SILENT TODAY, CONVERSANT TOMORROW:
EDUCATION ADEQUACY AS
A POLITICAL QUESTION

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ABSTRACT—When the Supreme Court declined to recognize the right to education as one fundamental to liberty, and thus unprotected by the U.S. Constitution, state courts took on the mantle as the next best fora for those yearning for judicial review of inequities present in American public schools. The explicit inclusion of the right to education in each state’s constitution carried the torch of optimism into the late twentieth century. Despite half a century of litigation in the states, the condition of the nation’s public school system remains troubling and perhaps increasingly falls short of expectations. Less competitive on an international level, producing historic declines in knowledge, and exhibiting growing gaps between high- and low-performing students, public schools are crying out for help.

But in some states, these cries go largely ignored. Legislators overpromise and underdeliver, while some judges throw their hands up in deliberate defeat, excusing themselves of the judicial duty of interpreting their state’s constitution. Why? To state courts, the very nature of this litigation is a “political question.” This Note examines different approaches that state courts employ in education adequacy litigation, endorses the active participation model as the “best approach,” and uses the recent case William Penn School District v. Pennsylvania Department of Education as a lesson to showcase the internal absurdity underlying state judges’ use of the political question doctrine in this area. In evaluating how state courts use this device or reject it entirely, this Note argues against the propriety of the political question doctrine and points out the doubly offensive nature of its inconsistent use.

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INTRODUCTION

After a long day of kindergarten at Chicago’s Grissom Elementary, Valentin Quintero’s son comes home and spends the rest of his evening studying. Such discipline might suggest the dedication of an academic virtuoso. Yet, the Quinteros celebrate little over the young child’s study habits. Why? The six-year-old is simply trying to learn material that his teacher could not cover in class. This is because Quintero’s kindergarten class has around forty students and only one teacher.¹ The combination of overcrowded public school classrooms and the dearth of classroom assistants

make in-class learning virtually impossible.\footnote{2} Valentin calls the situation a safety and health issue.\footnote{3} Worse still, Grissom is only one of the many Chicago Public Schools suffering from this exact problem.\footnote{4}

Over in Florida, Governor Ron DeSantis tweets about academic achievement in Florida public schools, which remained open during the COVID-19 pandemic.\footnote{5} He boasts that Florida’s “4th grade students are #1 in both Reading and Math” in the National Assessment of Educational Progress’s annual evaluation.\footnote{6} In doing so, DeSantis ignores the bigger picture—Florida’s eighth graders produced results far worse than its fourth graders.\footnote{7} The same study indicates an alarming trend in which Florida’s students become less competitive nationally as they move up through the grades, having higher rankings as fourth graders than as eighth graders. Furthermore, the future of the state’s education system remains in limbo in the wake of its legislature passing House Bill 1. This bill will enable Florida students to take their public school funding to any school of their choosing.\footnote{8} Some call this legislation “an $8,000 gift card to the millionaires and billionaires,” while others see it as a competitive means to improve education outcomes.\footnote{9} Parents already share concerns about teacher shortages in Florida schools, and former school board members fear this bill may deplete money from the public schools that are struggling the most.\footnote{10}


\footnote{3} Kunichoff, supra note 1. Indicators of this safety and health concern involve “kindergartens with more than 40 students, or children whose asthma attacks have gone unnoticed in packed classrooms.” \textit{Id.}


\footnote{6} Townsend, supra note 5.

\footnote{7} Townsend, supra note 5.


\footnote{10} Collins, supra note 8.
These two vignettes reflect a stark reality about school funding and the quality of public education in the United States. The American public school system is no longer a paragon of academic achievement. Despite being one of the most well-educated countries in the world, American students have fallen below the global average in test scores and ranked toward the bottom of industrialized countries in their math skills for decades. Because of this puzzling situation, many scholars have demanded change in the American public school system. Sociological studies and policy briefs have “essentially settled” the strong association between increased funding for schools and improved academic performance.

Hopeful parents and teachers have not been shy in bringing lawsuits against states for this exact condition for the current condition of public education—all but three states have had active litigation in this area. These litigants base their challenges on the supreme law of the state, pointing to the education clauses of their respective state constitutions. Many states guarantee an “adequate education” under their state constitutions, thus grounding legal challenges to states’ school funding schemes in their constitutional inadequacy.

Unfortunately, this litigation has been largely ineffective. Sure, “adequacy litigation” that focuses on removing specific obstacles to high-quality public education may facilitate a process of adversarial reform, leading to increased state spending on education or improved educational performance. But much of the existing analyses provide strategies around education litigation without addressing the preliminary question of whether


14 Adequacy litigation, rather than focusing on equal resources or funding, seeks to address the many manifestations of a failing education system, whether that be poor student performance, unqualified educators, or conditions of school facilities. Martin R. West & Paul E. Peterson, The Adequacy Lawsuit: A Critical Appraisal, in SCHOOL MONEY TRIALS: THE LEGAL PURSUIT OF EDUCATIONAL ADEQUACY 1, 2 (Martin R. West & Paul E. Peterson eds., 2007).
a court would even be willing to engage in judicial review of this issue. If a state court determines that educational adequacy is a “political question”—and they frequently have—then it will dismiss the suit as nonjusticiable.\(^\text{15}\) This makes state courts unavailable for redress. If courtroom doors will not even open, where are the litigants to go? The students in Illinois and Florida face this exact problem.

Fortunately, the problem is not always permanent. In Pennsylvania, President Judge Renée Cohn Jubelirer swung open courtroom doors that had been closed for twenty-five years. In *William Penn School District v. Pennsylvania Department of Education (William Penn II)*, the Pennsylvania Supreme Court found that the adequacy of Pennsylvania children’s education was no longer a political question.\(^\text{16}\) *William Penn IV*, a case decided in the Pennsylvania Commonwealth Court, clarified that the state’s school funding scheme denying Pennsylvanian students their constitutional right to an adequate education was a justiciable issue.\(^\text{17}\) President Judge Cohn Jubelirer finally gave the funding scheme a label it had not been assigned for years: unconstitutional.

