South Carolina Law Review

Volume 56
Issue 4 *ANNUAL SURVEY OF SOUTH CAROLINA LAW*

Article 10

Summer 2005

The Opportunity in Adequacy Ligitation: Recognizing the Legitimacy and Value of Pursuing Educational Reform Through the Courts

Amanda S. Hawthorne

THE OPPORTUNITY IN ADEQUACY LITIGATION: RECOGNIZING THE LEGITIMACY AND VALUE OF PURSUING EDUCATIONAL REFORM THROUGH THE COURTS

I. INTRODUCTION

After more than ten years of litigation, South Carolina is on the brink of discovering whether the state's education system is due for a major overhaul. Following the South Carolina Supreme Court's ruling in *Abbeville County School District v. State*,[1] the Clarendon County Circuit Court must determine whether the state is fulfilling its constitutional obligation to provide South Carolina students with a "minimally adequate education."[2] The plaintiffs are "less wealthy," rural public school districts that initially brought suit against the state in 1993.[3] While the pursuit of educational reform through the courts may be cast as a disquieting innovation by members of the state's judicial and political branches, the pending litigation in South Carolina is part of a national trend that began more than thirty years ago.[4] Most states have faced legal challenges to their education systems,[5] although the nature of the claims has changed over time. The most recent challenges are based on education clauses found in state constitutions and address the quality of education provided rather than simply the amount or distribution of funding.[6] Courts interpret such clauses as establishing an affirmative duty on the states to provide adequacy in education.[7]

This Note examines the most recent installment in South Carolina's educational adequacy litigation in light of national trends at the state level. In South Carolina, judges' inhibitions about transgressing the boundaries of the judicial role threaten to limit the efficacy of education adequacy litigation. The South Carolina courts must assume a more active role, however, in light of the state's history of

---

1. 335 S.C. 58, 515 S.E.2d 535 (1999).

2. *Id.* at 69, 515 S.E.2d at 540-41.

3. *Id.* at 63, 515 S.E.2d at 538.

4. For an overview on the history of school finance litigation, see National Conference of State Legislatures, *Education Finance Litigation: History, Issues and Current Status, at* http://www.ncsl.org/programs/educ/LitigationCon.htm (last visited Jan. 9, 2005).

5. As of 2002, at least forty-three states faced legal challenges to the constitutionality of their education systems. Liz Kramer, Note, *Achieving Equitable Education Through the Courts: A Comparative Analysis of Three States*, 31 J.L. & EDUC. 1, 6 (2002).

6. For a discussion on how the focus of school funding cases has turned from equity to adequacy, see Patricia F. First & Barbara M. De Luca, *The Meaning of Educational Adequacy: The Confusion of* DeRolph, 32 J.L. & EDUC. 185, 188–90 (2003); National Conference of State Legislatures, *supra* note 4, at http://www.ncsl.org/programs/educ/LitigationCon.htm.

7. *See, e.g.*, Rose v. Council for Better Educ., 790 S.W.2d 186, 205, 211 (Ky. 1989) (holding the state constitutional guarantee of an "efficient system of common schools . . . requires the General Assembly to establish a system of common schools that provides an equal opportunity for children to have an adequate education"); Leandro v. State, 488 S.E.2d 249, 254 (N.C. 1997) (holding that the North Carolina Constitution's guarantee of "a general and uniform system of free public schools" amount to a qualitative right to a "sound basic education"); *Abbeville*, 335 S.C. at 67–68, 515 S.E.2d at 539–40 (holding that the General Assembly's constitutional duty to "provide for the maintenance and support of a system of free public education" guarantees the right to a "minimally adequate education").

neglecting education to the detriment of the public at large. Educational reform through the courts is justified given the inherent flexibility of the separation of powers doctrine at the state level and the courts' ability to draw from the constantly evolving case law and reforms from other states. With an eye toward reforming the ailing educational system and benefiting society as a whole, South Carolina state courts and policy makers should follow the lead of other state courts in assuming broad interpretations of educational adequacy and opportunity.

Part II of this Note presents an overview of school reform litigation and its evolution from a funding equity to an educational adequacy perspective. Part II also describes the development of South Carolina's educational adequacy case in *Abbeville*. Next, Part III explains why the courts are an appropriate and legitimate forum for educational reform. Part IV analyzes the definition of "educational adequacy" in terms of its goal for reform as articulated by the South Carolina Supreme Court and other state courts. Part V discusses the meaning of opportunity as it applies to the state's duty under South Carolina's education clause. Finally, Part VI argues for South Carolina courts and policy makers to take steps toward reform because of the importance of an adequate education, not only for the benefit of children in the plaintiff districts, but for the good of the state as a whole.

II. BACKGROUND

A. The Development of School Reform Litigation

The evolution of school reform litigation developed in three "waves."[8] The first wave of litigation began in 1971 with the California Supreme Court's decision in *Serrano v. Priest*.[9] In *Serrano*, the plaintiffs successfully challenged the state's education finance scheme based on the Fourteenth Amendment's Equal Protection Clause.[10] According to the plaintiffs, the state's heavy reliance on local property taxes to fund its schools led to "substantial disparities in the quality and . . . availability of educational opportunities . . . among the several school districts of the State."[11] The plaintiffs argued that the financing scheme violated the Fourteenth Amendment because the quality of education within a given district was dependent on its inhabitants' wealth.[12] The California Supreme Court agreed and invalidated the financing system because it denied plaintiffs' equal protection under the Fourteenth Amendment.[13] Finding education a fundamental right and wealth a suspect classification, the court applied a strict scrutiny standard.[14]

The first wave was short-lived because the United States Supreme Court's 1973 decision in *San Antonio Independent School District v. Rodriguez*[15] precluded reliance on the Equal Protection Clause as an avenue for education finance

8. William E. Thro, *The Third Wave: The Impact of the Montana, Kentucky, and Texas Decisions on the Future of Public School Finance Reform Litigation*, 19 J.L. & EDUC. 219, 222 (1990).

9. *Id.* at 223 n.22 (citing Serrano v. Priest, 487 P.2d 1241 (Cal. 1971)).

10. *See Serrano*, 487 P.2d at 1244 (citing U.S. CONST. amend XIV, § 1). Plaintiffs were Los Angeles County public school children and their parents. *Id.* at 1244.

11. *Id.*

12. *Id.*

13. *Id.* at 1263.

