WHAT'S QUALITY GOT TO DO WITH IT?: CONSTITUTIONAL THEORY, POLITICS, AND EDUCATION REFORM

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INTRODUCTION

Legal commentators often evaluate constitutional adjudication based on its internal structure: its logic, rules, and judgments. Others critique

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judicial action for falsely raising expectations, becoming a "hollow hope" for social reform by proposing remedies which cannot be successfully implemented.[1] Employing both a constitutional theory and a positive political theory perspective,[2] this Article compares the recent education reform litigation in Kentucky and New Jersey. This comparison highlights the way in which different approaches to adjudication help to define the political dynamics of the reform debate and contribute—or fail to contribute—to remedying the alleged constitutional violation.[3]

The education reform litigation debate often centers around two related issues: (1) the substantive interpretation of relevant state constitutional provisions[4] and (2) the less frequently considered issue of why a remedy ordered by a state court succeeds or fails.[5] Commentators tend to

1. *See generally* GERALD N. ROSENBERG, THE HOLLOW HOPE (1991) (arguing that the Supreme Court has generally failed to implement its activist agenda for civil rights, reproductive rights, and the environment). Rosenberg bases his argument on his analysis of federal court decisionmaking, but he extends its conclusions to the ability of all courts to effectuate social reform. *Id.* at 338.

2. This Article uses the term "positive political theory" to describe the insights derived from modeling and conceptualizing politics as a strategic game. As Professor Eskridge has shown, the use of such a model "deepens our understanding of the interaction between the Court, the Congress, and the President." William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 334 (1991). Positive political theory illustrates how "policy is set through a sequential process by which each player—including the Court—tries to impose its policy preferences. The game is a dynamic one because each player is responsive to the preferences of other players *and* because the preferences of the players change as information is generated and distributed in the game." *Id.*

3. Unfortunately, political scientists often fail to consider that courts can serve as agenda-setters. *See, e.g.*, JOHN W. KINGDON, AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES 16 (1984) (listing the participants in agenda-setting as "the President, the Congress, bureaucrats in the executive branch, and various forces outside government (including the media, interest groups, political parties, and the general public)"). However, legal commentators are often more attentive to the judiciary's ability to set the agenda. *See, e.g.*, Donald W. Crowley, *Implementing* Serrano*: A Study in Judicial Impact*, 4 LAW & POL'Y Q. 299, 321 (1982) (noting that Serrano v. Priest, 557 P.2d 929 (1977), successfully helped set the agenda for education reform in California); Alan G. Hickrod, Edward R. Hines, Gregory P. Anthony, John A. Dively & Gweyn B. Proyne, *The Effect of Constitutional Litigation On Educational Finance: A Preliminary Analysis*, 18 J. EDUC. FIN. 180 (1992) (concluding that constitutional litigation focuses attention on education and increases spending).

4. Several commentators have pursued this perspective. *See, e.g.*, William E. Thro, *To Render Them Safe: The Analysis of State Constitutional Provisions in Public School Finance Reform Litigation*, 75 VA. L. REV. 1639 (1989); Richard J. Stark, *Education Reform: Judicial Interpretation of State Constitutions' Education Finance Provisions—Adequacy Vs. Equality*, 1991 ANN. SURV. AM. L. 609 (1992).

5. One recent work, Note, *Unfulfilled Promises: School Finance Remedies and State Courts*, 104 HARV. L. REV. 1072 (1991), examines the question of remedies, but not from the standpoint of positive political theory or constitutional theory as used in this Article.

conclude either that courts will almost always fail to drive meaningful reform[6] or that courts just need to push harder to remedy a constitutional violation.[7] In contrast, this Article suggests that courts can make a difference—not by mandating specific remedies, but by effectively framing the issues, by using their powers of persuasion to articulate a constitutional vision of education, and by defining the roles of other political actors in the effort to reform a state's educational system.[8]

Optimism about courts' abilities to drive reform has been tempered by the difficult history of implementing the school desegregation remedies that stemmed from the U.S. Supreme Court's decision in *Brown v. Board of Education I*.[9] The Court's call to desegregate with "all deliberate speed"[10] failed to overcome effectively the southern resistance to integration.[11] Efforts to force desegregation by withholding federal funding for segregated schools met with further resistance,[12] and specific, judicially-mandated actions such as busing also faltered.[13] Based on this experience,

6. *See generally* ROSENBERG, *supra* note 1, at 338. Rosenberg concludes that U.S. courts can *almost never* effectively produce significant social reform. At best, they can second the social reform acts of the other branches of government. "Turning to courts to produce significant social reform substitutes the myth of America for its reality. It credits courts and judicial decisions with a power they do not have." *Id.*

7. *See* Note, *supra* note 5, at 1092.

8. This Article is concerned not only with state constitutional decisions on the school financing issue presented in San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 59 (1973) (holding that the U.S. Constitution does not require equal funding between school districts), but also more general education issues, such as curricular and governance reforms.

9. 347 U.S. 483, 493 (1954) (holding that the Equal Protection Clause demands integrated schools).

10. Brown v. Board of Educ. II, 349 U.S. 294, 301 (1955).

11. *See, e.g.*, Cooper v. Aaron, 358 U.S. 1 (1958) (holding that school desegregation must continue despite opponent's efforts to disrupt the educational process). In 1964, ten years after *Brown I*, only 2.3 percent of the black school children in the South were attending integrated schools. *See* James R. Dunn, *Title VI, the Guidelines & School Desegregation in the South*, 53 VA. L. REV. 42, 44 n.9 (1967).

12. Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d(1) (1988 & Supp. IV 1992), finally succeeded in advancing the integrative ideal by withholding federal funding for segregated schools. *See* ROSENBERG, *supra* note 1, at 48. However, schools still looked for ways to evade *Brown*'s vision of integrated schools. For example, in 1968, the Court struck down a freedom of choice plan that had allowed parents to choose where to send their children to school, leaving a local school system segregated and failing to "convert [the school district] to a unitary system in which racial discrimination would be eliminated root and branch." Green v. New Kent County Sch. Bd., 391 U.S. 430, 438 (1968). The Court ordered the school district "to come forward with a plan that promises realistically to work, and promises realistically to work *now*." *Green*, 391 U.S. at 439.

13. In Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 30 (1971), the Court supported a remedy that created a school to serve all of Mecklenburg County, North Carolina, and provided for busing students across residential lines to attend the school. This approach encountered serious resistance and required continued judicial oversight. Within a few years, the Court's commitment to using busing as a remedy for segregated schools faltered. *See* Milliken v. Bradley I, 418 U.S. 717, 745 (1974) (rejecting interdistrict busing as a remedy to desegregate school districts); Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 435 (1976) (overturning lower court order to periodically adjust geographic boundaries

some commentators conclude that we cannot (and should not) expect courts successfully to change society.[14] Others warn that while courts are potentially effective vehicles for social change, they should guard against overreaching their institutional authority.[15]

In the midst of its struggle with the desegregation issue, the U.S. Supreme Court declared in *San Antonio Indep. Sch. Dist. v. Rodriguez* that it would not enter the "thicket" of overseeing school financing to ensure equal funding among districts.[16] The *Rodriguez* Court's awareness of its own institutional limitations suggests that its decision did not necessarily mean that the Constitution is neutral on issues of educational quality or equal funding, but simply that the Supreme Court would not attempt to enforce any such requirement.[17] Nevertheless, at least twenty-nine state courts, including those in Kentucky and New Jersey, have entered into this "thicket," scrutinizing school financing schemes[18] despite basic

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to limit the "white flight" phenomenon, in which white families fled from urban areas to predominantly white suburbs).

14. *See generally* ROSENBERG, *supra* note 1, at 338 (outlining the conditions under which courts are effective producers of significant social change).

15. *See, e.g.*, ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 16-17 (1962) (arguing that "the root difficulty is that judicial review is a counter-majoritarian force in our system" and urging "prudence and restraint" in constitutional adjudication). For a modern version of a theory of judicial restraint, see generally JOHN H. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980) (offering a theory based on reinforcing representation as a limited rationale for judicial intervention into the political process).

16. 411 U.S. 1, 59 (1973) (justifying its holding that disproportionate funding of schools does not violate the Equal Protection Clause on the ground that "the ultimate solutions [in educational financing reform] must come from the lawmakers and from the democratic pressures of those who elect them").

17. *See id.* at 59; *see also* Lawrence G. Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1250-51 (1978) (suggesting that state courts may enforce federal constitutional norms governing education, even if the Supreme Court has declined to do so).

18. *See* Alabama Coalition for Equity, Inc. v. Hunt, Nos. CV-90-883-R, CV-91-0117-R, 1993 WL 204083 (Ala. Cir. Ct. Apr. 1, 1993); Shofstall v. Hollins, 515 P.2d 590 (Ariz. 1973); Dupree v. Alma Sch. Dist. No. 30, 651 S.W.2d 90 (Ark. 1983); Serrano v. Priest, 557 P.2d 929 (Cal. 1977) (*Serrano II*); Serrano v. Priest, 487 P.2d 1241 (Cal. 1971) (*Serrano I*); Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005 (Colo. 1982); Horton v. Meskill, 376 A.2d 359 (Conn. 1977); Sheff v. O'Neill, 609 A.2d 1072 (Conn. Super. Ct. 1992); McDaniel v. Thomas, 285 S.E.2d 156 (Ga. 1981); Idaho Sch. for Equal Educ. Opportunity v. Evans, 850 P.2d 724 (Idaho 1993); Thompson v. Engelking, 537 P.2d 635 (Idaho 1975); Blase v. State, 302 N.E.2d 46 (Ill. 1973); Rose v. Council for Better Educ., Inc., 790 S.W.2d 186 (Ky. 1989); Hornbeck v. Somerset County Bd. of Educ., 458 A.2d 758 (Md. 1983); McDuffy v. Secretary of the Executive Office of Educ., 615 N.E.2d 516 (Mass. 1993); Milliken v. Green, 203 N.W.2d 457 (Mich. 1972), *vacated*, 212 N.W.2d 711 (Mich. 1973); East Jackson Pub. Sch. v. State, 348 N.W.2d 303 (Mich. Ct. App. 1984); Skeen v. State, 505 N.W.2d 299 (Minn. 1993); Helena Elementary Sch. Dist. No. 1 v. State, 769 P.2d 684 (Mont. 1989); Gould v. Orr, 506 N.W.2d 349 (Neb. 1993); Abbott v. Burke II, 575 A.2d 359 (N.J. 1990); Abbott v. Burke III, 643 A.2d 575 (N.J. 1994); Robinson v. Cahill I, 303 A.2d 273 (N.J.), *cert. denied sub nom.* Dickey v. Robinson, 414 U.S. 976 (1973); Robinson v. Cahill II, 306 A.2d 65 (N.J. 1973), *cert. denied sub nom.* Dickey v. Robinson, 414 U.S. 976 (1973); Robinson v. Cahill III, 335 A.2d 6 (N.J. 1975); Robinson v. Cahill IV, 351 A.2d 713 (N.J. 1975), *cert. denied sub nom.* Klein v. Robinson, 423 U.S. 913 (1975), *and vacated*, 355 A.2d 129 (N.J. 1979); Robinson v. Cahill V,

prudential concerns about how to manage and enforce education reform decisions.[19]

The Kentucky Supreme Court first dealt with the issue of school financing in 1989, when it decided *Rose v. Council for Better Educ., Inc.*[20] The Kentucky court rejected the lower court's holding that the disparities among school districts created by the state's education system violated the Kentucky Constitution's equality guarantees.[21] Focusing instead on the state constitution's education clause,[22] which mandates that the "General Assembly shall, by appropriate legislation, provide for an efficient system of common schools throughout the state,"[23] the court stressed the constitution's commitment to the overall quality of the school system. Its opinion sparked public support for reshaping Kentucky's educational system to accommodate *both* a desire to improve overall quality and a concern for distributional equity.[24]

The New Jersey Supreme Court visited the issue of education reform sixteen years earlier than Kentucky, when *Robinson v. Cahill I* held that

355 A.2d 129 (N.J. 1976); Robinson v. Cahill VI, 358 A.2d 457 (N.J. 1976); Robinson v. Cahill VII, 360 A.2d 400 (N.J. 1976); Board of Educ., Levittown Union Free Sch. Dist. v. Nyquist, 439 N.E.2d 359 (N.Y. 1982); Reform Educ. Fin. Inequalities Today v. Cuomo, 578 N.Y.S.2d 969 (N.Y. Sup. Ct. 1991); Britt v. North Carolina State Bd. of Educ., 357 S.E.2d 432 (N.C. Ct. App.), *review denied*, 361 S.E.2d 71 (N.C. 1987); Board of Educ. of the City Sch. Dist. v. Walter, 390 N.E.2d 813 (Ohio 1979), *cert. denied*, 444 U.S. 1015 (1980); Fair Sch. Fin. Council, Inc. v. State, 746 P.2d 1135 (Okla. 1987); Coalition for Equitable Sch. Funding, Inc. v. State, 811 P.2d 116 (Or. 1991); Olsen v. State, 554 P.2d 139 (Or. 1976); Danson v. Casey, 399 A.2d 360 (Pa. 1979); Richland County v. Campbell, 364 S.E.2d 470 (S.C. 1988); Tennessee Small Sch. Sys. v. McWherter, 851 S.W.2d 139 (Tenn. 1993); Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist., 826 S.W.2d 489 (Tex. 1992); Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391 (Tex. 1989), 804 S.W.2d 491 (Tex. 1991); Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71 (Wash. 1978); Pauley v. Kelly, 255 S.E.2d 859 (W. Va. 1979); Kukor v. Grover, 436 N.W.2d 568 (Wis. 1989); Buse v. Smith, 247 N.W.2d 141 (Wis. 1976); Washakie County Sch. Dist. No. 1 v. Herschler, 606 P.2d 310 (Wyo.), *cert. denied*, 449 U.S. 824 (1980).

19. *See, e.g.*, McInnis v. Shapiro, 293 F. Supp. 327, 335-36 (N.D. Ill. 1968) (noting that while this case is not a "political question, . . . there are no 'discoverable and manageable standards' by which a court can determine when the Constitution is satisfied and when it is violated," and "the courts simply cannot provide the empirical research and consultation necessary for intelligent educational planning"), *aff'd sub nom.* McInnis v. Ogilvie, 394 U.S. 322 (1969); *see also Rodriguez*, 411 U.S. at 59 (noting that "the ultimate solutions [in educational financing reform] must come from the lawmakers and from the democratic pressures of those who elect them"). *But see* Plyler v. Doe, 457 U.S. 202, 213 (1982) (holding that denying the children of illegal aliens the right to a minimally adequate education violates the Equal Protection Clause of the Fourteenth Amendment).

20. 790 S.W.2d 186 (Ky. 1989).

21. *Id.* at 215 (noting that the only governing constitutional provision was the education clause of the Kentucky constitution). This contrasts with the lower court's reliance on the equality guarantee. *See* Council for Better Educ., Inc. v. Wilkinson, No. 85-CI-1759, slip. op. at 15 (Ky. Franklin Cir. Ct. Div. I, May 31, 1988). For the text of the equality guarantees, see *infra* note 97.

22. *Rose*, 790 S.W.2d at 215.

23. KY. CONST. § 183.

24. *See infra* part II.A.

New Jersey's schools failed to satisfy the state constitution's education clause.[25] That clause requires that the "[l]egislature 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."[26] The New Jersey Supreme Court interpreted the state constitution's guarantee of a "thorough and efficient" education as requiring the state to give each child an equal "educational opportunity . . . to equip [him] for his role as a citizen and as a competitor in the labor market."[27] The decision initially outlined an open-ended remedy, giving the legislature fifteen months to resolve the matter.[28] Despite the legislature's failure to act in a timely manner, the court decided not to disturb the current scheme during the 1975-76 school year.[29] When the legislature again failed to act, the court considered shutting down the school system by enjoining its financing.[30] Finally, the legislature reformed the state's school financing system so as to reduce the funding differences between rich and poor districts while leaving the overall system intact.[31] Although the New Jersey Supreme Court validated the new arrangement,[32] the legislature failed to fund the new system.[33] The court then carried out its earlier threat and closed the system by enjoining its funding.[34] In response, the legislature enacted a controversial state income tax to fund the schools.[35] This solution finally resolved the *Robinson* litigation—after seven trips to the state's highest court.[36]

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25. 303 A.2d 273, 295 (N.J. 1973), *cert. denied sub nom.* Dickey v. Robinson, 414 U.S. 976 (1973).

