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Jill Ambrose, *Fourth Wave of Education Funding Litigation: How Education Standards and Costing-Out Studies Can Aid Plaintiffs in Pennsylvania and Beyond*, 19 B.U. PUB. INT. L.J. 107 (2009).

ALWD 7th ed.

Jill Ambrose, *Fourth Wave of Education Funding Litigation: How Education Standards and Costing-Out Studies Can Aid Plaintiffs in Pennsylvania and Beyond*, 19 B.U. Pub. Int. L.J. 107 (2009).

APA 7th ed.

Ambrose, Jill. (2009). *Fourth wave of education funding litigation: how education standards and costing-out studies can aid plaintiffs in pennsylvania and beyond*. Boston University Public interest Law Journal, 19(1), 107-136.

Chicago 17th ed.

Jill Ambrose, "Fourth Wave of Education Funding Litigation: How Education Standards and Costing-Out Studies Can Aid Plaintiffs in Pennsylvania and Beyond," Boston University Public interest Law Journal 19, no. 1 (Fall 2009): 107-136

McGill Guide 9th ed.

Jill Ambrose, "Fourth Wave of Education Funding Litigation: How Education Standards and Costing-Out Studies Can Aid Plaintiffs in Pennsylvania and Beyond" (2009) 19:1 BU Pub Int LJ 107.

AGLC 4th ed.

Jill Ambrose, 'Fourth Wave of Education Funding Litigation: How Education Standards and Costing-Out Studies Can Aid Plaintiffs in Pennsylvania and Beyond' (2009) 19(1) Boston University Public interest Law Journal 107

MLA 9th ed.

Ambrose, Jill. "Fourth Wave of Education Funding Litigation: How Education Standards and Costing-Out Studies Can Aid Plaintiffs in Pennsylvania and Beyond." Boston University Public interest Law Journal, vol. 19, no. 1, Fall 2009, pp. 107-136. HeinOnline.

OSCOLA 4th ed.

Jill Ambrose, 'Fourth Wave of Education Funding Litigation: How Education Standards and Costing-Out Studies Can Aid Plaintiffs in Pennsylvania and Beyond' (2009) 19 BU Pub Int LJ 107

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NOTES

A FOURTH WAVE OF EDUCATION FUNDING LITIGATION: HOW EDUCATION STANDARDS AND COSTING-OUT STUDIES CAN AID PLAINTIFFS IN PENNSYLVANIA AND BEYOND

JILL AMBROSE

“In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.”

– Chief Justice Warren, *Brown v. Board of Education*¹

I. INTRODUCTION

Anyone who has been exposed to public schools in low-income communities is well aware of the states’ failure to realize the promise of Chief Justice Warren in the landmark decision that ended racially segregated schools. More than fifty years later, educational opportunity in America is still anything but equal, as states have traditionally relied on local property taxes, rather than state-wide taxes, to fund public schools.² As a result of these funding schemes, inequality in public education persists along socioeconomic and racial lines: Elementary school students in low-income districts are three grade levels behind students in high-income communities; half of students in low-income communities will not graduate from high school at age eighteen; and only one out of ten students in poor communities will graduate from college.³

Educational disparities have sparked a great debate over where poor children disadvantaged by this system should seek relief—in the legislature or the courts. In *San Antonio Independent School District v. Rodriguez*,⁴ the Supreme Court rejected the argument that the poor should receive the same heightened

¹ 347 U.S. 483, 493 (1954).

² National Access Network, Teachers’ College, Columbia University, *Costing Out*, <http://www.schoolfunding.info/policy/CostingOut/costingout.php3> (last visited Oct. 28, 2009).

³ Teach for America, *Our Nation’s Greatest Injustice*, http://www.teachforamerica.org/mission/greatest_injustice.htm (last visited Oct. 28, 2009).

⁴ 411 U.S. 1 (1973).

protection from discriminatory legislation as blacks and women.⁵ The Court reasoned that unlike racial minorities and women, the poor are not “relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.”⁶ Justice Marshall, dissenting from this opinion, took issue with the majority’s finding that the poor can actually have a real influence in politics. He noted that while we ordinarily rely on the political process for the protection and promotion of such interests as education, in the case of school funding, the poor are disabled because “legislative reallocation of the state’s property wealth must be sought in the face of inevitable opposition from significantly advantaged districts that have a strong vested interest in the preservation of the status quo.”⁷ Thirty-five years later, it appears Marshall had it right: Rarely do we ever hear our politicians propose solutions to the problems facing the poor.⁸

With no help from legislatures, waves of lawsuits challenging state funding schemes have swept the nation since 1973. Each wave of lawsuits evolved from the limitations and failures of the wave before it. The first wave was halted when the Supreme Court held that inequitable funding schemes do not violate the Equal Protection Clause of the U.S. Constitution.⁹ Thus, the second wave of funding challenged the vast disparities resulting from state funding schemes under the states’ constitutions.¹⁰ However, several judges expressed their hesitation to strike down state legislation on the basis of mere inequality rather than a showing of inadequacy in the quality of education.¹¹ Adapting to the demands of the courts, plaintiffs in the third wave showed inadequacy in their schools and claimed that funding schemes denied poor students their fun-

⁵ *Id.*

⁶ *Id.* at 28.

⁷ *Id.* at 123 (Marshall, J., dissenting).

⁸ For example, in the 2008 presidential election neither candidate mentioned the word “poverty” in the presidential debates. See Kevin Gosztola, *The Second Debate: What They Don’t Know and How They Plan to Find It Out*, OPEdNews.com, Oct. 8, 2008, <http://www.opednews.com/articles/The-Second-Debate-What-Th-by-Kevin-Gosztola-081008-954.html>.

⁹ Janet D. McDonald, Mary F. Hughes & Gary W. Ritter, *School Finance Litigation and Adequacy Studies*, 27 U. ARK. LITTLE ROCK L. REV. 69, 74 (2004). See also Rodriguez, 411 U.S. at 60.

¹⁰ McDonald, *supra* note 9, at 74–75. See, e.g., Robinson v. Cahill, 303 A.2d 273 (N.J. 1973); Dupree v. Alma Sch. Dist., 651 S.W.2d 90 (Ark. 1983).

¹¹ McDonald, *supra* note 9, at 75. See, e.g., Hornbeck v. Somerset County Bd. of Educ., 458 A.2d 758, 780 (Md. 1983) (noting that no allegation was made in the complaint that funding scheme failed to provide schools “with the means essential to provide the basic education contemplated by” the state constitution); Northshore Sch. Dist. No. 417 v. Kinneer, 530 P.2d 178, 203 (Wash. 1974) (noting that, in claim alleging that inequality in funding violated the state constitution, “[w]hat is lacking in this case . . . is proof that the state does not make available to any of petitioner children reasonably equal opportunity for an ample education”).

damental right to a minimal education.¹² Litigation has been brought in forty-five states, with twenty-five state supreme courts ruling that their state funding schemes violate their state's constitution.¹³ Plaintiffs in Pennsylvania have found little relief as the state supreme court has adamantly refused to intervene in the area of educational policy—a domain the court has held belongs exclusively to the legislative branch.¹⁴

While lawsuits were being filed, another crucial development was taking place at the legislative level: the rise of standards-based education. During the 1990s, state legislatures across the nation authorized their boards of education to promulgate content standards, indicating what every child should know and be able to do at each grade level.¹⁵ With clear measures of what teachers need to accomplish in public schools, researchers dramatically improved the methodologies for calculating the actual cost of an education.¹⁶ In response to plaintiffs' claims during the third wave, several courts ordered legislatures to provide for these "costing-out studies" to determine the level of funding needed to satisfy each child's right to an adequate education.¹⁷

Part II of this Note summarizes developments in educational reform since 1973, including the waves of education funding litigation, standards-based education, and costing-out studies, with a detailed summary of these developments in Pennsylvania. Part III argues that the rise of standards-based education and costing-out studies could enable the evolution of a fourth wave of funding litigation. Part III shapes this new wave by detailing how plaintiffs can utilize the findings of Pennsylvania's costing-out study and standards-based education to achieve the first success for plaintiffs in Pennsylvania. In addition, Part III briefly describes how the Pennsylvania model could be adapted to help plain-

¹² McDonald, *supra* note 9, at 76.

¹³ National Access Network, Teachers' College, Columbia University, *Litigation*, <http://www.schoolfunding.info/litigation/litigation.php3> (last visited Oct. 28, 2009). *See, e.g.*, *Roosevelt Elementary Sch. Dist. No. 66 v. Bishop*, 877 P.2d 806 (Ariz. 1994) (inequitable funding scheme in violation of state's equal protection clause); *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71 (Wash. 1978) (funding scheme in violation of state's education clause).

¹⁴ *Marrero ex rel. Tabalas v. Commonwealth*, 739 A.2d 110, 112 (Pa. 1999) (characterizing education funding as "power which the Constitution commits exclusively to the Legislature").

¹⁵ Patte Barthe, *A Guide to Standards-Based Reform*, The Center for Public Education, Mar. 23, 2006, http://www.centerforpubliceducation.org/site/c.lvIXIiN0JwE/b.5056999/k.21BC/A_guide_to_standardsbased_reform.htm.

¹⁶ National Access Network, Teachers' College, Columbia University, *An Introduction to Education Cost Studies*, <http://www.schoolfunding.info/issues/CostingOut.pdf> (last visited Oct. 28, 2009).

¹⁷ *Id.* *See, e.g.*, *Flores v. Arizona*, 405 F. Supp. 2d 1112 (D. Ariz. 2005); *Campbell County Sch. Dist. v. State*, 907 P.2d 1238, 1279 (Wyo. 1995) (ordering that a costing-out study be conducted and results used to inform new funding formula).

tiffs elsewhere and evaluates the potential shortcomings of this litigation strategy.