14. Serrano v. Priest, 487 P.2d 1241 (Cal. 1971).

15. 411 U.S. 1 (1973).

reform.[16] The case came before the Texas District Court on facts similar to *Serrano*, and the court was as receptive to the plaintiffs' claims as the California Supreme Court was to the *Serrano* plaintiffs' claims.[17] The Supreme Court reversed the district court's decision, however, finding that Texas's school financing scheme passed muster under the less stringent rational basis standard.[18] Although the Court stressed the importance of education, it decided that education was not a fundamental right under the Constitution and held that wealth was not a suspect classification.[19]

With no hope for relief in federal court after the first wave of litigation, plaintiffs in the second wave turned to their respective state courts, beginning with *Robinson v. Cahill* in 1973.[20] During the second wave, plaintiffs sought education finance reform based on education clauses and equal protection clauses in their state constitutions.[21] Despite the available bases for remedies in every state,[22] plaintiffs' reform efforts during the second wave met with limited success.[23]

Finally, in 1989 *Helena*, *Rose*, and *Edgewood* ushered in the third wave.[24] These three decisions represented a new trend because they invalidated school financing schemes based solely on education clauses.[25] The Kentucky Supreme Court took its decision in *Rose v. Council for Better Education* one step further by using the education clause to declare its entire public school system unconstitutional.[26] This broad decision demonstrated that "school finance reform litigation may be proven to be a road to more general educational reform."[27] As the third wave progressed, focus shifted from financial equity to educational adequacy as it became apparent that equal distribution of funding did not necessarily improve educational outcomes.[28] Professors James Liebman and Charles Sabel, leading

---

16. *See* Thro, *supra* note 8, at 224–25 (citing San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973)).

17. *Compare Rodriguez*, 411 U.S. at 16, *with supra* notes 9–14 and accompanying text (finding for the plaintiffs based on constitutional arguments). Plaintiffs in *Rodriguez* were "Mexican-American parents whose children attend[ed] . . . schools in the Edgewood Independent School District, an urban school district in San Antonio, Texas." *Id.* at 4–5.

18. *Id.* at 55.

19. *Id.* at 28–40.

20. 303 A.2d 273 (N.J. 1973), *cited in* Thro, *supra* note 8, at 228–29.

21. Thro, *supra* note 8, at 228–29. Mississippi is the only state that lacks an education clause. *Id.* at 229. Each state's education clause guarantees "at a minimum . . . some sort of system of free public education." *Id.* In addition, each state constitution contains a provision that a court could interpret to guaranty equal protection. *Id.* at 229–31 nn.49–54.

22. *See supra* note 21.

23. For six victories, fifteen defeats occurred, including a defeat in South Carolina. Thro, *supra* note 8, at 232 nn.62–63.

24. *See* Thro, *supra* note 8, at 233–43 (citing Helena Elementary Sch. Dist. No. 1 v. State, 769 P.2d 684 (Mont. 1989); Rose v. Council for Better Educ., Inc., 790 S.W.2d 186 (Ky. 1989); Edgewood Ind. Sch. Dist. v. Kirby, 777 S.W.2d 391 (Tex. 1989)).

25. *See* Thro, *supra* note 8, at 239.

26. *Rose*, 790 S.W.2d at 215, *cited in* Thro, *supra* note 8, at 236.

27. Thro, *supra* note 8, at 239.

28. *See* First & De Luca, *supra* note 6, at 190. From its inception, *Abbeville* exemplified the movement away from equity and towards adequacy: "[A]ppellants do not seek 'equal' state funding since they already receive more than wealthier districts, but instead allege that the funding results in an inadequate education." Abbeville County Sch. Dist. v. State, 335 S.C. 58, 64, 515 S.E.2d 535, 538 (1999).

scholars on contemporary education reform explained, "[A]dequacy no longer connotes financial adequacy.... What counts is the adequacy of the outcome, not the cross-district equality of the inputs."[29] Despite the popular misconception,[30] *Abbeville* is an educational adequacy case.[31] Though the case began as a challenge to funding, the ultimate issue on remand is whether South Carolina is providing its students with a minimally adequate education.[32] Funding remains an important background issue only to the extent that "every judicial order implies an allocation of public funds sufficient to enforce it."[33] This distinction is important, in part, because educational adequacy cases "rais[e] many legal and factual questions that typically are resolved over the course of several decisions."[34]

---

29. James S. Liebman & Charles F. Sabel, *A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform*, 28 N.Y.U. REV. L. & SOC. CHANGE 183, 205 (2003).

30. The media incorrectly characterizes *Abbeville* as a school finance case. The following headlines illustrate the misconception: James T. Hammond, *Poor Schools Renew Battle for Funding*, GREENVILLE NEWS (S.C.), July 28, 2003, at 1A; Paul Krohne, *Important Questions on Funding Our Public Schools*, THE STATE (Columbia, S.C.), Feb. 20, 2004, at A15; Beth Padgett, *Poor Districts Already Get More Funds*, GREENVILLE NEWS (S.C.), Aug. 3, 2003, at 1A; Bill Robinson & John C. Drake, *School Funding Trial Opens in Manning; Districts' Lawyer Accuses State of 'Continuing Neglect,'* THE STATE (Columbia, S.C.), July 29, 2003, at A1. This media-perpetuated misunderstanding could have detrimental effects at the remedial stage. For example, in New Jersey "white citizens . . . inaccurately perceived school finance reform as primarily benefiting blacks," leading to strong public opposition to remedial efforts. James E. Ryan, *The Influence of Race in School Finance Reform*, 98 MICH. L. REV. 432, 432–33 (1999). The public, the courts, and policymakers need to understand *Abbeville* as an educational adequacy case that holds benefits for all South Carolinians. *See infra* notes 53–57, 92–97 and accompanying text. South Carolina must view the case as one for educational adequacy, particularly because of serious questions raised as to the efficacy of finance-based reforms. *See, e.g.*, Jeffrey Metzler, *Inequitable Equilibrium: School Finance in the United States*, 36 IND. L. REV. 561, 563 (2003) ("After conducting an empirical analysis . . . I learned that no connection can be made between a state's basic approach to education finance and the equality of educational opportunity provided to students."); Virginia Postrel, *A Texas Experiment That Shifts Money from Rich to Poor School Districts is Turning into a Major Policy Disaster*, N.Y. TIMES, Oct. 7, 2004, at C2 (describing the failure of Texas's school finance equalization program).

31. *See Abbeville*, 335 S.C. at 69, 515 S.E.2d at 541 (1999).

32. *Id.*

33. *See* Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1059 (2004); *see also* Deborah A. Verstegen, *The Law of Financing Education: Towards a Theory of Adequacy: The Continuing Saga of Equal Educational Opportunity in the Context of State Constitutional Challenges to School Finance Systems*, 23 ST. LOUIS U. PUB. L. REV. 499, 528 (2004) ("Resource indicators of adequacy . . . include opportunities provided to children in schools and classrooms, such as the depth and breadth of curriculum, teacher quality, the ability to attract and retain quality teachers, facilities needs and safety, class sizes, budget flexibility and stability, and other input, output, and process indicators.").

