

EDUCATION REFORM LITIGATION IN NEVADA: IS THE NEVADA LEGISLATURE NEGLECTING ITS CONSTITUTIONAL DUTIES?

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I. INTRODUCTION

On February 16, 2010, the governor of Nevada, facing one of the worst economic crises in the State's history, signed a proclamation convening the state legislature into a special session to reduce state government spending.¹ As is his constitutional prerogative, Governor Jim Gibbons chose which areas the legislature should look to in making budget cuts during the 2010 Special Session.² Among them were the removal of all but the most essential spending earmarks for K-12 education in the state³ and revisions of statutory language mandating the reduction of teacher-pupil ratios.⁴ The result was a 6.9 percent reduction of state funding for K-12 education⁵ and an increase in elementary-grade class sizes.⁶

This budget cut was merely the latest blow by the Nevada legislature to the quality of education in Nevada. Over the past decade, the legislature has

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¹ STATE OF NEV. EXEC. DEP'T, A PROCLAMATION BY THE GOVERNOR (Feb. 16, 2010), *available at* <http://leg.state.nv.us/26th2010Special/Governor/Proclamation.pdf>.

² See NEV. CONST. art. V, § 9 ("The Governor may on extraordinary occasions, convene the Legislature by Proclamation and shall state to both houses when organized, the purpose for which they have been convened, and the Legislature shall transact no legislative business, except that for which they were specially convened, or such other legislative business as the Governor may call to the attention of the Legislature while in Session.").

³ STATE OF NEV. EXEC. DEP'T, *supra* note 1.

⁴ STATE OF NEV. EXEC. DEP'T, FIRST AMENDED PROCLAMATION BY THE GOVERNOR (Feb. 24, 2010), *available at* <http://leg.state.nv.us/26th2010Special/Governor/ProclamationSpecialSession2010Amend1.pdf>.

⁵ David McGrath Schwartz & Cy Ryan, *Budget Gets OK as Session Ends; Sales Tax Extended for Roads*, LAS VEGAS SUN (Mar. 1, 2010, 6:45 AM), <http://www.lasvegassun.com/news/2010/feb/28/governor-legislators-announce-budget-cut-agreement/>.

⁶ CLARK CNTY. SCH. DIST., COMPREHENSIVE ANNUAL BUDGET REPORT FOR FISCAL YEAR ENDING JUNE 30, 2011, at 16 (2010), *available at* http://ccsd.net/directory/budget-finance/publications/10-11_Budget/Budget_10-11_Complete.pdf.

slashed the education budget,⁷ increased class sizes,⁸ eliminated funds to remediate troubled schools,⁹ and done away with innovative educational reform.¹⁰ In fact, before the 2010 Special Session decreased school funding and increased class sizes, Nevada already ranked forty-fifth in per-pupil expenditures¹¹ and maintained the fifth-highest student-teacher ratio in the nation.¹² Such statistics have led to an unfortunately commonplace expression: when it comes to education Nevada finds itself at the bottom of every good list and the top of every bad list.¹³

The educational provision, Article 11, of the Nevada Constitution mandates, in part, that “[t]he legislature shall provide for a uniform system of common schools”¹⁴ and, furthermore, that “[t]he legislature shall encourage by all suitable means the promotion of intellectual, literary, scientific, mining, mechanical, agricultural, and moral improvements”¹⁵ Yet, despite these constitutional mandates, Nevada continues to rank well below the national averages in terms of student achievement and academic funding.¹⁶ In light of such disappointing statistics, continued budget cuts, and a lack of education reform in Nevada, one might wonder whether the legislature has abdicated its constitutional responsibility under Article 11, and, if so, whether a remedy exists.

⁷ Brendan Riley, *Outlook for State Budget Remains Gloomy*, LAS VEGAS REV. J., Mar. 20, 2008, at 2B, available at <http://www.lvrj.com/news/16846541.html> (“The 4.5 percent budget cuts already in effect hit the state’s K-12 schools and its human services programs the hardest. The K-12 system has had to deal with cuts of nearly \$93 million, and the Department of Health and Human Services is cutting \$82 million.”).

⁸ Emily Richmond, *Education Cuts May Never Be Healed*, LAS VEGAS SUN, Mar. 2, 2010, at 1, available at <http://www.lasvegassun.com/news/2010/mar/02/education-cuts-may-never-be-healed/>.

⁹ *Id.*

¹⁰ *Id.*

¹¹ LAS VEGAS CHAMBER OF COMMERCE, EDUCATION BRIEFING SERIES: FACTORS CORRELATIVE WITH EDUCATION ATTAINMENT 20 (2010), available at <http://www.lvchamber.com/files/pdf/lvcc-edbrief-series-1-2.pdf>.

¹² *Id.* at 21.

¹³ See, e.g., Alexandra Berzon, *Nevada in a Budget Squeeze*, WALL ST. J., Feb. 22, 2010, at A3, available at <http://online.wsj.com/article/SB10001424052748703791504575079391267764362.html> (“Democratic lawmakers often blame the low spending for the state’s ranking on what they call the bottom of all the good lists and the top of all the bad lists. Nevada has among the highest number of uninsured children and suicide rates and among the lowest reading scores and college degrees per capita.”); Dina Titus, Nevada Senator, Address at the 4th Annual Clark County Education Association (May 5, 2007) (transcript available at <http://www.ccea-nv.org/index.php/recent-articles/436-senator-dina-titus-addresses-group.html>) (“If we do not make education a real priority, Nevada will never get off the bottom of every good list and the top of every bad list”); Dan Klaich, *Building a New Nevada: How the College of Southern Nevada Is Using Partnerships to Build a Better Community*, NEV. SYS. HIGHER EDUC., <http://archive.constantcontact.com/fs030/1100950573924/archive/1102824459206.html> (last visited Mar. 25, 2011) (“It is no secret that Nevada has been at the bottom of every ‘good’ list and the top of every ‘bad’ list when it comes to quality of life and education.”).

¹⁴ NEV. CONST. art. XI, § 2.

¹⁵ *Id.* § 1.

¹⁶ See *infra* Part IV.A.

Since the 1970s, education plaintiffs across the country have taken their claims to state courts, challenging the inequities and inadequacies of their educational systems under their respective state constitutions.¹⁷ Surprisingly, Nevada remains one of only five states in the nation not to have encountered such a lawsuit.¹⁸ This Note explores the potential for litigants, on behalf of Nevada schoolchildren, to take to the courts and force the legislature's reluctant hand into complying with the Nevada Constitution and providing real reform in the State's educational financing and structure.

In exploring this approach to education reform, Part II provides a brief history of school finance litigation and the various legal strategies used to attack the constitutionality of school financing systems. Part III engages in a comparative analysis of successful education reform litigation in sister states, providing model approaches to litigation and jurisprudential analysis. Part IV sets forth the constitutional and factual bases for challenging the Nevada system of financing public education as inadequate, and concludes with a brief discussion of defining an "adequate" education. Finally, Part V takes on criticisms often leveled at education reform lawsuits and assuages separation of powers concerns. The Note concludes that there is ample evidence and a sufficient constitutional basis for challenging the current system for financing public education in Nevada.

II. HISTORY OF EDUCATION REFORM LITIGATION

A. Federal Courts and Education Reform Litigation

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of 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.¹⁹

In this oft-quoted "encomium to education,"²⁰ first enunciated in *Brown v. Board of Education*, the United States Supreme Court underscored the vital role of public education in American life. The immediate objective behind

¹⁷ Christine M. O'Neill, Note, *Closing the Door on Positive Rights: State Court Use of the Political Question Doctrine to Deny Access to Educational Adequacy Claims*, 42 COLUM. J.L. & SOC. PROBS. 545, 545-46 (2009).

¹⁸ NAT'L ACCESS NETWORK, LITIGATIONS CHALLENGING CONSTITUTIONALITY OF K-12 FUNDING IN THE 50 STATES 1 (2010), available at http://www.schoolfunding.info/litigation/New_Charts/06_2010_lit_chall_constitutionality.pdf. Delaware, Hawaii, Mississippi, Nevada, and Utah are the only five states in the nation that have never faced litigation challenging the constitutionality of their respective education systems.

¹⁹ *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

²⁰ Brief for Appellees at 26, *San Antonio Indep. Sch. Dist. v. Rodriguez*, 41 U.S. 1 (1973) (No. 71-1332).

Brown, of course, was to confront the educational inequities caused by racial segregation in public schools, which the Court ultimately held violated the Equal Protection Clause of the Fourteenth Amendment.²¹ However, many activists saw in the above language the potential to constitutionally secure equal educational opportunities for students of diverse socioeconomic, linguistic, and geographic backgrounds, as well.²²

Despite *Brown*'s great promise, attempts to desegregate America's public schools in the following decade saw few gains.²³ In lieu of racial segregation, state education-funding schemes relying largely on local property taxes led to unequal education opportunities based on geographic location.²⁴ As minority populations relocated to the inner cities and the white population took flight to the suburbs, cities' tax bases and property values correspondingly decreased.²⁵ The use of local property taxes to fund education consequently provided these property-rich, predominately white suburbs with significantly more money for schools than the city school districts and their mostly minority student bodies.²⁶ To combat these vestiges of segregation and past discrimination, litigants took to the courts and challenged inter-district school funding disparities under the federal Equal Protection Clause.

By the 1970s, the Court had developed a three-tiered framework of judicial scrutiny for evaluating equal protection challenges to legislation.²⁷ First, where the law in question burdens a suspect class or interferes with the exercise of fundamental rights and liberties explicitly or implicitly protected by the U.S. Constitution, strict scrutiny applies.²⁸ Strict scrutiny is the most exacting form of judicial review, and the statute will only be upheld if the state can show that the legislation is narrowly drawn to serve a compelling state interest.²⁹ Second, where the statute draws distinctions based on certain classifications that the Court has declared "quasi-suspect," such as gender³⁰ or illegitimacy,³¹ an intermediate level of scrutiny applies.³² Under intermediate scrutiny, the statute will be upheld if the government can demonstrate that the classification "substantially furthers an important government interest."³³ All other laws chal-

²¹ *Brown*, 347 U.S. at 495.

²² Recent Cases, *School Finance—North Carolina Supreme Court Finds the State in Violation of Its Constitution for Failing to Provide Students an Opportunity to Obtain a Sound Basic Education.—Hoke County Board of Education v. State*, 599 S.E.2d 365 (N.C. 2004), 118 HARV. L. REV. 1753, 1753 (2005); see also Kate Strickland, *The School Finance Reform Movement, A History and Prognosis: Will Massachusetts Join the Third Wave of Reform?*, 32 B.C. L. REV. 1105, 1118 (1991).