II. LEGAL BACKGROUND

A. *Education Funding Litigation Across the Country*

1. Wave One: Education Funding Challenges Under the Federal Constitution

Wave one of education funding litigation was bold and short-lived. This wave began in the California Supreme Court in *Serrano v. Priest*,¹⁸ in which plaintiffs claimed that substantial disparities in state funding among wealthy and poor school districts violated the federal Equal Protection Clause.¹⁹ Citing the United States Supreme Court's precedents, the California Supreme Court found wealth a suspect classification as "[p]rior decisions have invalidated classifications based on wealth even in the absence of a discriminatory motivation"²⁰ and considered education a fundamental right under the federal Constitution.²¹ Thus, the court held a public school financing system relying heavily on local property taxes a violation of both the United States and California Constitutions.²²

The United States Supreme Court promptly refuted the reasoning of *Serrano* two years later in *San Antonio School District v. Rodriguez*,²³ in which the Court held wealth is not a suspect class because discrimination against the poor is not invidious.²⁴ Also, the Court held education is not a fundamental right under the U.S. Constitution because a right to education is not explicitly or implicitly guaranteed by the text.²⁵ Therefore, the Court upheld a disparate education funding scheme as "rationally related" to a legitimate government interest under the U.S. Constitution.²⁶ However, the Court suggested that plaintiffs might find more success in state courts, as most state constitutions address education explicitly.²⁷ And thus began the second wave as plaintiffs

¹⁸ 487 P.2d 1241 (Cal. 1971).

¹⁹ *Id.* at 1244. See U.S. CONST. amend. XIV.

²⁰ *Serrano*, 487 P.2d at 1254 (citing *Harper v. Va. State Bd. of Elections*, 383 U.S. 663 (1996) (invalidating a poll tax as a violation of the Equal Protection Clause)).

²¹ *Id.* at 1256 (citing *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (declaring that "education is perhaps the most important function of state and local governments")).

²² *Id.* at 1241.

²³ 411 U.S. 1 (1973).

²⁴ *Id.* at 55 ("[W]e cannot say that such disparities [in the funding scheme] are the product of a system that is so irrational as to be invidiously discriminatory.").

²⁵ *Id.* at 37-38.

²⁶ *Id.* at 44-56 (holding Texas funding scheme is rationally related to the legitimate purpose of giving local communities control over how their tax dollars are spent in public schools, enabling local programs to be tailored to local needs).

²⁷ *Id.* at 44 (holding issues of federalism warrant a less rigorous standard of review and

sought relief under state constitutions and filed their claims in state courts.

2. Wave Two: Education Funding Challenges Under Claims of Equity

Continuing to focus on the inequalities created by education funding schemes, plaintiffs devised two causes of action under their state constitutions. Plaintiffs claimed that disparities created by education funding schemes violated either (1) the state's education clause or (2) the state's equal protection clause. The wave began in 1973 with *Robinson v. Cahill*,²⁸ in which the New Jersey Supreme Court held that the large inequalities created under the state's education funding scheme violated the education clause's mandate for the legislature to provide a "thorough and efficient" system of schools.²⁹

While a mandate of "thorough and efficient" education is not an explicit command of equality, a few state supreme courts were willing to interpret similar language in their states' education clauses to implicitly require some degree of equity. For example, the Kentucky Supreme Court interpreted its mandate of an "efficient" education to require similar educational opportunity for all students.³⁰ Also, the Connecticut Supreme Court interpreted its constitutional language that education be funded by "appropriate legislation" as mandating equality in education funding.³¹ However, courts have been more receptive to equity claims under the states' education clauses when the language of the clause contains a more unambiguous requirement of equality. These include a mandate for "[e]quality of educational opportunity"³² under the Montana Constitution or a "general diffusion of knowledge"³³ under the Texas Constitution.³⁴ Therefore, claims that grounded equity requirements in states' education

presumption of constitutionality, as the Supreme Court was "urged to abrogate systems of financing public education presently in existence in virtually every state"). *See, e.g.*, PA. CONST. art. III, § 14 (mandating that the legislature "provide for the maintenance and support of a thorough and efficient system of public education"); TEX. CONST. art. VII, § 1 (making it the "duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools").

²⁸ 303 A.2d 273 (N.J. 1973).

²⁹ *Robinson*, 303 A.2d at 294–95. *See* N.J. CONST. art. VIII, § 4 ("Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State.").

³⁰ *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 211–12 (Ky. 1989) (inequitable scheme not "efficient" under education clause).

³¹ *Horton v. Meskill*, 376 A.2d 359, 375 (Conn. 1977).

³² MONT. CONST. art. X, § 1.

³³ TEX. CONST. art. VII, § 1.

³⁴ *See* *Helena Elementary Sch. Dist. No. 1 v. State*, 769 P.2d 684, 690 (Mont. 1989) (holding inequity of funding scheme in violation of education clause mandating "[e]quality of educational opportunity"); *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 398 (Tex. 1989) (holding inequity of funding scheme in violation of education clause mandating a "general diffusion of knowledge").

clauses proved to have very limited success, as in most cases courts found more ambiguous constitutional mandates such as "thorough," "efficient," "general" and "uniform" do not require a degree of equality in funding.³⁵

Plaintiffs had more success in equity cases under the claim that disparities in education funding violated the states' equal protection clauses; however, plaintiffs continued to face resistance in many courts. Under this claim, a state court will not apply heightened scrutiny unless it holds either that wealth is a suspect class or education is a fundamental right under the state constitution.³⁶ Adopting the Supreme Court's reasoning in *Rodriguez*, state courts addressing this claim since 1973 almost uniformly held that wealth is not a suspect classification.³⁷ Thus, the more important issue became whether education was a fundamental right under the state's education clause.³⁸

The Supreme Court articulated the test for finding a fundamental right in the U.S. Constitution in *Rodriguez*.³⁹ The Court held that a right is fundamental if the right is implicitly or explicitly guaranteed in the text of the Constitution.⁴⁰ If state courts adopt this "*Rodriguez* test" when interpreting their own constitutions, a fair application of this test would conclude that education is a funda-

³⁵ See *Lujan v. Colo. State Bd. of Educ.*, 649 P.2d 1005, 1025 (Colo. 1982) (inequitable scheme does not violate requirement of "thorough and uniform system"); *Thompson v. Engkeling*, 537 P.2d 635, 652 (Idaho 1975) (scheme upheld because uniformity requirement of education clause only required that students be able to transfer from one district to another); *Hornbeck v. Somerset County Bd. of Educ.*, 458 A.2d 758, 776 (Md. 1983) (inequitable scheme does not violate education clause mandating "thorough and efficient" system); *Skeen v. State*, 505 N.W.2d 299, 311 (Minn. 1993) (inequitable scheme does not violate education clause requiring uniformity); *Bd. of Ed. of City Sch. Dist. v. Walter*, 390 N.E.2d 813, 825 (Ohio 1979) (inequitable scheme does not violate "thorough and efficient" mandate); *Olsen v. State*, 554 P.2d 139, 148 (Or. 1976) (inequitable scheme does not violate requirement that system be "uniform and general"); *Danson v. Casey*, 399 A.2d 360, 367 (Pa. 1979) (education clause mandating "thorough and efficient" system does not require uniformity in funding); *Kukor v. Grover*, 436 N.W.2d 568, 574 (Wis. 1989) (inequitable scheme not in violation of clause requiring schools be "as nearly uniform as practical"). But see *Roosevelt Elementary Sch. Dist. No. 66 v. Bishop*, 877 P.2d 806, 814-15 (Ariz. 1994) (inequitable scheme violates "general and uniform" requirement of education clause); *Rose*, 790 S.W.2d at 211 (an "efficient" system must be substantially uniform).

³⁶ See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973). State courts employ the same analysis used in *Rodriguez*. See, e.g., *Olsen*, 554 P.2d at 143 (citing *Rodriguez*, 411 U.S. at 17, in structuring analysis by asking if legislation impinges a fundamental interest or creates a classification on the basis of a suspect class).

³⁷ But see *Washakie County Sch. Dist. No. One v. Herschler*, 606 P.2d 310, 334 (Wyo. 1980) ("A classification on the basis of wealth is considered suspect, especially when applied to fundamental interests.").

³⁸ See cases cited *infra* note 44.

³⁹ *Rodriguez*, 411 U.S. at 34-38.

⁴⁰ *Id.*

mental right in almost every state.⁴¹ For example, in *Pauley v. Kelly*,⁴² the West Virginia Supreme Court held that the state constitution's mandatory requirement that the legislature provide for a system of education implicitly guaranteed the right to an education.⁴³

While some courts certainly followed the *Pauley* court's reasoning,⁴⁴ other courts refused to adopt the *Rodriguez* test when interpreting their state constitutions.⁴⁵ Several state supreme courts have adopted the view that the *Rodriguez* test does not apply to finding a fundamental right in a state constitution because unlike the Federal Constitution, state constitutions do not restrict a government's authority and therefore are not limited to addressing only fundamental rights.⁴⁶ Having found no fundamental right or suspect classification, most of these courts have upheld the legislative funding schemes as rationally related to the state's interest in preserving local control over education expenditures.⁴⁷

Judges reluctant to strike down funding schemes on the basis of inequality often criticized plaintiffs for either conceding or failing to show that the inequality in funding deprived children in poor districts of some minimal quality of education.⁴⁸ With the equality approach successful only one-third of the

⁴¹ In fact, almost every state that has applied the *Rodriguez* test concluded that education is a fundamental right under the state constitution. See, e.g., *Washakie*, 606 P.2d at 333; *Pauley v. Kelly*, 255 S.E.2d 859, 878 (W. Va. 1979).

⁴² 225 S.E.2d 859 (W. Va. 1979).

⁴³ *Pauley*, 255 S.E.2d at 876.

⁴⁴ See *Horton v. Meskill*, 376 A.2d 359, 373 (Conn. 1977) (without explicitly adopting *Rodriguez* test, court notes that under a multitude of tests, including the *Rodriguez* test, education is a fundamental right); *Pauley*, 255 S.E.2d at 878 (constitutional mandate of a system of schools makes education a fundamental right); *Washakie*, 606 P.2d at 333 (state constitution's great emphasis on education makes it a fundamental right). But see *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 206 (Ky. 1989) (education is a fundamental right because framers had emphasized its importance).