26. N.J. CONST. art. VIII, § 4, para. 1.

27. *Robinson I*, 303 A.2d at 295.

28. *See* Robinson v. Cahill II, 306 A.2d 65, 66 (N.J. 1973) (requiring that the legislature enact measures compatible with the holding in Robinson v. Cahill I, 303 A.2d 273 (N.J. 1973), by December 31, 1974), *cert. denied sub nom.* Dickey v. Robinson, 414 U.S. 976 (1973).

29. *See* Robinson v. Cahill III, 335 A.2d 6, 7 (N.J. 1975) (denying injunctive relief on the basis that a redistribution of funds during the school year would result in inequity and chaos). The court did arrange to hear oral argument on March 18, 1975, to resolve four issues: 1) the definition of "thorough and efficient" into financial terms, 2) the extent of the court's power to order relief, 3) the ways in which the court should use this power, and 4) the appointment of a special master. *Id.* at 7.

30. *See* Robinson v. Cahill IV, 351 A.2d 713, 720 (N.J. 1975), *cert. denied sub nom.* Klein v. Robinson, 423 U.S. 913 (1975), *and vacated*, 355 A.2d 129 (N.J. 1979).

31. *See* RICHARD LEHNE, THE QUEST FOR JUSTICE: THE POLITICS OF SCHOOL FINANCE REFORM 108-13, 200 (1978).

32. *See* Robinson v. Cahill V, 355 A.2d 129, 132 (N.J. 1976).

33. LEHNE, *supra* note 31, at 122.

34. *See* Robinson v. Cahill VI, 358 A.2d 457, 459 (N.J. 1976) (enjoining any state, county, or municipal official from expending funds to support any public school), *modified*, 360 A.2d 400 (1976).

35. N.J. STAT. ANN. §§ 54A:2-1 to 54A:9-27 (West Supp. 1994).

36. Robinson v. Cahill VII, 360 A.2d 400 (N.J. 1976).

More recently, in 1990, the New Jersey Supreme Court interpreted its education clause in *Abbott v. Burke II*,[37] the subject of the second case study in this Article.[38] The court declared that the state failed to provide adequately for twenty-eight "special needs" districts.[39] The legislature responded promptly,[40] but ultimately diluted the reform legislation in the face of intense public pressure.[41] Thus, the court intervened again in *Abbott v. Burke III*, ordering additional funding for these districts by the 1997-98 school year.[42]

This Article draws on the experience of education reform ushered by the recent court-ordered remedies in Kentucky and New Jersey. It argues that to alter the political status quo and effectuate meaningful education reform, courts must (1) force a new consideration of the state's educational problems, (2) create a sense of urgency and crisis, and (3) provide legislators with political protection, or "cover," for enacting comprehensive reform. To create these conditions, courts need to connect the constitutional violation and its remedy to the intuitively appealing goal of overall educational quality.[43] The alternative approach, which focuses *solely* on distributional equity, fails to reflect the constitutional mandate and invites significantly greater political resistance.

The Kentucky Supreme Court's decision to emphasize the overall quality of the educational system may explain its comparative success in motivating education reform. However, certain conditions in New Jersey might have frustrated any judicially instigated reform efforts in New Jersey—even those along the lines of the Kentucky example. The key differences between the states include the overall quality of the state's educational system at the outset of the litigation, the extent to which school districts across the state vary in their wealth and racial composition, and the extent to which citizens identify with the state. Undoubtedly, these environmental factors constitute formidable constraints to education reform and certainly help to account for the different results of the education reform efforts in the two states.[44]

Part I of this Article outlines various theories of constitutional interpretation and applies them to the adjudication of state constitutional clauses governing education in order to develop the ideal interpretative strategy for implementing education reform. Part I then discusses how the

37. 575 A.2d 359 (N.J. 1990). Abbott v. Burke I, 495 A.2d 376 (N.J. 1985), dealt with procedural issues, requiring plaintiffs to exhaust potential administrative remedies before turning to the courts. 495 A.2d at 394.

38. *See infra* part II.B.

39. *Abbott II*, 575 A.2d at 363.

40. *See infra* notes 184-86 and accompanying text.

41. *See infra* notes 188-90 and accompanying text.

42. Abbott v. Burke III, 643 A.2d 575, 577 (N.J. 1994).

43. This Article employs the term "overall quality" to indicate an adequate level of quality in education provided to all students (i.e., a concern for "educational adequacy").

44. *See infra* notes 239-54 and accompanying text.

successfully implemented decision in Kentucky effectively followed this ideal interpretive strategy, while the New Jersey court pursued an alternative strategy. Part II, which outlines the education reform efforts in New Jersey and Kentucky, considers whether the most successful political strategy for education reform is to follow the best interpretation of the education clauses. Specifically, Part II models the struggle for education reform through the use of positive political theory (conceiving of policymaking as a political game) to analyze whether the political dynamics of education reform militate in favor of the ideal interpretative strategy. Part III then draws on the lessons of Part I's constitutional theory and Part II's positive political theory analyses to suggest that courts, litigators, and political actors should seek to meet the three conditions outlined above to successfully effectuate meaningful education reform. Finally, Part III contrasts the demographic profiles of the two states and considers to what extent they explain their different experiences with education reform.

I
CONSTITUTIONAL THEORY AND THE FOCUS ON QUALITY

Decisions calling for education reform implicate basic questions of judicial legitimacy, such as the "counter-majoritarian difficulty" inherent in any judicial override of legislative decisions[45] and the possibility that the judiciary will be unable to implement some of its decisions.[46] Judicial caution in ordering reform is evidenced by certain principles, such as the standing and political question doctrines, that enable courts to avoid adjudicating certain thorny issues.[47] Such caution, which Alexander Bickel has termed "prudence,"[48] can dissuade a court from challenging an unconstitutional state of affairs.[49] Indeed, critics who believe that state constitution

45. *See* BICKEL, *supra* note 15, at 19. Bickel's concern stems from the fact that whenever the unelected judiciary seeks to impose its will on the popularly elected legislature, it engages in an anti-democratic exercise. *Id.*

46. For a more detailed discussion of the potential constraints on judicial action, *see infra* notes 134-39 and accompanying text.

47. *See, e.g.*, Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 226-27 (1974) (holding that a citizen lacked standing to challenge the commission of members of Congress into the army because the alleged injury was too abstract); *see also* Allen v. Wright, 468 U.S. 736, 766 (1984) (holding that the impact of IRS regulations upon integration was non-justiciable because the causal connection was too attenuated and the injury could not be judicially redressed). Some term these prudential doctrines as "hot potato" doctrines because they are so malleable that the Court can reach the merits if it so chooses. *See, e.g.*, Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 103 (1978) (Stevens, J., concurring) (noting that the Court performed a cursory analysis of the injury under the standing doctrine in order to reach the merits of the case and uphold the Price-Anderson Act).

48. *See* BICKEL, *supra* note 15, at 70-71 (explaining that prudence requires the "passive virtue" of deciding to "withhold constitutional judgment" on a particular issue that might encounter resistance from popular opinion or the majoritarian branches).

49. Some state courts have relied on such doctrines to avoid reaching the merits on school financing litigation. *See, e.g.*, Danson v. Casey, 399 A.2d. 360, 365, 367 (Pa. 1979)

education clauses focus on distributional equity make precisely this accusation: courts tolerate unconstitutional results when they exercise restraint and defer to the legislature.[50] On this account, courts face a difficult dilemma in deciding school financing cases. Either they can follow the dictates of a constitutional mandate for distributional equity, which will be frustrated in practice,[51] or they can focus on overall quality, which achieves better results but appears to depart from the constitutional mandate.[52] However, this Article suggests a third alternative, arguing that state constitutions' education clauses are properly interpreted as expressing a concern for overall quality. Courts that adopt this approach will spark successful reforms, in part because of its appeal to the public.

This third alternative employs an interpretative theory that directs judges to read state constitutions' education clauses as embodying deeply held views of justice.[53] This approach understands that constitutions, unlike statutes, cannot be easily revised and their interpreters must heed Chief Justice Marshall's advice that "we must never forget that it is *a constitution* that we are expounding."[54] Indeed, this strategy offers an attractive normative methodology: judges can not only justify their constitutional decisions so as to maintain the judiciary's legitimacy, they also can justify their decisions by appealing to the public's deep concern for justice. Moreover, this strategy directs judges not to deny the legislature its proper role in constitutional interpretation. Otherwise, they risk stifling efforts to build consensus as well as entangling the court in complex and highly politicized policy decisions.

(holding that plaintiffs did not meet the state's standing requirements to allege a constitutional violation, because no one had suffered the necessary injury).

50. *See* Note, *supra* note 5, at 1092 (concluding that only when the judiciary ceases to defer to the legislature will the constitutional promises of education be upheld).

51. This failure in practice is illustrated by the case study of New Jersey discussed in the positive political theory model outlined below. *See infra* part II.B.

52. The value of focusing on overall quality is illustrated by the successful education reform effectuated in Kentucky. *See infra* part II.A.

53. This approach to constitutional interpretation looks to the moral authority of principles deeply held by the community. In this sense,

> judicial review is also idealistic, for it is essentially concerned with the interpretation and implementation of moral ideals. Our ideals are aspirational goals; they define the kind of people we would like to be. In this respect, they differ from our needs, which also signify some lack or incompleteness but imply nothing certain about our moral betterment (which may or may not be promoted by their satisfaction).

Anthony T. Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 YALE L.J. 1567, 1577 (1985). Alexander Hamilton first articulated this view that judicial review speaks for "the people" in a moral sense in his defense of judicial review in Federalist No. 78. *Id.* at 1574 n.33.

54. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).

A. *Constitutional Theory and State Constitutions' Education Clauses*

A basic goal of constitutional theory is to identify the qualities that distinguish a constitution from ordinary legislation and justify judicial review of legislative action. In one classic explanation, Ronald Dworkin has argued that broadly cast constitutional provisions should be interpreted as expressing a coherent vision of justice.[55] In Dworkin's view, the public's deep commitment to a *concept* of justice is later interpreted and translated into specific *conceptions* when applied to cases before a court.[56] Another explanation, recently offered by Bruce Ackerman, argues that the Constitution derives its meaning through the *process* of public participation in "higher-track lawmaking."[57] According to Ackerman, it is during those rare "constitutional moments," characterized by a deliberative and active debate, that the public commits to constitutional principles and codifies the higher-track law of the constitution.[58] Both Dworkin and Ackerman conclude that courts, through judicial review, are authorized to protect the fundamental public commitments embodied in the Constitution.[59]

While Dworkin and Ackerman contemplate the federal Constitution, their approaches also apply to interpreting certain state constitutional provisions. Like the federal Constitution, the drafters of state constitutions generally viewed themselves as agents of the public, and sought to codify deeply held public commitments.[60] Judith Kaye, Chief Judge of the New York Court of Appeals, echoes this view of state constitutions:

> It is a function of a constitution and constitutional law, then, to preserve a community's most basic, or overarching, values in the face of its transient choices. Moreover, it is a function of the courts to ascertain and identify these most basic values, to flag them when they are at risk, and to preserve constitutional boundaries on majority rule.[61]

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55. RONALD M. DWORKIN, LAW'S EMPIRE 368 (1986).

56. *Id.* at 70-72. For example, Dworkin explains that the Constitution embodies a commitment to a concept of "equal protection of the laws" which is not opaque and should not be narrowly construed. *Id.* at 362-63. The difficulty of this task is captured by Justice Jackson's reflections on how to "translat[e] the majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into restraints on officials dealing with the concrete problems of the twentieth century." West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943).

57. BRUCE A. ACKERMAN, WE THE PEOPLE 6-7 (1991).

58. *Id.*

59. DWORKIN, *supra* note 55, at 356; ACKERMAN, *supra* note 57, at 10.

60. For example, a delegate to the Maryland Constitutional Convention, who himself doubted the value of a public education system, still supported a constitutional guarantee for education because "as the people seemed to think there was something in them, therefore he was content to admit that there was something in them." Pauley v. Kelly, 255 S.E.2d 859, 884 n.43 (W. Va. 1979) (quoting DEBATES OF THE MARYLAND CONSTITUTIONAL CONVENTION OF 1867, 247 (1923)).

61. Judith S. Kaye, *Contributions of State Constitutional Law to the Third Century of American Federalism*, 13 VT. L. REV. 49, 54 (1988).

Some commentators contest the application of federal constitutional theory to state constitutional interpretation. Alan Tarr, for example, argues that state constitutions generally do not embody basic public commitments because their form is more statutory than constitutional.[62] This argument, while true with respect to certain state constitutional provisions, does not apply to state education clauses.[63] Unlike many other state constitutional provisions, the education clauses are broadly written[64] and embody basic commitments, such as preparation for self-governance,[65] that are similar to those of the federal Constitution. As the New Jersey Supreme Court explained, "there can be little doubt that the constitutional provision for public education, designed to serve the needs of an enlightened citizenry in a democratic society, was intended by its framers to be expansive in its application."[66] The "expansive" education clause, a *concept* in Dworkin's terminology,[67] must be applied to new situations in order to maintain high quality educational systems. Furthermore, although state constitutions are more easily amended than the federal Constitution, states appear to take seriously changes in their education clauses,[68] which bolsters the analogy between state constitutional education clauses and provisions of the U.S. Constitution.

Critics also note that state constitutionalism lacks its own meaningful discourse to guide the interpretation of specific clauses.[69] However, state education clauses represent not only the state's commitment to education,

62. *See* G. Alan Tarr, *Understanding State Constitutions*, 65 TEMP. L. REV. 1169, 1181-85 (1992).

63. Tarr suggests that state constitutional provisions should be given independent effect if the provisions reflect a textual departure from the federal Constitution or stem from a unique political and historical justification. *See* G. Alan Tarr, *Constitutional Theory and State Constitutional Interpretation*, 22 RUTGERS L.J. 841, 855 (1991). Both conditions exist with respect to state education clauses.

64. *See, e.g.*, KY. CONST. § 183; N.J. CONST. art. VIII, § 4, para. 1. For the text of these clauses, see *supra* notes 23 and 26 and accompanying text.

65. *See* Allen W. Hubsch, *Education and Self-Government: The Rights to Education Under State Constitutional Law*, 18 J.L. & EDUC. 93, 96-101 (1989) (arguing that the state constitutional education clauses embody a basic commitment to preparation for self-government).

66. Levine v. State Dep't of Inst. & Agencies, 418 A.2d 229, 236 (N.J. 1980).

67. *See supra* notes 55-59 and accompanying text.

68. For example, the New Jersey Senate considered and ultimately rejected changing its constitutional mandate on education to circumvent an unfavorable court ruling. *See infra* notes 194-97 and accompanying text. Kentucky, meanwhile, has not amended its education clause since it was passed in 1891. KY. CONST. § 183, annot. KY. REV. STAT. ANN. (Baldwin 1992). Similarly, state courts approach interpretation of these clauses as cautiously as they approach federal constitutional interpretation. *See, e.g.*, *Levine*, 418 A.2d at 235-36 (exploring the state's fundamental obligation to develop an educated citizenry); Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 206-09 (Ky. 1989) (examining legal precedents interpreting the education clause).