A robust discussion of justiciability is noticeably sparse in discussions about adequacy litigation.\(^\text{18}\) The threshold question of whether a case is justiciable is incredibly important and determinative of whether a plaintiff’s rights may be vindicated. This Note aims to fill a gap in legal scholarship by utilizing *William Penn II* and *IV* as lessons in why state courts ought not to use the political question doctrine. Observing that the political question doctrine is a federally rooted justiciability tool, lacking the same doctrinal underpinnings and necessity in state courts, this Note encourages state courts to abandon this doctrine. State courts should question the political question doctrine’s legitimacy in the realm of education adequacy litigation given the adverse consequential realities of its misuse highlighted in this Note.

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\(^{15}\) See [SCHOOLFUNDING.INFO](http://SCHOOLFUNDING.INFO), supra note 13 (documenting the fifteen states that have recognized the right to education as protected by the state constitution but do not believe it is legally enforceable).

\(^{16}\) 170 A.3d 414, 457 (Pa. 2017).


This Note is divided into four Parts. Part I provides a brief historical overview of education litigation in the United States and how the development of constitutional litigation has been shaped as adequacy litigation in state courts. Part I also discusses the right to education, what it entails, and the promise of reform inherent to adequacy litigation. Part II outlines the political question doctrine. It catalogs critiques and commentary on the doctrine and its usage in adequacy litigation. Part III then explores how one Pennsylvania court came to change its mind on what was or was not justiciable in adequacy litigation and argues that this shift in thought was the proper course of action. Part IV concludes by providing grounds for which other states should conform to Pennsylvania’s model. By following Pennsylvania’s lead, states can fulfill their judicial obligations to ensure the integrity of all American students’ right to education.

I. MUCH ADO ABOUT A LOT: EDUCATION LITIGATION IN THE UNITED STATES

Education, despite being deemed “the most important function of state and local governments” by the Supreme Court, is largely unprotected by the federal Constitution.\(^\text{19}\) Still, all fifty states recognize the right to education in their constitutions.\(^\text{20}\) This Part charts the history of education litigation as it began in the federal courts. It notes how the Supreme Court’s decision in *San Antonio Independent School District v. Rodriguez* left the protection of educational rights largely to the states. It then chronicles the development of litigation seeking to enforce “adequate education” clauses in state constitutions. After examining how “adequacy litigation” came to be, this Part then considers the nature of the right to education in the states and the variance among different state constitutions. This discussion sets the foundation for Part II of this Note, which introduces the political question doctrine, its foundations, and its use by state judges in adequacy litigation.

A. From Equity to Adequacy:

*Development of State Constitutional Litigation*

A significant part of reform and education improvement strategy has revolved, and continues to revolve, around education litigation based on state constitutional guarantees.\(^\text{21}\) Almost all states have engaged in rigorous


\(^{20}\) See Heise, *supra* note 18, at 635 n.5.

\(^{21}\) Although federal initiatives such as the No Child Left Behind Act and efforts to address special educational needs have increased federal funding for education, the Supreme Court’s decision in *San Antonio Independent School District v. Rodriguez* has relegated judicial review of school funding to
debates about what state education systems should entail, how to best realize state educational aspirations, and how well the current systems have performed.\footnote{Forty-seven states’ highest courts have heard constitutional challenges to state education funding. See Scott R. Bauries, Is There an Elephant in the Room?: Judicial Review of Educational Adequacy and the Separation of Powers in State Constitutions, 61 Ala. L. Rev. 701, 718 (2010); Advisory Comm’n on Intergovernmental Rel., A-113, State Constitutions in the Federal System: Selected Issues and Opportunities for State Initiatives 111–13 (1989); https://library.unt.edu/gpo/acir/Reports/policy/a-113.pdf (describing how state constitutional guarantees have been used by the school finance reform movement).} Some impetus for reform followed federal legislation, namely No Child Left Behind, “which greatly enlarged the federal role in education policy and substantially increased federal funding of education.”\footnote{See id. at 600 (identifying the first wave of school finance cases, “last[ing] from the late 1960s until [ ] 1973”). Some scholars consider Brown v. Board of Education to be a school finance case. 347 U.S. 483 (1954). See, e.g., Scott R. Bauries, State Constitutions and Individual Rights: Conceptual Convergence in School Finance Litigation, 18 Geo. Mason L. Rev. 301, 326 (2011) (“In many ways, Brown v. Board of Education was a school finance case.”).} But given the unique provisions of education clauses in state constitutions, litigation on the federal level may pose inefficiencies in evaluating constitutional guarantees or administering appropriate remedies.

Scholars tend to divide developments in education litigation into three waves.\footnote{Thro, supra note 18, at 600–01; Michael Heise, Litigated Learning and the Limits of Law, 57 Vand. L. Rev. 2417, 2436 (2004) (claiming Brown “stimulat[ed] a sustained effort . . . to deploy the courts to help insure greater equal educational opportunity by supplying a necessary precedential foundation upon which successive efforts rest”); see, e.g., Parker v. Mandel, 344 F. Supp. 1068, 1069 (D. Md. 1972) (seeking a declaratory judgment that the Maryland system of financing public school education violated the Equal Protection Clause of the Fourteenth Amendment); Serrano v. Priest, 487 P.2d 1241, 1244 (Cal. 1971) (accepting the plaintiffs’ claims that the California public school financing system violated the Equal Protection Clause); McInnis v. Shapiro, 293 F. Supp. 327, 329 (N.D. Ill. 1968) (denying allegations of equal protection violations).} The first wave began in the 1960s when advocates began to litigate effectively for better public education; during this wave, courts started entertaining school finance cases.\footnote{Thro, supra note 21, at 718.} This litigation initially envisioned “better” education in terms of equality: the right to equal per-pupil expenditures across school districts. The Equal Protection Clause of the federal Constitution served as a textual predicate, riding the coattails of the progress achieved by school desegregation efforts.\footnote{Thro, supra note 18, at 600–03 (characterizing each of the first, second, and third waves of school finance cases).} There was a comfortable logic behind assuming that closing resource gaps between low- and high-spending school districts would sufficiently address the former’s inadequate...
services and performance levels. However, the Supreme Court’s 1973 decision in *Rodriguez* “foreclosed the use of the Federal Constitution” as a source of federal judicial engagement with school funding disparities and ended the first wave. *Rodriguez* left the states to determine the future of education after deeming Texas’s scheme for “public school finance . . . an inappropriate candidate for strict judicial scrutiny.” The Court, by applying rational basis review to funding differentials, felt that the local control of school district spending via the school-district-level taxes met the deferential test.

