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Educational Gerrymandering: Money, Motives, and Constitutional Rights

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EDUCATIONAL GERRYMANDERING: MONEY, MOTIVES, AND CONSTITUTIONAL RIGHTS

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Public school funding plummeted following the Great Recession and failed to recover over the next decade, prompting strikes and protests across the nation. Courts have done almost nothing to stop the decline. While a majority of state supreme courts recognize a constitutional right to an adequate or equal education, they increasingly struggle to enforce the right. That right is now approaching a tipping point. Either it evolves, or risks becoming irrelevant.

In the past, courts have focused almost exclusively on the adequacy and equity of funding for at-risk students, demanding that states provide more resources. Courts have failed to ask the equally important question of why states refuse to provide the necessary resources. As a result, states have never stopped engaging in the behavior that leads to the funding failures in the first place.

This Article argues that states refuse to fully fund low-income students' education because they have ulterior aims and biases—maintaining privilege for suburban schools, lowering taxes for wealthy individuals, and not "wasting" money on low-income kids. States go to extraordinary lengths to manipulate school funding formulas to achieve these ends. Thus, the various policies that produce inequality and inadequacy are not just benign state failures; they are intentional efforts to gerrymander educational opportunity. Understood this way, school funding manipulations violate federal equal protection and state constitutional rights to education. Reframing school funding failures as gerrymandering can both create a much-needed federal check on educational inequality and reinvigorate the enforcement of state constitutional rights to education.

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INTRODUCTION

Public school funding is in worse condition than it has been in decades. In real dollar terms, school funding in most states is lower

today than it was before the 2008 recession.[1] Some states are twenty to thirty percent below pre-recession levels.[2] While minor budget adjustments may be theoretically innocuous, studies show that funding cuts of this scale depress student achievement.[3] In fact, one of the most comprehensive studies to date shows that twenty percent variances in school funding account for half of the black-white graduation gap.[4] Analyzing its own data, one state found that "a 1% increase in student performance was associated with a .83% increase in spending."[5] Notwithstanding these robust findings, states consistently fund education well below the levels that disadvantaged students need to achieve acceptable academic outcomes.[6] School funding has gotten so bad that teachers went on strike and led mass protests across the nation in the spring of 2018.[7] A year later, problems remained. In

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[1] MICHAEL LEACHMAN ET AL., CTR. ON BUDGET & POLICY PRIORITIES, MOST STATES HAVE CUT SCHOOL FUNDING, AND SOME CONTINUE CUTTING 1 (2016) (finding that thirty one states were still funding education below pre-recession levels).

[2] MICHAEL LEACHMAN ET AL., CTR. ON BUDGET & POLICY PRIORITIES, A PUNISHING DECADE FOR SCHOOL FUNDING 5 (2017), https://www.cbpp.org/research/state-budget-and-tax/a-punishing-decade-for-school-funding (finding that Arizona was 36.6% below 2008 funding levels and Florida and Alabama more than 20% below).

[3] *See, e.g.*, BRUCE D. BAKER, ALBERT SHANKER INST., REVISITING THAT AGE-OLD QUESTION: DOES MONEY MATTER IN EDUCATION? 1 (2012), http://www.shankerinstitute.org/sites/shanker/files/moneymatters_edition2.pdf (surveying all the relevant studies and finding a consensus that money matters for student outcomes); C. Kirabo Jackson et al., *Do School Spending Cuts Matter? Evidence from the Great Recession* 21 (Nat'l Bureau of Econ. Research, Working Paper No. 24203, 2018), https://www.nber.org/papers/w24203 ("[A] $1000 decline in per-pupil spending reduced test scores by about 0.045ó and reduced college-going rates by about 3 percentage points.").

[4] *See, e.g.*, C. Kirabo Jackson et al., *The Effect of School Finance Reforms on the Distribution of Spending, Academic Achievement, and Adult Outcomes* 15–17 (Nat'l Bureau of Econ. Research, Working Paper No. 20118, 2014), http://www.nber.org/papers/w20118 (finding that school funding litigation had reduced school funding inequalities). Funding variances, if maintained over time, equate with nearly a year's worth of learning for low-income students. *Id*. Relying on a different methodolgy, another study found similarly robust evidence of the positive effects of school funding reforms on student achievement across time. *See* Julien Lafortune et al., *School Finance Reform and the Distribution of Student Achievement*, AMER. ECON. J.: APPLIED ECON. 1, 24 (Apr. 2018), https://pubs.aeaweb.org/doi/pdfplus/10.1257/app.20160567 (comparing its results to those produced by Jackson et al., *supra*).

[5] Gannon v. State (*Gannon IV*), 390 P.3d 461, 493 (Kan. 2017) (citing Kansas's own legislative study of school funding in the state: LEGISLATIVE POST AUDIT, STATE OF KAN., ELEMENTARY AND SECONDARY EDUCATION IN KANSAS: ESTIMATING THE COSTS OF K-12 EDUCATION USING TWO APPROACHES (2006), http://www.kslpa.org/media/files/highlights/media/files/temp/05pa19_nomfJG1.pdf).

[6] *See* BRUCE D. BAKER ET AL., EDUC. LAW CTR., THE REAL SHAME OF THE NATION: THE CAUSES AND CONSEQUENCES OF INTERSTATE INEQUITY IN PUBLIC SCHOOL INVESTMENTS 1 (2018) (calculating the funding gap between what students would need to achieve "average" academic outcomes and what states currently spend on students).

[7] *See, e.g*., Moriah Balingit, *Fed Up with School Spending Cuts, Oklahoma Teachers Walk Out*, WASH. POST (Apr. 2, 2018), https://www.washingtonpost.com/news/education/

January 2019, teachers in the nation's second largest school district went on strike for the first time in three decades and teachers in other states followed suit with their own protests.[8]

In the past, advocates have challenged school funding inadequacies and inequities as deprivations of students' state constitutional right to education. Since the 1970s, advocates have won more than half of the time.[9] But courtroom victories have not stopped inadequacies and inequities from reoccurring. Ironically, the more plaintiffs win the more things seem to stay the same. States often quickly slip back into their bad habits or, even worse, never fully implement an effective remedy in the first instance.[10] Either way, another round of litigation ensues, and the process repeats itself.[11]

This perpetual struggle stems from two unmitigated problems. First, states go to extreme lengths to manipulate and obfuscate the way in which they fund public schools.[12] They use funding formulas that are so complex that only experts fully understand them.[13]

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wp/2018/04/02/fed-up-with-school-spending-cuts-oklahoma-teachers-prepare-to-walk-out; Simon Romero et al., *Teachers in Arizona and Colorado Walk Out Over Education Funding*, N.Y. TIMES (Apr. 26, 2018), https://www.nytimes.com/2018/04/26/us/teacher-walkout-arizona-colorado.html.

[8] Jennifer Medina et al., *Los Angeles Teachers Strike, Disrupting Classes for 500,000 Students*, N.Y. TIMES (Jan. 14, 2019), https://www.nytimes.com/2019/01/14/us/lausd-teachers-strike.html; Matthew S. Schwartz, *West Virginia's Education Bill Dies as Teachers Strike*, NPR (Feb. 19, 2019), https://www.npr.org/2019/02/19/695856032/w-va-teachers-go-on-strike-over-state-education-bill; Holly Yan, *Thousands of North and South Carolina Teachers Are Protesting—but Not Just for the Reasons You Might Think*, CNN (May 1, 2019), https://www.cnn.com/2019/05/01/us/south-carolina-teachers-protest-may-1/index.html.

[9] Michael A. Rebell, *Poverty, "Meaningful" Educational Opportunity, and the Necessary Role of the Courts*, 85 N.C. L. REV. 1467, 1500–05 (2007) (finding plaintiffs had won sixty percent of the time in school funding litigation as of 2007); *see also* John Dayton & Anne Dupre, *School Funding Litigation: Who's Winning the War?*, 57 VAND. L. REV. 2351, 2353 (2004) ("To date, the highest courts in thirty-six states have issued opinions on the merits of funding litigation suits, with nineteen courts upholding state funding systems and seventeen declaring the systems unconstitutional.").

[10] *See generally* Dayton & Dupre, *supra* note 9, at 2406 ("[A]dequate reform is not guaranteed merely by 'success' in litigation. . . . [A]fter several years of serial litigation and little progress, these cases sometimes represent little more than a confirmation of the futility of reform where political will is lacking.").

[11] *Id*.

[12] *See, e.g*., Gannon v. State (*Gannon V*), 402 P.3d 513, 525–29 (Kan. 2017) (explaining the unusual methods and data inputs the state had used to develop its formula); DeRolph v. State, 677 N.E.2d 733, 737–38 (Ohio 1997) (examining seven different funding formula inequities).

[13] *See generally* MATTHEW M. CHINGOS & KRISTIN BLAGG, URB. INST., MAKING SENSE OF STATE SCHOOL FUNDING POLICY (2017), https://www.urban.org/sites/default/files/publication/94961/making-sense-of-state-school-funding-policy_0.pdf; *How Do School Funding Formulas Work?*, URB. INST. (Nov. 29, 2017), https://apps.urban.org/features/funding-formulas (exploring the multiple aspects of how states tend to build a funding

Embedded in those formulas are the tools by which to advantage and disadvantage particular communities and ensure that the state never fully absorbs the cost of providing a decent education for all students. States, for instance, pick arbitrarily low estimates of education costs, exclude inflation increases, cap or exclude supplements for low-income and special education students, and shift costs onto local districts that they know the districts cannot afford.[14]

Second, courts and litigants fail to appreciate the significance of these manipulations because they ignore an important question—motive. School funding litigation focuses almost exclusively on outcomes.[15] It asks whether students have received an adequate or equal education, which entails an intense factual analysis of how students are performing and what they need to improve.[16] But courts and litigants never stop to ask *why* states are failing to provide the resources students need. It is enough, they assume, to find that states have failed and then demand a remedy. Those remedies, however, rarely account for the source of the problem: states' propensity to actively manipulate school funding.

This Article is the first to offer a much-needed normative and doctrinal reconceptualization of school funding failures and their effects on educational opportunity. Drawing on increasing concerns with politically motivated manipulation of voting districts,[17] the

formula); Regina Mack, *Lawmakers*, *Education Leaders Discuss School Finance in Texas*, TEX. TRIB. (May 4, 2018), https://www.texastribune.org/2018/05/04/school-finance-reform (discussing the difficulty of statewide school finance reform because "many legislators" do not understand school funding and "don't understand what's at stake").

[14] *See infra* Part I.

[15] James E. Ryan, *Standards, Testing, and School Finance Litigation*, 86 TEX. L. REV. 1223, 1240–43 (2008) (focusing on comparing the court's narrow definitions of adequacy and the examination of school resources and student outcomes).

[16] *Cf.* William S. Koski, *Beyond Dollars? The Promises and Pitfalls of the Next Generation of Educational Rights Litigation*, 117 COLUM. L. REV. 1897, 1907 (2017) (positing that these evaluations are so difficult that courts have grown weary of enforcing adequacy and equity claims).

[17] *See, e.g.*, Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2659 (2015) (upholding a voter referendum that removed redistricting decisions from the legislature and assigned them to an independent commission); Vieth v. Jubelirer, 541 U.S. 267, 293 (2004) (demonstrating a situation in which all nine Justices agreeing that "excessive injections of politics" in redistricting violates the Constitution); *see also* Whitford v. Gill, 218 F. Supp. 3d 837, 843 (W.D. Wis. 2016) (striking down political gerrymandering based on the Court's recent jurisprudence), *vacated*, 138 S. Ct. 1916, 1934 (2018). To the extent the U.S. Supreme Court is unusure of the appropriate remedy for these political gerrymanders, state courts are acting in its stead. *See, e.g.*, Michael Wines & Richard Fausset, *North Carolina's Legislative Maps Are Thrown Out by State Court Panel*, N.Y. TIMES (Sept. 3, 2019), https://www.nytimes.com/2019/09/03/us/north-carolina-gerrymander-unconstitutional.html (writing that a North Carolina state court panel's decision to throw out that state's legislative maps suggested that state courts could act against partisan gerrymandering even in the face of the Supreme Court's decision that

Article reframes the various policies that produce educational inequality and inadequacy not just as benign state failures but as intentional efforts to gerrymander educational opportunity. Based on that reframing, this Article argues that gerrymandering educational funding can rise to the level of unconstitutionality.

Rather than honestly attempt to fairly fund basic educational opportunities, some states decide how much they are willing to spend on education and then work backward to create a funding formula that will match the state's arbitrary budget goals.[18] More distressing, states insert precise values into their funding formulas that ensure privileged districts maintain, if not expand, their privilege.[19] Questioning or rejecting the notion that additional money will help disadvantaged students, states use a similar method to ensure that the state will not have to absorb the full cost of educating low-income and minority students.[20] The current U.S. Secretary of Education has even egged them on, saying that "[t]he notion that spending more money is going to bring about different results is ill-placed and ill-advised."[21]

States' school funding inadequacies and inequities are not accidental but calculated and illicit attempts to underfund the education

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federal courts could not); Zachary Roth, Opinion, *We're Winning the Fight Against Gerrymandering*, BRENNAN CTR. FOR JUST. (Sept. 9, 2019), https://www.brennancenter.org/blog/we-are-winning-fight-against-gerrymandering ("[The] North Carolina decision was the eighth straight anti-gerrymandering ruling by a state or lower federal court, underscoring just what an outlier the high court's ruling really is.").

[18] *See, e.g.*, *Gannon V*, 402 P.3d 513, 533 (Kan. 2017) (finding the state had worked backward in its estimates of local contributions); DeRolph v. State, 677 N.E.2d 733, 738 (Ohio 1997) (positing that the state had "work[ed] backward").

[19] *See, e.g.*, Emma Brown, *In 23 States, Richer School Districts Get More Local Funding than Poorer Districts*, WASH. POST (Mar. 12, 2015, 8:00 AM), https://www.washingtonpost.com/news/local/wp/2015/03/12/in-23-states-richer-school-districts-get-more-local-funding-than-poorer-districts.

[20] *See, e.g.*, Campaign for Fiscal Equity, Inc. v. State, 861 N.E.2d 50, 56 (N.Y. 2006) (selecting the lowest estimate of student need to drive its funding formula); *DeRolph*, 677 N.E.2d at 738–39 (freezing the aid for concentrated poverty once it reaches 20%). A survey of student funding policies reveals that almost all states fail to provide the additional 30% to 40% in funding that low income students would need to achieve adequate outcomes. *See* EDBUILD, FUNDED: STUDENT POVERTY FUNDING POLICIES IN EACH STATE (2016) [hereinafter STUDENT POVERTY FUNDING]; NAT'L CTR. EDUC. OF STATISTICS, U.S. DEP'T OF EDUC., INEQUALITIES IN PUBLIC SCHOOL DISTRICT REVENUES 62 (1998) (identifying 40% as the appropriate adjustment for low-income students).

[21] Kayla Lattimore, *DeVos Says More Money Won't Help Schools; Research Says Otherwise*, NPR (June 9, 2017, 6:00 AM), https://www.npr.org/sections/ed/2017/06/09/531908094/devos-says-more-money-wont-help-schools-research-says-otherwise. DeVos is far from the first high level leader to suggest as much. *See, e.g.*, Susan Chira, *Spending and Learning: Money's Role Questioned in Schools Debate*, N.Y. TIMES (May 4, 1991), https://www.nytimes.com/1991/05/04/us/spending-and-learning-money-s-role-questioned-in-schools-debate.html (noting that former President George H. W. Bush once said "[d]ollar bills don't educate students"). The overwhelming weight of evidence demonstrates that money clearly does matter. BAKER, *supra* note 3.

of some students and get away with it—what this Article terms gerrymandering. Gerrymandering school funding to target particular students for disfavor is inconsistent with any reasonable normative concept of equal educational opportunity for all.[22] Rather than leveling the playing field or allowing individual merit to dictate outcomes, gerrymandering school funding disadvantages certain communities and students.[23] Courts and advocates, however, have overlooked this root cause and motive for education underfunding. In doing so, they have implicitly invited states to continue their illicit behavior, which inevitably reproduces bad outcomes. This Article provides a solution, explaining how gerrymandering school funding to advantage and disadvantage students is unconstitutional, regardless of the precise adequacy and equity outcomes it produces.

Under both state and federal constitutional law, educational gerrymandering that disadvantages students should fail for a simple reason: The state's goals, when properly understood, are illegitimate.[24] This Article demonstrates that school funding gerrymanders rarely represent good faith efforts to improve educational opportunities or meet state constitutional obligations to provide adequate and equal

[22] Courts have found that state's educational duty to ensure access for all is an absolute one. *See, e.g.*, Lake View Sch. Dist. No. 25 v. Huckabee, 91 S.W.3d 472, 495 (Ark. 2002), *abrogated for noncompliance*, Morgan v. State, 142 S.W.3d 643 (Ark. 2004) (per curiam) ("[The state constitution] imposes upon the State an absolute constitutional duty to educate our children."); Claremont Sch. Dist. v. Governor, 794 A.2d 744, 754 (N.H. 2002) ("As we have repeatedly held, it is the State's duty to guarantee the funding necessary to provide a constitutionally adequate education to every educable child in the public schools in the State."); Abbott v. Burke, 710 A.2d 450, 485 (N.J. 1998) (recognizing the state has an affirmative duty in addressing educational deficiencies).

[23] The act of stacking the deck or, in the case of voting, gerrymandering a government process strikes many as normatively unconscionable. A Wisconsin legislator captured it perfectly with the statement that "legislators are picking their constituents rather than constituents picking their legislators." Nina Totenberg, *This Supreme Court Case Could Radically Reshape Politics*, NPR (Oct. 3, 2017), https://www.npr.org/2017/10/03/552904504/this-supreme-court-case-could-radically-reshape-politics. The government should no more "pick" who gets a decent education than it should pick its voters. The behavior is simply contrary to our form of government and the rule of law. Michael S. Kang, *Gerrymandering and the Constitutional Norm Against Government Partisanship*, 116 MICH. L. REV. 351, 353–54 (2017); Justin Levitt, *Intent Is Enough: Invidious Partisanship in Redistricting*, 59 WM. & MARY L. REV. 1993, 2023–24 (2018).

[24] Even budgetary constraints—real or imagined—fail to rise to the level of a legitimate excuse for school funding failures. *See, e.g.*, Butt v. State, 842 P.2d 1240, 1243 (Cal. 1992) (rejecting budgetary shortfalls or challenges as a justification for failure to discharge constitutional education duties); Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 209 (Ky. 1989) (same); *Claremont Sch. Dist.*, 794 A.2d at 754 (same); Abbott v. Burke, 798 A.2d 602, 603–04 (N.J. 2002) (same); Campbell Cty. Sch. Dist. v. State, 907 P.2d 1238, 1279 (Wyo. 1995) (same); *see also* Michael A. Rebell, *Safeguarding the Right to a Sound Basic Education in Times of Fiscal Constraint*, 75 ALA. L. REV. 1855, 1859–60 (2012) (analyzing financial exigency school funding cases). This Article argues that real exigencies cannot explain most states' behavior.

education. Rather, states' primary motives are often to favor schools in privileged communities, lower taxes for the wealthy, avoid their constitutional duty in education, and stop spending what they incorrectly believe to be wasted money on low-income kids.[25]

Under federal equal protection, these motives—when understood as attempts to disadvantage particular groups—cannot be ends unto themselves. Even rational basis review provides a limit to this type of behavior. Over the course of several cases, the Court has emphasized that intentionally targeting groups for disadvantage simply because the state does not like or value them is illegitimate, even if the targeted group is not a suspect class.[26]

School funding gerrymandering triggers this concern. At the most general level, state funding policies make it harder for some students to access their right to an adequate or equal education.[27] At a more granular level, the depth and scope of the gerrymandering embedded in state funding formulas makes little sense other than as state efforts to advantage privileged suburban school districts and disadvantage low-income and minority school districts. When school funding gerrymandering simply singles out groups rather than achieving some legitimate educational goal, it violates the basic promise of equal protection.

The targeting of communities and students also violates state constitutions because it is logically inconsistent with states' affirmative constitutional duty to provide an adequate or equal educational opportunity to all students.[28] A state cannot, in good faith, carry out

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[25] *See infra* Part II.

[26] The Court has held that "a bare . . . desire to harm," "disadvantage," or "singl[e] out" a group is illicit regardless of the level of scrutiny employed. Romer v. Evans, 517 U.S. 620, 685, 632–33 (1996) (citations omitted); *see, e.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985); Plyler v. Doe, 457 U.S. 202 (1982); U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973). This principle lies at the heart of the Constitution. Both the rule of law and equal protection demand that government be "impartial . . . to all who seek its assistance." *Romer*, 517 U.S. at 633. Government cannot make it "more difficult for one group of citizens than for all others" to access government benefits, services, or protection. *Id.* In these cases, the Court also focuses on the "peculiar" and "unusual" nature of the state's actions. *See, e.g.*, United States v. Windsor, 570 U.S. 744, 754 (2013); *Romer*, 517 U.S. at 631–32; Louisville Gas & Elec. Co. v. Coleman, 277 U.S. 32, 37–38 (1928). States' unusual efforts are themselves indicative of a desire to disadvantage a group.

[27] *See generally* Press Release, U.S. Dep't of Educ., More Than 40% of Low-Income Schools Don't Get a Fair Share of State and Local Funds, Department of Education Research Finds (Nov. 30, 2011), https://www.ed.gov/news/press-releases/more-40-low-income-schools-dont-get-fair-share-state-and-local-funds-department-education-research-finds (explaining the extent of resource inequality in the nation's schools).

[28] Several state constitutions, for instance, require the provision of a "uniform" system of public education. EMILY PARKER, EDUC. COMM'N OF THE STATES, CONSTITUTIONAL OBLIGATIONS FOR PUBLIC EDUCATION (2016), https://www.ecs.org/wp-content/uploads/

this constitutional duty while at the same time putting certain students at a disadvantage. A more complicated legal analysis arises when states obfuscate their motives under the guise of separation of powers, asserting that the legislature has the discretion to fund education as it deems fit.[29] States are correct that their constitutions afford legislatures wide discretion in the implementation of education policy, but the doctrinal response must be to distinguish active resistance to a constitutional duty from the exercise of discretion.[30] Legislatures can freely exercise discretion in the context of good faith efforts to discharge their constitutional duty, but that discretion does not include the authority to reject the duty itself or act in bad faith. Legislative resistance all too often is a refusal to accept judicial findings that money matters for low-income students and that they need more.[31]

A gerrymandering framework fills several important gaps in current strategies and doctrine—gaps that threaten to undermine the whole movement to enforce the constitutional right to education. First, identifying gerrymandering in school funding formulas and labeling it as such normatively delegitimizes what has become common practice by state legislatures. And it does so in a way that is easier for courts and the public to grasp than amorphous labels like educational adequacy and inequity or variations in per pupil spending that are otherwise difficult to appreciate. Second, a gerrymandering framework gives rise to a federal claim that is sorely missing. Absent a federal claim, many states have had free reign to operate almost any type of education scheme they could imagine, regardless of its effects

2016-Constitutional-obligations-for-public-education-1.pdf (identifying fifteen states with a uniformity clause). Most state constitutions also specifically indicate that the state's duty is to serve "all" students. *See* Derek W. Black, *The Constitutional Compromise to Guarantee Education*, 70 STAN. L. REV. 735, 780 (2018) (analyzing the intentional inclusion of the term "all" in constitutional education clauses).

[29] *See, e.g.*, *Rose*, 790 S.W.2d at 214 (responding to the state's argument that the trial court's order to remedy educational inadequacies "is a violation of the separation of powers"); Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71, 88–90 (Wash. 1978) (same). For a discussion of separation of powers and the role they play in school funding contests, 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 (2010).

[30] *Gannon IV*, 390 P.3d 461, 503–04 (Kan. 2017) ("[A]ny system of school finance created by the legislature must comply with the Kansas Constitution. The constitution is 'the work . . . of the people,' and 'is the supreme and paramount law, receiving its force from the express will of the people.'" (citations omitted)).

[31] *See, e.g.*, Abbott v. Burke, 575 A.2d 359, 403 (N.J. 1990) (responding to the state claim that "additional funding will not enable the poorer urban districts to satisfy the thorough and efficient test" and responding that "the constitutional answer is that they are entitled to pass or fail with at least the same amount of money as their competitors"); Campaign for Fiscal Equity, Inc. v. State, 801 N.E.2d 326, 331 (N.Y. 2003) (rejecting state argument that disadvantaged districts were already receiving sufficient funds because an eighth grade level of learning was sufficient).

on students.[32] Third, a gerrymandering framework can be easier to apply and enforce than adequacy and equity doctrine. Rather than difficult qualitative and statistical evaluations regarding student resources, student outcomes, and educational remedies,[33] educational gerrymandering involves a narrow and judicially familiar inquiry into legislative goals and motivations.[34]

These advantages collectively further school funding litigation's ultimate goal—improving educational opportunities. Without this framework, state courts increasingly struggle to achieve their goals.[35] Constant and seemingly unresolvable fights with state legislatures are testing state courts in ways that raise the question of whether adequacy and equity litigation can remain viable over the long term.[36] More bluntly, nothing less than the long-term enforceability of the constitutional right to education hangs in the balance of its ability to evolve.

This Article proceeds in four parts. Part I categorizes and details the precise ways in which states gerrymander educational opportunity. Part II identifies and analyzes the state motives that lead to school funding gerrymandering. Part III explores the limits of current ade-

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[32] *See generally* Robinson v. Kansas, 117 F. Supp. 2d 1124, 1150 (D. Kan. 2000), *aff'd*, 295 F.3d 1183 (10th Cir. 2002) (dismissing "the alleged disparities created by the local option budgets is attributed to the varying wealths of the areas . . . because it is not the 'constitutional prerogative' of the federal courts 'to nullify statewide measures for financing public services'" (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 54 (1973))); Derek W. Black, *Abandoning the Federal Role in Education: The Every Student Succeeds Act*, 105 CALIF. L. REV. 1309, 1344–46 (2017) (surveying states' poor track record in school funding).

[33] Scholars posit that these inquires have caused courts to grow "weary." Koski, *supra* note 16, at 1907 ("In the last eight years or so, courts appear to have grown more reluctant to intervene in educational finance policy and, as a result, third-wave adequacy litigations may be receding."); *see also* Scott R. Bauries, *The Education Duty*, 47 WAKE FOREST L. REV. 705, 730–31 (2012) (arguing that the indeterminacy of qualitative education standards has resulted in both under- and over-enforcement of the Constitution).

