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RETHINKING CONSTITUTIONALITY IN EDUCATION RIGHTS CASES

Joshua E. Weishart*

ABSTRACT

Education rights cases often devolve into a farce of constitutional brinkmanship played by a miserable cast of reluctant courts and recalcitrant legislatures. Between successive rounds of litigation and tepid legislative fixes, come threats of impeaching judges, closing schools, stripping courts of jurisdiction, and holding legislators in contempt. Despite all the bluster, judges and legislators both anxiously await the curtain call, when they can bow out and terminate the matter. In the end, what passes for constitutionality in the *successful* cases is a school funding scheme judged “reasonably likely” or “reasonably calculated” to achieve an adequate or equitable education—as opposed to a public education system that is adequate and equitable. But rather than reflect the reality that adequacy and equity are interminable demands, these cases reflect a failure to confront and blunt that reality for disadvantaged children.

The trouble lies in a judicial exit strategy focused on a fixed point of compliance—a state of *being* constitutional—that is altogether misplaced and counterproductive when the object is educational adequacy and equity. This Article proposes that the focus instead should be on whether the state maintains fidelity with those guarantees. That reconception counsels courts to entertain periodic exercises of jurisdiction. Between these periodic exercises of jurisdiction, interim remedies—data collection and public engagement projects—should gauge and sustain the state’s fidelity with the constitutional guarantees.

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More fundamentally, this reconception requires transformative thinking, beginning with an acknowledgment that the end goal in these cases should be progress towards a goal without end.

I. INTRODUCTION

“It feels weird to say it’s done, after all this time,” said Stephanie McCleary, mother of two, who challenged the constitutionality of Washington’s K-12 school funding system.¹ When Stephanie and her husband initiated the lawsuit in 2007, their son Carter was seven and their daughter Kelsey was thirteen; when the court finally terminated the case in 2018, Kelsey had already graduated from college and Carter had graduated from high school.² It felt somewhat like a hollow victory, not just for her family, leaving Stephanie to wonder, “What does ‘done’ mean?”³

For even as the court terminated the case, Stephanie and her attorney insisted it “didn’t rule on whether the state’s plan actually fulfills the constitutional definition of ‘ample’ funding.”⁴ The definition of ample funding and its alleged denial to a million-plus K-12 children was the basis of the McClearys’ original petition.⁵ Decades earlier, the Washington Supreme Court had declared that ample funding was the State’s “mandatory,” “affirmative,” and “paramount” duty.⁶ Decades later, when *McCleary* reached the high court, it reiterated that ample meant “fully sufficient” funding, enough to guarantee to “each and every child” a “constitutionally adequate education” that provides “the opportunity” to meet the State’s education standards.⁷ This paramount duty is “the State’s first and highest priority before any other State programs or operations.”⁸

1. . Joseph O’Sullivan, *Washington Supreme Court Ends Long-running McCleary Education Case Against the State*, SEATTLE TIMES (June 9, 2018), <https://www.seattletimes.com/seattle-news/washington-supreme-court-ends-100000-per-day-sanctions-against-state-in-mccleary-education-case/> [https://perma.cc/L924-DPRZ].

2. . *Id.*

3. . *Id.*

4. . *Id.*

5. . *See* *McCleary v. State*, 269 P.3d 227, 244–45 (Wash. 2012).

6. . *See* *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71, 85 (Wash. 1978).

7. . *See* *McCleary*, 269 P.3d at 249, 251–53.

8. . *Id.* at 249.

The court unanimously agreed with the McClearys that the state had failed to fulfill that duty.⁹ The school funding formulas were not calibrated to meet the actual costs of providing an adequate education, resulting in the underfunding of teacher salaries, transportation, instructional materials, and other operating costs.¹⁰ The State had instead “relied heavily on local levies to fill the gap in funding,” especially for teacher salaries.¹¹ Local districts were thereby forced “to turn increasingly to excess levies”—property rich districts were able to do so, property poor districts could not—thus affecting the equity of a statewide system.”¹² Therefore, the court concluded, the State must undertake “fundamental reforms” to address these issues and satisfy “its constitutional obligation to its students.”¹³

That conclusion, rendered in 2012, came too late for Kelsey McCleary, by then a high school senior, who would not benefit from any funding reforms.¹⁴ Younger brother Carter, then in middle school, would also not benefit from those reforms, which did not come for another *six years*, until 2018. You see, rather than order specific reforms in its 2012 decision, the court deferred to the Legislature to devise the appropriate K-12 funding system remedies.¹⁵ A majority of the court, nevertheless, elected to retain jurisdiction to monitor implementation.¹⁶ “This option,” the majority said, “strikes the appropriate balance between deferring to the legislature to determine the precise means for discharging its [constitutional] duty, while also recognizing this court’s constitutional obligation” to ensure compliance.¹⁷ The court also required the Legislature to submit periodic reports on its progress.¹⁸

9. . *See id.* at 261.

10. . *See id.* at 253–58.

11. . *Id.* at 257.

12. . *McCleary*, 269 P.3d at 252-53.

13. . *See id.* at 258.

14. . *See* Donna Gordon Blankinship, *What the Education-funding Lawsuit Means to Moms*, THE SEATTLE TIMES (Sept. 12, 2016) [<https://perma.cc/7NRT-RMCQ>].

15. . *See McCleary*, 269 P.3d at 260–61.

16. . *Id.* at 261.

17. . *Id.*

18. . *McCleary v. State*, No. 84362-7, at 2 (Wash. Jul. 18, 2012) (order requiring the legislature to submit periodic reports) [<https://perma.cc/SHT5-JYCR>].

Order from Jul. 18, 2012 at 2, *McCleary*, 269 P.3d 227 (No. 84362-7) [<https://perma.cc/SHT5-JYCR>].

In the six years that followed, “legislators and the governor dragged their heels,” failing to comply fully with the 2012 decision.¹⁹ Just two years in, the court unanimously held the State in contempt for failing to submit a plan for full implementation of the required reforms.²⁰ A year later, the Legislature remained obstinate, so the court took the unprecedented step of imposing a \$100,000-per-day fine until the State complied.²¹ Meanwhile, three Supreme Court justices faced challenges in the 2016 election, their challengers recruited by a state representative who viewed *McCleary* as a judicial overreach.²² Not to be outdone, the McClearys’ attorney suggested that the court should ratchet up the contempt sanctions, threaten to shut down schools or invalidate billions in previously enacted corporate tax breaks, unless or until the state complied.²³

The brinkmanship eventually gave way to action and cooler heads prevailed. The three incumbent justices won reelection, the court did not impose more drastic contempt sanctions, and, in 2017, the Legislature enacted a K-12 budget under new formulas that the court then determined would fund the components of a basic education and “achieve constitutional compliance” when “fully implemented.”²⁴ The only matter delaying full implementation at that point was when the Legislature would be required to fund increases in teacher and staff salaries to bring compensation to market levels.²⁵ The State wanted until the 2019-20 school year to phase in the full \$2.2 billion salary increase, but the court insisted on full

19. . O’Sullivan, *supra* note 1.

20. . McCleary v. State, No. 84362-7, at 4 (Wash. Sept. 11, 2014) (order finding the State in contempt for failing to comply with a previous order) [<https://perma.cc/DP5C-GXRU>].

21. . McCleary v. State, No. 84362-7, at 9-10 (Wash. Aug. 13, 2015) (order assessing a \$100,000 per day penalty on the State of Washington) [<https://perma.cc/4CVC-XXZE>].

22. . Sara Hayden, *Electing the Bench: An Analysis of the Possible Negative Effects of Judicial Elections on Hawai’i’s Legal Community*, 18 ASIAN-PAC. L. & POL’Y J. 114, 134 (2016).

23. . Melissa Santos, *Why \$67 Million Fine Isn’t Motivating the Legislature to Act*, THE NEWS TRIBUNE (Jun. 13, 2017) [<https://perma.cc/3NDY-49AP>].

24. . McCleary v. State, No. 84362-7, at 1 (Wash. Nov. 15, 2017) (order acknowledging the State of Washington’s progress in the *McCleary* matter) [<https://perma.cc/WW7A-SZUB>].

