set and collected locally would be state taxes in anything but name. Presumably, when coupled with its never-implemented order for equitable funding, *James I*, 713 So. 2d 869, 933 (Ala. 1997) (Hooper, J., dissenting) (reprinting remedy order from Pinto v. Ala. Coalition for Equity, 662 So. 2d 894, 899 (Ala. 1995)), this holding would require the state to compensate with its own funds for variations in local revenues. This, in turn, would create a financial incentive for localities to lower taxes, knowing that the state had an obligation to fill the funding void, beginning a process of state revenues and expenditures replacing local ones. Of course, once the Alabama Supreme Court prevented the implementation of the trial court's remedy, this process could not begin. See id. at 882.

Understanding adequacy as the linchpin of education clause litigation will help courts resist the impulse in school funding cases to consider equal funding a suitable remedy. Numerous commentators have recognized that it costs more to provide an adequate education to at-risk children.[178] Because poorer children tend to arrive at their first day of school at age five or six already behind their middle- and upper-class peers,[179] school districts must spend more money per pupil for children commonly labeled "at-risk." The higher cost of educating at-risk children argues against defining adequacy by averaging per-pupil costs.[180]

Beyond fiscal remedies, plaintiffs could seek a state takeover of a chronically mismanaged school or district.[181] Plaintiffs could seek

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[178] See, e.g., Buzuvis, supra note 6, at 669 (arguing that adequacy claims can help at-risk children "receive the additional funding they require"); William H. Clune, Educational Adequacy: A Theory and its Remedies, 28 U. Mich. J.L. Reform 481, 486-87 (1995) (arguing that adequacy claims support claims for spending more money on at-risk children than on their peers); Michael A. Rebell, Fiscal Equity in Education: Deconstructing the Reigning Myths and Facing Reality, 21 N.Y.U. Rev. L. & Soc. Change 691, 712 (1995) (pointing out that urban schools require high levels of funding due to large proportion of remedial students, non-English speaking students, and students with disabilities); James E. Ryan, Schools, Race, and Money, 109 Yale L.J. 249, 285 (1999) ("Greater needs require greater resources: Disadvantaged students simply cost more to educate, requiring additional educational programs and non-academic services such as health care and counseling.").

[179] See, e.g., Carol H. Ripple et al., Will Fifty Cooks Spoil the Broth?: The Debate Over Entrusting Head Start to the States, 54 Am. Psychol. 327, 329 (1999) (reporting that by some estimates, about one-third of all children "enter kindergarten ill-prepared to learn" and rate is nearly double in poor urban areas). The performance gap among children enrolling in kindergarten or first grade could form the foundation for a lawsuit demanding that the state provide early childhood education to children under five. Plaintiffs would argue that without early childhood education, the school system does not allow the opportunity to achieve the results of an adequate education.

[180] *CFE II* rejected the state's claims that roughly equal spending across the state meant that the legislature had fulfilled its duty to New York City children. No. 74, 2003 N.Y. LEXIS 1678, at *57 (June 26, 2003) ("[P]laintiffs have a right not to equal State funding but to schools that provide the opportunity for a sound basic education."). Unfortunately, the Ohio Supreme Court has implied that an approach based on equal funding would meet with its approval. In 2001, it upheld a legislative scheme based on averaging per-pupil expenditures. See *DeRolph III*, 754 N.E.2d 1184, 1191 (Ohio 2001). The legislature had averaged per-pupil costs of all districts that met twenty of twenty-seven state standards and defined that figure ($4814 in fiscal year 2002) as the input required for an adequate education. Id. at 1191. In *DeRolph III*, the court tinkered with the legislature's formula, see id. at 1200, but gave its imprimatur to the legislature's work, giving no consideration to the greater needs of children who may be disproportionately concentrated in certain districts. Although it reversed that decision in 2002, it gave no additional guidance to the legislature, and a concurring justice in the 4-3 decision suggested a constitutional amendment requiring a specific per-pupil figure. See *DeRolph IV*, 780 N.E.2d 529, 534 (Ohio 2002) (Resnick, J., concurring).

[181] See generally, Aaron Saiger, Disestablishing Local School Districts as a Remedy for Educational Inadequacy, 99 Colum. L. Rev. 1830 (1999) (encouraging courts to require states to "disestablish" failing school systems).

court-ordered changes to management practices, or requirements that the state ensure some measure of teacher quality.[182] Some commentators have suggested that plaintiffs seek racial and economic integration, a goal hard to achieve without looking beyond school district lines.[183]

Some plaintiffs have sought school choice as a remedy for inadequacy.[184] Without stepping too far into the school choice debate, this remedy, like any other, may find court support so long as plaintiffs could prove that the absence of school choice caused inadequacy. However, such proof may be difficult since school choice rests more on economic theory than hard data.[185]

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[182] See Liz Kramer, Achieving Equitable Education Through the Courts: A Comparative Analysis of Three States, 31 J.L. & Educ. 1, 49-50 (2002) (encouraging plaintiffs to seek remedies beyond money, including efficient school management and higher teacher standards).

[183] McUsic, The Law's Role, supra note 46, at 120 (listing "class integration," school choice, and statewide reform as potential remedies); Ryan, supra note 165, at 554 (arguing that racial and socioeconomic integration are "viable alternatives to traditional school finance litigation"). Such a remedy would help plaintiffs get beyond the bar to interdistrict desegregation remedies set by the Supreme Court under federal law. See Milliken v. Bradley, 418 U.S. 717, 721, 745-46 (1974) (preventing interdistrict remedies "absent any claim" that district lines were drawn with racial animus or that each district at issue "committed acts which effected segregation within the other districts").