69. *See, e.g.*, James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 812 (1992) (noting the failure of state constitutionalism to provide a "workable model for the contemporary practice of constitutional law and discourse on the state level").

but also the constitutional value of education protected, but not enforced, by the federal Constitution.[70] As such, state courts have borrowed from federal constitutional discourse in interpreting these clauses.[71]

If Ackerman and Dworkin accurately depict constitutional lawmaking as the result of serious public deliberation, constitutional interpretation need not be a frustrating battle against prevailing political forces, but rather a search for the best application of the public's commitment to a political principle. Christopher Eisgruber has argued that because constitutional interpretation is a search for and application of the public's commitment to political principles, its results should reflect the public's deepest and most thoughtful views, rather than its reflexive reactions to an issue.[72] Hence, constitutional interpretation may be an especially sophisticated poll, rather than a poor cousin to an opinion survey.[73] Eisgruber's account suggests that constitutional interpretation will often yield results similar to those of James Fishkin's *deliberative* public opinion poll.[74] Unlike the typical telephone poll, which elicits *reflexive* answers, Fishkin's poll requires ordinary citizens to discuss issues, deliberate, and offer their *reflective* judgments.[75]

Eisgruber's view of constitutional interpretation, combined with Fishkin's approach to public opinion, indicates that a major constitutional decision cannot be successfully implemented unless it sparks discussion of,

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70. For an argument outlining the constitutional value of education, see Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1210 (1991) (arguing for a reversal of San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) and the establishment of a constitutional right to education). For the classic statement of the view that state courts should enforce this constitutional value, see Sager, *supra* note 17, at 1250-51 (suggesting that state courts may enforce constitutional norms governing education because the Supreme Court has declined to do so claiming, in part, a lack of institutional competence).

71. In fact, state courts adjudicating education reform cases often cite federal cases addressing education—most notably Brown v. Board of Educ. I, 347 U.S. 483 (1954). *See, e.g.*, *Rose*, 790 S.W.2d at 190 (Ky. 1989) ("The goal of the framers of our constitution, and the polestar of this opinion, is eloquently and movingly stated in the landmark case of *Brown v. Board of Education*.").

72. Christopher L. Eisgruber, *Justice and the Text: Rethinking the Constitutional Relation Between Principle and Prudence*, 43 DUKE L.J. 1, 31 (1993).

73. *Id.*

74. JAMES S. FISHKIN, DEMOCRACY AND DELIBERATION: NEW DIRECTIONS FOR DEMOCRATIC REFORM 1-13 (1991).

75. Fishkin describes the poll designed to be employed in the context of presidential primaries as follows:

> The first evaluation of candidates would have the thoughtfulness and depth of face-to-face politics, as well as the representative character of a national event that includes us all. It offers a way out of the false dilemma within which previous reforms [to enhance the quality of participation in the presidential selection process] have been trapped. It is not elitist; a deliberative opinion poll is representative of ordinary citizens. But it permits the reflectiveness of small-scale interactions to replace the comparative superficialities of mass-retail and wholesale politics.

Id. at 9.

and ultimately connects with, the public's basic constitutional commitments. Not surprisingly, Eisgruber also suggests that courts should act as educative institutions to further that process. He encourages courts to draft their opinions so as to draw on the public's civic identity and to lay the foundation for the implementation of their decisions.[76]

Political resistance to a court decision does not necessarily mean that the constitutional provision at issue has been misinterpreted. Instead, it may mean that the judiciary has failed to challenge the public to deliver a deliberate—rather than a reflexive—opinion, or that it has ignored the role of the political process in constitutional interpretation.[77] In adjudicating state education clauses, courts should not dictate the specific requirements of the constitutional mandate, but should turn to the legislature to implement the basic constitutional commitment to quality education.[78] Otherwise, public resistance to the judicial decision may delay efforts to build a consensus on how to implement the right to an adequate education.[79] In addition, courts that try to outline a specific remedy (for example, the number of districts to be funded) risk involving themselves in policy judgments for which the legislature is institutionally better suited.[80]

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76. Christopher L. Eisgruber, *Is The Supreme Court An Educative Institution?*, 67 N.Y.U. L. REV. 961, 968 (1992) (arguing that a particularly effective form of persuasion based on collective identity relies on appeals such as "[i]t's the American thing to do").

77. The New Jersey court, which outlined a specific remedy for education reform that demanded very little creativity and input from the public and the political process, may have failed to accept these groups' roles as participants in constitutional interpretation. *See infra* notes 116, 181-82 and accompanying text.

78. See Lawrence G. Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 Nw. U. L. REV. 410, 430 (1993), for a lucid explanation of this view.

79. Justice Ginsburg makes this point with regard to the Court's abortion jurisprudence:

> With prestige to persuade, but not physical power to enforce, with a will for self-preservation and the knowledge that they are not "a bevy of Platonic Guardians," the Justices generally follow, they do not lead, changes taking place elsewhere in society. But without taking giant strides and thereby risking a backlash too forceful to contain, the Court, through constitutional adjudication, can reinforce or signal a green light for social change.

Ruth Bader Ginsburg, *Speaking In A Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1208 (1992) (citations omitted).

80. William R. Andersen explains:

> If a court ventures too far into the specifics of an educational policy dispute—especially, again, in the setting of constitutional litigation—the characteristic drag of legal doctrine could prove very hurtful. . . . But how responsive can the legislature be when the concept is woven into the fabric of the constitution? Especially in fields as fast-moving as [education reform], freedom to change seems unusually important, and specific legal mandates seem accordingly less desirable.

William R. Andersen, *School Finance Litigation—The Styles of Judicial Intervention*, 55 WASH. L. REV. 137, 169-70 (1979). *See also* Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 217 (Ky. 1989) (Gant, J., concurring) ("This Court has neither the expertise nor the power to instruct the General Assembly as to how the constitutional deficiency should be corrected.").

B. *Examining the Interpretation of State Education Provisions: The Cases of Kentucky and New Jersey*

Like most states, New Jersey and Kentucky have constitutionalized their commitment to a system of public education.[81] While most states delegate administration of the public education system to local school boards, state legislatures retain the ultimate responsibility for implementing the public's commitment to education.[82] Neither state's constitution, however, focuses on educational equity;[83] instead, each one guarantees an "efficient system" of education.[84]

Both New Jersey's and Kentucky's education clauses define the nature of the entire system of education rather than the status of different groups within the system.[85] Thus, they do not suggest a redistributive interpretation. Moreover, the provisions' focus on the educational system as a whole is consistent with the understanding of the American federal system articulated by Paul Peterson. He argues that the national government attends to distributional issues through progressive taxation and welfare provisions, while states and municipalities focus on developing their local economies.[86]

The governor of Kentucky during the education reform process, Wallace G. Wilkinson, clearly viewed education as primarily serving a developmental purpose:

> As we proceed with our efforts to improve education, I believe we must recognize the economic consequences of our educational policies. Perhaps it is time to examine school reform issues in the

81. *See* Gershon M. Ratner, *A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills*, 63 TEX. L. REV. 777, 814 n.138 (1985) (listing constitutional education provisions in every state except Alabama and Mississippi, both of which have since added such a provision); Stark, *supra* note 4, at 627-28 n.90 (listing provisions).

82. 1 WILLIAM D. VALENTE, EDUCATION LAW PUBLIC AND PRIVATE § 1.2 (1985). The Kentucky Supreme Court stressed this point. *See Rose*, 790 S.W.2d at 211 ("The sole responsibility for providing the system of common schools is that of our General Assembly."). The New Jersey Supreme Court recently emphasized this point as well. *See* Abbott v. Burke III, 643 A.2d 575, 580 (N.J. 1994) ("It is the State and only the State that is responsible for this educational disparity, and only the State can correct it.").

83. In fact, most states' education clauses are silent on distributional equity concerns. *See* Thro, *supra* note 4, at 1669-70 (noting that "[b]ecause the state education clauses have limited utility as vehicles for public school finance reform, litigants have searched for alternative state constitutional provisions that would be more effective").

84. KY. CONST. § 183; N.J. CONST. art. VIII, § 4, para. 1.

85. This observation is consistent with the republican origins of these clauses, which were directed toward the community as a whole. *See* Hubsch, *supra* note 65, at 100.

86. *See* PAUL E. PETERSON, CITY LIMITS 69, 77 (1981). Peterson explains: "All members of the city thus come to share an interest in policies that affect the well-being of that territory. Policies which enhance the desirability or attractiveness of the territory are in the city's interest, because they benefit *all* residents—in their roles as residents of the community." *Id.* at 21 (emphasis added). Peterson finds that states take an intermediate position between the central and local governments on these issues. *Id.* at 77. He refuses to classify education as either a developmental or redistributive concern because of its potential to serve either end. *Id.* at 42, 52.

> larger context of economic development policy. We have no choice but to make a significant investment in the human capital required to keep us competitive.[87]

The developmental function of education coheres with its traditional justification. Many state constitutions' education clauses reflect their drafters' belief that a universal right to a quality education is necessary for a republican government.[88] Together, the concerns of civic and economic development provide a powerful rationale for the universal right to a quality education—a rationale used by both the Kentucky and New Jersey Supreme Courts. The Kentucky court "view[ed its] decision as an opportunity for the General Assembly to launch the Commonwealth into a new era of educational opportunity which will ensure a strong economic, cultural and political future."[89] Similarly, the New Jersey court explained that education reform is necessary "to equip a child for his role as a citizen and as a competitor in the labor market."[90] The joining of the traditional and the more modern justifications for a quality educational system reflects Learned Hand's description of judicial interpretation as a process in which a judge must "preserve his authority by cloaking himself in the majesty of an overshadowing past; but he must discover some composition with the dominant trends of his times."[91]

1. Kentucky: A Model of Judicial Interpretation

In *Rose*, the Kentucky Supreme Court focused on the constitutional provision as an expression of the public's overall goal for its educational

87. Wallace G. Wilkinson, *Education Reform and Economic Competition: Critical Issues*, 15 J. EDUC. FIN. 603, 609 (1990).

88. Hubsch, *supra* note 65, at 99. This rationale for a right to education certainly emerges from an analysis of Kentucky's education clause. *See* Kern Alexander, John Brock, Larry Forgy, James Melton & Sylvia Watson, *Constitutional Intent: "System," "Common," and "Efficient" as Terms of Art*, 15 J. EDUC. FIN. 142, 162 (1989) [hereinafter *Constitutional Intent*] (concluding from an analysis of the history of Kentucky's provision that it "establishes certain limitations below which the legislature cannot justifiably fall").

89. Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 216 (Ky. 1989).

90. Robinson v. Cahill I, 303 A.2d 273, 295 (N.J. 1973), *cert. denied sub nom.* Dickey v. Robinson, 414 U.S. 976 (1973).

91. Learned Hand, *Mr. Justice Cardozo*, 52 HARV. L. REV. 361, 361 (1939). Others, such as Edward Fadeley, an associate justice of the Oregon Supreme Court, view the potential conflict between the traditional justification of civic development and the more modern justification of economic development as the central interpretive issue facing courts adjudicating education reform litigation. *See* Edward N. Fadeley, *Determining the Scope of State Constitutional Education Guarantees: A Preliminary Methodology*, 28 WILLAMETTE L. REV. 333 (1992). This Article will not address this interpretive question, but suggests several possible responses: that economic and civic development are not necessarily incompatible; that the provisions share a basic commitment to an adequate education for all; and that any potential conflict between these two justifications might be resolved through Dworkin's connection between the public's commitment to a general concept of education and a specific conception of it, which could include a concern for economic, as well as civic, development.

system.[92] The court declared that the state had failed to fulfill its constitutional commitments, but refused to criticize the legislature's previous actions.[93] Instead, as Eisgruber suggests, it sought to connect the decision to the public's civic identity and pride.[94] In response, the public viewed the decision as legitimate.[95]

Whether for prudential or constitutional reasons, or both, the Kentucky court chose to defer to the legislature and the political process. Although it refused to specify the precise changes necessary to develop an "efficient" system of education, it suggested a framework to guide the legislature's deliberations.[96] The Kentucky Supreme Court did not view the issue as a question of equity deriving from Kentucky's "equality guarantee" clauses,[97] but rather as a question of how to apply the education clause to

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92. The Kentucky Supreme Court specifically addressed the purpose of the education clause:

> In reaching this decision, we are ever mindful of the immeasurable worth of education to our state and its citizens, especially to its young people. The framers of our constitution intended that each and every child should receive a proper and adequate education . . . .

Rose, 790 S.W.2d at 189-90. Kentucky's commitment to education follows Thomas Jefferson's vision that education should be constitutionalized, since democracy depends on improving the minds of the public. *See* THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 148-49 (William Peden ed., 1954) (1787). Kentucky's commitment reflects Jefferson's vision, which may stem from Jefferson's role in Kentucky's constitutional history. *See Rose*, 790 S.W.2d at 213 (noting that Jefferson authored the state's separation of powers provisions).

93. *See, e.g.*, *Rose*, 790 S.W.2d at 189 ("[W]e intend no criticism of the substantial efforts made by the present General Assembly and its predecessors. . . .").

94. *See, e.g.*, *id.* at 216 ("We view this decision as an opportunity for the General Assembly to launch the Commonwealth into a new era of educational opportunity which will ensure a strong economic, cultural and political future.").

95. *See infra* note 107, 160-72 and accompanying text.

96. In defining "efficiency," the court stated:

> 1) The establishment, maintenance and funding of common schools in Kentucky is the sole responsibility of the General Assembly.
> 2) Common schools shall be free to all.
> 3) Common schools shall be available to all Kentucky children.
> 4) Common schools shall be substantially uniform throughout the state.
> 5) Common schools shall provide equal educational opportunities to all Kentucky children, regardless of place of residence or economic circumstances.
> 6) Common schools shall be monitored by the General Assembly to assure that they are operated with no waste, no duplication, no mismanagement, and no political influence.
> 7) The premise for the existence of common schools is that all children in Kentucky have a constitutional right to an adequate education.
> 8) The General Assembly shall provide funding which is sufficient to provide each child in Kentucky an adequate education.
> 9) An adequate education is one which has as its goal the development of the seven capacities recited previously.

Rose, 790 S.W.2d at 212-13.

97. The Kentucky "equality guarantee" clauses provide that "[a]ll men are, by nature, free and equal," KY. CONST. § 1, and that "[a]ll men when they form a social compact, are equal," KY. CONST. § 3. Equality guarantees are not identical to, but are generally interpreted similarly to, the federal Equal Protection Clause. Yost v. Smith, 862 S.W.2d 852, 854

the system as a whole.[98] This approach focused on the constitution's commitment to the overall quality of education.[99] As a result, the court declared Kentucky's entire *educational system* unconstitutional.[100] Distributional equity was a secondary concern, reflected in the principle that "all students, whatever their race or wealth characteristics, be educated sufficiently to fulfill their civic responsibilities."[101] Michael Resnick, associate director of the National School Boards Association, explained that statewide involvement in education, such as that effectuated by the Kentucky Supreme Court in *Rose*, often implicitly addresses equity concerns: "If you have [an increased] state revenue base for education, if the state is the one collecting the taxes rather than localities, there will probably be a greater tendency to allocate money equally."[102]

The comprehensive nature of *Rose* exemplifies a "performance-oriented" approach, focusing on effective instruction and student achievement,[103] rather than formal equality (equal dollars for all districts). This approach reflects the view that money is not a cure-all[104] and that a focus on formal equality can deflect attention from other barriers to educational quality.[105] Because *Rose* stressed educational effectiveness, grounded the

(Ky. 1993) (explaining that the equal guarantee provisions of the Kentucky Constitution offer the same protections afforded by the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution).

98. *Cf. Rose*, 790 S.W.2d at 215 ("Lest there be any doubt, the result of our decision is that Kentucky's *entire system* of common schools is unconstitutional.").

99. *Id.* at 217 ("Although adequate and additional funding is a necessary part of the contemplated procedure, money alone is not the answer. Efficiency of administration, curriculum, facilities, . . . and many other problems are extant and pleading for cure.").

100. *Id.* at 215. Commentators have lauded the Kentucky litigation and the court's comprehensive approach to education reform. *See, e.g.*, Jacob E. Adams, Jr., *School Finance Reform and Systemic School Change: Reconstituting Kentucky's Public Schools*, 18 J. EDUC. FIN. 318, 322 (1993).