25. . *Id.* at 2.

implementation by its September 1, 2018 deadline.²⁶ Lawmakers relented, appropriating the full funds for the new salary allocation model by the start of the 2018-19 school year.²⁷ That brought the State into compliance with the court’s prior orders in the case—even the McClearys agreed—and “therefore the State’s appeal” could at last “come to an end.”²⁸ More than a decade after the case was initiated, the court lifted its contempt sanctions and terminated its jurisdiction.²⁹

By nearly every traditional measure, the McClearys had prevailed. The court reaffirmed and elaborated on children’s “positive constitutional right” to education, explaining that it (i) imposes a duty compelling, rather than restraining, government action to provide an adequate education and (ii) obligates “the court to take a more active stance in ensuring that the State complies with its affirmative constitutional duty.”³⁰ And the court remained steadfast in its demands that the State fulfill its paramount duty despite staunch opposition and noncompliance from the other coordinate branches of government. The court did not flinch in imposing contempt sanctions that the State was forced to set aside in a separate account—\$105 million of which the State appropriated for teacher salaries and special education costs.³¹

In total, lawmakers increased state funding for K-12 education by more than \$8 billion.³² That additional funding will help pay for all-day kindergarten, reduced K-3 class sizes, enhanced transportation, increased funding for exceptional and special needs students, and market-based salaries for teachers, among other things.³³ Overall spending per pupil “increased from \$6,655 in 2010 to \$9,344 in 2018.”³⁴ As a result, “more

26. . *Id.* at 2, 41–42.

27. . *McCleary v. State*, No. 84362-7, at 2–3 (Wash. June 7, 2018) (order lifting the \$100,000 per day penalty against the State of Washington) [<https://perma.cc/3KVL-L4YS>].

28. . *Id.* at 3–4.

29. . *Id.* at 4.

30. . *McCleary*, 269 P.3d at 247–48.

31. . Order of Jun. 7, 2018, *supra* note 27, at 3. The court declined plaintiffs’ request to order the state “to pay prejudgment interest on the accrued sanctions.” *Id.* at 4.

32. . *See* Order of Nov. 15, 2017, *supra* note 24, at 23 (from \$13.4 billion when *McCleary* was decided in 2012 to \$22 billion when it was terminated in 2018).

33. . *See id.* at 28–40.

34. . *Id.* at 23.

than half of the state's operating budget will go to public schools for the first time in nearly 25 years."³⁵

So why were Stephanie McCleary and her attorney unwilling to accept this outcome as a complete and total victory? Because they contended that the court did not determine that the new funding formulas were, in fact, fully sufficient to guarantee all children a constitutionally adequate education.³⁶ Yet that was the impression conveyed by the court putting its imprimatur on the new formula, formally approving the state's actions, and terminating the case.³⁷ Before the court ended its jurisdiction, there was already some evidence to suggest that the new school finance scheme was not, in fact, adequately or equitably funded.³⁸ Indeed, within months of the court's ruling, teachers in multiple school districts went on strike when contract negotiations failed over the \$2 billion allocated for increased teacher salaries.³⁹ For some districts, the overriding sense was

35. . Jim Camden, *Legislature Met Its Duty on Public Schools, Supreme Court Says*, THE SPOKESMAN-REVIEW (Jun. 8, 2018), <http://www.spokesman.com/stories/2018/jun/07/legislature-met-its-duty-on-public-schools-supreme/> [<https://perma.cc/W2YN-URR>].

36. . *Id.*

37. . *See, e.g., id.; They Did It! Washington Has Finally Fully Funded Education*, MYNORTHWEST (Jun. 7, 2018), <http://mynorthwest.com/1012718/washington-fully-funds-education-mccleary/> [<https://perma.cc/V85J-ESP9>]; Emily Boerger, *Supreme Court Rules Legislature Finally in Full Compliance with the McCleary Decision*, WASHINGTON STATE WIRE (Jun. 7, 2018), <https://washingtonstatewire.com/supreme-court-rules-legislature-finally-in-full-compliance-with-the-mccleary-decision/> [<https://perma.cc/9DYH-SS42>].

38. . *See* Brief of Amicus Curiae, Washington's Paramount Duty, 1-8, McCleary, 269 P.3d 227 (No. 84362-7); Bill Keim, *Commentary: School funding lawsuit over but not its headaches*, THE HERALD (Jun. 24, 2018), <https://www.heraldnet.com/opinion/commentary-school-funding-lawsuit-over-but-not-its-headaches/> [<https://perma.cc/ULF5-ZVES>]; The Editorial Board, *McCleary is over, but work to improve education in Washington is not*, THE SEATTLE TIMES (Jun. 7, 2018) [<https://perma.cc/Q5ZV-QXXL>]; BRUCE D. BAKER ET AL., IS SCHOOL FUNDING FAIR? A NATIONAL REPORT CARD 17, 26 (7th ed. 2018) [<https://perma.cc/ZXB8-UP9C>].

39. . *See* Sarah Schwartz, *Washington State Teachers Strike Over Salary Negotiations*, EDUCATION WEEK (Aug. 29, 2018), http://blogs.edweek.org/edweek/teacherbeat/2018/08/washington_state_teachers_strike.html [<https://perma.cc/793Y-4DTR>]; Melissa Hellman, *Seattle Public Schools and Teachers' Unions Spar Over Alleged Deficits*, SEATTLE WEEKLY (Aug. 6, 2018), <http://www.seattleweekly.com/news/seattle-public-schools-and-teachers-unions-spar-of-alleged-deficits/> [<https://perma.cc/39PY-QQ98>]; Neal Morton, *Washington State's Teacher Contract Chaos was Inevitable*, YAKIMAHEARLD.COM (Sept. 1, 2018), https://www.yakimaherald.com/news/education/analysis-washington-state-s-teacher-contract-chaos-was-inevitable/article_f6449dca-ae6e-11e8-8df4-77aeebe6aad4.html [<https://perma.cc/SFY6-E8L4>].

that “the state gave with one hand and took with another” in order to comply with *McCleary*.⁴⁰

The Washington Supreme Court accepted that there might be funding disparities remaining after the State had achieved full compliance its orders.⁴¹ But the court said it was “willing to allow the State’s program to operate and let experience be the judge of whether it proves adequate.”⁴² That was acceptable, the court reasoned, because the standard it had adopted for constitutionality was whether the State “acted within the broad range of its policy discretion in a manner that ‘achieves or is reasonably likely to achieve’ the constitutional end of amply funding K-12 basic education.”⁴³ And so, the State did not actually need to achieve ample funding, provided it could show that its funding formulas were at least reasonably likely to achieve ample funding.

This ‘reasonably likely’ or ‘reasonably calculated’ to achieve standard is fast becoming the benchmark for constitutionality in education rights cases, particularly in the latter remedial stages of adequacy suits.⁴⁴ Most state high courts have abandoned heightened scrutiny and the tiers of scrutiny altogether, even when the right to education has been deemed fundamental under the state constitution.⁴⁵ A number of state courts have increasingly turned instead to an ad-hoc, often-unannounced, less proscriptive standard that scrutinizes the reasonableness of the fit between the legislative means and the constitutional ends (adequacy and equity), with little or no scrutiny of the means or the ends themselves.⁴⁶ As I explain in Part II, this reasonable fit standard is ill-suited to the task of determining constitutionality in education rights cases because it is predicated on a fixed point of compliance for educational adequacy and equity—variable constitutional ends that cannot

40. . See Jim Allen, *For school systems, McCleary Decision Gave with One Hand and Took with the Other*, THE SPOKESMAN-REVIEW (Sept. 9, 2018), <http://www.spokesman.com/stories/2018/sep/09/for-school-systems-confusion-and-angst-mix-with-re/> [https://perma.cc/B3XN-T7RK].

41. . See Order of Nov. 15, 2017, *supra* note 24, at 28–39.

42. . *Id.* at 37.

43. . *Id.* (quoting *McCleary*, 269 P.3d at 248).

44. . See Joshua E. Weishart, *Equal Liberty in Proportion*, 59 WM. & MARY L. REV. 215, 243–59 (2017).

45. . *See id.*

46. . *See id.* at 260–66.

be so neatly circumscribed. I propose a new approach in Part III, one geared towards sustaining demonstrable and durable fidelity to those constitutional ends.