⁴⁵ See *infra* notes 46–47 and accompanying text.

⁴⁶ See *Lujan v. Colo. State Bd. of Educ.*, 649 P.2d 1005, 1017 (Colo. 1982); *McDaniel v. Thomas*, 285 S.E.2d 156, 167–68 (Ga. 1981); *Thompson v. Engelking*, 537 P.2d 635, 646 (Idaho 1975); *Hornbeck v. Somerset County Bd. of Educ.*, 458 A.2d 758, 784–85 (Md. 1983); *East Jackson Pub. Sch. v. State*, 348 N.W.2d 303, 305–06 (Mich. Ct. App. 1984); *Bd. of Educ. v. Nyquist*, 439 N.E.2d 359, 365–66 (N.Y. Sup. 1982); *Bd. of Ed. of City Sch. Dist. v. Walter*, 390 N.E.2d 813, 818 (Ohio 1979); *Fair Sch. Fin. Council of Okla. v. State*, 746 P.2d 1135, 1148–49 (Okla. 1987); *Olsen v. State*, 554 P.2d 139, 144–45 (Or. 1976).

⁴⁷ *Lujan*, 649 P.2d at 1022–23; *McDaniel*, 285 S.E.2d at 167–68; *Hornbeck*, 458 A.2d at 790; *Nyquist*, 439 N.E.2d at 366; *Walter*, 390 N.E.2d at 821; *Fair Sch. Fin. Council of Okla.*, 746 P.2d at 1150; *Olsen*, 554 P.2d at 144–47.

⁴⁸ See, e.g., *Hornbeck*, 458 A.2d at 780 (“No evidentiary showing was made . . . indeed no allegation was even advanced—that . . . the State's school financing scheme did not provide all school districts with the means essential to provide the basic education contemplated by” the education clause.).

time⁴⁹ and several courts unmoved by grossly disparate funding across the states, plaintiffs treaded toward a new litigation strategy focusing on the adequacy of funding.

3. Wave Three: Education Funding Challenges Under Claims of Adequacy

The seeds of the third wave were actually planted during the second wave case of *Pauley*. Although the Supreme Court of West Virginia struck down the state's funding scheme as a violation of the equal protection clause, the court found it necessary to define a "thorough and efficient system of schools" as one that develops in every child several minimal capacities including: (1) oral and written communication skills; (2) mathematical ability; (3) knowledge of economic, social, and political systems; (4) understanding of governmental processes; (5) awareness of mental and physical wellness; (6) knowledge of the arts; and (7) vocational skills.⁵⁰ As a new wave of funding litigation came under the claim that funding schemes violated states' education clauses by denying students a "basic" or "adequate" education, courts found the West Virginia Supreme Court's definition incredibly conducive to adequacy claims.

In 1989, the third wave officially began with *Rose v. Council for Better Education*.⁵¹ In *Rose*, the Supreme Court of Kentucky struck down the state's funding scheme as violating the state constitutional mandate on the legislature to provide students with an adequate education, as defined by the capacities recited in *Pauley*.⁵² *Rose*'s innovative holding led the way for the third wave as other state supreme courts—including Arkansas, Massachusetts, New York, North Carolina, and South Carolina—either fully or substantially adopted this definition of an adequate education as the right granted to every child under its state's education clause.⁵³

This new "adequacy" wave was so successful that several courts that previously upheld funding schemes on equity claims found these precedents were not controlling and inapplicable to adequacy claims. In states such as Arizona, North Carolina, and South Carolina, state supreme courts that were not persuaded by equity claims during the second wave struck down their states' funding schemes when plaintiffs showed the deprivation of an adequate education.⁵⁴ Indeed, adequacy claims proved substantially more successful than equity

⁴⁹ McDonald, *supra* note 9, at 75.

⁵⁰ *Pauley v. Kelly*, 255 S.E.2d 859, 877 (W. Va. 1979).

⁵¹ 790 S.W.2d 186 (Ky. 1989).

⁵² *Id.* at 212.

⁵³ *Lake View Sch. Dist., No. 25 v. Huckabee*, 91 S.W.3d 472 (Ark. 2002); *McDuffy v. Sec'y of the Executive Office of Educ.*, 615 N.E.2d 516 (Mass. 1993); *Campaign for Fiscal Equity v. State*, 719 N.Y.S.2d 475 (N.Y. Sup. 2001); *Leandro v. State*, 488 S.E.2d 249 (N.C. 1997); *Abbeville v. State*, 515 S.E.2d 535 (S.C. 1999).

⁵⁴ *Roosevelt Elementary Sch. Dist. No. 66 v. Bishop*, 877 P.2d 806 (Ariz. 1994); *Leandro*, 488 S.E.2d 249; *Abbeville*, 515 S.E.2d 535.

claims, with plaintiffs prevailing in about two-thirds of finance litigation cases based on adequacy.⁵⁵

However, this third wave further demonstrates that there is simply no “one size fits all” approach to education funding litigation. The success of these adequacy challenges depended entirely on a court’s willingness to make two bold judicial actions: (1) find that a state’s education clause grants the right to a certain level or quality of education, and (2) judicially define what constitutes an adequate education. But several courts, including the high courts of Florida,⁵⁶ Pennsylvania,⁵⁷ Illinois,⁵⁸ and Rhode Island,⁵⁹ invoked the “political question doctrine” in holding that allocation of funding for public schools is not a justiciable cause of action because education funding schemes are the responsibility of the legislative branch of government. Under the political question doctrine, a cause of action is nonjusticiable when a court determines that there is

a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government.⁶⁰

Therefore, the political question doctrine presents a daunting barrier for plaintiffs challenging their states’ funding schemes—especially in Pennsylvania.⁶¹ Out of all the states whose courts have yet to strike down their funding schemes, Pennsylvania arguably has the most unfavorable judicial precedents for plaintiffs; the Pennsylvania Supreme Court found education funding claims nonjusticiable and even held that students have no right to a certain quality of education.⁶²

B. *Education Funding Litigation in Pennsylvania*

The Pennsylvania Supreme Court has twice upheld the constitutionality of funding schemes that heavily relied on local property taxes to fund education.⁶³

⁵⁵ McDonald, *supra* note 9, at 77.

⁵⁶ Coal. for Adequacy and Fairness in Sch. Funding v. Chiles, 680 So. 2d 400 (Fla. 1996).

⁵⁷ Marrero *ex rel.* Tabalas v. Commonwealth, 739 A.2d 110 (Pa. 1999).

⁵⁸ Lewis E. v. Spagnolo, 710 N.E.2d 798 (Ill. 1999).

⁵⁹ City of Pawtucket v. Sundlun, 662 A.2d 40 (R.I. 1995).

⁶⁰ Baker v. Carr, 369 U.S. 186, 217 (1962).

⁶¹ See *infra* Part II.B.

⁶² See Marrero *ex rel.* Tabalas v. Commonwealth, 739 A.2d 110, 112 (Pa. 1999) (education clause is a mandate on the legislature and does not confer an individual right upon each student).

⁶³ See Marrero, 739 A.2d 110; Danson v. Casey, 399 A.2d 360 (Pa. 1979).

The court analyzed these funding schemes in light of the state's education clause requiring that the General Assembly "provide for the maintenance and support of a thorough and efficient system of public education to serve the needs of the Commonwealth."⁶⁴

First, in *Danson v. Case*⁶⁵ the court applied rational basis scrutiny to the Philadelphia School District's claims that (1) the education funding scheme in Pennsylvania violated the education clause because Philadelphia schools were unable to provide their students with a "normal program of educational services" provided to other students in the state, and (2) the scheme violated the equal protection clause because the Philadelphia school district was the only district in the state that did not have direct power to levy local property taxes for additional revenue.⁶⁶ The court rejected the argument that an inequitable funding scheme violated the education clause because "the framers considered and rejected the possibility of specifically requiring the Commonwealth's system of education be uniform."⁶⁷ The court held that "[a]s long as the legislative scheme for financing public education 'has a reasonable relation' to '[providing] for the maintenance and support of a thorough and efficient system of public schools' the General Assembly has fulfilled its constitutional duty."⁶⁸ The court upheld the scheme under this rational basis standard.⁶⁹

The Pennsylvania Supreme Court noted several other problems with the school district's challenge to the funding scheme. First, the claims were "broad and general"—not challenging any particular portion or aspect of the scheme but the system of funding as a whole.⁷⁰ Also, the school district did not allege that any student was suffering a legal injury as a result of the funding scheme.⁷¹ Most importantly, the school district did not allege that its children were "being denied an 'adequate,' 'minimum,' or 'basic' education."⁷² Therefore, the school district failed to state a justiciable cause of action.⁷³ The court simply characterized the school district's request for injunctive relief as a demand for "whatever sum of money it deems necessary to operate the Philadelphia schools."⁷⁴

Although in *Danson* the Pennsylvania Supreme Court seemed amenable to striking down a funding scheme if children were being deprived of an adequate

⁶⁴ PA. CONST. art. III, § 14.

⁶⁵ 399 A.2d 360 (Pa. 1979).

⁶⁶ *Id.*

⁶⁷ *Id.* at 367.

⁶⁸ *Id.* (quoting *Malone v. Hayden (Teachers' Tenure Act Cases)*, 197 A. 344, 352 (1938)).

⁶⁹ *Id.*

⁷⁰ *Id.* at 363.

⁷¹ *Id.* at 365.

⁷² *Id.*

⁷³ *Id.* at 363.