Judge DeGrasse, in the final paragraphs of his seventy-six-page decision in *CFE Trial*, ordered the state to study the effect of racial segregation on the quality of education. 719 N.Y.S.2d 475, 551 (N.Y. Sup. Ct. 2001) (citing Ryan, supra note 178). The Court of Appeals did not include this command in its remedial order. More drastically, the Court of Appeals, in a case decided the same day as *CFE II*, ruled that racial integration was not an element of constitutionally required adequacy. See Paynter v. State, No. 75, 2003 N.Y. LEXIS 1672, at *12 (June 26, 2003) (holding that plaintiff's claim connecting racial isolation to inadequate education "has no relation to the discernible objectives of the Education Article"). Unfortunately, the New York Court of Appeals seemed to base its conclusion on a confused understanding of the state's responsibility to provide an adequate education. The court wrote that "the Education Article enshrined in the Constitution a State-local partnership," rejecting any proposed remedy that would cross local school district lines. Id. at *11. A dissenting justice correctly noted that "[t]he Constitution does not place the responsibility of providing a sound education on local school districts, or towns, or cities. It places that responsibility squarely on the State." Id. at *64 (Smith, J., dissenting).

[184] See, e.g., Jenkins v. Leininger, 659 N.E.2d 1366, 1368 (Ill. App. Ct. 1995). Upholding the trial court's dismissal of the case, the Illinois Appellate Court worried that, given the "very complexity of the problems of financing and managing a statewide public school system," the record would not justify choosing one grand remedy. Id. at 1377 (citing San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 41-43 (1973)).

[185] For instance, had the *CFE* plaintiffs sought school choice as a remedy, they could not have relied on evidence connecting factors such as teacher quality, class size, and school buildings to an adequate education, because addressing these problems is distinct from school choice.

Finally, just as plaintiffs can think creatively in deciding what remedies to seek, they also can seek creative settlements.[186] Once courts make clear that plaintiffs have colorable legal claims, they will have significantly more political capital when lobbying for particular changes. Among states surveyed in this Note, those that opened courthouse doors to education clause suits (regardless of any flaws in those states' reasoning) saw funding disparities between rich and poor districts decrease at a rate faster than the national average.[187] A settlement could bring immediate changes to a state education system and alleviate a plaintiff's concern that courts could give an unfavorable ruling. A settlement could also allow other plaintiffs to return to court seeking more specific remedies left out of a settlement.

CONCLUSION

State courts have at their disposal sufficient tools to craft a constitutionally legitimate, theoretically coherent, and effective definition of educational adequacy. State courts can consider their own history and the history and development of education clauses and education

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[186] In New York, the Campaign for Fiscal Equity had negotiated with Governor George E. Pataki before the Court of Appeals issued its final ruling. See Greg Winter, Both Sides Explore Settlement in Suit over School Financing, N.Y. Times, Oct. 10, 2002, at B11. It is unclear whether Pataki's willingness to negotiate was due to fear of what the Court of Appeals might do with the case or out of fear of how his opponents in the gubernatorial election would characterize his position. See Shaila K. Dewan, Pataki Attacks June Ruling that 8th-Grade Education is Enough, N.Y. Times, Sept. 13, 2002, at B6 (describing criticisms of appellate division's dismissal of case by Governor George Pataki's Democratic opponent and Pataki's subsequent distancing from that ruling, despite his initial support). After Pataki's landslide re-election, talks ended in stalemate. Abby Goodnogh, Settlement Fails in Talks on School Financing, N.Y. Times, Dec. 3, 2002, at B3.

[187] Between 1997 and 2000, Ohio's disparity fell by forty-one percent, New Hampshire's by twenty-seven percent, New York's by twenty-three percent, and Wyoming's by twenty percent. The average national difference fell fifteen percent. The Education Trust, The Funding Gap: Low-Income and Minority Students Receive Fewer Dollars 4-5 tbl.2 (Aug. 2002), http://www2.edtrust.org/NR/rdonlyres/B9193391-542E-4D1D-8745-533273F144EA/0/investment.pdf. To compile its data, the Education Trust compared per-pupil funding in the quartile of districts with the highest child poverty rates with the quartile with the lowest child poverty rates. The data include state and local funding only, not federal funding. Id. at 3 tbl.1. While isolating causes of trends as complex as education funding always presents difficulties, the diversity in size, demographics, politics, and economics among New York, New Hampshire, Ohio, and Wyoming suggests that court battles in those states played some role in funding changes. Despite progress, severe funding disparities remained, especially in New York, which, at $2152 per pupil, had the highest disparity in the nation. New Hampshire's disparity was $733, Wyoming's $715, and Ohio's $394. Id. at 3. Alabama's disparity actually increased from 1997 to 2000 by thirty-four percent to $991. Id. at 3-4. The dismissal in *James II* could not be a cause because it did not occur until 2002. However, *James I*'s relatively weak court order to the legislature did not provide plaintiffs and their political allies with the same bargaining position as cases in other states, and could be a cause. See supra notes 65-70 and accompanying text.

theory in other states. Such an analysis leads to the conclusion that an adequate education prepares children to be productive members of our democratic community: It builds sufficient basic skills and critical thinking necessary to understand, appreciate, and form opinions regarding the complex issues that they will encounter as voters, jurors, and citizens. The state, not local school districts, bears the constitutional responsibility for providing an adequate education. Guided by a constitutional definition, trial courts have the ability to determine what educational inputs the state must provide—whether those inputs are school buildings, equipment, teachers, curriculum, management, or anything else that parties can prove is required for the preparation of citizens. This does not give courts unchecked power, both because adequacy represents a minimum level of education, not perfect schools, and because state courts are checked by legislative power and the relatively easy means to amend state constitutions. If state courts adopt this approach, they will go a long way towards ensuring an adequate education for all children.