II. FIXED CONSTITUTIONALITY, ENDLESS CONSTITUTIONAL ENDS

Courts achieve the pretense of reaching a fixed point of constitutional compliance in education rights by applying an unfixed, rather loose standard. As a measure of constitutionality, the reasonable fit standard licenses considerable discretion and latitude; its contours remain fluid, and deliberately so. All of this elasticity increases the likelihood of inconsistent rulings over time. Perhaps most problematic for a standard that was developed partly to address justiciability concerns, it is “at once more and less deferential to the legislature than state separation of powers doctrine commands.”⁴⁷

It is less deferential whenever the legislative means are not reasonably likely to achieve the constitutional ends of educational adequacy and equity because then courts are compelled to pass judgment on the legislative means—a separation of powers boundary that courts have drawn for themselves and have been unwilling to cross, at least directly.⁴⁸ It is more deferential whenever the case enters the remedial and contempt phases because courts, by then weary from extended showdowns with the legislature, have been inclined to find the legislative means reasonably likely to achieve the constitutional ends despite persistent educational deprivations and disparities.⁴⁹ In such instances, the reasonable fit standard permits the court to excuse objectionable deprivations and disparities in the short term on the prospect that they might be cured, without providing any mechanism for assuring sustained progress in the long term.⁵⁰

47. . Joshua E. Weishart, *Aligning Education Rights and Remedies*, 27 KAN. J. L. & PUB. POL’Y 346, 382 (2018).

48. . *See id.*

49. . *See id.* at 382–83.

50. . *See* Weishart, *supra* note 44, at 289–90.

For these and other reasons, I have elsewhere proposed a new constitutional standard of review⁵¹ as well as remedial standards for evaluating legislative and judicial remedies⁵²—all of which focus more on scrutinizing progress towards the constitutional ends than on the reasonableness of their fit with the legislative means.

Assuming that reasonable fit emerges as the prevailing standard, however, it should be a test for conditional compliance, not for constitutionality. That is how the “reasonably calculated” standard operates, for instance, in special education cases. To comply with the Individuals with Disabilities Education Act, the school district must offer an individualized education plan “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.”⁵³ The standard contemplates that the degree of a child’s grade-to-grade progress along with changes to his or her circumstances affect an IEP’s statutory compliance year to year.⁵⁴ Likewise, the “reasonably calculated” standard for determining “appropriate action” under the Equal Opportunity Education Act for limited English proficient students is conditioned on whether the school’s program “produce[s] results indicating that the language barriers confronting students are actually being overcome” after a “sufficient” time period.⁵⁵

Misapplication of the reasonable fit standard as a test for constitutionality rather than conditional compliance invites at least three problems: (1) It distorts the norm and expectations of constitutionality; (2) It indulges rather perverse presumptions

51. . See *id.* at 292 (proposing “direct-proportionality review [that] entails a two-part inquiry. First, do the state’s actions advance children’s equality and liberty interests by ensuring that vertical equity and adequacy maintain a mutually reinforcing, upward trajectory? Second, is the margin between vertical equity and adequacy proportional so as to protect children from the harms of educational disparities?”).

52. . See Weishart, *supra* note 47, at 353 (proposing “*direct proportionality* standard” for “a court’s review of legislative remedies intended to cure violations of the state constitutional right to education” and a “*reasonable congruence* standard” for “courts in contemplating or reviewing injunctive relief to cure [such] violations”).

53. . Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1, 137 S. Ct. 988, 999 (2017).

54. . *Id.* at 999 (“Progress through this system is what our society generally means by an ‘education.’ False Accordingly, . . . an IEP typically should. . . be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.”) (internal quotations and citation omitted).

55. . See *Castaneda v. Pickard*, 648 F.2d 989, 1010 (5th Cir. 1981).

and burdens in favor of repeated rights offenders; and (3) It foments the misguided belief that constitutionality can be fixed for educational adequacy and equity.

A. Constitutionality Distorted

The reasonable fit standard distorts both the norm and expectations of constitutionality in education rights cases. Constitutionality is commonly understood as the “quality, state, or condition of being” in accordance with the constitution.⁵⁶ The Washington Supreme Court was decidedly not saying that its K-12 system had an achieved such a quality, state, or condition when it concluded that the new 2017-18 funding formulas had satisfied the reasonable fit standard. According to the court’s 2012 *McCleary* decision, full compliance with its constitution will not be reached until the State has adequately and equitably funded education such that “each and every child” has an “opportunity” to obtain certain judicially-approved and legislatively-enacted educational “outcomes.”⁵⁷ The state constitution does not mandate that every child *actually* achieve those educational outcomes, just that they have a fair and meaningful opportunity to achieve them.⁵⁸ But to judge whether such opportunity exists, courts must scrutinize both educational inputs *and* outcomes over time.⁵⁹ That assessment of student

56. . See Constitutionality, BLACK’S LAW DICTIONARY (10th ed. 2014); see also Constitutionality, MERIAM-WEBSTER ONLINE DICTIONARY, <https://www.merriam-webster.com/dictionary/constitutionality> (defining constitutionality as “quality or state of being constitutional, especially: accordance with the provisions of a constitution”) [<https://perma.cc/632B-Q8S9>].

57. . *McCleary v. State*, 269 P.3d 227, 249, 251 (Wash. 2012).

58. . See *id.* at 251.

59. . See, e.g., *Gannon v. State*, 390 P.3d 461, 488–89 (Kan. 2017) (“To determine whether the *Gannon I* test for adequacy is being met through implementation, it is appropriate to look—as did the panel—to both the financing system’s inputs, e.g., funding, and outputs, e.g., outcomes such as student achievement.”); *Abbeville Cty. Sch. Dist. v. State*, 767 S.E.2d 157, 167, 174–75 (S.C. 2014); *Conn. Coal. for Justice in Educ. Funding, Inc. v. Rell*, 990 A.2d 206, 289 (Conn. 2010) (“Measuring educational adequacy traditionally is accomplished by identifying input and/or output standards that serve as a measure of adequacy, then calculating the actual cost of attaining those inputs and/or outputs, a process referred to as ‘costing out.’”); *Hoke Cty. Bd. of Educ. v. State*, 599 S.E.2d 365, 381 (N.C. 2004); *Lake View v. Huckabee*, 91 S.W.3d 472, 493 (Ark. 2002); *Vincent v. Voight*, 614 N.W.2d 388, 488 (Wisc. 2000); *Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist.*, 826 S.W.2d 489, 529 (Tex. 1992) (“An efficient school system cannot be achieved through simple control of the inputs to the system (and

growth and achievement in both absolute and relative terms informs the court's judgment about whether fair and meaningful educational opportunity exists.

For this reason as well, the Washington Supreme Court said it needed to wait and see whether the new funding formulas were constitutionally adequate—whether they provided the requisite opportunity that the state constitution demands.⁶⁰ Unfortunately, as these news headlines show, that is not how the court's ruling terminating its jurisdiction and lifting its contempt sanctions was interpreted:

“They did it! Washington has finally fully funded education”⁶¹

“Supreme court rules legislature finally in full compliance with the *McCleary* decision”⁶²

“Washington state school funding now legal, high court rules”⁶³

“Legislature met its duty on public schools, Supreme Court says”⁶⁴

It would be easy to dismiss these headlines as uninformed or sensational but for the fact that the Washington Supreme Court itself repeatedly characterized the legislature's actions as

certainly not through control of funding alone) the outputs of the system must be monitored and measured against a standard and the inputs must then be adjusted to correct any deficiencies.”); *Seattle Sch. Dist. No. 1 of King Cty. v. State*, 585 P.2d 71 (Wash. 1978); *Robinson v. Cahill*, 351 A.2d 713 (N.J. 1975) (“Ultimately a well-conceived educational system requires that educational goals be formulated, that decisions be made as to what inputs of human and material resources are required, that the resources be properly allocated among students according to their needs in light of the goals, and finally that the success of the system in achieving its educational goals be evaluated and, based upon that evaluation, the choice of educational goals, the decision as to resource needs, and the process of allocating resources to students be revised.”); *Milliken v. Green*, 212 N.W.2d 711, 716 (Mich. 1973).

