The Judiciary and the Uncertain Future of Adequacy Remedies: A Look to the Past

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PEPG 05-36

Preliminary draft
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Prepared for the conference:
"Adequacy Lawsuits: Their Growing Impact on American Education"
Kennedy School of Government, Harvard University, October 13-14, 2005
INTRODUCTION

Not far from this place, one of the leading lights of American law penned these simple words: “The life of the law has been experience, not logic.” So too in the arena of education litigation, and in particular the nettlesome question of remedies. My thesis is equally simple, but not nearly so elegant as Holmes’ towering insight: The judiciary is well advised to be mindful of the experience of the last half century in education litigation. That experience, at the dawn of the Roberts era in our constitutional law, counsels caution and humility.

I

Prior to Holmes’ tackling the rather large subject of the entire corpus of the common law, Mr. Webster came forward with a simple definition of “remedy.” Lawyers, especially in this Age of Textualism, love definitions. And Mr. Webster, or those who labor in his large shadow, advises the gentle reader that the preferred definition for the subject that now arrests our attention is, in effect, medicine for what ails a person. It is a curative, a response from science to a condition or disease. The purpose is relief, restoration and elimination of the undesired condition (or ailment).

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2 The publication of The Common Law thrust Holmes into the forefront of legal thought. The book, though dense, is regarded as “one of the classic works in American legal scholarship.” White, supra note 1 at 149.

3 First published in 1847, the Merriam-Webster Dictionary was actually the second Webster Dictionary published in the United States. In 1841, Noah Webster published An American Dictionary of the English Language, Corrected and Enlarged. Merriam-Webster purchased the rights to revise and publish Noah Webster’s dictionary in 1843, thus creating the lexographical monolith that is the Merriam-Webster Unabridged Dictionary.
Judges are superb doctors, at least when the ailment is identifiably reflective of conditions that have, by tradition, come to the judiciary for diagnosis and relief. Who owns Blackacre, or perhaps more challengingly, can the city of, say, New London take Blackacre for economic redevelopment purposes, are familiar grist for the judicial mill. Judges in the English and American traditions welcome such cases, and apply familiar rules from the judicial counterpart to the Physicians’ Desk Reference. Susan Kelo owns Blackacre, the tribunal concludes, but she must hand over title to New London, which for its part can "take" Blackacre, convey title to a private developer who, in turn, can transform Ms. Kelo's beloved home into a Starbucks. One might not like the rule, and judges may not like their own analysis, as we saw recently in a remarkable speech by the author of *Kelo v. City of New London*, Justice John Paul Stevens. But judges (and Justices) feel constrained by those rules (such as precedents) that have been fashioned in the crucible of litigation. And great respect tends naturally to be displayed by the judges

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4 The most current definition of “remedy” is “a medicine, application, or treatment that relieves or cures a disease.” Merriam-Webster Online, available at [http://www.m-w.com/cgi-bin/dictionary](http://www.m-w.com/cgi-bin/dictionary) (last visited Oct. 8, 2005.)


6 The *Physicians’ Desk Reference* is an annual compendium of available prescription drugs. Just as a *Black's Law Dictionary* rests on the bookshelf of nearly every lawyer or judge, the *Physicians’ Desk Reference* is one of the most widely used volumes in the medical field.

7 In *Kelo*, the Court found that as “with other exercises in urban planning and development, the City is endeavoring to coordinate a variety of commercial, residential, and recreational uses of land, with the hope that they will form a whole greater than the sum of its parts. To effectuate this plan, the City has invoked a state statute that specifically authorizes the use of eminent domain to promote economic development . . . Because that plan unquestionably serves a public purpose, the takings challenged here satisfy the public use requirement of the Fifth Amendment.” 125 S. Ct. at 2665.

8 In a speech before the Clark County (Nevada) Bar Association, Justice Stevens criticized his own decision in *Kelo* as “unwise.” Additionally, he stated that the law compelled him to reach a holding that he “would have opposed” if he had been a legislator. Linda Greenhouse, *New York Times*, “Justice Weighs Desire v. Duty (Duty Prevails)” (August 25, 2005).
of today (and presumably those of tomorrow) for the accumulated wisdom of what has
gone before.9 Indeed, and here Mr. Webster's preferred definition conjures up a very
different way of thinking, judges tend to be wary of bold new inventions and imaginative
breakthroughs. Indeed, while the Warren Court is now one for the ages, lionized in the
popular imagination (and in Senate confirmation processes), the lingering fact remains
that the judiciary is seen as doing well when it diagnoses the condition, but is well
advised to be careful and cautious in administering a proposed cure.10

II

This counsel of caution is a familiar tale in education litigation. Before returning
to the fount (Brown v. Board of Education), let's briefly examine this culture of judicial
humility in the most directly applicable context, namely the early post-Brown litigation
on educational funding.