²³ Strickland, *supra* note 22, at 1118.

²⁴ *Id.* at 1119.

²⁵ *Id.* at 1120.

²⁶ *Id.*

²⁷ Roger Craig Green, *Interest Definition in Equal Protection: A Study of Judicial Technique*, 108 YALE L.J. 439, 439 (1998).

²⁸ See, e.g., *Grutter v. Bollinger*, 539 U.S. 306 (2003) (racial classifications); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 627-28 (1969) (right to vote).

²⁹ See, e.g., *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

³⁰ *Craig v. Boren*, 429 U.S. 190 (1976).

³¹ *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 441 (1985).

³² See *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

³³ *Kirchberg v. Feenstra*, 450 U.S. 455, 460 (1981).

lenged on equal protection grounds are subject to rational basis review, the most deferential form of judicial scrutiny, requiring only that a law rationally relate to a legitimate government interest.³⁴

By arguing that education is an implied fundamental right and that the poor are a suspect class, plaintiffs in federal finance-reform cases sought strict judicial scrutiny of state education-funding schemes reliant on local wealth.³⁵ Following some success in lower courts, the early 1970s witnessed a groundswell of state and federal court cases challenging the constitutionality of such funding methods.³⁶ Given the number of school finance cases percolating up through the judicial system, it seemed only a matter of time before the Supreme Court would review a school finance case.³⁷ Then, in 1973, the Court considered a lower court decision from Texas declaring the state's system of financing schools unconstitutional.³⁸ The ensuing five-to-four opinion in *San Antonio Independent School District v. Rodriguez* reversed the lower court's decision, and effectively closed the door of the federal courthouse to school finance challenges based on the federal equal protection clause.³⁹

In *Rodriguez*, Mexican-American parents of schoolchildren residing in districts with a low property tax base brought a class-action suit attacking the Texas school financing system.⁴⁰ At the time of the suit, local property taxes accounted for nearly half of school revenues in Texas, creating dramatic inequalities in public funding between school districts.⁴¹ To highlight these disparities, the plaintiffs drew a comparison between Texas's least- and most-affluent school districts.⁴² Alamo Heights, with its predominantly white student body population, had an assessed property value more than eight times that of Edgewood, a district with a student population that was approximately 90 percent Mexican-American and 6 percent African-American.⁴³ As a result, public schools in Alamo Heights received nearly double the per-pupil funding that schools in the Edgewood district received.⁴⁴ In light of these disparities, Texas virtually conceded its financing system could not withstand strict judicial scrutiny.⁴⁵ The issue, therefore, was whether the Texas system of financing public education was subject to strict judicial scrutiny, either because it operated to the disadvantage of some suspect class or impinged on a fundamental right.⁴⁶ In its analysis, however, the Court found neither the suspect-classifica-

³⁴ See, e.g., *Romer v. Evans*, 517 U.S. 620, 631 (1996); *City of Cleburne*, 473 U.S. at 440.

³⁵ Lauren Nicole Gillespie, Note, *The Fourth Wave of Education Finance Litigation: Pursuing a Federal Right to an Adequate Education*, 95 CORNELL L. REV. 989, 991 (2010).

³⁶ See, e.g., *Van Dusartz v. Hatfield*, 334 F. Supp. 870, (D. Minn. 1971); *Serrano v. Priest (Serrano I)*, 487 P.2d 1241 (Cal. 1971); *Milliken v. Green*, 203 N.W.2d 457 (Mich. 1972); *Robinson v. Cahill*, 289 A.2d 569 (N.J. Super. Ct. Law Div. 1972); *Spano v. Bd. of Educ.*, 68 Misc. 2d 804 (N.Y. Sup. Ct. 1972).

³⁷ Strickland, *supra* note 22, at 1128.

³⁸ *Id.*

³⁹ See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

⁴⁰ *Id.* at 4-5.

⁴¹ *Id.* at 9 n.21.

⁴² *Id.* at 11.

⁴³ *Id.* at 12-13.

⁴⁴ *Id.* at 13.

⁴⁵ *Id.* at 16.

⁴⁶ *Id.* at 17.

tion nor the fundamental-interest analyses compelling, and held that the rational basis test was the proper standard by which to examine the school-funding scheme.⁴⁷

The Court first rejected the argument that the Texas school-financing plan discriminates against the poor on the basis of wealth as a “suspect category.” Reviewing precedent, the Court noted two distinguishing characteristics shared by individuals fairly classified as “indigent” for purposes of suspect classification analysis: (1) they were completely unable to pay for some benefit, and (2) as a result, they sustained an absolute deprivation of that benefit.⁴⁸ The plaintiffs in *Rodriguez*, however, possessed neither of these characteristics.⁴⁹ First, “poor” school districts are not strictly composed of persons whose incomes fall below some designated poverty level or who are in any way fairly definable as indigent.⁵⁰ Second, the students in such districts were not absolutely deprived of education.⁵¹ The Court therefore refused “to extend its most exacting scrutiny to review a system that allegedly discriminates against a large, diverse, and amorphous class, unified only by the common factor of residence in districts that happen to have less taxable wealth than other districts.”⁵²

The Court also rejected the argument that education was a fundamental right under the federal constitution. The Court determined that the key to discovering whether education is fundamental “lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution.”⁵³ Noting that education is not among those rights explicitly protected by the U.S. Constitution, the Court’s decision turned to whether education was an implicitly protected right.⁵⁴ While recognizing the societal significance of education as a font from which other fundamental rights emanate,⁵⁵ the court nevertheless found such arguments unpersuasive in establishing education as an implied fundamental right.⁵⁶ Because the challenged legislation in *Rodriguez* neither created a suspect classification nor impinged upon constitutionally protected rights, the Court held that the Texas system of public school finance was an inappropriate candidate for strict judicial scrutiny.⁵⁷

Reinforcing this conclusion, the Court expressed a number of reservations over its own involvement in school finance litigation.⁵⁸ In particular, the Court pointed to federalism concerns over interfering with States’ fiscal and educa-

⁴⁷ *Id.* at 18.

⁴⁸ *Id.* at 20.

⁴⁹ *Id.* at 22.

⁵⁰ *Id.* at 22-23.

⁵¹ *Id.* at 23.

⁵² *Id.* at 28.

⁵³ *Id.* at 33.

⁵⁴ *Id.* at 35.

⁵⁵ *See, e.g., id.* at 35-36 (asserting that education is essential to the exercise of free speech, as the right becomes “meaningless unless the speaker is capable of articulating his thoughts intelligently and persuasively,” and similarly, to the right to vote, which “depends on an informed electorate: a voter cannot cast his ballot intelligently unless his reading skills and thought processes have been adequately developed”).

⁵⁶ *Id.* at 37.

⁵⁷ *Id.* at 44.

⁵⁸ *See id.* at 40-44.

tional policies.⁵⁹ The Court traditionally deferred such matters to local legislatures because the Justices lacked the specialized knowledge necessary to make informed judgments.⁶⁰ Accordingly, the Court examined the Texas system under the less-stringent “rational basis” test, and concluded the financing scheme was constitutional.⁶¹ Thus, so long as the state’s school-financing system “rationally furthers a legitimate state purpose or interest,”⁶² Texas—and every other state in the country, for that matter—could maintain a school-financing system that leads to funding inequities between schools, and still comply with the demands of the U.S. Constitution.⁶³

Despite the blow suffered in *Rodriguez*, proponents of education reform litigation took solace in the dissent’s final footnote, in which Justice Thurgood Marshall observed that “nothing in the Court’s decision today should inhibit further review of state educational funding schemes under state constitutional provisions.”⁶⁴ Acting on this cue, finance-reform litigants took to the state courts and argued against school funding inequalities based on their state constitutional provisions.⁶⁵ And so, with *Rodriguez* effectively closing the door on a federally mandated fundamental right to education, the impetus behind education finance litigation shifted from the federal forum to state courts.

B. State Courts and Education Reform Litigation: Equity or Adequacy?

In the aftermath of *Rodriguez*, proponents of school finance reform began challenging state funding structures that disadvantaged racial and socioeconomic minorities under the equal protection guarantees and educational provisions found in state constitutions.⁶⁶ The state court approach auspiciously addressed many of the concerns plaguing the *Rodriguez* majority. First, unlike the federal constitution, state constitutions explicitly guarantee a right to education.⁶⁷ Second, fewer federalism concerns exist where state courts meddle with state fiscal and educational policies governed by state constitutions.⁶⁸ Third, state court judges possess a greater “expertise and familiarity with local

⁵⁹ *Id.* at 40.

⁶⁰ *Id.*

⁶¹ *Id.* at 55.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 132-33 n.100 (Marshall, J., dissenting).

⁶⁵ Larry J. Onhof, *Rethinking Judicial Activism and Restraint in State School Finance Litigation*, 27 HARV. J.L. & PUB. POL’Y 569, 577 (2004).

⁶⁶ Sonja R. Elder, Note, *Standing Up to Legislative Bullies: Separation of Powers, State Courts, and Educational Rights*, 57 DUKE L.J. 755, 756 (2007). For further justification of state courts’ ability to recognize education as a fundamental right, see discussion *infra* Part III.A.

⁶⁷ Molly McUsic, *The Use of Education Clauses in School Finance Reform Litigation*, 28 HARV. J. ON LEGIS. 307, 311 (1991); see, e.g., NEV. CONST. art. XI, § 1.