34. Josh Kagan, Note, *A Civics Action: Interpreting "Adequacy" In State Constitutions' Education Clauses*, 78 N.Y.U. L. REV. 2241, 2245 (2003). An example of the complexity associated with adequacy cases is *Hoke County Bd. of Educ. v. State*, 599 S.E.2d 365, 373 (N.C. 2004), where the trial to determine whether North Carolina was providing students with a sound basic education "lasted approximately fourteen months and resulted in over fifty boxes of exhibits and transcripts, an eight-volume record on appeal, and a memorandum of decision that exceeds 400 pages." *Id.*

B. *School Reform Litigation in South Carolina*

South Carolina's educational adequacy case began in 1993 when forty public school districts sued the state, alleging that the state's education finance scheme violated state and federal law.[35] Initially, the circuit court dismissed for failure to state a cause of action.[36] After affirming the dismissal of the plaintiffs' claims under state and federal equal protection clauses and South Carolina's Education Finance Act (EFA), the supreme court went on to hold that the South Carolina Constitution "requires the General Assembly to provide the opportunity for each child to receive a minimally adequate education."[37] In so holding, the court supplied interpretive content to the language of the state constitution's education clause: "The General Assembly shall provide for the maintenance and support of a system of free public schools open to all children in the state and shall establish, organize and support such other public institutions of learning as may be desirable."[38] Absent from the bare language of the clause is any qualitative notion of adequacy. Nonetheless, the court supported its holding by citing to other jurisdictions' interpretations of similar language in their states' education clauses and to the General Assembly's own acknowledgment under the Education Finance Act (EFA) of the need for "the availability of at least minimum educational programs and services."[39] While some commentators may find fault with the court implying an adequacy standard in the education clause,[40] the court's opinion is consistent with an experimentalist approach and, thus, the national trend among states.[41]

The circuit court is hearing *Abbeville* on remand to determine whether the state is meeting its "constitutional duty . . . [of providing] a minimally adequate education to each student in South Carolina."[42] The supreme court defined a minimally adequate education:

> [A minimally adequate education] includes providing students adequate and safe facilities in which they have the opportunity to acquire: 1) the ability to read, write, and speak the English language, and knowledge of mathematics and physical science; 2)

---

35. Jennifer L. Fogle, Note, Abbeville County School District v. State*: The Right to a Minimally Adequate Education in South Carolina*, 51 S.C. L. REV. 781, 782 (2000). Eight of the original forty districts continue as parties to the litigation: Allendale, Dillon 2, Florence 4, Hampton 2, Jasper, Lee, Marion 7 and Orangeburg 3. Nelson, Mullins, Riley & Scarborough, L.L.P., Adequacy in Education, *at* http://www.scschoolcase.com/education-trial-presentations.cfm (last visited Jan. 10, 2005).

36. Abbeville County Sch. Dist. v. State, 335 S.C. 58, 63, 515 S.E.2d 535, 538 (1999).

37. *Id.* at 68, 515 S.E.2d at 540.

38. *See id.* at 66, 515 S.E.2d at 539 (quoting S.C. CONST. art. XI, § 3).

39. S.C. CODE ANN. § 59-20-30 (Law. Co-op. 1990) (language unchanged in S.C. CODE ANN. § 59-20-30 (West 2004)), *quoted in Abbeville*, 335 S.C. at 65, 515 S.E.2d at 539.

40. *See* Fogle, *supra* note 35, at 804 (*citing* Thro, *supra* note 8). Fogle rightly questions Thro's "'textual taxonomy' of education clauses" in light of the South Carolina Supreme Court's interpretation of the constitution's education clause. *Id.* at 804–05.

41. *See infra* notes 70–72 and accompanying text. Furthermore, state politicians argue that judicial intervention is consistent with reform efforts in South Carolina. *See infra* note 50 and accompanying text, *see also* Garrow, *infra* note 53, at 244 (quoting State Senator John W. Matthews Jr.: "[T]he South has seen 'no progressive leaps without court orders'").

42. Abbeville County Sch. Dist. v. State, 335 S.C. 58, 69, 515 S.E.2d 535, 541 (1999).

> a fundamental knowledge of economic, social, and political systems, and of history and governmental processes; and 3) academic and vocational skills.[43]

After 101 days in trial over a period of sixteen months, Judge Thomas W. Cooper has heard testimony from seventy witnesses.[44] Judge Cooper hopes to render his opinion in the summer of 2005.[45]

III. THE LEGITIMACY OF PURSUING EDUCATIONAL REFORM THROUGH THE COURTS

A. Education Reform Litigation Enforces Destabilization Rights

Professor Charles Sabel and Professor William Simon's theory of destabilization rights helps to explain why educational reform efforts developed in the South Carolina courts. In their article, Sabel and Simon outline how "public law litigation" serves as a catalyst to institutional change and "democratic accountability."[46] According to Sabel and Simon, educational adequacy claims assert "destabilization rights."[47] Destabilization rights, they say, are "claims to unsettle and open up public institutions that have chronically failed to meet their obligations and that are substantially insulated from the normal processes of political accountability."[48] A prima facie case for destabilization rights involves both 1) "failure to meet standards" and 2) "political blockage."[49] Some South Carolina politicians have indicated that the plaintiffs in *Abbeville* assert a prima facie case. For example, State Senator John Land lamented that South Carolina's failure to meet standards is typical:

> Before we adequately funded our prisons, the federal court had to tell us to do it. Before we integrated our schools, the court had to tell us to do it. There are too many times when our Legislature did not do what it should have done, and the courts had to intervene. It's the same old thing over and over again.[50]

In her testimony for the plaintiffs, Representative Gilda Cobb-Hunter agreed that the General Assembly would not act to improve education unless compelled by the

---

43. *Id.* at 68–69, 515 S.E.2d at 540 (citing Rose v. Council for Better Educ., Inc., 790 S.W.2d 186 (Ky. 1989); McDuffy v. Sec'y of the Executive Office of Educ., 615 N.E.2d 516 (Mass. 1993); Leandro v. State, 488 S.E.2d 249 (N.C. 1997); Randolph County Bd. of Educ. v. Adams, 467 S.E.2d 150 (W.Va 1995)).

44. Bill Robinson & Ellyde Roko, *Closing Arguments Scheduled Today; But Resolution of Issue Might be Years Away*, THE STATE (Columbia, SC), Dec. 9, 2004, at A1.

45. *Id.*

46. Sabel & Simon, *supra* note 33, at 1016.

47. *Id.* at 1020.

48. *Id.*

49. *Id.* at 1062.