101. Hubsch, *supra* note 65, at 105.

102. Amer. Pol. Network, *School Finance: The "Jump Off The Cliff" Approach*, DAILY REPORT CARD, Mar. 10, 1994, *available in* LEXIS, News Library, RptCrd File.

103. William H. Clune, *New Answers to Hard Questions Posed by* Rodriguez: *Ending the Separation of School Finance and Educational Policy by Bridging the Gap Between Wrong and Remedy*, 24 CONN. L. REV. 721, 734 (1992).

104. Richard J. Murnane, who believes that "money matters," nevertheless underscores that

> remedies should include incentives for local districts and individual schools to devise and implement plans for raising student achievement. Such plans might involve changes in the practices used to hire teachers, and the design of a strategy to increase the amount of student writing. . . . [T]he dollars must follow the plans.

Richard J. Murnane, *Interpreting the Evidence on "Does Money Matter?"* 28 HARV. J. ON LEGIS. 457, 462-63 (1991).

105. As Eric A. Hanushek points out, "[e]mphasizing primarily the distribution of expenditures per student, financing reform is almost certain to exacerbate existing problems of inefficiency. . . . History indicates that while some districts might use additional funds effectively, other districts will probably use them ineffectively." Eric A. Hanushek, *When School Finance "Reform" May Not Be Good Policy*, 28 HARV. J. ON LEGIS. 423, 453-54 (1991).

issue in a clear constitutional mandate, and appealed to the public's intuitive sense of justice,[106] it enjoyed widespread public support. Kern Alexander, an educational expert who closely observed the Kentucky litigation, described the effect of the court's ruling:

> The court's mandate seemed to represent an external force authorizing an important social change that the people intuitively knew was morally necessary and long overdue. The court decision and the enactment of the new education law appeared to imbue the citizenry with a collective pride of ownership which later found the most obdurate legislators and reluctant taxpayers exalting themselves with praise for their accomplishments.[107]

The Kentucky court successfully framed the debate by not only focusing on overall educational quality, but also prodding the legislature to act according to a timetable, rather than mandating a specific remedial scheme.[108] The court's action emerged from its understanding of its role under the constitution:

> Clearly, no "legislating" is present in . . . the decision of this Court. . . . Our job is to 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.[109]

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106. Although this intuitive sense of justice can be found by looking to the understanding of the drafters, courts need not be confined to such an analysis. *See* Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147, 1156-59 (1993). Nor should state constitutional judgments necessarily follow the U.S. Supreme Court or look solely to unique state sources. For example, Kentucky v. Wasson, 842 S.W.2d 487, 491-92 (Ky. 1992), held that the criminalization of homosexual sodomy violated the state constitution, thereby diverging from the Supreme Court's holding in Bowers v. Hardwick, 478 U.S. 186, 190-91 (1986) (finding that the Due Process Clause, which protects the right of privacy, does not reach sodomy). *Wasson* not only considered Kentucky-based sources, 842 S.W.2d at 493-96, but also examined the position of the American Law Institute, the philosophy of John Stuart Mill, and the U.S. Supreme Court's decision in Loving v. Virginia, 388 U.S. 1, 12 (1967) (striking down Virginia's anti-miscegenation statute). 842 S.W.2d at 496-98. In the case of education reform, the Kentucky court did not explicitly discuss the value of result-oriented criteria, but such criteria served as a legitimate interpretive basis for the decision.

107. Kern Alexander, *The Common School Ideal and the Limits of Legislative Authority: The Kentucky Case*, 28 HARV. J. ON LEGIS. 341, 344 (1991).

108. Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 216 (Ky. 1989) (allowing the legislature one year to implement a new educational system).

109. *Id.* at 214.

The court chose this remedy because it viewed the state's separation of powers doctrine as preventing it from mandating any particular legislative program or taxation scheme.[110]

2. New Jersey's Judicial Interpretation: Mired in the Details

The New Jersey Supreme Court, in contrast, interpreted its constitutional education clause and the facts presented to it by exclusively focusing on distributional equity, ultimately crafting a narrow judicial remedy.[111] Despite the Commissioner of Education's earlier administrative ruling that the education clause required a level of adequate education,[112] the state court declined to take responsibility for the quality of the educational system as a whole.[113] The court acknowledged that the problems might be "systemic, requiring a declaration of unconstitutionality."[114] However, the court chose to view them as "district-specific, requiring corrective action under the Act in a limited number of failing districts."[115] The court's remedy did not demand creativity of the legislature; the opinion simply required it to improve a selected number of poor urban school districts.[116] Although the court recognized that money alone could not ensure quality educational for all,[117] it directed that certain districts receive additional aid and that the

110. The court interpreted the "letter and spirit of th[e] constitutional mandate," *id.* at 213, as requiring a different remedy than that crafted by the lower court. The lower court's reliance on federal court precedents was improper, since the Kentucky constitution reflects a different understanding of separation of powers than the federal Constitution. Specifically, the lower court had created a commission to develop specific remedial measures rather than leaving that task to the legislature. *See id.* at 214.

111. Abbott v. Burke II, 575 A.2d 359, 382-89 (N.J. 1990) (addressing the evidence and concerns related to different spending levels of different school districts); *id.* at 367 (discussing how the clause has primarily been viewed as mandating equality).

112. *Id.* at 365.

113. The New Jersey court explained its "constitutional answer" as solely connected to monetary concerns and formal equality, not to a level of educational quality:

> We have concluded, however, that even if not a cure, money will help, and that these students are constitutionally entitled to that help. If the claim is that additional funding will not enable the poorer urban districts to satisfy the thorough and efficient test, the constitutional answer is that they are entitled to pass or fail with at least the same amount of money as their competitors.

Id. at 403.

114. *Id.* at 366.

115. *Id.*

116. *Id.* at 409.

117. In considering the research analyzing the impact of other factors besides and connected to money, the court explained that the research

> shows beyond doubt that money alone has not worked. It shows promising success in many different approaches emphasizing techniques, relationships, social forces, motivation, approaches often quite different from conventional instruction. But it does not show that money makes no difference. What it strongly suggests is that money can be used more effectively than it is being used today.

Id. at 404.

legislature address only the narrow issue of equity, rather than overall quality.[118]

The New Jersey court, while acknowledging the flaws of its decision, justified its position by noting that "fundamental [constitutional] limits on judicial power . . . cannot justify a sliding scale which tailors the remedy [and addresses] issues of fairness unrelated to the constitutional command."[119] This explanation is belied, however, by the constitutional theory applied by the Kentucky court and the remedy that court devised. The New Jersey court might have balked at the Kentucky approach, as it would have entailed addressing issues beyond those framed by the litigants. On the other hand, in education reform litigation, the relief sought by the plaintiffs should not be dispositive; the nature of the constitutional provision should structure the nature of the remedy. Given a general constitutional mandate that does not differentiate between districts,[120] the best interpretation of the education clause demands an adequate level of education for all. A second interpretive reason for a general remedy is that the constitution clearly delegates responsibility for educational issues to the legislature.[121] The court's district-by-district remedy limits this delegation. Finally, practical concerns also caution against a district-by-district remedy, as money must be supplemented by curricular and administrative reforms in order to effect substantial educational improvements.[122]

There are several possible explanations for the New Jersey Supreme Court's refusal to declare the entire state's education system unconstitutional. First, the court was presumably influenced by the state's political situation.[123] Second, the court may have had little confidence in the political process' support for educational reform. It had observed the nationwide resistance to federal desegregation rulings during the civil rights era and, closer to home, the New Jersey legislature's resistance to a previous decision holding the state's educational financing scheme unconstitutional.[124] Finally, the Kentucky approach of declaring the entire education system unconstitutional and demanding comprehensive education reform

118. *Id.* at 408-09. The lower court went so far as to define the equity issue in precise dollar terms. Abbott v. Burke III, No. 91-C-00150, 1993 WL 379818 at *10 (N.J. Super, Aug. 31, 1993).

119. *Abbott II*, 575 A.2d at 409.

120. The court explicitly stated that it was only interpreting the education clause and did not rely on the state equal protection clause. *See id.* at 410.

121. *See* N.J. CONST. art. VIII, § 4, para. 1 ("The Legislature shall provide for the maintenance and support of a thorough and efficient education. . . .").

122. *See, e.g.*, Murnane, *supra* note 104, at 462-63; *Abbott II*, 575 A.2d at 404 (relevant portions quoted *supra* note 117).

123. *See infra* part II.B.

124. The court's frustration in its initial effort to reform education is addressed *supra* notes 25-36 and accompanying text.

was innovative and untested;[125] the New Jersey court might have hesitated before following this radical approach.

3. *Evaluating New Jersey's Original Approach: The Path Not Taken*

Supporters of the *Abbott II* decision and Governor James Florio's proposed program might argue that their approach was the only viable strategy. However, the New Jersey Supreme Court's recent decision in *Abbott III*[126] offers the most illustrative example of the path not taken. The *Abbott III* decision departed from both the lower court's decision and the New Jersey Supreme Court's *Abbott II* decision in several ways. First and most importantly, the decision did not offer specific financial goals or dictate guidelines, as the lower court had done,[127] but instead forcefully outlined the direction and necessity of comprehensive reform.[128] Second, while constrained by the view that the constitutional command did not require a general remedy, the court underscored that the condition of the special needs districts was of statewide concern: "While the constitutional measure of the educational deficiency is its impact on the lives of these students, we are also aware of its potential impact on the entire state and its economy—not only on its social and cultural fabric, but on its material well-being, on its jobs, industry, and business."[129] In so doing, the court sought to appeal to a collective interest and responsibility of the state to provide a quality education for all students:

> [W]e underlined the clear and absolute responsibility of the State for both the problem and its solution, noting that all of the money—whether the taxes are local or State—is authorized and controlled in terms of its source, amount, distribution, and use by the State, and that all of the students are citizens of the State . . . .[130]

Third, the court addressed the criticism that the Florio administration failed to oversee the aid to school districts[131] and emphasized that "the Legislature or the Department [of Education] should ensure that the uses

125. Both the Kentucky court in Rose v. Council for Better Educ., Inc., 790 S.W.2d 186 (Ky. 1989) and the New Jersey court in Robinson v. Cahill V, 355 A.2d 129 (1976) selected open-ended remedies and returned the issue to their respective legislatures. However, the Kentucky approach was innovative in that it attempted to frame the agenda very broadly, focusing on overall quality of the entire educational system and creating a sense of urgency. *Rose*, 790 S.W.2d at 215-16.

126. Abbott v. Burke III, 643 A.2d 575 (N.J. 1994).

127. Abbott v. Burke III, No. 91-C-00150, 1993 WL 379818 (N.J. Super, Aug. 31, 1993).

128. Abbott v. Burke III, 643 A.2d at 580-81.

129. *Id.* at 581.

130. *Id.*

131. Chris Mondics, *New Jersey Ordered To Equalize Aid to Schools The Governor and Legislature Have Three Years To Bring Poor Urban Districts Up To Par*, PHILA. INQUIRER, July 13, 1994, at B1.

of the additional funding available to the special needs districts are supervised and regulated."[132] The court's shift in tone and substance reflects changes in the political landscape which focused attention on the merits of the Kentucky strategy and of an appeal to a collective identity. In fact, New Jersey has begun to pursue education reform in a system-wide manner. The plan offered by Governor Christine Todd Whitman, elected in 1993, proposes a more comprehensive and incremental "leveling up" strategy, similar to that employed in Kentucky, to solve the constitutional defects in New Jersey's system of education.[133]

II
POSITIVE POLITICAL THEORY AND A FOCUS ON QUALITY FOR ALL: EXAMINING THE POLITICAL DYNAMICS OF EDUCATION REFORM

To analyze the political dynamics affecting implementation of judicially mandated education reform, this Article will model the institutional actors (the judiciary, legislature, and executive) as players engaged in a strategic game.[134] This Article will chart the players' positions on graphs where the X coordinate represents changes in distributional equity and the Y coordinate represents changes in educational quality and efficiency. It is important to note that the graphs offered in this discussion are not scientific or precise. Rather, they attempt to present a relational progression of educational policy based on the series of events that set the agenda and the course of education reform in Kentucky and New Jersey.

As illustrated by the models presented below, a state judiciary's effort to move policy solely along the X-axis towards greater distributional equity will fail because the legislature will act in accordance with the electorate's

132. *Abbott III*, 643 A.2d at 579.

133. *See infra* notes 206-07. It is certainly too premature to judge the likely success of the Whitman plan especially since it proposes to improve education partly by economizing on teachers' salaries. *See* Iver Peterson, *Commission Urges Curbing Pay in New Jersey Schools*, N.Y. TIMES, Apr. 9, 1994, at 23. The likelihood of the plan's passage is difficult to discern because it directly challenges the politically powerful teachers' union. *See* Iver Peterson, *New Jersey Teachers Flex Muscles, But Carefully*, N.Y. TIMES, Apr. 19, 1994, at B1 ("In the tightly knit world of New Jersey politics, no organization has had more muscle than the New Jersey Education Association, and none has been more willing to use it."). *See also*, David P. Rebovich, *Governor's Education Policies May Sway Assembly Elections*, N.J. LAWYER, May 15, 1995, at 3. Brian Kladko, *Whitman's 'Model' Proposal Garners Disfavor*, ASBURY PARK PRESS (New Jersey), Sept. 19, 1995, at A3.

However, Michigan's education reform plan passed despite the opposition of the teacher's unions. *See* James L. Tyson, *Michigan's New Tax Scheme Aims To Upgrade Its Poorer Schools: Instead of Relying on Property Tax, Schools To Get State Sales-Tax Money*, CHRISTIAN SCI. MONITOR, Mar. 22, 1994, at 2 (noting that various critics opposed the loss of local autonomy and that the teachers' unions specifically opposed the increased dependence on state tax policy).

134. This model assumes that each actor engages in bargaining with the other political actors to arrive at an equilibrium point that best approximates the policy preferences of all of the involved actors as mediated by the rules of the policymaking process.

resistance to such changes. However, if the court frames the issue as primarily one of overall educational quality, or as a Y-axis issue, with a secondary and related focus on the X-axis concern of distributional equity, the remedy will draw on significantly more public support. Such a remedy will connect with the public's constitutional commitment to support public education. As discussed below, the one-dimensional X-axis story—focusing on distributional equity—unfolded in New Jersey with a predictable lack of success. The two-dimensional X- and Y-axis story—centered on concerns of overall quality—unfolded in Kentucky and successfully sparked meaningful education reform.

In addition to the judiciary's view of the facts and legal principles implicated in an education reform case, several external forces will determine the dynamics of the strategic game. Among them are (1) whether the court expects the legislature or the public to overturn the decision through constitutional amendment,[135] (2) whether the decision can be successfully implemented, (3) whether the decision might pose a threat to the judiciary's institutional legitimacy,[136] (4) the electoral impact of the decision,[137] and (5) the justices' personal reputations within the legal profession.[138] Together, these forces will limit the extent to which state judiciaries will craft radical and innovative remedies for constitutional flaws in state educational

135. Because the issue of school financing is governed by a constitutional provision rather than an ordinary statute, the probability of a legislative override is lessened, due to the additional effort required for a constitutional amendment. This difference became an important factor in New Jersey's educational financing litigation. *See infra* notes 195-98 and accompanying text.

136. *Cf.* Planned Parenthood v. Casey, 112 S. Ct. 2791, 2814 (1992) (affirming the "central holding" in *Roe v. Wade* because overruling *Roe* would "seriously weaken the Court's capacity to exercise the judicial power" by undercutting the Court's legitimacy as an institution). *But see id.* at 2883 (Scalia, J., dissenting) ("[W]hether [overruling *Roe*] would 'subvert the Court's legitimacy' or not, the notion that we would decide a case differently from the way we otherwise would have in order to show that we can stand firm against public disapproval is frightening.").