⁷⁴ *Id.* at 365.

education, the court later in *Marrero ex rel. Tabalas v. Commonwealth*⁷⁵ affirmed a decision holding that this claim also constitutes a nonjusticiable cause of action.⁷⁶ Citing *Danson*, the court affirmed the reasoning that just as a “normal program of education services” cannot be defined by a court, so is a court “unable to judicially define what constitutes an ‘adequate’ education or what funds are ‘adequate’ to support such a program.”⁷⁷ Also, the court held that Pennsylvania’s education clause does not confer “an individual right upon each student to a particular level or quality of education, but . . . impose[s] a constitutional duty upon the legislature to provide for the maintenance of a thorough and efficient system of public schools.”⁷⁸ The court reaffirmed the rational basis test in *Danson*, holding that as long as the legislative funding scheme had a “reasonable relation” to the purpose of the education clause, the court would “not inquire into the reason, wisdom, or expediency of the legislative policy.”⁷⁹

C. Standards-Based Education

While the education funding litigation “waves” were crashing across the country, another critical development in education reform was occurring at the national level. In 1983, the U.S. Department of Education released a shocking study on the status of the country’s education system.⁸⁰ The study, *A Nation at Risk*, warned that “the educational foundations of our society are presently being eroded by a rising tide of mediocrity that threatens our very future as a Nation and a people.”⁸¹ *A Nation at Risk* promoted the modern school reform movement, as virtually every state in the country later adopted a standards-based model for learning in their public school systems.⁸²

The standards-based model has three key components: (1) academic content standards for various subjects identifying what a student should know and be able to do at each grade level; (2) standardized tests designed to gauge student mastery of these standards; and (3) a system of accountability for schools, including rewards and consequences based on individual school and district performance.⁸³ Legislatures delegate authority to their states’ boards of education to promulgate standards.⁸⁴ As a check on this program, the state administrators

⁷⁵ 739 A.2d 110 (Pa. 1999).

⁷⁶ *Id.*

⁷⁷ *Id.* at 113–14 (quoting *Danson v. Casey*, 399 A.2d 360, 362 (Pa. 1979)).

⁷⁸ *Id.* at 112 (quoting *Marrero by Tabales v. Commonwealth*, 709 A.2d 956, 961–62 (Pa. Commw. Ct. 1998)).

⁷⁹ *Id.* at 113.

⁸⁰ U.S. DEPT. OF EDUC., NAT’L COMM’N ON EXCELLENCE IN EDUC., *A NATION AT RISK: THE IMPERATIVE FOR EDUCATION REFORM* (1983).

⁸¹ *Id.* at 5.

⁸² The Center for Public Education, *supra* note 15. Iowa is the only state not to adopt this model. *Id.*

⁸³ *Id.*

⁸⁴ For example, in Pennsylvania, the General Assembly has delegated to its Board of

tests at various grade levels to measure each school's success in implementing the standards-based model.⁸⁵

In 2001, the No Child Left Behind Act⁸⁶ (NCLB) raised the stakes for school performance by extending federal accountability standards to virtually all school districts.⁸⁷ Under this new federal system of standards-based education, schools across the country are now responsible for meeting federal benchmark measures for proficiency (called Adequate Yearly Process, or "AYP") set until the year 2014.⁸⁸ NCLB made it a nationwide goal for 100 percent of students to score proficient or better on the states' standardized tests by 2014.⁸⁹ When a school fails to make AYP, it faces a series of sanctions ranging from the requirement of a school-improvement plan to state takeover, with these sanctions gradually increasing each year the school falls short of its benchmark progress.⁹⁰

The potential for standards to serve as an aid for plaintiffs in litigation is monumental; however, funding reform advocates have realized this potential only recently.⁹¹ William S. Koski argues that standards can be used as a sword to slash through judges' reservations about the justiciability of funding claims:

Armed with specific, clear, and meaningful standards that are the product of such an extensive political process, courts are better positioned to overcome their self-imposed obstacles to policy reform. No judge has to make additional findings of fact as to the competencies that all children are expected to achieve or whether those competencies are necessary for success in the twenty first century. No judge has to develop a remedial scheme that tells administrators and teachers what all children should know and be able to do. Thus, concerns about judicial fact-finding, expertise, and legitimacy are ameliorated. The court's main task . . . is to determine whether a school or school system has failed to provide the opportunity for children to meet the requisite standards and whether that failure runs afoul of

Education authority to develop an "evaluation procedure designed to measure objectively the adequacy and efficiency of the educational programs offered by the public schools of the Commonwealth . . . and devise performance standards" for the state's public schools. 24 PA. STAT. ANN. § 2-290.1 (2009).

⁸⁵ The Center for Public Education, *supra* note 15.

⁸⁶ 20 U.S.C. § 6301 (2002).

⁸⁷ *See id.* § 6301(4). In 2005, ninety percent of U.S. school districts were held accountable under No Child Left Behind. The Center for Public Education, *supra* note 15.

⁸⁸ *See* 34 C.F.R. § 200.13 (2009).

⁸⁹ The Center for Public Education, *supra* note 15.

⁹⁰ U.S. DEP'T OF EDUCATION, LEA AND SCHOOL IMPROVEMENT NON-REGULATORY GUIDANCE (2006), available at <http://www.ed.gov/policy/elsec/guid/schoolimprovementguid.pdf>. *See* 34 C.F.R. § 200.50 (2009) (identifying when states must take "corrective action").

⁹¹ James E. Ryan, *Standards, Testing, and School Finance Litigation*, 86 TEX. L. REV. 1223, 1233 (2008) (noting that the Kansas Supreme Court is the only court to incorporate state content standards in its definition of an adequate education).

some legal obligation. This is something that courts are eminently capable of doing.⁹²

In other words, Koski proposes that standards be “the legal hooks upon which to hang a cause of action.”⁹³ Despite the apparent attractiveness of using standards as the definition of an “adequate education,” the standards-based education movement only really started gaining ground in the 1990s when the third wave of adequacy claims were well underway.⁹⁴ Therefore, the most groundbreaking cases of the third wave relied on the *Pauley-Rose* judicial definition of adequacy rather than on legislative academic standards.⁹⁵ But by the start of the twenty-first century, academic standards began to play a prominent role in education funding litigation—with costing-out studies providing critical support for these causes of action.⁹⁶

D. *The Rise of Costing-Out Studies*

1. Background on Methodology

Historically, the amount of money available to schools has been based arbitrarily on the political whims of the times and the ability of individual districts to raise their own money through property taxes.⁹⁷ However, the trend toward standards and accountability in the public education system has prompted policymakers and courts to ask the critical questions: How much does it *actually* cost for schools to implement the content standards that legislatures mandate, and are the state legislatures providing the requisite funding for this standards-based education?

As several adequacy decisions of the third wave resulted in judicial orders for legislatures to fully fund the cost of an “adequate education,” research methodologies for calculating this cost advanced dramatically.⁹⁸ Today, costing-out experts recognize four research approaches: (1) the professional judgment approach, which relies on the expertise of professionals in the education field to identify the resources needed to meet performance expectations; (2) the successful school district approach, which identifies school districts meeting

⁹² William S. Koski, *Educational Opportunity and Accountability In an Era of Standards-Based School Reform*, 12 STAN. L. & POL’Y REV. 301, 307 (2001).

⁹³ *Id.*

⁹⁴ The Center for Public Education, *supra* note 15.

⁹⁵ See Ryan, *supra* note 91, at 1233 (referring to standards and adequacy litigation as a “match made in theory”). See also *McDuffy v. Sec’y of the Executive Office of Educ.*, 615 N.E.2d 516, 516 (Mass. 1993).

⁹⁶ See, e.g., *Montoy v. State*, 102 P.3d 1160 (Kan. 2005) (holding that funding scheme’s failure to fund standards-based education violated education clause).

⁹⁷ Molly A. Hunter, National Access Network, Teachers’ College, Columbia University, *An Introduction to Education Cost Studies*, <http://www.schoolfunding.info/issues/CostingOut.pdf> (last visited Oct. 28, 2009).

⁹⁸ *Id.*

performance expectations and calculates their average expenditures; (3) the evidence based approach, which relies on the research of education policy experts and (4) cost function studies, which rely on complex statistical analyses of per-pupil expenditures, student performance, and various other characteristics of students and school districts.⁹⁹ Often, studies combine several of these research methodologies when calculating the cost of an adequate education.¹⁰⁰ Across the nation, thirty-five state legislatures have ordered costing-out studies, either in response to remedial orders from adequacy litigation, or on their own initiative.¹⁰¹

2. Pennsylvania's Costing-Out Study of 2008

Pennsylvania's General Assembly acted on its own initiative to order the Commonwealth's Board of Education to provide for an independent study to determine how much it actually costs Pennsylvania schools to provide each student with an adequate education (referred to as a "costing-out estimate") as defined by the commonwealth's performance standards and expectations.¹⁰² In 2008, the Board adopted the study's recommendations for a new funding formula in the commonwealth's budget.¹⁰³

a. Key Findings

In determining each district's costing-out estimate, the study adopted the "successful school district," "professional judgment," and "evidence based" methodologies.¹⁰⁴ In addition, it considered a number of student-driven and district-driven factors that influence the "base cost" of an adequate education, including the number of poor, gifted, and special-education students, as well as the district's size and geographical location.¹⁰⁵ Some of the key findings from the study include:

- The average costing-out estimate per student for the 2005–06 school year was \$12,057, while the actual average expenditure per pupil for this year was \$9,512.¹⁰⁶

⁹⁹ *Id.*

¹⁰⁰ See, e.g., Augenblick, Palaich & Associates, Inc., *Costing Out Resources Needed to Meet Pennsylvania's Public Education Goals* (2007), at i–ii, http://www.pde.state.pa.us/stateboard_ed/lib/stateboard_ed/PA_Costing_Out_Study_rev_12-07.pdf (employing the successful school district, professional judgment, and evidence based approaches).

¹⁰¹ *Id.*

¹⁰² Augenblick, *supra* note 100, at i–ii.

¹⁰³ Education Law Center of Pennsylvania, *Analysis of the New State System of Education Funding*, [http://www.elc-pa.org/pubs/downloads/english/fun-Analysis%20of%20New%20State%20System%20for%20Education%20Funding%207-10-08%20\(2\).doc](http://www.elc-pa.org/pubs/downloads/english/fun-Analysis%20of%20New%20State%20System%20for%20Education%20Funding%207-10-08%20(2).doc) (last visited Oct. 15, 2009). See S.B. 1389, 2007–08 Leg., Reg. Sess. (Pa. 2008).