50. James T. Hammond, *Poor Schools Renew Battle for Funding*, GREENVILLE NEWS (S.C.), July 28, 2003, at 8A.

court.[51] She also testified that the General Assembly did not fully fund its own educational initiatives.[52]

Speaking to the second element of political blockage, Land asserted "South Carolina is two states: the rich state of South Carolina and the poor State of South Carolina"; to this, Professor David J. Garrow adds, "[F]irm majorities in the Republican-controlled state House and state Senate have no interest in eliminating the disparity."[53] As a witness for the plaintiffs, State Senator John Matthews opined that the poor, rural districts in South Carolina exercise diminished influence in the General Assembly.[54]

B. Separation of Powers

Despite objections framed in separation of powers terms by opponents of adequacy litigation, the state courts are appropriate venues for education reform. The separation of powers doctrine considers the branches of the federal government as "coordinate, independent, and coequal" with separate and distinct governmental powers.[55] The doctrine assumes that each branch must not exercise powers properly delegated to another branch.

In *Abbeville*, the South Carolina Supreme Court acted within the bounds of its power, albeit with some hesitation, when it interpreted the education clause. As the court recognized, "[i]t is the duty of this Court to interpret and declare the meaning of the Constitution."[56] Nonetheless, it appears that the court was not entirely comfortable giving meaning to the right. The court was careful to note the following:

> We recognize that we are not experts in education, and we do not intend to dictate the programs utilized in our public schools. Instead, we have defined, within deliberately broad parameters, the outlines of the constitution's requirement of minimally adequate education . . . .
>
> . . . We do not intend by this opinion to suggest to any party that we will usurp the authority of [the legislative] branch to determine the way in which educational opportunities are delivered to the children of our State. We do not intend the courts of this State to become super-legislatures or super-school boards.[57]

---

51. Tom Truitt, *Law, Justice, and the Constitution: South Carolina's Unfulfilled Dream*, South Carolina Association of School Administrators (May 3, 2004), *at* http://www.scasa.org/Trial_Day_65.doc. In his series available through the South Carolina Association of School Administrator's web site, Dr. Tom Truitt reports his observations of the trial in Manning, SC.

52. *Id.*; *see also* Hammond, *supra* note 30.

53. David J. Garrow, *Clarendon County in Black & White: A Visit to the Home of* Briggs v. Elliot, *50 Years After* Brown v. Board of Education, 7 GREEN BAG 2d 237, 244 (2004).

54. Tom Truitt, *Law, Justice, and the Constitution: South Carolina's Unfulfilled Promises*, South Carolina Association of School Administrators (Sept. 8, 2003), *at* http://www.scasa.org/Trial_Day_15.doc.

55. 16A AM. JUR. 2D *Constitutional Law* § 246 (1998).

56. Abbeville County Sch. Dist. v. State, 335 S.C. 58, 67, 515 S.E.2d 535, 539 (1999) (citing State *ex rel.* Rawlinson v. Ansel, 76 S.C. 395, 57 S.E. 185 (1907)).

57. *Id.* at 69, 515 S.E.2d at 540–41.

North Carolina expressed a similar concern in *Leandro* but nonetheless set out a more specific definition with more concrete guidelines for the court on remand.[58] Given the South Carolina Supreme Court's self-acknowledged "duty to interpret and declare the meaning of [the education] clause," its apparent deference to the legislature in defining the constitutional right is misplaced.[59]

Judge Cooper should not be reluctant to hold that the state fails to meet its constitutional duty because of perceived separation of powers constraints. The federal separation of powers doctrine does not automatically apply in individual states: "As far as local governments are concerned, there is no natural law of separation of powers, and the powers of local governments are separate only insofar as the state constitution makes them separate."[60] According to Professor Helen Hershkoff, significant differences between state and federal systems merit more judicial activism at the state level.[61] For example, while federal powers are limited and constrained by the United States Constitution, "state constitutions often include positive rights and regulatory norms" that "engage state courts in substantive areas that have historically been outside the [federal judiciary's] domain."[62] South Carolina's education clause confers such a positive right on its citizens.[63] As written, it resembles a "broad administrative code[] that invite[s] and depend[s] on judicial involvement for [its] interpretation and enforcement."[64]

When evaluating the proper role of the judiciary within the state, it is important to note that while federal judges are appointed for life, state judges serve for limited terms. In South Carolina, the General Assembly elects and reelects state court judges.[65] Therefore, far from being insulated from "political accountability,"[66] state judges depend on the legislature for their continued appointments. Another

---

58. Leandro v. State, 488 S.E.2d 249, 259–61 (N.C. 1997); *see also* Hoke County Bd. of Educ. v. State, 599 S.E.2d 365, 390–91 (N.C. 2004) (describing the detailed instructions given by the trial court in *Leandro*).

59. *Abbeville*, 335 S.C. at 67, 515 S.E.2d at 540 (citing State *ex rel* Rawlinson v. Ansel, 6 S.C. 395, 57 S.E.2d 185 (1907)); *see also* Kagan, *supra* note 34, at 2251 (allowing the legislature to define adequacy "delegates judicial authority to the legislature without constitutional basis").

60. 16A AM. JUR. 2D *Constitutional Law* § 275 (1998). Although South Carolina's constitution contains a separation of powers provision in article I, section 8, according to James Underwood, South Carolina has a deeply-rooted history of legislative dominance that is tempered somewhat by a tradition of judicial review that developed in the state "long before [it] mature[d] . . . in the federal system." JAMES L. UNDERWOOD, THE CONSTITUTION OF SOUTH CAROLINA 27 (1986).

61. Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1887–90 (2001).

62. *Id.* at 1889–90.

63. "The General Assembly shall provide for the maintenance and support of a system of free public schools open to all children in the State and shall establish, organize and support such other public institutions of learning, as may be desirable." S.C. CONST. art. XI, § 3.

64. *See* Hershkoff, *supra* note 61, at 1891; *see also* Campaign for Fiscal Equity, Inc. v. State, 801 N.E.2d 326, 349 (N.Y. 2003) ("Courts are . . . well suited to interpret and safeguard constitutional rights and review challenged acts of our co-equal branches of government—not in order to make policy but in order to assure the protection of constitutional rights.").