60. . Order of Nov. 15, 2017, *supra* note 24, at 1.

61. . MYNORTHWEST (Jun. 7, 2018), <http://mynorthwest.com/1012718/washington-fully-funds-education-mccleary/>.

62. . Emily Boerger, WASHINGTON STATE WIRE (Jun. 7, 2018), <https://washingtonstatewire.com/supreme-court-rules-legislature-finally-in-full-compliance-with-the-mccleary-decision> [<https://perma.cc/FE9J-ZTPX>].

63. . Rachel La Corte, ASSOCIATED PRESS (Jun. 7, 2018), https://www.oregonlive.com/pacific-northwest-news/index.ssf/2018/06/washington_state_school_fundin.html [<https://perma.cc/HC2F-VFXE>].

64. . Jim Camden, THE SPOKESMAN-REVIEW (updated Jun. 8, 2018), <http://www.spokesman.com/stories/2018/jun/07/legislature-met-its-duty-on-public-schools-supreme/> [<https://perma.cc/X3L7-ZPU3>].

being compliant, having adequately or fully funding key components of the basic education program—again even as the court was reserving the possibility that the new funding formulas were not constitutionally adequate:

The “legislature enacted a funding system that, when fully implemented, will achieve constitutional compliance according to the benchmarks that have consistently guided judicial oversight.”⁶⁵

“The court concludes that the legislature has met the formulas. . . called for by [statute], and thus it is adequately funding that component of basic education.”⁶⁶

“In sum, . . . the State has satisfied the court’s mandate to fully fund the program of basic education established by [statute] in accordance with the formulas and benchmarks set forth in [statute] and this court’s orders.”⁶⁷

Misperception about the ruling bolstered by the unduly generous application of the reasonable fit standard not only distorted the norm and commonly understood meaning of constitutionality, it also now poses the risk of distorting the expectations of constitutionality. If educational outcomes do not improve or only modestly improve in the State of Washington over the next few years, opponents will point to the protracted *McCleary* saga and say it was not worth it, either because “money doesn’t matter”⁶⁸ or because courts can’t make a difference.⁶⁹ Such criticisms will be based on the mistaken assumption that Washington had achieved constitutionally adequate funding in 2018. Yet the influx of \$8 billion into the K-12 education budget must be considered from the perspective that, prior to *McCleary*, Washington had to a long way to go to

65. . Order of Nov. 15, 2017, *supra* note 24, at 1.

66. . *Id.* at 29.

67. . *Id.* at 37.

68. . See Michael A. Rebell, *Poverty, “Meaningful” Educational Opportunity, and the Necessary Role of the Courts*, 85 N.C. L. REV. 1467, 1469 (2007) (“Insult is added to the injury being perpetrated on these students by the argument advanced by some critics of judicial efforts to rectify these inequities that ‘money doesn’t matter’ in overcoming educational disadvantages.”).

69. . See Derek W. Black, *Reforming School Discipline*, 111 NW. U. L. REV. 1, 66–67 (2016) (“States argue that educational outcomes are more directly a product of student demographic variables and student effort [or,] to the extent money matters, the state has provided districts with sufficient funds and that the problem is local mismanagement.”).

reach even *average* student outcomes, much less constitutionally adequate outcomes.⁷⁰

Before the state enacted its new budget, analysis showed that Washington ranked in the bottom of states with a grade of “F” due to its low fiscal effort on education spending compared with its high fiscal capacity.⁷¹ The same analysis showed Washington ranked near the bottom on teacher wage competitiveness.⁷² And another report determined that, for poor school districts in the bottom twenty percent to reach *average* student outcomes, the State would need to increase funding by \$10,500 per pupil.⁷³ From that perspective, the \$8 billion does not seem so grand or even adequate.

Beyond the numbers, it matters that courts formulate constitutionality with care and precision because other courts, advocates, scholars, and state defendants pay attention to the net effect of these cases as well as the political costs incurred in the judicial-legislative showdowns they inevitably set off. Some state courts are encouraged by the overall outcomes, like the Pennsylvania Supreme Court which after decades of treating these cases as nonjusticiable, recently reversed course.⁷⁴ But more courts lately are discouraged. Courts in six states have surrendered entirely, refusing to even to entertain the merits of these cases which they perceive to entangle them in political

70. . See Derek Black, *The Washington Legislature May Have Gotten the Supreme Court Off Its Back, But Is It Funding Schools Adequately?*, EDUCATION LAW PROF BLOG (Jun. 8, 2018), https://lawprofessors.typepad.com/education_law/2018/06/the-washington-legislature-may-have-gotten-the-supreme-court-off-its-back-but-is-it-funding-schools-.html [<https://perma.cc/85DJ-AV4P>].

71. . BRUCE D. BAKER ET AL., *IS SCHOOL FUNDING FAIR? A NATIONAL REPORT CARD* 7, (7th ed. 2018), http://www.edlawcenter.org/assets/files/pdfs/publications/Is_School_Funding_Fair_7th_Edition.pdf [<https://perma.cc/ZXB8-UP9C>].

72. . *Id.* at 17.

73. . BRUCE D. BAKER, ET AL., *THE REAL SHAME OF THE NATION: THE CAUSES AND CONSEQUENCES OF INTERSTATE INEQUITY IN PUBLIC SCHOOL INVESTMENTS* 49 (2018), <https://drive.google.com/file/d/1cm6Jkm6ktUT3SQplzDFjJy3G3iLWotJ/view> [<https://perma.cc/YN6J-69HK>].

74. . *William Penn Sch. Dist. v. Penn. Dep’t of Educ.*, 170 A.3d 414, 455 (Pa. 2017) (“These many decisions stand for the proposition that courts in a substantial majority of American jurisdictions have declined to let the potential difficulty and conflict that may attend constitutional oversight of education dissuade them from undertaking the task of judicial review.”).

questions reserved for the other coordinate branches.⁷⁵ Equally troubling, a majority of courts are on the retreat.⁷⁶ They either decline the opportunity to get involved, deny a constitutional violation despite substantial educational deprivations and disparities, or find a violation but then decline to specify a remedy or give any remedial guidance, out of deference to legislative prerogatives and separation of powers.⁷⁷ Few courts are advancing in the battle, by not only finding a constitutional violation but also specifying a remedy or providing guidance about remedial measures to cure the violation.⁷⁸

The Washington Supreme Court is one of the few that have remained active, setting a rhythm and pace for others to follow. The concern raised here is that the court's use of the reasonable fit standard—as a politically expedient test for constitutionality rather than conditional compliance—will ultimately undercut the judiciary's role in education rights cases, which will set back the cause of educational justice.

B. Perverse Presumptions and Burden Shifting

The reasonable fit standard indulges procedural inequities once the standard is satisfied and the court then terminates its jurisdiction. At that point, a heavy burden of proof shifts back to aggrieved-yet-not-fully remediated rightholders, i.e., the children. Meanwhile, courts will assume the continued good faith of a repeated-rights-offender dutyholder, i.e., the state, who otherwise remains insufficiently undeterred. In a number of jurisdictions, the state is then further entitled to a presumption of constitutionality.⁷⁹ Thereafter, would-be plaintiffs seeking to

75. . See *Ex parte* James, 836 So. 2d 813, 819 (Ala. 2002); *Coal. for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles*, 680 So. 2d 400, 406–08 (Fla. 1996); *Comm. for Educ. Rights v. Edgar*, 672 N.E.2d 1178, 1190–93 (Ill. 1996); *Neb. Coal. for Educ. Equity & Adequacy v. Heineman*, 731 N.W.2d 164, 178–80 (Neb. 2007); *Okla. Educ. Ass'n v. State*, 158 P.3d 1058, 1066 (Okla. 2007); *City of Pawtucket v. Sundlun*, 662 A.2d 40, 57–59 (R.I. 1995).

76. . See Weishart, *supra* note 47, at 348.