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9 In discussing the value of precedent, Justice Marshall stated that
stare decisis is important not merely because individuals rely on precedent to structure
their commercial activity but because fidelity to precedent is part and parcel of a
conception of the judiciary as a source of impersonal and reasoned judgments. . . .
Because enforcement of the Bill of Rights and the Fourteenth Amendment frequently
requires this Court to rein in the forces of democratic politics, this Court can legitimately
lay claim to compliance with its directives only if the public understands the Court to be
implementing principles . . . founded in the law rather than in the proclivities of

10 One of the most notable examples of this philosophy is embodied by Justice Holmes during the Court’s
Lochner era. Justice Sandra Day O’Connor described Holmes’s philosophy in this way: “[H]is
disagreement with his colleagues was not based on any concern for the health of bakers, or for the ability of
women to earn a decent wage, or for the rights of workers to join unions. . . . Holmes’s point was a
different one: it was not that the law was properly aimed, but that the state had the power to pass the law
regardless of its aim.” Sandra Day O’Connor, The Majesty of the Law 104 (2003). In other words, Justice
Holmes recognized that, although the Court may prefer a certain policy, policy choices should be left to the
state legislatures. His viewpoint advocated deference over judicial assertiveness. Decades later, Chief
Justice Rehnquist warned against the judicial prerogative to “feel that the sky is the limit when it comes to
imposing . . . solutions to national problems on the popularly elected branches of the government and on
Relying on the strong language in *Brown* and the long record of general discrimination lawsuits, education activists in pursuit of fiscal equality filed an important post-*Brown* federal lawsuit in the Western District of Virginia in 1968.11 Relying on state constitutional language that required the General Assembly to “establish and maintain an efficient system of public free schools throughout the state,”12 the lawsuit sought to strike down a Virginia statute which provided for the uniform distribution of educational funds.13 A representative group of parents and children from Bath County, Virginia, claimed that the statute created and perpetuated “substantial disparities in the educational opportunities available in the different counties and cities of the State” and was thus “repugnant to the equal protection clause of the Fourteenth Amendment” and failed to meet the mandate set forth by the Virginia Constitution.14

The decision in *Burruss* deeply disappointed those inspired by the soaring pro-equality language of *Brown*. A three-judge panel found15 that the plaintiffs’ goal to provide students with the same educational opportunities throughout Virginia was “a

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12 VA. CONST. art. I, § 15, cl. 2. In its Bill of Rights, Virginia’s Constitution declares that “free government rests, as does all progress, upon the broadest possible diffusion of knowledge, and that the Commonwealth should avail itself of those talents which nature has sown so liberally among its people by assuring the opportunity for their fullest development by an effective system of education throughout the Commonwealth.” Additionally, Article VIII is devoted entirely to Virginia’s educational system.


14 *Id.*

15 The three-judge panel consisted of two judges from the Western District of Virginia and one judge from the Fourth Circuit, Albert V. Bryan. Though this structure is no longer utilized today, these district court panels presented a clear advantage to the litigants: The parties had an appeal by right directly to the Supreme Court. Because the Supreme Court heard these cases on appeal, rather than by petition for writ of certiorari, the Justices would simply “summarily affirm” those decisions that did not need to be overturned.
worthy aim, commendable beyond measure.”16 However, the panel ultimately determined that the courts had “neither the knowledge, nor the means, nor the power to tailor the public moneys to fit the varying needs of these students throughout the State.”17

Following closely on the heels of Burruss was a similar case, McInnis v. Shapiro,18 a suit on behalf of public school students in Cook County, Illinois. The gravamen of the Illinois challenge was that state statutes controlling educational disbursements violated equal protection and due process. The statutory regime in question guaranteed a baseline allocation to each school district of $400 per pupil, but allowed each locality, if it so desired, to supplement the minimum $400 assurance through local taxation.19 The claim (naturally) was that the statute was constitutionally infirm because it allowed for wide variations in available education funding between districts.20 The proposed remedy: To allow each district to set its own tax rate, but require the State to capture and redistribute any amount above the $400 baseline minimum.21

The McInnis panel22 began its review by noting the basic point in the American structure of government, namely that “the allocation of public revenues is a basic policy

16Burruss, 310 F. Supp. at 574.
17Id. See also Shepheard v. Godwin, 280 F. Supp. 869, 872 (E.D. Va. 1968) (holding that federal funds would no longer be counted against local school districts in determining uniform state apportionment).
19Id. at 330.
20Id. at 328-29.
21Id.
22Like Burruss, McInnis was decided by a three-judge panel. Judge Hastings, from the Seventh Circuit, sat with judges from the Eastern District of Illinois.
decision more appropriately handled by a legislature than a court.”