65. S.C. CONST. art. V, §§ 3, 8, 13.

66. Michael Heise, *Preliminary Thoughts on the Virtues of Passive Dialogue*, 34 AKRON L. REV. 73, 85 (2000) ("Many of the Framers harbored deep concerns about the potential for a judicial branch wholly insulated from direct political accountability which, in turn, could generate a tyrannical superlegislature."). Such concerns are diminished in a state like South Carolina where the General Assembly elects and reelects state judges.

important factor is the sophistication and fact-finding ability of the legislature. Unlike Congress, state legislatures are not necessarily better equipped to analyze policy issues relative to the courts.[67]

At the remedial stage, courts are well-advised to defer, to the extent necessary, to the legislature.[68] The courts find themselves walking a fine line between deferring too much, thus allowing political abuses to remain in play, and exerting too much control over traditional legislative functions.[69] Striking the appropriate balance is important, and the separation of powers doctrine is flexible enough to allow such a balance.[70] Although the court's ongoing role at the remedial level has the most potential to blur traditional notions of the separation of powers doctrine, both the court and the legislature have the benefit of observing and drawing from the relative successes and failures of other states as they collaborate toward reform.[71]

C. *Applying the Lessons of Other States' Experiences: The Experimentalist Approach*

In analyzing *Abbeville*'s path, the experiences of other states are illustrative. An experimentalist approach facilitates the progression of educational reform movements in the courts.[72] Sabel and Simon describe the experimentalist approach as a "process of disciplined comparison . . . designed to facilitate learning by directing attention to the practices of the most successful peer institutions."[73] Although Sabel and Simon discuss the experimentalist approach with regard to remedial development, the process of "disciplined comparison" seems relevant at

---

67. "[T]he legislature's comparative advantage over courts in addressing complex policy questions is less pronounced in many states than in the federal system, because state legislatures often lack the research resources that Congress has." Kagan, *supra* note 34, at 2258. The parties in the current installment of *Abbeville* have provided the circuit court with a voluminous record of expert testimony on remand. In contrast, the South Carolina General Assembly declined to consider Representative Gilda Cobb-Hunter's bill to study school finance in 1999. Truitt, *supra* note 51 (May 3, 2004), *at* http://www.scasa.org/Trial_Day_65.doc.

68. Courts and policymakers are increasingly concerned with decisions that lead to extensive judicial oversight and cause the courts to become entangled in possible policy failures. *See, e.g.*, Heise, *supra* note 66, at 98–103 (arguing against active judicial participation based on the experiences of New Jersey and Texas).

69. Liebman & Sabel, *supra* note 29, at 280.

70. "[T]he modern view of separation of powers rejects the metaphysical abstractions and reverts instead to a more pragmatic, flexible, functional approach, giving recognition to the fact that there may be a certain degree of blending or admixture of the three powers of government." 16A AM. JUR. 2D *Constitutional Law* § 251 (1998).

71. The active and entangled roles assumed by courts in New Jersey and Texas are generally disfavored. *See* Heise, *supra* note 66, at 99–103. Ohio's reform efforts were thwarted, however, due to the court's indecision about its proper role and its difficulty in defining "adequacy." *See* First & De Luca, *supra* note 6, at 185–86. On the other hand, Kentucky has had a positive experience with reform litigation. *See* Liebman & Sabel, *supra* note 29, at 205–06.

72. *See* Sabel & Simon, *supra* note 33, at 1019.

73. *Id.* Both state and national level peer institution successes are relevant. Successful school systems within and outside the state can provide a model for reform.

all stages in adequacy cases.[74] In drawing support from other jurisdictions, the South Carolina Supreme Court's decision in *Abbeville* suggests a tentative acceptance of the experimentalist approach. The court drew exclusively from the precedents of other states in interpreting its constitutional clause and crafting its definition of adequacy.[75] The judicial collaboration occurring from state to state in opinions addressing rights and remedies legitimizes the resulting educational reforms. Therefore, in its future opinions the supreme court should not hesitate to rely on the precedent and experiences of other state courts and legislatures.

IV. DEFINING ADEQUACY

Defining the meaning of a constitutional right is one of the court's most important and challenging tasks. Defining adequacy under the Constitution is one of the most crucial steps in guiding the case toward an outcome, because it sets the bar for the parties' arguments on the merits and sets the stage for a remedy.[76] In spite of this task's importance, and perhaps because of it, courts and commentators have grappled extensively with defining educational adequacy.[77]

According to Liebman and Sabel, "an adequate education is one that meets the demands of contemporary society."[78] Many courts now define educational adequacy in terms of providing students with the skills necessary to compete in a global economy.[79] For example, the Kentucky Supreme Court defined educational adequacy in terms of the provision of seven "capacities," including: "sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization" and "sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market."[80] The definition articulated by the Kentucky court and replicated in part by other states demonstrates a historical current running through today's court opinions; the seven capacities are based on standards the National Educational Association articulated in 1918.[81] This historical consensus militates against defining educational adequacy in minimalist terms.[82]

Courts rely on various sources in order to conceptualize educational adequacy. Some courts defer to existing legislative standards or leave the issue of defining adequacy to the legislature entirely.[83] Most courts, on the other hand, generate their

---

74. *See id.* An experimentalist approach in all stages of adequacy litigation seems relevant in light of the intimate connection Sabel and Simon describe between remedy and right. *See id.* at 1055 ("The remedy is an elaboration of the rights in question"). In this way, the development of the right shapes the development of the remedy.

75. *See* Abbeville County Sch. Dist. v. State, 335 S.C. 58, 68–69, 515 S.E.2d 535, 540 (1999).

76. *See* Sabel & Simon, *supra* note 33, at 1055 ("the remedy arises from a reflective effort to give meaning to the right").

77. *See* Campaign for Fiscal Equity Inc. v. State, 801 N.E.2d 326, 363–64 (N.Y. 2003) (Read, J., dissenting); First & De Luca, *supra* note 6; Verstegen, *supra* note 33; Kagan, *supra* note 34.

78. Liebman & Sabel, *supra* note 29, at 205.

79. *See* Verstegen, *supra* note 33, at 508–12 (discussing educational adequacy definitions of Vermont, New Jersey, New Hampshire, and New York), 527–28.

80. Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 212 (Ky. 1989).

81. First & De Luca, *supra* note 6, at 207–08.

82. *See* Verstegan, *supra* note 33, at 507–08.