137. This concept of electoral impact can be broadly understood to encompass: (1) recall (*see, e.g.*, Paul Reidinger, *The Politics of Judging*, A.B.A. J., Apr. 1, 1987, at 52 (attributing the defeat of several judges to unpopular stances, including the recall of California State Supreme Court Chief Justice Rose Bird)); (2) reelection chances of individual judges; (3) electoral possibilities of other judges who may be hostile to the views pronounced in the decision (*cf.* Fran Ellers, *Two Judicial Races Not Expected To Cause Major Shift On State Supreme Court*, COURIER-JOURNAL (Louisville, Ky.), Nov. 2, 1990, at B4 (noting the attention that the landmark school-finance ruling and other major decisions have drawn toward the popularly elected Kentucky Supreme Court)); or (4) reelection chances of a friendly governor whose defeat would result in the appointment of hostile judges. All state courts confront at least some of these considerations and most are directly connected to the political process—e.g., only two states (Massachusetts and New Hampshire) have tenure until retirement and executive appointment similar to the Article III process. *See* COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES, 1990-91, at 190-91, 204-05 (1990).

138. *See generally* David Millon, *Objectivity and Democracy*, 67 N.Y.U. L. REV. 1 (1992) (arguing that the "interpretive community" of lawyers serves as a constraint on judicial decision making).

systems[139] and will affect how they communicate their decisions to the public.[140]

A. *The Case of Kentucky: Realizing a Vision of Overall Quality*

In deciding *Rose v. Council for Better Education, Inc.*, the Kentucky Supreme Court refused to set the agenda for education reform solely from a distributional equity (X-axis) perspective. In fact, the court rejected the lower court's finding that the state's education system violated the Kentucky constitution's equality guarantee.[141] Instead, the court held that the constitutional provision governing education[142] had been violated and stressed quality and efficiency (Y-axis concerns) rather than distributional equity.[143] Moreover, the court, mindful of separation of powers concerns and its limited institutional competence, demanded neither that remedies be devised for particular districts nor that a particular amount of money be spent.[144] Instead, the court simply declared the entire school system unconstitutional on the ground that it failed to provide an adequate education for all students.[145] This decision opened a "policy window,"[146] or an opportunity for action, by forcing the legislature to rethink the state's approach

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139. Commentators have previously noted how state court judges' broad connection to and understanding of the political process sharply affects their decisions in adjudicating cases under state constitutions. *See, e.g., Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1351-53 (1982) ("[I]nvolvement in the electoral process surely heightens the sensitivity of state judges to political pressures and concerns.").

140. Robert F. Utter, a Washington Supreme Court justice, underscored how the political forces affecting state courts make judges

> aware of the need to be sensitive to public concerns and to carefully explain why value choices that must be made in decisions are chosen. State judges also frequently participate in public education regarding the role of the courts in a constitutional government. This is part of the ongoing education of the public for the support that judges must give to basic concepts of personal rights contained in the bills of rights of the federal and state constitutions.

Robert F. Utter, *State Constitutional Law, the United States Supreme Court, and Democratic Accountability: Is There a Crocodile in the Bathtub?*, 64 WASH. L. REV. 19, 48 (1989).

141. Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 215 (Ky. 1989) (noting that the only constitutional provision governing this case was the education clause of the Kentucky constitution). This contrasts with the lower court's reliance on the equality guarantees. *See* Council for Better Educ., Inc. v. Wilkinson, No. 85-CI-1759, slip. op. at 15 (Ky. Franklin Cir. Ct. Div. I, May 31, 1988). For equality guarantees, see *supra* note 97.

142. KY. CONST. § 183.

143. *Rose*, 790 S.W.2d at 214.

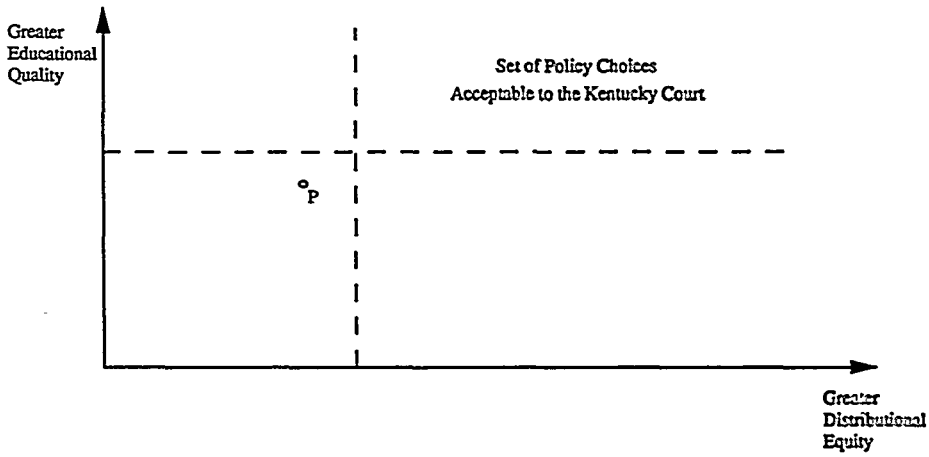
144. *Id.*

145. The court's ruling was clear and simple:

> We have decided one legal issue—and one legal issue only . . . that the General Assembly of the Commonwealth has failed to establish an efficient system of common schools throughout the Commonwealth. Lest there be any doubt, the result of our decision is that Kentucky's entire system of common schools is unconstitutional. There is no allegation that only part of the common school system is invalid, and we find no such circumstance. This decision applies to the entire sweep of the system—all its parts and parcels. This decision applies to the statutes creating, implementing and financing the system and to all regulations, etc., pertaining thereto.

to public education and to change its previously entrenched educational system.[147] The executive and legislature seized that opportunity, bringing in renowned consultants and taking reams of testimony before enacting a plan providing for a quality education for all.[148]

FIGURE 1: THE POLICY WINDOW CREATED BY *ROSE*



While the court did not pinpoint a specific policy, it outlined a vision of an educational system consistent with the state's constitutional commitment to education.[149] The court structured the reform process through substantive requirements derived from the constitutional mandate,[150] and

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Id. at 215.

146. KINGDON, *supra* note 3, at 174-76. Kingdon explains this concept as follows:

> [P]olicy windows, the opportunities for action on given initiatives, present themselves and stay open for only short periods. If the participants cannot or do not take advantage of these opportunities, they must bide their time until the next opportunity comes along.

Id. at 174.

147. The court opened this policy window self-consciously, explaining that "[w]e view this decision as an opportunity for the General Assembly to launch the Commonwealth into a new era of educational opportunity which will ensure a strong economic, cultural and political future." *Rose*, 790 S.W.2d at 216. Justice Gant's concurrence underscored this view:

> This decision has provided the Executive and Legislative branches of our government with a rare opportunity to start with a clean slate; to utilize the expertise of its members and others (both inside and outside the state) to study other jurisdictions which have faced a similar problem and successfully solved it; and to stamp a distinguished impression upon the pages of the history of this Commonwealth.

Id. at 217 (Gant, J., concurring). Unlike the New Jersey court, the Kentucky court broadly outlined the need for quality-based reforms and underscored their importance to the state, rather than demanding changes in distributional equity. *Id.* at 211-13.

148. Michael Jennings, COURIER-JOURNAL (Louisville, Ky.), Apr. 12, 1990, at 1A.

149. *Rose*, 790 S.W.2d at 212-13 (summarizing the essential and minimal characteristics of an "efficient" system of common schools).

150. *Id.*

declared the state responsible for direct supervision of the system.[151] Furthermore, it called on the legislature to provide additional overall funding to education[152] and warned that the state could not shift the constitutional obligation to provide adequate educational opportunities to local governments.[153] These requirements forced the governor and the legislature to work within the shaded area of Figure 1, an area representing a level of overall quality which inherently necessitates a certain level of distributional equity.[154] Framed in this manner, the reforms cohered with the public's concern for educational quality and simultaneously provided political protection for taxes to support greater distributional equity.[155] By declaring the entire educational system to be unconstitutional, the court also strongly underscored that the state must *comprehensively* confront its educational problems; that is, if some students are not receiving an adequate education, the entire *system* is unconstitutional.[156]

The program devised by the Kentucky legislature allows teachers, principals, and parents to team up at each school to make most instructional and school-management decisions.[157] It also provides them with additional resources and incentives to invest in education.[158] The Kentucky

151. *Id.* at 211.
152. *Id.* at 197.
153. *Id.* at 211.
154. *Id.* at 211-12.
155. *See Constitutional Intent*, *supra* note 88, at 160 (noting the moral authority of the court's ruling which connected and mobilized the entire public based on its appeal to their constitutional commitment to education); *see also* Adams, *supra* note 100, at 324-25. Adams aptly characterized the Kentucky experience: "In short, the Kentucky Supreme Court presented the commonwealth with an unprecedented opportunity: to reconstitute the state's elementary and secondary school system so as to provide equitable and adequate educational opportunities to all Kentucky school children." *Id.*
156. By broadening the educational issue "beyond the plea of the plaintiffs [and their focus on equity]" in declaring the whole school system inadequate, the Kentucky Supreme Court forced the legislature to devise a comprehensive reform program addressing more than the questions of educational equity sparked by education financing litigation in the other states, such as New Jersey. *See* Michael Jennings, *Reform Plan Seen as National Model, Gets Wide Support*, COURIER-JOURNAL (Louisville, Ky.), May 6, 1990, at 1A.
157. The investment into and innovation in education over the past three years have been remarkable. *See, e.g.*, Mary Jordan, *Kentucky's Retooled Classrooms "Erase the Board Clean,"* WASH. POST, Apr. 23, 1993, at A3. Jordan described the improved conditions:

> Boys lug dolls and diapers for two weeks straight as part of an introductory course in parenting. Saturday classes and tougher tests emphasize the value of learning. Desks come with laptop computers, which students will soon be able to check out like library books. And the school recently installed computer-ready telephone hookups in every classroom, joining other schools implementing reforms mandated throughout Kentucky three years ago in the nation's most technologically advanced public school system. . . .
>
> The new way includes untimed class periods; less-structured subjects so, for instance, English and math lessons can be combined; community service in nursing homes and elsewhere; parenting lessons; and new family resource centers inside to deal with everything from divorce depression to joblessness.

Id.
158. *Id.*

Education Reform Act of 1990 (KERA),[159] which addresses financing, governance, and curricular concerns,[160] is remarkable both for its comprehensive solution to the problems in the state's educational system[161] and for its effort to measure educational success by progress in learning, rather than compliance with regulations.[162] If individual schools do not improve to the level required by the state,[163] the state can impose sanctions against them.[164] The sanctions include sending outside managers to intervene, firing the school's administrative and teaching staff, allowing parents to remove their children, and even closing the school.[165] This school reform package also included $2.5 billion in additional education funds drawn from increases in the sales tax and personal and corporate income taxes.[166]

At a symposium at Harvard Law School, former Kentucky governor and lawyer for the *Rose* plaintiffs, Bert T. Combs, and state Senator Michael R. Moloney termed the combination of Kentucky's grassroots support for education reform and the far-reaching judicial decision that precipitated the 1990 General Assembly's action "a near miracle."[167] In Combs' words:

159. 1990 Ky. Rev. Stat. & R. Serv. 476 (Baldwin) (codified as amended in scattered sections of KY. REV. STAT. ANN. (Baldwin 1990)).

160. For a fuller description of this program, see Adams, *supra* note 100, at 328-36.

161. 1990 Ky. Rev. Stat. & R. Serv. 476. Commentators have praised this aspect of Kentucky's reforms. *See, e.g.*, Charles S. Benson, *Definitions of Equity in School Finance in Texas, New Jersey, and Kentucky*, 28 HARV. J. ON LEGIS. 401, 417-21 (1991). Benson noted:

> The Kentucky case represents the most comprehensive attack yet on the constitutionality of a state educational system. Instead of focusing on financial issues, as do the first generation of cases and the recent Texas litigation, in Kentucky financial questions play only a subsidiary role in the reform of public education. The Supreme Court of Kentucky did require the Kentucky General Assembly to change school financing, but these required changes were simply a means to reach a far broader set of goals.

Id. at 417.

162. 1990 Ky. Rev. Stat. & R. Serv. 476, §§ 3, 4, 5, 11. Former Assistant U.S. Secretary of Education Chester Finn, now a Vanderbilt University professor and head of the Washington-based Education Excellence Network, praised the Kentucky reform package for embracing "all the right ideas," including the notion that "you should organize and regulate your education through the results" it achieves. Jennings, *supra* note 156, at A1.

163. 1990 Ky. Rev. Stat. & R. Serv. 476, § 11. Compliance with state requirements will be determined by a series of tests geared to measure schools against their own potential. The overall test scores for a school will take into account each school's attendance record, dropout rate, and the percentage of students held back in a grade. These results will then be publicly released so that taxpayers can learn whether their money is being spent in ways that benefit students. Editorial, *KERA: Making A Difference*, COURIER-JOURNAL (Louisville, Ky.), Aug. 8, 1993, at 2D.

164. 1990 Ky. Rev. Stat. & R. Serv. 476, § 5(6); William Celis 3d, *Local Running of Kentucky Schools Leads to Rewards, and Some Stress*, N.Y. TIMES, July 3, 1991, at A17.

165. 1990 Ky. Rev. Stat. & R. Serv. 476, § 5(6); *Unaccountable, Ineducable, Unmanageable, Unreformable*, ECONOMIST, Mar. 16, 1991, at 19.

166. 1990 Ky. Rev. Stat. & R. Serv. 476, §§ 105-12(a), 284(7), 124(4); Jennings, *supra* note 148, at 1A.

167. Carolyn Gatz, *School-Reform Law Hailed at Harvard*, COURIER-JOURNAL (Louisville, Ky.), Feb. 10, 1991, at B1.

> The great difference in Kentucky is that the legislature, rather than paying lip service to the court and dragging its feet as has happened in other states, faced up to its constitutional responsibilities. . . . It grabbed the ball and ran with it. . . . Kentucky has now, by reason of this [court] decision, decided to become educated and embarked on a crusade. . . . We're determined in Kentucky to make this school reform fly.[168]

The public and political support for the court's decision and the lack of significant protest to the tax increases may be rooted in the public's strong commitment to education.[169] Taxpayers supported the decision to increase funding for the public school system by $2.5 billion,[170] presumably to ensure better schools for their children and better qualified citizens for their workforces.

The public's support for higher quality schools and the program's commitment to accountability were critical to the program's success in improving both the quality and distributional equity of Kentucky's school system. The Kentucky school reform law has considerably narrowed the gap between the best funded and worst funded school districts.[171] Unlike New Jersey's remedial scheme, which alienated wealthier districts by capping the amount that they could spend, Kentucky's program implemented a fund-matching formula, which matches all districts' increases in education spending, but reimburses poorer districts at a higher rate.[172] While this financing scheme, motivated by both equity and quality concerns, has been

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168. *Id.* at B1, B4.

169. Thirty-eight percent of the public cited education as the state's number one problem after the Kentucky Supreme Court's decision in *Rose*. This was twice the percentage of those who cited jobs and economic development as the state's greatest problem. Dick Kaukas, *Bluegrass State Poll: Education Outranks Jobs as State's Main Problem*, COURIER-JOURNAL (Louisville, Ky.), Dec. 2, 1990, at B1.

170. Rorie Sherman, *Tackling Education Financing: Lawmakers and Courts Battle Over Disparities Among School Districts*, NAT'L L.J., July 22, 1991, at 23.

171. Michael Jennings, *Inequity In School Funding Is Fading, Official Tells Panel*, COURIER-JOURNAL (Louisville, Ky.), Sept. 14, 1990, at 1B. Ron Moubray, head of the Kentucky Department of Education's office of school administration and finance, reported:

> Last year [1990], only 21 school districts had funding of more than $3,000 per child; this year, 173 of the state's 176 school districts are above that figure. The funding gap between Fort Thomas, a relatively wealthy school district in Campbell County, and Floyd County, a relatively poor district, has narrowed from $912 per child last year to only $178 per child this year.

Id.