⁶⁸ See Andrea J. Faraone, *The Florida Equal Rights Amendment: Raising the Standard Applied to Gender Under the Equal Protection Clause of the Florida Constitution*, 1 FLA. COASTAL L.J. 421, 429 (citing *Traylor v. State*, 596 So. 2d 957, 961 (Fla. 1992)); see also *Oregon v. Hass*, 420 U.S. 714 (1975); *Cooper v. California*, 386 U.S. 58 (1967).

problems so necessary to the making of wise decisions,”⁶⁹ which federal court judges and Justices of the United States Supreme Court lack.⁷⁰

The litigation approach in state courts has taken on two distinct, yet inter-related, forms: (1) the equity approach, which focuses on equalizing per-pupil funding disparities, and was prominent from 1973 through 1989;⁷¹ and (2) the adequacy approach, which focuses on overall sufficiency of funds and educational opportunities, and has been the preferred litigation approach ever since 1989.⁷² These approaches, outlined below, differ with respect to legal theories, methods of judicial analysis, plaintiff success rates, and the degree of substantial education reform that results from successful litigation⁷³

1. *The Equity Approach*

The litigation strategies of the early state cases challenging education-funding schemes largely mimicked their federal counterparts.⁷⁴ Most state constitutions, including Nevada’s,⁷⁵ contain equal protection provisions, or some similar equality guarantee, which courts have interpreted to be substantively equivalent to the federal equal protection clause.⁷⁶ Under the “equity” approach, plaintiffs sought strict judicial scrutiny of school funding schemes, once again arguing that education constituted a fundamental right, or, alternatively, that school district poverty constituted a suspect class.⁷⁷ Added to their arsenal, however, were the education provisions of state constitutions, which

⁶⁹ *Rodriguez*, 411 U.S. at 41.

⁷⁰ Faraone, *supra* note 68, at 429-30 (“[S]tate courts have a greater ability to assess local conditions and to respond to the unique needs of their own state.”).

⁷¹ William E. Thro, *Judicial Analysis During the Third Wave of School Finance Litigation: The Massachusetts Decision as a Model*, 35 B.C. L. REV. 597, 601 (1994) [hereinafter Thro, *Third Wave*].

⁷² See Alexandra Natapoff, *1993: The Year of Living Dangerously; State Courts Expand the Right to Education*, 92 EDUC. L. REP. 755, 757 (1994); see also William E. Thro, *A New Approach to State Constitutional Analysis in School Finance Litigation*, 14 J.L. & POL. 525, 538-39 (1998) [hereinafter Thro, *A New Approach*]; Thro, *Third Wave*, *supra* note 71, at 601. Thro actually reasons that challenges to the school finance systems of the various states can be divided into three distinct “waves” with their own identifiable set of characteristics with respect to legal theory, judicial analyses, and plaintiff success rate. The first “wave”—litigation arising under the federal Equal Protection Clause—died with *Rodriguez*. But see William S. Koski, *Of Fuzzy Standards and Institutional Constraints: A Re-examination of the Jurisprudential History of Educational Finance Reform Litigation*, 43 SANTA CLARA L. REV. 1185, 1188 (2003) (noting that “courts have fused their equity and adequacy analysis” and that it is often difficult to distinguish between the second- and third-wave cases effectively).

⁷³ Thro, *Third Wave*, *supra* note 71, at 598-99.

⁷⁴ Natapoff, *supra* note 72, at 757.

⁷⁵ NEV. CONST. art. IV, § 21.

⁷⁶ Richard J. Stark, *Education Reform: Judicial Interpretation of State Constitutions’ Education Finance Provisions—Adequacy vs. Equality*, 1991 ANN. SURV. AM. L. 609, 626-27. Nevada is included amongst states adopting the federal Equal Protection analysis. See *Laakonen v. Eighth Judicial Dist. Court*, 538 P.2d 574, 575-76 (Nev. 1975); see also *Tarango v. State Indus. Ins. Sys.*, 25 P.3d 175, 182 (Nev. 2001) (“This court’s standard for examining the validity of legislation under the Equal Protection Clause is the same as the federal standard. Thus, the proper standard of review depends on the classification to be considered, and the appropriate level of scrutiny to be applied to the affected interest.”).

⁷⁷ Gillespie, *supra* note 35, at 999.

impose a duty upon the state to provide for public education and bolster the argument for declaring education a fundamental right under state equal protection analysis.⁷⁸

Although this litigation strategy initially produced some successful results,⁷⁹ its success was ultimately short-lived.⁸⁰ In both the judicial and legislative arenas, efforts to equalize educational opportunities proved daunting. For instance, a number of state courts found inequities in inter-district school funding acceptable under state equal protection analysis.⁸¹ Additionally, the complexity and competing viewpoints of how best to establish equality invited courts to depict the issue as a political question best suited for the legislative branch.⁸² These same complexities also frustrated legislative efforts to implement judicial mandates for equality, which required vast amounts of up-to-date empirical data to ensure equality in funding schemes.⁸³

Adding fuel to the fire, certain sections of the populace—particularly the wealthier and more politically powerful school districts—were resolved in their resistance to any attempt to equalize inter-district funding.⁸⁴ For instance, wealthier districts strongly opposed legislative efforts to achieve equality that required restricting resources in their districts in order to match funding levels in less-affluent districts.⁸⁵ Wealthier districts were similarly hostile to legislation requiring them to shoulder the financial burden of raising school funding revenues in the poorer districts.⁸⁶ In addition, wealthier districts feared that by equalizing inter-district funding, they would lose their competitive edge in attracting better teachers and their students would consequently lose their competitive edge in attaining post-school opportunities.⁸⁷

Opponents of school funding equality also focused on arguments beyond preserving the privileges of the upper class.⁸⁸ One prominent fear was the loss of local control and the right to determine how to allocate resources within a community.⁸⁹ Another common concern, following a “slippery slope” logic, was that an equal protection victory in school funding could extend to other social programs or municipal services, eliminating local control over housing, recreational facilities, or even trash collection.⁹⁰ Combined, these challenges often proved too difficult for plaintiffs to overcome. Of the twenty-three states that heard educational equality claims, plaintiffs prevailed in only seven.⁹¹

⁷⁸ Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101, 107 (1995).

⁷⁹ See, e.g., *Serrano v. Priest (Serrano II)*, 557 P.2d 929 (Cal. 1976); *Serrano v. Priest (Serrano I)*, 487 P.2d 1241 (Cal. 1971); *Robinson v. Cahill*, 303 A.2d. 273 (N.J. 1973).

⁸⁰ Gillespie, *supra* note 35, at 1000.

⁸¹ Enrich, *supra* note 78, at 143-44.

⁸² *Id.* at 153-54.

⁸³ *Id.* at 154.

⁸⁴ *Id.* at 155-56.

⁸⁵ *Id.* at 156.

⁸⁶ *Id.* at 156-57.

⁸⁷ *Id.* at 157-58.

⁸⁸ *Id.* at 158-59.

⁸⁹ See *id.* at 158-61.

⁹⁰ See *id.* at 161; see also O’Neill, *supra* note 17, at 553.

⁹¹ See Thro, *Third Wave*, *supra* note 71, at 602-03 (“Although plaintiffs were able to prevail in Arkansas, California, Connecticut, New Jersey, Washington, West Virginia, and Wyo-

This less than inspiring record forced proponents of school finance litigation to change their strategy.⁹²

2. *The Adequacy Approach*

Beginning in 1989 with plaintiffs' victories in Montana,⁹³ Kentucky,⁹⁴ and Texas,⁹⁵ the adequacy approach has shown greater promise for achieving education reform in the courtroom.⁹⁶ Grounded in the state constitution education clauses, the adequacy argument derived strength in its simplicity. Rather than navigating the doctrinal labyrinth of equal protection analysis, the adequacy approach relies on an interpretation of the positive text set forth in the education clauses of state constitutions.⁹⁷ Instead of placing a remedial focus on per-pupil spending disparities, the adequacy approach looks at the quality of the educational services delivered to disadvantaged districts and aims to ensure those services meet a constitutionally prescribed level of adequacy.⁹⁸

The adequacy approach addressed many of the underlying concerns of the equity approach without falling victim to the legal arguments and political resistance that plagued inter-district funding equality.⁹⁹ Specifically, three fundamental differences, described in greater detail below, give the adequacy approach a distinct advantage:¹⁰⁰ (1) the adequacy arguments are based upon explicit textual sources in state constitutions; (2) the adequacy remedy allows for local control of public education, making it more politically palatable; and (3) under adequacy claims, courts have shown a propensity to both prescribe overarching goals and take a stronger role in state education finance reform.¹⁰¹

Because adequacy claims rely almost exclusively on the education clauses of state constitutions, adequacy litigation takes on a more narrowed constitutional focus.¹⁰² As a result, courts need only appeal to the positive text of the state constitutions to interpret and enforce an affirmative right to education.¹⁰³ In comparison, the equal protection analysis employed by the equity approach

ming, the overwhelming majority of the cases resulted in victories for the state." (footnotes omitted)).

⁹² O'Neill, *supra* note 17, at 553.

⁹³ *Helena Elementary Sch. Dist. No. 1 v. State*, 769 P.2d 684, 690 (Mont. 1989).

⁹⁴ *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 213 (Ky. 1989).

⁹⁵ *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 397 (Tex. 1989).

⁹⁶ See MICHAEL A. REBELL & JESSICA R. WOLFF, LITIGATION AND EDUCATION REFORM: THE HISTORY AND THE PROMISE OF THE EDUCATION ADEQUACY MOVEMENT 8 (2006), available at http://www.schoolfunding.info/resource_center/adequacy-history.pdf ("In the early years, most of these [education reform] cases sought equal per-pupil funding ('equity'), but state defendants won about two-thirds of those cases. Since 1989, however, education advocates and lawyers have emphasized a different legal theory—known as 'education adequacy'—that has led to a dramatic wave of plaintiff victories. . . . Over the past 16 years, plaintiffs have won in 21 of the 28 highest state court 'adequacy' cases.").

⁹⁷ See Enrich, *supra* note 78, at 167.

⁹⁸ William E. Thro, *The Role of Language of the State Education Clauses in School Finance Litigation*, 79 EDUC. L. REP. 19, 21 (1993) [hereinafter Thro, *The Role of Language*].

⁹⁹ Quentin A. Palfrey, *The State Judiciary's Role in Fulfilling Brown's Promise*, 8 MICH. J. RACE & L. 1, 3 (2002).

¹⁰⁰ Thro, *Third Wave*, *supra* note 71, at 603.

¹⁰¹ *Id.* at 603-04.