83. Kagan, *supra* note 34, at 2248.

own definitions. Massachusetts, for example, relied on voluminous historical writings and legislative history in support of its definition.[84] In crafting their definitions, however, state courts often borrow from decisions in other states.[85] The definitions that emerge establish those resources and skills deemed necessary for realizing an adequate education.[86] Courts have described these resources and skills in terms of "inputs" and "outputs."[87] Input describes the resources that support a state's education system, such as funding, facilities, teachers, curriculum, and educational materials.[88] Output relates to different measures of student performance, such as skills-based test results and graduation rates.[89]

Drawing from cases in other jurisdictions, the South Carolina Supreme Court defined the General Assembly's duty by requiring that it provide students with the following: "adequate and safe facilities in which they have the opportunity to acquire: 1) the ability to read, write, and speak the English language, and knowledge of mathematics and physical science; 2) a fundamental knowledge of economic, social, and political systems, and of history and governmental processes; and 3) academic and vocational skills."[90] The bulk of the court's definition implicates outputs—sets of skills that when acquired reflect a minimally adequate education. The only explicit input requirement calls for "adequate and safe facilities."[91]

Despite borrowing language from other courts' adequacy definitions, the South Carolina Supreme Court's definition does not echo the goal of civic preparation that runs through these other opinions.[92] In fact, when compared to the opinions to which the supreme court cites, South Carolina's definition is much less substantive. The court provides little insight into the purpose of a minimally adequate education and only offers a skeletal description of the definition's elements. South Carolina courts must understand and articulate what adequacy means in the educational context in order to ensure the achievement of meaningful reform.[93]

---

84. McDuffy v. Sec'y of the Executive Office of Educ., 615 N.E.2d 516 (Mass. 1993).

85. *Id.* at 618–19, and *Leandro v. State*, 488 S.E.2d 249 (N.C. 1997), among others, echo the definition provided in *Rose*, 790 S.W.2d at 212.

86. *See* Pauley v. Kelly, 255 S.E.2d 859, 877 (W.Va. 1979) (discussing student "supportive services" and student "capacities" as elements of a "thorough and efficient" system of schools).

87. *See, e.g.*, Campaign for Fiscal Equity, Inc. v. State, 801 N.E.2d 326, 333 (N.Y. 2003) (discussing educational "inputs" and "outputs").

88. *Id.* at 332–36; Hoke County Bd. of Educ. v. State, 599 S.E.2d 365, 386 (N.C. 2004)

89. *Campaign for Fiscal Equity, Inc.*, 801 N.E.2d at 336–40; *Hoke*, 599 S.E.2d at 384.

90. Abbeville County Sch. Dist. v. State, 335 S.C. 58, 68–69, 515 S.E.2d 535, 540 (1999) (citing *Rose*, 790 S.W.2d 186; *McDuffy*, 615 N.E.2d 516; *Leandro*, 488 S.E.2d 249; Randolph County Bd. of Educ. v. Adams, 467 S.E.2d 150 (W. Va. 1995)).

91. *Abbeville*, 335 S.C. at 68–69, 515 S.E.2d at 540.

92. *See McDuffy*, 615 N.E.2d at 548 ("[T]he Commonwealth has a duty to provide education . . . to prepare [students] to participate as free citizens of a free State to meet the needs and interests of a republican government."); *Leandro*, 488 S.E.2d at 254 ("An education that does not serve the purpose of preparing students to participate and compete in the society in which they live and work is devoid of substance and is constitutionally inadequate."); *Randolph*, 467 S.E.2d at 158 ("[L]egally recognized elements" of "thorough and efficient" include "knowledge of government to the extent that the child will be equipped as a citizen to make informed choices among persons and issues that affect his own governance.").

93. *See* First & De Luca, *supra* note 6, at 197–200 (discussing the confusion encountered by Ohio courts in trying to define and react to the meaning of adequacy).

V. EDUCATIONAL OPPORTUNITY

"In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."[94]

A. Defining Opportunity in the Courts

In presenting its case, the state focused on the word "opportunity" in the South Carolina Supreme Court's 1999 *Abbeville* opinion. The state maintained that because some children in the plaintiff districts are able to meet education standards, all children have the "opportunity" to do so.[95] The state argued that it fulfilled its duty and shifted the blame for poor educational outputs to other parties.[96] For example, the state asserted that children in the plaintiff districts are unable to take advantage of the opportunities the state provides because they come to school with deficits related to socio-economic status. The state also attempted to shift the burden to the districts by alleging that they mismanaged funds received from the state. Finally, the state argued that it has standards in place, and with more time the system will improve.[97]

Other state courts recognize a broader standard for opportunity and the state's duty to provide it. For example, New York's highest court rejected an argument by the state that closely resembled South Carolina's reading of "opportunity" in the definition of a minimally adequate education. In *Campaign for Fiscal Equity, Inc. v. State*, the New York Court of Appeals evaluated defense arguments concerning the state's burden for providing educational opportunity.[98] The state attempted to distinguish between providing an adequate education and providing the opportunity to obtain an adequate education, acknowledging responsibility only for the latter.[99] The court of appeals rejected the state's argument and clarified that the state's duty was to ensure the opportunity was available to all students, including at-risk students.[100]

The North Carolina Supreme Court also found that at-risk students require special attention from the state.[101] In considering opportunity, "one size does not fit all." Instruction tailored to the needs of at-risk students rightly falls within the ambit of the state's constitutional responsibility; research demonstrates that good teaching has a greater affect on improved educational performance than socio-

---

94. Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

95. Tom Truitt, *Law, Justice, and the Constitution: South Carolina's Unfulfilled Dream*, South Carolina Association of School Administrators (July 28, 2003), *at* http://www.scasa.org/Trial_Day_01.doc (discussing the defense's opening statement). Recall that the South Carolina Supreme Court, in construing the constitution's education clause, defined the General Assembly's duty to provide a minimally adequate education in terms of giving students "the opportunity to acquire" a broad list of academic skills. *Abbeville*, 335 S.C. at 68, 515 S.E.2d at 540.

96. *See* Bill Robinson, *State's Defense Rests Case in School Trial; Eight Witnesses Testify That More Money Won't Assure Better Grades*, THE STATE (Columbia, SC), Oct. 2, 2004, at B5.

97. Truitt, *supra* note 51 (July 28, 2003) (describing the defenses opening statement), *at* http://www.scasa.org/Trial_Day_01.doc.

98. 801 N.E.2d 326, 337 (N.Y. 2003).

99. *Id.*

100. *Id.*

101. Hoke County Bd. of Educ. v. State, 599 S.E.2d 365, 389–90 (N.C. 2004).

economic status.[102] Arguments in favor of recognizing the state's duty to provide the opportunity for minimally adequate education regardless of socio-economic confounds should not be a hard pill for the legislature to swallow given the purpose of its own Educational Finance Act:

> To guarantee to each student in the public schools of South Carolina the availability of at least minimum educational programs and services appropriate to his needs, and which are substantially equal to those available to other students with similar needs and reasonably comparable from a program standpoint to those students of all other classifications, notwithstanding geographic differences and varying local economic factors.[103]

Placing the blame on the local districts is also untenable in light of other courts' opinions.[104] The North Carolina Supreme Court affirmed that because of the state's constitutional duty to provide educational opportunity, it was also responsible for overseeing the use of resources on a local level.[105] Thus, the state could not pass the blame for inadequacy on to another governmental entity. Ultimately, the constitutional burden falls on the state itself, not on lower entities. If educational opportunity is thwarted because of inefficiencies at any level, the state should remain accountable.[106]

B. Opportunity to Learn in Light of High-Stakes Testing

"High-stakes tests are examinations that are used to grant rewards for passing or impose extreme sanctions for failing. The stakes can be high for a school

---

102. A study by Harold Wenglinsky regarding the effects of educational reform found that "the combined effects of the relevant reforms in teaching and the professional development of teachers is greater than the contribution to performance of the students' social and economic status." Liebman & Sabel, *supra* note 29, at 226.