With this bedrock principle in mind, the court proceeded with a “reasonableness” standard of review and found that under governing Supreme Court standards, the Illinois statute was neither arbitrary nor invidiously discriminatory. In upholding the statute, the court relied on tried-and-true principles of local choice and local control, noting that “even the plaintiffs concede the virtue of decentralization.” The court explained that the Illinois General Assembly delegated authority to local school districts in order to “allow individual localities to determine their own tax burden according to the importance which they place on public schools.” The value of local control was bolstered by the happy fact that the legislature was “constantly upgrading the quality of education” and already provided for some degree of equalization through the baseline minimum.

This was the easy part. The *McInnis* panel went on to confess that no discoverable and manageable standards existed by which the court could determine the constitutionality of the statute. In other words, the controversy was non-justiciable. It was not for the courts to decide. The court reasoned that “local autonomy in education … indicates the impracticability of a single, simple formula.” It concluded this way: “[E]ven if there were some guidelines available to the judiciary, the courts simply cannot provide the empirical research and consultation necessary for intelligent educational

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23 *McInnis*, 293 F. Supp. at 332.

24 *Id.* at 333, n.20.

25 *Id.* at 333.

26 *Id.* at 334.

27 *McInnis*, 293 F. Supp. at 335-37.

28 *Id.* at 336.
The intractable problem, in short, was the institutional incapacity of the judiciary to tackle such issues.

It is important to note that the panel decision was rendered after substantial briefing. Several very prominent organizations weighed in with amicus briefs on behalf of the challengers. The losers went on to the Supreme Court, which unanimously affirmed the holding, wholly confirming the lower court’s deference to the Illinois state legislature. The basic message was this: No constitutional requirement mandates uniform per-pupil expenditures under the Fourteenth Amendment’s Equal Protection Clause.

Both decisions trumpeted separation of powers principles and, at least in the absence of blatant invidious discrimination, deferred to the state legislature. The ruling (by summary affirmance) suggested the Supreme Court’s unwillingness “to go beyond the historically narrow application of the race relations” in education reform.

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29 Id.

30 Id. at 329, n.3 (noting that the “following five organizations filed a brief in support of the complaint as amici curiae: American Jewish Congress, League of Women Voters of Illinois, South Suburban Human Relations Council, National Association of Social Workers, and Inter-Community Programs, Inc.”).


32 Id. at 335-36.


34 Id. at 540.
These early adventures are instructive of the broader judicial culture, which I am suggesting is a tradition of humility.\textsuperscript{35} It is a tradition born in response to the now-universally condemned exercises of judicial power in the much-maligned “\textit{Lochner} era.”\textsuperscript{36} \textit{Lochner} is milk fed to babes in the constitutional woods, and of course stands familiarly for the era in which the robust exercise of judicial power gave rise to the great dissents first of Harlan (the first) and then of Holmes, joined none too soon by Brandeis.\textsuperscript{37} The \textit{Lochner} Era stands as a rather ugly period in American law, when judges were riding roughshod over considered judgments of the States and, famously, of the early New Deal initiatives of FDR.\textsuperscript{38} That muscular judicial approach is now seen as