¹⁰⁴ Augenblick, *supra* note 100, at 1–2.

¹⁰⁵ Augenblick, *supra* note 100, at ii.

¹⁰⁶ Augenblick, *supra* note 100, at iv.

- Out of the 501 school districts in Pennsylvania, 474 districts (or 94% of districts) spent below their costing-out estimate.¹⁰⁷
- In total, the 474 districts spending below their estimates would need an additional \$4.81 billion in revenue to have funds sufficient to meet performance expectations.¹⁰⁸
- Thirty districts in Pennsylvania would need \$4,000 or more per pupil to reach their costing-out estimate, with York City School District, the district with the greatest funding deficiency, requiring \$6,253 more per pupil to reach its costing-out estimate.¹⁰⁹

b. *Pennsylvania's New Funding Formula*

In response to this study, the General Assembly mandated that beginning in the 2008–09 academic school year, school funding would be calculated according to the following multi-step formula recommended by the study:¹¹⁰

(1) *Calculate an Adequacy Target for Each District*

First, the legislature will calculate each district's "adequacy target," or total amount of revenue the district needs to meet the state's performance standards in a given year, by beginning with the base cost of funding an adequate education at a typical school district without any extraordinary student needs.¹¹¹ Then, the base cost per pupil is multiplied by a five-year average student enrollment and adjusted by various weights to account for the unique circumstances and needs of the specific district.¹¹² The resulting number is the state's adequacy target.

(2) *Calculate a State Funding Target*

The legislature will next calculate each district's "state funding target," or the portion of the district's adequacy target that *should* be funded by the state after accounting for the district's revenue acquired from local property taxes.¹¹³ The legislature calculates the state funding target by subtracting the actual spending for each district in the prior year from the adequacy target and multiplying the difference by a percentage ratio factoring in local property values, personal incomes, and property tax rates of the district.¹¹⁴ This formula results in the property-poor districts having a higher state funding target (as high as over twenty percent of the district's adequacy target for thirty-nine districts) and the property-rich districts with the lowest state funding targets (as low as

¹⁰⁷ Augenblick, *supra* note 100, at iv.

¹⁰⁸ Augenblick, *supra* note 100, at iv.

¹⁰⁹ Pennsylvania Department of Education, *Pennsylvania Costing-Out Database*, http://www.pde.state.pa.us/stateboard_ed/cwp/view.asp?Q=130714&A=3 [hereinafter *Pa. Costing-Out Database*] (click on "Costing-Out Study Database").

¹¹⁰ See H.B. 1067, 2007–08 Leg., Reg. Sess. (Pa. 2008).

¹¹¹ Education Law Center of Pennsylvania, *supra* note 103.

¹¹² Education Law Center of Pennsylvania, *supra* note 103.

¹¹³ Education Law Center of Pennsylvania, *supra* note 103.

¹¹⁴ Education Law Center of Pennsylvania, *supra* note 103.

zero percent of the adequacy targets for thirty-six districts).¹¹⁵ The average state-funding target in Pennsylvania is 10.84% of a district's adequacy target.¹¹⁶

(3) *Annual Allocation*

Finally, the legislature will determine what percentage of the districts' state funding targets the state will actually fund, which will be the district's annual allocation.¹¹⁷ For the 2008–09 school year, the districts with the highest local tax effort will receive 16.75% of their state-funding targets, while districts with lower tax efforts will receive ten percent of their targets.¹¹⁸ However, it is important to note that Pennsylvania's recent budget legislation stated the General Assembly's intention to meet 100% of the state-funding targets by fiscal year 2013–14.¹¹⁹

In sum, the General Assembly's funding formula still leaves many public school districts with inadequate funds to meet state performance standards. The 2008–09 fiscal year budget increased education funding by only \$274 million,¹²⁰ despite the \$4.38 billion deficit reported in the costing-out study.¹²¹ And although the most underfunded districts have adequacy gaps over \$4,000 per pupil,¹²² the Governor of Pennsylvania announced that one such district will see an increase of only approximately \$400 per pupil under the new funding formula in the 2008–09 fiscal year.¹²³ However, the General Assembly has stated a "goal in law to meet the state's commitment to adequate school funding over the next six years."¹²⁴

III. ARGUMENT

A. *A Fourth Wave? The Use of Standards and Costing-Out Studies in Education Funding Litigation*

1. Standards as Defining an "Adequate Education"

As mentioned in Part II, many commentators have advocated for the use of

¹¹⁵ Education Law Center of Pennsylvania, *supra* note 103.

¹¹⁶ Education Law Center of Pennsylvania, *supra* note 103.

¹¹⁷ Education Law Center of Pennsylvania, *supra* note 103.

¹¹⁸ Education Law Center of Pennsylvania, *supra* note 103.

¹¹⁹ Education Law Center of Pennsylvania, *supra* note 103.

¹²⁰ Press Release, Office of the Governor, Commonwealth of Pennsylvania, 2008–09 Pennsylvania Education Budget Benefits Children, Schools and Taxpayers; Lays Groundwork for Long-Term Funding Adequacy (July 4, 2008), available at <http://www.pde.state.pa.us/newsroom/cwp/view.asp?A=3&Q=144252>.

¹²¹ Augenblick, *supra* note 100, at iv.

¹²² *Pa. Costing-Out Database*, *supra* note 109.

¹²³ Governor Rendell announced that Upper Darby School District, a district with approximately 12,000 students, would receive \$4.9 million. Thus, the funding increase for Upper Darby translates to only approximately \$400 per student, despite its \$4,000 per student deficiency. See *id.*; Press Release, *supra* note 120.

¹²⁴ Press Release, *supra* note 120 (quoting Pennsylvania Governor Edward Rendell).

standards to define an adequate education in education financing litigation, rather than the *Pauley-Rose* judicial definition of adequacy.¹²⁵ This innovative strategy still fits within the framework of the third wave, because it relies on the claim that a state constitution guarantees students the right to a certain level or quality of education. However, this approach is still limited in a state like Pennsylvania, where the supreme court has held that students have no right to a certain level or quality of education under the state constitution. Therefore, any use of standards in education funding litigation in Pennsylvania will require plaintiffs to move beyond the framework of the third wave. In other words, the time has come for education funding litigation to evolve into yet another wave of strategy.

2. Failure to Fund Standards-Based Education and the Legislature's Affirmative Duty Under the Education Clause

As noted in Part II, Koski has argued that standards can be utilized in education funding litigation by evaluating whether the failure of a school system "to provide the opportunity for children to meet the requisite standards . . . runs afoul of some legal obligation."¹²⁶ Costing-out studies conveniently provide a numerical determination of this "failure" to provide the opportunity for schools to meet standards, based on scientifically accepted methodologies. While the second and third wave have used abstract notions of equality and the right to an adequate education as the "legal obligation" breached by funding systems' shortcomings, I argue that the next wave of education funding litigation will need to focus instead on the "legal obligation" imposed on state legislatures in the explicit text of their state constitutions. In other words, the next wave of education funding litigation should adopt the following framework: (1) the failure of a funding system to fully fund state-mandated academic standards (as proven by the state's costing-out study) runs afoul of (2) the state legislature's affirmative obligations with regards to education, imposed on them by the explicit text of the state's constitution.

The beginnings of a fourth wave can already be seen in the 2005 opinion *Montoy v. State*,¹²⁷ in which the Kansas Supreme Court held that the legislature failed to meet its obligation under the state constitution to "make suitable provision for finance" of the public school system by refusing to adequately fund their own state-mandated education standards (as evidenced by a costing-out study).¹²⁸ In this case, the court explicitly rejected the argument that the inequality created by the funding scheme violated equal protection.¹²⁹ Also, the decision makes no mention of an individual right of students to an adequate

¹²⁵ See *supra* Part II.C.

¹²⁶ See Koski, *supra* note 92, at 307.

¹²⁷ 102 P.3d 1160 (Kan. 2005).

¹²⁸ *Id.* at 1163.

¹²⁹ *Id.*

education guaranteed by the state's education clause. Therefore, the holding of the decision fits neither the framework of the second nor third wave of funding litigation. Instead, the holding stands alone among the education funding cases in its reliance on interpreting the constitutional obligation of the legislature in light of the legislature's failure to fund the very academic standards it has mandated. This new framework, I argue, has initiated a "fourth wave" of funding litigation—and it is one that appears very promising for Pennsylvania and other states awaiting relief from the courts.

3. Pennsylvania as a Model for the Fourth Wave

a. *The Claim*

The current state of education funding law in Pennsylvania—the precedent of *Marrero*, the release of a costing-out study detailing the state's underfunding of state standards, and the refusal of the legislature to meet the funding targets recommended by the costing-out study—provides the conditions necessary to fit the *Montoy* framework for challenging a state's funding system. Under the Pennsylvania Constitution, the legislature has a duty to "provide for the maintenance and support of a thorough and efficient system of public education."¹³⁰ In accordance with this mandate, the legislature has given the State Board of Education statutory authority to set academic content standards and has arranged for an independent study to determine how much funding is necessary for schools to meet these state-mandated performance expectations. However, the new funding scheme is not supplying the funds necessary for teachers to meet these standards and the legislature has merely made it a "goal in law" to finally do so in six years.¹³¹ According to *Marrero*, the standard for whether the legislature has failed to meet its constitutional obligations under article III,

¹³⁰ PA. CONST. art. III, § 14.