103. S.C. CODE ANN. § 59-20-30 (Law. Co-op 1990) (language unchanged in S.C. CODE ANN. § 59-20-30 (West 2004)), *cited in* Abbeville County Sch. Dist. v. State, 335 S.C. 58, 65, 515 S.E.2d 535, 539 (1999).

104. *See Campaign for Fiscal Equity, Inc.*, 801 N.E.2d at 343 ("[T]he State remains responsible when the failures of its agents sabotage the measures by which it secures for its citizens their constitutionally-mandated rights."); McDuffy v. Sec'y of the Executive 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 magistrates and Legislatures . . . by the Constitution.").

105. *Hoke*, 599 S.E.2d at 389.

106.

> If the deficiencies are due to a lack of effective management practices, then it is the State's responsibility to see that effective management practices are put in place . . . .
>
> The State of North Carolina cannot shirk or delegate its ultimate responsibility to provide each and every child in the State with the equal opportunity to obtain a sound basic education . . . .

Tico A. Almeida, Note, *Refocusing School Finance Litigation on At-Risk Children:* Leandro v. State of North Carolina, 22 YALE L. & POL'Y REV. 525, 542 (2004).

district, a single campus, a teacher, or an individual student."[107] South Carolina implemented a high-stakes testing system in 1998 with the Education Accountability Act (EAA).[108] The state contended that it already addressed educational reform through the EAA. Moreover, the state argued that it just needs more time to realize changes the accountability model contemplates.[109] However, the EAA is simply a formalized means of transferring the state's burden to the children and the schools. Although the goals of the EAA are laudable,[110] as the system stands, local districts bear the burden of making it work unless chronic and repeated failures occur—only then does the state step in to offer assistance in the form of grants.[111] The EAA uses standardized tests to measure whether students and schools are meeting the state's goals.[112] The problem is that the state offers little assistance to ensure that students have the opportunity to learn the material tested.[113] Furthermore, some commentators argue that high-stakes tests like those used in South Carolina will not necessarily improve educational outcomes: "[T]ests do not produce improved teaching and learning, any more than a thermometer reduces fever."[114] On the contrary, evidence that high-stakes testing leads to increased drop-out rates indicates that such testing is detrimental.[115] Higher standards are not likely to help improve educational outcomes if the state does not provide the students the opportunity to achieve.

Failure to deal properly with the meaning of "opportunity" now may lead to headaches for South Carolina later because due process requires the state to provide students with the opportunity to learn. Members of the Education Oversight Committee appointed under the EAA seem to agree: "It would be unfair to fail to provide students with the level of knowledge and skills they need to be successful in their lives and work."[116] In fact, commentators posit that due process questions about the opportunity to learn may comprise a fourth wave of reform litigation.[117]

---

107. Mark Littleton, *High Stakes Testing*, 187 ED. L. REP. 389, 389 (2004).

108. *See* S.C. CODE ANN. §§ 59-18-100 to -1930 (West 2004).

109. Truitt, *supra* note 95 (describing the defense's opening statement).

110. *See* S.C. CODE ANN. §§ 59-18-100 to -110 (West 2004).

111. *See* S.C. CODE ANN. §§ 59-18-1500 to -1930.

112. S.C. CODE ANN. §§ 59-18-300 to -370.

113. Sandra Lindsay, Deputy Superintendent for Curriculum and Instruction, testified as to the lack of funding for the Education Accountability Act. Tom Truitt, *Law, Justice, and the Constitution: South Carolina's Unfulfilled Dream*, South Carolina Association of School Administrators (Oct. 6, 2003), *at* http://www.scasa.org/Trial_Day_29.doc. State Senator John Matthews also testified that a staff development program for underachieving districts was never funded. Truitt, *supra* note 54.

114. Littleton, *supra* note 107, at 391 (quoting Jay P. Heubert, *High-Stakes Testing and Civil Rights: Standards of Appropriate Test Use and a Strategy for Enforcing Them*, *in* RAISING STANDARDS OR RAISING BARRIERS? 180 (Gary Orfield & Mindy L. Kornhaber eds., 2001)).

115. *Id.* When asked about PACT standards under the Education Accountability Act, Rex Whitcomb, a former principal specialist in Marion County, testified that he believed that increasing the standards for the exit exam would cause more students to drop out. Tom Truitt, *Law, Justice, and the Constitution: South Carolina's Unfulfilled Dream*, South Carolina Association of School Administrators (Aug. 1, 2003), *at* http://www.scasa.org/Trial_Day_05.doc.

116. South Carolina Education Oversight Committee, *Why is the Rigor of the Ratings Increasing This Year? Twelve Frequently Asked Questions*, *at* http://www.sceoc.org/ Performance.htm (last visited Jan. 10, 2005).

117. Maurice R. Dyson, *Leave No Child Behind: Normative Proposals to Link Educational Adequacy Claims and High Stakes Assessment Due Process Challenges*, 7 TEX. F. ON C.L. & C.R. 1, 32 (2002); *see also* John R. Munich, *High-Stakes Testing: The Next Round of Finance Litigation*, 18

States that employ high-stakes testing as part of their educational accountability systems have already begun to face procedural due process challenges from students who assert that their states did not provide the opportunity to learn the material tested by state competency exams.

In *Debra P. v. Turlington*,[118] although the plaintiffs did not ultimately prevail, the United States Court of Appeals for the Fifth Circuit recognized that when the State of Florida established and maintained an educational system, it "created a mutual expectation that the student who is successful will graduate with a diploma."[119] This expectation amounts to an implied property right that is subject to protection under the Fourteenth Amendment. The court went on to hold that if graduation is predicated on passing a competency examination, the exam must demonstrate "curricular validity."[120] In other words, the exam must test material actually taught. Without curricular validity, a competency exam "cannot be said to be rationally related to a state interest."[121]

A South Carolina student who is held back under the EAA may have an even stronger due process claim against the state because the South Carolina Supreme Court recognizes the state's duty to provide a minimally adequate education under the state constitution.[122] Indeed, if the state is responsible for providing a minimally adequate education, it seems all the more unfair that a student should be held back under the state's accountability system because the state failed to allow the child the opportunity to learn. Such a system invites the courts to hold the state accountable. If South Carolina schools actually carry out the mandate of the EAA and retain students without holding the state responsible, questions regarding educational opportunity will not go away. On the contrary, if the system remains unchanged, the state should expect the issue to arise in a new class of suits.