\begin{footnotesize}
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\item This tradition of humility finds an eloquent spokesperson in Judge Learned Hand. The universally admired Second Circuit jurist recognized that a judge’s “chief obligation [is] to be a disinterested interpreter of other men’s wills. He was to remain detached, not merely from immediate partisanship, but also from any ultimate passion for reform. Such abstinence he regarded as the only condition upon which appointed judges could be properly tolerated in a democracy.” Charles E. Wyzanski, Jr., “Introduction,” in Learned Hand, \textit{The Bill of Rights}, vi (1965).
\item The Supreme Court’s “\textit{Lochner} era” represented a period of time where the Court routinely struck down state statutes that violated of newly-discovered individual rights. For example, in \textit{Lochner}, the Court struck down a New York statute that limited the number of hours that bakers could work each week. The Court justified its decision on the grounds that limiting the number of hours that bakers could work interfered with a worker’s substantive due process right to freely enter into labor contracts. \textit{Lochner v. New York}, 198 U.S. 45 (1905). In \textit{Bailey v. Alabama}, the Court held that Alabama’s statute criminalizing an employee’s breach of an employment contract was an impermissible form of slavery under the Thirteenth Amendment. 219 U.S. 219 (1911). Later, in \textit{Meyer v. Nebraska}, the Court found it unconstitutional for Nebraska to prohibit teaching any language other than English. 262 U.S. 390 (1923). O’Connor, supra note 10 at 104-05.
\item Justice Holmes’s most famous dissent from the \textit{Lochner} era was in \textit{Lochner} itself. There, Justice Holmes decried the majority’s decision as being incorrectly decided upon an economic theory which a large part of the country does not entertain . . . But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of \textit{laissez faire}. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States. \textit{Lochner}, 198 U.S. at 75-76 (Holmes, J., dissenting).
\item The Court’s consistent leveling of legislative schemes was not limited to individual States. President Franklin Delano Roosevelt initially found the Supreme Court very hostile to his New Deal legislation. In
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profundely misguided and deeply anti-democratic. The gung-ho Justices of yesteryear are now sharply condemned, especially in law schools, for having displaced thoughtful, or, at any event, democratic judgments of the Progressive Era.

C

We return, briefly, to the fount: Brown v. Board of Education. As Michael Heise has aptly observed, Brown “helped animate a movement towards pressing courts into the service of litigated reform.” Brown, however, at bottom expressed a bedrock principle of limited transferability. Building upon a considerable body of existing precedent, and reforms at the national level, the Supreme Court articulated a powerful vision of legal equality. That is, schoolchildren could not be singled out for disparately

1934, the Court struck down its first piece of New Deal legislation in Home Bldg. & Loan Assoc. v. Blaisdell, 290 U.S. 398 (1934). From 1935-1936 the Court invalidated over a dozen of FDR’s New Deal enactments. It was not until FDR’s maligned court-packing scheme and the “stitch in time that saved nine” did the Court begin to defer to the President and the Congress. Stephen K. Shaw, “Introduction,” in Franklin D. Roosevelt and the Transformation of the Supreme Court 1-10, Stephen K. Shaw, William D. Pederson & Frank J. Williams, eds. (2004).

39 Although FDR was widely criticized for his court-packing scheme (FDR wanted to add a new member to the Supreme Court for every existing member of the Court that did not retire by the age of seventy), the Court’s decision-making from 1905 to 1937 has been just as widely criticized by legal scholars. According to some scholars, Lochner would probably win the prize, if there were one, for the most widely reviled decision of the last hundred years. Lochner does have capable defenders who make arguments that must be taken seriously [and] Lochner would have some competition for the prize. . . . But judged by some rough-and-ready indicators--Would you ever cite this case in a Supreme Court brief, except to identify it with your opponents' position? If a judicial nominee avowed support for this case in a Senate confirmation hearing, would that immediately put an end to her chances?--Lochner is one of the great anti-precedents of the twentieth century. You have to reject Lochner if you want to be in the mainstream of American constitutional law today.


42 Brown, 347 U.S. at 493 (stating that “education is perhaps the most important function of state and local governments. . . . 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”).
unfavorable treatment on the basis of race.\textsuperscript{43} The contrary rule -- that of de jure segregation -- embodied an enormous evil, depriving individuals of basic human dignity. Little children -- and their parents -- were summarily dispatched to (at times inconvenient) schools arranged on the basis of apartheid. Community and neighborhood lines would be ignored. Topeka illustrated the point, as black schoolchildren were sent to schools far away from hearth and home. And this apartheid regime was for no good effect. It was racism pure and simple. The de jure system had nothing whatever to redeem it, such as “local control” or “decentralized decision-making authority” and the like.

Could Brown's logic, though, be expanded to include a broader, more expansive vision of equality? The early returns suggested not, as we saw in the prior section. The coup de grace -- at the federal level -- came in the Edgewood School District case.\textsuperscript{44} In
\textit{San Antonio Independent School District v. Rodriguez},\textsuperscript{45} the Court first rejected the concept of wealth as a suspect class,\textsuperscript{46} a claim that would have triggered the likely doomsday standard of strict scrutiny. Few governmental programs have successfully run the “strict scrutiny” gauntlet, and indeed various Justices have expressed concern over time about such extraordinarily powerful standards that tear asunder democratically

\textsuperscript{43} Id. at 495.