[34] *See, e.g.*, McCreary Cty. v. Am. Civil Liberties Union, 545 U.S. 844, 861 (2005) ("[G]overnmental purpose is a key element of a good deal of constitutional doctrine." (citing Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993))); Levitt, *supra* note 23, at 2011–13 (surveying more than ten constitutional contexts in which intent is a touchstone of judicial inquiry). Scott Bauries has argued that courts should focus on whether the legislature has acted in good faith. Bauries, *supra* note 33, at 761. His theory moves in the direction of focusing litigation on legislative motive but would afford legislatures more discretion than current doctrine allows. Thus, his thesis would involve the judiciary less in school funding litigation whereas this Article aims to add another arrow to courts' quivers.

[35] *See generally* Derek W. Black, *Averting Educational Crisis: Funding Cuts, Teacher Shortages, and the Dwindling Commitment to Public Education*, 94 WASH. U. L. REV. 423, 451–59 (2016) (finding that courts grew reticent to enforce education rights following the recession).

[36] Koski, *supra* note 16, at 1907.

quacy and equity litigation approaches to address this gerrymandering, positing that the viability of the constitutional right to education could be at risk. Part IV details the equal protection and state constitutional right principles that prohibit states from targeting groups for disadvantage. Part IV closes by exploring the advantages of this framework in comparison to adequacy and equity.

I
How States Gerrymander School Funding

States use funding formulas to distribute widely differing levels of funding to every district in the state.[37] The complexity and nuances of these formulas allow states to gerrymander school funding in plain sight. Except for a handful of experts and legislative staff, no one understands what the state is doing or its real-world impact on students; most simply wait to be told how much funding they will receive and hope it will be enough. For that reason, challenging the state's assumptions and decisions is almost out of the question.[38]

For the lay person, school funding formulas, in many respects, resemble jigsaw puzzles. The state—the puzzle-maker—knows exactly how and where to draw calculated and sharp lines, which only the state fully appreciates. To most everyone else, the funding formula looks like an indecipherable mess of random puzzle pieces.[39] Herein lies the rub that allows the state to manipulate the puzzle lines any way it wants to produce as many different pieces and shapes as it wants. Whereas the puzzle maker's aim is to create a challenging puzzle, the state's objectives are often more nefarious—to keep its costs down, maintain the status quo, or obfuscate the fact that it is not treating students fairly. Only on rare occasions is the state's objective

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[37] *See generally* Baker et al., *supra* note 6, at 45 (listing per pupil expenditures by district quintile for all states).

[38] *See* Andrea Zelinski, *Politics Block Way of Education Funding Solutions, Experts Say: Texas Legislators Face Incentives to Perpetuate the Status Quo*, Hous. Chron. (May 14, 2016), https://www.houstonchronicle.com/news/politics/texas/article/Politics-block-way-of-education-funding-7469121.php (claiming that Texas only addresses school funding when courts force them to do so and even then does not fix the problem); *see also* Jim Allen, *For School Systems,* McCleary *Decision Gave with One Hand and Took with the Other*, Spokesman-Rev. (Sept. 9, 2018), http://www.spokesman.com/stories/2018/sep/09/for-school-systems-confusion-and-angst-mix-with-re (discussing the confusion among districts regarding how the state will spend and disperse the substantial new investment in the school funding system).

[39] *See, e.g.*, Jessica Handy, *Confused About New School Funding Reform Law?*, Stand for Children (Sept. 1, 2017), http://stand.org/illinois/blog/2017/09/01/confused-about-new-school-funding-reform-law (explaining and simplifying the multi-part school funding reform bill for the lay person).

to ensure that all students actually have access to adequate and equal resources.

The following sections demystify state funding formulas, explaining their most basic levers and, more important, naming and identifying the precise ways in which states gerrymander school funding. Educational gerrymandering includes: arbitrarily driving down the estimated cost of educating students; consistently picking low supplements for at-risk students; conveniently excluding inflation increases and other fixed costs over time; and shifting excessive and unrealistic funding burdens onto local districts. These tactics, among others, allow states to reduce and minimize their contribution to education. But states sometimes go one step further.

Rather than just plug in arbitrarily low numbers and cover the cost of whatever the formula generates, some states begin their budgeting process by deciding how much they are willing to spend on education. They then make up estimates and values that will require the state to spend no more or less than that number. In short, they work backwards. The following subsections explain and detail each of these gerrymandering tactics.

A. Manipulating the Base

States often gerrymander school funding through the "student base."[40] The student base is the basic minimum amount a school district will receive from the state for each child it enrolls and, thus, the starting point for all education funding.[41] The state sets the base by estimating the amount of money districts need from the state to provide students with access to qualified teachers, appropriate class sizes, instructional materials, technology, and facilities.[42] More specifically, the base is the difference between the total cost of delivering those resources and the amount the state can reasonably expect local districts to cover themselves. If the cost of educating students is $8000 per pupil, and even the lowest-income district in the state can afford to provide $1000 per pupil toward education, the state might set the base at $7000 per pupil.

After arriving at that base, the state creates adjustments to further tailor the precise amount a district receives to its local circumstances. The state increases or decreases the base per pupil funding

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[40] Two states, however, do not even use a funding formula and, thus, do not calculate a student base cost. STUDENT POVERTY FUNDING, *supra* note 20 (Pennsylvania and Connecticut).

[41] EDUC. L. CTR., FUNDING, FORMULAS, AND FAIRNESS: WHAT PENNSYLVANIA CAN LEARN FROM OTHER STATES' EDUCATION FUNDING FORMULAS 5 (2013).

[42] *Id.*

based on things like geographic costs and student demographics. Putting aside any manipulations that might occur in those demographic and geographic adjustments, states routinely manipulate the base estimate through a series of "fuzzy math" calculations.

The first and most manipulative tactic involves cherry-picking data that the state knows will produce its desired result—lower education spending. Kansas provides a poignant example. Kansas recently estimated the cost of an adequate education in the state by examining how much money "successful schools" spend on students.[43] But Kansas did not actually follow a legitimate method for applying this "successful schools" model. Instead, the state rigged its study to produce an artificially low estimate of necessary per pupil expenditures.[44] Rather than evaluate all its successful schools, the state cherry-picked a subset of schools and then looked at the most successful ones in that group.[45] Many of the so-called "successful schools" in the subgroup had low student achievement.[46] Even more oddly, many of these "successful schools" were among those that school funding plaintiffs had recently demonstrated to be inadequately funded.[47] In other words, the schools the state chose were not really successful schools; they were "merely the best, or the most efficient, of the constitutionally inadequate" schools.[48] By cherry-picking these schools, Kansas was able to manufacture a low estimated base student cost and drastically decrease its funding obligations.

The following chart[49] provides a glimpse of the extent to which Kansas has manipulated its base and its effect on the total resources available to students. The state contribution to education varied considerably between 2008 and 2015. Yet, the total funding that students received from state, local, and federal resources combined remained relatively constant. For instance, the state increased the state portion of school funding from $6326 per pupil in 2010 to $8567 in 2015, but during that same period, the required local contribution declined from $4406 to $3456. So what might have looked like a $2000 increase in school funding from the state amounted to something closer to a

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[43] *Gannon V*, 402 P.3d 513, 525 (Kan. 2017). A successful schools model is a plausible method for setting a student base. *Id*. at 531. Experts prefer other methods. *Id*. at 525.

[44] *Id.* at 529.

[45] *Id.* at 530.

[46] *Id.* at 528. As high as one in four students were achieving below grade level. *Id.*

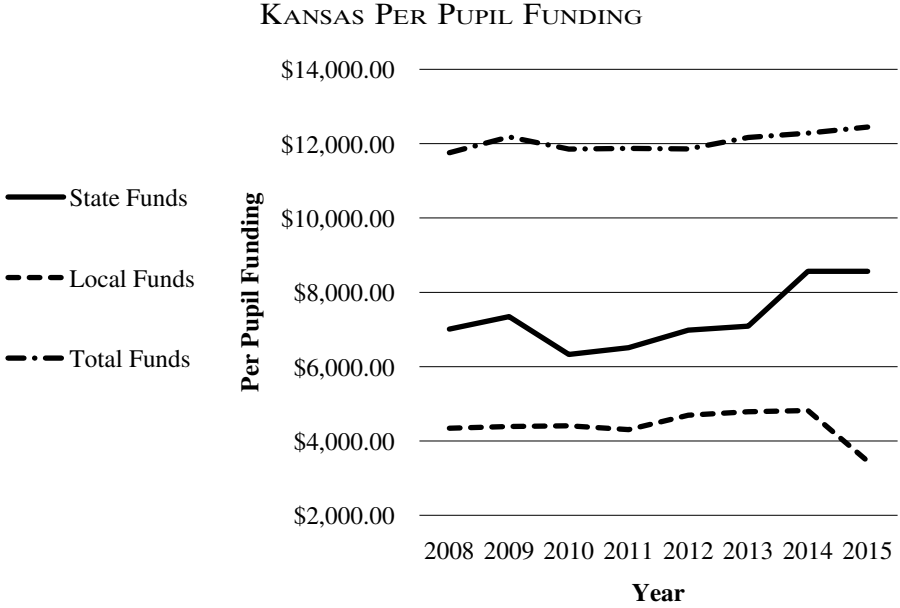
[47] *Id.* at 527.

[48] *Id.*

[49] This chart is based on data from the Kansas State Department of Education and the calculations from Dave Trabert, *Kansas School Funding Set New Records in 2017*, KAN. POL'Y INST. (Nov. 6, 2017), https://kansaspolicy.org/kansas-school-funding-set-new-records-2017.

$1000 per-pupil increase. Moreover, comparing 2009 to 2015, the increase falls to a mere $263 per pupil.

In short, by constantly altering the state and local contributions, the state kept the overall cost of education low and presented the picture that it was doing far more for education than it actually was in some years.



A second method states use to manipulate base education costs is to adjust expenditures down under the guise of efficiency. States claim to estimate the cost of an adequate education by relying on spending patterns in financially efficient schools.[50] But, as a practical matter, states eliminate the possibility that they will need to increase spending to the levels found in high-spending, high-performing districts. New York, for instance, explicitly excluded high-spending districts from its efficiency analysis altogether,[51] removing districts in the state's top half of spending from its estimate of efficiently funded education.[52] This approach also had the side effect of excluding half of the state's most academically successful schools from analysis.[53]

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[50] *See supra* notes 43–48 and accompanying text.

[51] Campaign for Fiscal Equity, Inc. v. State, 861 N.E.2d 50, 67 (N.Y. 2006).

[52] *Id.* at 66.

[53] *Id.* (describing how 140 of the 281 schools that were successful in meeting state educational benchmarks were deemed inefficient).

Excluding districts simply because they spend above the median is impossible to justify,[54] particularly when it excludes half of the state's best achieving schools—the exact type of schools the state is trying to efficiently replicate. New York's own expert admitted that there was no evidence that districts in the top fifty percent of spending were inefficient.[55] The state could have legitimately excluded outlier districts—those in both the top and bottom five percent in spending.[56] But the fact that the state instead took a facially arbitrary approach suggests the state's primary goal was to drive down the base cost of education, not identify quality schools with efficient spending practices.[57] In short, New York, like Kansas, is guilty of cherry-picking school districts under the guise of legitimately estimating base costs.[58]

States, however, can also manipulate base funding through far simpler and more obvious strategies: using old data,[59] ignoring inflation,[60] and excluding certain costs. For instance, a state can rely on old spending data to estimate the cost of an adequate education, knowing that it underfunded education in those past years.[61] With that data, the state will almost necessarily produce an artificially low and inaccurate estimate of adequate base costs. Or a state can do the inverse: use current data but exclude inflation adjustments for upcoming budgets. Even if the state's estimate is valid for the first year, the estimate

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[54] *Id.* at 67 (discussing testimony from state's expert who admitted he would not use the state's efficiency filter and that it was not "generally accepted by experts in educational finance").

[55] *Id*.

[56] *Id.*

[57] The court noted that only one other state in the country, New Hampshire, uses such a method and its purposes "appear" to be "'to drive costs down' to a predetermined amount." *Id.*

[58] Kansas, ironically, used an efficiency filter within its successful-schools model to manipulate the base cost even further. Similar to New York, its efficiency filter indicated that twenty six of its "successful" schools were spending more per pupil than the state estimated they should. *Gannon V*, 402 P.3d 513, 528 (Kan. 2017). In other words, by the state's estimate, most successful schools spend too much money. This remarkable conclusion begs the question of whether the state manipulated its analysis. The court suggested the state did just that, emphasizing that the state had made "efficiency" a more dominant factor than student achievement in its analysis. *Id.* at 527. The court also indicated that the state had included spending data that should have been excluded and provided no explanation for other odd data that it did include. *Id.*

[59] *See* Steve LeBlanc, *Massachusetts Debates 25-Year-Old Education Formula*, BOSTON.COM (July 15, 2018), https://www.boston.com/news/education/2018/07/15/massachusetts-debates-25-year-old-education-funding-formula.

[60] *See* Gannon v. State (*Gannon VI*), 420 P.3d 477, 480–81 (Kan. 2018); Montoy v. State, 62 P.3d 228, 234 (Kan. 2003) (discussing the allegation that the state had failed to provide for inflation increases); Campbell Cty. Sch. Dist. v. State, 181 P.3d 43, 48 (Wyo. 2008).

[61] *See Gannon V*, 402 P.3d at 527.

should increase with inflation over time.[62] By excluding inflation adjustments or intentionally underestimating the rate of inflation, state legislatures drive down their future education base costs.[63] Another variant is to accurately forecast the future cost of an adequate education and the base cost of delivering it, but give the state several years to gradually increase the base to reach those future estimates.[64] In other words, the state underfunds education today in hopes of fully funding it at some later date. Underestimations and delayed implementation save the state hundreds of millions of dollars[65] and thus create enormously perverse incentives.

In addition to excluding inflation or delaying implementation, some states exclude certain education expenditures from their base costs. During the recession, Virginia, for instance, capped the number of support personnel positions it would fund in schools.[66] By excluding these personnel from the base funding estimate, the state dramatically drove down its costs. In a single year, this exclusion cut $378 million from the state's base education funding obligation.[67] Other states have been excluding facility costs for decades, calculating base education costs on everything but facilities.[68] This exclusion places an enormous

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[62] *See Gannon IV*, 390 P.3d 461, 470 (Kan. 2017); Davis v. State, 804 N.W.2d 618, 630 (S.D. 2011).

[63] *See Gannon VI*, 420 P.3d at 480–81 (excluding inflation); *Campbell Cty.*, 181 P.3d at 48 (discussing plaintiffs' claims that the state had excluded inflation and other cost adjustments and plaintiffs' trial court victory). Estimating future inflation is inherently speculative, making it easy for a state to estimate downward. *See generally* JAMES H. STOCK & MARK W. WATSON, NAT'L BUREAU ECON. RESEARCH, WHY HAS U.S. INFLATION BECOME HARDER TO FORECAST? (2006) (discussing difficulties in forecasting inflation).

[64] *See* Campaign for Fiscal Equity, Inc. v. State, 861 N.E.2d 50, 57 (N.Y. 2006).

[65] Economists project a 2.25% inflation rate over the next five years. If the estimated cost of an adequate education today is $7500, the projected base rate should be $8382 in five years. But if the state estimates 2% inflation, that number falls to $8280, amounting to roughly $40,000 in an average school—two-thirds the cost of the median teacher's salary and far more than the median salary of a teacher's aid. *Teacher Assistants*, U.S. DEP'T LABOR, BUREAU LABOR STATISTICS (BLS), https://www.bls.gov/ooh/education-training-and-library/teacher-assistants.htm; *Kindergarten and Elementary School Teachers*, U.S. DEP'T LABOR, BUREAU LABOR STATISTICS (BLS), https://www.bls.gov/ooh/education-training-and-library/kindergarten-and-elementary-school-teachers.htm.

[66] VA. BD. OF EDUC., VIRGINIA BOARD OF EDUCATION'S 2016 ANNUAL REPORT ON THE CONDITION AND NEEDS OF PUBLIC SCHOOLS IN VIRGINIA 16 (2016) [hereinafter VA. 2016 ANNUAL REPORT], http://www.doe.virginia.gov/boe/reports/annual_reports/2016.pdf.

[67] *Id.* at 16.

[68] *See, e.g.*, DeRolph v. State, 677 N.E.2d 733, 747 (Ohio 1997); Abbeville v. State, 355 S.C. 58, 68 (1999); Pauley v. Kelly, 255 S.E.2d 859, 882 (W. Va. 1979); Jones v. State Bd., 927 So. 2d 426, 429 (La. Ct. App. 2005). The longer a school defers repairs, the higher the cost gets and the more into disrepair a facility falls. *See* DEBBIE ALEXANDER & LAURIE LEWIS, INST. OF EDUC. SCIS. NAT'L CTR. FOR EDUC. STATISTICS, CONDITION OF AMERICA'S PUBLIC SCHOOL FACILITIES: 2012–2013, at 6 tbl.1 (2014) (noting thirty-one percent of schools nationwide rely on temporary buildings, with fourty-five percent of

hardship on low-income school districts and progressively worsens as each year passes.[69] Without state funding, these districts may never be in a position to repair their facilities or, as is eventually needed, build a new school.[70]

States can be remarkably creative about manipulating the base. For example, Texas recently adopted a distinct but related scheme to those already outlined above. In 2004, Texas capped the number of special education students for whom it would provide funding.[71] No matter how many special education students a district enrolled, Texas would only fund special education services for 8.5% of a school district's students.[72] Nationally, 13% of students require special education.[73] Texas educators indicate that the state's precise motive was "to control special education costs," not fairly fund the cost of education.[74] Now, current estimates indicate that Texas will need to spend $3.2 billion in the next three years to close the funding gap it created.[75] As the following Section further reveals, manipulating funding for special education and other disadvantaged students is extremely prevalent and has particularly serious negative effects for those students.

B. Manipulating Student Weights

Overt manipulations of base costs are far from states' only tool. States also manipulate the supplements they provide for disadvantaged students, which can generate even larger budget savings because

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those buildings in fair to poor condition); COUNCIL OF THE GREAT CITY SCH., FACILITY NEEDS AND COSTS IN AMERICA'S GREAT CITY SCHOOLS 3 (2011) (studying the school facilities in the nation's major cities and identifying $61.4 billion in needed repairs and $19.0 billion in deferred maintenance).

[69] *See DeRolph*, 677 N.E.2d at 756 (discussing the compounding costs of unfunded school facility updates and repairs).

[70] *See id.*; *Pauley*, 255 S.E.2d at 900 n.4; BUD FERILLO, CORRIDOR OF SHAME: THE NEGLECT OF SOUTH CAROLINA'S RURAL SCHOOLS (2006), http://www.corridorofshame.com/whataboutus/background.php (documenting school facilities that are roughly a century old and in deep disrepair).

[71] Press Release, U.S. Dep't of Educ., U.S. Department of Education Issues Findings in Texas Individuals with Disabilities Education Act Monitoring (Jan. 11, 2018) [hereinafter IDEA Monitoring], https://www.ed.gov/news/press-releases/us-department-education-issues-findings-texas-individuals-disabilities-education-act-monitoring.

[72] *Id*.

[73] Alejandra Matos, *Texas Needs to Find Up to $3.3 Billion to Bring Special Education Services Up to National Standards*, HOUS. CHRON. (Aug. 10, 2018), https://www.houstonchronicle.com/news/investigations/article/Texas-may-pay-up-to-3-billion-to-raise-special-13146845.php.

[74] Aliyya Swaby, *Special Education Caps Were the Texas Legislature's Idea, Educators Say*, TEX. TRIB. (Jan. 14, 2018), https://www.texastribune.org/2018/01/14/school-groups-special-education-texas-legislators (quoting from a legislative report).

[75] *See* Matos, *supra* note 73.

the supplements can vary so wildly. These manipulations, moreover, are normatively worse than base manipulations. Whereas manipulating the base affects the entire state, manipulating funding for disadvantaged students impacts districts serving the neediest students the most and, as a result, widens inequality even further.

States typically allocate supplemental funding for disadvantaged students through their funding formulas. While complex in practice, these formulas are conceptually simple in regard to disadvantaged students. Some students, particularly low-income students, require more resources to achieve at grade level than others.[76] To address these needs, states add a specific percentage of funding to the base funding for each low-income student a school district enrolls.[77] This is called weighted funding.[78]

Unfortunately, like the base amount itself, determining the appropriate additional percentage that low-income students require is not an exact science.[79] Researchers and educators all agree that low-income students require substantial additional resources, but their estimates of precisely how much vary. There is, however, a general consensus among experts and the federal government that low-income students require at least forty percent more resources than the average student.[80] The variance comes from those few researchers who set the minimum threshold at thirty percent and others who suggest that covering all low-income students' needs requires something closer to sixty percent more funding.[81]

States consistently ignore the general consensus and take advantage of these nuanced differences in four distinct ways. First, some states select estimates that are not even within the range of expert

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[76] *See, e.g.*, WILLIAM D. DUNCOMBE & JOHN YINGER, CTR. POL'Y RES., HOW MUCH MORE DOES A DISADVANTAGED STUDENT COST? (2004).

[77] *See Objective Formula for Base Student Cost Is Essential*, TPCREF.ORG (2016), http://www.tpcref.org/objective-formula-for-base-student-cost-is-essential.

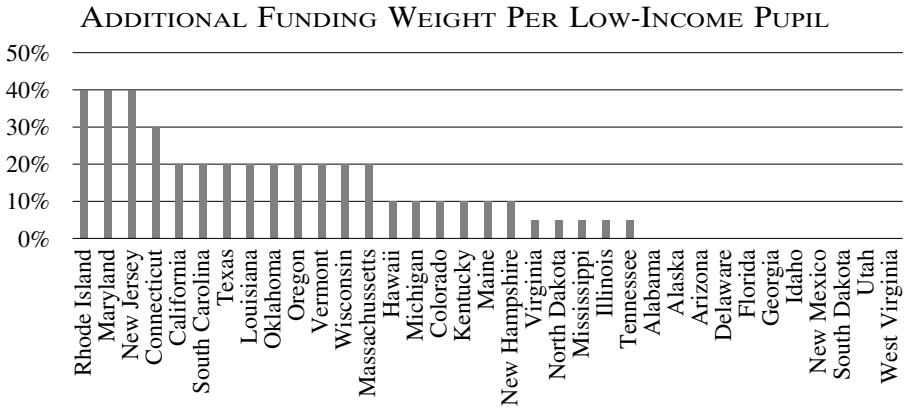
[78] *See generally* MIKE PETKO, WEIGHTED STUDENT FORMULA ("WSF"): WHAT IS IT AND HOW DOES IT IMPACT EDUCATIONAL PROGRAMS IN LARGE URBAN DISTRICTS? 6 (2005), http://www.nea.org/assets/docs/HE/formula.pdf (explaining the meaning and basics of weighted funding).

[79] *Objective Formula for Base Student Cost Is Essential*, *supra* note 77.

[80] *See* Education Finance Incentive Grant Program, 20 U.S.C. § 6337 (2006) (setting the standard for whether low-income schools are fairly funded as whether they receive a forty percent funding increase adjustment); THOMAS B. PARRISH ET AL., NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., INEQUALITIES IN PUBLIC SCHOOL DISTRICT REVENUES 62 (1998) (identifying forty percent as the appropriate adjustment for low-income students).

[81] Ross Wiener & Eli Pristoop, *How States Shortchange the Districts That Need the Most Help*, *in* EDUCATION TRUST, FUNDING GAPS 5, 5 (2006).

judgment.[82] As the following chart reveals,[83] six states provided no additional funding for low-income students at all in 2015, and the vast majority of states did not provide even half of what the federal government and experts estimate is necessary.[84] A mere three states applied a supplemental weight that would have met those federal and expert assessments.



Second, states exploit the variance among experts and select low estimates seemingly for no reason other than to achieve cost savings. New York offers a perfect example. After New York's highest court confirmed that the state was inequitably and inadequately funding its schools, the trial court appointed a blue ribbon panel to study the

[82] *See, e.g.*, IVY MORGAN & ARY AMERIKANER, EDUC. TRUST, FUNDING GAPS: AN ANALYSIS OF SCHOOL FUNDING EQUITY ACROSS THE U.S. AND WITHIN EACH STATE 6 (2018), https://1k9gl1yevnfp2lpq1dhrqe17-wpengine.netdna-ssl.com/wp-content/uploads/2014/09/FundingGapReport_2018_FINAL.pdf (2018) [hereinafter FUNDING GAPS 2018] (states with the largest funding gaps between the highest and lowest poverty school districts are Alabama, New York, Maryland, and Illinois); LEGIS. FIN. COMM., PROGRESS REPORT: MODERNIZING THE PUBLIC EDUCATION FUNDING FORMULA 3 (2017), https://www.nmlegis.gov/Entity/LFC/Documents/Program_Evaluation_Progress_Reports/Funding%20Formula%20Progress%20Report%20-%20September%202017.pdf (noting that New Mexico's fifteen percent multiplier for at-risk students was low); STUDENT POVERTY FUNDING, *supra* note 20.

[83] This chart is based on data from STUDENT POVERTY FUNDING, *supra* note 20. Some states excluded from the chart do increase a district's funding when its percentage of low-income students reaches some precise level but do not provide funding for individual low-income students. Due to their complexities, these concentrated poverty funds cannot be accurately included in this chart.

[84] The remaining states not included on this chart relied on funding formulas that either defied categorization or sought to address student poverty by basing supplements on a sliding scale that depends on the percentage of low-income students in a district. Research supports such an approach if implemented properly, but no more than a couple of states do it properly. *See* BRUCE D. BAKER ET AL., EDUC. L. CTR., IS SCHOOL FUNDING FAIR? A NATIONAL REPORT CARD (7th ed. 2018) (calculating the extent to which school funding systems appropriately factor in concentrated poverty).

reforms necessary to bring the state's funding system into compliance.[85] The panel recommended a fifty percent weight for low-income students.[86] After this recommendation and the Governor's support for it, the state later chose to apply a thirty-five percent weight instead.[87] New York, at least, considered another study in making this decision, but offered no rational explanation for why the lower estimate was the appropriate one, begging the question of its motivation. The state's lack of commitment to fairly funding the needs of disadvantaged students became clearer two years later. With the court no longer policing it, New York stopped funding the increases it had just promised to provide.[88]

The third way that states manipulate additional funding weights for disadvantaged students is to require local districts to cover an inordinate percentage of the additional funding themselves.[89] In other words, a state might indicate that low-income students require thirty percent more resources but leave the task of raising most of those additional funds to local districts. Districts with inordinate numbers of low-income students tend to lack the fiscal capacity to raise those funds and, thus, students do not actually receive them.[90] The real-world effect of manipulating funding for low-income students is enormous. By simply changing the multiplier, the state can drastically reduce its financial obligation to disadvantaged students. New York's decision to apply a 35% rather than 50% student weight, for instance, reduced its funding obligation by $1 billion.[91]

Finally, states compound the manipulation of poverty weighting by failing to account for the effects of concentrated poverty. Research uniformly indicates that as the concentration of poverty in a school increases the negative educational effects of poverty are compounded.[92] Thus, it costs more per pupil to counteract the disadvan-

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[85] Campaign for Fiscal Equity, Inc. v. State, 861 N.E.2d 50, 56 (N.Y. 2006).