77. . See *id.*

78. . See *id.*

79. . See *Abbott by Abbott v. Burke (Abbott IV)*, 693 A.2d 417, 431–32 (N.J. 1997) (“We do not discount or minimize the State’s contention that . . . a legislative enactment . . . is entitled to a presumption of validity.”); *DeRolph v. State (DeRolph I)*, 677 N.E.2d at 737 (“We are aware that the General Assembly has the responsibility to enact legislation and

prove that the K-12 system remains inadequate or inequitable must overcome that presumption and reestablish causation, which can be exceedingly difficult in education rights cases.⁸⁰

The rejoinder that plaintiffs typically bear the burden of proof in the normal course of civil litigation overlooks the thumb that the reasonable fit standard places on the scales.⁸¹ It is because that standard has been satisfied that plaintiffs remain unsatisfactorily remediated. At best, plaintiffs have been told that certain legislative measures may reasonably achieve constitutional adequacy and equity, not that they do or will. Under such circumstances, the fairer procedure would be to presume that the system remains unconstitutional (or conditionally constitutional), unless and until plaintiffs are fully remediated. The reasonable fit standard provides no such failsafe. Rather, it returns the parties procedurally to the *status quo ante* with all the attendant presumptions and burdens in the state's favor. This is especially problematic when, upon plaintiffs return to court, constitutionality will again be judged by the *reasonable* fit standard: "The presumption of constitutionality operates to supply the facts necessary to establish a law's *reasonableness*" even when those facts do "not actually exist"—"all that is necessary is that a rational legislator

that such legislation is presumptively valid. However, this does not mean that we may turn a deaf ear to any challenge to laws passed by the General Assembly." (internal citations omitted); *Abbeville Cty. Sch. Dist. v. State* (Abbeville II), 767 S.E.2d 157, 161 (S.C. 2014) ("[A]ll statutes are presumed constitutional and, if possible, will be construed to render them valid.' Accordingly, we will not find a statute unconstitutional unless 'its repugnance to the Constitution is clear beyond a reasonable doubt.'") (alteration in original) (quoting *Curtis v. State*, 549 S.E.2d 591, 597 (S.C. 2001)).

The presumption would not typically apply when the challenged law affects a fundamental right. *See, e.g., Yakima Cty. Deputy Sheriff's Ass'n v. Bd. of Comm'rs for Yakima Cty.*, 601 P.2d 936, 941 (Wash. 1979) ("[S]tatutes which affect constitutionally protected fundamental rights. . .do not enjoy such a presumption of constitutionality."). A number of state courts, however, have either ruled that education is not a fundamental right or declined to decide the question. *See Weishart, supra* note 44, at Tables A–C, 244–54.

80. . *See* Derek W. Black, *The Constitutional Challenge to Teacher Tenure*, 104 CALIF. L. REV. 75, 107, 123-42 (2016) (explanation the difficulties of establishing that state policy or practice caused educational deprivations).

81. . *Cf.* Edward C. Dawson, *Adjusting the Presumption of Constitutionality Based on Margin of Statutory Passage*, 16 U. PA. J. CONST. L. 97, 113 (2013) (noting contention that application of strong presumption of constitutionality "would operate as a 'thumb on the scale' and might lead a judge to uphold a statute even if he had a fairly strong belief that it might be unconstitutional").

could have reasonably thought that they exist.”⁸² Thus, the reasonable fit standard tips the scales on the backend of the litigation and on the frontend of successive litigation.

The deference compelled by the presumption of constitutionality to legislative fact-finding may be entirely unwarranted in many education rights cases. “Legislatures often enact legislation without engaging in any fact-finding, and even when legislatures *do* conduct fact-finding, the legislative agenda may drive fact-finding instead of the other way around.”⁸³ Legislatures enacting education budgets and funding formulas are no exception in that they “typically follow one of two paths: a majority rules democratic process that tends toward inequitable results, or a process driven by expert analysis that tends toward meeting student need. Absent judicial oversight, the former has been the *de facto* rule in nearly all states.”⁸⁴ And even when the legislature incorporates experts and “make good-faith findings of fact, . . . [it] is unlikely to have devoted much attention to whether the factual circumstances underlying the legislation satisfy the . . . constitutional tests.”⁸⁵

Such measures of democratic accountability—another justification for attaching the presumption of constitutionality—also seems misplaced in state education rights cases.⁸⁶ At minimum, democratic accountability is less salient for state court judges, most of whom are “popularly elected and

82. . See F. Andrew Hessick, *Rethinking the Presumption of Constitutionality*, 85 NOTRE DAME L. REV. 1447, 1453 (2010) (emphasis added).

83. . *Id.* at 1473–74.

84. . Derek W. Black, *Averting Educational Crisis: Funding Cuts, Teacher Shortages, and the Dwindling Commitment to Public Education*, 94 WASH. U.L. REV. 423, 476 (2016); see *Montoy v. State*, 120 P.3d 306, 310 (Kan. 2005) (per curiam) (“[T]he financing formula was not based upon actual costs to educate children but was instead based on former spending levels and political compromise.”); *Campaign for Fiscal Equity, Inc. v. State*, 801 N.E.2d 326, 347–48 (N.Y. 2003) (“[T]he political process allocates to City schools a share of state aid that does not bear a perceptible relation to the needs of City students.”).

85. . Hessick, *supra* note 82, at 1474.

86. . See *id.* at 1469 (noting justification supposes that “[a]ggressive judicial review undermines this accountability by allowing the policy preferences of the judiciary to displace the policy preferences of the democratically accountable legislators. . . . Courts accordingly should restrain themselves from intervening. . . and allow poor decisions to be worked out through the democratic process.”).

retained.”⁸⁷ Yet even if the democratic accountability justification were more apt, the U.S. Supreme Court has explained that the presumption of constitutionality should restrain courts from intervening in democratic process “*absent some reason to infer antipathy*” by the political branches.⁸⁸ Such antipathy is surely present in many education rights cases focused on the adequacy and equity of school funding.

State legislatures have chronically underfunded or defunded public education for decades.⁸⁹ And then when they are finally held to give an account, it takes them years to comply with the court’s orders, as they kick and scream along the way. Consider the bruising school funding battles in Kansas, where legislators have tried to strip the court of jurisdiction, threatened to change the process of judicial selection, and have repeatedly sought to amend the state constitution to weaken the right to education.⁹⁰ All of this in response to the Kansas Supreme Court trying to enforce that right rather than retreat as so many other courts have done. If that does not provide a basis to infer antipathy, it is hard to imagine what else would besides more overt and invidious discrimination or animus.

There is certainly no credible argument that the state, having once satisfied the reasonable fit standard, will be sufficiently deterred from backsliding on their promise to achieve and maintain adequate school funding levels. The Washington Supreme Court acknowledged as much but shrugged off the concern, saying it was “the nature of the legislative process.”⁹¹ The court also said it “presumes the legislature will do its job until it demonstrates otherwise.”⁹² This is a stunningly obtuse statement considering the record before the court. Were the preceding decades of

87. . See Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1157-58 (1999) (“Counter-majoritarian concerns may not be as uniformly salient in the state constitutional context, given variations among state court systems—states vary, among other things, in the way in which judges are recruited, selected, retained, and compensated—but they are all non-Article III decisionmakers.”).

88. . *Vance v. Bradley*, 440 U.S. 93, 97 (1979) (emphasis added).

89. . See, e.g., Black, *supra* note 84, at 431–34.

90. . Richard E. Levy, *The War of Judicial Independence: Letters from the Kansas Front*, 65 U. KAN. L. REV. 725, 725–267 (2017).

91. . Order of Nov. 15, 2017, *supra* note 24, at 38.

92. . *Id.* at 39.

underfunding not sufficient demonstration? How about the 1,365 days that the legislature was in contempt for failing to comply with the court's orders? Or the 1,029 days of which that the legislature incurred \$100,000-per-day fines, was that not sufficient demonstration to avoid the presumption of constitutionality and good faith compliance?

The balance of the equities simply does not weigh in favor of burdening not-fully-remediated plaintiffs with overcoming a presumption of constitutionality while benefiting repeated-rights-offender defendants out of deference to their legislative acts and facts. Yet that procedural inequity is exactly what the reasonable fit standard indulges when it inevitably leads courts to terminate their jurisdiction without any safeguards to deter future legislative transgressions.