172. *Id.* For example, this formula might offer two dollars in state funds for every dollar increase in education spending by a poorer district, but only one dollar in state funds for a dollar increase by a richer district. Hence, Ron Moubray, head of the Kentucky Department of Education's office of school administration and finance, commented: "I believe equity has arrived through this formula . . . [I have] difficulty finding anything substantially wrong [with it]". *Id.*

successful in Kentucky,[173] it might not be as successful in closing the gap in states such as New Jersey, in which greater disparities between school districts are evident.[174] However, even from the standpoint of pure equity concerns, even a less successful scheme clearly is preferable to the gridlock which existed in New Jersey.

B. The Case of New Jersey: Frustration of Equity-Centered Reform

In New Jersey, the interaction of several factors[175] influenced the judiciary's crafting of a narrow distributional remedy in *Abbott II*.[176] First, the legislature was heavily Democratic, and the Democratic governor was already crafting an educational program with significant redistributive elements.[177] Therefore, the court probably did not foresee the long-term public resistance that would emerge from its remedial decision. Second, the state judiciary enjoyed a reputation as an activist court.[178] Third, the state's highest court had earlier declared the state's financing scheme unconstitutional, thereby setting a precedent for the court's involvement in the issue.[179] Finally, New Jersey Supreme Court justices do not face reelection and therefore need not defend their decisions before the full electorate.[180] Comforted by the governor's support and by their partial insulation from political pressures, the justices faced few institutional incentives to present a politically palatable decision.

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173. Early studies have assessed KERA's results favorably. *See, e.g.*, Stephen J. Goetz & David L. Debertin, *Rural Areas and Education Reform in Kentucky: An Early Assessment of Revenue Equalization*, 18 J. EDUC. FIN. 163, 172 (1992) ("To the extent that the KERA intended to increase the per-pupil availability of funds in poorer, and often rural, school districts it has thus been successful").

174. Kern Alexander, former president of Western Kentucky University and an expert on school finance who participated in early stages of the Kentucky case, noted that Kentucky is relatively unique in its ability to raise its poorer districts to the level of their more advantaged neighbors without forcing any school district to give up large resources to expand poorer districts' resources. In other states, with greater disparities, Alexander noted that "leveling up" is not likely. Gatz, *supra* note 167, at B4. *See also infra* part III.C.

175. *See supra* text accompanying notes 134-37.

176. Abbott v. Burke II, 575 A.2d 359 (N.J. 1990).

177. Jerry Gray, *Judge Says Trenton Spending Fails Mandate to Aid Schools*, N.Y. TIMES, Sept. 1, 1993, at A1, B5 ("Anticipating the court's ruling, Mr. Florio had already begun pushing his own school spending plan, the Quality Education Act, through the Legislature, which was then controlled by Democrats.").

178. *See* Tarr, *supra* note 63, at 855 (citing the state supreme court's elaboration of criteria for legitimately diverging from U.S. Supreme Court decisions as evidence of its reputation for activism); *cf.* Southern Burlington County NAACP v. Mount Laurel, 336 A.2d 713, 731 (1975) (holding that the New Jersey constitution provides a right against exclusionary zoning), *cert. denied*, 423 U.S. 808 (1975).

179. *See* Robinson v. Cahill I, 303 A.2d 273, 294 (N.J. 1973) (rejecting plaintiff's equal protection claim but finding that the financing system violates provisions in the state constitution which impose a duty on the state to provide equal educational opportunity), *cert. denied sub nom.*, Dickey v. Robinson, 414 U.S. 976 (1973).

180. Members do not face reelection, but are subject to reappointment by the governor and reconfirmation by the senate at the end of every seven year term. *See* N.J. CONST. art. VI, § 6, para. 1; *see also* COUNCIL OF STATE GOVERNMENTS, *supra* note 137, at 191.

Because the court's battle with the legislature over the *Robinson* case fourteen years earlier had failed to effect any enduring change in educational equity,[181] *Abbott II* forced the court to reconsider the constitutional mandate of a "thorough and efficient education."[182] The court again focused on distributional equity issues, mandating that the legislature provide additional funding to twenty-eight of the poorer inner-city districts.[183] Governor Florio's plan, the Quality Education Act (QEA),[184] went even further. It targeted aid to an additional two school districts and capped the spending of wealthier districts in order to realize greater distributional equity.[185] The legislature passed Florio's plan with little public deliberation or discussion.[186]

Figure 2, below, represents the shifts in educational policy—points P, P_1, P_2, etc.—relative to distributional equity concerns (the X-axis) and quality concerns (the Y-axis). Since the debate focused exclusively on issues of distributional equity, the positions of the institutional actors are represented as values along the X-axis. For example, the judiciary (J) called for a level of distributional equity greater than that of value P. Similarly, the governor (G) and the legislature (L) supported a plan that redistributed educational funding even more than what was called for by the court. The point P represents state policy in the late 1980s, while the shift to P_1 reflects the impact of the judiciary's *Abbott II* decision and P_2 represents state policy following passage of the QEA.

181. *See* LEHNE, *supra* note 31, at 200.

182. Abbott v. Burke II, 575 A.2d 359, 384 (N.J. 1990).

183. *Id.* at 408.

184. Quality Education Act of 1990, N.J. STAT. ANN. §§ 18A:7D-1 to 18A:7D-37 (West Supp. 1994). The name of the statute reveals that the drafters may have viewed their narrowly focused program (addressing only equity-based concerns) as motivated by a desire to extend the quality wealthier school districts already enjoyed to poorer districts. However, the Act failed to deal with school governance, curriculum, and financial issues. This Article focuses on the politics of implementation of the court-ordered remedies; it does not discuss the mechanics of the QEA. For a detailed overview of the Act, see Margaret E. Goertz, *School Finance Reform in New Jersey: The Saga Continues*, 18 J. EDUC. FIN. 346, 350-54 (1993).

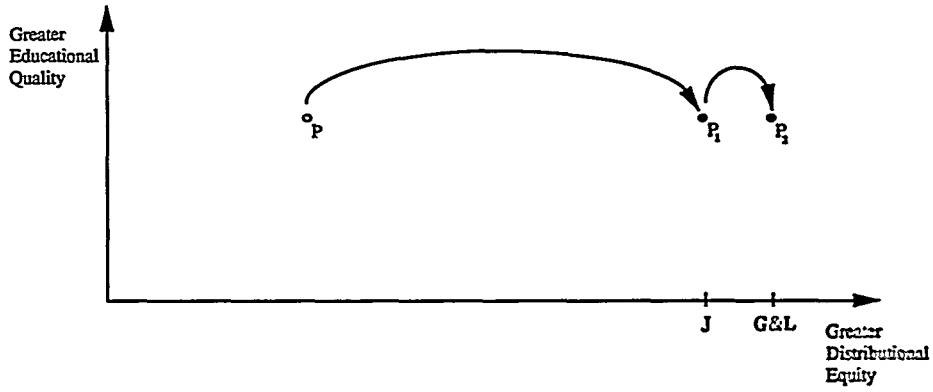
185. Quality Education Act of 1990, N.J. STAT. ANN. §§ 18A:7D-1, 18A:7D-28 (West Supp. 1994); *see also* Gray, *supra* note 177, at A1. Gray reported:

> [Florio] signed the controversial legislation on July 3, 1990, barely a month after the court decision. The QEA, as the spending plan is commonly known, went well beyond the court mandate. It increased the special needs districts to 30 from the 28 identified by the court, and it allocated $1.1 billion over five years.

Id.

186. Stephen Barr, *Florio's Response to Tax Critics Is Questioned*, N.Y. TIMES, Aug. 5, 1990, § 12 (New Jersey Weekly) at 1, 6.

FIGURE 2: *ABBOTT II* AND THE ENACTMENT OF THE QUALITY EDUCATION ACT



Both during and after the debate, the QEA's proponents—the *Abbott II* plaintiffs, the governor, and members of the legislature—failed to explain its reforms or to build any significant grassroots support for them.[187] The reforms, particularly a record tax increase to support redistributive transfers, alienated both middle class taxpayers and residents of wealthier school districts.[188] A voter backlash almost gave Christine Todd Whitman, a virtually unknown candidate in the 1990 U.S. Senate race who capitalized on the public anger over the tax increases, a victory over Bill Bradley, the popular Democratic incumbent.[189]

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187. *Id.* at 1. Richard W. Roper, director of the New Jersey Affairs program at the Woodrow Wilson School for Public and International Affairs at Princeton University, commented:

> I do not understand why Florio has decided to let the dust settle before putting forward an aggressive attempt to shape public perception. Rather than mount an orchestrated campaign to educate the public, Mr. Florio has responded that there will not be acceptance of increases in sales and income taxes and changes in the state's school financing formula until people begin to get the promised long-term benefit of property tax relief next year.

Id.

188. Gray, *supra* note 177, at B5 ("To raise the money and to close a large budget gap, Mr. Florio pushed through a record $2.8 billion tax bill; it sent his popularity plummeting."); *see also* Neal R. Pierce, *Lessons from a Political Pariah*, NAT'L JOURNAL, Mar. 16, 1991, at 659. Pierce commented on how support for Florio's program

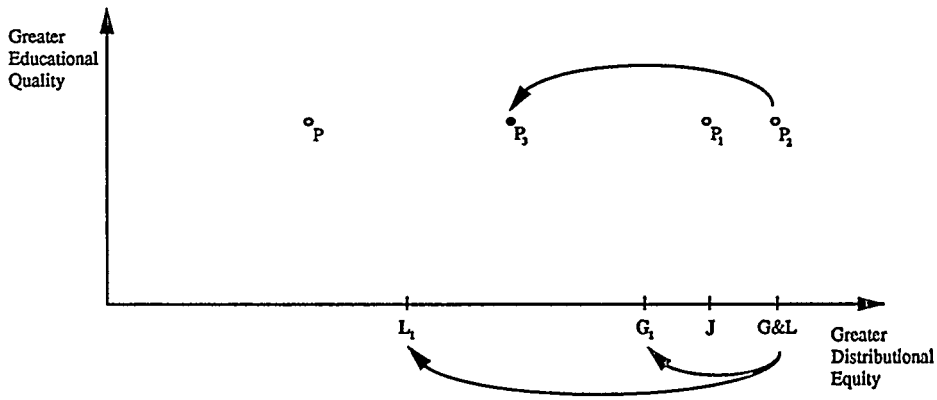
> boomeranged so viciously that Florio, 14 months into his term, is now left with 18-20 per cent approval ratings, among the lowest in the history of polling. His name is close to a curse word on the lips of thousands of New Jerseyans. Florio's policies generated such fury that "Hands Across New Jersey," a kind of blue-collar middle-class "I'm-mad-and-I'm-not-going-to-take-it-anymore" coalition, sprang into being. It wants to undo Florio's tax hikes, reverse his subsidies to the inner cities and rout his legislative allies this fall.

Id.

189. Peter Kerr, *Senate Race: Bradley, Heavily Favored, Narrowly Defeats Whitman*, N.Y. TIMES, Nov. 7, 1990, at B10.

In response, Governor Florio and the legislature agreed to "pay back" two-thirds of the increased tax revenues in the form of property tax relief.[190] After the elections, both the governor and the legislature retreated from their original positions (represented below as a shift to G_1 and L_1). Since members of the legislature distanced themselves from distributional equity concerns more than the governor did, they forged a compromise position with the amended QEA (P_3).

FIGURE 3: THE COMPROMISE IN RESPONSE TO THE 1990 ELECTION AND VOTER BACKLASH



The compromise position (P_3) did not satisfy the more conservative state senate, which favored a less redistributive policy (such as that represented by L_1). However, the senate lacked the votes to override the governor's veto of any legislative attack on the new status quo created by the initial court decision (P_1) and the Quality Education Act (P_2). The senate did request—unsuccessfully—that it be allowed to intervene in the case to express its distinct views on the issue.[191]

Voter anger continued through the 1991 mid-term legislative elections, and Democratic legislators lost in overwhelming numbers. However, the

190. Iver Peterson, *Statewide School Tax Is Proposed*, N.Y. TIMES, Dec. 6, 1993, at B6.

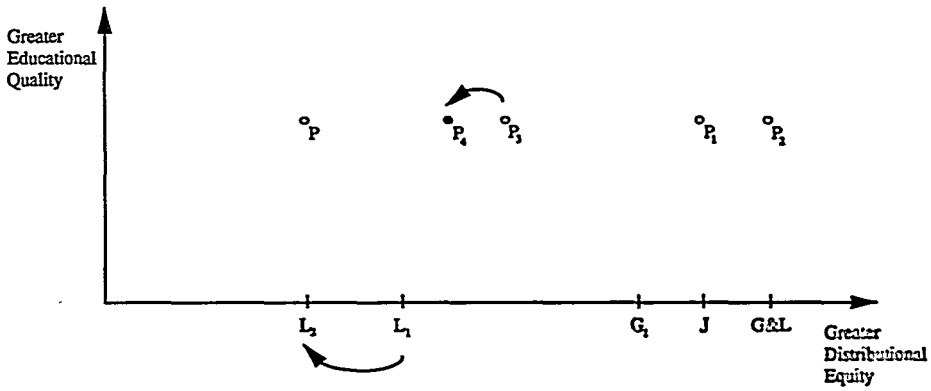
191. Kathleen Bird, *Senate Seeks To Enter Latest Round in* Abbott, N.J. L.J., July 18, 1991, at 3. Bird noted that

> if the justices grant the Senate's request to intervene, legislators would be able to present their own evidence and witnesses and conduct cross-examination if, at some point down the road, lower court hearings are held on the issue. It would also give the Senate standing in the future to appeal an adverse ruling, even if the attorney general, on behalf of the state, decides not to do so. And it would give [State Senate President John] Lynch another platform from which to express his views. "Furthermore," says Lynch, "it is possible that the Legislative and Executive branches may have different views as to how to meet this mandate.... [T]he process of developing a new statewide education plan is dynamic and on-going, and each coordinate branch of State government should be represented before the Court to present its positions.

Id. The request was denied, although Lynch was allowed to file an amicus curiae brief. Kathleen Bird, *Victory for 2 Sides?*, N.J. L.J., July 25, 1991, at 8.

new Republican majority favored a much less redistributive policy (L_2), and Florio agreed to a further compromise (represented by P_4 in Figure 4) to avert a showdown during the 1993 gubernatorial elections. The one-year plan, the Public School Reform Act of 1992,[192] sought to provide a bridge between the amended QEA (P_3) and some future plan to be developed by an educational task force.[193] In addition to its additional tax relief, the compromise plan raised the spending cap imposed on wealthier districts, thus increasing the funding disparity between poorer and richer districts.

FIGURE 4: THE REPUBLICAN-FLORIO COMPROMISE AFTER THE 1991 LEGISLATIVE ELECTION



The Republican majorities in the legislature still preferred an even less redistributive policy than the 1992 compromise (P_4),[194] but realized that such legislation faced the threat of a gubernatorial veto and of a new court decision in the continuing litigation. In July of 1992, the Republican Senate considered eliminating the education clause through a constitutional amendment to dismantle the QEA and to end the judiciary's influence over education policy.[195] To many critics, the effort to amend the constitutional guarantee of a "thorough and efficient" education seemed like an attack on the public's commitment to education.[196] Under pressure from religious,

192. N.J. REV. STAT. § 66 (1992).

193. Jerry Gray, *Florio Agrees to Revisions in School Act*, N.Y. TIMES, Dec. 14, 1992, at B1. A senior Florio administration official noted: "On one side we have a group that says the state is not moving fast enough on this matter and on the other side you have a Republican legislature saying the state is moving too fast. . . . Then you have a court decision looming over you. It's sheer chaos and the Governor is caught in the middle of it." *Id.*

194. Wayne King, *Trenton G.O.P. Shifting School Aid to Suburbs*, N.Y. TIMES, Aug. 30, 1992, at 40.

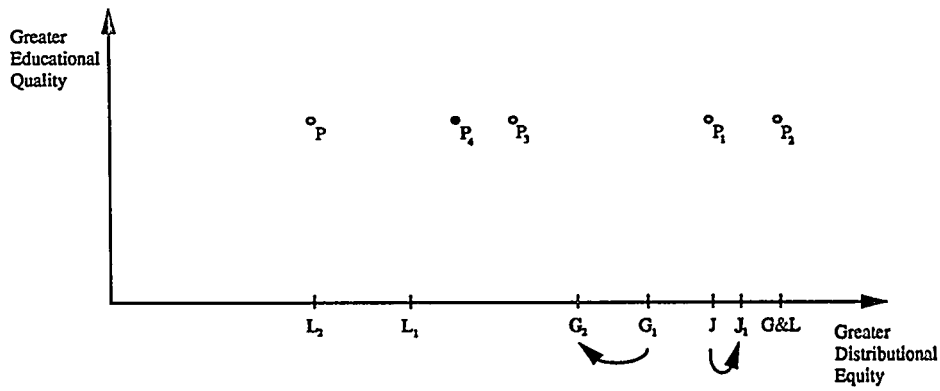
195. Jerry Gray, *G.O.P. Is Told Not to Alter Constitution*, N.Y. TIMES, July 14, 1992, at B6.