\textsuperscript{44} The Texas Supreme Court has visited the issue of “equal opportunity for education” four times since 1989. See Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 392 (Tex. 1989). “After the first three Edgewood cases, the Texas Legislature responded with a reformed finance system.” J. Steven Farr & Mark Tractenberg, “The Edgewood Drama: An Epic Quest for Education Equity,” 17 YALE L. & POL’Y REV. 607, 607-09 (1999). However, Texas’s quest for education equality was not limited to journey between its courthouse and capitol building. The impetus for the flurry of litigation in Texas was the United States Supreme Court’s landmark decision, \textit{San Antonio Independent School District v. Rodriguez} 411 U.S. 1 (1973).


\textsuperscript{46} Id. at 17-25.
chosen mechanisms.\textsuperscript{47} In rejecting each of the challengers’ claims in the \textit{Edgewood} case, the Court brought down the curtain on the Equal Protection Clause’s role as a powerful engine of social change.

III

Some state courts, to be sure, have adopted remedies that trigger first-principles type debates over separation of powers, the nature and extent of judicial power, and the displacement of local control.\textsuperscript{48} But two episodes from the federal experience counsel caution in this panoramic visit to Remedies Land.

A

\textit{First}, and most concretely, is the uneasy implementation of \textit{Brown} itself. That story, oft told, is a rather unhappy chapter in American social (and legal) history. Desegregation efforts languished, year after year, eventuating in increasingly far-reaching remedies generously authorized in a sweeping (and unanimous) Supreme Court decision in the \textit{Charlotte-Mecklenburg} case.\textsuperscript{49} Writing for the entire Court, then-Chief Justice Burger lifted up a vision of the wise, discerning local district judge, close to the scene,

\textsuperscript{47} For example, Justice Marshall has noted that “the failure of legislative action to survive strict scrutiny has led some to wonder whether our review of racial classifications has been strict in theory, but fatal in fact.” \textit{Fullilove v. Klutznick}, 448 U.S. 448, 519 (1980) (Marshall, J., concurring); see also Gunther, The Supreme Court, 1971 Term-- Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 HARV.L.REV. 1, 8 (1972).

\textsuperscript{48} Perhaps the most sweeping decision was the California Supreme Court’s ruling in \textit{Serrano v. Priest}, 487 P.2d 1241 (Cal. 1971). \textit{Serrano} is the counter-point to \textit{Rodriguez}: It categorized wealth as a suspect class, it determined that education is a fundamental right, and it examined California’s statutory regime under the strict scrutiny standard. Not surprisingly, \textit{Serrano} held that the challenged statutory scheme violated the Equal Protection Clause. The \textit{Serrano} decision had an immediate, far-reaching impact. It brought education finance under the umbrella of equal educational opportunity and it sparked unprecedented reform of state education funding in several states. Wood, \textit{supra} note 33 at 546.

who would know best what to do.\textsuperscript{50} Count on your local district judge to exercise sound judicial discretion, the Court told the country, in fashioning the right remedy. Desegregation must be achieved, \textit{Brown} and its progeny demanded, and the wise “Chancellor sitting in equity” would measure and craft the appropriate response fitted to the exigencies of the particular community in question.\textsuperscript{51} And thus \textit{Swann} ushered in nationwide programs of forced busing, with vigorous debates (scholarly and otherwise) raging across the country as to the wisdom and efficacy of such regimes.\textsuperscript{52} Fairly viewed from our more distant vantage point in 2005, federal judges were simply seeking, as they saw best, to fulfill this heavy duty as passed down by the High Court. But the storm of criticism directed at socially disruptive remedies was powerful, even spawning violence in major cities.\textsuperscript{53} As time went on, the public school systems in major metropolitan

\textsuperscript{50} \textit{Id.} at 22 (“In devising remedies where legally imposed segregation has been established, it is the responsibility of local authorities and district courts to see to it that future school construction and abandonment are not used and do not serve to perpetuate or re-establish the dual system. When necessary, district courts should retain jurisdiction to assure that these responsibilities are carried out.”).

\textsuperscript{51} \textit{Id.} at 15.


\textsuperscript{53} \textit{See} Michael J. Kalarman, \textit{From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality} 442, 468 (stating that “[w]ithout \textit{Brown}, negotiation might have continued to produce gradual change without inciting white violence,” and that \textit{Brown} led to unnecessary violence by “inspir[ing] southern whites to try to destroy the NAACP”).

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efforts fell badly into disarray and disrepair.\textsuperscript{54} Families, by the thousands, left the system.\textsuperscript{55}

The judicial denouement came in Kansas City.\textsuperscript{56} There, a district judge famously determined that more was better than less, and in the course of a long-lived desegregation effort mandated a tax increase to finance a very bold plan to remediate the schools of Kansas City (and otherwise make them more attractive to families that had long since fled the inner city system).\textsuperscript{57} \textit{Missouri v. Jenkins} was the Supreme Court’s yellow light, bringing a strong note of caution to bear in the arena of federal remediation of unconstitutional conditions.