[86] *Id*.

[87] *Id.*

[88] Rebell, *supra* note 24.

[89] In an attempt to obfuscate what it was doing, Kansas manipulated student poverty weights extensively. To arrive at the base education cost, it applied a poverty weighting filter to all the actual expenditures districts were incurring. *Gannon V*, 402 P.3d 513, 530 (Kan. 2017). But once it had that determined the base costs, it applied a different lower weighting when determining how much state funding it would send districts. *Id.* at 531. Moreover, the state changed those poverty weightings three years in a row. *Id.* at 530.

[90] *See generally* BAKER ET AL., *supra* note 84 (charting and grading states on the extent to which they progressively fund student need in higher poverty districts).

[91] Campaign for Fiscal Equity, Inc. v. State, 861 N.E.2d 50, 56 (N.Y. 2006).

[92] *See, e.g.*, JAMES S. COLEMAN ET AL., U.S. DEP'T OF HEALTH, EDUC., & WELFARE, EQUALITY OF EDUCATIONAL OPPORTUNITY 20–23 (1966); RICHARD D. KAHLENBERG, ALL TOGETHER NOW: CREATING MIDDLE-CLASS SCHOOLS THROUGH PUBLIC SCHOOL CHOICE 39–40 (2001); Molly S. McUsic, *The Future of* Brown v. Board of Education*:*

tage of poverty in a school where half the students are low-income than it does in a school where only a few students are low-income.[93] More than two-thirds of states exclude concentrated poverty from their formulas,[94] which is doubly problematic in states where supplements for individual low-income students are already too low.[95]

The few states that take concentrated poverty into account tend to grossly underestimate its costs. Wisconsin, for instance, provides a mere $66.17 in additional funding for each low-income student in schools where over half of the students are low-income.[96] Other states provide larger supplements but focus on the wrong school districts. A state might create funding increases when poverty concentration hits 10, 20, or 25%, but make no adjustment for increases in poverty beyond that.[97] Increasing funding for districts with these low levels of poverty is irrational because concentrated poverty, by definition, does not exist in these districts.[98] Social science demonstrates the harms of concentrated poverty occur when the percentage of low-income students reaches or exceeds approximately 50–75%.[99]

Economic Integration of the Public Schools, 117 HARV. L. REV. 1334, 1335 (2004) (arguing that the best way to reach the goal of *Brown* is desegregation by economic class); *see also* GARY ORFIELD & SUSAN E. EATON, DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF *BROWN V. BOARD OF EDUCATION* 53 (1996) (indicating that research has consistently found a "powerful relationship between concentrated poverty and virtually every measure of school-level academic results").

93 *See* Derek W. Black, *Middle-Income Peers as Educational Resources and the Constitutional Right to Equal Access*, 53 B.C. L. REV. 373, 411 (2012) (discussing the higher costs in higher poverty districts and arguing that, for this reason, segregation is economically inefficient).

94 STUDENT POVERTY FUNDING, *supra* note 20; MARGARET WESTON, CTR. POVERTY RESEARCH, ADJUSTING WEIGHTED PUPIL FUNDING FOR CONCENTRATED POVERTY.

95 New York, for instance, had relied on a study that used a low estimate of the additional resources that each low-income student needed and then excluded a concentrated poverty rating all together. *Campaign for Fiscal Equity, Inc.*, 861 N.E.2d at 65–66.

96 STUDENT POVERTY FUNDING, *supra* note 20. Virginia maxes out its additional funding for concentrated poverty at thirteen percent. *Id.*

97 *See, e.g.*, DeRolph v. State, 677 N.E.2d 733, 738–39 (Ohio 1997) (freezing the aid for concentrated poverty once it reaches twenty percent).

98 Colorado, for instance, begins its poverty concentration supplements when district poverty is simply above the statewide average (37.2% in 2016). STUDENT POVERTY FUNDING, *supra* note 20.

99 *See* KAHLENBERG, *supra* note 92, at 39–40 (explaining that researchers have defined high-poverty as the point where fifty percent or more of students are eligible for free- or reduced-price meals because students in these schools have far lower test scores than similar students in schools with lesser concentrations of low-income students); MICHAEL J. PUMA ET AL., U.S. DEP'T OF EDUC., PROSPECTS: STUDENT OUTCOMES FINAL REPORT 12 (1997), https://files.eric.ed.gov/fulltext/ED413411.pdf ("School poverty depresses the scores of all students in schools where at least half of the students are eligible for subsidized lunch, and seriously depresses the scores when over 75 percent of students live in low-income households."); MICHAEL J. PUMA ET AL., U.S. DEP'T OF EDUC., PROSPECTS:

When states fail to properly adjust their formulas for concentrated poverty, they are advantaging predominantly middle-income districts. With no weighting for concentrated poverty, they limit the extent to which funds will be redistributed away from middle-income districts. And when they create additional funding for low levels of poverty, they ironically send funding to districts that do not actually need it.[100] The byproduct is to deprive high poverty districts of funds that they otherwise deserve.[101]

When states combine minor base cost manipulations with these student weighting manipulations, they generate enormous funding variations. Supplemental funding for at-risk students plays such a significant role that states do not need to manipulate the base at all to drive down education costs. And student poverty manipulations are arguably worse. Whereas manipulating the base affects the entire state, manipulations of student demographic weights targets those districts serving the neediest students for the biggest reductions.

C. Bifurcating Funding Between the State and Local Districts

In addition to base manipulation and the manipulation of student weights, states also gerrymander school funding through the bifurcation of funding responsibility between the state and local districts. Anytime the state covers something short of the entire overall cost of education, the possibility of gerrymandering arises. Whether the state's cost estimate of an adequate education is on target or low, variations among districts will be substantial if local districts are to cover a large portion of the cost themselves.[102] Many districts will be unable to raise the funds necessary to cover their portion, while others—typically suburbs—easily raise their share and more.[103]

The following chart[104] demonstrates that only two states finance the primary cost of public education themselves. The rest place substantial school funding burdens on local communities. In fact, most

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THE CONGRESSIONALLY MANDATED STUDY OF EDUCATIONAL GROWTH AND OPPORTUNITY: THE INTERIM REPORT 77 tbl.1.51 (1993), https://files.eric.ed.gov/fulltext/ED361466.pdf (demonstrating a precipitous decline in student performance once the percentage of low-income students reaches fifty percent).

100 *See, e.g.*, Derek W. Black, *The Congressional Failure to Enforce Equal Protection Through the Elementary and Secondary Education Act*, 90 B.U. L. REV. 313 (2010).

101 *Id.*

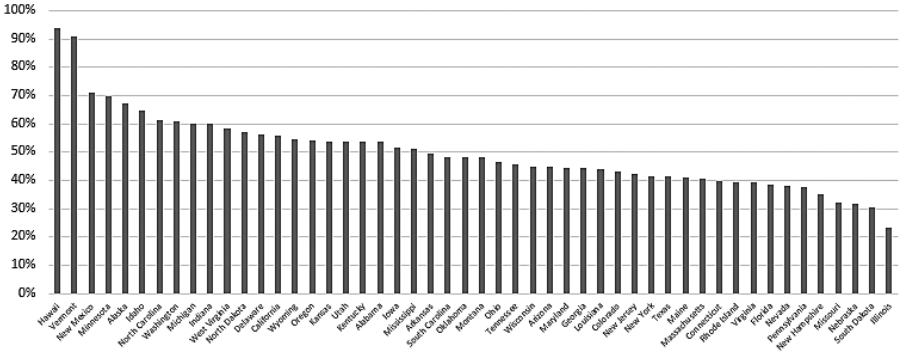
102 Black, *supra* note 32, at 1363; Brown, *supra* note 19.

103 Black, *supra* note 32, at 1354–55.

104 For underlying data, see NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., REVENUES FOR PUBLIC ELEMENTARY AND SECONDARY SCHOOLS, BY SOURCE OF FUNDS AND STATE OR JURISDICTION, 2013–2014.

states require local communities to finance more than half of the cost of public education.

STATE PUBLIC SCHOOL EXPENDITURES AS A PERCENTAGE OF TOTAL



In *San Antonio Independent School District v. Rodriguez* and other cases, courts have characterized the decision to place substantial funding burdens on local districts as a value choice to support local autonomy.[105] The past four decades have shown this characterization to be a farce. The only districts afforded autonomy under a bifurcated system of education funding are the wealthy ones.[106] They can choose to fully fund their education systems or not. Their choice is typically to fund it. Other districts lack the fiscal capacity to make that choice. Thus, their choice, if it can be called that, is the extent to which they will underfund education.

Bifurcation, however, is not just a burden for needy districts. It is an affirmative benefit for wealthier suburban districts because it spares them from any meaningful participation in a statewide funding system. First, bifurcation means that the state will only redistribute a portion of the available combined state and local education resources.[107] In other words, the state will not spread the full cost of public education for all districts across all districts. It will only spread a portion of that cost. The state could, for instance, set statewide property and income tax rates at the level necessary to generate the full cost of public education for the state. But when the state bifurcates

105 411 U.S. 1, 53 (1973); Lobato v. State, 218 P.3d 358, 373–74 (Colo. 2009); Comm. for Educ. Rights v. Edgar, 672 N.E.2d 1178, 1186–89 (Ill. 1996).

106 *See id.* at 70 (Marshall, J., dissenting) (disapproving of state educational financing schemes that are contingent on taxable local wealth).

107 *See generally* JOAN YOUNGMAN, SCHOOL FINANCE AND PROPERTY TAXES (2016), https://www.lincolninst.edu/sites/default/files/pubfiles/School_Finance_and_Property_Taxes_w16LL-v2.pdf (excerpted from A GOOD TAX: LEGAL AND POLICY ISSUES FOR THE PROPERTY TAX IN THE UNITED STATES (2016)).

funding, it sets statewide tax rates at a level that covers something less than the full cost.[108] The rest is left to the districts.[109] Second, bifurcation means that wealthy districts can spend disproportionate amounts on public education.[110] The state makes limited demands that they contribute to the statewide system and leaves them free to spend as much they want on their own local system.[111] The lower the state contribution to districts in general, the less the state demands that wealthy districts contribute to the state system.[112] And the less the state demands from wealthy districts, the more those districts can spend on their local schools.[113]

The following chart[114] demonstrates that states that provide the most aid to school districts tend to have smaller funding gaps between high- and low-need school districts. And states that provide less aid to school districts tend to have the largest funding gaps. In other words, the percentage of funding that the state provides for education roughly corresponds with the funding gaps between districts. These funding gaps, of course, dictate the extent to which districts serving predominantly low-income students can meet their students' academic needs.

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[108] *See generally id.* at 17–20 (discussing the relationship between state and local taxation for education).

[109] *Id.*; DeRolph v. State, 677 N.E.2d 733, 738 (Ohio 1997) ("The effect of an increase in this percentage would be to decrease the amount of basic state aid, resulting in an even greater burden for local schools to fund education through local property and/or income taxes.").

[110] *See, e.g.*, *Spending per Student*, CONN. SCH. FIN. PROJECT, http://ctschoolfinance.org/spending/per-student (last visited June 6, 2019) (showing a spending variation of up to $23,327 per student between districts in Connecticut).

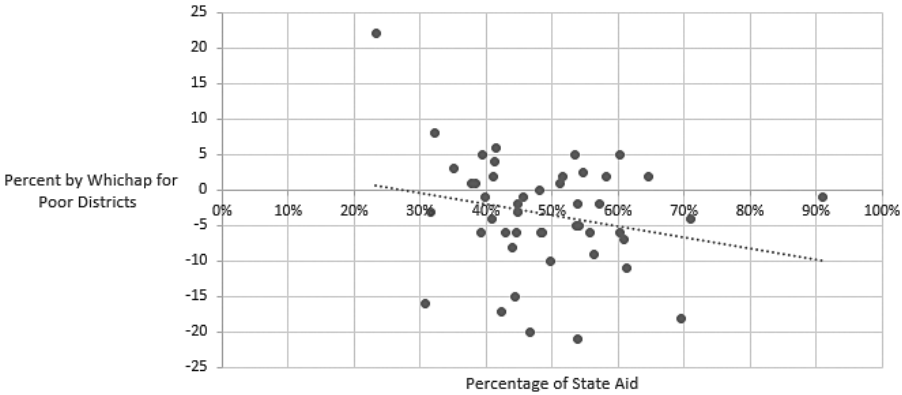
[111] *See, e.g.*, *id.*; Montoy v. State, 112 P.3d 923, 934 (Kan. 2005).

[112] For instance, prior to adopting a statewide income tax in 2008, New Jersey funded very little of the cost of education. After adopting a statewide income tax, the state became able to redistribute resources and now, low-income districts receive more state funding because wealthier districts are better able to cover the costs of adequately funding their schools. *See* Abbott v. Burke, 971 A.2d 989, 1031 (N.J. 2009).

[113] *See, e.g.*, ADVANCE ILL., SCHOOL FUNDING IN ILLINOIS (2016), http://www.advanceillinois.org/wp-content/uploads/2016/03/An-Overview.pdf (reporting that prior to 2017, local property taxes constituted sixty-two percent of Illinois districts' school funding, compared to thirty-eight percent funding provided by the state, leaving high poverty districts with much less funding for schools).

[114] The chart is based on data from NAT'L CTR. FOR EDUC. STATISTICS, THE CONDITION OF EDUCATION 2019, at 138 (reporting sources of revenue for 2015–2016), https://nces.ed.gov/pubs2019/2019144.pdf and FUNDING GAPS 2018, *supra* note 82 (relying on 2015 school funding data, which came from the National Center for Education Statistics).

SCHOOL FUNDING GAPS IN RELATION TO STATE AID



In a system in which the state was the sole source of education funding, the foregoing problems would not occur. The decision to bifurcate funding is one that frees wealthy districts from having their education spending anchored to the state system in any meaningful way. In this respect, the state's decision regarding the percentage of education costs it will cover is ultimately a decision about how much it will spare the suburbs or meet the needs of districts serving high percentages of at-risk students.[115] If the state does anything other than pick up the vast majority of those costs, the state is deciding to allow advantaged districts to operate as they see fit and leaving others short of meeting student needs. The less the state picks up, the more it exacerbates the problem.[116]

Although the effects are smaller, states also advantage wealthy districts when they send districts basic operating funds through flat or matching grants. The most problematic examples occur with special education and English language learner (ELL) programs. Rather than calculating districts' actual needs and geographic costs, some states give every eligible district the exact same amount to educate their ELL students.[117] The problem is that the cost of educating ELL students is far higher than the state's per-pupil flat grant.[118] Wealthy districts can make up the difference, but lower-income districts often cannot.[119] Even worse is the practice of awarding lump sum grants.

115 *See, e.g.*, FUNDING GAPS 2018, *supra* note 82, at 8.

116 *See, e.g.*, BAKER ET AL., *supra* note 84, at 2.

117 *See, e.g.*, Bruce D. Baker & Paul L. Markham, *State School Funding Policies and Limited English Proficient Students*, 26 BILINGUAL RES. J. 659, 665 (2002). Not every district will necessarily receive ELL funding because the state may require districts to enroll a minimum number of ELL students to receive a grant, but all eligible districts will receive the same grant. *Id.*

118 *Id.* at 679.

119 DeRolph v. State, 677 N.E.2d 733, 758–59 (Ohio 1997).

Districts have to enroll a minimum number of students to be eligible for a grant, but all eligible districts receive the same flat grant regardless of the number of students in the program. Ohio operated a special education program with this general approach, failing to cover special education costs on a per pupil basis.[120] The practical effect of such a program is to advantage wealthy districts and leave students in other districts without the resources they need.

D. Working Backward Toward a Result

While the various foregoing gerrymandering tools are prospective in that they manipulate portions of their funding formulas to decrease costs, in a few instances, states brazenly work backward to achieve a predetermined funding amount. These states begin the budgeting process by determining how much they are willing to spend on education—an arbitrary number—and with that dollar amount in hand, the state develops a funding formula that will produce that precise amount. The state does not base the funding formula on any real or objective estimates; it simply fills in the blanks in the formula with numbers that, when multiplied, will equal the preordained amount of money the state is willing to spend. In other words, the state's education expenditures are divorced from any realistic assessment of student need or education costs. The state has simply decided to "work backward" to a result—the epitome of gerrymandering.

At least two different states—Ohio and Kansas—have been caught by their state supreme courts doing exactly that. After explaining the multiple flaws in Ohio's funding formula, the Ohio Supreme Court adopted an expert witness's holistic assessment of Ohio's funding formula:

> The 'formula amount' has no real relation to what it actually costs to educate a pupil. . . . [T]he foundation dollar amount 'is a budgetary residual, which is determined as a result of working backwards through the state aid formula after the legislature determines the total dollars to be allocated to primary and secondary education in each biennial budget. Thus, the foundation level reflects political and budgetary considerations at least as much as it reflects a judgment as to how much money *should* be spent on K–12 education.'[121]

The Kansas Supreme Court similarly concluded that the state was working backward. On its face, the state's contribution to education funding was based on estimates of local districts' revenues and how

[120] *See id*. at 738–39.
[121] *Id.* at 738.

much they would still need from the state.[122] Kansas, however, appeared to inflate its estimates of local district revenues to generate figures that would leave it only owing local districts the amount the state was willing to give them.[123] In other words, if the actual cost of education in Kansas is $9000 per pupil next year, but the state only wants to pay $6000 of it, the state estimates that a local district will generate $3000 per pupil even though it knows this local estimate is inaccurate. The state is simply working backward.

In addition to working backward to hit precise dollar amounts, states have also worked backward to benefit particular districts. Pennsylvania is the most obvious example. In 2013, the legislature, claiming to address underfunding in the state, developed a one-time supplemental funding package and targeted it to particular districts.[124] The state constitution, however, prohibits special, as opposed to statewide, appropriations, so the legislature developed one of the most nuanced funding systems one could imagine.[125] Rather than one statewide formula, Pennsylvania developed twelve separate formulas and included factors so complicated and precise that only a couple of districts would qualify under each formula.[126] With names like "rural school supplement," the formula's explicit goal was to assist rural schools or small schools with special needs, but six of the twelve formulas funded a single district each.[127] Altogether, these twelve formulas sent funds to just twenty-one of the state's five hundred school districts.[128] The most telling evidence that the state had worked backward from political goals is that "33 of the 37 lawmakers who represent the 21 districts that received extra funds are legislative leaders, committee chairs, vice chairs or secretaries."[129] This evidence made it clear that the state had no interest in pursuing its stated goals. Rather, the real goal was to reward the political leadership's home districts and no one else. It devised a formula that did exactly that.

This Pennsylvania example painfully captures the gerrymandering that occurs on a broader scale in states across the country.

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122 *Gannon V*, 402 P.3d 513 (Kan. 2017).

123 *Id*. at 532.

124 *See* Jeff Hawkes, *Legislators Give $30.3M to 21 School Districts Behind Closed Doors*, LANCASTER ONLINE (July 21, 2013), https://lancasteronline.com/news/legislators-give-m-to-school-districts-behind-closed-doors/article_46b7acd1-05ae-5411-a1cc-3f6427782c8b.html.

125 PA. CONST. art. III, § 32 ("The General Assembly shall pass no local or special law in any case which has been or can be provided for by general law.").

126 PUB. CITIZENS FOR CHILDREN & YOUTH, THE BOTTOM LINE IS CHILDREN: PUBLIC EDUCATION IN MONTGOMERY COUNTY 6 (2013); Hawkes, *supra* note 124.

127 Hawkes, *supra* note 124.

128 *Id*.

129 *Id*.

States have multiple levers through which to manipulate school funding and often exercise them with impunity. Sometimes the result is to decrease school funding generally. Sometimes the result is to disadvantage districts serving high need students while setting wealthier districts free from the limitations of a statewide system. Sometimes the state seemingly could care less and builds funding formulas that are entirely arbitrary, save for the state's desire to achieve some ulterior objective—a precise dollar expenditure or benefits for precise districts. All of these practices are divorced from what states are constitutionally charged with doing—coming up with rational formulas that provide adequate and equal educational opportunities.

E. Inaction and Resistance

States have one final tool in their arsenal, although it does not technically fit the category of gerrymandering: willful non-action and resistance. The most basic form of non-action occurs when states refuse to adopt and fully fund an education financing formula. These states do not go through the pretense of accounting for districts' varying demographic and geographic needs in a funding formula. Instead, they refuse to do anything. For instance, between 1991 and 2008, Pennsylvania did not use any type of formula to fund its schools.[130] The state's education budget was based on nothing more than the raw dollars it had spent in the previous year.[131] Changes in enrollment, district wealth, and student demographics did not have any effect on how much money the state actually gave a district.[132] The state knew the system was arbitrary and only served to cap education costs—a point laid bare when the state finally adopted a funding formula in 2008 only to abandon it three years later in order to save money.[133]

Other states adopt funding formulas but refuse to appropriate money to fund them. Mississippi, for instance, has a statutorily enacted funding formula but refuses to allocate the funds that the formula indicates schools need.[134] Mississippi has only fully funded its

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[130] *See* PEW CHARITABLE TRS., A SCHOOL FUNDING FORMULA FOR PHILADELPHIA: LESSONS FROM URBAN DISTRICTS ACROSS THE UNITED STATES 2 (2015), http://www.pewtrusts.org/~/media/assets/2015/01/philadelphiaschoolfundingreportjanuary2015.pdf.

[131] *Id.* (describing Pennsylvania's "hold-harmless" funding system which was designed to ensure only that funding was not cut from one year to the next).

[132] *Id.*

[133] EDUC. L. CTR., *supra* note 41, at 4.

[134] MISS. CODE ANN. § 37-151-7 (2019) (providing a formula for the annual allocation of funding for each school district in Mississippi).

formula four times in twenty years.[135] In some years, the governor even imposes mid-year cuts to the already underfunded education budget.[136] Virginia's practice is similar but constitutionally more egregious. The state constitution directs the state board of education to set the "[s]tandards of quality"[137] and the General Assembly to appropriate funds to "meet[] the prescribed standards of quality."[138] In recent years, the Virginia General Assembly has completely flouted this constitutional structure. In 2016, for instance, the state appropriated $339 million less than the resources projected as necessary to deliver the state standards of quality.[139]

The more common practice in recent years, however, is for states to actively resist changing their funding formula in response to a judicial finding that the current formula is constitutionally deficient. Or when the state finally implements change, it acts simply to temporarily escape the current crisis knowing that it can resort to its prior practices as soon as the judiciary ends the case. The worst examples of resistance in recent history are in Kansas and Washington.

The Kansas Supreme Court issued seven different opinions between 2003 and 2018, finding that the state's school funding formula was unconstitutional.[140] At one point, rather than address the problem, state legislators threatened the judiciary itself, taking steps

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[135] Bracey Harris, *School Funding Rewrite Clears Appropriations, Advances to Full House*, CLARION LEDGER (Jan. 16, 2018), https://www.clarionledger.com/story/news/politics/2018/01/16/school-funding-rewrite-clears-appropriations-advances-full-house/1035523001; *see also Facts About Education in Mississippi*, PARENTS CAMPAIGN RESEARCH & EDUC. FUND (May 29, 2015), http://www.tpcref.org/facts-about-education-in-mississippi (reporting that the last time Mississippi schools were fully funded according to the formula was in 2008, and that in the years since, schools have been underfunded by $1.7 billion).

[136] *See* PARENTS CAMPAIGN RESEARCH & EDUC. FUND, *supra* note 135 (reporting mid-year cuts in 2009 and 2010); *see also* Keith M. Phaneuf, *House Tells Governor to Save Money Without Cutting School Aid*, CONN. MIRROR (May 2, 2018), https://ctmirror.org/2018/05/02/house-tells-governor-save-money-without-cutting-school-aid (discussing the Governor's mid-year cut to the Education Cost Sharing program and a legislative response to prevent such action in the future).

[137] VA. CONST. art. 8, § 2.

[138] *Id.* While the state has discretion in how it raises those funds and, if necessary, the state can revise the standards of quality, it has a constitutional duty to otherwise fund the cost of the education standards adopted by the Board. Scott v. Commonwealth, 29 Va. Cir. 324, at *4 (1992).

[139] CYNTHIA A. CAVE, VA. BD. OF EDUC., VIRGINIA BOARD OF EDUCATION AGENDA ITEM F (2016), http://www.doe.virginia.gov/boe/meetings/2016/10-oct/agenda-items/item-f.pdf; VA. 2016 ANNUAL REPORT, *supra* note 66; Chris Duncombe, *State Budget Misses on Long-Term Solutions for K-12*, COMMONWEALTH INST. FOR FISCAL ANALYSIS: THE HALF SHEET (Mar. 2, 2017), http://thehalfsheet.org/post/157910531208/state-budget-misses-on-long-term-solutions-for.

[140] *See, e.g.*, *Gannon VI*, 420 P.3d 477 (Kan. 2018); *Gannon V*, 402 P.3d 513 (Kan. 2017); *Gannon IV*, 390 P.3d 461 (Kan. 2017); Gannon v. State (*Gannon III*), 372 P.3d 1181 (2016);

to change how judges are appointed,[141] to reduce the judiciary's funding and, if necessary, pass a constitutional amendment to deprive the court of jurisdiction in school funding cases.[142] Washington's legislature did not threaten the judiciary but similarly refused to respond to court orders for years, eventually forcing the court to impose a $100,000-a-day fine until the state acted.[143] Even then, the state did not spring into action.[144]

From afar, Kansas and Washington appear as nothing more than textbook examples of the general difficulty involved in securing legislative compliance. But up close, they represent another way in which states arbitrarily and illegitimately underfund education. Once they lose before the state supreme court, states are past the point of being able to easily gerrymander school funding in new ways—at least without getting caught—so they cling to the status quo instead. Consider the circumstances: Courts are demanding that the state eliminate its inadequate or unequal funding system and the state actively resists.[145] Legislative foot-dragging, recalcitrance, and hostility toward the judiciary are not ends in themselves but the means by which to maintain the status quo for as long as possible. And the state is doing so by exercising raw power. The state's refusal to comply with judicial orders is borne not out of some legitimate position but its recognition

Gannon v. State (*Gannon II*), 368 P.3d 1024 (Kan. 2016); Gannon v. State (*Gannon I*), 319 P.3d 1196 (Kan. 2014).