¹⁰² *Id.*

¹⁰³ Enrich, *supra* note 78, at 166.

requires that the courts take an intermediate interpretive step of determining whether education is a fundamental right or wealth a suspect category, before it can establish a constitutional mandate to equal education.¹⁰⁴ Moreover, because the central focus of an adequacy suit is on state constitution education provisions, a ruling in favor of the plaintiff has fewer implications in other areas of the law.¹⁰⁵ By not implicating the equal protection doctrine, adequacy plaintiffs avoid the “slippery slope” argument that equal protection could extend to other local or state programs, such as housing or healthcare.¹⁰⁶

By providing for a greater degree of local control, adequacy challenges eliminate much of the political backlash faced by the equality approach.¹⁰⁷ Instead of mandating equal expenditures for every district, adequacy plaintiffs only seek to inject resources into schools that are not providing for a constitutionally mandated level of quality education.¹⁰⁸ Thus, because an adequacy remedy will not reduce funding or cap spending in wealthier districts, these districts are free to provide for a more-than-adequate education for their students by spending more local tax dollars.¹⁰⁹ By focusing only on those districts that do not provide the constitutionally adequate standard of education, the adequacy approach achieves education reform without requiring the far-reaching demands necessary to equalize funding across all school districts in the state.¹¹⁰

Adequacy suits also allow for a more sweeping approach to reform accompanied by continued court supervision.¹¹¹ Whereas equity-based remedies seek only to equalize the economic inputs of inter-district funding, adequacy-based remedies focus on both economic inputs and academic outputs of student achievement in determining whether the education provided is “adequate.”¹¹² Thus, under the adequacy approach, courts develop broad frameworks by which the state legislature can either implement new, or modify

¹⁰⁴ *Id.* at 167.

¹⁰⁵ Thro, *Third Wave*, *supra* note 71, at 603.

¹⁰⁶ *See supra* Part II.B.2; *see also* O’Neill, *supra* note 17, at 553 (“An equal protection victory for plaintiffs in schools could be extended to other social programs, such as housing or healthcare. On the other hand, an adequacy claim based on an affirmative constitutional right cannot be replicated for other social issues (i.e., there is no right to housing or to healthcare in state constitutions though there is a right to education for all).”).

¹⁰⁷ Gillespie, *supra* note 35, at 1005.

¹⁰⁸ Palfrey, *supra* note 99, at 22; *see also* Thro, *Third Wave*, *supra* note 71, at 603.

¹⁰⁹ Gillespie, *supra* note 35, at 1005.

¹¹⁰ *See* Enrich, *supra* note 78, at 166.

¹¹¹ Thro, *Third Wave*, *supra* note 71, at 604.

¹¹² William H. Clune, *Educational Adequacy: A Theory and Its Remedies*, 28 U. MICH. J.L. REFORM 481, 485 (1995) (“At its heart, adequacy refers to a shift in the emphasis of school finance from inputs to outcomes, e.g. from dollars to student achievement as measured by standardized tests and avoidance of dropping out.”); *see also* McUsic, *supra* note 67, at 310 (“Output measures are preferable currency units for litigants because they sidestep the need to prove that more money produces more education. Output measures are also valuable because a dollar cannot always buy the same amount of education in one district as it can in another. Thus the use of output measures protects students from being guaranteed an ‘equal or minimum education’ that meets the standard in terms of dollars spent, but not in education received. Output measures also excuse the courts from the role of educators or legislators. Courts need only order a certain minimum standard without having to step outside their expertise to dictate how that standard must be attained.”).

current, education policy to achieve adequacy in schools.¹¹³ The adequacy method, therefore, has allowed both state legislatures and courts to take on a holistic approach to reforming education quality.¹¹⁴

Despite their theoretical differences, however, the equity and adequacy approaches are largely interrelated in practice.¹¹⁵ Indeed, advocating for either approach in its purest form could prove highly problematic: for instance, a pure equity approach can be satisfied by funding all schools at an equally inadequate level; on the contrary, a pure adequacy approach without regard for equality can rob the poorest students of the educational opportunities afforded the wealthiest.¹¹⁶ Thus, the most successful education-finance reform cases have been brought by plaintiffs using a “hybrid” approach, wherein evidence of both inadequacy and funding disparities synergize to bolster claims of constitutional deficiency.¹¹⁷ While the remedial focus remains on the *quality* of education in each school district, *equality* still stands as one measurement in determining *adequacy*.¹¹⁸

III. MODEL APPROACHES TAKEN IN SISTER STATES

Over the last four decades, forty-five states have faced education-funding lawsuits, in one form or another, brought under their respective state constitutions.¹¹⁹ Therefore, educational reform plaintiffs in Nevada stand to benefit from these sister states by embracing the successes and avoiding the pitfalls of past litigation. Additionally, the Nevada courts have a multitude of judicial analyses, constitutional interpretations, and remedial actions to look to in interpreting the education clause of the Nevada Constitution.

A. *Equity Suits: California’s Serrano v. Priest and Education as a Fundamental Right*

*Serrano v. Priest*¹²⁰ was the nation’s first state-court equity case.¹²¹ There, the California Supreme Court held that education was a fundamental right under the California Constitution,¹²² and, accordingly, applied strict scrutiny to overturn the state’s property-tax-based education funding scheme.¹²³ Although the equity approach has fallen out of favor, a detailed analysis of the

¹¹³ Erin E. Buzuvis, Note, “A” for Effort: Evaluating Recent State Education Reform in Response to Judicial Demands for Equity and Adequacy, 86 CORNELL L. REV. 644, 670 (2001).

¹¹⁴ Gillespie, *supra* note 35, at 1005-06.

¹¹⁵ See Koski, *supra* note 72, at 1188 (arguing that “courts have fused their equity and adequacy analyses,” blurring the supposed demarcation between equity cases and adequacy cases).

¹¹⁶ Natapoff, *supra* note 72, at 779.

¹¹⁷ Robert M. Jensen, *Advancing Education Through Education Clauses of State Constitutions*, 1997 BYU EDUC. & L.J. 1, 27 (1997); see also Buzuvis, *supra* note 113, at 656-57.

¹¹⁸ Natapoff, *supra* note 72, at 760.

¹¹⁹ NAT’L ACCESS NETWORK, *supra* note 18, at 1.

¹²⁰ *Serrano v. Priest (Serrano I)*, 487 P.2d 1241 (Cal. 1971).

¹²¹ Strickland, *supra* note 22, at 1125-26.

¹²² *Serrano I*, 487 P.2d at 1258.

¹²³ *Id.* at 1263.

Serrano decision is included here for two reasons. First, *Serrano* should serve as a touchstone of jurisprudence for the Nevada courts in determining whether education is a fundamental right under the Nevada Constitution. The Nevada Supreme Court has recognized that when a constitutional provision is derived from a sister state, it is presumably adopted with the construction given it by the highest court of the sister state.¹²⁴ Because the California Constitution served as the basis for the Nevada Constitution¹²⁵—including the education provisions¹²⁶—it is appropriate for Nevada courts to look to the *Serrano* decision in deciphering the education clause of the Nevada Constitution. Second, equity arguments are still important to adequacy suits,¹²⁷ and establishing education as a fundamental right under the state constitution should bolster the argument for a quality standard that requires more adequately funded schools.¹²⁸

In determining whether education is a fundamental right under the California Constitution, the *Serrano* court began by examining the “indispensable role which education plays in the modern industrial state.”¹²⁹ In this examination, the court first reviewed dicta from United State Supreme Court cases that recognized the significance of education.¹³⁰ The court then repeated the exercise, this time reviewing its own opinions that discussed education’s importance to both society as a whole and the individual citizen.¹³¹ Moreover, the court compared education to other recognized fundamental rights, noting that education had “far greater social significance” than, for example, the right to a court-appointed lawyer.¹³² Additionally, the court analogized voting and education, observing how each is crucial to the preservation and functioning of democracy.¹³³ Finally, the court looked at the education clause of the California Con-

¹²⁴ State *ex rel.* Harvey v. Second Judicial Dist. Court, 32 P.3d 1263, 1269 (Nev. 2001).

¹²⁵ See ELEANORE BUSHNELL & DON W. DRIGGS, THE NEVADA CONSTITUTION: ORIGIN AND GROWTH 25-27 (6th ed. 1984). During Nevada’s Second Constitutional Convention in 1864, from which Nevada’s current constitution derives, a proposal to use the California Constitution as the base of discussion was rejected because the First Nevada Constitution was largely derived from the California Constitution. For more discussion of the Nevada Constitution, see *supra* Part I.

¹²⁶ Compare NEV. CONST. art. XI, § 1 (“The legislature shall encourage by all suitable means the promotion of intellectual, literary, scientific, mining, mechanical, agricultural, and moral improvements . . .”), and *id.* § 2 (“The legislature shall provide for a uniform system of common schools, by which a school shall be established and maintained in each school district at least six months in every year, . . . and the legislature may pass such laws as will tend to secure a general attendance of the children in each school district upon said public schools.”), with CAL. CONST. art. IX § 1 (“[T]he Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement.”), and *id.* § 5 (“The Legislature shall provide for a system of common schools by which a free school shall be kept up and supported in each district at least six months in every year, after the first year in which a school has been established.”).

¹²⁷ See *supra* Part II.B.2.

¹²⁸ Thro, *A New Approach*, *supra* note 72, at 543-44.

¹²⁹ *Serrano v. Priest (Serrano I)*, 487 P.2d 1241, 1255 (Cal. 1971).

¹³⁰ *Id.* at 1256.

¹³¹ *Id.* at 1257.

¹³² *Id.* at 1257-58.

¹³³ *Id.* at 1258.

stitution and took note of the framers' intention, recognizing that their language "express[ed] the importance of education."¹³⁴

Upon concluding that "the distinctive and priceless function of education in our society warrants, indeed compels, our treating it as a 'fundamental interest,'"¹³⁵ the *Serrano* court provided a summary of the significance of education to modern society and the responsibility entrusted to the government in providing education to the youth. First, education provides a gateway to mainstream American society regardless of an individual's disadvantaged background, and is thus essential to maintaining our free enterprise democracy.¹³⁶ Second, in comparison to other social services provided by the state, such as welfare or police services, every person benefits from the publicly provided service of education.¹³⁷ Third, unlike other government services, public education is an intensive, prolonged interaction between the child and the state, often lasting more than a decade.¹³⁸ Fourth, education actively attempts to shape the emotional and psychological development of children in a manner determined solely by the state.¹³⁹ Finally, the state's compulsory attendance statutes both recognize the importance of education and place a responsibility on the state to maintain adequate schools for the students who are required to attend them.¹⁴⁰

Because Nevada based its constitution's educational provisions on California's, and due to Nevada Supreme Court precedent giving great weight to the California high court's interpretations of adopted constitutional clauses, *Serrano* should have significant implications for future education litigation in Nevada. The *Serrano* court's interpretation of California's education provisions lays the groundwork for establishing education as a fundamental right under the Nevada Constitution—worthy of equal protection considerations and paramount to other governmental services provided by the state. Even if the Nevada judiciary fails to declare education a fundamental right, the jurisprudential weight of *Serrano* should aid potential education-reform plaintiffs in advancing the adequacy argument that the educational provisions of the Nevada Constitution demand some greater level of quality in education than is already being provided.