With the fervor for a federal right to education doused by the Supreme Court, litigants took to state courts instead for the second wave of education litigation: the wave of state-based equality litigation. Diverting education suits from a federal to a state forum resulted in state judges inevitably grappling with questions of public policy. Disappointingly, these suits were largely unsuccessful. Lack of success cut short the second wave of education litigation. Notably, the realization that “gaps in educational spending between urban and nonurban districts were not the key problem” also cut the second wave short.

Presently, education litigation—in its third wave—centers adequacy over equality as its primary goal. This wave, and the current litigation

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27 Referred to as “equality suits” by Professor William Thro, “[these] equality suits were premised on the belief that more money meant a better education and on a lack of tolerance for any difference in money or opportunities.” Thro, * supra* note 18, at 601.

28 *Id.*


30 *Rodriguez*, 411 U.S. at 44 (“Texas’ system of public school finance . . . bears some rational relationship to a legitimate state purpose.”).

31 *See* Thro, * supra* note 18, at 601–03.

32 *See* Heise, * supra* note 18, at 636. Before this period, “most state courts declined requests by litigants to translate . . . education clauses into specific educational policies or spending mandates” on grounds that these vague provisions were better left to legislatures to develop. *Id.*

33 *See* Thro, * supra* note 18, at 603 (detailing several different classes of education cases, “the overwhelming majority of which resulted in victories for the state”).

34 Heise, * supra* note 18, at 648. In fact, the implications were often that “major urban school systems benefitted from spending levels that exceed state averages”; as such, advocates feared equality litigation would result in these schools potentially losing resources if successful. *Id.*

35 Thro, * supra* note 18, at 609. A Kentucky Supreme Court decision marked the start of the third wave. *See* Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 215 (Ky. 1989) (finding education was a “basic, fundamental constitutional right” and Kentucky’s system of common schools was unconstitutional). The Court cited Kentucky’s constitution as creating “an absolute duty” on Kentucky’s legislature to meet this provision. *Id.* Rose resulted in somewhat of a domino effect, with the predominant
strategy, is termed “adequacy litigation.” Measures of adequacy refer to a broad range of factors that may contribute to a positive learning environment and improved academic achievement. Inadequate education may manifest in many forms: “rundown school buildings,” “large numbers of uncertified teachers,” or “abysmal and unequal student performance.” Research shows adequacy litigation works. Data on national student achievement shows that adequacy litigation has increased spending in school districts and that schools have used those funds in turn to enact reforms, such as more investment in instruction quality and reduced class size. These “[r]eforms increased the absolute and relative achievement of students in low-income districts.”

36 West & Peterson, supra note 14, at 2. This, of course, is not to forget the impossibility of divorcing the dynamics and limitations of school finance reform from race. The school finance reform movement through litigation necessarily owes credit to school desegregation litigation. Often, these movements seek to improve education for poor, minority students. Heise, supra note 26, at 2444.

37 Cf. Laurie Reynolds, Uniformity of Taxation and the Preservation of Local Control in School Finance Reform, 40 U.C. DAVIS L. REV. 1835, 1844 (2007) (providing a contrary account of the viability of education litigation). But see generally GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (2008) (contending that courts alone almost never effectively produce political or social change); West & Peterson, supra note 14, at 3–4 (viewing adequacy litigation as ultimately “unlikely to make educational opportunities more adequate or more equitable, and . . . [a threat to] the separation of powers within state governments”).

38 Julien LaFortune, Jesse Rothstein & Diane Whitmore Schanzenbach, School Finance Reform and the Distribution of Student Achievement, 10 AM. ECON. J.: APPLIED ECON. 1, 23 (2018); see also Susanna Loeb, Continued Support for Improving the Lowest-Performing Schools, BROOKINGS (Feb. 9, 2017) https://www.brookings.edu/articles/continued-support-for-improving-the-lowest-performing-schools/ [https://perma.cc/QX6D-4DGE] (identifying promising results of school improvement where there is “strategic staff replacement and substantial funding”).

Nevertheless, scholars have been keen to hypothesize the inconsistent results and shortcomings of adequacy litigation across the nation. This decisional variance among states suggests that, despite marginal wins, the shift to adequacy litigation has not fully addressed the problems of educational access and quality. The next Section examines the nature of the right to education in the states and how scholars have considered the formulation of this right to influence adequacy litigation.

B. A Human Right Denied: The Right to Education in the States

The United Nations Education, Scientific, and Cultural Organization (UNESCO) calls the right to education a “basic human right” which can “level inequalities and ensure sustainable development.” However, defining the right to education, important as it is, can be puzzling. One might naturally begin by following Justice Elena Kagan. “We’re all textualists now,” Justice Kagan boldly claimed in 2015, only to recant herself seven years later. Because all fifty states guarantee a right to education in their constitutions, a textualist assessment of state constitutions would presumably produce a right to education in nearly every state. However, despite the presumptive belief that constitutional language matters, empirical studies suggest there exists no clear relationship between the strength of a state constitution’s education clause and case outcomes. This Section proceeds by examining the general contents of state constitutional education clauses and what these rights might entail.