141 Editorial Board, *The Partisan Winds Aimed at Kansas' Court*, N.Y. TIMES (Sept. 9, 2016), https://www.nytimes.com/2016/09/09/opinion/the-partisan-winds-aimed-at-kansas-court.html; Rhonda Holman, Editorial, *Lawmakers Showing Contempt for Courts*, WICHITA EAGLE (Mar. 25, 2015), https://www.kansas.com/opinion/editorials/article16415747.html.

142 Hunter Woodall, *Constitutional Amendment on Education Funding Heads to the House Floor*, KAN. CITY STAR (Apr. 4, 2018, 8:09 PM), https://www.kansascity.com/news/politics-government/article207953054.html.

143 Order, McCleary v. State, 296 P.3d 227 (Wash. 2012) (No. 84362-7), http://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/843627_081315McClearyorder.pdf.

144 Melissa Santos & Jordan Schrader, *Court Fines State Government $100,000 per Day for Failure to Fund Education*, NEWS TRIBUNE (Aug. 13, 2015, 9:32 AM), https://www.thenewstribune.com/news/politics-government/article31008225.html (quoting a state legislator remarking that the fines were not so large as to require an immediate legislative response); Joseph O'Sullivan, *Washington Supreme Court Ends Long-Running* McCleary *Education Case Against the State*, SEATTLE TIMES (June 9, 2018, 10:51 AM), https://www.seattletimes.com/seattle-news/washington-supreme-court-ends-100000-per-day-sanctions-against-state-in-mccleary-education-case (noting that the daily fines for failure to comply had been in place for over two years).

145 *See, e.g.*, Joy Chia & Sarah A. Seo, *Battle of the Branches: The Separation of Powers Doctrine in State Education Funding Suits*, 41 COLUM. J.L. & SOC. PROBS. 125, 145 (2007).

that the courts' ability to force the state's hand or penalize it is extremely limited.[146]

The most obvious examples of passing a remedy only to revert to prior practice once the judiciary accepted the remedy are in New York and New Jersey. New York went through a long process of adopting a new funding formula in the early 2000s.[147] Its final formula was flawed in the various respects discussed above, but it included just enough new funding for the court to agree that the state was taking reasonable steps toward compliance.[148] At that point, the court ended the case.[149] In retrospect, all the state had done was promise to adequately fund its schools; it had not actually done so yet.[150] Within a few years of the promise, the state cut $1.4 billion from the education budget.[151] New Jersey, similarly, had been forced to adopt a new school funding formula in 2008 and sought the Court's blessing.[152] But within two years, the state began grossly underfunding the formula, cutting $1.6 billion from the amount the statutory formula required.[153] In short, identifying and enacting a school funding formula free of gerrymandering is only half the battle. States still reserve and exercise the power to underfund the formula or revert back to prior practices in any given year.

II
Why States Gerrymander School Funding

States have previously claimed that their funding formulas are aimed at fostering local control, adapting funding to local circumstances, and meeting student needs.[154] Part I makes clear that these formulas are not actually achieving those goals. This Article argues

146 *See generally* Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 Harv. L. Rev. 1015, 1025 (2004) (explaining that the litigation, rather than securing specific remedies, garners plaintiffs a seat at the bargaining table that the normal political processes otherwise deny them).

147 *See* Natalie Gomez-Velez, *Urban Public Education Reform: Governments, Accountability, Outsourcing*, 45 Urb. Law. 51, 78 n.133 (2013).

148 Campaign for Fiscal Equity, Inc. v. State, 861 N.E.2d 50, 61 (N.Y. 2006).

149 *Id.*

150 Aristy-Farer v. State, 81 N.E.3d 360, 368 (N.Y. 2017) (describing the history of the *Campaign for Fiscal Equity* case); *see also* Neil Demause & Elizabeth Green, *The Campaign for Fiscal Equity Lawsuit Was the Best Hope for City Schools. It Failed.*, Village Voice (Jan. 21, 2009), https://www.villagevoice.com/2009/01/21/the-campaign-for-fiscal-equity-lawsuit-was-the-best-hope-for-city-schools-it-failed ("This is not the post-victory landscape the people who waged the lawsuit imagined.").

151 *See* Maisto v. State, 64 N.Y.S.3d 139, 144 (App. Div. 2017) (noting that the 2010–2011 New York State budget reduced formula-based school aid by $1.4 billion).

152 Abbott *ex rel.* Abbott v. Burke, 971 A.2d 989, 992 (N.J. 2009).

153 Abbott *ex rel.* Abbott v. Burke, 20 A.3d 1018, 1025–26 (N.J. 2011).

154 *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

that the reason these formulas do not achieve the stated goals is because states actually harbor a different set of goals. As to bifurcated funding schemes, for instance, state motives are, at worst, to create a system that preferences middle-income districts and, at best, to avoid spending money on public education in general. Similarly, states' motives in intentionally keeping the multiplier for low-income students low or non-existent is not to provide an appropriate level of funding or to ensure efficiency in educational expenditures. It is to arbitrarily reduce the amount the state spends on these students. In some instances, direct evidence reveals these motives; in other instances, states' actions bely their motives and ulterior goals.

Motivations for school funding gerrymandering vary from state to state and across time, but the following sections identify at least four distinct motives: refusing to serve disadvantaged students, saving the suburbs, rejecting the duty to fund education, and contesting the judiciary's authority to interpret and apply the constitution. Properly understood, the first two of these motives represent efforts to target and disadvantage certain populations. The last two represent a rejection of the state's constitutional duty in education—a motive that cannot be legitimate given the goals the state is tasked with pursuing and the responsibilities they entail.

A. Not Wasting Money on Disadvantaged Students

One of the most problematic motivations for education gerrymandering appears to be disregard for and bias against disadvantaged students. States know that some students cost more to educate—students with disabilities, low-income students, ELLs, homeless students, and others.[155] Most states even acknowledge the reality of these additional costs in some way in their funding formulas.[156] Yet, all but a few states refuse to carry the full actual cost of educating these students.[157]

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[155] NATASHA USHOMIRSKY & DAVID WILLIAMS, EDUC. TRUST, FUNDING GAPS 2015, at 5 (2015), https://edtrust.org/wp-content/uploads/2014/09/FundingGaps2015_TheEducationTrust1.pdf (presenting a conservative estimate that it costs a district forty percent more to educate a student in poverty than a student not in poverty); *Background of Special Education and the Individuals with Disabilities Education Act (IDEA)*, NAT'L EDUC. ASS'N, http://www.nea.org/home/19029.htm (last visited June 7, 2019) (finding that, on average, schools spend $7552 per student, while the average cost per special education student is an additional $9369 per student, or $16,921).

[156] *See generally* MORGAN & AMERIKANER, *supra* note 82 (examining funding for low income students on a state-by-state basis); Maria Millard & Stephanie Aragon, *State Funding for Students with Disabilities*, EDUC. COMM'N OF THE STATES (June 2015), http://ecs.force.com/mbdata/mbfundallf?rep=SBFAF (comparing the various ways that states account for students with disabilities in their funding formulas).

[157] *See, e.g.*, Helena Elementary Sch. Dist. No. 1 v. State, 769 P.2d 684, 690 (Mont. 1989); Campaign for Fiscal Equity, Inc. v. State, 861 N.E.2d 50, 65 (N.Y. 2006).

Through their words and their actions, these states make it clear that they are only willing to fund disadvantaged students' education up to a certain level.[158]

Texas, for instance, explicitly capped the number of special education students it would serve and incentivized districts to do the same.[159] In doing so, it created a $3.2 billion funding gap for special education students within just a few years.[160] Other states have recently targeted low-income students and districts for funding cuts. New Jersey cut $1.6 billion from its education budget in 2011.[161] "The districts with high concentrations of at-risk children . . . lost $687 million or $1530 per pupil," whereas wealthy districts only lost $944 per pupil.[162] Michael Rebell recounts similar targeted cuts in other states:

> [I]n Georgia, $112 million, amounting to over twenty percent, was cut from the equalization component of the state's education aid formula established to help close the gap between wealthier and poorer districts. . . . Illinois eliminated state funding for advanced placement ("AP") courses in school districts with large concentrations of low-income students [and] Texas terminated pre-school services for over 100,000 mostly at-risk students.[163]

Kansas was similarly draconian, enacting tax cuts for wealthy individuals and then in following legislative sessions "stopping all equalization payments" for poor school districts and prohibiting new outlays for those districts in future years.[164]

To be clear, it is not that states lack the capacity to fully fund disadvantaged students' education.[165] States simply refuse to. Vermont and New Hampshire are perfect examples. Both states have relatively few low-income students and, given the states' overall wealth, could easily fund education in high-need areas.[166] Instead,

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158 *Helena Elementary Sch. Dist. No. 1*, 769 P.2d at 690; *Campaign for Fiscal Equity, Inc.*, 861 N.E.2d at 65.

159 IDEA Monitoring, *supra* note 71.

160 Matos, *supra* note 73.

161 Abbott *ex rel.* Abbott v. Burke, 20 A.3d 1018, 1034 (N.J. 2011).

162 *Id*.

163 Rebell, *supra* note 24, at 1858.

164 *Gannon I*, 319 P.3d 1196, 1241–43 (2014); *see also* Michael Leachman, *Timeline: 5 Years of Kansas' Tax-Cut Disaster*, CTR. ON BUDGET & POL'Y PRIORITIES (May 24, 2017, 9:30 AM), https://www.cbpp.org/blog/timeline-5-years-of-kansas-tax-cut-disaster (explaining the dire impacts that Kansas's 2012 income tax cuts have had on the state).

165 *See* BAKER ET AL., *supra* note 84, at 15–17 (giving seventeen states an F grade for "fiscal effort" for funding public schools based on one metric and thirteen based on another metric).

166 *See* BRUCE D. BAKER ET AL., IS SCHOOL FUNDING FAIR?: A NATIONAL REPORT CARD 26–27 tbl.4 (3d ed. 2014) (reporting that in 2011 New Hampshire's per capita real gross domestic product was higher than that of twenty-nine other states); S. EDUC. FOUND., A NEW MAJORITY: LOW INCOME STUDENTS NOW A MAJORITY IN THE NATION'S

these states operate funding systems that work to the distinct disadvantage of low-income students. In 2007, per-pupil funding in predominantly low-income New Hampshire school districts was twenty-three percent less than in wealthier districts.[167] Vermont similarly had a twenty percent funding gap for low-income districts over several years.[168]

Recent events in North Carolina add a racial dimension to these poverty challenges. North Carolina is experiencing two demographic trends. First, low-income students, for the first time in recent history, became the majority in its traditional public schools in 2013.[169] Second, its charter schools are becoming whiter while its traditional public schools are increasingly enrolling higher percentages of students of color.[170] These demographic trends coincided with drastic changes in school funding. Between 2007 and 2012, the legislature cut education funding by roughly $700 per pupil, almost a ten percent cut.[171] As a function of its gross state product, in 2015 North Carolina exerted the third least school funding effort in the nation.[172] From 2013 to 2015, North Carolina doubled its charter school funding and instituted enormous tax cuts for the wealthiest individuals in the state.[173] These dramatic funding changes are difficult to interpret as anything other than an intentional disinvestment in the education of low-income and minority students.[174]

A statistical analysis of Pennsylvania's school funding system revealed similarly troubling trends. The study found "systematic racial

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PUBLIC SCHOOLS app. 1 at 5 (2015) (reporting that, in 2013, Vermont and New Hampshire had thirty-six and twenty-seven percent low-income students in their public schools, respectively, ranking forty-eighth and fiftieth among all states for this metric).

167 BAKER ET AL., *supra* note 166, at 15 tbl.3.

168 BRUCE D. BAKER ET AL., IS SCHOOL FUNDING FAIR? A NATIONAL REPORT CARD 39–40 tbl.C-2 (4th ed. 2015) (reporting percentages of 79% in 2010, 78% in 2011, and 82% in 2012).

169 S. EDUC. FOUND., *supra* note 166, at 2, 3 (reporting that in 2013 low-income students made up fifty-three percent of North Carolina's public-school population).

170 *See* Helen F. Ladd et al., *The Growing Segmentation of the Charter School Sector in North Carolina*, 12 EDUC. FIN. & POL'Y 536, 540–41 (2017) (noting that, between 1998 and 2012, the percentage of students who were white in North Carolina charter schools increased while the percentage decreased in the traditional public schools).

171 BAKER ET AL., *supra* note 168, at 8 & fig.3.

172 BAKER ET AL., *supra* note 84, at 16.

173 Black, *supra* note 35, at 432–33, 435.

174 This disinvestment also happened to coincide with the state's targeted attempts to undermine the voting strength of minority voters. *See* Covington v. North Carolina, 316 F.R.D. 117, 124 (M.D.N.C. 2016) (finding that the state defendants had failed to justify their predominant consideration of race in drawing twenty-eight state legislative and federal congressional districts and ordering that new maps be drawn), *aff'd mem.*, 137 S. Ct. 2211 (2017).

discrimination in the distribution of state funds."[175] The state's whitest districts receive nearly two thousand dollars more per pupil than the state's fairness formula indicates they need while predominantly minority districts receive nearly two thousand dollars less per pupil than they need—and socio-economic differences in the districts do not explain these gaps.[176] To address this and other problems, a bipartisan commission recently proposed a new funding formula, which is "widely viewed as fair and comprehensive."[177] The irony is that while the state adopted the formula, it only applied it to future increases in funding, thereby locking in the systemic bias that exists in the system.[178] Even substantial increases in statewide school funding will not be enough to reverse the bias.[179]

Were these actions not enough to explain why state leaders gerrymander school funding, some state leaders come out and make their feelings explicitly known. The new majority leader in Tennessee's House of Representatives recently said, "no matter how well we fund the schools there are going to be some school systems that choose to waste the funds they could be using to educate children and provide for good teachers and good classrooms."[180] During the campaign, Florida's governor similarly called for reductions in "bureaucratic

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[175] DAVID MOSENKIS, POWER, SYSTEMIC RACIAL BIAS IN LATEST PENNSYLVANIA SCHOOL FUNDING 9 (2016), https://powerinterfaith.org/wp-content/uploads/2016/08/PA-Racial-School-Funding-Bias-July-2016-1-1.pdf.

[176] *See id.* at 7, 9.

[177] *Id.* at 1.

[178] *Id.* at 9.

[179] *See id.* ("Even if the overall [Basic Education Funding] budget increases in future years, current law prescribes that the whitest districts continue to receive thousands of dollars per student more than their fair share, while the least white districts receive thousands per student less than their fair share."). One might add to these examples above the line that the court-ordered equalization and increase in school funding for Kansas City Schools (Missouri) in the context of school desegregation has long been chided as a waste of money or failed project. *See, e.g.*, Paul Ciotti, *America's Most Costly Educational Failure*, CATO INST., https://www.cato.org/publications/commentary/americas-most-costly-educational-failure (last visited June 21, 2019). The state of Missouri heavily contested the federal courts' authority to impose a school funding remedy, arguing "that federal courts cannot set aside state-imposed limitations on local taxing authority because to do so is to do more than to require the local government 'to exercise the power that is theirs.'" Missouri v. Jenkins, 495 U.S. 33, 56 (1990); *see also* Dan Eggen & David A. Vise, *Ashcroft's Accuracy on Desegregation Challenged*, WASH. POST (Jan. 18, 2001), https://www.washingtonpost.com/archive/politics/2001/01/18/ashcrofts-accuracy-on-desegregation-challenged/b8b57c88-ef7d-4bff-bdef-e91caaa453b8 (discussing John Aschroft and the state of Missouri's "denial and obfuscation and obstruction at every stage" of financing the cost of desegregating St. Louis's schools (quoting desegregation expert Gary A. Orfield)).

[180] Sam Stockard, *Republican Lawmaker Calls Schools Funding Lawsuit 'Waste' of Money*, DAILY MEMPHIAN (Jan. 7, 2019, 2:46 PM), https://www.dailymemphian.com/article/2252/Republican-lawmaker-calls-schools-funding-lawsuit-waste-of-money.

waste,"[181] even though the state had the ninth lowest funding levels in the nation and its low-income districts received fewer funds than other districts.[182] One of the most egregious positions was that of New Jersey during the earlier years of school funding litigation. Attempting to justify school resource inequalities in the state, New Jersey argued "that the education currently offered in these lower-income urban districts is tailored to the students' present need, that these students simply cannot now benefit from the kind of vastly superior course offerings found in the richer districts."[183] When that failed, New Jersey, like Tennessee and Florida's officials, sought to blame school districts, claiming that "mismanagement[,] . . . incompetence, politics, and worse" were the cause of education deficiencies in urban districts.[184]

Now, the Secretary of Education is condoning, if not encouraging, these practices. Betsy DeVos claims "that spending more money . . . is ill-placed and ill-advised."[185] While her statements do not explicitly indicate that additional funding for poor students is a waste, the overall context of school funding makes it hard to receive her message as anything but that. Data shows that the in forty-four states, the wealthiest quintile of districts have all the funding they need to achieve average academic outcomes—often far more than they need.[186] In contrast, only nine states provide the highest poverty districts the funds they need to achieve average outcomes.[187] The gap for these students in some states is in excess of $10,000 per pupil.[188] Even in raw numbers, roughly half of states spend less on students in the lowest-income districts than the highest-income districts.[189] Eight of the ten states that made the largest reductions in public school funding over the last decade also cut taxes for the wealthy or reduced their overall tax effort.[190] So when Betsy DeVos makes the general state-

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[181] Jeffery S. Solochek, *Ron DeSantis Says Florida Public Schools Are Wasting Money. Are They?*, TAMPA BAY TIMES (Oct. 22, 2018), https://www.tampabay.com/news/education/k12/Ron-DeSantis-says-Florida-public-schools-are-wasting-money-Are-they-_172747756.

[182] BAKER ET AL., *supra* note 84, at 10, 11.

[183] Abbott v. Burke, 575 A.2d 359, 398 (N.J. 1990).

[184] *Id*. at 406.

[185] Lattimore, *supra* note 21.

[186] BRUCE D. BAKER ET AL., THE REAL SHAME OF THE NATION: THE CAUSES AND CONSEQUENCES OF INTERSTATE INEQUITY IN PUBLIC SCHOOL INVESTMENTS app. C. (2018).

[187] *Id.*

[188] *Id.*

[189] Brown, *supra* note 19.

[190] AM. FED'N OF TEACHERS, A DECADE OF NEGLECT: PUBLIC EDUCATION FUNDING IN THE AFTERMATH OF THE GREAT RECESSION 4 (2018), https://www.aft.org/sites/default/files/decade-of-neglect-2018.pdf.

ment that we should not spend more money on public schools, she is defending the status quo: funding gaps for districts serving predominantly poor kids and the tax cuts that drive those gaps.[191]

Finally, it is worth emphasizing that this story is not new. Scholars have recently begun to unearth the discriminatory motives that shaped our modern school financing structure more than a century ago. Camille Walsh, for instance, reveals how the system of local taxation to support public schools was established during the infancy of formal school segregation in the late 1800s.[192] Some states, for instance, kept white taxes for white schools and black taxes for black schools.[193] Some also gave white communites the power to issue bonds to support their schools while denying that power to blacks.[194] While explicitly segregated taxes and bonds have since been declared unconstitutional, the facially race-neutral tax and school financing policies that accompanied these explicit policies persist largely unseen and continue to drive inequality in education today.[195] Other scholars offer more detailed accounts, revealing how Southern states changed their constitutional systems for financing education in the late 1800s and early 1900s as part of their effort to racially segregate schools and disenfranchise blacks.[196] Again, the courts later declared segregation itself unconstitutional,[197] but the facially race neutral tool of achieving unequal access to school resources—finance systems that shift respon-

191 Others supporting and pushing DeVos's agenda at the federal level are more explicit. *See, e.g.*, Edwin J. Feulner, *Haven't We Learned Our School Spending Lesson?*, HERITAGE FOUND. (Apr. 10, 2019), https://www.heritage.org/education/commentary/havent-we-learned-our-school-spending-lesson (characterizing federal funding for poor students as being "good money . . . thrown after bad"); Jude Schwalback, *Federal Education Programs Are Bloated and Failing. Now, Congress Wants to Give Them More Money*, HERITAGE FOUND. (Sept. 25, 2018), https://www.heritage.org/education/commentary/federal-education-programs-are-bloated-and-failing-now-congress-wants-give (claiming that Head Start, a preschool program aimed solely at disadvantaged kids, is "another prime example of wasteful and poor policy").

192 *See* CAMILLE WALSH, RACIAL TAXATION: SCHOOLS, SEGREGATION, AND TAXPAYER CITIZENSHIP, 1869–1973, at 7–8, 15–20 (2018).

193 *Id.* at 50.

194 *See id.* at 31 (describing the City of Owensboro's discriminatory issuance of bonds).

195 *Id.* at 33.

196 *See, e.g.*, PAUL E. HERRON, FRAMING THE SOLID SOUTH: THE STATE CONSTITUTIONAL CONVENTIONS OF SECESSION, RECONSTRUCTION, AND REDEMPTION, 1860–1902, at 206 (2017); DOROTHY OVERSTREET PRATT, SOWING THE WIND: THE MISSISSIPPI CONSTITUTIONAL CONVENTION OF 1890, at 118 (2018); *see also* Clinton G. Wallace, *Tax Policy and Our Democracy*, 118 MICH. L. REV. (forthcoming 2020) (first reviewing CAMILLE WALSH, RACIAL TAXATION: SCHOOLS, SEGREGATION, AND TAXPAYER CITIZENSHIP, 1869–1973 (2018); and then reviewing ANTHONY C. INFANTI, OUR SELFISH TAX LAWS: TOWARD TAX REFORM THAT MIRRORS OUR BETTER SELVES (2018) (focusing on the ways that tax policies and systems have promoted social injustices and continue to do so)).

197 *See* Brown v. Board of Educ., 347 U.S. 483, 495 (1954).

sibility from the state to local school districts—remains in place and available for use today.[198]

B. Privileging the Suburbs

State efforts to protect entrenched privilege, while giving the appearance of pursuing equal and adequate education for all, also leads to gerrymandering. In the modern era, constitutional duties and cultural expectations demand that the state provides an equal and quality education to all students.[199] But vested and politically powerful interests of the status quo are allied against those ends, seeking to favor white middle-income neighborhoods.[200] Gerrymandering, in effect, allows privileged communities to operate school systems outside of the general rules or creates purported neutral rules that only work to the advantage of certain communities.

James Ryan astutely concludes in his book on race, money, and education that "the most dominant and important theme in education law and policy for the last fifty years" has been a strategy to "save the cities, but spare the suburbs."[201] Both in school desegregation and school funding, Ryan explains that while the stated goal may have often been to help "urban schools," the precise strategy was to "help[] in ways that do not threaten the physical, financial, or political independence of suburban schools."[202] This strategy, he observes, "continues to shape nearly every modern education reform."[203] Kimberly Robinson takes this insight one step further, arguing that it is overly generous to suggest education policy actually aspires to help the cities.[204] The more accurate description, she argues, is an effort to

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198 Without any appreciation of this history, the Supreme Court in *San Antonio Independent School District v. Rodriguez* conceptualized the divide between state and local school financing as purely an issue of educational policy and discretion. *See* 411 U.S. 1, 47–52 (1973) (discussing the history of local control as an important tradition).

199 *See generally* Rebell, *supra* note 9 (discussing the impact of *Brown v. Board of Education* and the role of the courts in helping provide meaningful educational opportunities).

200 *See, e.g.*, Laurie Reynolds, *Skybox Schools: Public Education as Private Luxury*, 82 WASH. U. L.Q. 755, 792 (2004) (noting that wealthy donor districts in Texas oppose the Robin Hood redistributive school funding system).

201 JAMES E. RYAN, FIVE MILES AWAY, A WORLD APART: ONE CITY, TWO SCHOOLS, AND THE STORY OF EDUCATIONAL OPPORTUNITY IN MODERN AMERICA 5, 12–13 (2010).

202 *Id.* at 5.

203 *Id*.

204 *See* Kimberly Jenkins Robinson, *The Past, Present, and Future of Equal Educational Opportunity: A Call for a New Theory of Education Federalism*, 79 U. CHI. L. REV. 427, 433 (2012) (reviewing JAMES E. RYAN, FIVE MILES AWAY, A WORLD APART: ONE CITY, TWO SCHOOLS, AND THE STORY OF EDUCATIONAL OPPORTUNITY IN MODERN AMERICA (2010)).

"save the suburbs, tinker with the cities."[205] Education reforms have primarily attempted to "save the suburbs" for mostly white, middle-class schoolchildren while only marginally addressing the needs of urban schools.[206]

Putting their nuanced differences aside, both scholars agree that education policy serves the interests of the suburbs rather than urban schools. This Article's revelation of the multiple ways in which states gerrymandering school funding powerfully confirms their thesis. Bifurcated state-local funding schemes, underestimates of inflation and student need, and arbitrary school funding multipliers all serve the interests of suburbs.[207] Each of these policies minimizes the contributions that suburbs must make to the statewide education system—i.e., the needs of other students—and frees suburbs to go at education themselves.[208] Suburbs can raise as much funding as they want and create islands of opportunity.[209] In one of the earliest empirical studies of the problem, President Nixon's 1972 Commission on School Finance cited the heavy reliance on local funding sources as a primary cause of inequality[210] and called on states to "assume responsibility for determining and raising on a statewide basis, the amount of funds required for education."[211] Yet, that inequality remains firmly entrenched and the level of machinations that state formulas go through to maintain it appear inexplicable on any grounds other than: a) a desire to preference the suburbs; b) a desire to disadvantage the cities and special needs students; or c) one of the other illicit motives discussed below.[212]

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[205] *Id*.

[206] *Id.*

[207] *See, e.g.*, *id.* at 439–41 (citing RYAN, *supra* note 201) (collecting examples from Ryan's book where educational policies were designed to "save the suburbs"); James E. Ryan, *The Influence of Race in School Finance Reform*, 98 MICH. L. REV. 432, 433–34 (1999) (arguing that the poor success rate of minority districts in school finance litigation is at least in part attributable to the racial composition of the schools).

[208] *See* Robinson, *supra* note 204, at 441 (noting efforts by suburbs to keep urban students out of their schools).