B. Adequacy Suits: Model Approaches of Sister States

1. *Rose v. Council for Better Education, Inc.*

Just as *Serrano* was the seminal case in the equality approach to education-finance litigation, scholars view the Kentucky Supreme Court's decision in *Rose v. Council for Better Education, Inc.*¹⁴¹ as the turning point in which

¹³⁴ *Id.*

¹³⁵ *Id.* (citation omitted).

¹³⁶ *Id.* at 1258-59.

¹³⁷ *Id.* at 1259.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* (noting that "a child of the poor assigned will-nilly to an inferior state school takes on the complexion of a prisoner, complete with a minimum sentence of 12 years.") (quoting John E. Coons et al., *Educational Opportunity: A Workable Constitutional Test for State Financial Structures*, 57 CALIF. L. REV. 305, 388 (1969)).

¹⁴¹ *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186 (Ky. 1989).

school finance suits moved to a focus on adequacy.¹⁴² The education reform legislation that arose out of the *Rose* court's holding produced promising results, and many courts have since followed the lead set by the Kentucky Supreme Court in response to adequacy suits.¹⁴³

In *Rose*, plaintiffs from property-poor school districts in Kentucky filed a class-action suit, claiming that the state education-finance system violated the state constitution.¹⁴⁴ In addressing the claim, the court held that education was a fundamental right,¹⁴⁵ and declared that at issue was whether the Kentucky General Assembly had complied with its constitutional mandate to "provide an efficient system of common schools throughout the state."¹⁴⁶ The court recognized the "tidal wave" of evidence that showed Kentucky schools were underfunded and inadequate: the state's school system was ranked nationally in the lower 20-25 percent in nearly every category used to evaluate educational performance; 35 percent of the adult population were high school drop-outs; the state ranked fortieth nationally in per-pupil expenditures and thirty-seventh in teacher salary and compensation.¹⁴⁷ Based on these factors, the court declared Kentucky's education funding scheme "constitutionally deficient," and constructed a remedy requiring a fundamental overhaul of the entire public school system.¹⁴⁸

The final decision was groundbreaking both for its breadth in declaring the entire system of common schools in Kentucky constitutionally inadequate, and for its specificity in providing guidelines for the Kentucky General Assembly to follow in reestablishing this new school system.¹⁴⁹ In defining an adequate education, the *Rose* court enumerated seven learning goals, which have served as a touchstone for other courts deciding similar cases:¹⁵⁰

- (i) sufficient oral and written communications skills to enable students to function in a complex and rapidly changing civilization; (ii) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices; (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation; (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness; (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage; (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and (vii) sufficient level of academic or vocational skills to

¹⁴² See, e.g., Clune, *supra* note 112, at 482; Preston C. Green & Bruce D. Baker, *Circumventing Rodriguez: Can Plaintiffs Use the Equal Protection Clause to Challenge School Finance Disparities Caused by Inequitable State Distribution Policies?*, 7 TEX. F. ON C.L. & C.R. 141, 148 (2002); Aaron J. Saiger, *Legislating Accountability: Standards, Sanctions, and School District Reform*, 46 WM. & MARY L. REV. 1655, 1710 (2005); C. Scott Trimble & Andrew C. Forsaith, *Achieving Equity and Excellence in Kentucky Education*, 28 U. MICH. J.L. REFORM 599, 605-09 (1995).

¹⁴³ Palfrey, *supra* note 99, at 23.

¹⁴⁴ *Rose*, 790 S.W.2d at 190.

¹⁴⁵ *Id.* at 206.

¹⁴⁶ KY. CONST. § 183.

¹⁴⁷ *Rose*, 790 S.W.2d at 196-97.

¹⁴⁸ *Id.* at 212.

¹⁴⁹ *Id.* at 215.

¹⁵⁰ Gillespie, *supra* note 35, at 1004.

enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.¹⁵¹

While the Kentucky Supreme Court noted that it made its decision only on the grounds of the education provision of the state constitution, the court reiterated that the premise of the opinion was “that education is a basic, fundamental constitutional right that is available to all children within this Commonwealth.”¹⁵² Within a year of *Rose*, the Kentucky legislature enacted the Kentucky Education Reform Act (KERA), a comprehensive package of education reforms based on the seven enumerated goals.¹⁵³ Over the next ten years, Kentucky enjoyed improved student achievement and lasting education reform.¹⁵⁴

Rose has served as a model that many states have sought to emulate.¹⁵⁵ By providing the seven learning goals defining the contours of an *adequate* education, the *Rose* court created a structure within which the state legislature could work to achieve a constitutionally sufficient level of quality education.¹⁵⁶ Additionally, the *Rose* court’s willingness to take control of education finance and compel the legislature to design a new system has inspired bold action on the part of the judiciary in other states to seek sweeping reform in their holdings.¹⁵⁷ Finally, the Kentucky model highlights the importance of courts and legislatures working together to achieve education reform through litigation.¹⁵⁸

2. McDuffy v. Secretary of the Executive Office of Education

Like the Kentucky model, Massachusetts’s education reform case reinforces the importance of collaboration between state courts and state legislatures.¹⁵⁹ In *McDuffy v. Secretary of the Executive Office of Education*,¹⁶⁰ the Supreme Judicial Court of Massachusetts first acknowledged that the suit was an adequacy suit:¹⁶¹

We note that the plaintiffs do not seek a judgment that the Commonwealth has an obligation to equalize educational spending across all towns and cities, or that the Commonwealth has an obligation to provide equal educational opportunities to all its students. Instead, they seek a declaratory judgment that these constitutional provisions require the State to provide every young person . . . with “adequate” education.¹⁶²

The court then devoted sixteen pages to reviewing the language, constitutional structure, and history of education in Massachusetts, and concluded that a qual-

¹⁵¹ *Rose*, 790 S.W.2d at 212.

¹⁵² *Id.* at 215.

¹⁵³ Elder, *supra* note 66, at 774.

¹⁵⁴ *Id.* at 775 (citing Molly A. Hunter, *All Eyes Forward: Public Engagement and Educational Reform in Kentucky*, 28 J.L. & EDUC. 485, 515-16 (1999)).

¹⁵⁵ Palfrey, *supra* note 99, at 23.

¹⁵⁶ *Id.* at 24.

¹⁵⁷ Thro, *Third Wave*, *supra* note 71, at 604.

¹⁵⁸ Palfrey, *supra* note 99, at 24.

¹⁵⁹ *Id.* at 24-25.

¹⁶⁰ *McDuffy v. Sec’y of the Exec. Office of Educ.*, 615 N.E.2d 516 (Mass. 1993).

¹⁶¹ Thro, *Third Wave*, *supra* note 71, at 608.

¹⁶² *McDuffy*, 615 N.E.2d at 522.

ity standard of education did in fact exist under the Massachusetts Constitution.¹⁶³

The *McDuffy* court declared the state's education system constitutionally inadequate, and adopted word-for-word the seven learning goals from *Rose*.¹⁶⁴ In addition, the *McDuffy* court reserved for the legislature the responsibility of "defining the specifics and the appropriate means to provide the constitutionally-required education."¹⁶⁵ Three days later, the Massachusetts legislature passed the Education Reform Act of 1993, restructuring the funding scheme of public education and employing "objective and performance-based accountability measures for all children, teachers, schools and districts."¹⁶⁶

The *Rose* and *McDuffy* opinions are instructive, and can serve as models for both education reform plaintiffs in Nevada as well as the judges that oversee such cases. For instance, in determining whether their state constitutions mandated a particular level of adequacy in schooling, both courts examined a variety of sources, including: the specific language of state constitutions' education clauses; the constitutional history surrounding the education clauses; the history of education in the state; and whether education was considered a fundamental right under the state constitution. Additionally, in determining whether the current state of education was constitutionally deficient, the *Rose* court looked to the national rankings across an assortment of categories used to evaluate educational performance and found the Kentucky education system lacking in virtually every respect. Notably, Nevada today ranks lower nationally than Kentucky circa 1989 in every education statistic examined in the *Rose* decision.¹⁶⁷ Finally, these model cases suggest that the best approach to achieving true education reform out of school-finance litigation requires that the judicial and legislative branches work together.

IV. CHALLENGING THE CONSTITUTIONALITY OF THE NEVADA SYSTEM OF FUNDING PUBLIC EDUCATION

As seen in the model cases above, and in accordance with four decades of education litigation in state courts across the country, a constitutional challenge to Nevada's education financing scheme should show that there exists both statistical proof that Nevada is failing to provide its students with an adequate education and a constitutional basis for declaring the school system inadequate. This section presents the factual and legal bases for an adequacy suit in Nevada, and concludes with a brief discussion on determining how, exactly, the Nevada judiciary might come to define what constitutes an "adequate education."

A. *The Factual Basis for Education Reform in Nevada*

In order to ensure a "reasonably equal education opportunity" for each Nevada child, regardless of the wealth of individual school districts, the 1967

¹⁶³ Thro, *Third Wave*, *supra* note 71, at 610.

¹⁶⁴ Elder, *supra* note 66, at 775.

¹⁶⁵ *McDuffy*, 615 N.E.2d at 554 n.92.

¹⁶⁶ Elder, *supra* note 66, at 775.