196. Jerry Gray, *Pace Resumed by Legislators After a Break*, N.Y. TIMES, July 21, 1992, at B5.

civil rights, and civil liberties organizations, the Republicans withdrew the proposal[197] and limited their work to revising the education act itself.[198]

The *Abbott II* plaintiffs, however, found the 1992 compromise inadequate and filed *Abbott III*. In the trial court, Superior Court Judge Paul G. Levy mandated that the state devote an additional $450 million to the poorer districts whose state aid had been cut by the amended QEA (J_1 in Figure 5).[199] This remedy, requiring an exact dollar amount,[200] was unprecedented in school finance litigation.[201] After the court specified this remedy, Governor Florio requested that the legislature provide an additional $300 million for the poorer urban school districts (illustrated as G_2).[202] However, the legislature refused to provide this additional funding and instead used these funds for statewide property tax relief.[203] The new political equilibrium which produced the 1992 compromise (P_4)—anchored by the Republican legislature's opposition to redistributive policies—prevented either the lower court's decision (J_1) or Florio's compromise proposal (G_2) from being implemented.

FIGURE 5: FLORIO'S FINAL EFFORT AND THE LOWER COURT'S DECISION IN *ABBOTT III*



The election of Christine Todd Whitman as governor in 1993 made any court-ordered remedy even more likely to encounter resistance. While

197. *Id.*

198. King, *supra* note 194, at 40.

199. Abbott v. Burke III, No. 91-C-00150, 1993 WL 379818 at *10 (N.J. Super, Aug. 31, 1993); *see also* Peterson, *supra* note 190, at B6.

200. Abbott v. Burke III, No. 91-C-00150, 1993 WL 379818 at *10 (N.J. Super, Aug. 31, 1993).

201. The New Jersey court became the first state court ever to specify in precise dollar terms the educational funding deficiency that created the unconstitutional state of affairs. *See All Things Considered: New Jersey School Funding Reform Ruled Unconstitutional* (National Public Radio broadcast, Sept. 7, 1993) *available in* LEXIS, News Library, Script File.

202. Iver Peterson, *As Whitman Nears Inauguration, Deficit Complicates Tax-Cut Vow*, N.Y. TIMES, Jan. 16, 1994, at B1.

203. *Id.*

Florio had been committed to implementing a redistributive school financing program, Whitman criticized Florio's actions and committed herself to cutting state taxes.[204] The court might have had an ally in the commission appointed pursuant to the 1992 compromise plan,[205] but political forces militated against the type of equity-based school financing and educational reform outlined in *Abbott II* and pursued by Governor Florio. Nevertheless, Governor Whitman did not abandon the constitutional obligation to provide a "thorough and efficient" education; she appointed her own commission to outline a constitutionally acceptable solution.[206] Rather than focusing on distributional equity, the Whitman commission's plan sets a level of educational adequacy and provides a mechanism which will "level up" the poorer school districts through increased state aid.[207]

The strength of the political forces, which fought increased distributional equity and limited the court's ability to spur such reforms, is not surprising from the standpoint of positive political theory. Positive political theory explains that it is difficult to build a coalition for explicitly redistributive policies at the state level, because states that engage in such policies risk losing wealthier residents to other states.[208] Wealthier residents may choose between exiting the community or exercising their voice within the community through involvement in local politics.[209] Exit might appear an especiallly attractive option in a state like New Jersey, where residents might feel more connected to a greater metropolitan area (i.e., New York or Philadelphia) or to a region (i.e., the Northeast) than to the state itself. Moreover, wealthier residents who choose not to move will be able to exert a disproportionate amount of influence through the political process.[210]

The New Jersey court, influenced by the federal judiciary's experience with school desegregation and its own failure to spark meaningful reform through its previous education financing decisions, may have deliberately

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204. Peterson, *supra* note 190, at B6.

205. *Id.*

206. *See* Iver Peterson, *Trenton Panel Offers Plan on School Aid*, N.Y. TIMES, Apr. 8, 1994, at B1.

207. *Id.* at B5.

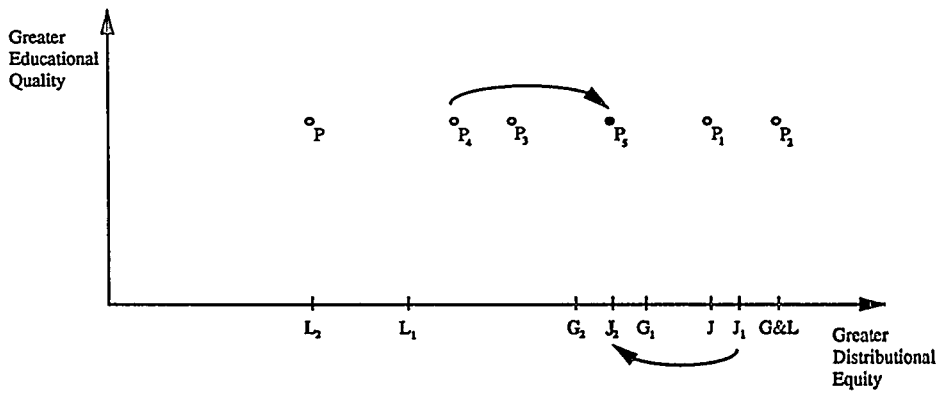
208. *See, e.g.*, PETERSON, *supra* note 86, at 66-92; *see also* Vicki L. Been, *"Exit" as a Constraint on Land Use Extractions: Rethinking the Unconstitutional Conditions Doctrine*, 91 COLUM. L. REV. 473, 514-28 (1991) (describing the literature and the findings that residents tend to "vote with their feet"). While both Peterson and Been discuss the propensity of residents at the local level to move based on higher tax rates and fiscal policies, their insights apply with nearly equal force to the propensity to move from one state to another.

209. ALBERT O. HIRSCHMAN, EXIT, VOICE AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970). Hence, it is important to note that the strength of a resident's state or local civic identity will encourage a resident to exercise her voice through political participation rather than "voting with her feet" and leaving the state.

210. *See e.g.*, FRANCIS F. PIVEN & RICHARD A. CLOWARD, WHY AMERICANS DON'T VOTE 4 (1988) (concluding that the "American electorate overrepresents those who have more, and underrepresents those who have less"); PETERSON, *supra* note 86, at 90 ("In local government, which has a smaller constituency, it is easier for dominant economic [i.e., wealthier] interests to control policy to the exclusion of weaker, less organized interests").

adopted a strategy that focused on distributional equity rather than overall quality. When even this distributional strategy failed in *Abbott II*,[211] the New Jersey Supreme Court changed course. Rather than affirm the lower court's redistributive remedy, in *Abbott III* the court opted for a more open-ended remedy, giving the legislature three years to achieve "substantial equivalence" of parity.[212] The court did not specifically order the court to achieve parity by that time, but indicated that it would intervene if the legislature failed to improve the situation.[213] The court's action (represented by J_2 in Figure 6) effectively forced policy to move toward greater distributional equity (P_5).

FIGURE 6: THE NEW JERSEY SUPREME COURT'S RESPONSE (*ABBOTT III*)



In *Abbott III*, the court was self-consciously aware of the political ramifications of its actions and of the need to build a social consensus for reform.[214] The need for such a consensus underlies the court's more moderate stance, its appeal to a collective identity,[215] its focus on the state's social responsibility,[216] and its emphasis on oversight and efficiency.[217] These ingredients were missing from the court's initial approach; the reactions to the court's decision in *Abbott III* suggest a better chance of lasting success. For example, Assembly Speaker Chuck Haytaian praised the decision by explaining: "I believe in parity and we will achieve it. . . . But we will do it by building up needy districts, not by tearing down good ones."[218]

211. *See* Abbott v. Burke III, 643 A.2d 575, 577 (N.J. 1994) (noting the failure of the QEA to solve the problem, although it purported to respond to the mandate in *Abbott II*).
212. *See* Mondics, *supra* note 131, at B1.
213. *Id.*
214. *See* Abbott v. Burke III, 643 A.2d 575, 580-81 (N.J. 1994).
215. *Id.* at 581.
216. *Id.* at 580.
217. *Id.* at 579.
218. Joseph F. Sullivan, *Top Jersey Court Orders New Plan for School Funds: To Aid Poor Areas: 3 Years to Reach Parity in Money for Needy and Rich Districts*, N.Y. TIMES, July 13, 1994, at A1, B6.

III
LESSONS FROM THE COMPARISON OF KENTUCKY AND NEW JERSEY

A. The Judiciary: Institutional Actor and Constitutional Interpreter

Consideration of both the constitutional underpinnings and the political dynamics of implementing education reform remedies suggests that state courts adjudicating education reform cases should focus on overall quality, viewing distributional equity as a secondary concern. In essence, the courts play at a great disadvantage in the single, horizontal-axis equity "game." While some commentators blame state courts for their inability to ensure equity (their failure to win in this game),[219] one cannot ignore the political forces that militate against their success.[220] However, a focus on a second (vertical) axis, representing quality, alters the nature of the game and redefines the political environment. A court can spark new consideration of education reform by correctly framing the constitutional commitment to a quality education for all and outlining the other branches' responsibility to implement this commitment. Moreover, the courts can open a "policy window" by creating a sense of urgency and by offering the legislative and executive branches political protection for actions such as comprehensive reform and tax increases.

The Kentucky Supreme Court successfully provided each of these elements. First, the court framed the issue as one of overall quality, sparking a deliberative and innovative process of education reform that involved both the public and political branches of government.[221] Second, the court gave the legislature a clear one-year deadline, creating a sense of urgency and opening a policy window for comprehensive legislative action on an issue of public interest.[222] Indeed, some legislators even speculated that a legislative response would not have been possible if the court had merely ruled that the school finance system, considered alone, was unconstitutional.[223] Finally, the court's action offered political protection, legitimacy, and support for the legislature's action.[224] From its approach, it was evident that

219. *See* Note, *supra* note 5, at 1092.

220. *See supra* notes 135-40 and accompanying text.

221. When this Article discusses the role of litigation, it also means to include the effect of the parties' litigation and grassroots strategy on the success of implementing a remedy.

222. Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 216 (Ky. 1989). Jack D. Rose, the county superintendent (and named plaintiff in the case), explained that as a result of the decision, "[b]asically we were able to erase the board clean and do away with everything as it was. It's probably the cleanest sweep [the country] has had in education." Jordan, *supra* note 157, at A3.

223. Alexander, *supra* note 107, at 363 (citing address by Senator Michael Moloney, Chairman of the Senate Appropriations Committee, Kentucky Senate).

224. *Id.* at 343.

Kentucky had learned from the failures of other states that focused exclusively on equity and excluded the public and the legislature from the process of interpreting and implementing the constitutional mandate. Because of its attention to these lessons, "the Kentucky high court has gone the furthest in finance-inspired education reform and has met with the least resistance."[225]

The New Jersey court met none of these elements. Instead, the court and governor framed the issue around raising taxes to support poor inner cities, while failing to establish oversight mechanisms to ensure improvements in quality. The court's decision, combined with Governor Florio's haste to enact a plan, undercut any possibility for the legislature meaningfully to consider and for the public to learn about the urgency of the issue. Finally, since the Florio plan went further than the court's remedy, the constitutionally based decision did not offer effective political protection for the QEA.[226] That is not to say that the constitutional nature of the decision did not support the governor's action at all. In fact, the senate decided not to seek a constitutional amendment because it was aware of the public's widespread commitment to overall educational quality.[227] However, the court's equity-based interpretation of the constitution's education clause did not connect with the public's deep concerns for educational quality, and Governor Florio failed to persuade the public that his agenda was focused on quality or was based on the court's decision. Florio's haste to act without ensuring improvements in quality, and his failure to educate the public about the need for reform, led voters to complain that education did not benefit from the extra resources.[228] This result is not surprising; the Florio administration itself conceded that it had failed to define how the equalized funding would make a difference and had failed to implement a program to evaluate and explain the changes.[229]

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225. Sherman, *supra* note 170, at 23.

226. Reflecting upon this action after the court ordered an additional $500 million for education to these districts, Christine Todd Whitman said the ruling reflected another failed Florio program:

> Had the Governor in 1990 waited for the Supreme Court opinion rather than rush headlong into a $2.8 billion tax increase, we might not be involved in the court action today. Obviously, we will await any further judicial action on this issue, but it is inescapable that the actions of the Florio administration did nothing to solve the problem; rather, it made the problem worse.

Gray, *supra* note 177, at A1.

227. *See supra* notes 195-98 and accompanying text.

228. Priscilla Van Tassel, *As Schools Open, Many Ask if the State Knows How to Add*, N.Y. TIMES, Sept. 5, 1993, at B1.

229. Dr. Mary Lee Fitzgerald, New Jersey's Commissioner of Education, admitted that until the fall of 1993, the Florio administration failed to define what would be accomplished, neglected to set up a system to measure these accomplishments, and did not adequately explain these programs to the public. *Id.*

B. *Constitutional Theory, Litigation Strategy, and the Political Process*

A constitutional theory and positive political theory analysis of the litigation in Kentucky and New Jersey offers lessons not only to the judiciary, but also to those litigating education reform cases. As we might expect, the different litigation strategies employed in the Kentucky and New Jersey cases foreshadowed the different approaches to constitutional interpretation and the political games which unfolded in each state. The Kentucky education reform effort was led by Bert T. Combs, a former governor who had championed education and understood the connections between constitutional litigation and the dynamics of the political process.[230] Combs sought to build middle-class support for the movement, educate the public on the need for reform, build public confidence in the reforms, work with the legislature, and ensure that wealthier school districts were not alienated by the reforms.[231] Hence, shortly after the court's decision, Combs underscored that due to the plaintiff's litigation strategy, the ruling would not hurt wealthier school districts:

> The plaintiffs in this case said in their complaint, and we have said in every motion, every pleading and every argument[,] that we do not want—and will not tolerate—taking money from one school district and giving it to another. . . .
>
> As a citizen of this state and one who knows something about this situation and will have some influence on it, that will not happen. . . . These plaintiffs don't want it, and they will have some control over it.[232]

Not only was Combs careful not to alienate wealthier districts, but his campaign for reform of the education system often centered on appeals to a collective identity. Hence, he observed and appealed to the "feeling among the people . . . that the time had come when they had to do something about their school system or . . . *we* would always remain a *mediocre state*."[233] Governor Wallace Wilkinson's statement upon signing the new education reform law reflected the success of Combs' strategy of appealing to civic pride: "On this day, more than any other, I am proud to be a Kentuckian."[234] Recognizing Combs' effective combination of litigation and political strategy, Harvard law professor Christopher Edley noted that

230. Bob Johnson, *Combs Touched State Profoundly*, COURIER-JOURNAL (Louisville, Ky.), Dec. 5, 1991 at 1A, 12A (obituary describing the career of the former governor).