¹³¹ Press Release, *supra* note 120. It is critical to consider the legal implications of this "goal" of the legislature to fully fund standards-based education by 2013–14. Considering the great deference the Supreme Court of Pennsylvania paid to the legislature in *Danson* and *Marrero*, a challenge to the scheme before the General Assembly officially fails to follow through with this goal could lead to the court finding the challenge not yet ripe and giving the legislature time to follow through with this goal. However, several indications make it almost certain that the legislature will not follow through with this goal, including: the legislature's conscious choice to make full funding a "goal in law" rather than a legal commitment; the minimalist effort to close the deficit in the very first fiscal year by providing less than 5.7% of what was necessary to meet funding targets (calculated by dividing the increase of \$274 million by the \$4.81 billion deficit in education spending) and the fact that in light of the 2008 economic crisis, the legislature has already cut spending on education by \$78 million, which takes the state's progress in meeting their goal to less than a mere 4.1% of what is necessary to close the deficit. See Amy Worden, *Rendell Announces Budget Trims*, PHILA. INQUIRER, Oct. 31, 2008, at B04. Therefore, one could argue that even in 2010, it is obvious that the legislature is simply not committed to meeting its goal of fully funding standards-based education.

section 14 is rational basis scrutiny—which requires the court to ask whether the legislature’s funding scheme is rationally related to the maintenance and support of a thorough and efficient system of education.¹³² I argue that the new funding scheme could not withstand rational basis scrutiny, as a funding scheme that admittedly does not provide the funding necessary for schools to implement the very form of education they have been required by the state to provide is anything but “rationally related” to supporting a thorough and efficient system of education. Therefore, the Pennsylvania legislature is clearly failing to fulfill its constitutional duty to education.

b. *Justiciability Under the Political Question Doctrine*

While the Supreme Court of Pennsylvania was twice inclined to hold that challenges to the legislature’s funding scheme presented a nonjusticiable cause of action under the frameworks of the second and third wave in *Danson* and *Marrero*, the new proposed framework of interpreting the legislature’s constitutional duty, in light of funding mandated standards, can and should survive the court’s previous criticism of justiciability. Any successful challenge to the education funding scheme in Pennsylvania (and most other states in which the highest court has refused to rectify the legislature’s funding schemes) must aggressively and persuasively establish that the claim presents a justiciable cause of action. Thus, I will address the two justiciability issues raised by the court in *Danson* and *Marrero*—the fact that the text of the Pennsylvania Constitution commits education to the legislature and the requirement of judicially discoverable and manageable standards for evaluating a cause of action.

i. *Textually Demonstrable Constitutional Commitment of Education to the General Assembly*

The U.S. Supreme Court clarified the political question doctrine in *Powell v. McCormack*,¹³³ in which the Court noted that the fact that the text of a constitution assigns some responsibility of an issue to the legislative branch of government is insufficient, in and of itself, to make the issue nonjusticiable.¹³⁴ In *Powell*, the Court first examined the *scope* of the text’s commitment to determine the extent to which Congress’s actions were subject to judicial review.¹³⁵ While the Supreme Court of Pennsylvania did not explicitly adopt *Powell*’s

¹³² *Marrero ex rel. Tabalas v. Commonwealth*, 739 A.2d 110, 113 (Pa. 1999).

¹³³ 395 U.S. 486 (1944).

¹³⁴ *Id.* at 519–22 (stating that the fact that Article I, section 5 of the U.S. Constitution grants the House of Representatives “adjudicatory power” to judge the qualifications of its members does not necessarily mean this judgment cannot be subjected to judicial review).

¹³⁵ *Id.* at 547–48 (stating that because Article I, section 5 was determined to be “at most a ‘textually demonstrable commitment’ to Congress to judge only the qualifications expressly set forth in the Constitution,” a challenge to Congress’s authority to dismiss a member at will is a justiciable cause of action).

framework in *Danson* and *Marrero*, in these cases the court essentially defined Pennsylvania's constitutional commitment to education as a "positive mandate" that the Legislature 'provide for the maintenance and support of a thorough and efficient system of public schools.'"¹³⁶ Furthermore, that court acknowledged in both cases that the legislature's actions in accordance with this positive mandate are subject to judicial review under rational basis scrutiny.

Therefore, the claim asserted in this Note—that the legislature's failure to fully fund the very standards-based education it has mandated bears no reasonable relation to providing for the maintenance and support of a thorough and efficient system of education—must be a justiciable cause of action because it challenges the legislature's compliance with article III, section 14 within the scope of permissible judicial review. Such a claim would merely require a Pennsylvania court to fulfill its own constitutional duty of defining the words "thorough" and "efficient" in the state's education clause to determine if the education funding scheme is rationally related to the purpose of article III, section 14.¹³⁷ Because it is the well-established role of the judicial branch "to apply, interpret, define, [and] construe all words, phrases, sentences, and sections of [a state's c]onstitution as necessitated by the controversies before it,"¹³⁸ this claim constitutes a justiciable cause of action.

ii. Lack of Judicially Discoverable and Manageable Standards

A claim structured within the *Montoy* framework would also eliminate the concerns for a "lack of judicially discoverable and manageable standards" for resolving claims against funding schemes because such claims do not require a court to delineate an "adequate education." Unlike cases in the third wave of litigation, such a claim does not even depend on an abstract notion of an adequate education. The only terms a court would need to define are in the state constitution—such as "thorough and efficient"—which are undoubtedly within the court's jurisdiction to interpret.¹³⁹ Courts have historically used a number of "judicially manageable standards" for resolving claims based on constitutional language, including looking to records from constitutional debates and conventions as well as dictionary definitions to determine the meaning of

¹³⁶ *Danson v. Casey*, 399 A.2d 360, 425 (Pa. 1979) (quoting *Malone v. Hayden* (Teachers' Tenure Act Cases), 197 A. 344, 352 (1938)).

¹³⁷ See *McCulloch v. Maryland*, 17 U.S. 316, 353–60 (1819) (Supreme Court assumes its role as interpreter of the Constitution in interpreting and defining the word "necessary" in the necessary and proper clause); *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 209 (Ky. 1989) (recognizing the court's "sworn duty" to define the word "efficient" in state's education clause and in doing so the court is "not question[ing] the wisdom of the General Assembly's decision, only its failure to comply with its constitutional mandate"); *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 395 (Tex. 1989) (court defines "efficient" in the state constitution's education clause).

¹³⁸ *Rose*, 790 S.W.2d at 209.

¹³⁹ See *McCulloch*, 17 U.S. at 353–60.

words used in constitutions.¹⁴⁰ This history shows that courts are perfectly capable of filling in the gaps that undeniably remain when applying constitutional language to concrete situations. In addition, costing-out studies can now provide courts with reliable evidence of the actual cost of standards-based education and a legislature's failure to provide sufficient funding. The results of costing-out studies are *reliable* evidence because these studies are conducted according to scientifically accepted methodologies.¹⁴¹ Therefore, a court could not dismiss this claim under the political question doctrine on the basis of a lack of judicially manageable standards, as the Pennsylvania Supreme Court did to other funding scheme challenges in the second and third waves.

c. *Interpretation of the Education Clause*

Assuming the claim proposed by this Note survives the political question doctrine, would an application of the judicially manageable standards of looking to the text and history of Pennsylvania's education clause yield a victory for plaintiffs challenging the funding scheme?

The key terms and phrases used to articulate the legislature's duty under the Pennsylvania Constitution include "provide for," "maintenance," "support," "thorough," and "efficient."¹⁴² One acceptable method of defining these terms—referring to a standard dictionary—reveals the following definitions of these terms: (1) provide – "equip or supply someone with (something useful or necessary)"¹⁴³; (2) maintain – "provide with necessities for life or existence"¹⁴⁴; (3) support – "bear all or part of the weight of; hold up"¹⁴⁵; (4) thorough – "complete with regard to every detail; not superficial or partial"¹⁴⁶; (5) efficient – "achieving maximum productivity with minimum wasted effort or expense."¹⁴⁷

All these definitions support the claim that the legislature's failure to fully fund the very standards-based education it has mandated violates its constitutional duty. The funding scheme is not *equipping or supplying schools with what is necessary* or *bearing the weight of* standards-based education mandated by the state. As the costing-out study reveals, this scheme results in a system of education that is *incomplete* and does not *achieve* the state's standards.

The legislative history of the education clause also supports the claim that

¹⁴⁰ See *id.* (inferring framers' intent from historical records in interpreting the meaning of "necessary"); *Edgewood Indep. Sch. Dist.*, 777 S.W.2d at 395 (using dictionary to define "efficient").

¹⁴¹ See *infra* Part II.D.1.

¹⁴² PA. CONST. art. III, § 14.

¹⁴³ THE NEW OXFORD AMERICAN DICTIONARY 1364 (2d ed. 2005).

¹⁴⁴ *Id.* at 1022.

¹⁴⁵ *Id.* at 1699.

¹⁴⁶ *Id.* at 1755.

¹⁴⁷ *Id.* at 540. See *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 395 (Tex. 1989) (accepting this very definition of "efficient" when interpreting education clause).

the legislature's failure to meet funding targets is in violation of its constitutional obligation. Before 1967, the Pennsylvania education clause mandated that the legislature "provide for the maintenance and support of a thorough and efficient system of public schools . . . and shall appropriate at least one million dollars each year for that purpose."¹⁴⁸ The legislature removed this last provision from the education clause and replaced it with "to serve the needs of the Commonwealth."¹⁴⁹ This change provides historical evidence that (1) the framers of the clause intended the terms "provide for" and "support" to be interpreted as requiring the legislature to provide *financially* for and support public education¹⁵⁰ and (2) the framers clearly intended that the legislature provide enough financial support to fully meet the "needs of the Commonwealth." This change supports this reading because the framers purposefully removed a minimum amount of support that was constitutionally required and replaced it with an indefinite amount to be determined by the state's needs. Therefore, interpreting the education clause as requiring that the legislature provide sufficient funds to meet its state-mandated standards is strongly supported by both ordinary interpretations of the words in the education clause and historical evidence of the framers' intentions. A funding scheme that does not sufficiently fund the needs of the state in meeting the requirements of standards-based education, as outlined in the findings of the costing-out study, is not rationally related to the purpose of the education clause.

4. Implications of a Fourth Wave for Other States

The *Montoy* framework presents a promising outlook for victory not just in Pennsylvania, but in several other states where plaintiffs have yet to achieve courtroom victories. Because the highest courts in most of these states have already rejected funding challenges brought under the second and third wave frameworks,¹⁵¹ any successful claim in these states cannot rely on the contention that their state constitutions require abstract notions of "equality" and "ad-

¹⁴⁸ PA. CONST. art. X, § 1 (1874) (amended and renumbered as art. III, § 14, in 1967) (emphasis added).