¹⁶⁷ *See infra* Part IV.A.

legislature adopted the Nevada Plan as the mechanism to finance K-12 public education.¹⁶⁸ Each legislative session, the Nevada legislature establishes a statewide aggregate K-12 budget that guarantees a level of funding on a per-pupil basis.¹⁶⁹ The funds, which come from both state and local sources, are divided statewide by a weighted apportionment enrollment that adjusts funding based on student grade-levels and student transfers into and out of the school district.¹⁷⁰ The Nevada Plan also levels disparities in inter-district funding through weighted calculations based on the unique characteristics of each district, such as student enrollment, transportation costs, local wealth factors, and more.¹⁷¹ Thus, districts with higher local revenues and lower costs per student receive less state aid than districts with lower local revenues and higher costs per student.¹⁷² These adjustments establish a per-pupil funding amount for each district, which the State guarantees to provide.¹⁷³ On average, these guaranteed funds provide roughly 78 percent of school districts' operating funds,¹⁷⁴ with the remaining costs coming from local revenues "outside" the Nevada Plan.¹⁷⁵ As a result, the Nevada Plan has been characterized as a public school-financing system that provides for great equity of educational opportunity.¹⁷⁶

Despite Nevada's laudable achievements in creating *equal* educational opportunities for its students, the issue of whether Nevada is providing its students an *adequate* education is debatable. In August of 2010, the University of Nevada Las Vegas' Lied Institute for Real Estate Studies brought together forty Southern Nevadan professionals for a roundtable discussion, the topic of which was "Nevada: 50th in the Nation for Education?".¹⁷⁷ The roundtable was in response to concerns over the "education crisis in Nevada" and the resulting inability to attract innovative employers to diversify the state's depressed economy.¹⁷⁸ With the roundtable in agreement that successful economic diversification will require a greater investment in our public schools, the group recommended a series of changes, including the need for a responsible and serious conversation about tax reform and the need for education to become a core value for all Nevadans.¹⁷⁹ To this end, the roundtable issued a call to action, requesting that local chambers of commerce advocate on behalf of the

¹⁶⁸ NEV. REV. STAT. § 387.121 (2009).

¹⁶⁹ FISCAL ANALYSIS DIV., LEGISLATIVE COUNSEL BUREAU, THE NEVADA PLAN FOR SCHOOL FINANCE: AN OVERVIEW 2 (2011), available at http://www.leg.state.nv.us/Division/Fiscal/NevadaPlan/Nevada_Plan_2011_JW.pdf.

¹⁷⁰ *Id.*

¹⁷¹ JOHN AUGENBLICK ET AL., ESTIMATING THE COST OF AN ADEQUATE EDUCATION IN NEVADA 91 (2006), available at <http://www.apaconsulting.net/uploads/reports/5.pdf>.

¹⁷² LAS VEGAS CHAMBER OF COMMERCE, EDUCATION BRIEFING SERIES: EDUCATION FUNDING IN NEVADA 6 (2010), available at <http://www.lvchamber.com/files/pdf/lvcc-edbrief-appendix-2-3.pdf>.

¹⁷³ *Id.*

¹⁷⁴ FISCAL ANALYSIS DIV., *supra* note 169, at 2.

¹⁷⁵ AUGENBLICK, *supra* note 171, at 92.

¹⁷⁶ *See, e.g., id.* at 105; LAS VEGAS CHAMBER OF COMMERCE, *supra* note 172, at 4.

¹⁷⁷ LIED INST. FOR REAL ESTATE STUDIES, NEVADA: 50TH IN THE NATION FOR EDUCATION? 3 (2010), available at <http://business.unlv.edu/files/lied/2010LiedWhitePaper.pdf>.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 4.

need for true education investments in Nevada to diversify its economy and help prevent it from returning to a deep recession.¹⁸⁰

The call was answered by the Las Vegas Chamber of Commerce, which, throughout 2010, released a series of Education Analysis Reports to help determine where taxpayer dollars are currently being spent on education and to provide a factual foundation to make informed public policy recommendations. To date, the chamber has issued three reports from its Education Briefing Series. *K-12 Student Achievement Testing*, released in March 2010, provides comparisons of student achievement amongst the states and found that Nevada continues to rank well below the national average on standardized student proficiency exams administered to elementary, middle, and high school students.¹⁸¹ *Factors Correlated with Educational Attainment*, released in April 2010, assesses the effects of various socio-economic factors and school operations on student achievement in Nevada.¹⁸² The third, and final, report, released in December 2010, discusses education funding in Nevada, characterizing the Nevada Plan as follows:

In summary, the Legislature's application of the Nevada Plan for School Finance forms a ceiling for total K-12 funding, and absorbs residual balances of K-12 revenue for general purposes. Virtually all authority over K-12 taxes, other than voter-approved capital funds and related debt service rests with the Legislature. Although the Legislature funds schools in the aggregate, not by line item, its estimates are sufficiently precise that little flexibility remains for local school boards. The Legislature's comprehensive ownership of K-12 operating revenue transfers significant tax revenue among school districts in the name of equity, and to the exclusion of local determination of funding levels. Finally the state's practice of returning excess K-12 appropriations to its general fund in years when revenues are ample, coupled with its periodic lapses in meeting its funding pledge to school districts renders the state's "guarantee" a misnomer at best.¹⁸³

The problems found within the current Nevada Plan, combined with inadequate funding levels, have led to rather abysmal and embarrassing education statistics in comparison with the rest of the country. Perhaps the most effective means of organizing such statistics is to adopt the unfortunate Nevada rubric, wherein the state finds itself at the bottom of every good list and the top of every bad list. At the bottom of every good list, Nevada currently ranks forty-ninth in per-pupil expenditures and forty-fifth in spending on education as a percent of state taxable resources.¹⁸⁴ On standardized national exams, Nevada fourth-graders rank forty-third in math and forty-fourth in reading.¹⁸⁵ By grade eight, Nevada students fall to forty-fourth in math and forty-eighth in reading.¹⁸⁶ At the top of the bad lists, Nevada enjoys the fourth-highest student-

¹⁸⁰ *Id.*

¹⁸¹ LAS VEGAS CHAMBER OF COMMERCE, EDUCATION BRIEFING SERIES: K-12 STUDENT ACHIEVEMENT TESTING 2 (2010), available at <http://www.lvchamber.com/files/pdf/chamber-student-testing-narrative.pdf>.

¹⁸² LAS VEGAS CHAMBER OF COMMERCE, *supra* note 11, at 1.

¹⁸³ LAS VEGAS CHAMBER OF COMMERCE, *supra* note 172, at 12-13.

¹⁸⁴ EDITORIAL PROJECTS IN EDUC. RESEARCH CTR., NEVADA—STATE HIGHLIGHTS 2010, at 14 (2010); see also LAS VEGAS CHAMBER OF COMMERCE, *supra* note 11, at 20.

¹⁸⁵ LAS VEGAS CHAMBER OF COMMERCE, *supra* note 181, app. 3.

¹⁸⁶ *Id.*

teacher ratio in the country and the highest number of students per school.¹⁸⁷ Rounding out these statistics, with fewer than 50 percent of the public high school students graduating with a diploma, Nevada maintains the country's highest high school dropout rate.¹⁸⁸

In January 2010, Editorial Projects in Education Research Center, the independent non-profit publisher of *Education Week*, released its fourteenth annual *Quality Counts* report card on public education in the fifty states and the District of Columbia.¹⁸⁹ For a second year, Nevada ranked fiftieth in the nation for its quality of public K-12 education in the *Quality Counts* report.¹⁹⁰ Perhaps most alarming, however, is that the report ranks Nevada dead last amongst the states in providing its schoolchildren opportunities for success, according to the "Chance-for-Success Index."¹⁹¹ The Chance-for-Success Index measures each state's capacity for helping its youth succeed by "combin[ing] information from 13 indicators that span an individual's life from cradle to career," with a heavy emphasis on the performance of public schools and the educational and economic outcomes in adulthood.¹⁹²

How has the legislature responded to these alarming statistics? Less than one month after the *Quality Counts* report was released in 2010, the 26th Special Session of the Nevada legislature *reduced* supposedly "guaranteed" per-student funding levels across the state.¹⁹³ Such acts fly in the face of the legislature's constitutional duty to "encourage by all suitable means the promotion of intellectual, literary, scientific . . . and moral improvements,"¹⁹⁴ in providing for education. While the statistical evidence cries out for judicial review, there remains the question of whether a constitutional basis exists to challenge the currently inadequate state of education in Nevada.

B. *The Legal Basis for Education Reform Litigation in Nevada*

One can best determine whether a state constitution's education provision establishes education as a fundamental right or mandates a particular quality standard by looking to the actual text of the provision itself.¹⁹⁵ Article 11 of the Nevada Constitution embodies the high value placed on education as expressed by the state's constitutional framers. Of particular importance are Sections 1, 2, and 6. Section 1 mandates:

The legislature shall encourage by all suitable means the promotion of intellectual, literary, scientific, mining, mechanical, agricultural, and moral improvements¹⁹⁶

Section 2 mandates:

¹⁸⁷ LAS VEGAS CHAMBER OF COMMERCE, *supra* note 11, at 21-22.

¹⁸⁸ *Id.* app. 1, at 4.

¹⁸⁹ EDITORIAL PROJECTS IN EDUC. RESEARCH CTR., *supra* note 184, at 1.

¹⁹⁰ *Id.* at 2.

¹⁹¹ *Id.* at 9.

¹⁹² *Id.* at 8.

¹⁹³ CLARK CNTY. SCH. DIST., *supra* note 6, at 16.

¹⁹⁴ NEV. CONST. art. XI, § 1.

¹⁹⁵ Thro, *A New Approach*, *supra* note 72, at 537-38.

¹⁹⁶ NEV. CONST. art. XI, § 1.

The legislature shall provide for a uniform system of common schools, by which a school shall be established and maintained in each school district at least six months in every year . . . and the legislature may pass such laws as will tend to secure a general attendance of the children in each school district upon said public schools.¹⁹⁷

And Section 6 requires the Nevada legislature to provide for the support and maintenance of the public schools by funding their operation before funding any other part of the state budget.¹⁹⁸

In *A New Approach to State Constitutional Analysis in School Finance Litigation*, Professor William E. Thro, building upon the works of Professors Grubb and Ratner, established a tripartite classification scheme categorizing the educational provisions of state constitutions based upon the duty they impose upon their state legislatures.¹⁹⁹ Thro argues that merely because an education clause exists within a state constitution does not, by itself, demand a specific level of adequate education or establish education as a fundamental right.²⁰⁰ Rather, each state constitution, with its own unique education clause,²⁰¹ imposes a different level of duty on the state legislature.²⁰² Each state's constitution obligates the legislature to establish some form of educational system, yet each has its own unique phrasing. In a search for consistency and predictability in school finance litigation, many scholars have postulated a categorical approach—grouping the education clauses of the states into categories based on the duty the plain language imposes on the legislature.²⁰³

Thro's first category of education clauses, the "establishment provisions," demands the least of the state legislature, simply requiring that it establish free public education within the state and nothing more.²⁰⁴ The educational provisions of seventeen state constitutions fall within this category.²⁰⁵ Because they merely mandate the establishment of a system of education, the plain language of these provisions fails to create either an adequacy standard or a fundamental right in education.²⁰⁶ Alaska's education clause is typical of such establish-

¹⁹⁷ *Id.* § 2.