231. These efforts are outlined in Ronald G. Dove, Jr., *Acorns in a Mountain Pool: The Role of Litigation, Law and Lawyers in Kentucky Educational Reform*, 17 J. EDUC. FIN. 83 (1991). For example, citizens' groups allied with the litigation organized hundreds of town meetings to promote education reform before the case was decided by the Kentucky Supreme Court. *See id.* at 111.

232. Tom Loftus, *Combs Says Ruling Won't Spell Trouble for Wealthier Schools*, COURIER-JOURNAL (Louisville, Ky.), June 12, 1989, at 1B.

233. Sherman, *supra* note 170, at 231 (quoting Bert Combs) (emphasis added).

234. Jennings, *supra* note 148.

"[o]ne striking thing about the Kentucky case is that we have a marriage of politics and lawyering that demonstrates the enormous capacity to make progress on serious social problems."[235]

Unlike Governor Combs, the New Jersey plaintiffs did not seek to build a broad-based coalition. The New Jersey plaintiffs did not ask for broad, statewide reform, nor did they appeal to a collective identity or the constitutional commitment to an overall quality education. Instead, Marilyn Morheuser, the lawyer for the Education Law Center who brought the New Jersey lawsuit, argued that "this Court cannot stand by while another generation of children *in poor urban districts*, their hopes raised by inspiring and lofty constitutional pronouncements, sees these hopes dashed on the political rocks below."[236] The plaintiffs saw the judiciary as an ally of "poor urban districts" against a hostile political process. In essence, this view draws upon "the myth of rights," which endows courts with the power simply to prescribe a right that will then be realized, regardless of whether it draws upon public support.[237] Such an approach, based upon a narrow conception of democracy, ignores the role of the political process in implementing reform; it contributed, in fact, to the failure of reform in New Jersey.[238]

C. *Considering the Constraints: Could New Jersey Have Followed the Path Not Taken?*

The central argument of this Article is that New Jersey's Supreme Court, education reform lawyers, and political actors failed properly to conceptualize the constitutional remedy necessary to reform its educational system. This Article suggests that New Jersey's failure to interpret and frame the constitutional mandate of its education clause properly resulted in a proposed remedy doomed to political failure. However, it is also possible that, given the constraints facing the New Jersey Supreme Court, it could not have successfully implemented a Kentucky strategy.

From the outset of each state's education reform litigation, the educational systems in the two states were very different. The Kentucky Court acted in light of an obvious need for meaningful education reform.[239] Under many standards of educational quality, from expenditure per pupil to American College Test (ACT) scores to pupil-teacher ratios, Kentucky

235. Gatz, *supra* note 167, at B4.

236. Kathleen Bird, *Abbott Revisited: It's Deja Vu All Over Again; A New Round in 20 Years of Litigation Over School Financing Begins*, N.J. L.J., June 20, 1991, at 4 (emphasis added).

237. *See generally* STUART A. SCHEINGOLD, THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE (1974).

238. *See generally* MICHAEL W. MCCANN, TAKING REFORM SERIOUSLY: PERSPECTIVES ON PUBLIC INTEREST LIBERALISM (1986) (arguing that such a strategy fails because it does not address the basic structural issues, build grassroots support for the movement, or succeed in the political process through building a winning coalition).

239. Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 215 (Ky. 1989).

ranked in the lowest quartile nationwide.[240] The state's literacy rate was the lowest in the United States.[241]

In New Jersey, on the other hand, the flaws in the educational system were neither as pervasive nor as pressing. On the whole, New Jersey devoted an impressive amount of resources to education, but had mixed results in terms of achievement. New Jersey spent more money per pupil than any other state[242] and offered higher teachers' salaries than all but three other states.[243] In terms of achievement, New Jersey's suburban students fared around the national average for suburban students in terms of Scholastic Aptitude Test (SAT) scores, while its urban students trailed the national average for urban students by 66 points (out of 800) on the verbal section and 74 points on the math section.[244] The breakdown by race was even more stark: New Jersey's black students scored over 200 points lower on the combined verbal and math sections than their white peers.[245] However, a partial cause of these relative disparities was that so many of its students took the SAT—in 1994 only three states had a higher percentage of students which took the exam.[246]

In addition, Kentucky and New Jersey differed in the extent of income disparity among communities and consequently in the disparity among school districts. Witnesses at the *Rose* trial testified that the deficiencies in Kentucky schools were not limited to the poorer districts and that almost all schools provided inadequate educational opportunities.[247] In New Jersey, however, some communities had excellent schools. Per pupil funding ranged from $11,000 in Bedminster, a wealthy suburb, to just over $4,000 per pupil in Harrison, an inner-city school district.[248] This divide between rich and poor in New Jersey would make it harder to pursue Kentucky's leveling-up approach to school financing.[249] Since some schools are

240. *Id.* at 197-98.

241. Brief for Appellees at 1-2, Rose v. Council for Better Educ., Inc., 790 S.W.2d 186 (Ky. 1989), *cited in* Stark, *supra* note 4, at 645.

242. N. R. Kleinfield, *City and Suburbs Battle Over Distribution of Aid*, N.Y. TIMES, Nov. 27, 1993, at A24.

243. *Id.*

244. Devin Leonard, *SAT Verbal Scores Drop; Math Scores Rise; Disparity Between N.J. City, Suburban Schools*, BERGEN RECORD (N.J.), Aug. 25, 1994, at A1.

245. *Id.*

246. *Id.*

247. *Rose*, 790 S.W.2d at 198.

248. Peterson, *supra* note 190 at B6.

249. *See* Sherman, *supra* note 170, at 23. That is not to say that Kentucky didn't also confront the constraint of wealthier districts. Before the reforms enacted pursuant to the court decision, Kentucky faced disparities in local revenue collections for education ranging from $80 per pupil to $3,716 per pupil. Rodd Zolkos, *States Finding School Funding Equity Elusive*, CITY & STATE, Apr. 12, 1993, at 1.

already very well funded, New Jersey does not have the need nor the ability to fully equalize funding by raising the funding for both the wealthier and the poorer schools.[250]

The distribution of socio-economic political power among school districts may also explain the difference between the states. Due to the requirements set by the New Jersey court, policymakers had to focus the benefits of the education reform on the thirty poorest school districts, districts which spent only 84 percent of the average spent by the 110 wealthiest communities.[251] Most of these districts were located in the inner city, and wealthier citizens might have resisted any redistributive effort.[252] However, the New Jersey court's approach also created an arbitrary distinction between the thirtieth poorest school, which deserved more state funding, and the thirty-first poorest school, which did not. This distinction alienated a middle-class constituency which might have sympathized with the need for education reform.[253] Moreover, this focus on a narrow group of students limited the ability of the courts and political actors to appeal to civic pride and instigate the kind of statewide effort that was so successful in Kentucky.

Even if the New Jersey court's remedy did not actively encourage an appeal to civic pride, such an appeal might fall on deaf ears in New Jersey, the "first all-suburban state,"[254] yet also a state marked by great differences among its citizens. Not only is New Jersey's population extremely diverse, but it also lacks many of the foundations for collective identity: statewide

250. Kentucky raised taxes $800 million for its schools and gave 25 percent more state aid to the poorer schools and 8 percent more aid to the wealthier schools. Mary Beth Lane, *Lawsuits Forcing States to Change*, PLAIN DEALER (Cleveland, Ohio), July 3, 1994, at A11.

251. Mary McGrath, *Wrestling Over School Financing Court and State Poised for High-Stakes Confrontation*, BERGEN RECORD (N.J.), May 1, 1994, at A31. The average for the 110 wealthier districts is $8,111 per pupil and the average for the 30 poorest districts is $6,813 per pupil. *Id.*

252. *See, e.g.*, Stark, *supra* note 4, at 667 ("Lack of success of prior funding equalization programs shows the power of wealthier interests to thwart redistributive efforts.").

253. Commenting on *Abbott III*, Albert Burstein, who headed a Commission examining the need for education reform, explained:

> Omitted from the court's opinion is any reference to that large cohort of school districts and students who are in the so-called foundation aid districts. These are the school districts that are not part of the 30 special needs grouping but are essentially middle class areas. . . . It is undeniably the case that large numbers of districts are going to be ending up as the new education underclass should the Legislature's response be narrowly focused on 30 special needs districts. There is little doubt that mid-level districts now struggling to maintain school systems at a decent level will, because of less assistance from the state and inadequate local resources to make up the difference, fall further and further behind. . . . The funding problem calls for a comprehensive solution. Any new law must encompass the broader landscape of educational funding to ensure stability in the future and provide elements of certainty to local school budget personnel.

Albert Burstein, *School Funding Debate*, BERGEN RECORD (N.J.), July 17, 1994, at A19.

254. *See* Charles Strum, *Beauty Beyond The Turnpike: Jokes Aside, New Jersey Tries to Shed Inferiority Complex*, N.Y. TIMES, Jan. 15, 1994, at 26 (describing New Jersey's lack of a single, central city and lack of densely populated cities).

television stations (the network stations are based in either New York or Philadelphia), collectively supported symbols such as sports teams (the two football teams playing in New Jersey still maintain their New York identity and appellation), and independent major cities (the biggest cities in the state are part of the New York or Philadelphia metropolitan areas). Thus, New Jersey supporters of education reform may have found it more difficult to connect to a civic identity and a collective constitutional ideal than their counterparts in Kentucky.

One might argue that these differences undermine the conclusions of this Article. However, the actual New Jersey experience demonstrates that a pure redistributive approach was doomed to fail. If the differences between the states are such that the Kentucky court's model would also fail, then judicially initiated reform of New Jersey's educational system is essentially impossible.[255] Admittedly, these constraints make the implementation of any remedial effort more difficult, but this Article argues that the overall quality approach is inherently truer to the constitutional mandate and politically more effective.

The difference between the focus on overall quality and a more narrow focus on redistributive equity is not always obvious.[256] In New Jersey,

255. While this Article is limited to a comparison of the Kentucky and New Jersey case studies, a brief look at the experience in Michigan serves to indicate that reform under the Kentucky model may not be impossible in a state with demographic characteristics such as New Jersey. Like New Jersey, Michigan ranks in the top 10 states in terms of school spending. *See Moneyline*, CNN, Mar. 15, 1994, *available in* LEXIS, News Library, CNN File, and Michigan's wealthiest districts spend over three times as much on education as its poorer districts. *See* Tyson, *supra* note 133, at 2.

Michigan's plan for education reform, like Kentucky's and unlike New Jersey's, deals comprehensively with issues of school financing fairness and educational performance. *See* Roger Worthington, *States Make Radical Moves In School Funding*, CHI. TRIB., Mar. 8, 1994, at 2. In doing so, it recognized the state's constitutional commitment to provide for an overall quality system of education.

The Michigan plan stabilized funding at the state level by trimming the percentage of educational expenses financed by property taxes to 10 percent (through a $2 billion increase in sales taxes) and setting a minimum expenditure on education of $4,200 per pupil ($1,000 more than currently spent by the poorest school districts). *See* Editorial, *Fairer Schooling for Michigan*, N.Y. TIMES, Mar. 18, 1994, at A28. W. Robert Docking, superintendent of Bloomfield Hills, Michigan, explained that "I am pleased that the lowest-financed schools will receive more assistance . . . that absolutely had to happen," but he underscored that it should not happen at the expense of the affluent school systems. William Celis, 3d, *Michigan Votes for Revolution In Financing Its Public Schools*, N.Y. TIMES, Mar. 17, 1994, at A1, A21.

As in Kentucky, the Michigan campaign for education reform succeeded in connecting to the public's desire for education reform, garnering support from 69 percent of the electorate. *See* David Van Biema, *The Great Tax Switch*, TIME, Mar. 28, 1994, at 31.

256. The distinction is often missed by commentators who examine only the fact that both the Kentucky and New Jersey Supreme Courts invalidated their education financing schemes, and disregard or downplay the fact that these two courts employed very different approaches in analyzing the constitutionality of their education systems. *See, e.g.*, Noreen O'Grady, *Comments: Toward a Thorough and Efficient Education: Resurrecting the Pennsylvania Education Clause*, 67 TEMP. L. REV. 613, 630 n.102 (1994). Without examining the different approaches, O'Grady reported that "[i]n New Jersey, a judicial decree declaring

where many school districts already met a standard of quality, the desired outcome of either approach—a focus on overall quality or redistributive equity—is very similar. However, the important difference between the two judicial approaches is not only the desired outcome, but the process by which that outcome was achieved. As discussed in Part II, the process employed by Kentucky—the framing of a remedy consonant with overall quality—has two advantages over New Jersey's initial effort to pinpoint an exact redistributive remedy: (1) the overall quality approach requires the legislature to address the need for a comprehensive remedy and recognizes the legislature's and the public's role in constitutional interpretation;[257] and (2) the overall quality approach is inclusive in that it speaks to a right of all citizens to a quality education.[258]

The more inclusive approach of overall quality relies on an appeal to civic identity: namely, that the entire population benefits from all citizens enjoying a quality education. Essentially, the problem with the narrower focus on redistributive equity is that it highlights the differences among citizens rather than focusing on their common interests. Even if the state cannot completely equalize funding, an overall quality approach could still address some financing issues while allowing the legislature and the public to play their roles in constitutional interpretation. On the other hand, a purely equity-based strategy, while initially successful, ultimately could not succeed in the political process—as reflected in the most recent decision by the New Jersey Supreme Court.

CONCLUSION

The contrast between the experiences of Kentucky and New Jersey illustrates the importance of focusing on quality in education reform litigation. When a court connects to a deep public concern for overall educational quality, it can succeed in sparking meaningful reform, as the

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the education funding formula unconstitutional did not prevent legislative stalemate. . . . However, in Kentucky, such a decree provided needed impetus to resolve legislative stalemate." *Id.*

257. *See* Alexander, *supra* note 107, at 343 ("[J]udicial intervention and interpretation of state constitutional provisions is necessary to provide initiative and guidance for the legislature if it is to abide by its constitutional obligations.").

258. Inclusiveness in crafting a remedy, as well as in constitutional interpretation generally, is critical to making a decision more palpable to those who otherwise might feel alienated or excluded by the end result. *See generally* Eisgruber, *supra* note 76. *Cf.* Evans v. Romer, 882 P.2d 1335 (Colo. 1994), *cert. granted*, 115 S. Ct. 1092 (1995) (employing a general right to political participation analysis, rather than a suspect class equal protection analysis, to invalidate an amendment to the Colorado constitution precluding civil rights protection to gay men and women). The concurrence in *Evans* provides an especially good example of generalizing the constitutional remedy to address the rights of all citizens in employing a privileges and immunities analysis to consider the constitutionality of the amendment. Justice Scott explained that "[t]he importance of the Privileges and Immunities Clause is that it does not require varying standards of review and that its protections are extended to *every citizen*." 882 P.2d at 1356 (Scott, J., concurring) (emphasis added).

Kentucky example demonstrates. Litigation strategies based on state constitutions' education clauses will be fruitful if courts interpret such clauses to embody the public's deep commitment to overall educational quality and consider the political dynamics favoring a comprehensive, rather than a district-by-district, remedy.[259] Courts and plaintiffs should follow Kentucky's lead and realize that constitutional theory and positive political theory favor education reform remedies that are based on an appeal for a system that provides for overall educational quality.

259. Hence, one commentator has underscored how the more recent cases in Texas, Kentucky, and Montana may illustrate the potential for a new revolution in school finance litigation. *See* William E. Thro, *The Third Wave: The Impact of the Montana, Kentucky and Texas Decisions on the Future of School Finance Reform Litigation*, 19 J.L. & EDUC. 219, 250 (1990). This revolution appears to connect both to state education clauses and to an overall concern for educational adequacy, rather than fiscal equity. *See* William Celis, 3d, *School Financing: Arguing Equity Is Not Enough*, N.Y. TIMES, Apr. 29, 1992, at B8 (noting that Connecticut, Louisiana, and Alabama are following Kentucky in focusing on educational adequacy). Hence, newly-appointed Judge David Tatel, a specialist in school financing, underscored that "what's been happening in the last few years is people are increasingly focusing on adequacy. This is the cutting edge of education litigation." *Id.*