In the meanwhile, and \textit{secondly}, came school choice. The better part of educational valor, it seemed, was to grant exit visas to students caught up in under performing school districts.\textsuperscript{58} The issue was now, of course, not judicial power \textit{per se}, but whether the political branches’ decision to employ educational capacity found in religiously-affiliated schools would run afoul of the Supreme Courts’ wildly controversial (and frustratingly inconsistent) Establishment Clause jurisprudence.\textsuperscript{59} \textit{Zelman} answered the question authoritatively, albeit by a 5-4 margin, but the constitutionality of school


\textsuperscript{58} \textit{Zelman}, 536 U.S. at 662-663 (holding that Cleveland’s school-choice and voucher system was a sound remedy for the failings of the public education system even though parents could use the vouchers to attend religiously-affiliated schools).

\textsuperscript{59} \textit{Id.} at 643-44.
choice (in terms of the federal Constitution) is now settled.\textsuperscript{60} The Rehnquist Court (now a matter of history) was at peace with school choice, and no reason for instability of that precedent is suggested by the arrival of the new Chief Justice (himself, coincidentally, a product of religiously-affiliated schools).\textsuperscript{61}

But the more relevant story within the story of school choice was the reluctance, along the way, of federal judicial authorities to intervene in an aggressive fashion in the public school system itself. When the presiding judge in the Cleveland desegregation case eventually threw up his hands in frustration over the lamentable condition of Cleveland schools, the judicial response was to place the entire city school system in receivership -- but in the hands of the state superintendent of education.\textsuperscript{62} Drawing a lesson once again from judicial experience, logic having its Holmesian limits, the federal district judge sent Cleveland's school system to the state capital for management and direction. Accountability principles loomed large in the selection of the remedy, with school choice having emerged as an important (if limited) policy response to the scandal of public education in Ohio's largest city.

\textsuperscript{60} \textit{Id.} at 662-63 (stating that “the Ohio program is entirely neutral with respect to religion. It provides benefits directly to a wide spectrum of individuals, defined only by financial need and residence in a particular school district. It permits such individuals to exercise genuine choice among options public and private, secular and religious. . . . In keeping with an unbroken line of decisions rejecting challenges to similar programs, we hold that the program does not offend the Establishment Clause”).


\textsuperscript{62} On March 3, 1995, District Judge Thomas I. Atkins entered an order that directed “the State Board of Education, by and through its Superintendent of Public Instruction, to assume and exercise the authority and responsibility invested in it by the Ohio Constitution, its duly-enacted statutes, and the Court's various desegregation orders and consent decrees. . . .” That order was upheld in February 1996. \textit{Reed v. Rhodes}, 934 F. Supp. 1485, 1486 (N.D. Ohio 1996).
So too the Swann era itself was destined to end. The conclusion came in the Oklahoma City school case, *Board of Education of Oklahoma City v. Dowell.*\(^{63}\) Overturning the decision of the federal court of appeals in Denver, the Supreme Court brought an end to federal supervision of local school districts under the rubric of desegregation remedial efforts.\(^{64}\) Enough was enough, the High Court said, even though Oklahoma City's public schools remained racially identifiable. But local authority and control was seen as an overridingly important value, especially since the labors toward dismantling the prior de jure system had been long, arduous and systematic.\(^{65}\) Racial identifiability, from aught that appeared, resulted not from state action, but from demographics beyond (at least direct) state control.\(^{66}\) As the decades of school desegregation efforts were coming to a close, the idea of permanent judicial receivership was seen as in severe tension with basic principles of self-governance and democratic theory.

### IV

The articulation of separation of powers concerns has not been limited to voices within American courthouses. In the field of education litigation, scholars are increasingly attentive to broader questions regarding the judiciary’s role in school finance.

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\(^{64}\) *Id.* at 250-51.

\(^{65}\) *Id.* at 248 (stating that it is proper for a court to dissolve “a desegregation decree after the local authorities have operated in compliance with it for a reasonable period of time”).

\(^{66}\) *Id.* at 250, n. 2 (noting that “present residential segregation in Oklahoma City was the result of private decisionmaking and economics, and that it was too attenuated to be a vestige of former school segregation”).
reform (and in our democratic system more generally). Commentators fall comfortably on both sides of the debate, with some suggesting that it is entirely appropriate for the courts to take an active role as overseer of important parts of community life, whereas others embrace a cautious approach by reason of traditional separation of powers principles.