[209] The facts of *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), make this point obvious. Edgewood and Alamo school districts are both in San Antonio and a fifteen- to twenty-minute drive apart, but the Texas funding scheme allowed Alamo to spend twice as much. *Id.* at 11–13; *see also* Cory Turner et al., *Why America's Schools Have a Money Problem*, NPR (Apr. 18, 2016, 5:00 AM), https://www.npr.org/2016/04/18/474256366/why-americas-schools-have-a-money-problem (discussing the disparities in Chicago, where local property taxes allow one district to spend nearly three times as much on education as another nearby district).

[210] PRESIDENT'S COMM'N ON SCH. FIN., SCHOOLS, PEOPLE, & MONEY: THE NEED FOR EDUCATIONAL REFORM xi (1972), https://files.eric.ed.gov/fulltext/ED058473.pdf.

[211] *Id.* at xii.

[212] *See, e.g.*, Phil Kadner, *Illinois Schools Have Biggest Funding Gap in Nation*, CHI. TRIB. (Mar. 26, 2015, 9:17 PM), https://www.chicagotribune.com/ct-sta-kadner-sudies-st-

Preferencing suburbs is the practical inverse of targeting a group for disfavor. Whereas disfavor entails targeting a group for exclusion or harm, preference entails placing one group in a better position than others. Either way, the state creates an in-group and an out-group. With school funding, the in-group—the suburbs—just so happens to be relatively small and the out-group can be relatively large. But in both instances, the state engages in targeted partiality toward some students and denies other students the impartiality that equal protection demands.[213] In short, the state entrenches and favors the interests of one group over another—the antithesis of carrying out its educational duty and the exact type of behavior driving judicial concerns in voter redistricting.

C. Anti-Public Education Motives

The third potential motivation behind education gerrymandering is that the state does not want to adequately fund the public education system on the whole. In this scenario, the state may not target a particular group of students but public education in general. State leaders simply object to the high costs that education places on the state,[214]

0327-20150326-column.html (discussing the confluence of property and income tax burdens with widening school funding gaps in Illinois and concluding that "[a]ll of this is created by legislative policies set in Springfield, and none of it happened by accident"); *see also* Bruce J. Biddle & David C. Berliner, A Research Synthesis, *Unequal School Funding in the United States*, 59 EDUC. LEADERSHIP 48, 51 (2002), ("Parents who moved to affluent suburbs were generally willing to fund well-equipped, well-staffed public schools for their own children, but . . . they saw little reason to pay additional taxes to fund equivalent schools for the impoverished students left behind in city centers or rural towns."); Alana Semuels, *Good School, Rich School; Bad School, Poor School*, ATLANTIC (Aug. 25, 2016), https://www.theatlantic.com/business/archive/2016/08/property-taxes-and-unequal-schools/497333 (discussing the phenomenon of "white families mov[ing] out of the cities into the suburbs and enter[ing] school systems there, and black families [being] stuck in the cities, where property values plummeted and schools lacked basic resources"). In some states, where school districts were run on the county level, costs could be shared between rich and poor districts by combining and integrating them, especially after *Brown v. Board of Education*. But in states like Connecticut, with deeper histories of public schooling, there were hundreds of separate districts, and it was much more difficult to combine them or to equalize funding across them. Pennsylvania's heavy reliance on property tax has created what one researcher has called a "Wild West" of school funding, where anything goes, including extreme funding disparities and extremely different tax burdens. Dale Mezzacappa, *Study: Pa. Is 'Wild West' of Property Taxes*, NOTEBOOK (Mar. 2, 2017, 10:52 AM), https://thenotebook.org/articles/2017/03/02/study-pa-is-wild-west-of-property-taxes.

213 *See infra* Section IV.B (explaining equal protection impartiality).

214 *See generally* Opinion, *Gov. Christie's Toxic School Plan*, N.Y. TIMES, June 26, 2016, at 10 (discussing Governor Christie's proposed flat funding formula that would eliminate the additional financial burden the state carries for high poverty districts—a cost he had long been critical of); Adam Clark, *Christie: Give All School Districts Same Amount of Aid, Provide Some Towns Property Tax Relief*, NJ.COM (June 21, 2016), https://nj.com/education/2016/06/christie_nj_school_funding_announcement.html ("It is time to change

prefer lower taxes,[215] doubt the extent to which money matters to educational quality,[216] or question the validity of expert judgments as to the precise cost of an adequate education.[217] The resistance to fully

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the failed school funding formula and replace it with one that will force the end of these two crises—the property tax scandal and the disgrace of failed urban education."); Nadia Pflaum, *Trump: U.S. Spends More than 'Almost Any Other Major Country' on Education*, POLITIFACT (Sept. 21, 2016), https://www.politifact.com/ohio/statements/2016/sep/21/donald-trump/trump-us-spends-more-almost-any-other-major-countr (President Trump arguing that public schools are wasting money and spend more than almost any other nation in the world); Jeffrey S. Solochek, *Ron DeSantis Says Florida Public Schools Are Wasting Money. Are They?*, TAMPA BAY TIMES (Oct. 22, 2018), https://www.tampabay.com/news/education/k12/Ron-DeSantis-says-Florida-public-schools-are-wasting-money-Are-they-_172747756 (gubernatorial candidate claiming that public education wastes money and should be more efficient).

215 *See, e.g.*, John Eligon, *Education Is Newest Target of Kansas Budget Cuts*, N.Y. TIMES (Feb. 11, 2015), https://www.nytimes.com/2015/02/12/us/politics/education-is-newest-target-of-kansas-budget-cuts.html (discussing large education cuts and noting that critics attributed them to earlier tax cuts); Howard Fischer, *Gov. Ducey: Teachers Aren't Going to Get 20 Percent Pay Raises*, TUCSON.COM (Mar. 29, 2018), https://tucson.com/news/local/gov-ducey-teachers-aren-t-going-to-get-percent-pay/article_75a9b7dc-930b-5374-be12-61fb840e4ced.html ("Gov. Doug Ducey said Thursday that teachers aren't going to get the 20 percent pay hike they are demanding—not now and not in the foreseeable future. And he intends to continue to propose further cuts in state taxes . . . ."); Michael Leachman, *North Carolina's Deep Tax Cuts Impeding Adequate School Funding*, CTR. ON BUDGET & POL'Y PRIORITIES BLOG (May 10, 2018, 10:00 AM), https://www.cbpp.org/blog/north-carolinas-deep-tax-cuts-impeding-adequate-school-funding (noting that five of six states with the lowest public school funding levels in 2013 also cut taxes between 2008 and 2018).

216 *See, e.g.*, Abbott v. Burke, 495 A.2d 376, 381 (N.J. 1985) (summarizing defendants' argument that educational inequities were due to inefficient management not funding disparities); BAKER, *supra* note 3, at 1 (noting the "widespread political effort" to argue that educational quality had little or nothing to do with funding of public schools); Lattimore, *supra* note 21 (recounting DeVos's rejection of the notion that increasing funding is good education policy); Rebell, *supra* note 9, at 1484–86 (surveying arguments between states and plaintiffs over whether money matters).

217 *See, e.g.*, Jonathan Shorman & Hunter Woodall, *Lawmakers Shocked by Report that Kansas Schools Need Up to $2 Billion*, KAN. CITY STAR (Mar. 16, 2018, 3:00 PM), https://www.kansascity.com/news/politics-government/article205556234.html (noting that, in response to the Kansas Supreme Court's ruling that educational funding was constitutionally inadequate, lawmakers at one point tried to find experts who could show that school funding was in fact adequate). Kansas eventually approved additional education funding, but only after a multi-year battle with the courts and a judicial threat to shut down schools if the state did not act. The Associated Press, *Kansas Supreme Court Signs Off on Increased Education Spending*, N.Y. TIMES (June 14, 2019), https://www.nytimes.com/2019/06/14/us/kansas-education-funding-supreme-court.html. In New York, the debate is so intense regarding the adequacy of current funding levels that school advocates and the governor cannot even agree on the most basic facts. The Governor claims that poor districts have the money they need and that the state's underfunding of the education formula is not a problem, while school advocates respond that both are insufficient to address inequality. *See* ALLIANCE FOR QUALITY EDUCATION, JOINT LEGISLATIVE HEARING ON THE EXECUTIVE PROPOSAL 2018–19 TESTIMONY BY THE ALLIANCE FOR QUALITY EDUCATION (2018), http://www.aqeny.org/wp-content/uploads/2018/01/Budget-Testimony-AQE-Elem_Sec_Ed-2.pdf; Joseph Spector, *Why School Funding in New York Is Still a Major Fight*, DEMOCRAT & CHRON. (Mar. 20, 2019, 6:00

funding public education does not immediately present itself as an attempt at targeted disadvantage or illegitimate goals. Efficiency and cost savings, for instance, are generally legitimate goals, assuming they are sincere. The legitimacy of gerrymandering in the name of efficiency and savings ultimately turns on whether the state is acting within the bounds of its constitutional duty to provide education or instead reduces and contains education spending regardless of its effect on educational opportunity. The latter represents an anti-education agenda rather than simple fiscal conservatism within margins of reasonable education spending.

Anti-education agendas are illegitimate given the nature of the state's educational duty. State constitutions place an absolute obligation on states.[218] Those constitutions, and courts' interpretation of them, often describe that obligation as a paramount duty of the state.[219] Thus, courts have consistently held that fiscal constraints, for instance, cannot justify a state's failure to carry out that duty.[220] As both federal and state courts in Kentucky explained, "neither the [legislature] nor those individuals responsible for discharging the [education] duties imposed on them by the state constitution . . . can abrogate those duties merely because the monetary obligations become[] unexpectedly large or onerous."[221]

AM), https://www.democratandchronicle.com/story/news/politics/albany/2019/03/20/why-school-funding-new-york-still-major-fight/3139023002.

218 *See, e.g.*, Lake View Sch. Dist. No. 25 v. Huckabee, 91 S.W.3d 472, 495 (Ark. 2002) (finding that the state constitution "imposes upon the State an absolute constitutional duty to educate our children"); Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 215 (Ky. 1989) (finding that the state constitution's education clause "places an absolute duty on the General Assembly to re-create, re-establish a new system of common schools in the Commonwealth"); Claremont Sch. Dist. v. Governor, 794 A.2d 744, 754 (N.H. 2002) ("[I]t is the State's duty to guarantee the funding necessary to provide a constitutionally adequate education to every educable child in the public schools in the State."); *see also* Derek W. Black, *The Constitutional Challenge to Teacher Tenure*, 104 CALIF. L. REV. 75, 108 (2016) (noting the recognition of educational obligations under state constitutions beginning in the 1970s).

219 *See, e.g.*, FLA. CONST. art. IX, § 1; WASH. CONST. art. IX, § 1; Bush v. Holmes, 919 So. 2d 392, 405 (Fla. 2006); Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71, 85 (Wash. 1978).

220 *See, e.g.*, Butt v. State, 842 P.2d 1240, 1251–52 (Cal. 1992) (applying heightened scrutiny to education cuts notwithstanding the district's fiscal problems); *Claremont Sch. Dist.*, 794 A.2d at 754 (noting that "financial reasons alone" do not excuse noncompliance with "the constitutional command that the State must guarantee sufficient funding to ensure . . . a constitutionally adequate education"); Abbott *ex rel.* Abbott v. Burke, 798 A.2d 602, 603–04 (N.J. 2002) (rejecting state's request for budgetary cap on education to ease other constraints); *see also* Rebell, *supra* note 24, at 1859–60 (noting the challenges states face for providing adequate educational opportunities with budget shortfalls).

221 *Rose*, 790 S.W.2d at 208 (quoting Carroll v. Dep't of Health, Educ. & Welfare, 410 F. Supp. 234, 238 (W.D. Ky. 1976)).

Reduced to their essence, anti-education spending motivations are legislative policy preferences. But such policy preferences necessarily fail in the face of a constitutional duty to provide education.[222] First, the constitutional duty unquestionably prohibits entirely defunding education.[223] Second, if fiscal constraints cannot justify the lesser act of underfunding education,[224] a policy preference to spend less on education or lower taxes at the expense of education cannot justify underfunding either. State discretion to pursue policy preferences only occurs in regard to spending variations beyond the amount reasonably necessary to deliver adequate and equal education. Only then can the state justify gerrymandering in the service of cost containment.

Attempts to contain cost without any basis for knowing or believing that the state has met its constitutional obligations places cost reduction ahead of the state's constitutional duty. In short, pursuing an anti-education spending agenda is antithetical to the legislature's constitutional duty to fund education. In the context of a federal claim, however, these motivations require more explanation, because nothing in the Federal Constitution explicitly obligates states to provide public education.[225] An anti-education objective would be a presumptively legitimate (even if an unwise) goal. The absence of any explicit education reference in the United States Constitution has long fueled a general consensus that states have no federal education obligation. But new research emphasizing a few key historical events indicates that the general consensus is wrong.

First, the history and process through which states adopted their education clauses reveal that the provision of education was a federal requirement.[226] Prior to the Civil War, fewer than half of state constitutions mandated the provision of public education.[227] During the

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[222] *See* Black, *supra* note 35, at 460 (describing the absolutist framing that some courts and commentators have used to describe constitutional duties to provide education).

[223] *See, e.g.*, NEV. CONST. art. 11, § 2 ("The legislature shall provide for a uniform system of common schools, by which a school shall be established and maintained in each school district at least six months in every year."); S.C. CONST. art. XI, § 3 ("The General Assembly shall provide for the maintenance and support of a system of free public schools open to all children in the State.").

[224] *See* Black, *supra* note 35, at 459–60 ("[E]ducation's special constitutional status requires that states put education ahead of other priorities, including during financial crisis.").

[225] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973).

[226] *See* Black, *supra* note 28, at 765–68.

[227] Derek W. Black, *The Fundamental Right to Education*, 94 NOTRE DAME L. REV. 1059, 1093–94 (2019); *see also* Steven G. Calabresi & Michael W. Perl, *Originalism and* Brown v. Board of Education, 2014 MICH. ST. L. REV. 429, 460 (discussing the number of states that did recognize a right to education in 1868, the year the Fourteenth Amendment was ratified).

post-Civil War era, however, Congress saw the provision of public education as a central pillar of state citizenship and a necessity of rebuilding democracy.[228] Using its constitutional authority and duty to guarantee a republican form of government in each state, Congress required Southern states to rewrite their constitutions.[229] These rewrites included providing for public education.[230] In fact, Congress explicitly conditioned the readmission of the final three Southern states on the continued provision of equal education under their education clauses.[231] And after that historical point, no other state would ever be admitted to the Union without an education clause.[232] This history demonstrates that the Federal Constitution, contrary to conventional wisdom, does mandate that states provide education.[233]

Second, even without an affirmative duty, anti-education agendas can still represent class-based disadvantage in government services. Public education, of course, serves a discrete class of individuals, generally children under the age of twenty-one.[234] Thus, when government targets education, it necessarily targets children's benefits. It is disadvantaging them in relation to other government programs or interests. More importantly, anti-education policies target the constitutional rights of a single group of individuals—children.[235] Under-

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228 Black, *supra* note 28, at 778 ("Only by extending public education to the masses could the disadvantaged of the South become full citizens and their states finally operate as democracies.").

229 Reconstruction Act of 1867, ch. 153, § 5, 14 Stat. 428, 429.

230 *See, e.g.*, ALA. CONST. of 1868 art. XI, § 6 (requiring schools in every township or district); ARK. CONST. of 1868, art. IX, § 1 (requiring "a system of free schools"); FLA. CONST. of 1868, art. VIII, § 1 (requiring "education of all the children residing within its borders"); GA. CONST. of 1868, art. VI, § 1 (requiring "a thorough system of general education"); LA. CONST. of 1868, tit. VII, art. 135 (requiring "one free public school in every parish throughout the State"); MISS. CONST. of 1868, art. VIII, § 1 (requiring "a uniform system of free public schools"); N.C. CONST. of 1868, art. IX, § 2 (requiring "a general and uniform system of public schools"); S.C. CONST. of 1868, art. X, § 3 (requiring a "uniform system of free public schools").

231 Act of Mar. 30, 1870, ch. 39, 16 Stat. 80, 81 (admitting Texas on the condition that its constitution "shall never be so amended or changed as to deprive any citizen or class of citizens of the United States of the school rights and privileges secured by the [state] constitution"); Act of Feb. 23, 1870, ch. 19, 16 Stat. 67, 68 (same for Mississippi); Act of Jan. 26, 1870, ch. 10, 16 Stat. 62, 63 (same for Virginia).

232 Black, *supra* note 28, at 793 & n.310; Black, *supra* note 227, at 1093.

233 *See* Black, *supra* note 28, at 794 ("[T]he Constitution, at the time the Fourteenth Amendment was ratified, afforded special recognition to education.")

234 *See, e.g.*, ALA. CONST. of 1868, art. XI, § 6 (obligating education for "all the children of the State" in a given age range); ARK. CONST. of 1868, art. IX, § 1 (same); LA. CONST. of 1868, tit. VII, art. 135 (same).

235 The fact that education is constitutionally grounded is also noteworthy because other government programs, save the judicial and criminal justice systems, do not directly implicate constitutional rights and, thus, the way in which government funds, does not fund, or targets these other programs is of no constitutional concern.

stood as an attack on constitutional rights, anti-education positions are particularly anomalous. Such strange anomalies, as the Supreme Court has repeatedly indicated, demand a persuasive legitimate explanation under equal protection.[236] The following Section explores the remaining potential explanation: legislative uncertainty regarding actual and appropriate education costs.

D. Usurping the Judiciary and Disputing Whether Money Matters

School funding gerrymandering is also an outgrowth of legislative efforts to resist the basic empirical fact that money matters in education and the judicial holding that the constitution obligates the state to ensure students have adequate funding. That resistance is constitutionally illegitimate. Legislative resistance occurs, in part, because the precise cost of an adequate education is not an exact science.[237] Uncertainties surrounding precise funding requirements coupled with legislative discretion can justify substantial variance in the particular policies that states adopt. But debate, uncertainty, and legislative discretion do not mean legislatures have carte blanche discretion. The cost of adequacy and money's effect on quality are ultimately empirical questions with empirical answers.[238] Legislatures can exercise discretion among policies that are reasonably consistent with empirical reality,[239] but they are not free to reject or entirely disregard that reality,[240] particularly when courts have already adjudicated those facts.

At that point, the scope of constitutionally reasonable and legitimate policies narrow. Legislative resistance to adequate education funding after that point operates under the premise that the legislature has the authority to decide for itself whether it has met its constitutional duty.[241] This is something the legislature cannot do. First, courts' independent and exclusive authority to decide constitutional

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[236] *See* United States v. Windsor, 570 U.S. 744, 768 (2013) ("[D]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision [under the Equal Protection Clause]." (quoting *Romer v. Evans*, 517 U.S. 620, 663 (1996))).

[237] *See, e.g.*, BAKER, *supra* note 3, at 13 (discussing scholarship disagreement about estimating the cost of education).

[238] *See id.* (noting various empirical findings regarding the cost of education and its effectiveness).

[239] *See* Campaign for Fiscal Equity, Inc. v. State, 861 N.E.2d 50, 52 (N.Y. 2006) (deferring to the government's "reasonable" estimate of the cost of education).

[240] *See* Brigham v. State, 692 A.2d 384, 390 (Vt. 1997) ("[T]here is no reasonable doubt that substantial funding differences significantly affect opportunities to learn.").

[241] *See, e.g.*, Jonathan Shorman, *Kansas Conservatives Renew Push for a Constitutional Amendment on Schools After Ruling*, WICHITA EAGLE (June 26, 2018, 3:03 PM), https://www.kansas.com/news/politics-government/article213856059.html (charging the Kansas

compliance is one of the most basic principles of our legal system, dating back to *Marbury v. Madison*.[242] The Court in *Marbury* famously wrote that "[i]t is emphatically the province and duty of the judicial department to say what the law is."[243] Second, state supreme courts have adopted this same maxim and expounded on its importance and function in the particular context of educational adequacy and equity cases.[244] When the Kentucky legislature, for instance, argued that separation of powers prohibited the judiciary from intervening in school funding disputes, the state supreme court explained that the court's job is:

> [T]o determine the constitutional validity of the system of common schools within the meaning of the Kentucky Constitution, Section 183. We have done so. We have declared the system of common schools to be unconstitutional. It is now up to the General Assembly to re-create, and re-establish a system of common schools within this state which will be in compliance with the Constitution.[245]

Third, on matters on which the constitution and state courts have spoken, legislatures lack the authority to disagree—at least through legislative action.[246] For instance, when New York's highest court determined that the state constitution required educational opportunities that prepare students for college, the legislature lacked the discretion to persist in the position that it thinks workplace preparedness is sufficient and all that it will fund.[247] Kansas's Supreme Court explains why constitutions divide power this way:

Supreme Court with "judicial overreach" and proposing constitutional amendment to "block the court from reviewing overall spending on schools").

242 5 U.S. (1 Cranch) 137 (1803).

243 *Id.* at 177.

244 *See, e.g.*, *Ex parte* James, 713 So. 2d 869, 879 (Ala. 1997) (rejecting the argument that courts are precluded from reviewing the constitutionality of Alabama's public school system, given that the judiciary has a duty "to review, and if necessary, nullify, acts of the legislature it deemed to be inconsistent with the fundamental law of the land"); *Gannon I*, 319 P.3d 1196, 1230 (Kan. 2014) (finding that the Kansas Constitution empowers the courts to review legislation with respect to public education); Abbeville Cty. Sch. Dist. v. State, 767 S.E.2d 157, 163–64 (S.C. 2014) (rejecting the argument that educational policies are non-justiciable).

245 Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 214 (Ky. 1989).

246 As William Thro explains, "[a]ll Education Clauses limit the sovereign discretion of the legislature," and the "judiciary must enforce those limits." William E. Thro, *Originalism and School Finance Litigation*, 335 EDUC. L. REP. 538, 552 (2016); *see also* Cooper v. Aaron, 358 U.S. 1, 18 (1958) ("No state legislator . . . can war against the Constitution without violating his undertaking to support it.").

247 *See* Campaign for Fiscal Equity, Inc. v. State, 801 N.E.2d 326, 351–56 (N.Y. 2003) ("It is the responsibility of the State to offer the opportunity of a sound basic education, and it is the responsibility of this Court to determine whether the State is fulfilling its responsibility . . . .").

> [C]onstitutional assignment of different roles to different entities [dictates] that the people of Kansas wanted to ensure that the education of school children in their state is not entirely dependent upon political influence or the voters' constant vigilance. . . . [M]atters intended for permanence are placed in constitutions for a reason—to protect them from the vagaries of politics or majority.[248]

Fourth, the requisite education funding—or the steps the state must take in regard to funding—can become a settled issue and beyond dispute when it intersects with the courts' interpretation and application of the constitution. During the early phases of litigation, legislatures can contest the question of whether money matters and the appropriate level of funding for the education system.[249] Courts consider states' and plaintiffs' extensive competing evidence on these issues.[250] But once the court evaluates and adjudicates the evidence in the context of a constitutional standard, it is no longer subject to debate. The state must accept and comply with the court's decision. More specifically, a judicial finding that current funding levels are insufficient to deliver an adequate education is a finding that the state has failed to discharge its constitutional duty.[251] The state cannot, after such a decision, relitigate the issue in the court of public opinion in the hope of getting a different result. Nor can the state legitimately justify a continued low level of education funding on the premise that it still believes money does not matter.[252]

Yet, gerrymandering school funding becomes the means through which legislatures resist and reject judicial authority, just through less explicit means. But whether explicit or not, gerrymandering is resistance nonetheless because it represents an intentional act of bad faith

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248 *Gannon I*, 319 P.3d at 1230.

249 *See* Hoke Cty. Bd. of Educ. v. State, No. 95CVS1158, 2000 WL 1639686, at *56 (N.C. Super. Ct. Oct. 12, 2000) (accepting the state's argument that the education problem cannot be resolved by simply increasing funding), *aff'd*, 599 S.E.2d 365, 373 (N.C. 2004).

250 Rebell, *supra* note 9, at 1484–85.

251 *See, e.g.*, *Gannon I*, 319 P.3d at 1230; Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 211–13 (Ky. 1989) (finding that Kentucky's public school system "falls short of the mark of the constitutional mandate of 'efficient'"); McCleary v. State, 269 P.3d 227, 248 (Wash. 2012) (finding that Washington has a constitutional responsibility to provide ample funding for public education).

252 To be clear, this does not mean that the constitution or judiciary deprives the legislature of discretion on important education funding and policy issues. The legislature is vested with wide ranging extensive discretion on these issues—far more than any other branch—and that discretion is not subject to override by another branch of government. The point here is that as to that narrow set of issues on which the constitution and interpretation of it have spoken, legislatures cannot continue to actively contest those issues without violating constitutional law. And as a constitutional violation, refusal to fund education on these grounds is an illegitimate goal that should be struck down even under the most minimal level of scrutiny. It is whether the legislature has actually acted on this illegitimate basis, not whether it can do so, that should be determinative.

as opposed to an effort to comply with a court order or precedent. When legislators manipulate school funding based on ideological principles or factual hypotheses that reject the settled constitutional law of the state, they are claiming the authority for themselves to disagree with the court's findings.[253]

Here, legislators miss a key distinction that threatens separation of powers and the rule of law: Individual legislators will always be free to hold their own opinions, but they are not free to set state policy that represents their opinions rather than constitutional principle. Anarchists and authoritarians, for instance, can hold elected office, but their election does not grant them authority to violate or ignore the Constitution.[254] Understood as efforts to resist constitutional compliance, these educational gerrymanders are just as problematic as intentional refusals to serve certain communities. Both lack any legitimate justification.

The aftermath of *Brown v. Board* and the Court's responses crystalize and confirm the foregoing logic.[255] Once the Court declared school segregation unconstitutional, schools had no authority to persist in segregation.[256] Nor did they have the authority to adopt dilatory tactics aimed at avoiding the *Brown* holding. Most school districts, however, did just that,[257] and legislators urged them on.[258] So when

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[253] Kansas provides one of the most blatant examples. *See, e.g.*, Editorial Board, *Nix This Lousy Idea: Kansas Should Say No to Constitutional Amendment on School Funding*, KAN. CITY STAR (July 6, 2018), https://www.kansascity.com/opinion/editorials/article214016379.html ("Within hours [of court ruling on school funding], conservative lawmakers were starting to beat the drum—again—for a constitutional amendment that would ensure that such an order from the court could never happen again."); Jonathan Shorman, *How Much Money for Kansas Schools? Lawmakers Have No Quick Answers*, KAN. CITY STAR (Oct. 5, 2017), https://www.kansascity.com/news/politics-government/article177324881.html (legislators responding to court's school funding decision by saying it does not "recognize and respect the will of the people and those whom they have elected" and calling the court's decision "unsurprising as it is absurd"); *see also supra* notes 141–43 and accompanying text (discussing the contention between the state and the judiciary in Kansas).