¹⁴⁹ See PA. CONST. art. III, § 14.

¹⁵⁰ See PA. CONST. art. X, § 1 (1874) (amended and renumbered as art. III, § 14, in 1967) (text of the constitution itself mandated that legislature appropriate funds for the "purpose" of "provid[ing] for the maintenance and support of a thorough and efficient system of public schools"). Cf. *Richland County v. Campbell*, 364 S.E.2d, 470, 471 (S.C. 1988) (refusing to interpret "provide for" in constitutional mandate that legislature "provide for the maintenance and support of a system of free public schools" as requiring that the "legislature 'pay for' the cost of the public school system").

¹⁵¹ See, e.g., *Coalition for Adequacy & Fairness in Sch. Funding v. Chiles*, 680 So. 2d 400 (Fla. 1996); *Marrero ex rel. Tabalas v. Commonwealth*, 739 A.2d 110 (Pa. 1999); *City of Pawtucket v. Sundlun*, 662 A.2d 40 (R.I. 1995). Only six states in the country have not been presented with any claim that their state funding scheme violates the state constitution. See National Access Network, Teachers College, Columbia University, *Iowa Suit Seeks Eq-*

equacy.” Rather, plaintiffs in these states stand a much greater chance of success if they focus on the concrete ideas of standards and their legislatures’ constitutional obligations to education specially enumerated by the text of their education clauses.

For example, the Florida Constitution mandates that “adequate provision shall be made by law for a uniform . . . system of free public schools . . . and for the establishment, maintenance and operation of . . .” schools.¹⁵² However, in *Coalition for Adequacy and Fairness in School Funding v. Chiles*,¹⁵³ the Florida Supreme Court rejected a challenge to the state’s funding scheme under this provision, stating that “courts cannot decide whether the Legislature’s appropriation of funds is adequate in the abstract”¹⁵⁴ and noting that the plaintiffs “failed to demonstrate . . . an appropriate standard for determining ‘adequacy’ that would not present a substantial risk of judicial intrusion into the powers and responsibilities assigned to the legislature.”¹⁵⁵ These justiciability concerns are similar to those expressed by the Pennsylvania Supreme Court in *Danson* and *Marrero*; thus, a challenge to the funding scheme structured around the scheme’s failure to fully fund Florida’s mandated content standards could provide the “appropriate standard” for determining “adequate provision” when interpreting the state’s constitution. Although Florida voters have slightly amended the state’s education clause since *Coalition for Adequacy*,¹⁵⁶ the education clause still requires an interpretation of “adequate provision”¹⁵⁷ and is therefore still likely to pose the same justiciability concerns when interpreted by courts. However, there is a significant problem with a Florida plaintiff adopting the *Montoy* framework: The state has yet to conduct a costing-out study to determine the funding necessary to meet state standards.¹⁵⁸ While there are clear indications that Florida’s funding scheme is not providing sufficient funding,¹⁵⁹ plaintiffs must fund a costing-out study themselves (or suc-

uitable and Adequate School Funding, http://www.schoolfunding.info/states/ia/lit_ia.php3 (last visited Oct. 28, 2009).

¹⁵² FLA. CONST. art. IX, § 1.

¹⁵³ 680 So. 2d 400 (Fla. 1996).

¹⁵⁴ *Id.* at 406.

¹⁵⁵ *Id.* at 408.

¹⁵⁶ FLA. CONST. art. IX, § 1 (added language mandates that “[a]dequate provision . . . be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools”).

¹⁵⁷ *Id.*

¹⁵⁸ National Access Network, *supra* note 151 (noting that “[n]o education cost study has yet been performed in Florida”).

¹⁵⁹ Michael A. Rebell, National Access Network, Teachers College, Columbia University, *ACLU Tests New Adequacy Theory in Florida Case*, <http://www.schoolfunding.info/news/litigation/3-31-08FLACUL.php3> (last visited Oct. 28, 2009) (noting that currently the American Civil Liberties Union is representing plaintiffs in a new adequacy claim, alleging that “dismal graduation rates in and of themselves constitute a constitutional violation”).

cessfully advocate for their legislature to provide for one) or rely on means of proof other than the scientific method of costing-out studies.

The *Montoy* framework could be promising to Minnesota plaintiffs, as well. The Minnesota Constitution makes it “the duty of the legislature to establish a general and uniform system of public schools” and obligates the “legislature [to] make such provisions by taxation or otherwise as will secure a thorough and efficient system of public schools”¹⁶⁰ However, a costing-out study conducted in 2006 revealed that the legislature was failing to make adequate provision for the standards-based education mandated by the state.¹⁶¹ Therefore, the Minnesota legislature, like the Pennsylvania legislature, mandated a system of standards-based education while knowingly providing insufficient funding to support it.

B. *Response to the Criticism of Using Standards in Funding Litigation*

James E. Ryan, an ardent opponent of using standards in funding litigation, makes several arguments against plaintiffs in adequacy cases using standards as a legislative definition of an “adequate” education in third wave funding litigation.¹⁶² Many of Ryan’s criticisms also apply to the so-called “fourth wave” or *Montoy* framework proposed by this Note. Therefore, this Note would be incomplete without a defense against these criticisms.

1. The Risk of Lowering Standards

Ryan argues that relying on standards to define an adequate education in third wave litigation creates a perverse incentive for legislatures to lower standards in order to lower the cost of an adequate education.¹⁶³ The claim put forth in this Note raises a similar concern.¹⁶⁴ Indeed, if the Pennsylvania legislature lowered standards to such a degree that current spending levels were sufficient to enable schools to meet the state-mandated standards, the “irrationality” of the legislature’s actions in accordance with its constitutional duty

¹⁶⁰ MINN. CONST. art. XIII, § 1.

¹⁶¹ Justin Silverstein et al., Augenblick, Palaich & Associates, Inc., *Estimating the Cost of an Adequate Education in Minnesota*, Nov. 2006, at 28–30, <http://www.schoolfunding.info/states/mn/MN-APA-11-06.pdf>. See also National Access Network, Teachers College, Columbia University, *Minnesota: Historical Background*, http://www.schoolfunding.info/states/mn/lit_mn.php3 (last visited Oct. 28, 2009) (costing study revealed the state fell \$1.79 billion short of what is necessary to enable schools to meet the state standards).

¹⁶² See *infra* notes 163–167 and accompanying text.

¹⁶³ Ryan, *supra* note 91, at 1247.

¹⁶⁴ See *supra* Part III.A.3.a. The Pennsylvania legislature can rectify the claim that the funding scheme is not rationally related to providing for a thorough and efficient system of public schools because the scheme fails to fully fund the state-mandated education standards simply by lowering the standards that must be met, thus reducing the cost. Because this claim does not rely on the right to an “adequate education,” the perverse incentive here is somewhat different from the one addressed by Ryan.

under the education clause is rectified.¹⁶⁵ Presumably, for most outside observers to our public education system, the notion of lowering standards intuitively seems like an unacceptable solution to funding problems. However, a possible lowering of standards may actually have some positive impacts on our educational system.

First, the political pressures put on legislatures by middle-class communities eliminate the possibility of legislatures lowering standards abysmally.¹⁶⁶ While citizens in wealthier districts might be passive to any proposal of lowering standards (feeling assured that nothing will change in their schools),¹⁶⁷ parents of middle-class communities will likely be concerned that this will threaten the quality of education in their communities where schools are more likely to be walking a thin line in meeting current standards. Thus, states can rely on the middle class to ensure that the lowering of standards (if any) will still preserve high expectations in our public schools.

Also, the gap between what is expected of teachers and what is realistic for teachers to accomplish has serious adverse consequences for the public school system.¹⁶⁸ In order to fully understand the practical effect of this gap, the reader should put herself in the position of a teacher in a state like Pennsylvania. Imagine that you are responsible for teaching a class of twenty-some elementary school students and your principal gives you a long list of standards that you

¹⁶⁵ See *supra* Part III.A.3. The proposed claim asserts that a fair interpretation of the education clause requires the legislature to ensure sufficient funds to meet its state-mandated standards; thus if standards are lowered such an interpretation is satisfied and one can no longer claim the funding scheme is not rationally related to serving the purpose of the clause.

¹⁶⁶ See Terry M. Moe, *Politics, Control, and the Future of School Accountability*, in *NO CHILD LEFT BEHIND?: THE POLITICS AND PRACTICE OF SCHOOL ACCOUNTABILITY* 80 (Paul E. Peterson & Martin R. West eds., Hopkins Fulfillment Services 2003) (arguing that proponents of standards-based education have found “a receptive audience in the American public” and thus “policymakers have fallen all over themselves to endorse accountability [through standards-based education] as a key means of promoting better schools”).

¹⁶⁷ Schools in wealthy Pennsylvania districts—where schools are able to spend over \$10,000 a year per pupil—generally achieve proficiency levels far in excess of the state’s proficiency targets of sixty-three percent for reading and fifty-six percent in math. For example, two such school districts—Fox Chapel and Mount Lebanon—achieved proficiency levels of at least 88% in both subjects in the 2007–08 academic year. PA. DEPT. OF EDUC., BUREAU OF ASSESSMENT & ACCOUNTABILITY, COMMONWEALTH OF PA., DISTRICT REPORT CARD – FOX CHAPEL AREA SD (2007–08); PA. DEPT. OF EDUC., BUREAU OF ASSESSMENT & ACCOUNTABILITY, COMMONWEALTH OF PA., DISTRICT REPORT CARD—MT. LEBANON SD (2007–08). I argue such statistics suggest schools in wealthier districts do not rely on the standards-based education system of incentives and sanctions to drive their strong academic performance. The fact that these schools are so far beyond the state-mandated benchmarks suggests that such schools actually establish their own, more ambitious performance expectations.