Notably, commentators supporting a more muscular judicial power emphasize that the courts are struggling to shirk their traditional limits under separation of powers principles. For example, one commentator notes that “it is likely that courts will always be reluctant to engage in specific judicial prescription as a remedy to education finance distribution problems because courts are bound to respect the separation of powers.”

Interestingly, the suggestion that “courts are poor tools for school finance reform” is then countered with an admonition to plaintiffs not to forsake litigation-based remedies, noting that the “power of the courts should never be underestimated; if it were not for litigation, it is absolutely certain that less progress toward fundamental fairness in the financing of public elementary and secondary education would exist today.”

On the other side are voices of caution. Michael Heise has suggested one example, namely that the Wyoming Supreme Court’s decision in Campbell County School District v. Wyoming provided the impetus for legislative policy reform that


69 Wood, supra note 33 at 562.

70 Id. at 563.
might otherwise not have taken place.\textsuperscript{72} Though some may rejoice in such a policy victory, Heise notes that \textit{Campbell} may have been the “unfortunate legalization of an issue” that may have benefited “from further legislative activity.”\textsuperscript{73} Heise raises the possibility that the “judicial excursion” by the court into such territory “risks upsetting the precarious and delicate system of checks and balances between and among Wyoming’s legislative, executive, and judicial branches.”\textsuperscript{74}

Indeed, separation of powers will likely be of paramount concern as this field of litigation evolves. The structure of education systems and allocation of resources have historically been an issue exclusively reserved for the legislature (or its delegates).\textsuperscript{75} There are sound, familiar reasons supporting this traditional designation. The fundamental importance of honoring the democratic process is too obvious to require extended comment. Suffice it to say that the people are given their strongest voice when they can petition their local representatives, instead of seeking redress from a relatively remote court system.

Local control looms large as a factor in public education.\textsuperscript{76} Allowing sweeping judicial mandates to control an historically local \textit{legislative} issue should disturb even the most enthusiastic activist-reformer. Such a result not only blurs separation of powers but also (as to the federal judiciary) raises issues of federalism. That is, sweeping judicial

\textsuperscript{71} \textit{Campbell County Sch. Dist. v. Wyoming}, 907 P.2d 1238 (Wyo. 1995).
\textsuperscript{72} Heise, \textit{supra} note 67 at 281.
\textsuperscript{73} \textit{Id}.
\textsuperscript{74} \textit{Id}.
\textsuperscript{76} See generally \textit{Zelman}, 536 U.S. at 639; \textit{Reed}, 934 F. Supp. at 1485; Blanchard, \textit{supra} note 75.
mandates can operate as the perverse offspring of an otherwise noble delineation of power. In that respect, the lack of judicially manageable standards remains a serious, abiding concern.

Even those courts and commentators purporting to have established manageable standards often find themselves observing horribly protracted litigation. with dissatisfied plaintiffs continually appealing to the court as their means of first redress.77 Judicial expertise is obviously limited in the field of educational reform. To state the Breyeresque obvious: the judiciary deals with a wide range of issues and has neither the time, institutional capacity, or the resources to become fully equipped to formulate, implement, and then manage a system that would ensure “adequate” education.78 Indeed, even when such a task is delegated to a legislative body, the judiciary may well lack the needed resources to oversee effective implementation.

V

Consider also the ramifications of judicially mandated reform. Professor Heise suggests that courts may not be the most appropriate vessel for education reform, noting that “[i]ndependent of important theoretical and normative questions surrounding the courts’ role in helping to achieve reform or social change, equally important empirical questions lurk regarding whether courts can be effectively deployed in such a manner.”79

The use of judicial mandates is nothing new: As the courts shift from equity-based remedies to adequacy-based measures, we see a new wave of education litigation

77 Heise, supra note 41 at 2447 (finding that “[s]imilar to school desegregation litigation, the school finance litigation effort has encountered numerous difficulties”).


79 Heise, supra note 41 at 2447.
beginning to form. Some scholars have praised the resurgence in education and public law litigation noting that this movement directly resulted from a change in judicial remedies: it is suggested that “[p]ublic litigants now shy away from ‘command-and-control’ injunctive judicial regulation and favor more ‘experimental’ judicial intervention.”