[254] *See* United States v. Nixon, 418 U.S. 683, 704 (1974) (holding that the executive was bound to comply with the Court's constitutional holdings, not the executive's opinion as to what the Constitution requires).

[255] 347 U.S. 483, 495 (1954).

[256] Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 11 (1971); Green v. Cty. Sch. Bd., 391 U.S. 430, 435 (1968).

[257] *See, e.g.*, U.S. COMM'N ON CIVIL RIGHTS, FULFILLING THE LETTER AND SPIRIT OF THE LAW: DESEGREGATION OF THE NATION'S SCHOOLS 6 (1976) (finding that, a decade after the Court's decision in *Brown v. Board of Education*, less than two percent of African Americans in the South had been admitted to schools with whites); DAVID J. MAYS, RACE, REASON, AND MASSIVE RESISTANCE 197 (2008) (noting political candidates who ran against integration, including Virginian governor Lindsay Almond and his "massive resistance" slogan).

[258] *The Southern Manifesto*, TIME, Mar. 26, 1956, at 25.

school desegregation returned to the Court in *Green v. New Kent County*[259] in 1968, the Court made two points clear. First, school districts had a constitutional duty to immediately develop plans that would integrate schools.[260] Second, schools' failure to adopt such plans following *Brown* was a constitutional violation and, thus, was a continuing constitutional violation during those subsequent years.[261] The Court made a third point in *Swann v. Charlotte-Mecklenburg* a few years later: A failure to end these continuing violations justifies a court in taking even stronger measures to remedy the constitutional violation and assure districts' compliance moving forward.[262]

This absolute mandate to integrate, however, did not mean that states or districts lacked all direction. Rather, it meant schools and the state lacked the discretion to avoid and resist integration, directly or indirectly. So long as they avoided those problems, school policy discretion remained exclusively in their hands.[263] But when the schools crossed this line and refused to act in good faith toward constitutional compliance, courts had the authority to devise an appropriate desegregation remedy based on the evidence before them.[264] School officials could no more resist that remedy than they could a direct command of the Constitution.[265]

The parallels between desegregation and school funding are unmistakable. In both, once courts find a constitutional violation, the state has a duty to remedy the violation. While state actors have discretion in devising a remedy to the violation, that discretion does not extend to efforts to avoid an effective remedy. Thus, when a court finds that a school funding system is unconstitutional and requires substantial additional financial resources, the state has no authority to insist otherwise or to treat the issue of whether money matters in its schools as one that is still subject to debate. And when a legislature gerrymanders educational opportunity in ways that reject or contest judicial findings and conclusions on this issue, the gerrymander represents an assertion of power that the legislature does not possess and is,

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259 391 U.S. 430 (1968).

260 *Id.* at 435–36.

261 *Id.* at 438.

262 Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971).

263 *See, e.g.*, *id.* at 16 ("Remedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary."). The point was actually one of dismay for the plaintiffs, who urged the Court to declare freedom of choice to be unconstitutional.

264 *See id.* at 16 (noting that when school authorities "default [on] their obligation to proffer acceptable remedies [to segregation], a district court has broad power to fashion a remedy that will assure a unitary school system").

265 *See, e.g.*, Cooper v. Aaron, 358 U.S. 1, 18 (1958).

thus, constitutionally illegitimate. Nothing less than basic separation of power and rule of law principles compel this conclusion.

III
The Limits of Current Education Doctrine

Scholars, advocates, and courts have viewed school funding solely through the doctrinal lens of whether students in a particular district are receiving an adequate or equal education. They inquire whether students are achieving at adequate levels and, if not, whether they are receiving the necessary resources. In other words, resources and student outcomes drive the inquiry. These questions almost entirely ignore states' motivations and assume states' good faith. State failures to provide appropriate educational resources, then, are treated as benign neglect that can be cured by calling a state's attention to the issue.

This framing and set of assumptions overlook serious problems in education policy. First, they ignore bad faith by the state. In doing so, they allow the state to persist in illicit behavior, asking over and over again whether the state has met its obligation rather than whether the state is actively subverting educational opportunity.[266] Second, they understate the severity of what states have done in education, replacing bad faith educational gerrymandering with terms like inadequacy and inequity. Third and maybe most important, inadequacy and inequity have doctrinal and rhetorical limits. The uncertainties involved in defining, measuring, and enforcing adequacy and equity make it hard for courts to do their job—and do it consistently. The terms have aged and may no longer convey the moral urgency they once did. As adequacy and equity grow in complexity, they become less clear and potentially less compelling claims against the state.

A. Adequacy and Equity Theory

In the 1970s, school funding litigation focused on the concept of equality of educational opportunity.[267] The goal was to ensure that students have access to the same educational resources. Equality evolved to require that students have access to the resources they need to achieve equal outcomes—what some call vertical equity.[268]

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[266] *See, e.g.*, *Gannon* VI, 420 P.3d 477, 480–81 (Kan. 2018) (finding that Kansas manipulated base funding by ignoring inflation).

[267] *See* Julie K. Underwood, *School Finance Adequacy as Vertical Equity*, 28 U. Mich. J.L. Reform 493, 498–99 (1995).

[268] *Id*. at 493, 513–19.

Vertical equity requires that students with greater needs receive greater resources.[269]

The advent of the national standards-based movement in the 1980s combined with concerns about the potential limits of equity litigation led advocates to pursue adequacy claims.[270] Adequacy cases assert that there is a baseline of educational quality that all students must receive.[271] Courts further defined quality with concepts like "sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization" and "sufficient knowledge" in substantive subject matter areas to enable students to pursue "advanced training in either academic or vocational fields."[272] The biggest distinction from equity litigation was the requirement that no school falls below these thresholds, not that all schools provide the same opportunities.[273]

B. Separation of Power Constraints

Adequacy and equity litigation have proven incredibly successful in key respects. By 2006, equity and adequacy litigators had won sixty percent of the time.[274] The percentage was even higher in cases filed after 1989, as adequacy theories proved more palatable to courts.[275] The litigation, however, has faced enormous challenges and suffered enormous losses as well. The losses and challenges revolve around the inherent separation of powers dynamics in school finance litigation and the actual educational judgments that courts must render in the cases.

Only legislatures can pass school funding laws and set academic standards.[276] Courts can issue opinions concluding that the current statutory framework fails to meet the constitutional standard, but courts cannot make the legislature enact a legislative fix.[277] And for that matter, courts are even constrained in their ability to tell a legisla-

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[269] *Id*.

[270] *See* NAT'L COMM'N ON EXCELLENCE IN EDUC., A NATION AT RISK 5 (1983) (warning of a "rising tide of mediocrity" in American education); Christopher F. Edley, Jr., *Lawyers and Education Reform*, 28 HARV. J. LEGIS. 293, 293–94 (1991) (discussing the debate about whether our education system is in crisis).

[271] Rebell, *supra* note 9, at 1501.

[272] *See, e.g*., Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 212 (Ky. 1989).

[273] Scholars and increasingly some courts would eventually recognize that equity and adequacy cannot be entirely separated. Joshua E. Weishart, *Transcending Equality Versus Adequacy*, 66 STAN. L. REV. 477, 478–79 (2014).

[274] Rebell, *supra* note 9, at 1500.

[275] *Id.* at 1527.

[276] *Rose*, 790 S.W.2d at 214.

[277] *See* Julia A. Simon-Kerr & Robynn K. Sturm, *Justiciability and the Role of Courts in Adequacy Litigation: Preserving the Constitutional Right to Education*, 6 STAN. J. C.R. &

ture exactly what the fix should be.[278] The problem is further exacerbated in those states where the constitutional education clause suggests that the legislature is the sole arbiter of what amounts to an appropriate education[279] or where the clause's key terms are vague and skeptics claim the courts are making up educational standards.[280]

Even the clearest constitutional language and most forceful courts cannot make these problems go away. The supreme courts in Kansas and Washington, for instance, have revealed the limits of judicial power, no matter how aggressively courts assert those powers. Other courts intentionally refrain from making specific demands of their legislature.[281] Some courts have grown weary and find, with little to no factual basis, that whatever the state has done is constitutionally sufficient.[282] During and immediately following the recession, passivist and deferential judicial decisionmaking increased sharply, suggesting that courts may be losing their will to enforce their state constitutions.[283]

C.L. 83, 114–15 (2010) (discussing the Texas Supreme Court's threat to shut down the schools if the state did not pass legislation).

278 *See, e.g.*, Campaign for Fiscal Equity, Inc. v. State, 861 N.E.2d 50, 59–60 (N.Y. 2006) ("Judicial intervention in the state budget may be invoked only in the narrowest of instances." (internal quotation marks omitted)); Hoke Cty. Bd. of Educ. v. State, 599 S.E.2d 365, 397 (N.C. 2004) (remanding the case to "the legislature and executive," and noting that it is up to those branches to "step forward, boldly and decisively, to see that all children . . . have an educational opportunity and experience . . . that . . . meets the constitutional mandates").

279 Comm. for Educ. Rights v. Edgar, 672 N.E.2d 1178, 1189 (Ill. 1996).

280 *See, e.g.*, Abbeville Cty. Sch. Dist. v. State, 515 S.E.2d 535, 541 (S.C. 1999) (Moore, J., dissenting) ("Our Education Clause requires only that the General Assembly 'provide for the [support and maintenance] of a system of free public schools.' It contains no directive regarding the quality or adequacy of the education that must be provided." (quoting S.C. CONST. art. XI, § 3)).

281 *See, e.g.*, *Rose*, 790 S.W.2d at 214 (declaring the then public school system as unconstitutional but leaving the legislature broad discretion to build the new system); Abbeville Cty. Sch. Dist. v. State, 767 S.E.2d 157, 178 (S.C. 2014) (noting that the redress is "to be made by the General Assembly as to how best to provide our State's students their opportunity for a minimally adequate education").

282 *See, e.g.*, Order, Abbeville Cty. Sch. Dist. v. State, No. 2007-065159 (S.C. Nov. 17, 2017), http://schoolfunding.info/wp-content/uploads/2017/12/5a130bddd6089.pdf (withdrawing jurisdiction in a twenty-year-old case but pointing to no significant remedy by the state).

283 These separation of powers issues have flummoxed scholars for decades. *See, e.g.*, Bauries, *supra* note 33, at 730–31 (discussing academic debates as to the merits of judicial deference in this type of case); William S. Koski, *Of Fuzzy Standards and Institutional Constraints: A Re-Examination of the Jurisprudential History of Educational Finance Reform Litigation*, 43 SANTA CLARA L. REV. 1185, 1259–61 (2003) (discussing the appropriateness of judicial deference in school financing cases).

C. *The Factual Ambiguity of Adequacy and Equity*

While much has been said about the separation of powers issue,[284] the existing literature has done little to resolve the underlying problem that, even placing separation of powers limits aside, adequacy and equity are difficult doctrinal concepts for courts to apply. Courts must first decide what those terms mean.[285] Courts can relatively easily define adequacy in general terms but defining it more specifically involves a level of judgment. And no matter what, measuring whether students are receiving an adequate education is fact-intensive and involves matters of degree.[286] Equity on its face might appear simpler, but it is not. By equity, courts mean equitable access to the resources that students need.[287] According to various courts, different students and districts need different resources.[288] Those differential needs are just as difficult to define and measure as adequacy.

In older cases, abject underfunding, rotting buildings, and swaths of uncertified teachers made it easy for courts to find that a state was failing to meet its constitutional duty.[289] The state's effort was paltry, and education conditions were pathetic. These egregious circumstances would fail under almost any concept of equality or adequacy a court might devise. But under less egregious facts, courts must identify and apply more precise lines between adequacy and inadequacy, which means they increasingly rely more heavily on outside experts for the key assessments on which the cases turn. Most notably, courts rely on state and outside experts for estimates of what it costs to deliver an education. When they differ—as they always do—courts must determine who is more credible, who is owed deference, or if the truth lies somewhere in between the experts' views.[290] Dealing with these issues over the course of several cases and years challenges courts' institutional capacity and can undermine courts' confidence in their ability to compel positive change.[291] It is not unusual for a court, having previously declared an education system unconstitutional, to

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284 *See, e.g.*, Black, *supra* note 35, at 456.

285 *See, e.g.*, *Rose*, 790 S.W.2d at 214 (noting the definition of "efficient" education system); Leandro v. State, 488 S.E.2d 249 (N.C. 1997) (noting a few factors that are relevant to determining "adequacy").

286 Koski, *supra* note 283, at 1234–37.

287 *See* Weishart, *supra* note 273, at 501–04 (discussing equity in terms of financial resources).

288 *Id*. at 505–07.

289 *See, e.g.*, DeRolph v. State, 677 N.E.2d 733, 743 (Ohio 1997) (describing teachers falling through floors and desks covered with coal dust).

290 *See, e.g.*, Campaign for Fiscal Equity, Inc. v. State, 801 N.E.2d 326, 334 (N.Y. 2003).

291 *See, e.g.*, Abbott v. Burke, 20 A.3d 1018, 1113 (N.J. 2011) (Rivera-Soto, J., dissenting).

inexplicably find that a state has achieved compliance a few years later, even though the state has done very little to comply and experts indicate more remains to be done.[292]

Texas is one of the worst examples in recent years. After two decades of litigation and decisions in which it had ordered the state to improve its school funding system and the state had responded with varying degrees of success,[293] the Texas Supreme Court basically gave up in 2016. It overturned a trial court decision that had found that Texas schools were underfunded by $3.7 billion in 2010 and would be even more underfunded in the future.[294] The Texas Supreme Court justified its reversal by asserting that the connection between money and student outcomes was far too uncertain for it to continue to intervene.[295] Even the New Jersey Supreme Court, traditionally the strongest education rights court in the country,[296] has struggled in recent years. In one case on remand, a trial court found that $1.6 billion in school funding cuts had "moved many districts further away from 'adequacy'" and imposed the greatest burdens on at-risk students,[297] but there was only one vote on the court to restore statewide funding for at-risk students.[298] In dissenting, one justice wanted to end school funding litigation in the state altogether.[299]

Such decisions reflect how concepts like adequacy are malleable and difficult to administer. They are malleable enough for courts to demand enormous increases in school funding one year only to walk away from striking down even larger budget cuts a few years later. Substantial evidence indicates that most state funding regularly falls

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[292] *See, e.g.*, Morath v. Texas Taxpayer & Student Fairness Coal., 490 S.W.3d 826 (Tex. 2016) (finding Texas legislature's decisions constitutional despite marginal improvements).

[293] Between 1989 and 2005 alone, the Texas Supreme Court had issued six positive school finance decisions. *See, e.g.*, Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist., 176 S.W.3d 746, 752 (Tex. 2005); W. Orange-Cove Consol. Indep. Sch. Dist. v. Alanis, 107 S.W.3d 558, 562–63 (Tex. 2003); Edgewood Indep. Sch. Dist. v. Meno, 917 S.W.2d 717, 725 (Tex. 1995); Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist., 826 S.W.2d 489, 492–93 (Tex. 1992); Edgewood Indep. Sch. Dist. v. Kirby, 804 S.W.2d 491, 492–93 (Tex. 1991); Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 391–92 (Tex. 1989).

[294] *Morath*, 490 S.W.3d at 850.

[295] *Id.* at 850–51.

[296] *See generally* Alexandra Greif, *Politics, Practicalities, and Priorities: New Jersey's Experience Implementing the* Abbott V *Mandate*, 22 YALE L. & POL'Y REV. 615 (2004) (discussing a quarter century of school finance litigation in the state, which included numerous decisions against the state, major legislative overhauls, and concrete remedial demands).

[297] *Abbott*, 20 A.3d at 1035.

[298] *See id.* at 1101 (concurring judge favoring a state-wide remedy but joining the majority to ensure a remedy for a narrower group of districts).

[299] *See id*. at 1110 (arguing that the litigation was "well-intentioned but now fundamentally flawed").

below levels necessary to achieve what experts deem adequate,[300] but no firm standard or data point mandates that a court intervene. Thus, courts operate within an enormous gray area, leaving them subject to enormous pressure. They are accused of judicial activism when they intervene and abdication when they do not.[301]

The combined weight of these challenges helps explain why courts began intervening less frequently and less forcefully in the last decade. The shift in outcomes was hard to explain on the facts alone.[302] Equity and adequacy claims may have simply pushed courts to the limits of their institutional capacity and authority.[303] Courts were less sure of their judgment calls, less sure they could compel states to act, and thus more interested in finding bases upon which to remove themselves from ongoing litigation. As two New Jersey Supreme Court justices wrote:

> [T]his Court embarked on an initially well-intentioned but now fundamentally flawed and misguided approach [in 1973] to addressing the New Jersey Constitution's promise that '[t]he Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years.'[304]

D. The Viability of Future Adequacy and Equity Claims

The future of school finance litigation is, of course, impossible to predict. Courts may very well learn their lessons and find ways to moderately advance more effective reform and educational accountability. There have been significant new victories more recently.[305] But one cannot discount the possibility that school finance is running a natural lifespan that will not end well. The history of school desegregation offers an obvious analogy.

The depth and obvious nature of the original harms of school segregation made demanding legal standards and aggressive judicial intervention entirely appropriate to all but the most conservative ele-

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300 *See, e.g.*, BAKER ET AL., *supra* note 6, at 1.

301 *See* Koski, *supra* note 283, at 1240 (discussing judicial activism and restraint); Thro, *supra* note 246, at 550–51 (concluding Kentucky's supreme court engaged in activism, but other courts abdicate their duty).

302 Black, *supra* note 35, at 453–58 (discussing the reversals of course in Colorado, Kansas, New Jersey, South Carolina, Texas, and Washington).

303 *See* Koski, *supra* note 283, at 1296–97 (concluding that courts have grown cognizant of their institutional limitations in school funding cases).

304 Abbott v. Burke, 20 A.3d 1018, 1110 (N.J. 2011) (Rivera-Soto, J., dissenting).

305 *See, e.g.*, Cruz-Guzman v. State, 916 N.W.2d 1, 5 (Minn. 2018) (finding that the education clause is justiciable); William Penn Sch. Dist. v. Pa. Dep't of Educ., 170 A.3d 414, 457 (Pa. 2017) (finding that the State's education clause is justiciable and reversing prior holdings of the court).

ments in the early years of desegregation. Between *Brown v. Board of Education* in 1954 and *Swann v. Mecklenburg* in 1971, every one of the Court's desegregation decisions was unanimous.[306] But that unanimity eventually fractured, and the gaps in judicial perspectives widened.[307] In the mid-1970s, a slim majority on the Supreme Court emerged to focus on factual nuances and new legal distinctions to end desegregation.[308] Later, members of the Court began to openly question both the efficacy and legitimacy of desegregation remedies and emphasize the need to return control to local districts.[309] Most recently in *Parents Involved in Community Schools v. Seattle School District No. 1*, the Court went so far as to even limit schools' ability to voluntarily desegregate.[310] Today, the effects of desegregation are diminished by the end of court oversight.[311]

This trajectory was foretold as early as 1973 by a basic legal concept. In *Keyes v. School District No. 1*, the Court held that the judiciary could only remedy intentional, not de facto, segregation.[312] This distinction became the basis for immediately limiting and preventing desegregation in the North and the basis upon which desegregation would end nationwide in the 1990s.[313] This result may have been inev-

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306 Steven L. Nelson & Alison C. Tyler, *Examining* Pennsylvania Human Relations Commission v. School District of Philadelphia*: Considering How the Supreme Court's Waning Support of School Desegregation Affected Desegregation Efforts Based on State Law*, 40 SEATTLE U. L. REV. 1049, 1053–55 (2017) (surveying the Court's decisions in those years).

307 *Id.*

308 *See* Milliken v. Bradley, 418 U.S. 717, 753 (1974) (holding that inter-district busing, as mandated by the lower courts, was not an appropriate remedy for a single district's purposeful acts of segregation, and remanding for "prompt formulation of a decree directed to eliminating the segregation found to exist in Detroit city schools"); Keyes v. Sch. Dist. No. 1, 93 S. Ct. 2686, 2691 (1973) (focusing on population compositions to analyze discrimination).

309 *See, e.g.*, Missouri v. Jenkins, 515 U.S. 70, 99 (1995) ("[L]ocal autonomy of school districts is a vital national tradition."); *id.* at 114 (Thomas, J., concurring) (questioning the social science evidence regarding the harms of segregation and the judiciary's order of integrative remedies); Freeman v. Pitts, 503 U.S. 467, 489 (1992) ("[T]he court's end purpose must be to remedy the violation and, in addition, to restore state and local authorities to the control of a school system."); *id.* at 490 ("Returning schools to the control of local authorities at the earliest practicable date is essential to restore their true accountability in our governmental system.").

310 127 S. Ct. 2738, 2742 (2007) (holding that strict scrutiny applies to voluntary desegregation plans that rely on racial classifications and that the instant plans were unconstitutional).

311 Sean F. Reardon et al., Brown *Fades: The End of Court-Ordered School Desegregation and the Resegregation of American Public Schools*, 31 J. POL'Y ANALYSIS & MGMT. 876, 901 (2012).

312 93 S. Ct. 2686, 2689–90 (1973).

313 *See generally* Erica Frankenberg & Kendra Taylor, *De Facto Segregation: Tracing a Legal Basis for Contemporary Inequalit*y, 47 J.L. & EDUC. 189 (2018) (discussing how the

itable, but it may have also resulted from the failure to identify new theories upon which desegregation could continue or evolve. Without an evolved theory, the legitimacy of desegregation remained moored to the concepts of original segregation (which necessarily grew distant in time) and racial balance (which proved ever-elusive).[314]

The possibility that school finance litigation will follow this trajectory is real. School finance litigation strikes at the heart of the state's central government function, demands enormous and ongoing remedies, and relies on contested concepts of adequacy and equity. While adequacy and equity theories have been enormously powerful, there is no guarantee that their combined normative power will persist or that courts can perpetually enforce them. Equity litigation itself largely gave way to adequacy, which proved even more successful.[315]

Brown's mild concept of non-discrimination similarly gave way to *Green v. New Kent County*'s command that districts affirmatively further integration and stamp out the vestiges of desegregation.[316] The principles of *Green* dramatically accelerated integration but also eventually required more judicial intervention than the courts or the public would tolerate.[317] It is altogether possible, if not likely, that adequacy and equity litigation's recent struggles are reflections of the fact that they make enormous demands of courts and legislatures, which are not counterbalanced by sufficient normative forces. Absent a counterbalance, the movements will wane in the long run.

IV
Theorizing an Anti-Gerrymandering Doctrine in Education

Educational inequality and unfairness challenges have almost uniformly failed under the Federal Constitution because the applicable level of scrutiny is rational basis. State constitutional claims have succeeded in most instances but largely ignore educational gerrymandering as a distinct problem. The only question in state cases is the final education outcome—adequacy and equity. The focus on those outcomes obscures the damage that gerrymandering has on educational opportunity. Gerrymandering makes it more difficult for courts

requirement of intentional discrimination has stymied the elimination of school segregation).

314 *See, e.g.*, Freeman v. Pitts, 112 S. Ct. 1430, 1437 (1992).

315 Rebell, *supra* note 9, at 1500–01.

316 *See* Green v. Cty. Sch. Bd., 391 U.S. 430, 438 (1968).

317 *See generally* Derrick Bell, Race, Racism, and American Law 150–66 (5th ed. 2004) (tracing the Court's precedent from *Green* through the retreats during the Nixon administration and then again in the 1990s).

to measure and monitor adequacy and equity, as well as enforce compliance with those constitutional mandates. An anti-gerrymandering framework can attack and prohibit these education failures.

A close examination of Supreme Court doctrine, as well as state constitutional education principles, reveals that educational gerrymandering is unconstitutional under both federal and state law. It is unconstitutional under federal equal protection doctrine because educational gerrymandering is the product of illegitimate state motives. Even under the most permissive form of review—rational basis—states cannot intentionally target groups for disadvantage just for the sake of doing so. Nor, as this Article demonstrates, can states muster a legitimate or logical goal for subverting their state constitutional duties regarding education. Thus, this subversion is unconstitutional under both federal and state constitutional law because the state lacks a legitimate justification for its action. The following sections detail the precedent and doctrines that buttress these principles.

A. Equal Protection's Prohibition on Intentionally Disadvantaging Groups

As a general principle, educational inequalities, save those motivated by race or gender, only trigger rational basis review under federal equal protection analysis.[318] Rational basis review is so deferential to the state that lower courts, advocates, and scholars rarely pay it serious attention.[319] This lack of attention is a mistake. The Court has, in fact, struck down legislation under rational basis review even absent facial discrimination on the basis of race or gender.

Rational basis review is not a searching form of review.[320] Plaintiffs bear a heavy burden.[321] They must rule out the notion that the state is pursuing any conceivable legitimate purpose.[322] Courts will even assume the possibility of purposes that the state may not have raised itself.[323] So long as some legitimate goal exists, the state's

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318 San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 55 (1973).

319 *See, e.g.*, Brian B. v. Pa. Dep't of Educ., 230 F.3d 582, 586 (3d Cir. 2000); Aaron Belzer, *Putting the "Review" Back in Rational Basis Review*, 41 W. ST. U. L. REV. 339, 346 (2014).

320 Richard B. Saphire, *Equal Protection, Rational Basis Review, and the Impact of* Cleburne Living Center, Inc., 88 KY. L.J. 591, 611–12 (2000).

321 F.C.C. v. Beach Comm'ns, 113 S. Ct. 2096, 2101–02 (1993) (requiring under rational basis review that "those attacking the rationality of the legislative classification have the burden 'to negate every conceivable basis which might support it'" (citation omitted)).

322 *Id*.

323 *Id.*

actions need only minimally advance the legitimate goal.[324] There need not even be a good fit between the state's goal and the means it chose to advance it.[325]

This deference makes perfect sense. It is not the judiciary's role to supervise and second-guess everyday legislation simply because of its incidental and unequal effects.[326] Policymakers necessarily draw lines in legislation and practice.[327] Those lines inevitably disparately affect certain individuals and groups.[328] But not all legislation is benign in its effects, even if it does not involve invidious racial or gender-based discrimination. States sometimes inject rather unusual distinctions and disadvantages into law. When framed as such, the Court has been willing to strike down these legislative oddities.[329]

Some state policies and goals are simply off limits.[330] The Court has explained that certain fundamental norms and principles underpin the Constitution and, more specifically, equal protection. These norms and principles operate as limits, regardless of the particular classification the state may draw. The Supreme Court in *Romer v. Evans* best articulated the core principle relevant to this Article, writing:

> Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance. . . . A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.[331]

The Court in *Romer* was not the first to seize on this idea and built on much earlier and, sometimes more mundane, cases. In 1928 in *Louisville Gas & Electric Co. v. Coleman*, for instance, the Court

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[324] *See* N.Y.C. Transit Auth. v. Beazer, 99 S. Ct. 1355, 1368–69 (1979).