VI. EDUCATION FOR THE PUBLIC GOOD

> "Education, in our competitive global economy, has become the dividing line between those who are able to move ahead and those who lag behind."[123]

The South Carolina Supreme Court recognizes that "the purpose of providing a public education is to benefit not just the individual receiving it, but also the public at large."[124] Thus, it is curious that the state takes such a resistant stance

---

ME. B.J. 202, 204–07 (2003) (providing recent examples of due process challenges for failure to provide an adequate opportunity to learn and implying that more such due process challenges are on the horizon).

118. 644 F.2d 397 (5th Cir. 1981).

119. *Id.* at 404.

120. *Id.* at 405.

121. *Id.* at 406.

122. In *Debra P.*, however, the Fifth Circuit did not decide whether the Florida Constitution required the state to provide a school system. *Id.* at 404.

123. President William J. Clinton, *The Budget Message of the President*, *in* BUDGET OF THE UNITED STATES GOVERNMENT: FISCAL YEAR 2001 3, 5 (United States Government Printing Office 2000).

124. Abbeville County Sch. Dist. v. State, 335 S.C. 58, 66, 515 S.E.2d 535, 539 (1999).

toward education reform and is willing to place the blame on particular children and government entities.[125]

The importance of education to our society may be best understood in terms of its relationship to a global economy. In 1983, the National Commission on Excellence in Education presented its findings regarding the quality of education in America in *A Nation at Risk: The Imperative for Educational Reform*. The report addressed the effects of educational deficits on the nation:

> Our Nation is at risk. Once unchallenged preeminence in commerce, industry, science and technological innovation is being overtaken by competitors throughout the world.
>
> . . . .
>
> Knowledge, learning, information and skilled intelligence are the new raw materials of international commerce. . . . [T]o keep and improve on the slim competitive edge we still retain in world markets, we must dedicate ourselves to the reform of our educational system for the benefit of all—old and young alike, affluent and poor, majority and minority . . . .
>
> . . . A high level of shared education is essential to a free, democratic society and to the fostering of a common culture, especially in a country that prides itself on pluralism and individual freedom.[126]

In its recommendations regarding leadership and fiscal support, the report provided the following: "State and local officials, including school board members, governors, and legislators, have *the primary responsibility* for financing and governing the schools, [sic] and should incorporate the reforms we propose in their educational policies and fiscal planning."[127]

Individual states recognize the correlation between economic performance and education, as their reform movements and adequacy definitions demonstrate.[128] Although South Carolina's definition of educational adequacy lacks mention of the goals of educational adequacy, the business community is aware of the importance of education for the economic development of the state. In December 2003,

---

125. Unfortunately, legislative recalcitrance hinders the success of educational reform in the courts. Almeida, *supra* note 106, at 557.

126. National Commission on Excellence in Education, *A Nation at Risk* (1983), *at* http://www.ed.gov/pubs/NatAtRisk/risk.html (last visited Jan. 10, 2005).

127. *Id.*, *at* http://www.ed.gov/pubs/NatAtRisk/recomm.html.

128.

> The stirrings of Kentucky's civil society date to the early 1980s, when political, civic, and business communities acknowledged the catastrophic economic and social costs of a school system that ranked nationally near the bottom on all significant criteria . . . .
>
> . . . Ashland Oil, the third largest employer in the state, . . . like many leading firms in Kentucky, was convinced that education reform was a precondition to attracting and retaining high quality employees.

Liebman & Sabel, *supra* note 29, at 251–52. According to Liebman and Sabel, educational reform began in Texas when "the gap between the modern economy's demands for an educated workforce and the state education system's inability to produce one was alarming enough to prompt formation of a reform coalition of business leaders and citizens' groups." *Id.* at 233.

Professor Michael Porter presented the Phase I findings of his study, *The South Carolina Competitiveness Initiative*, in conjunction with the University of South Carolina's Economic Outlook Conference.[129] Porter's study acknowledged that South Carolina's "relatively poor educational system[,] and the resulting limited skill set in the workforce," impede the quality of its business environment.[130] Improving education and workforce training were among the recommendations Porter offered for the state.[131] In order to implement his recommendations, Porter urged that members from the business community, government, and academia form leadership groups to address the issues.[132] Such a plan is consistent with the collaborative remedial approaches implicated by Sabel and Simon's destabilization rights and experimentalist approach.[133]

As other states recognize the importance of educational reform for civic development, it becomes more important that South Carolina courts and leaders make strides toward educational reform. Otherwise, the state will continue to lag behind.

VII. CONCLUSION

As the *Abbeville* case progresses toward a circuit court ruling—and later on possible appeal—the courts, legislators, and South Carolina's citizens should bear in mind that educational reform through the courts is both necessary and appropriate. The deeper meanings of adequacy and opportunity imply that the state has a broad duty to provide for the education of all of South Carolina's students in order to benefit all South Carolinians. The courts must not shy away from an active yet collaborative role, because such a role is legitimate given the dire state of education in South Carolina, the flexibility of separation of powers, and the guiding current of experimentalism running through other court opinions. In order to avoid extensive judicial oversight, the court would be well-advised to "articulat[e] . . . both constitutional principles and feasible expectations of complying with them."[134] In doing so, South Carolina courts will need to assert a slightly more active role in defining the goals of a "minimally adequate education" under the constitution. Both courts and legislators must recognize that adequacy relates to competencies that will prepare South Carolina students for the rigors of life in the global economy. As soon as the courts and legislators realize that opportunity requires more than the state currently provides, the General Assembly will be able to take its first steps toward improving education in the state. Although the state fervently denies that increased spending will help struggling school districts provide academic success,[135] it is unclear whether using resources in conjunction with the General Assembly's educational goals will fail to foster improved results. Educational reform is possible for South Carolina if the courts,

---

129. MICHAEL E. PORTER, SOUTH CAROLINA COMPETITIVENESS INITIATIVE: PHASE I PRESENTATION (2003), *available at* http://www.<allsouthcarolina.com/teamscpdfs/press/pdf/mcwiter.pdf (last accessed Jan. 25, 2005).

130. *Id.* at 3.

131. *Id.* at 5.

132. *Id.*

133. *See supra* notes 46–49, 72–74 and accompanying text.

134. Liebman & Sabel, *supra* note 29, at 280.

135. Robinson, *supra* note 96.

legislators, school districts, and the people recognize the challenge and then work toward achieving a minimally adequate education for all South Carolina students.

Amanda S. Hawthorne