C. Terminating the Interminable

The reasonable fit standard operates on the misguided belief that constitutionality can be fixed for educational adequacy and equity such that once the standard is satisfied, the matter should be terminated. That belief is misguided because equity and adequacy are comparative, dynamic, and interminable constitutional ends. To make and judge progress towards adequacy and equity one necessarily has to compare "educational resources, opportunities, and outcomes of similarly-situated and differently-situated children."⁹³ That task is plainly comparative when you are trying to make distributions of educational opportunity more equitable, across school districts and especially between students with different needs. But it is also comparative when the object is for all students to have access to a quality or adequate education, one that will enable them to meet certain educational outcomes, become full, equal citizens and productive members of society.

What it takes for a child to become an equal, productive citizen—where to set that adequacy baseline—invariably turns on what educational resources and opportunities other children

93. . See Joshua E. Weishart, *The Constitutionally Anomalous Right to Education*, THE OXFORD HANDBOOK OF U.S. EDUCATION LAW (Kristine Bowman, ed., Oxford Univ. Press, forthcoming), <http://bit.ly/2JYW1Ta>.

have.⁹⁴ Hence, below that baseline distributions aimed at achieving adequacy must be comparative. Moreover, at a certain point large-scale disparities between children just at the adequacy baseline and those high above it will begin to undermine the ability of all children to function as equals and compete on fair terms for higher education and high-quality jobs.⁹⁵ One must then make a comparative assessment to correct those disparities, which might require recalibrating and raising the adequacy baseline to diminish certain positional advantages held above it.⁹⁶

Adequacy and equity thus cannot be static concepts, they must be dynamic – evolving to meet the educational needs of an ever-changing society.⁹⁷ A number of courts have so concluded,⁹⁸ including notably the Washington Supreme Court.⁹⁹ Thus, as Derek Black has explained, the temporal

94. . See Weishart, *supra* note 44, at 240.

95. . *Id.* at 292.

96. . *Id.*

97. . Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101, 171 (1995) (observing that courts have recognized that questions of educational adequacy “must change with evolving social and economic conditions and with changing societal expectations about the role of the schools. The standard of adequacy cannot be static.”).

98. . Conn. Coal. for Justice in Educ. Funding, Inc. v. Rell, 990 A.2d 206, 255 (Conn. 2010) (“The broad constitutional standard also reflects our recognition of the fact that the specific educational inputs or instrumentalities suitable to achieve this minimum level of education may well change over time.”); Montoy v. State, 120 P.3d 306, 309 (Kan. 2005) (“The Kansas Constitution thus imposes a mandate that our educational system cannot be static or regressive but must be one which ‘advance[s] to a better quality or state.’”); DeRolph v. State, 728 N.E.2d 993, 1001 (Ohio 2000) (“The definition of ‘thorough and efficient’ is not static; it depends on one’s frame of reference. What was deemed thorough and efficient when the state’s Constitution was adopted certainly would not be considered thorough and efficient today. Likewise, an educational system that was considered thorough and efficient twenty-five years ago may not be so today.”); Claremont Sch. Dist. v. Governor, 703 A.2d 1353, 1359 (N.H. 1997) (“A constitutionally adequate public education is not a static concept removed from the demands of an evolving world.”); Campbell Cty. School District v. State, 907 P.2d 1238, 1274 (Wyo. 1995) (“The definition of a proper education is not static and necessarily will change.”); McDuffy v. Sec’y of Exec. Office of Educ., 615 N.E.2d 516, 555 (Mass. 1993) (“The content of the duty to educate which the Constitution places on the Commonwealth necessarily will evolve together with our society.”); Abbott by Abbott v. Burke, 575 A.2d 359, 367 (N.J. 1990) (“[A] thorough and efficient education consists of is a continually changing concept.”); Robinson v. Cahill, 355 A.2d 129, 133 (N.J. 1976) (recognizing education as “constantly evolving” and “that what seems sufficient today may be proved inadequate tomorrow”).

99. . McCleary v. State, 269 P.3d 227, 251 (Wash. 2012) (“The legislature has an obligation to review the basic education program as the needs of students and the demands

framing that is inherent in litigation is a poor fit for the constitutional duty to deliver an adequate and equitable education, which cannot occur at a finite moment in time because “education is an ongoing project that requires constant vigilance—the failure [or success] of which can span over years and decades.”¹⁰⁰

As a result of adequacy and equity being both comparative and dynamic, they are also interminable demands meaning that these guarantees are unending and cannot be permanently fulfilled once and for all time. That might strike some as a daunting if not hopeless proposition, but it should have just the opposite effect: it should embolden and inspire. One reason it may not is because we are predisposed to thinking of constitutionality as a quality, state of being, or condition that can and should be permanently fixed and, when infringed, promptly and completely rectified. We know the reality, however, is that violations of constitutional rights often go unremedied due to un- or under-enforcement by all three branches.¹⁰¹ Still, some might grimace at the thought of striving in vain towards constitutional guarantees with no conceivable end in sight. That these guarantees are aspirational, however, does not make them discretionary and unenforceable,¹⁰² and the project is only in vain if we fail to make consistent and sustainable progress.

of society evolve.”); *McDuffy*, 615 N.E.2d at 555 (“Our Constitution, and its education clause, must be interpreted ‘in accordance with the demands of modern society or it will be in constant danger of becoming atrophied and, in fact, may even lose its original meaning.’”).

100. . See Black, *supra* note 84, at 469.

101. . See generally Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1213 (1978); Barry Friedman, *When Rights Encounter Reality: Enforcing Federal Remedies*, 65 S. CAL. L. REV. 735 (1992); see also Black, *supra* note 84, at 464–66 (projecting some of “serious consequences” to current underenforcement of “education rights and duties” in state courts).

102. . Several state courts—the Washington Supreme Court being among the first—have rejected the argument that the education or equality provisions in state constitutions are purely hortatory or merely aspirational goals committed to the discretion of the legislature. See, e.g., *William Penn Sch. Dist. v. Penn. Dep’t of Educ.*, 170 A.3d 414, 450 (Pa. 2017); *Gannon v. State*, 319 P.3d 1196, 1223 (Kan. 2014); *Rell*, 990 A.2d at 261; *Brigham v. State*, 692 A.2d 384, 394 (Vt. 1997); *Campaign for Fiscal Equity, Inc. v. State*, 655 N.E.2d 661, 665 (N.Y. 1995); *Claremont Sch. Dist. v. Governor*, 635 A.2d 1375, 1378 (N.H. 1993); *McDuffy*, 615 N.E.2d at 524–28; *Helena Elem. Sch. Dist. No. 1 v. State*, 769 P.2d 684, 689 (Mont. 1989); *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71, 85 (Wash. 1978).

That, I submit, is the better way to think of constitutionality in education rights cases.

III. FIDELITY TO EDUCATIONAL ADEQUACY AND EQUITY

As a test for constitutionality rather than conditional compliance, the reasonable fit standard seemingly forces a binary decision once it is satisfied requiring the court then to either terminate its jurisdiction or maintain its jurisdiction indefinitely. That is precisely how justices on the Kansas Supreme Court viewed their options in *Montoy*, the precursor to the current, nearly decade-long *Gannon* litigation.¹⁰³ The *Montoy* court elected to terminate jurisdiction after it concluded that the legislature enacted a school funding formula that substantially complied with the state constitution.¹⁰⁴ The court reasoned that dismissal would avoid further protracted litigation, observing that other states struggled with developing a plan that would meet their highest state courts' approval following remand to a trial court for further proceedings.¹⁰⁵ The court also noted that it would potentially take up to three years to appreciate "the full financial impact" of the new formula—"a factor which would be important in any consideration of whether it provides constitutionally suitable funding."¹⁰⁶ In short, because the newly-enacted school funding formula essentially passed a reasonable fit standard, the court was inclined to terminate the matter and wait and see if it would actually achieve constitutionality.

Justice Rosen concurred in the judgment of dismissal, warning that the case could "continue in perpetuity" and "extend into an indefinite future," if a court had to continually assess constitutionality, for instance, whenever a different education model for adequacy were adopted or new adequacy cost study

103. . See John Robb, et al., *The Current State of School Finance in Kansas: The Kansas Legislature's Occasional Negative Approach to Its Positive Constitutional Duty*, 27 KAN. J. L. & PUB. POL'Y 329, 334–41 (2018) (recounting history of school funding litigation in Kansas including *Montoy* and *Gannon*).