[325] *Id.* at 1370.

[326] Heller v. Doe, 113 S. Ct. 2637, 2642 (1993).

[327] *Id.*

[328] *See, e.g.*, Ry. Express Agency v. New York, 69 S. Ct. 463 (1949) (noting that a New York law "draws the line between" advertisements on trucks and general advertising).

[329] *See, e.g.*, Romer v. Evans, 517 U.S. 620, 631–32 (1996); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 446–47 (1985); Plyler v. Doe, 457 U.S. 202, 221–22 (1982); U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 535–36 (1973).

[330] *Romer*, 517 U.S. at 634 (finding that "a bare . . . desire to harm a politically unpopular group" is an illegitimate government goal); *Plyler*, 457 U.S. at 223–24 (holding that targeting undocumented students for exclusion from school is illegitimate); *Moreno*, 413 U.S. at 535–36 (same); *see also* Magoun v. Ill. Trust & Sav. Bank, 18 S. Ct. 594, 598 (1898) ("Clear and hostile discriminations against particular persons and classes, especially such as are of unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition[.]" (quoting Bell's Gap R.R. Co. v. Pennsylvania, 134 U.S. 232, 240 (1890))).

[331] *Romer*, 517 U.S. at 632.

wrote that "the equal protection clause means that the rights of all persons must rest upon the same rule under similar circumstances."[332] This idea later became the basis to strike down more invidious forms of discrimination, such as racial discrimination. The rationale in the Court's early race discrimination cases was not that race classifications were inherently suspect, but that under certain circumstances they violated the basic rationale of equal protection.[333] In *Shelley v. Kraemer*, a case involving racially restrictive housing covenants, the Court reasoned that "[e]qual protection of the laws is not achieved through indiscriminate imposition of inequalities."[334] The Court focused on the oddity, unusualness, and apparent randomness of the inequality in striking down the restrictive covenants. The Court would later quote that same language in *Sweatt v. Painter* to explain why Texas could not exclude African Americans from its law school (even though segregation as a general principle remained constitutional).[335] In each of these cases, the Court relied not simply on heightened scrutiny, but on the intrinsic meaning of equality itself.[336]

A further synthesized statement of these basic concepts is that the state cannot purposefully single out groups for unfavorable treatment and hardships. Or, as the Court wrote in *Romer*, the state cannot draw classifications "for the purpose of disadvantaging the group burdened by the law."[337] Such a purpose is constitutionally illegitimate regardless of the group targeted or the level of scrutiny.[338] The Court

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[332] 48 S. Ct. 423 (1928); *Magoun*, 18 S. Ct. at 598 (writing that equal protection "prescribes that the law have the attribute of equality of operation, and equality of operation does not mean indiscriminate operation on persons, merely as such, but on persons according to their relations"). Writing in concurrence in a rational basis review case, Justice Jackson wrote that "there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally." *Ry. Express Agency*, 69 S. Ct. at 466–67.

[333] Sweatt v. Painter, 339 U.S. 629, 635 (1950); Shelley v. Kraemer, 68 S. Ct. 836, 846 (1948); *see also* Strauder v. West Virginia, 100 U.S. 303, 308 (1975) ("[S]ingl[ing] out and expressly den[ying] by a statute all right to participate in the administration of the law . . . is an impediment to securing to [the African American] race that equal justice which the law aims to secure to all others.").

[334] 68 S. Ct. at 846.

[335] *Sweatt*, 339 U.S. at 635.

[336] *Id.* Respect for this principle explains why laws singling out a certain class of citizens for disfavored legal status or general hardships are rare. Skinner v. Oklahoma, 62 S. Ct. 1110, 1113 (1942).

[337] Romer v. Evans, 413 U.S. 620, 633 (1996); *see also* U.S. R.R. Ret. Bd. v. Fritz, 101 S. Ct. 453, 462 (1980) (Stevens, J., concurring) ("If the adverse impact on the disfavored class is an apparent aim of the legislature, its impartiality would be suspect.").

[338] As the Court in *New York City Transit Authority v. Beazer* explained, "[T]he Court's equal protection cases have recognized a distinction between 'invidious discrimination'—i.e., classifications drawn 'with an evil eye and an unequal hand' or motivated by 'a feeling

made this point in both *Romer* and *United States Department of Agriculture v. Moreno*, explaining that the singling out of groups for disadvantage represents no more than "a bare . . . desire to harm a politically unpopular group."[339] It did not matter that the singling targeted "hippies" in *Moreno*, rather than race or sex.[340] What mattered was that the case involved a desire to disfavor a group just for the sake of doing so—a purpose that the Court reasoned was unequivocally unconstitutional.[341]

In recent years, a similar concept has also moved into voting rights doctrine. While voting rights doctrine on the subject is still in flux and the precise lines of permissible behavior have yet to be drawn,[342] the Court's normative concerns reflect the equal protection ideology of the foregoing cases. Previously, race was the only factor that the courts had found to be problematic in the context of redrawing voting districts.[343]

Courts, however, have increasingly grown skeptical about voting practices whose sole purpose is to disadvantage or subjugate particular groups of voters. The Supreme Court has denounced the motives that drive gerrymandering as constitutionally illegitimate.[344] Justin Levitt explains that while the Court may disagree on how much gerrymandering is too much, "all nine Justices [in *Vieth v. Jubelirer*] agreed that 'an *excessive* injection of politics' in the redistricting process violates the Constitution."[345] The district court in *Gill v. Whitford* similarly concluded that "[w]hatever gray may span the area between

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of antipathy' against, a specific group of residents—and those special rules that 'are often necessary for general benefits.'" 99 S. Ct. 1355, 1369 n.40 (1979) (internal citations omitted).

339 *Romer*, 517 U.S. at 634; U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 535–36 (1973).

340 In *Moreno*, Congress took action to make it harder for "hippies" to enroll in the food stamp program. *Moreno*, 413 U.S. at 535–36. The text of the law in *Moreno* did not draw a "hippie" distinction, but its underlying motivation and effect was to exclude them from welfare assistance. *Id.*

341 *Id.* at 534; *see also Beazer*, 99 S. Ct. at 1367 (framing the inquiry in a rational basis case as "whether the [challenged] rule reflects an impermissible bias against a special class"); *id.* at 1369 (reasoning the policy in question was constitutional because "[i]t is neither unprincipled nor invidious in the sense that it implies disrespect for the excluded subclass"); *id.* (emphasizing that the legislation was not targeted at a "class of persons characterized by some unpopular trait or affiliation" and thus does not "reflect any special likelihood of bias on the part of the ruling majority").

342 Many believed the Court would finally announce a standard for prohibiting gerrymandering in 2018, but the Court remanded a promising case based on a standing issue. Gill v. Whitford, 138 S. Ct. 1916 (2018).

343 *See, e.g.*, Miller v. Johnson, 115 S. Ct. 2475 (1995); Shaw v. Reno, 113 S. Ct. 2816, 2817–18 (1993).

344 *See, e.g.*, Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2658 (2015) (quoting Vieth v. Jubelirer, 541 U.S. 267, 292 (2004)).

345 Levitt, *supra* note 23, at 1999 (quoting *Vieth*, 541 U.S. at 293).

acceptable and excessive [gerrymandering], an intent to entrench a political party in power signals an excessive injection of politics into the redistricting process that impinges on the representational rights of those associated with the party out of power."[346]

The constitutional norm limiting gerrymandering parallels the rationale of *Romer* and *Moreno*. Lower courts articulate the problem of gerrymandering as being "intentional discrimination against an identifiable political group."[347] States have targeted a group for gerrymandering to "subordinate" the group and "entrench" the power of their competitor.[348] The net result of this subordination is directly analogous to *Romer*. In *Romer*, the result was to make it "more difficult for one group of citizens . . . to seek aid from the government."[349] In voting, the result is to make "state government . . . impervious to the interests of citizens" who identify with a particular political group.[350] This "tribal partisanship," as leading scholars term it, cannot be a legitimate end in itself.[351] Even in redistricting, where partisanship inherently plays a role, subordinating a group for the sake of doing so flies in the face of numerous constitutional norms, including the First Amendment, Equal Protection, Substantive Due Process, and the basic rule of law.[352] As such, it is nothing short of an "abuse of power" that lies at the core of the Court's approach to gerrymandering.[353]

The primary value of the gerrymandering comparison is simply to recognize that active government manipulations that disadvantage a group, whether in voting, food stamps, or housing, are constitutionally

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346 Whitford v. Gill, 218 F. Supp. 3d 837, 887 (W.D. Wis. 2016), *vacated*, 138 S. Ct. 1916 (2018).

347 *Id.* at 884 (quoting Davis v. Bandemer, 478 U.S. 109, 127 (1986)).

348 *Id.* at 886 (quoting *Ariz. State Legislature*, 135 S. Ct. at 2658).

349 Romer v. Evans, 517 U.S. 620, 633 (1996).

350 *Election Law—Partisan Gerrymandering—District Court Offers New Standard to Hold Wisconsin Redistricting Scheme Unconstitutional*.—Whitford v. Gill*, No. 15-cv-421-bbc, 2016 WL 6837229 (W.D. Wis. Nov. 21, 2016)*., 130 HARV. L. REV. 1954, 1957 (2017) (quoting *Whitford*, 218 F. Supp. 3d at 886).

351 Kang, *supra* note 23, at 353.

352 *See* Levitt, *supra* note 23, at 2023–24.

353 *Whitford*, 218 F. Supp. 3d at 885–86; *see also* Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2658 (2015) (defining partisan gerrymandering as "the drawing of legislative district lines to subordinate adherents of one political party and entrench a rival party in power"); Vieth v. Jubelirer, 541 U.S. 267, 307 (2004) (Kennedy, J., concurring in the judgment) (indicating that gerrymandering involves the application of political classifications "in an invidious manner or in a way unrelated to any legitimate legislative objective"); *id.* at 293 (plurality opinion) ("[A]n *excessive* injection of politics is *un*lawful."); *id*. at 362 (Breyer, J., dissenting) ("[G]errymandering that leads to entrenchment amounts to an abuse that violates the Constitution's Equal Protection Clause.").

suspect. And gerrymandering, by its very name, involves acts of manipulation and, thus, arouse constitutional suspicion. In its non-voting equal protection cases, the Court frequently comments on the odd and unusual manner in which the state singled out a group.[354] The oddity of the legislation itself alerts the Court to the likelihood that the governmental action is illegitimate. Legitimate government actions do not rely upon such unusual methods. In other words, the point of gerrymandering, regardless of the context, is to engage in illicit behavior.

The Court in *Romer*, for instance, noted that the legislation in question contained a "peculiar property" and an "unusual character."[355] The law was "exceptional" in that it "impos[ed] a broad and undifferentiated" burden on a single group.[356] And it is, quite simply, "not within our constitutional tradition to enact laws of this sort."[357] The Court in *United States v. Windsor* similarly emphasized that Congress had gone out of its way to defy federalism traditions and target a group. Congress refused to recognize same sex couples' marriage even though their home states had done so—a judgment to which Congress has always deferred in the past.[358] The Court, again, recognized this was an "unusual deviation" from tradition.[359] Nor was this just a *post facto* justification for striking down anti-gay legislation under rational basis review. The Court warned nearly a century ago in the most mundane of contexts—mortgage taxes—that "[d]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision."[360]

In sum, the holding and underlying rationale in these cases represents four simple tenets. First, purposefully targeting or singling out a group is an illegitimate government goal, even if the group is not a class that otherwise warrants heightened scrutiny. Second, absent some other obvious explanation, legislation and practices that rely on some unusual form to create distinctions or divisions between groups are suspect because such unusual state activity signals an illicit motive to create an in-group and out-group. Third, while traditional animus may motivate state action to single out a group, the absence of animus

354 *See, e.g.*, United States v. Windsor, 570 U.S. 744 (2013); Romer v. Evans, 517 U.S. 620, 632 (1996); U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973).

355 *Romer*, 517 U.S. at 632–33 (quoting Louisville Gas & Elec. Co. v. Coleman, 277 U.S. 32, 37–38 (1928)).

356 *Id.* at 632.

357 *Id.* at 633.

358 *Windsor*, 570 U.S. at 767.

359 *Id.* at 770.

360 *Coleman*, 277 U.S. at 37–38.

does not mean the state action is constitutional. Rather, the act of singling out a group can be problematic in and of itself. The state still needs some legitimate basis for its action and that basis will be missing if the state's only purpose is to disadvantage a group. Fourth, the method and effect by which the state singles out a group can take many forms. The state might make it harder for a group to secure favorable legislative action, request the assistance of law enforcement, win an election, or access governmental benefits and services. The form and substance of the government action, no matter how obscure, may still amount to targeted disadvantage.

B. The Anti-Disadvantage Principle in Education

1. Synthesizing Plyler v. Doe

The foregoing rational basis principles explain the Supreme Court's most doctrinally perplexing education case, *Plyler v. Doe*.[361] *Plyler* is the only case in which the Court has ever struck down an education policy or practice as irrational. The doctrine, theory, and legitimacy of the Court's holding in *Plyler* has long been debated. Conservative commentators and jurists argue the case was wrongly decided and targeted it for reversal.[362] More liberal scholars and advocates would stretch the Court's holding further,[363] using it as support for other education rights theories. Both sides misunderstand or overlook a major aspect of the case's foundation because they read too much into it. The simpler explanation is that *Plyler* rests on basic equal protection principles rather than announces new expanded ones. The reaffirmation of foundational rational basis review principles in *Plyler* does, however, make clear that a limiting principle on certain educational inequalities exists.

Plyler involved a Texas statute that barred undocumented children from attending public school.[364] Despite the troubling facts, plaintiffs' likelihood of litigation success was low. The Court's prior

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361 457 U.S. 202 (1982).

362 *See* Michael J. Perry, *Equal Protection, Judicial Activism, and the Intellectual Agenda of Constitutional Theory: Reflections on, and Beyond,* Plyler v. Doe, 44 U. PITT. L. REV. 329 (1983) (arguing that *Plyler* was not an issue which should have been decided by the Court).

363 *See* Class Action Complaint at 14–16, Gary B. v. Snyder, No. 2:16-cv-13292-SJM-APP (E.D. Mich. Sept. 13, 2016) (using *Plyler* to argue for equal opportunity to attain basic literacy skills); Complaint at 51–55, Martinez v. Malloy, No. 3:16-cv-01439-AWT (D. Conn. Aug. 23, 2016) (using *Plyler* to support an argument for the recognition of education as a fundamental right); Jaclyn Brickman, Note, *Educating Undocumented Children in the United States: Codification of* Plyler v. Doe *Through Federal Legislation*, 20 GEO. IMMIGR. L.J. 385 (2006).

364 *Plyler*, 457 U.S. at 205.

holding in *San Antonio v. Rodriguez* that education is not a fundamental right meant that general challenges to educational inequalities would only trigger rational basis review.[365] Separate Supreme Court precedent also indicated that discrimination based on immigration status did not trigger heightened review either.[366] The fact that the Court, nonetheless, struck down the Texas statute begs for an explanation.[367]

Texas had made the traditional defenses necessary under the minimal standard of review. It offered cost savings and improving education as its goals for excluding undocumented students.[368] As obnoxious as the legislation was, the state's stated goals are legitimate[369] and excluding undocumented students could minimally further them.[370] A minimal connection to a legitimate goal has long been recognized as sufficient to meet rational basis review.[371]

The fact that Texas's otherwise sufficient justification failed suggests that *Plyler* rests on an underlying unstated principle. Some argue that *Plyler* stands for the proposition that while education is not a fundamental right, our Constitution protects some minimal level of educational access.[372] Total exclusion from education, thus, drew special attention. Others conclude that *Plyler* represents a hybrid principle under which the Court applies slightly more rigorous rational basis review.[373] They reason that the relative importance of education combined with class-based legislation "threatens the creation of an

365 San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973).

366 *Plyler*, 457 U.S. at 223.

367 *Id.* at 230.

368 *Id.* at 209.

369 *Id.* at 227.

370 *See id.* at 250 (Burger, C.J., dissenting); Perry, *supra* note 362, at 338.

371 *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 51 (1973) (stating that a law "may not be condemned simply because it imperfectly effectuates the State's goals"); Dandridge v. Williams, 397 U.S. 471, 484 (1970) (rejecting the argument that equal protection invalidates a law simply for "overreaching" in its application).

372 *See* Daniel S. Greenspahn, *A Constitutional Right to Learn: The Uncertain Allure of Making a Federal Case out of Education*, 59 S.C. L. REV. 755, 769, 773 (2008); *see also* Louise Weinberg, *A General Theory of Governance: Due Process and Lawmaking Power*, 54 WM. & MARY L. REV. 1057, 1116–18 (2013) (suggesting that *Plyler* also involved an implicit due process analysis).

373 *See Plyler*, 457 U.S. at 236, 238 (Powell, J., concurring) (explaining "the unique characteristics of the cases before us" and reasoning that "[o]ur review in a case such as these is properly heightened"); *see, e.g.*, Mary Jean Moltenbrey, *Alternative Models of Equal Protection Analysis:* Plyler v. Doe, 24 B.C. L. REV. 1363, 1366 (1983) (writing that *Plyler* "indicates a strong shift away from a strict two-tiered equal protection analysis and toward the use of a balancing approach"); Michael A. Rebell, *The Right to Comprehensive Educational Opportunity*, 47 HARV. C.R.-C.L. L. REV. 47, 97–100 (2012) (arguing that *Plyler* represents the application of intermediate scrutiny).

underclass" and, thus, triggered this rigorous rational basis review.[374] This reasoning draws on the notion first articulated by Justice Marshall in dissent in *San Antonio* that while education may not be a fundamental right, it is sufficiently important to trigger a review more rigorous than rational basis.[375] In other words, the result in *Plyler* rests on the unique importance of education.

Equal protection's general anti-disadvantage and manipulation principles, however, provide a much simpler explanation for *Plyler*. They also make some new implicit doctrine superfluous and unnecessary. While language in *Plyler* discussing the importance of education hints at the possibility of an implied doctrine,[376] the Texas statute is unconstitutional because the state imposed a special burden on a group primarily, if not exclusively, for the sake of doing so. Purported cost savings and educational improvements were but window-dressing for the state's motive to burden undocumented immigrants.[377] Texas did not want those students in its schools and sought to rid itself of them through legislative action. The Court recognized as much.[378] That recognition alone resolves the case.

This type of goal, whether it be in education or some other context, is one the state simply cannot pursue. The fact that the state's policy might somehow have the incidental effect of producing otherwise legitimate cost savings cannot save such a policy. On this point, *Plyler* aligns perfectly with *Romer*. In *Romer*, Colorado argued that barring sexual orientation claims would allow it to focus more on combatting other forms of discrimination.[379] This is a legitimate goal and the Colorado law could marginally advance it, but the Court strikes it down anyway because an illicit motive to disadvantage a group was also present. These parallels are strong evidence that *Plyler*'s holding does not rest on the importance of education or the consequences of the state's action—whether it be the creation of an underclass or actual potential savings for the state in the short term. *Plyler* falls squarely within the general principle that the state cannot single out a group for unfavorable treatment just for the sake of doing so. All of

374 *Plyler*, 457 U.S. at 239.

375 Marshall argued that the Court should stop trying to place rights into the rigid categories of fundamental or non-fundamental and the strict versus rational basis review they trigger. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 98–100 (1973) (Marshall, J., dissenting). He argued for a nuanced sliding scale approach to equal protection. *Id.*

376 *Plyler*, 457 U.S. at 221 (emphasizing "the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child").

377 *Id.* at 228.

378 *Id.*

379 Romer v. Evans, 517 U.S. 620, 635 (1996).

Plyler's other explanations and implications are, in effect, icing on the cake.

Yet, none of this is to say that rational basis review ignores context. All standards are applied in the context of real facts and circumstances that can lead to different conclusions. The unique and unusual nature of the legislative bar on sexual orientation in *Romer* could only be fully appreciated in light of the broader context of anti-discrimination norms and cultural fights afoot in Colorado.[380] The same is true of *Plyler*. One must appreciate education and immigration's context to fully appreciate the fact that Texas was illegitimately targeting students for disfavor. The next Section draws on this insight and reveals how evolving state constitutional education norms create a context in which equal protection demands more impartiality than states are providing.

2. Affirmative Impartiality

Unlike its various other functions, states have an affirmative obligation under their state constitutions to provide education.[381] This affirmative obligation necessarily alters how rational basis applies to education. Whereas a state can decide to build a new park in a remote county even though it has no parks in other areas of the state, the state's affirmative education obligation strips it of this level of discretion in education. States must provide education in all communities.[382] Under many state constitutions, that education must also meet some qualitative standard.[383] In this context, rational basis review can also require the state to pay more to remedy the unequal burdens it imposes on students.

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[380] *See also Romer*, 517 U.S. at 623–25 (summarizing the historical background of the referendum). *See generally* Dirk Johnson, *Colorado Homosexuals Feel Betrayed*, N.Y. TIMES (Nov. 8, 1992), https://www.nytimes.com/1992/11/08/us/colorado-homosexuals-feel-betrayed.html (discussing the statewide referendum to prevent protections for homosexuals and the responses to the referendum's passage).

[381] *See* William E. Thro, *To Render Them Safe: The Analysis of State Constitutional Provisions in Public School Finance Reform Litigation*, 75 VA. L. REV. 1639, 1661 (1989) (detailing the constitutional right to education in all fifty states, except Mississippi).

[382] *See, e.g.*, ALASKA CONST. art. VII, § 1 ("The legislature shall by general law establish and maintain a system of public schools open to all children of the State . . . ."); COLO. CONST. art. IX, § 2 ("The general assembly shall, as soon as practicable, provide for the establishment and maintenance of a thorough and uniform system of free public schools throughout the state . . . ."); NEV. CONST. art. 11, § 2 ("The legislature shall provide for a uniform system of common schools, by which a school shall be established and maintained in each school district . . . .").

[383] *See, e.g.*, FLA. CONST. art. IX, § 1; Campaign for Fiscal Equity, Inc. v. State, 861 N.E.2d 50, 53 (N.Y. 2006); Leandro v. State, 488 S.E.2d 249, 254 (N.C. 1997); Rebell, *supra* note 9, at 1509–10.

It is not enough that the state refrains from singling out groups for exclusion from the education system.[384] The state may also be obligated to avoid making it more difficult for some groups and communities to receive the educational benefits to which they are entitled.[385] Referencing citizens' right to petition government on equal grounds, *Romer* phrased equal protection as a guarantee that "government and each of its parts remain open on impartial terms to all who seek its assistance."[386] In the context of education, that statement might be rephrased as: Government must ensure the baseline education required by the state constitution is available to all on impartial terms.

This impartiality, however, is far short of a principle that would treat education as a fundamental right or apply strict scrutiny to all educational inequalities. Those principles would overturn government policy based solely on its effects. Impartiality concerns pertain more to illicit governmental purposes. *Moreno* and *Romer*, for instance, bar unusual deviations in public policy whose purpose is to classify individuals for the sake of doing so, to burden them, or to make them unequal.[387] Thus, an impartiality guarantee in education does not affirmatively guarantee equal outcomes. Instead, it creates a negative right against state policies whose purpose is to further or reinforce inequality, to avoid the state's constitutional duty to provide education, or to create roadblocks to some students' access to education. More succinctly, impartiality does not require equal educational outcomes; it requires that the state not try to make them unequal.

The Washington Supreme Court captured the line between these two things, but through a different lens. The Court offered this simple statement: The state "must *act* pursuant to the constitutional mandate to discharge its [education] duty."[388] This means that some ends, which might be legitimate in other contexts, are not in education.[389] In

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[384] *See* Sheff v. O'Neill, 678 A.2d 1267, 1285 (Conn. 1996) (holding that the absence of an intent to discriminate or segregate was an insufficient defense to plaintiff's claim that they had been denied their right to equal education).

[385] *See* Abbott v. Burke, 710 A.2d 450, 485 (N.J. 1998) (recognizing the state has an affirmative duty to address educational deficiencies).

[386] Romer v. Evans, 517 U.S. 620, 633 (1996).

[387] *Id.*; U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973).

[388] McCleary v. State, 269 P.3d 227, 247 (Wash. 2012) (quoting Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71, 96 (Wash. 1978)).

[389] *See, e.g.*, Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 208 (Ky. 1989) (citing Carroll v. Dep't of Health, Educ. & Welfare, 410 F. Supp. 234, 238 (W.D. Ky. 1976)) ("[N]either the Kentucky General Assembly nor those individuals responsible for discharging the duties imposed on them by the state constitution . . . can abrogate those duties merely because the monetary obligations becomes [sic] unexpectedly large or onerous."); Claremont Sch. Dist. v. Governor, 794 A.2d 744, 754 (N.H. 2002) (rejecting an administrative rule that excused district compliance with standards for fiscal reasons); Campbell Cty. Sch. Dist. v. State, 907 P.2d 1238, 1279 (Wyo. 1995) (reasoning that a lack of

education, the state has only one choice—to pursue "the constitutionally prescribed end."[390] Thus, efforts to do something else, particularly things that are at odds with the constitutional duty, are illegitimate.

C. *The Illegitimacy of Educational Gerrymandering*

The key doctrinal question for this Article is whether educational gerrymandering breaches the foregoing equal protection and state constitutional principles. Is it possible that politics or gerrymandered opportunity serves some legitimate goal in education? The general answer is no. While politics and gerrymandering play an obvious and permissible role in some other contexts like voting, those factors tend to be inconsistent with the basic premises of education. As the following subsections discuss: statewide systems of education were originally designed to be apolitical; the structures through which education gerrymandering occurs—school districts—exist as a matter of convenience not necessity; and the targeting of any student group as less worthy or deserving is strictly prohibited by basic equal protection.

1. *Apolitical Values*

Unlike other areas, politics should not play a role in systems of education. The voting context, again, provides a helpful point of comparison because politics so often play a role there. If politics can play a role there, why not in education? In voting, courts have struggled to articulate the precise line between permissible and impermissible gerrymandering.[391] On one hand, courts have recognized that redistricting is an inherently political exercise in which the controlling political party draws district lines for the entire state.[392] That party will inevitably draw lines that advantage itself and doing so is not necessarily problematic.[393] On the other, a strong case exists that drawing lines for the sole purpose of burdening or discriminating against certain voters is unconstitutional.[394]

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financial resources is not a sufficient justification for failing to provide the constitutionally required educational system).