¹⁶⁸ The following discussion is largely based on observations I made during my two years as an elementary school teacher in a very poor urban area.

need to accomplish in your classroom. For example, in Pennsylvania every child must be able to “distinguish between essential and nonessential information within a text” and “categorize rates of change as faster and slower.”¹⁶⁹ Now suppose during the course of the academic year, it becomes patently obvious to you that given the resources you have (e.g. the time you have to teach, the teaching materials provided to you, and the various external effects of poverty on your students such as poorer health and reduced parental involvement at home) you are absolutely incapable of meeting all these standards in one school year. In fact, not only is this impossibility apparent, but you learn that costing-out studies provide scientific evidence of this impossibility. When the elementary school principal reprimands you and other teachers for not achieving the requisite level of proficiency in your classroom for a given year, would you feel a sense of personal responsibility for that failure?

Most people would answer “no” and would in fact feel a bit of resentment towards their employers for holding them to such unrealistic expectations. When legislatures impose standards on schools without considering the actual resources necessary for teachers to meet these standards, the politicians that comprise such legislatures are focusing solely on making standards “look good on paper” regardless of the practical difficulties of their mandates. Teachers are given the burden of actually making these standards a reality and are conscious of the impracticality of what they have been given. Consequently, some teachers adopt a sense of apathy towards the outcomes in their classrooms, as they feel free to shift blame for their students’ deficiencies elsewhere. Also, these unrealistic standards provide teachers and principals with an excuse to resort to cheating on standardized tests, which has become a severe problem in public schools across the country.¹⁷⁰

In sum, when the legislature—the actor at the very top of the pyramid structure making up a state’s education system—paints a picture of an exceptional education system (i.e. approves a smorgasbord of standards) but recklessly disregards its responsibility to that system (i.e. fails to provide adequate funding to make that picture a reality), the legislature sets a tone that permeates through the whole system. The legislature sends the message that maintaining the *illusion* of an exceptional education system is enough to satisfy our duties as educators. Administrators, principals, and teachers seem to perpetuate this illusion by making their own outcomes in the classroom look good on paper. In fact,

¹⁶⁹ 022 PA. CODE § 4.83 (2008).

¹⁷⁰ See, e.g., Richard C. Herrera, *Policing State Testing Under No Child Left Behind: Encouraging Students with Disabilities to Blow the Whistle on Unscrupulous Educators*, 80 S. CAL. L. REV. 1433 (2007); Ajuah Helton, *Allegations of Test Improprieties Cropping Up Across the Country: With High-stakes Tests, Are Teachers and Administrators Under Pressure to Cheat?*, PHILADELPHIA PUBLIC SCHOOL: THE NOTEBOOK (Spring 2003), <http://www.thenotebook.org/editions/2003/spring/cheating.htm>; Amy Goodnough, *Investigator Says Teachers in City Aided in Cheating*, N.Y. TIMES, Dec. 8, 1999, at A1.

this illusion must be sufficient because we simply do not have the resources to turn it into reality.

It is time that everyone—administrators, principals, and teachers—stop focusing on making standards and test scores look good on paper and instead start focusing on how best to achieve desirable results in our classrooms. This shift in focus will inevitably involve a consideration of the practical implications of the standards that legislatures mandate. Thus, a moderate lowering of standards in some states is not necessarily undesirable. All educators must feel a sense of personal responsibility for the results achieved in the classroom, and a system that simply mandates unrealistic goals for teachers and principals will not promote this sense of personal responsibility for results in the classroom.

2. Comparability

Ryan further argues that most successful funding cases, even during the second wave, strongly focused on “comparability.”¹⁷¹ By “comparability,” Ryan means “a focus on disparities in opportunities [between wealthy and poor districts] and the concern for equalizing those opportunities.”¹⁷² Ryan points out that in both the second and third waves of funding litigation, courts did not seek to achieve an absolute notion of either adequacy (while ignoring disparities in resources) or an absolute notion of equity (requiring an exactly equal disbursement of resources).¹⁷³ Rather than labeling either wave as “equity” or “adequacy” litigation, Ryan characterizes the courts’ decisions in both waves as a response to the significant disparities in resources and resulting disparities in educational opportunity by a concern for the relative adequacy of education.¹⁷⁴ Thus, Ryan argues that a standards-based approach to funding litigation has not become attractive to courts because that approach is fundamentally noncomparative, as the sufficiency of a student’s education is determined not in comparison to what the most successful schools are implementing, but by the absolute benchmark of standards set by the state.¹⁷⁵

However, courts have not yet been receptive to using standards in funding litigation merely because plaintiffs have only recently begun to utilize this approach in litigation. Courts in those states where plaintiffs have prevailed during the second and third waves have interpreted their state constitutions as requiring an equality and/or adequacy component to their education systems and have not deferred to their legislatures in the area of education financing under the guise of the political question doctrine. Therefore, the use of concrete, legislatively mandated standards in those cases was simply unnecessary, as courts were satisfied to interpret their state constitutions using only abstract notions of

¹⁷¹ Ryan, *supra* note 91, at 1233.

¹⁷² Ryan, *supra* note 91, at 1234.

¹⁷³ Ryan, *supra* note 91, at 1237.

¹⁷⁴ Ryan, *supra* note 91, at 1238.

¹⁷⁵ Ryan, *supra* note 91, at 1239.

equality and adequacy. Ryan's own statement asserts the problem: "Courts willing to enforce education rights should begin with the (hopefully) uncontroversial principle that legislatures are required to ensure that all students have a realistic opportunity to acquire a good education."¹⁷⁶ But what if a court, like the Pennsylvania Supreme Court, refuses to recognize "education rights" under the state constitution?

In Part II of this Note, I noted that the third, "adequacy" wave of litigation evolved from the shortcomings of the second, "equity" wave, as expressed by judges' uneasiness during the second wave in being asked to strike down a funding scheme on the grounds of inequality only, but not of the inadequacy of the education being offered. Certainly, this move from a focus on "equality" to "adequacy" was a concession for plaintiffs, but one necessary in light of courts' holdings that their state constitutions did not require equality in funding. At least under the third, "adequacy" wave, courts were inclined to give some relief to plaintiffs in failing schools, even if they were only willing to guarantee an adequate education rather than an education equal to wealthier citizens.

Similarly, the third wave litigation has reached a point of exhaustion. Judges writing for courts that have yet to strike down their state's funding schemes have expressed uneasiness about the justiciability issues raised when they are asked to decide the "adequacy" of education or to delve into the area of education legislation at all. Thus, claims focusing on abstract notions of adequacy, equity, and comparability are certain to be futile when brought in these remaining states. A plaintiff hoping for any relief from the courts will need to focus on the concrete ideas of the legislature's obligation under the state constitution and how the legislature's actions regarding standards and funding implicate its constitutional duty. While such a claim may result in a plaintiff gaining no more relief than a guarantee of sufficient funding to meet state education standards, this relief would still have a positive impact on schools in low-income communities. However, advocates for equal educational opportunity must recognize that this approach *does*, in fact, leave much to be done outside the courts, including advocacy for reform through the democratic process to elevate the educational opportunities of poor students to those of students in wealthier districts.

IV. CONCLUSION

Proponents of education reform must recognize that education funding litigation is merely one vehicle that can be used in realizing Justice Warren's vision of equal educational opportunity—and this vehicle alone will not get us to the finish line. The history of funding litigation shows judges' reluctance to intervene in education policy decisions. Many criticize these lawsuits as illegitimate, accusing the lawyers and plaintiffs who sue as employing the "throw everything at the wall and see what sticks" technique. But the framework pro-

¹⁷⁶ Ryan, *supra* note 91, at 1250.

posed in this Note is the most concrete and textualist approach of all the education funding waves. Unlike the previous claims, the claim set forth here does not require judges to read abstract notions of equality and a “fundamental right to an adequate education” into the constitutional text.

More importantly, this claim is one that recognizes the institutional limitations of courts in adjudicating claims of constitutional rights to welfare, such as the right to an education.¹⁷⁷ Often, people who advocate for these rights are quick to turn to courts as a means of achieving their vision for social justice, even when there is “no justiciable standard for determining when the supposed rights are satisfied.”¹⁷⁸ This is the case when it comes to claims for “equal educational opportunity” and “an adequate education”: Courts are simply ill-equipped to determine how to make equal educational opportunity a reality, or what course of instruction in schools will provide students with an “adequate” education. Because these claims raise “judicially inappropriate questions of definition [and] problems of enforcement,”¹⁷⁹ the bold objectives of creating equal educational opportunity or giving every student an adequate education will ultimately need to be achieved, to a great extent, through the legislative branch of government.

However, while courts are *limited* when it comes to adjudicating claims to welfare rights, they are not necessarily incompetent in doing so. The fourth wave framework for challenging funding schemes proposed by this Note avoids the pitfalls of previous claims by framing current education policy inadequacies in light of legislatures’ judicially recognized obligation to enact legislation that is rationally related to the purpose of the state’s education clause. Because this affirmative obligation is an uncontroversial notion, it is difficult to imagine how a court could invoke the political question doctrine to justify denying review of the legislature’s action in accordance with this mandate. In addition, educational standards and costing-out studies provide courts with concrete and reliable evidence of the implications of the legislature’s actions on the education system. Therefore, the issues to be resolved under this claim fall within the institutional capabilities of courts to adjudicate.

However, with this concreteness in strategy comes a price. Indeed, plaintiffs may be entitled to nothing more than a guarantee that funding be sufficient to satisfy standards, which is hardly the realization of equal educational opportunity for all. Nevertheless, this Note’s objective is merely to present a promising first step towards this vision. This step is one that requires state legislatures to take their constitutional obligation to education seriously by actually funding the rigorous educational standards they have mandated. But the struggle for

¹⁷⁷ Frank I. Michelman, *Welfare Rights in a Constitutional Democracy*, 3 WASH. U. L.Q. 659, 659 (1979) (characterizing “constitutional rights to provision for certain basic ingredients of individual welfare” as claims for “food, shelter, health care, and education”).

¹⁷⁸ *Id.* at 659–60.

¹⁷⁹ *Id.* at 679.

truly equal educational opportunity certainly will not end with a victory in the courtroom. Rather, advocates must continue to hash out the specifics of real equal educational opportunity in the political arena and strive to completely realize this vision through the legislative process.