104. . *Montoy v. State*, 138 P.3d 755, 765 (Kan. 2006) (per curiam).

105. . *Id.* at 765–66.

106. . *Id.* at 766.

were performed.¹⁰⁷ Justice Rosen contended that the court itself had shifted in its own adoptions of different educational models.¹⁰⁸ Taking exception to this “moving target” for constitutionality, Justice Rosen concluded, “the children of Kansas need a resolution of this matter now” convinced as he was that the legislature has substantially complied with this court’s prior orders.¹⁰⁹

Dissenting in part, Justice Beier insisted that the issue of constitutionality “remains squarely presented” noting the court had “consistently and correctly equated compliance with [its] directives to adherence to the legislature’s constitutional mandate.”¹¹⁰ Hence, unless and until there was full “compliance with [the court’s] directives,” the legislature could not be said to have “corrected the constitutional deficiencies in the school finance design.”¹¹¹ Justice Beier suggested that only with the benefit of further evidence of the state’s record on adequacy and equity could the court say that it had reached the condition of being in accordance with the constitution.¹¹² Justice Beier would have thus retained jurisdiction and remanded to the trial court “for further proceedings focused on the constitutionality of the finance system.”¹¹³

Post-*Montoy*, the legislature failed to make good on its promises: “Between 2009 and 2011, [it] cut funding to education by over \$500 million annually.”¹¹⁴ The *Montoy* plaintiffs moved to reopen their appeal for further proceedings in the trial court, but the Kansas Supreme Court denied that motion, which led to the filing of the *Gannon* litigation in 2010 that is still ongoing.¹¹⁵ With the benefit of hindsight, both Justices Beier and Rosen were correct in their respective concurrence in and dissent from the court’s 2006 decision. If constitutionality is to be understood as a quality, state, or condition of being in accordance with the constitution at particular moments in time,

107. . *Id.* at 769 (Rosen, J., concurring).

108. . *Id.*

109. . *Montoy*, 138 P.3d at 769.

110. . *Id.* at 770 (Beier, J., concurring in part, dissenting in part).

111. . *Id.*

112. . *Id.*

113. . *Id.*

114. . Robb, et al., *supra* note 103, at 338.

115. . *Gannon v. State*, 319 P.3d 1196, 1206 (Kan. 2014).

then Justice Rosen was surely correct that adequacy and equity are moving targets that would call for continual assessments, perhaps year after year, and certainly with each newly adopted education model or cost study estimates. Likewise, Justice Beier was surely correct that if we equate constitutionality with full compliance with the constitution, then constitutionality will remain squarely presented until the adequacy and equity guarantees are permanently fulfilled.

The question this dilemma provokes is not about Justice Rosen's and Beier's adherence to this traditional notion of constitutionality, but their allegiance to it. Imagine if we could transcend this notion of constitutionality as being fixed and tethered to the strictures of the litigation process and judicial procedure. What if, instead, we thought of constitutionality in education rights cases as demonstrable and durable fidelity to the constitution? Not a state of being in accordance with the constitution, time-stamped 2019, but enduring faithfulness to its provisions, through steady, verifiable progress towards its guarantees. That fidelity is compelled by the very nature of the constitutional guarantees in education rights cases—interminable demands of adequacy and equity. “Fidelity,” then as such, “is not a virtue but a precondition. It's not just a good thing, but the point of the practice of constitutional interpretation.”¹¹⁶ And yet fidelity is itself conditioned on a constitution that serves “as an approximation of what it says it is, and that requires at least some evidence of progress toward its ends.”¹¹⁷

In the brief space remaining, I will sketch what rethinking constitutionality in this vein could entail in education rights cases.

Demonstrable and durable fidelity to the constitution would neither force a court to terminate the case nor retain jurisdiction in *perpetuity*. Rather, a court could suspend the case and

116. . J.M. Balkin, *Agreements with Hell and Other Objects of Our Faith*, 65 *FORDHAM L. REV.* 1703, 1705 (1997).

117. . Sotirios A. Barber, *Welfare and the Instrumental Constitution*, 42 *AM. J. JURIS.* 159, 186 (1997); *see also* Sotirios A. Barber, *Fidelity and Constitutional Aspirations*, 65 *FORDHAM L. REV.* 1757 (1997) (“Fidelity to an aspirational constitution requires that we confront and overcome the imperfections in ourselves that the Constitution presupposes, including even provisions of the constitutional document that might obstruct progress toward constitutional ends.”).

remand to a special master or a trial court to exercise jurisdiction *periodically*. At each specified interval, the trial court or special master would make factual findings and render legal conclusions regarding the state's fidelity to educational adequacy and equity. Again, I have proposed standards for that assessment and for legislative and judicial remedies that are better suited for that review than the reasonable fit standard.¹¹⁸ Either way, with the reasonable fit standard or another standard, the trial court judge or special master would review the state's progress towards improving educational adequacy and equity.

Between each interval of periodic jurisdiction, the court should entertain interim remedies. The concept of provisional, interim remedies is nothing new in education rights cases—they are typically prompted when “the legislature does nothing or issues a wholly inadequate response” to the high court's order.¹¹⁹ The New Jersey Supreme Court, as active as its counterparts in Kansas and Washington, provides an example of the most extensive forms of such interim relief, at one point ordering “‘parity funding’, resourcing the [poor, urban] *Abbott* districts at the average level of an identified set of rich, suburban districts.”¹²⁰ But the interim remedies need not be so demanding. Indeed, two narrow remedies could potentially prove far more sustainable to the success of the long-term project for educational justice: data collection and public engagement projects.

In terms of data collection, courts should require states to adopt “knowledge production” plans for adequacy and equity.¹²¹ Researchers need to be able to track educational outcomes and experiences over time to confirm or revise adequacy cost estimates and also have access to data sets so that they can

118. . See *supra* notes 50-51 and accompanying text.

119. . See Christopher S. Elmendorf, *From Educational Adequacy to Representational Adequacy: A New Template for Legal Attacks on Partisan Gerrymanders*, 59 WM. & MARY L. REV. 1601, 1642–43 (2018).

120. . *Id.* at 1644; see also David G. Sciarra, *Enhancing Court Capacity to Enforce Education Rights: Judicial Tools Used in Abbot v. Burke*, FOUND. FOR LAW, JUSTICE & SOC'Y (2009), <http://www.edlawcenter.org/assets/files/pdfs/publications/JudicialToolsUsedInAbbottvBurke.pdf> [<https://perma.cc/2W8H-AWQE>].

121. . See Christopher S. Elmendorf & Darien Shanske, *Solving “Problems No One Has Solved”*: Courts, Causal Inference, and the Right to Education, 2018 U. ILL. L. REV. 693, 734–35, 738–44 (2018).

control for other variables that might affect causal inferences.¹²² State limitations on data collection hinder “the production of [this] constitutionally significant knowledge.”¹²³ In addition, researchers and education policymakers need to develop more reliable ways for identifying and categorizing the needs of students for weighted student funding purposes and other equity measures.¹²⁴

Courts should also facilitate public engagement with the process of ensuring fidelity to educational adequacy and equity.¹²⁵ Public engagement is vital to the ultimate success of an education rights case, which can be as dependent on public support as it is on an enforceable and effective remedy.

School finance litigation often includes a long process of back and forth between the courts and the legislature in which the court orders the legislature to refashion its unconstitutional school finance formula, the legislature acts, and then the court responds as to whether the revised formula passes constitutional muster. The court does not tell the legislature *how* to make change; the legislature is where the actual change must occur, and the court is the final arbiter of whether the change is sufficient.

This characteristic of school finance litigation reinforces the necessity for public engagement because without the shifting of political balance in the form of the support of the broader public, court orders requiring legislative action are not implemented or sustained.¹²⁶

122. . See *id.* .

123. . *Id.* at 697.