390 *McCleary*, 269 P.3d at 248 (quoting Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1137 (1999)).

391 *See* Whitford v. Gill, 218 F. Supp. 3d 837, 886 (W.D. Wis. 2016), *vacated*, 138 S. Ct. 1916 (2018).

392 Hunt v. Cromartie, 526 U.S. 541, 551 (1999).

393 *Id*.

394 *See id*. at 547 (describing how drawing district lines predominantly based on race is impermissible); *Whitford*, 218 F. Supp. 3d at 887 (finding that an intent to entrench the power of one political party at the expense of another satisfies the intent requirement for an equal protection claim); Levitt, *supra* note 23 (arguing that invidious partisan intent should be sufficient to establish a partisan gerrymandering claim).

Education, however, does not implicate the same level of ambiguity and fine line drawing. Access to education tends far more closely toward contexts in which politics and gerrymandering play no legitimate role than it does toward voting. Voter redistricting may be an inherently political process, but education is not. The level of education the state should offer on a statewide basis does involve judgments, some of which involve politics, but the question of whether the state will provide this education to all students is not subject to political debate.[395] The state is not free to make arbitrary distinctions among students. It is not, for instance, within the state's purview to make political judgments about what regions of the state ought to receive a decent education or have a better shot at a high-quality education than others.[396] Again, this prohibition does not mean the net result of state policy must be absolute equality, but it does mean that the state cannot legitimately pursue efforts to create inequality. In this respect, education is far more like the judicial system[397] than the voting system.

The constitutional design of public education is consciously apolitical. In addition to mandating education, state constitutions isolate education decisionmaking from normal political processes in technical and structural ways. The most significant examples are state constitutional provisions that require stable sources of statewide school financing, state level rather than local decisionmaking, and educational uniformity across the state.[398] Beginning in the 1800s, for instance, state constitutions created a constant source of education

395 *See* William Penn Sch. Dist. v. Pa. Dep't of Educ., 170 A.3d 414, 418 (Pa. 2017) (finding a claim relating to the funding scheme for public education in the state was justiciable and not a political question). *But see* Citizens for Strong Sch., Inc. v. Fla. State Bd. of Educ., 232 So. 3d 1163, 1165 (Fla. Dist. Ct. App. 2017) (finding a similar claim to be a non-justiciable political question).

396 *See* Abbott v. Burke, 575 A.2d 359, 403 (N.J. 1990) (rejecting the state's argument that it can underfund some students' needs simply because their needs are so great or "cannot be fully met" and writing that "in New Jersey there is no such thing as an uneducable district, not under our Constitution").

397 It ought to go without saying, for instance, that while the state might legitimately charge filing fees to cover the cost of court administration, it could not charge those same fees if the purpose was to make it harder for some citizens to assert their rights. Access to the courts is referenced as fundamental in some cases. Boddie v. Connecticut, 401 U.S. 371, 374 (1971). A more nuanced analysis indicates that access to the courts only triggers heightened scrutiny when the access to the courts intersects with some other fundamental interest or right. *See* United States v. Kras, 409 U.S. 434, 449–50 (1973). But the state still could not set a precise threshold if the purpose was to benefit or disadvantage some political or other demographic group.

398 *See* JOHN MATHIASON MATZEN, STATE CONSTITUTIONAL PROVISIONS FOR EDUCATION: FUNDAMENTAL ATTITUDE OF THE AMERICAN PEOPLE REGARDING EDUCATION AS REVEALED BY STATE CONSTITUTIONAL PROVISIONS 1776–1929, at 127–32 (1931); Black, *supra* note 28, at 808–16.

funding by establishing "common school funds"[399] requiring that earnings from state-held land be placed in a common school fund and reserved solely for public schools.[400] Some state constitutions even dictate the specific method for distributing those funds among schools.[401] The constitutionalization of school funding was meant to separate education from the year-to-year politics of competing for resources.

State boards of education and state superintendents similarly reflect an apolitical structure. Education power could have been vested at the local level, entirely with the state legislature, or in some independent state officers. Instead, state constitutions chose the third option, vesting them with constitutional authority furthered systemwide rather than regional or local decisionmaking, professional rather than political judgment, and to remain independent from rather than beholden to politicians.[402] This independent constitutional power importantly prevents legislatures from altering or taking it.[403]

2. *Districts of Convenience*

States' ability to gerrymander school funding depends on the existence of school districts. Those districts exist as a pure matter of convenience, not necessity. Part I detailed the various flaws in state funding formulas, most of which involve states foisting burdens onto districts and ignoring the needs of their students. But without school districts, the state would have to accept all funding burdens and meet all student needs itself. Likewise, without districts, political competition between districts would not occur.

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399 *See, e.g.*, ALA. CONST. of 1868, art. XI, § 10 (proceeds from all new and old state lands "shall be inviolably appropriated to educational purposes"); *id.* § 11 (requiring that one-fifth of general annual state revenues "be devoted exclusively to the maintenance of public schools"); *see also* MATZEN, *supra* note 398, at 129–35 (tracking the new common school funds in state constitutions).

400 *See, e.g.*, ALA. CONST. of 1868, art. XI, § 10; FLA. CONST. of 1868, art. VIII, § 4. By 1870, common school funds were included in eighty percent of all states' constitutions. MATZEN, *supra* note 398, at 130 tbl.XX. There were thirty-seven states in the Union as of 1870. *See 1870 Fast Facts*, U.S. CENSUS BUREAU, https://www.census.gov/history/www/through_the_decades/fast_facts/1870_fast_facts.html (last visited June 3, 2019).

401 FLA. CONST. of 1868, art. VIII, § 7 (requiring the distribution of funds among counties based on number of children residing in each county between four and twenty-one years old).

402 Black, *supra* note 28, at 815–16.

403 *See, e.g.*, Coyne v. Walker, 879 N.W.2d 520, 544–46 (Wis. 2016). These structures continue to serve as a basis to strike down legislation that undermines public education and invades these state officers' provinces. *See, e.g.*, *id.* at 546; Matthew Burns, *Judge Temporarily Blocks Law Shifting Power from NC Education Board*, WRAL.COM (Dec. 29, 2016), https://www.wral.com/judge-temporarily-blocks-law-shifting-power-from-nc-education-board/16384139.

While education has long been delivered through districts, school districts do not serve any grand constitutional function. Districts exist for the purpose of administering education, facilitating local input, and convenience.[404] States could just as easily deliver education without school districts. This point is obvious from variance in school district structures from state to state. Hawaii delivers education on a statewide basis without local districts.[405] Michigan and Pennsylvania, conversely, carve up communities into intricate webs of hundreds of districts.[406] North Carolina and Florida operate between these extremes with roughly one school district per county.[407] But even then, the districts vary tremendously in terms of their population size.[408]

The most plausible defense of school districts and, thus, the political competition that they make possible is that school districts further the normative value of local control of education. The Supreme Court's acceptance of local control as a justification for funding disparities in *San Antonio v. Rodriguez*, no doubt, stands as strong support for the potential legitimacy of educational gerrymandering.[409] Moreover, local control theoretically promotes certain positive education outcomes.[410] This Article does not contest that notion, but rather the notion that local control and political competition between districts serve the same masters.

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404 *See* McDuffy v. Sec'y of the Exec. Office of Educ., 615 N.E.2d 516, 548 (Mass. 1993) ("While it is clearly within the power of the Commonwealth to delegate some of the implementation of the duty to local governments, such power does not include a right to abdicate the obligation imposed on . . . them by the Constitution."); Campbell v. State, 907 P.2d 1238, 1272 (Wyo. 1995) (indicating that the state has the power to delegate authority to districts so long as the constitutional mandates of education are met).

405 *Organization*, HAW. STATE DEP'T OF EDUC., http://www.hawaiipublicschools.org/ConnectWithUs/Organization/Pages/home.aspx (last visited June 3, 2019).

406 ANDREW J. COULSON, MACKINAC CTR. FOR PUB. POL'Y, SCHOOL DISTRICT CONSOLIDATION, SIZE AND SPENDING: AN EVALUATION 27 app. C (2007); Black, *supra* note 93, at 423 n.271 (discussing the number of districts in Pennsylvania and how they differ from other states).

407 N.C. DEP'T OF PUB. INSTRUCTION, FACTS AND FIGURES 2015–16, http://www.dpi.state.nc.us/docs/fbs/resources/data/factsfigures/2015-16figures.pdf; Black, *supra* note 93, at 423 n.271 (comparing North Carolina's countywide school district pattern to Pennsylvania's more fragmented system); *School District Data*, FLA. DEP'T OF EDUC., http://www.fldoe.org/accountability/data-sys/school-dis-data (last visited June 3, 2019) (one school district per geographic county).

408 Black, *supra* note 93, at 423.

409 411 U.S. 1, 49 (1973).

410 Michael Heise, *The Political Economy of Education Federalism*, 56B EMORY L.J. 125, 131 (2006).

Local control, as a legitimate goal, entails empowering local communities to support public education and tailor it to their needs.[411] Competition between districts, in contrast, has entailed manipulating education structures, funding, and policies to advantage some communities in relation to others or to minimize the state's overall education responsibilities. These latter goals may appear similar to local control on the surface, but they are entirely different in motive and effect. These illicit goals simply operate under the guise of local control without actually achieving it.[412] Educational gerrymandering has the effect of depriving certain communities of the ability to control education. The careful rational basis review in *Romer*, *Plyler*, and *Moreno* clearly recognizes the distinction between otherwise legitimate goals—like local control—and illicit goals operating under their guise.[413] Thus, the key response to the local control defense of education gerrymandering is to carefully assess whether the gerrymandering actually promotes those goals rather than illicit ones.

3. Indefensible Educational Disadvantages

Finally, comparisons aside, the illegitimacy of educational gerrymandering is common sense when considered in context. As explained above, equal protection prohibits targeting disadvantaged students when that targeting is motivated by animus, stereotypes, and dislike. This simple prohibition in education means that a state cannot pass legislation that, for instance, bars low-income kids from public school because it believes they are uneducable or too costly to educate. In fact, relying on equal protection, federal courts rejected this same justification for the exclusion of students with disabilities as early as 1972.[414] Singling out low-income students for exclusion from a state

411 Richard Briffault, *The Role of Local Control in School Finance Reform*, 24 CONN. L. REV. 773, 808 (1992) (discussing the positives and negatives of local control); Laurie Reynolds, *Uniformity of Taxation and the Preservation of Local Control in School Finance Reform*, 40 U.C. DAVIS L. REV. 1835, 1886 (2007).

412 *See, e.g.*, Serrano v. Priest, 557 P.2d 929, 948 (Cal. 1976), *cert. denied*, 432 U.S. 907 (1977) ("[U]nder the facts as alleged the notion of local control was a 'cruel illusion for the poor school districts' due to limitations placed upon them by the system itself." (quoting Serrano v. Priest, 487 P.2d 1241, 1260 (Cal. 1971))); Olsen v. State, 554 P.2d 139, 145–46 (Or. 1976) (describing the drastic differences in educational opportunities between a poor school district and a wealthy one).

413 Romer v. Evans, 517 U.S. 620, 635 (1996); Plyler v. Doe, 457 U.S. 202, 228–29 (1982); U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973).

414 *See* Mills v. District of Columbia, 348 F. Supp. 866, 875–76 (D.D.C. 1972) ("If sufficient funds are not available to finance all of the services and programs that are needed and desirable in the system then the available funds must be expended equitably in such a manner that no child is entirely excluded from a publicly supported education . . . .").

program that is generally open to everyone would raise the same problem. It would also resemble the problem in *Romer* where the state excluded homosexuals from the ability to seek legal redress in Colorado even though everyone else still could.[415] The fact that the state thinks it has a good non-discriminatory reason for these exclusionary policies is beside the point. And in education, where states have an affirmative state constitutional duty to provide education, the exclusion is all the more problematic. The state simply cannot offer any plausible justification—other than exclusion for its own sake—for the legislation.[416]

Other disadvantages should also be clearly off-limits. Consider an example that falls just short of obviously unconstitutional exclusion—the state places an arbitrary cap on the amount that local districts can spend on low-income students. The state still grants low-income students educational access, but the low spending reduces the quality of education they will receive. While less egregious in effect, the purpose is not far removed from complete exclusion. In both instances, the state is burdening a group of students' educational access for its own sake. This sort of motive does not escape rational basis review simply because it is better disguised or because some other possible motive might exist.

Legislative actions just short of the foregoing should not escape scrutiny either. Consider legislation that bars school districts from providing transportation to students. The state might claim in defense that it wants to encourage schools to spend the recouped resources on improving student achievement. However, while improving achievement is an obviously appropriate goal that could justify budget reallocations,[417] rational basis review does not allow the state to pursue illicit motives through a ruse. If the state's purpose was to make it harder for low-income students to attend school, Supreme Court precedent should treat the legislation as being just as unconstitutional as the examples noted above.

The Court's analysis in *Department of Agriculture v. Moreno* makes this point clear. In *Moreno*, Congress indicated that its changes to the food stamp program were intended to prevent fraud.[418] For the

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415 *Romer*, 517 U.S. at 627.

416 *See, e.g.*, *Plyler*, 457 U.S. at 220; *Mills*, 348 F. Supp. at 876.

417 *See, e.g.*, GI Forum Image De Tejas v. Texas Educ. Agency, 87 F. Supp. 2d 667, 679–81 (W.D. Tex. 2000) (holding that standardized testing furthered the state's goals of holding schools accountable for student achievement and ensuring all students receive adequate learning opportunities was legitimate notwithstanding its racially disparate impact).

418 *Moreno*, 413 U.S. at 535.

Court to strike down the amendment, it had to identify an illicit unstated motive.[419] Congress did not explicitly prohibit "hippies" from receiving food stamps,[420] but the Court reasoned that no other motivation could explain the legislation.[421] The policy, even if it prevented some fraud, simply did not make sense as a piece of normal legitimate legislation.

The primary objection to illicit-motive analysis is that it would require the Court to regularly second-guess the soundness of education policy.[422] The objection overstates reality. A court could, for instance, easily uphold a poorly designed and relatively ineffective attempt to reduce education costs: Even racially disparate impact alone does not trigger judicial concern.[423] Only those policies with a real underlying purpose to burden a particular group of students are unconstitutional. Such a motive only becomes obvious when the disparate impact and ineffectiveness are also coupled with stated intentions or rather unusual legislative activity.

While a narrow line, this line drawing is consistent with the evolving motive analysis in voting. Courts and commentators have increasingly recognized that certain goals are off-limits and require courts to strike down otherwise permissible voting districts.[424] Scholars and courts alike reason that intent alone is enough to strike down partisan gerrymandering.[425] As the lower court in *Whitford* reasoned, "[w]hatever gray may span the area between acceptable and excessive, an intent to entrench a political party in power signals an excessive injection of politics into the redistricting process that impinges on the representational rights of those associated with the party out of power."[426] In other words, heavily manipulated, oddly shaped, and unfair voting districts may be permissible as a general

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[419] *See* Susannah W. Pollvogt, *Unconstitutional Animus*, 81 FORDHAM L. REV. 887, 902–04 (2012) ("[T]he Court first assessed the narrow congressional aim in passing the amendment, which the Court determined to be explicitly based on impermissible animus.").

[420] *Moreno*, 413 U.S. at 533–34 (1973) (quoting the challenged legislation, 7 U.S.C. § 2011).

[421] *Id.* at 534, 538.

[422] *See generally* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (refusing, under rational basis, to wade into issues of educational policy).

[423] *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977) ("Absent a pattern as stark as that in *Gomillion* [*v. Lightfoot*, 364 U.S. 339 (1960)] or *Yick Wo* [*v. Hopkins*, 118 U.S. 356 (1886)], impact alone is not determinative . . . .").

[424] *See* Levitt, *supra* note 23, at 2009–10 (discussing claims of impermissible intent in areas such as redistricting).

[425] Kang, *supra* note 23; Levitt, *supra* note 23, at 2024; *see, e.g.*, Benisek v. Lamone, 266 F. Supp. 3d 799, 801–02 (D. Md. 2017), *aff'd*, 138 S. Ct. 1942 (2018).

[426] Whitford v. Gill, 218 F. Supp. 3d 837, 887 (W.D. Wis. 2016), *vacated*, 138 S. Ct. 1916 (2018).

principle, but not when they are drawn for illicit reasons. The same would be true in education, where ineffective education policies remain constitutional so long as they do not represent efforts to target certain groups of students for disadvantage.

D. Advantages of a Gerrymandering Framework

1. Revealing Common Practice as Normatively Problematic

An anti-gerrymandering lens can normatively, doctrinally, and practically reframe school funding and educational quality fights. Understanding and labeling state funding manipulations as gerrymandering casts them as normatively problematic in ways that better resonate with courts and the public. The power of gerrymandering to change minds is evident in voting. The public response to the public information campaign has been overwhelming in recent years.[427] Even one of the legislators who had previously favored the vote redistricting plan at issue in *Gill v. Whitford* changed his mind.[428] As he came to realize and admit, "[l]egislators are picking their constituents rather than constituents picking their legislators."[429] When that happens, he said, the effect is "to sort of rob the people of their vote."[430] This inversion of government is one that cannot be normatively defended.[431]

Gerrymandering educational opportunity similarly begs for an explanation in a way that other modern education claims do not. Plaintiffs may claim, under an adequacy or equity framework, that their right to education has been violated, but the difference between spending $7500 per pupil and $8000, for instance, is not one that the public, or even many judges, immediately grasp.[432] They must instead accept someone else's judgment regarding adequacy.[433] But a legislative scheme to advantage some communities or disadvantage others

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[427] *See, e.g.*, Michael Wines, *Drive Against Gerrymandering Finds New Life in Ballot Initiatives*, N.Y. TIMES (July 23, 2018), https://www.nytimes.com/2018/07/23/us/gerrymandering-states.html (discussing enormous support for ballot initiatives to eliminate partisan gerrymandering).

[428] Totenberg, *supra* note 23.

[429] *Id*.

[430] *Id.*

[431] *See* Kang, *supra* note 23, at 353 ("The notion that the majority party in government can actively discriminate against the interests of the opposition violates a basic sensibility about democratic competition and fairness.").

[432] *See* BAKER, *supra* note 3, at 3–5 (discussing the enduring debate surrounding the importance of school funding and per-pupil expenditures).

[433] *See, e.g*., Jill Ambrose, Note, *A Fourth Wave of Education Funding Litigation: How Education Standards and Costing-Out Studies Can Aid Plaintiffs in Pennsylvania and Beyond*, 19 B.U. PUB. INT. L.J. 107, 109 (2009) (discussing the prevalence of cost-out studies in school funding litigation).

flies in the face of fairness and good government no matter what government benefit is at stake. It does not require further explanation. It simply requires advocates to reveal that educational gerrymandering has, in fact, occurred.

2. *Clearer and More Intuitive Doctrinal Standards*

A gerrymandering framework creates an equal protection and education clause challenge to forms of behavior previously deemed legally acceptable. From a federal constitutional perspective, states have had free rein to operate almost any type of education scheme they could imagine, regardless of its effect on students.[434] At the state level, courts have recognized claims of inadequate and unequal educational inputs and outputs,[435] but never stopped to consider why states are failing in their education duties or the possibility that some of the reasons were obnoxious to the constitution. By ignoring these motivations and the behaviors they produce,[436] courts inadvertently normalized what should be aberrational—both constitutionally and socially. Gerrymandering, as Part I demonstrates, has simply become the game that many states play as they navigate the political and constitutional demands in their state. Directly challenging gerrymandering for what it is opens constitutional doors that were previously closed.

A gerrymandering framework also offers a solution to courts' ongoing struggles in adjudicating adequacy and equity claims. The typical adequacy or equity claim in state court involves difficult educational evaluations.[437] Courts must, for instance, determine what resources matter most to student outcomes,[438] the meaning of an adequate education,[439] whether current resources are sufficient to deliver that education,[440] and the extent to which courts can compel particular remedies.[441] The fights between the legislature and the court over

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[434] *See* McUsic, *supra* note 92, at 1342 (discussing the limiting effect federal equal protection law has had on school finance litigation). So long as the scheme did not involve intentional racial discrimination, the Federal Constitution presumably provided no protection. *See id.* at 1342–44.

[435] *See, e.g.*, Weishart, *supra* note 273, at 529.

[436] *See* Scott R. Bauries, *A Common Law Constitutionalism for the Right to Education*, 48 GA. L. REV. 949, 1002 (2014) (urging courts to consider the adequacy of inputs and outcomes in determining "what an 'adequate education' means for an individual student").

[437] *Id.* at 974.

[438] *See, e.g.*, Campaign for Fiscal Equity, Inc. v. State, 801 N.E.2d 326, 332–36 (N.Y. 2003).

[439] Rose v. Council for Better Educ., Inc., 790 S.W.2d 186 (Ky. 1989); Leandro v. State, 488 S.E.2d 249 (N.C. 1997); Abbeville v. State, 515 S.E.2d 535 (S.C. 1999).

[440] Conn. Coal. for Justice in Educ. Funding, Inc. v. Rell, 990 A.2d 206, 212–13 (Conn. 2010); *Campaign for Fiscal Equity, Inc.*, 801 N.E.2d at 332–36.

[441] Hoke Cty. Bd. of Educ. v. State, 599 S.E.2d 365, 393 (N.C. 2004).

these issues often become the triggering event for gerrymandering to occur.

Gerrymandering claims do not inherently involve these issues or call on courts to evaluate matters of degree. Rather, with gerrymandering, courts would focus on legislative goals and motivations. Whether the legislature is doing a good job in providing adequate educational opportunities is beside the point. The primary question is whether the legislature is actually trying to do its job or whether, instead, it is manipulating education to further other illegitimate goals.[442] Shifting to this inquiry would also help address the separation of power and judicial authority issues that plague the typical school funding case.[443] Articulating clear and consistent rules regarding what states cannot do, rather than vaguely suggesting the various things a state must do, would reinforce the court's internal and external authority to intervene.[444] Intervening on these grounds involves a much narrower holding than the typical equity or adequacy case.

To be sure, actually discerning legislative intent is not always easy.[445] But the question to be answered regarding legislative intent is not a matter of degree. It is a black and white question. Given the nature of the intent a court is searching for, answering the question of legislative intent is not as difficult as, for instance, identifying racial motivations.[446] The unusualness of gerrymandering itself will tip courts off to illicit intent,[447] and the methods are almost impossible to hide. Moreover, questions of intent, no matter their difficulty, are ones that courts have long been charged with answering.[448]

3. A Check on Otherwise Unlimited Exercises of Power

A gerrymandering framework also responds to the problems associated with state legislatures' unlimited exercise of discretion in education. In the absence of a meaningful federal check, relatively few

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442 Bauries, *supra* note 436, at 986.

443 *See, e.g.*, *id.* at 986–87.

444 *Id.*

445 *See, e.g.*, John F. Manning, *Without the Pretense of Legislative Intent*, 130 HARV. L. REV. 2397 (2017).

446 *See generally* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (analyzing the changing nature of discrimination and the difficulty of identifying it).

447 United States v. Windsor, 570 U.S. 744, 768 (2013); Romer v. Evans, 517 U.S. 620, 633 (1996) (quoting Louisville Gas & Elec. Co. v. Coleman, 277 U.S. 32, 37–38 (1928)).

448 *See generally* Levitt, *supra* note 23 (exploring how to identify invidious intent in the context of partisan gerrymandering).

external limits exist on state education policy.[449] In states where state courts have refused to enforce education clauses, students have no recourse at all.[450] In states where courts have intervened, legislatures are still often willing to defy and delay state courts' demands.[451] The past decade has offered signs that things may have gotten worse in some states.[452] A gerrymandering approach has the potential to create both a federal check and a new tool for state courts themselves. That check, even if not regularly exercised, should scare states away from their most problematic tendencies and toward more equitable and adequate educational policies. The net effect of all the foregoing improvements would be to achieve the ultimate goal—improved educational opportunities.

Conclusion

For all its past success, state-based litigation has never come close to breaking states' bad habits. Even in states where the litigation has been successful, legislatures are resisting court orders on multiple fronts, ignoring court orders altogether, dragging out remedies for years, or doing just enough to get courts off their back before reverting back to their old ways. The reality of these limitations is best captured by the simple fact that thirty states spend less on education today than they did a decade ago. And now, the very concepts of educational adequacy and equity struggle to retain the doctrinal and normative force they once had.

These challenges beg for a new solution. Otherwise, the constitutional right to education risks the possibility of a long, tortured decline analogous to the one the affirmative duty to desegregate experienced in federal courts. Reconceptualizing education funding failures as active efforts to gerrymander educational opportunity can be that

449 *See* Comm. for Educ. Rights v. Edgar, 672 N.E.2d 1178, 1196 (Ill. 1996) (finding that school finance issues are nonjusticiable and must be resolved in a "legislative forum rather than in the courts").

450 Citizens for Strong Sch., Inc. v. Fla. State Bd. of Educ., 232 So. 3d 1163, 1165–66 (Fla. Dist. Ct. App. 2017) (finding that adequacy claims "raise political questions not subject to judicial review, because the relevant constitutional text does not contain judicially discoverable standards").

451 *See, e.g.*, Andrew Ujifusa, *Kansas Lawmakers OK Shift to Block-Grant Funding, but Court Fight Looms*, Educ. Wk.'s blogs: State EdWatch (Mar. 17, 2015), http://blogs.edweek.org/edweek/state_edwatch/2015/03/kansas_lawmakers_ok_shift_to_block-grant_funding_but_court_fight_looms.html. The most that some state legislatures have done to acquiesce is to propose a two-year "time out" while they determine the best course of action. *See, e.g.*, McCleary v. State, 269 P.3d 227, 239 (Wash. 2012); Don Hineman, *House Moves to Repeal School Finance Formula*, State Representative Don Hineman (Mar. 14, 2015), http://www.hinemanforkansas.org/newsletters/newsletter-2015-03-14.html.

452 Black, *supra* note 35, at 427.

solution. Ample facts demonstrate that states go to extreme lengths to gerrymander their school funding formulas, even after state supreme courts have ordered them to fix their school funding failures. The list of manipulations is so long and so commonplace that scholars and courts have failed to recognize that the manipulations are actually an unusual form of legislating. States are picking winners and losers—and in an area where students possess affirmative rights. When these failures are understood as gerrymandering, basic equal protection and state constitutional principles demand that they stop.