Even if true, this response does not alleviate the concern that even such “experimental” remedies may have unintended and far-reaching consequences on policy making. As plaintiffs shift from challenging school finance schemes to attacking achievement gaps (as indicators of unequal educational opportunity), a new array of complex variables come into play. Adding to the inherent complexity (and manageability), these variables “are located deeper inside schools and classrooms, and, as such, further away from the reach of lawsuits and court decisions.” As a result, “[t]o an even greater degree than for school desegregation or finance, courts and lawsuits seem ill-equipped to shoulder the task.”

While many anticipate that this embryonic litigation strategy will fully develop in due course, others have noted that with respect to already completed adequacy lawsuits, “the issue of equity and adequacy among schools continues to be elusive – even after court-ordered changes.” This leaves little promise that the lawsuits of tomorrow will prove effective vehicles for education reform.

80 Id. at 2450.
81 Id. at 2447-48, 2450.
82 Id at 2456.
83 Joe Agron, “Raising the Bar,” American School and University 6 (June 2005).
A story from The Big Apple tells the relevant tale. The New York City Education Department has been unable to meet a court order that mandated billions of dollars in additional aid for the public schools.\(^\text{84}\) This is an example of a direct clash between lofty judicial ideals and the flinty realities legislatures face in trying to sustain judicial demands and yet balance competing budget concerns. Indeed, such a result is common, as legislatures are often unable to meet judicially-mandated goals, leading to repeat litigation attempts by education reformers.\(^\text{85}\)

Another example comes from faraway Idaho.\(^\text{86}\) After the state supreme court ruled the Potato State’s educational finance system unconstitutional, the apparently miffed legislature reacted by passing a law that authorized judges to impose unlimited property taxes to repair dangerous school facilities.\(^\text{87}\) Though it reacted idiosyncratically, the legislature conceivably may have viewed this as its only available course.\(^\text{88}\)

Though advocates of education-reform-through-litigation praise recent court decisions and proclaim victories, the overwhelming evidence of repeat appeals and follow-up lawsuits suggests that this protracted and complex litigation has not been an unalloyed success.\(^\text{89}\) Such a result highlights not only the complex problem of judicially manageable educational standards, but also emphasizes the challenge of the judiciary’s


\(^{87}\) Kennedy, *supra* note 85 at 23

\(^{88}\) *Id.*

\(^{89}\) For example, Molly Hunter of the Advocacy Center for Children’s Educational Success with Standards (ACCESS) has stated that plaintiffs have won 20 of the 26 advocacy cases. However, “school finance litigation has occurred in 45 states, and lawsuits are still pending in approximately 22 states.” Michael D. Simpson, “The Right to An ‘Adequate’ Education,” *NEA Today* 23 (May 2005).
fully addressing the complicated problems inherent in education reform. Indeed, a
review of the decisions strongly suggests that such reform is appropriately left to a better
informed governmental body – the legislature.

Notably, other courts have been more cautious in dealing with adequacy lawsuits.
These courts have recognized the limitations on the court system and the traditional role
the legislature plays in education reform. For example, while the Kansas Supreme Court
ruled that the state school funding system was unconstitutional, the Jayhawk tribunal
refused to order the State to appropriate a specific sum to cure the violation.90 So too
Montana. That state supreme court has left the determination of an appropriate remedy
wholly in the legislature’s discretion.91

Other courts have flatly rejected the notion that the judiciary can police legislative
activity in the area of school reform. Adequacy lawsuits have recently been dismissed in
Arizona92 and Nebraska93 on pre-trial motions. In Arizona, the court expressly declined
to interfere with the legislature’s right to define what constitutes an adequate education.94

91 Columbia Falls Elementary Sch. Dist. No. 6 v. Montana, 109 P.3d 257 (Mont. 2005) (holding that while
the instant case presented a justiciable issue instead of a non-justiciable political question, the court would
defeer to the state legislature to provide appropriate standards).
decision to dismiss complaint on the grounds that as a matter of law no claim was stated under the Arizona
Constitution).
93 Gould v. Orr, 506 N.W.2d 349 (Neb. 1993) (affirming lower court’s dismissal that the petition failed to
state a cause of action under the State Constitution of Nebraska, but allowing plaintiffs leave to amend the
complaint).
94 David Hoff, Adequacy Arguments Help Give Momentum to School Aid Lawsuits, 24 EDUCATION 1 (Dec.
8, 2004).
CONCLUSION

The enduring lesson is the one taught by Holmes and Hand: Litigation has its limits, or at least should be seen as a rather uncertain method for achieving desired social goals. That, as Holmes would say, is the lesson of experience. Humility, at the end of the day, is the most admirable judicial response to invitations to judges to embark upon education-related adventures.