I. What State Constitutions Promise: Textualism and Its “Commitments”

Much constitutional argument on the language of the applicable education clauses begins with assessing their text. In one noted attempt to explain the range of obligations that state constitutions impose on states to improve urban public schools, Professor Gershon Ratner observed that state

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42 Kevin Tobia, We’re Not All Textualists Now, 78 N.Y.U. ANN. SURV. AM. L. 243, 244 (2023).

43 See Heise, supra note 18, at 635 n.5.

44 Bauries, supra note 21, at 714; see also Swenson, supra note 18, at 1175 (noting that states with the weakest education clauses struck down a greater percentage of school finance schemes than those with the strongest clauses); Yohance C. Edwards & Jennifer Ahern, Note, Unequal Treatment in State Supreme Courts: Minority and City Schools in Education Finance Reform Litigation, 79 N.Y.U. L. REV. 326, 349–50 (2004) (failing to find a relationship between education clause language and case outcomes).
education clauses generally fall into four categories of varying textual specificity and obligation. While “[a]ll four categories impose duties on the state to provide some form of public education,” successfully fulfilling duties in each category might result in greater expectations in some compared to others. Understanding the far ends of the constitutional commitment spectrum can help contextualize what guarantees are embedded within certain state constitutions. Category I’s hortatory commitment to education requires only the existence of a free public school system; this group, consequently, has the laxest constitutional commitment to the right to education. For example, Mississippi is a Category I state, with its right to education contained in the provision that its legislature “shall, by general law, provide for the establishment, maintenance and support of free public schools upon such conditions and limitations as the Legislature may prescribe.” Based on this type of language, courts in Category I states should reasonably be more lenient or less robust in determining what courts are duty-bound to require from the state when evaluating adequacy.

Category IV’s obligatory commitment is the most stringent; these clauses tend to characterize education as a “paramount duty,” which could theoretically suggest importance over any other public services provided by the state. These state constitutions contain a qualitative element against which citizens might reasonably form expectations of what a public school system might deliver. An example of a Category IV state is Florida, with its public education clause elevating public education to the status of “a fundamental value of the people of the State of Florida.” The clause further provides that it is, therefore, a “paramount duty of the state to make adequate provision for the education of all children residing within its borders.” Compared to Category I states, Category IV states would presumably

45 Ratner, supra note 18, at 815. Throughout this piece, I have referred to states along the lines of Professor Ratner’s categorizations with the small exception of states which have amended their constitutions since the publication of Professor Ratner’s original article. For those states, I have updated the categorizations based on the criteria that Professor Ratner utilized in his article to perform the original categorizations.

46 Id. at 816.

47 Id. at 815, 821–22.

48 See Miss. Const. art. 8, § 201; see also Conn. Const. art. VIII, § 1 (“There shall always be free public elementary and secondary schools in the state.”).

49 Ratner, supra note 18, at 816 (quoting Wash. Const. art. IX, § 1).

50 See, e.g., Ill. Const. art. X, § 1 (“The State shall provide for an efficient system of high quality public educational institutions and services.”) (emphasis added); Wash. Const. art. IX, § 1 (“It is a paramount duty of the state to make ample provision for the education of all children residing within its borders . . . .” (emphasis added)).

51 See Fla. Const. art. IX, § 1.
understand the right to education as quality controlled with state judges possessing a greater duty to protect the bounds of adequacy.

Category II and III’s commitments fall on a spectrum between these two ends. 52 Montana, a Category II state, mandates in its constitution that “[e]quality of educational opportunity is guaranteed to each person of the state.” 53 Thus, “[t]he legislature shall provide a basic system of free quality public elementary and secondary schools.” 54 Similarly, Indiana’s constitution—with a Category III clause—acknowledges that “[k]nowledge and learning, generally diffused through a community . . . [are] essential to the preservation of a [g]overnment.” 55 Therefore, it is “the duty of the General Assembly to encourage . . . and to provide, by law, for a general and uniform system of Common Schools, wherein tuition shall be without charge, and equally open to all.” 56 Some Category II and III state constitutions contain qualitative language similar to that found in Category IV constitutions that elaborates on what the right to education includes, which would seem crucial to outcomes of adequacy litigation. 57

Recognizing these varying textual provisions, Ratner emphasizes the importance of state supreme courts: the “ultimate arbiters” of state education clauses. 58 State judges determine the potential these provisions may hold. Assuming state judges adhere to principled textual interpretation, Category IV states should be expected to strike down more school funding schemes as unconstitutional or at least apply greater scrutiny to them by virtue of a more rigorous constitutional duty.

To some extent, state courts have enforced the textual guarantees of their constitutions. For example, Washington, a Category IV state, declared its school finance system unconstitutional in 1978. 59 The suit, Seattle School District No. 1 v. State, marked the beginning of “modern education funding” in the state. 60 The school districts had failed to raise enough funding to

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53 See MONT. CONST. art. X, § 1.
54 See id.
55 See IND. CONST. art. VIII, § 1.
56 Id.
57 See, e.g., DEL. CONST. art. X, § 1 (providing that the system of free public schools shall be “general and efficient”); KY. CONST. § 183 (including “efficient” as the qualitative element); TEX. CONST. art. VII, § 1 (same).
58 Ratner, supra note 18, at 816.
reliably operate, causing the Washington Supreme Court to rule that the existing funding system was neither dependable nor regular.\textsuperscript{61} The state supreme court found that the excessive delegation by the state legislature to local communities\textsuperscript{62} was an unacceptable violation of the “jural correlative”\textsuperscript{63} flowing from the constitutionally imposed “paramount duty” to education.\textsuperscript{64}

Yet even within the same category of education clause, an examination of adequacy litigation exhibits no concrete indication that stronger constitutional language results in greater protections for education rights. In the late twentieth century, twenty-one state supreme courts reviewed the constitutionality of their school finance schemes under equal protection and “thorough and efficient” (Category II) grounds.\textsuperscript{65} The courts were “evenly divided in their responses” in striking down or upholding the schemes.\textsuperscript{66} Currently, of the forty-seven states that have heard education adequacy cases, fifteen have refused to recognize the existence of a constitutionally protected right to education.\textsuperscript{67} Six of these states have Category IV clauses, containing clauses that purport education to be the “paramount duty of the state” or that the state “shall provide for an efficient system of high quality public educational institutions and services.”\textsuperscript{68} Therefore, what state constitutions may literally or textually promise is not necessarily what courts agree must be delivered. This complicates the expectations of citizens who face the realities of an educational promise that they believe is being underdelivered.