¹⁹⁸ This is a recent (2006) addition to the Nevada Constitution by voter initiative following the *Guinn* decision. See *infra* notes 227-32 and accompanying text.

¹⁹⁹ Thro, *A New Approach*, *supra* note 72, at 553 n.34.

²⁰⁰ Thro, *Third Wave*, *supra* note 71, at 605.

²⁰¹ But see Avidan Y. Cover, *Is "Adequacy" a More "Political Question" than "Equality?"*: *The Effect of Standards-Based Education on Judicial Standards for Education Finance*, 11 CORNELL J.L. & PUB. POL'Y 403, 404 & n.6 (2002) (noting that scholars disagree whether Mississippi has an education clause).

²⁰² Thro, *A New Approach*, *supra* note 72, at 538-39.

²⁰³ See, e.g., Erica Black Grubb, *Breaking the Language Barrier: The Right to Bilingual Education*, 9 HARV. C.R.-C.L. L. REV. 52, 66-70 (1974); Gershon M. Ratner, *A New Legal Duty For Urban Public Schools: Effective Education in Basic Skills*, 63 TEX. L. REV. 777, 814-16, n.143-46 (1985); Thro, *The Role of Language*, *supra* note 98, at 19-31.

²⁰⁴ Thro, *A New Approach*, *supra* note 72, at 539.

²⁰⁵ See ALA. CONST. art. XIV, § 256; ALASKA CONST. art. VII, § 1; ARIZ. CONST. art. XI, § 1; CONN. CONST. art. 8, § 1; HAW. CONST. art. X, § 1; KAN. CONST. art. 6, § 1; LA. CONST. art. VIII, § 1; MASS. CONST. pt. 2, ch. 5, § 2; NEB. CONST. art. VII, § 1; N.M. CONST. art. XII, § 1; N.Y. CONST. art. XI, § 1; N.C. CONST. art. IX, § 2; OKLA. CONST. art. XIII, § 1; S.C. CONST. art. XI, § 3; TENN. CONST. art. XI, § 12; UTAH CONST. art. X, § 1; VT. CONST. ch. II, § 68.

²⁰⁶ Thro, *A New Approach*, *supra* note 72, at 542-43.

ment provisions, providing: “The legislature shall by general law establish and maintain a system of public schools open to all children of the State”²⁰⁷

The intermediate category, referred to as “quality provisions,” requires that a certain level of quality within the educational system be provided by the state legislature.²⁰⁸ Eighteen state constitutions²⁰⁹ have these “quality provisions,” which typically demand that the system of public education established within the state be of a “thorough and/or efficient” quality.²¹⁰ In other words, for a system of education to be constitutionally adequate, the legislature must go beyond simply establishing an educational system and provide a certain level of constitutionally mandated quality. An example of quality provisions can be found in West Virginia’s constitution, which provides: “The Legislature shall provide, by general law, for a thorough and efficient system of free schools.”²¹¹

Finally, there are fourteen state constitutions²¹² with educational provisions that fall within the third category, labeled “high duty provisions.” These provisions elevate education above other governmental functions. These high duty provisions typically make education a “paramount”²¹³ or “primary”²¹⁴ duty of the legislature, and go beyond the establishment and quality provisions of other states with stronger and more specific educational mandates, such as “all means.”²¹⁵ Thro argues that these high duty provisions elevate education to a level of such import that “it is logical to say it is a fundamental right.”²¹⁶

²⁰⁷ ALASKA CONST. art. VII, § 1.

²⁰⁸ Thro, *A New Approach*, *supra* note 72, at 539.

²⁰⁹ See ARK. CONST. art. XIV, § 1; COLO. CONST. art. IX, § 2; DEL. CONST. art. X, § 1; FLA. CONST. art. IX, § 1; IDAHO CONST. art. IX, § 1; KY. CONST. § 183; MD. CONST. art. VIII, § 1; MINN. CONST. art. XIII, § 1; MONT. CONST. art. X, § 1; N.J. CONST. art. VIII, § IV; N.D. CONST. art. VIII, § 1; OHIO CONST. art. VI, § 2; OR. CONST. art. VIII, § 3; PA. CONST. art. III, § 14; TEX. CONST. art. VII, § 1; VA. CONST. art. VIII, § 1; W. VA. CONST. art. XII, § 1; WIS. CONST. art. X, § 3.

²¹⁰ Thro, *A New Approach*, *supra* note 72, at 539 n.38.

²¹¹ W. VA. CONST. art. XII, § 1.

²¹² See CAL. CONST. art. IX, § 1; GA. CONST. art. VIII, § I, para. I; ILL. CONST. art. X, § 1; IND. CONST. art. VIII, § 1; IOWA CONST. art. IX, 2d, § 3; ME. CONST. art. VIII, pt. 1, § 1; MICH. CONST. ch.1, art. VIII, § 2; MO. CONST. art. IX, § 1(a); NEV. CONST. art. XI, § 1; N.H. CONST. pt. 2, art. LXXXIII; R.I. CONST. art. XII, § 1; S.D. CONST. art. VIII, § 1; WASH. CONST. art. IX, § 1; WYO. CONST. art. VII, § 1.

²¹³ See, e.g., WASH. CONST. art. IX, § 1 (“It is the paramount duty of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste, or sex.”).

²¹⁴ See, e.g., GA. CONST. art. VIII, § 1, para. I (“The provision of an adequate public education for the citizens shall be a primary obligation of the State of Georgia.”).

²¹⁵ See, e.g., CAL. CONST. art. IX, § 1 (“A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement.”); see also NEV. CONST. art. XI, § 1 (“The legislature shall encourage by all suitable means the promotion of intellectual, literary, scientific, mining, mechanical, agricultural, and moral improvements, and also provide for a superintendent of public instruction and by law prescribe the manner of appointment, term of office and the duties thereof.”).

²¹⁶ Thro, *A New Approach*, *supra* note 72, at 543.

As such, these high duty provisions legitimize both adequacy suits, by creating a quality standard, and equality suits, by establishing a fundamental right.²¹⁷

The education provision of Nevada's Constitution falls under the "high duty" provision within this analytical framework.²¹⁸ By requiring the legislature to promote education "by all suitable means,"²¹⁹ the Nevada Constitution has created both a stronger and more specific educational mandate to promote education than seen in most other state constitutions. Such a mandate indicates that, in comparison to other states, the Nevada Constitution requires a certain baseline of quality education, and arguably establishes education as a fundamental right within the state. The California Supreme Court's holding in *Serrano*²²⁰ that education is a fundamental right under its state constitution further validates the notion of a fundamental right to education in Nevada, because Nevada's educational constitutional provision is modeled after California's.

Beyond a comparative analysis of state education clauses, a historical review of Nevada's Constitutional Convention indicates the framers strongly believed education to be a basic, if not fundamental, right that demands a certain level of quality. During the Nevada State Constitutional Convention of 1864, the framers spent considerable time debating the role education should play in the future of the state.²²¹ Indeed, the debate over whether attendance in public schools should be compulsory pitted the values of education against the private right of a parent to dictate his or her child's education, and led to some of the more profound statements of the framers' view of the role education would play in the new state's constitution.²²² Those opposed to compulsory attendance viewed such a mandate as dictatorial and undemocratic, striking at the very "spirit of our institutions when we are seeking to compel our fellow-citizens to send their children to the public schools."²²³ Proponents of the compulsory language argued that our democratic form of government presupposes an educated citizenry and therefore:

[C]hildren of the State, growing up to be men and women, should have the privilege secured to them of attending school We have no right, and we cannot afford to allow children to grow up in ignorance. The public is interested in that matter, and it is one of too great importance to be neglected.²²⁴

In the end, Section 2's granting of legislative power to "pass such laws as will tend to secure a general attendance of the children in each school district" was the resulting compromise between two important—indeed, fundamental—values: education and the private rights of citizens.²²⁵ This compromise supports the notion that education, in the framers' minds, is a fundamental right of

²¹⁷ *Id.* at 544.

²¹⁸ *Id.* at 540 n.39.

²¹⁹ NEV. CONST. art. XI, § 1.

²²⁰ *See supra* Part III.A.

²²¹ *See* OFFICIAL REPORT OF THE DEBATES AND PROCEEDINGS IN THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEVADA 565-82, 585-94, 659-62 (1866) [hereinafter NEVADA CONSTITUTIONAL CONVENTION].

²²² BUSHNELL & DRIGGS, *supra* note 125, at 32.

²²³ *See* NEVADA CONSTITUTIONAL CONVENTION, *supra* note 221, at 571 (statement of Mr. Warwick).

²²⁴ *See id.* at 567 (statement of John A. Collins of Storey County).

²²⁵ BUSHNELL & DRIGGS, *supra* note 125, at 32 (quotation omitted).

every child and should be provided at an adequate enough level to fulfill its role as an underpinning of our democratic society. As Albert T. Hawley, delegate of Douglas County, remarked at the close of debate on Section 2: “What we want is a basis upon which to build the educational superstructure, by means of which we can afford *every child* a *sufficient amount* of instruction to enable it to go creditably through life.”²²⁶

Finally, although Nevada remains one of the few states yet to face education-finance litigation, the Nevada Supreme Court has nonetheless recognized the constitutional import of education in its opinion in *Guinn v. Legislature*.²²⁷ In 2003, during a legislative impasse over school funding, then-governor Kenny Guinn initiated litigation requesting the Nevada Supreme Court to order the state legislature to override a two-thirds super majority vote requirement and appropriate funding for the 2003-05 school years.²²⁸ Though *Guinn* was, and remains, a controversial case,²²⁹ the court’s analysis of the framers’ stance on education remains uncontroversial. Citing to the *Debates & Proceedings of the Nevada State Constitutional Convention of 1864*, the court stated: “Our Constitution’s framers strongly believed that each child should have the opportunity to receive a basic education. Their views resulted in a Constitution that places great importance on education. Its provisions demonstrate that education is a basic constitutional right in Nevada.”²³⁰ The court concluded, “The framers have elevated the public education of the youth of Nevada to a position of constitutional primacy. Public education is a right that the people, and the youth, of Nevada are entitled, through the Constitution, to access.”²³¹ Notably, following the *Guinn* decision, Nevada voters approved the Education First initiative, amending the state constitution to require the Nevada legislature to fund public education before appropriating *any other* government expenditures.²³² Thus, along with the framers and the Nevada Supreme Court, the Nevada electorate has also intimated at the primacy of education over all other state-provided services.