124. . See generally *id.*; see also Betty Malen, et al., *The Challenges of Advancing Fiscal Equity in a Resource-Strained Context*, 31 EDUC. POL’Y 615, 618–19 (2017); Helen F. Ladd, *Reflections on Equity, Adequacy, and Weighted Student Funding*, 3 EDUC. FIN. & POL’Y 402, 411–12, 417–19 (2008).

125. . See Michael A. Rebell & Robert L. Hughes, *Efficacy and Engagement: The Remedies Problem Posed by Sheff v. O’Neill—and A Proposed Solution*, 29 CONN. L. REV. 1115, 1153 (1997). See generally PUBLIC ENGAGEMENT FOR PUBLIC EDUCATION: JOINING FORCES TO REVITALIZE DEMOCRACY AND EQUALIZE SCHOOLS (Marion Orr & John Rogers, eds. 2011).

126. . Amanda R. Broun & Wendy D. Puriefoy, *Public Engagement in School Reform: Building Public Responsibility for Public Education*, 4 STAN. J. CIV. RTS. & CIV. LIBERTIES 217, 241–42 (2008). See generally Jonathan R. Werner, *No Knight in Shining Armor: Why Courts Alone, Absent Public Engagement, Could Not Achieve Successful Public School Finance Reform in West Virginia*, 35 COLUM. J.L. & SOC. PROBS. 61 (2002);

Courts should therefore conscript the parties, through mediation or court direction, to consider the whole spectrum of public engagement possibilities, including organizing coalitions of teachers, parents, and business and community leaders; forming panels of professional educators for cost studies; convening focus groups or town halls to elicit broad-based public education; discussion; and involvement in implementation of the state's remedial scheme.¹²⁷

With the benefit of the data collected and public input, the trial court or special master will review the state's progress towards improving adequacy and equity. For reasons previously explained, that review should proceed without the state benefitting from any presumption of constitutionality. Yet, at the same time, the plaintiffs should still bear the burden of proof—to show that there has been insufficient progress towards educational adequacy and equity, that the funding formulas are no longer reasonably calculated to achieve adequacy, or that the margin between adequacy and equity is disproportionate.¹²⁸ The parties will have an opportunity for expedited appellate review of the judgment of the trial court or special master.

If the courts conclude that the state is no longer in compliance, then of course the state should be ordered to cure the violations. Should the courts determine that the state remains in conditional compliance, however, the process repeats itself, although a longer interval would then be justified — perhaps four years instead of two, and then, as the state continues to demonstrate its good faith compliance, six years instead of four. The state can accelerate the end of the court exercising periodic jurisdiction by institutionalizing the interim remedies or adopting other prophylactic remedies to ward of legislative relapses. Arkansas, for instance, has institutionalized

Molly A. Hunter, *All Eyes Forward: Public Engagement and Educational Reform in Kentucky*, 28 J.L. & EDUC. 485 (1999).

127. . Cf. Molly Townes O'Brien, *At the Intersection of Public Policy and Private Process: Court-Ordered Mediation and the Remedial Process in School Funding Litigation*, 18 OHIO ST. J. ON DISP. RESOL. 391, 433 (2003) ("Involving a broad range of interested constituencies in an effort to resolve school finance issues simply makes sense. Consensus building processes have been used successfully in a wide range of school disputes. Further, the kind of wide-ranging reform required in a school finance case may not be possible to implement without broad-based public support.").

128. . See Weishart, *supra* note 44, at 292.

one such remedy: by law, the State is required to perform an adequacy cost study every two years.¹²⁹

If there is a sustained period of reasonable progress and fidelity to the constitutional guarantees of adequacy and equity, then the court should terminate its jurisdiction. At that point, any new, subsequent challenge would have to proceed through the normal course of civil litigation, with any attendant presumptions and burdens that typically redound in the state's favor.

Justiciability presents no barrier to the court's exercise of periodic jurisdiction. As an initial matter, state courts effectuating state constitutional affirmative rights are not constrained by federal justiciability doctrines calibrated for Article III constitutional and prudential limitations.¹³⁰ Standing, for instance, has not been a significant hurdle. Even when children from other school districts are not parties to the case, courts have broadened standing and evidentiary parameters because the case presents issues "of significant, if not, paramount, public interests (school-aged children's rights concerning public education)."¹³¹ And, as explained, even when the reasonable fit standard is satisfied in these cases, the plaintiffs remain not fully remediated, so a constitutional injury persists and, thus, so does standing and ripeness, at least until there is demonstrable and durable fidelity with the constitutional

129. . ARK. CODE ANN. § 10-3-2102(a)(8), (j)(2) (2012).

130. . See generally Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131 (1999); Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833 (2001).

131. . See *Hoke Cty. Bd. of Educ. v. State*, 599 S.E.2d 365, 376–77 (N.C. 2004) ("If inordinate numbers of [children] are wrongfully being denied their constitutional right to the opportunity for a sound basic education, our state courts cannot risk further and continued damage because the perfect civil action has proved elusive."); *Idaho Sch. for Equal Educ. Opportunity v. State*, 129 P.3d 1199, 1203 (Idaho 2005) ("[A] judgment that [school] funding mechanism is unconstitutional will necessarily affect all school districts throughout the state, regardless of whether those districts presented evidence at trial, previously settled, or were never parties to this lawsuit."); *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 202 (Ky. 1989) ("If a statute (or in this case, a system established by statutes) is not constitutionally valid, the existence or non-existence of a class of litigants is immaterial."); see also *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71, 80-83 (N.J. 1978); but see *Abbott ex rel. Abbott v. Burke*, 20 A.3d 1018, 1042–43 (N.J. 2011) ("Simply stated, the present Abbott plaintiffs do not have standing. . .to seek vindication of the rights of children outside of the plaintiff class.").

guarantees. Separation of powers and political questions do not so much present textual obstacles,¹³² but they do force an underlying issue in education rights cases, namely, the proper role of state courts in determining constitutionality. That brings us back full circle to *McCleary*.

Justice Johnson dissented from the court's original 2012 decision and subsequent order retaining jurisdiction and requiring the state to report periodically on implementation. He argued that those actions breached separation of powers because the court did not "have enough information to know whether the legislature's outlined progress is adequate" in light of "financial constraints and plans for future budgets" and because "the state of educational opportunities in various areas is ever-changing."¹³³ Therefore, the court was simply "unqualified to assess the progress made or the legislature's chances of achieving" constitutionally adequate school funding.¹³⁴ But here Justice Johnson perhaps makes the best case for the court exercising periodic jurisdiction, rather than terminating the case—so that the court will be well-informed and well-positioned to assess the state's fidelity with the constitutional guarantees of educational adequacy and equity—that is, to assess constitutionality.

IV. CONCLUSION

The perception that courts keep spinning their wheels in education rights cases is partly driven by the glaring spotlight over a politically expedient finish line that never should have been marked there in the first place. Believing there is such a destination, an attainable, fixed point of constitutional

132. . See Scott R. Bauries, *Is There an Elephant in the Room?: Judicial Review of Educational Adequacy and the Separation of Powers in State Constitutions*, 61 ALA. L. REV. 701, 745 (2010) ("[T]he explicitness of separation of powers doctrine in the constitutional text—does not have any discernable impact on whether courts choose to abstain from the merits of constitutional litigation *on the very grounds of separation of powers.*"); David G. Hinojosa, "Race-Conscious" School Finance Litigation: *Is A Fourth Wave Emerging?*, 50 U. RICH. L. REV. 869, 882, 882 n.70 (2016) (noting very few courts have dismissed cases as nonjusticiable on grounds that there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department").

133. . Dissent to Order by Justice James M. Johnson at 4, 5, 8, *McCleary v. State*, 269 P.3d 227 (Wash. 2012) (No. 84362-7).

134. . *Id.* at 8.

compliance, merely dooms courts and legislatures to failure in these cases. Rather than judge whether the state has crossed an arbitrary line of probabilistic, temporary compliance, courts should judge whether the state is actually heading in the right direction with all children on board, improving adequacy and equity. To say that judging progress towards these constitutional guarantees is not the role of courts is to consign the judiciary to task of waving the flag—ostensibly checkered but really white. If we are truly committed to educational adequacy and equity, we can and should expect courts to stay the course, preoccupied not with judging an end but the distance from the beginning, until are all satisfied that the state has kept faith with the constitution.