2. \textit{The “United States” of Deference and Uniformity in Education Rights}

Because the initial wave of education litigation was based on the federal Constitution, there exists some conception that the right to education in the states has somewhat of a common origin.\textsuperscript{69} This tends to inform what the

\textsuperscript{61} Seattle Sch. Dist. No. 1, 585 P.2d at 77–78, 98.
\textsuperscript{62} For example, delegation of legislature authority to local institutions, such as boards of education or school districts, shifts policymaking responsibilities such as regulating, funding, and enforcing education policies away from the state. Id. at 97–99.
\textsuperscript{63} “Jural correlative” refers to the Hohfeldian conception of the right conferred to state citizens vis-à-vis the constitutional duty articulated in the education clauses. Id. at 91 & n.11. Here, the constitutional language of Washington’s constitution makes it the paramount duty of the \textit{state} to “make ample provision for the education of all children.” WASH. CONST. art. IX, § 1. Delegation to another entity would deprive the right-holding citizens of Washington of their constitutional guarantee to education.
\textsuperscript{64} Seattle Sch. Dist. No. 1, 585 P.2d at 91–92.
\textsuperscript{65} ADVISORY COMM’N ON INTERGOVERNMENTAL RELS., supra note 21, at 112.
\textsuperscript{66} Id.
\textsuperscript{67} SCHOOLFUNDING.INFO, supra note 13.
\textsuperscript{68} See FLA. CONST. art. IX, § 1; ILL. CONST. art. X, § 1; ME. CONST. art. VIII, § 1; MICH. CONST. art. VIII, §§ 1–2; MO. CONST. art. IX, § 1(a); GA. CONST. art. VIII, § I, para. I.
\textsuperscript{69} See supra Section I.A.
right to education entails. Therefore, state judges often use principles of deference and uniformity to find meaning in an inchoate right such as the one to education.\textsuperscript{70} In many adequacy litigation cases, judges assign importance to the constitutional language of education provisions for purposes of deference and uniformity. Sister states have their eyes on each other. State judges “put considerable effort into comparing their state constitution’s education clause to [those] of other states, and in consulting the constitutional interpretations of sister state high courts.”\textsuperscript{71}

Reference to other state court decisions may evidence an attempt to create some uniformity among states that share similar constitutional terms beyond purposes of persuasive precedent. In particular, state courts appear to place value on the common circumstances surrounding the drafting of the education clauses and potentially shared goals of states with similar education clauses to elucidate the educational duties promised in their own constitutions.\textsuperscript{72} Notably, the Delaware Court of Chancery appears well attuned to the discussions of the professors above.\textsuperscript{73} The Delaware court characterized its own clause as a Category II provision and looked to the decisions of other Category II states.\textsuperscript{74} Referring to each Category II state’s education clause and case law, the court then developed qualitative standards and defined its constitutional duty.\textsuperscript{75} Therefore, in practice, how other states interpret their education clause’s language seems to matter beyond the instant case they litigate. Some states, against backdrops of burgeoning adequacy litigation movements and in attempts to address the nebulous nature of their education clauses that led to unsuccessful education litigation, have added more determinative language to their constitutional text.\textsuperscript{76} Perhaps this legislative remedy assumes that moving toward Category IV clauses will facilitate improving education systems and replicate the decisions of states with more rigorous language.


\textsuperscript{71} Swenson, \textit{supra} note 18, at 1175; Pauley v. Kelly, 255 S.E.2d 859, 864 (W. Va. 1979) (finding a New Jersey case relevant to West Virginia’s constitutional duties regarding education); Horton v. Meskill, 376 A.2d 359, 373 (Conn. 1977) (referring to New Jersey and California decisions to conclude that education is a basic right in Connecticut).

\textsuperscript{72} Swenson, \textit{supra} note 18, at 1157.

\textsuperscript{73} See Delawareans for Educ. Opportunity, 199 A.3d at 156.

\textsuperscript{74} Id. at 173 & nn.338–341.

\textsuperscript{75} Id. at 174–75.

\textsuperscript{76} Scott R. Bauries, \textit{State Constitutional Design and Education Reform: Process Specification in Louisiana}, 40 \textit{J.L. & EDUC} 1, 32 (2011) (describing Oregon’s amendment to its state education clause as an example of such remedial behavior).
The distribution of states that do not recognize a constitutionally protected right to education is equal across Categories I–IV.\textsuperscript{77} Interestingly, having a stronger constitutional provision correlates negatively with recognizing a constitutionally protected right to education; almost 80% of states recognizing a constitutionally protected right to education are Category I or II states.\textsuperscript{78} Upon analyzing patterns of states’ behaviors in upholding or striking down funding schemes and recognition of the constitutional rights to education, the language of education provisions in state constitutions may not warrant as intense a focus as it currently does. Constitutional language of education clauses alone is not clearly a determinative force in adequacy litigation’s outcome. This factor’s modest or incidental impact should strike disappointment, if not concern; the cornerstone legal provision on which state courts rely appears to “ha[ve] no fixed meaning outside of the context of the case at hand.”\textsuperscript{79} This suggests that the deference that sister states grant each other may be mistaken.