C. *Determining the Content of the Right to Adequate Education in Nevada*

When a court finds the state’s school system constitutionally inadequate, the subsequent step of articulating a suitable remedy to correct these educational inadequacies often proves quite difficult.²³³ What, after all, is an “adequate education”? Beginning with the premise that constitutional construction

²²⁶ See NEVADA CONSTITUTIONAL CONVENTION, *supra* note 221, at 577 (statement of Mr. Hawley) (emphasis added).

²²⁷ *Guinn v. Legislature*, 71 P.3d 1269 (Nev. 2003).

²²⁸ *Id.* at 1272.

²²⁹ For a more in-depth understanding of the *Guinn* controversy, see Symposium: *Guinn v. Legislature of Nevada*, 4 NEV. L.J. 491 (2004).

²³⁰ *Guinn*, 71 P.3d at 1275.

²³¹ *Id.* at 1276.

²³² Editorial, *Education First? Oh My!*, LAS VEGAS REV. J., Nov. 30, 2006, at 8B, available at http://www.reviewjournal.com/lvrj_home/2006/Nov-30-Thu-2006/opinion/11130187.html.

²³³ Palfrey, *supra* note 99, at 3.

is purely a province of the judiciary,²³⁴ defining the content of the right to education under the Nevada Constitution will be a task for the Nevada judiciary to fulfill. However, because Nevada is late to the game of education-finance-reform litigation, the jurisprudential endeavors of our sister states should prove valuable in moving forward. While this Note does not delve into a detailed analysis of high court rulings defining the content of “quality” education beyond those presented in Part II.B, a brief overview of academic analyses of past high court rulings and a suggested approach in defining “adequacy” are presented below.

Perhaps the greatest fear and criticism presented in this endeavor to judicially define and enforce an *adequate* education, is the potential for legislative evasion.²³⁵ Thus, based on past litigation, scholars have advocated for remedies in which the judiciary (1) takes a firm but limited role to protect the constitutional rights of schoolchildren; (2) defines adequacy specifically enough to minimize inter-branch tensions and provide political cover for legislatures who must implement the reform; and (3) engages in a collaborative dialogue with the legislative and executive branches, as well as local school boards, parents, unions, and other affected or interested parties.²³⁶

Fortunately, the Nevada legislature began such a dialogue in 2005 when the Nevada’s Legislative Committee on School Financing Adequacy commissioned a report on estimating the costs of an adequate education in Nevada.²³⁷ The Committee selected Augenblick, Palaich and Associates (APA), a Denver-based consulting firm that worked with state policy makers on school funding issues for more than twenty years, to produce the 131-page report, which was released to the legislature in August 2006.²³⁸ For the purpose of the report, APA adopted a definition of *adequacy* as “the cost of meeting state and federal resource requirement and student performance expectations, including those in Nevada’s education accountability system and the state’s federally-approved plan to comply with the No Child Left Behind Act.”²³⁹ APA combined several analytical approaches to determine the costs necessary to provide for an *adequate* education in Nevada, and provided funding goals to achieve adequacy as well as minor policy tweaks to the current Nevada system of funding education.²⁴⁰

The APA report is certainly not the only route the judiciary may follow, but it serves as a suitable starting point for a dialogue between the judiciary and the legislature in defining the right to education. Such collaborations are necessary to the success of judicial remedies fraught with inter-branch tension.

²³⁴ *Guinn*, 71 P.3d at 1274 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803); *State v. Rosenthal*, 559 P.2d 830, 834 (Nev. 1977)).

²³⁵ See Koski, *supra* note 72, at 1185.

²³⁶ Palfrey, *supra* note 99, at 4.

²³⁷ AUGENBLICK, *supra* note 171, at 1.

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ See *id.* at 2.

V. ADDRESSING CRITICISMS—IS THIS THE COURT'S JOB?

Opponents of education reform lawsuits often claim that courts overstep their constitutional boundaries when they play a role in school finance.²⁴¹ Where state courts rule that schools are constitutionally inadequate, charges of “judicial activism” and “legislating from the bench” are sure to follow.²⁴² Although such criticisms express legitimate legal concerns, they are, at their heart, unfounded. The rationales behind separation of powers concerns and the political question doctrine, although common to federal court adjudication, do not apply in the same manner to state courts.²⁴³ It is within these fundamental differences between state and federal courts, governments, and constitutions that exists the rationale for state court authority to adjudicate and enforce constitutional remedies in school finance litigation against a stagnant legislature.²⁴⁴

First, on the constitutional level, the U.S. Constitution is substantively different from state constitutions. The U.S. Constitution is a charter of negative rights that block the government from taking action that would infringe on a person's right.²⁴⁵ State constitutions, on the contrary, include positive rights—such as a right to education—that entitle people to a benefit or action from the state government.²⁴⁶ When a constitution mandates a positive right, the legislative and executive branches are compelled to carry out that constitutional goal.²⁴⁷ Accordingly, it logically follows that it is the state judiciary's role to ensure that the state legislature complies with its constitutional duty to provide this positive right.²⁴⁸ Therefore, the enforcement of positive rights, such as the right to education, requires that the state court share in the public governing function of the other two branches.²⁴⁹ Because the education provisions of the Nevada Constitution place a duty on the legislature to provide an adequate education,²⁵⁰ a finding for the plaintiffs in school finance litigation would not be the result of an activist court, but rather the responsible enforcement of a constitutional covenant between the government and its people.

Second, whereas Article III judges receive lifetime appointments, the majority of state court judges are subject to judicial election.²⁵¹ Thus, in the federal court system, where a judge is appointed for a life term, it is reasonable to provide safeguards against the loss of democratic control by preventing the

²⁴¹ See, e.g., Patrick R. Gibbons, *Inadequate? Or Ineffective?*, NEV. POL'Y RES. INST. (Sept. 30, 2009), <http://www.npri.org/publications/inadequate-or-ineffective> (“Though courts in nine states have refused to hear adequacy lawsuits, some courts have overstepped their constitutional roles and interpreted these [education clauses] to require increases in educational expenditures.”).

²⁴² See *Know the Issues: The Role of the Courts*, NAT'L ACCESS NETWORK, <http://www.schoolfunding.info/issues/handouts/roleofthecourts.pdf> (last visited Mar. 25, 2011).

²⁴³ Elder, *supra* note 66, at 759-60.

²⁴⁴ See O'Neill, *supra* note 17, at 577-58.

²⁴⁵ Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1137-38 (1999).

²⁴⁶ Elder, *supra* note 66, at 760-61.

²⁴⁷ Hershkoff, *supra* note 245, at 1138.

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ See *supra* Part IV.B.

²⁵¹ Elder, *supra* note 66, at 763.

judge from engaging in policymaking that is the responsibility of the legislature.²⁵² However, where a judge is subject to popular review, the rationale behind concerns of judicial activism based on lifetime appointments melts away.²⁵³ In Nevada, state judges in both the supreme court and district courts are subject to a nonpartisan election every six years.²⁵⁴

Third, the state judiciary is a more competent policymaker than the federal judiciary in local matters under the state's jurisdiction. A constant concern regarding Article III courts injecting themselves into local public policy matters is a certain incompetence of federal courts in local dealings.²⁵⁵ As the United States Supreme Court stated in *Rodriguez*: “[W]e stand on familiar ground when we continue to acknowledge that the Justices of this Court lack both the expertise and the familiarity with local problems so necessary to the making of wise decisions with respect to the raising and disposition of public revenues.”²⁵⁶ However, this argument loses strength against state courts with closer ties to the community and a much smaller jurisdiction.²⁵⁷

Furthermore, state courts may often be as institutionally competent as, if not more than, the state legislature in matters of social welfare.²⁵⁸ Professor Hershoff points out that most state constitutions “do not reflect the same level of trust in state legislative decisionmaking as does the federal Constitution in congressional decisionmaking.”²⁵⁹ A source of this distrust lies in the fact that many state legislatures are underpaid, understaffed, and part-time.²⁶⁰ Nevada remains one of seventeen states with a part-time legislature,²⁶¹ and the Nevada legislature only meets biennially.²⁶² The part-time nature of the elected position requires that state legislators have other—potentially conflicting—means of earning income. Furthermore, the lack of time, staff, and other valuable resources might compromise the legislature's ability to create meaningful legislation when it comes to something as important, complex, and pervasive as education.

VI. CONCLUSION

After the last ten years of budget cuts and the elimination of innovative education programs, and in light of reports—both local and national—decrying the troubling state of education in Nevada, there is clearly no time better than the present to challenge the legislature's maintenance of the state school system

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ See NEV. CONST. art. VI, §§ 3, 5.

²⁵⁵ See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 55 (1973) (“We are unwilling to assume for ourselves a level of wisdom superior to that of legislators, scholars, and educational authorities in 50 States . . .”).

²⁵⁶ *Id.* at 41.

²⁵⁷ Elder, *supra* note 66, at 764.

²⁵⁸ O'Neill, *supra* note 17, at 582.

²⁵⁹ Helen Hershkoff, *State Courts and the “Passive Virtues”*: Rethinking the Judicial Function, 114 HARV. L. REV. 1833, 1892-93 (2001).

²⁶⁰ *Id.* at 1892.

²⁶¹ *Full and Part-Time Legislatures*, NAT'L CONF. ST. LEGISLATURES, <http://www.ncsl.org/?tabid=16701> (last updated June 2009).

²⁶² NEV. CONST. art. IV, § 2.

as unconstitutionally inadequate. So long as Nevada remains “at the bottom of every good list and the top of every bad list,” the promise of education in the Nevada Constitution remains unfulfilled.

Nevada is one of five states that has not yet ruled on the constitutionality of its public education financing system. Both education reform plaintiffs in Nevada and the Nevada judiciary should take advantage of the fact that forty-five states have gone down this path before. As the model cases of such reform show,²⁶³ successful litigation demands that the two branches—judicial and legislative—work together. Through an adequacy challenge, the court can issue specific guidelines directing the legislature toward the constitutionally required levels of adequate education. The legislature can then enact specific legislation to ensure a constitutionally adequate education system. A holding by the Nevada Supreme Court declaring the legislative branch to be in direct violation of its constitutional duty to provide an adequate education to the children of Nevada could realistically prompt much needed education reform within the state. As it stands, there exists both a statistical and constitution basis for such a holding.

²⁶³ See *supra* Part II.