So, it appears the right to education can neither be clearly grasped as parallel to its textual guarantee and goals of uniformity gravitate around an arbitrary measure of adequacy. Such a concerning reality only worsens when introducing the political question doctrine into the equation. The next Part grapples with the concept of justiciability and the political question doctrine while placing it within the context of adequacy litigation.

II. THE POLITICAL QUESTION DOCTRINE: JUDICIAL HUMILITY OR COWARDICE?

Courts simply do not answer all questions presented to them. Justiciability is the crucial vehicle through which courts evaluate their roles and obligations as well as respect the separation of powers.\textsuperscript{80} It is a mechanism that “determines whether, when, and by whom important public questions can be adjudicated,” and thus provides tools that allow courts to

\textsuperscript{77} See infra Appendix.

\textsuperscript{78} The Pearson product–moment correlation coefficient value between recognizing a constitutional right to education and the strength of the state’s education clause is –0.3254. See infra Appendix; SCHOOLFUNDING.INFO, supra note 13. Notable, however, is the respective educational rankings of these states. Most of the Category I and II states are in the lower performing half of states while all but one of the Category III and IV states are in the upper performing half of states. State Grades on Chance for Success: 2021 Map and Rankings, EDUC. WEEK (Jan. 19, 2021), https://www.edweek.org/policy-politics/state-grades-on-chance-for-success-2021-map-and-rankings/2021/01 [https://perma.cc/CG7S-YZG2].

\textsuperscript{79} Swenson, supra note 18, at 1174–75.

\textsuperscript{80} “Article III courts . . . do not provide advisory opinions, do not resolve generalized complaints of taxpayers, do not decide moot disputes, and do not hear political questions.” Helen Hershkoff, State Courts and the “Passive Virtues”: Rethinking the Judicial Function, 114 HARV. L. REV. 1833, 1835 (2001).
manage and define their judicial obligations. Referring to some of the justiciability tools as “passive virtues,” Professor Alexander Bickel heralded a philosophy of judicial restraint and contemplated such an approach as the solution to the “countermajoritarian difficulty.”

In the landscape of adequacy litigation, the most prominent of the justiciability concerns is the political question doctrine. The political question doctrine “postulates that there exist certain issues of constitutional law that are more effectively resolved by the political branches of government and are therefore inappropriate for judicial resolution.” Yet scholars part ways regarding the legitimacy of the political question doctrine. Some believe it properly affords courts a measure of restraint and that there is a proper place for it in both federal and state judicial systems. Others believe the political question doctrine may serve as a pretext for unwarranted abstention—as an act of self-interested preservation to avoid political backlash.

Because justiciability doctrines shape judicial practice in light of normative concerns as well as institutional assumptions, their manifestations naturally differ among states in broad manners. States have the discretion to structure their branches of government as they see fit.

Federal courts apply techniques or invoke principles to determine the bounds of justiciability primarily through the doctrines of standing, mootness, ripeness, political question, and refusal of advisory opinions. Professor Bickel explicitly refers to “standing,” the “case and controversy” requirement, “ripeness,” and the “political question” doctrine. Alexander M. Bickel, Foreword: The Passive Virtues, 75 Harv. L. Rev. 40, 42 (1961); see also Sandeep C. Ramesh, Alexander Bickel, FREE SPEECH CTR. AT MIDDLE TENN. STATE UNIV. (Feb. 18, 2024), https://www.mtsu.edu/first-amendment/article/1285/alexander-bickel [https://perma.cc/45X4-P53N] (defining the countermajoritarian difficulty as the “paradox of the democratically unaccountable few (the Supreme Court justices) overriding the democratically elected many (Congress, proxy to the American people)”).


Redish, supra note 83, at 1033 (positing that the political question doctrine “should play no role whatsoever in the exercise of the judicial review power”).

Hershkoff, supra note 80, at 1840. See, e.g., id. at 1860–61, 1866–67 (describing Virginia courts’ willingness to decide questions of municipal boundaries, which are federally nonjusticiable, and Indiana courts’ choice to resolve issues that federal courts would consider moot).

Swenson, supra note 18, at 1179. Furthermore, Swenson’s study provides evidence to support the idea that “judicial activism . . . is related to the views of the community that is served by the particular court.” Id.
A. Justiciability and Education Clauses: Put Up or Shut Up

States have a split approach to whether they deem issues of adequate education funding justiciable. While most state supreme courts find no justiciability concerns in hearing challenges to their state constitution’s education clause, others are puzzled by or unwilling to take on the task of defining adequacy.\textsuperscript{88} Such states find this task difficult, impossible, or simply inappropriate.\textsuperscript{89} Many invoke the political question doctrine to avoid the definitional task.\textsuperscript{90} When the political question doctrine enters the adequacy litigation dialogue, the conversation effectively ends for unhappy parents, students, and teachers.

Justiciability appears as a checkpoint at two phases of judicial review in education adequacy cases, posing important questions implicating the judicial role of the instant court. The first checkpoint asks whether the court has a role in evaluating an education funding scheme pursuant to a constitutional provision.\textsuperscript{91} The second inquires, after evaluation of the scheme, whether the court has any role in determining the remedy.\textsuperscript{92} This Section explores the approaches state courts tend to take when presented with these cases at the first step of the inquiry: assessing education funding schemes. Where the justiciability inquiries result in courts’ silence, presumably the legislature will figure out the problem in the future, even if it has not in the past. But this has not proven true. It is difficult to avoid the

\textsuperscript{88} See Gannon v. State, 390 P.3d 461, 475 (Kan. 2017) (finding that the legislature’s compliance with its constitutional duty to provide public education was a justiciable issue). But see DeSantis v. Fla. Educ. Ass’n, 306 So. 3d 1202, 1216 (Fla. Dist. Ct. App. 2020) (denying relief on the grounds that plaintiffs’ complaint presented a nonjusticiable political question).

\textsuperscript{89} See, e.g., DeSantis, 306 So. 3d at 1215 (declining to grant relief where no “judicially discoverable or manageable standards” existed); Campaign for Quality Educ. v. State, 209 Cal. Rptr. 3d 888, 892 (Cal. Ct. App. 2016) (finding that the “difficult and policy-laden question” of educational adequacy belonged to the legislature); King v. State, 818 N.W.2d 1, 18 (Iowa 2012) (explaining that the question of educational adequacy involved policy determinations not suitable for courts); Bonner ex rel. Bonner v. Daniels, 907 N.E.2d 516, 522 (Ind. 2009) (concluding that the state constitution delegated the determination of educational adequacy to the legislature); Ex parte James, 836 So. 2d 813, 819 (Ala. 2002) (holding that any effective judicial remedy would necessarily involve a “usurpation of that power entrusted exclusively to the Legislature”).

\textsuperscript{90} See Ex parte James, 836 So. 2d at 836, 854–55; see also Neb. Coal. for Educ. Equity & Adequacy v. Heineman, 731 N.W.2d 164, 181 (Neb. 2007) (“We could not hold that the Legislature’s expenditures were inadequate without invading the legislative branch’s exclusive realm of authority.”); Comm. for Educ. Rts. v. Edgar, 672 N.E.2d 1178, 1193 (Ill. 1996) (“We conclude that the question of whether the educational institutions and services in Illinois are ‘high quality’ is outside the sphere of the judicial function.”).

\textsuperscript{91} Michael Heise, Preliminary Thoughts on the Virtues of Passive Dialogue, 34 AKRON L. REV. 73, 97 (2000).

\textsuperscript{92} Id. at 97–98 (characterizing the willingness, and lack thereof, of state courts to engage in adjudicatory resolutions as a dichotomy between “active judicial participation” and “passive judicial participation”).
reality that this phenomenon might be seen as abdicating adjudicatory responsibility and assigning a resolution of the education problem to a legislature that has failed to fix the problem.

Illustrative of such abdication is the approach of the Florida Supreme Court. Like many state supreme courts, the Florida Supreme Court used the political question doctrine to shunt educational-adequacy issues back to the legislature.

Florida’s public school system, funded by a 1973 legislative program called the Florida Education Finance Program, ranks in the ten states with the lowest spending and funding per student for schools nationwide. And as explored at the beginning of this Note, students perform worse as they progress through the Florida public school system. Understandably, concerned citizens brought suit in 2022, alleging that the current public school system was constitutionally insufficient.

In Citizens for Strong Schools, Inc. v. Florida State Board of Education, the Florida Supreme Court relied on Baker v. Carr as a justification to apply the political question doctrine. Baker v. Carr lists several factors for courts to use in determining whether an issue is properly justiciable or legislative in character:

[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; [2] or a lack of judicially discoverable and manageable standards for resolving it; [3] or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; [4] or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; [5] or an unusual need for unquestioning adherence to a political decision already made; [6] or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

To the Florida Supreme Court, it was the “enormous discretion” vested in the legislature “to determine what provision to make for an adequate and uniform system of free public schools” that made it inappropriate for the courts to insert themselves into this dialogue. Notably, the court deferred to the legislature’s “enormous discretion” in the face of a state constitution that

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94 Townsend, supra note 5.

95 Citizens for Strong Schs., Inc. v. Fla. State Bd. of Educ., 262 So. 3d 127, 137 (Fla. 2019).


97 Citizens for Strong Schs., 262 So. 3d at 137.
considers the right to education a “fundamental value” and a “paramount
duty of the state.”\textsuperscript{98} Moreover, the Florida Supreme Court did not seem to mind that the
petitioners—public school students, parents, and citizen organizations—
sought a declaration that the Florida legislature was breaching its
constitutional duties. Specifically, the petitioners had demanded that the
State Board of Education and the Florida House of Representatives establish
remedial plans complemented with remedial studies to determine what
“resources and standards [would be] necessary to provide a high quality
education to Florida students.”\textsuperscript{99} The Florida Supreme Court, despite these
arguments, left litigants with no effective solution for a prolonged
constitutional violation by mischaracterizing the task at hand. The petitioners
did not seek a judicial articulation of adequacy; rather, they sought a
recognition of the current lack of compliance with constitutional standards.\textsuperscript{100} To send concerned parents and students back to the doorsteps of the exact
institution that failed to provide them with a funding scheme that meets the
state’s constitutional promises is a sore reality that Florida courts currently
perpetuate.

In contrast, the Minnesota Supreme Court recognizes that the mere
evaluation of a school funding scheme is neither a political question nor a
separation of powers concern.\textsuperscript{101} The 2018 case \textit{Cruz-Guzman v. State}
involved a challenge closely mirroring the Florida dispute discussed above.
Parents of students in public schools sought a class action against the state’s
Department of Education and legislature for practices that allegedly caused
inadequate educational outcomes.\textsuperscript{102} Despite the Minnesota Court of Appeals
having deemed the matter nonjusticiable on the basis of the political question
doctrine, the Minnesota Supreme Court had an additional concern.\textsuperscript{103} It
declined to view the state constitution’s assignment to the legislature to
establish a constitutionally compliant school system as the end of the
inquiry.\textsuperscript{104} At the heart of the legal dispute was “a yes or no question—
whether the Legislature has violated its constitutional duty to provide ‘a
general and uniform system of public schools’ that is ‘thorough and
efficient.’”\textsuperscript{105} By acknowledging that this was the central question, which did

\begin{itemize}
\item \textsuperscript{98} \textit{FLA. CONST.} art. IX, § 1.
\item \textsuperscript{99} \textit{Citizens for Strong Schs.}, 262 So. 3d at 130.
\item \textsuperscript{100} \textit{Id.}
\item \textsuperscript{101} \textit{Cruz-Guzman v. State}, 916 N.W.2d 1, 9 (Minn. 2018) (“Providing a remedy for Education Clause violations does not necessarily require the judiciary to exercise the powers of the Legislature.”).
\item \textsuperscript{102} \textit{Id.} at 5–6.
\item \textsuperscript{103} \textit{Id.}
\item \textsuperscript{104} \textit{Id.} at 6, 9.
\item \textsuperscript{105} \textit{Id.} at 9 (quoting \textit{MINN. CONST.} art. XIII, § 1).
\end{itemize}
not require courts “to devise particular education policies to remedy constitutional violations,” the Minnesota Supreme Court could comfortably “conclude that the courts are the appropriate domain for [determinations that the legislature violated its constitutional duty].”\textsuperscript{106}

Since \textit{Cruz-Guzman}, the Minnesota State Legislature has passed a “sweeping education bill” that increases public spending for schools by nearly $2.3 billion.\textsuperscript{107} Under the revised per-pupil formula for distribution, funding will increase by 6.8% per student.\textsuperscript{108} As of 2022, Minnesota has improved its position and now ranks in the top 50% of states for K–12 school spending, funding, and performance, ranking much higher than Florida.\textsuperscript{109} Comparing these two situations, it is evident just how important finding adequacy litigation to be justiciable is to ensuring constitutional guarantees.

As seen in Florida and Minnesota, different justiciability approaches—whether or not to dignify the merits of a given dispute—can lead to starkly different results for litigants. When states invoke federal doctrines of justiciability, they abstain from engaging in a larger dialogue that attempts to resolve issues of inequality. Abstention, however, maintains a problematic status quo.\textsuperscript{110} When state courts embrace education issues as justiciable, they accept the incidental responsibilities of “policy formation, government accountability, and social participation in the passionate issues of the day.”\textsuperscript{111} When they do not, the courts place upon the legislatures the burden of self-correcting without the acknowledgment that there is a problem. This is wishful thinking. It should trouble all state judiciaries if adequacy litigation still seeks to achieve the same goals it has sought for almost eighty years.

Having discussed the importance of overcoming the first justiciability hurdle in adequacy litigation, the next Section explores the approaches state

\textsuperscript{106} Id. (emphasis added).


\textsuperscript{108} Id.; \textit{Per Pupil Spending by State}, WISEVOTER, https://wisevoter.com/state-rankings/per-pupil-spending-by-state [https://perma.cc/KN8B-GV37] (ranking Minnesota’s per-pupil spending at twentieth in the country); see also \textit{NATION’S REPORT CARD}, https://www.nationsreportcard.gov/ [https://perma.cc/TF8W-UQNX] (hover over “Data Tools” in the header; then click “State Profiles”; then select “Minnesota” from the dropdown; then click “Summary Statements”) (showing an improvement in mathematics and science in fourth and eighth grade from 2015 to 2022 relative to other states).


\textsuperscript{110} See, \textit{e.g.}, Redish, supra note 83, at 1050 (“If the judiciary declines to resolve sensitive constitutional disputes, the nation is effectively left in a constitutional state of nature, in which the constitutional position that prevails is the one that is the politically or physically most powerful.”).

\textsuperscript{111} Hershkoff, supra note 80, at 1839.
courts tend to take at the second step of the justiciability inquiry: whether the court has a role in determining the remedy for educational inadequacy.

**B. Competing Models of Judicial Participation**

At the second checkpoint of the justiciability analysis, remedy definition, judicial participation in adequacy litigation among the states largely divides into two models: the active model and the passive model. Professor Michael Heise argues that the two competing models inform what form of judicial participation is proper.\(^{112}\) The active model resembles the one endorsed by former Acting Solicitor General Neal Katyal, in which courts “engage actively in the larger public constitutional dialogue principally by dispensing nonbinding advice to political branches through a variety of mechanisms.”\(^ {113}\) On the other hand, the passive model aligns with Professor Cass Sunstein’s “decisional minimalism,” which desires “doing and saying as little as necessary to justify an outcome.”\(^{114}\)

The active and passive descriptors refer to the demanding nature of oversight that courts may engage in upon declaring a school funding scheme unconstitutional. There exists a deep divergence among the states regarding which model of judicial participation they adopt, partly because education clauses in state constitutions are not usually considered self-executing.\(^{115}\) When an education clause is not self-executing, in contrast to the “usually automatic remedy for violation of negative rights such as freedom of speech—invalidation of the offending law or action—enforcement of positive rights entails policy formulation normally associated with the legislative and executive branches.”\(^ {116}\) Thus, an active court might continue to find school funding schemes in adequacy litigation as “inadequate” until the legislature finally complies with its constitutional duty. A passive court might consider its first determination of whether a given scheme is constitutionally adequate as its final say, holding future parties seeking to challenge the same scheme as collaterally estopped or given the same justification as the initial matter. It is also possible that an active court might appoint a special master to suggest an adequate funding scheme or order

\(^{112}\) See generally Heise, *supra* note 91 (describing the two forms of judicial participation).


\(^{116}\) Id. at 188.
specific increases in spending. Such parallel activity would not be expected from a passive court.

New Jersey epitomizes Professor Heise’s “active judicial participation” model. In the latter half of the twentieth century, the New Jersey Supreme Court engaged thoroughly in challenges to its state school funding schemes. Not only did the court determine that it possessed the ability to interpret the education clause to demand “equal educational opportunity,” but it also engaged in a three-year battle with the legislature, demanding a “finance system that would pass constitutional muster.”117 The New Jersey court, somewhat prophetically, warned a potentially recalcitrant legislature that subpar implementation of the remedy would lead to their reunion in the courtroom.118 Occasionally, active-model courts enact remedies so aggressive as to impose contempt sanctions against legislatures, “[o]rder[,] the sale of State property to fund constitutional compliance,” or “[i]nvalidat[e] education funds cuts to the [state] budget.”119 Some may view this as illustrative of judicial usurpation that separation of powers principles seek to prevent.

On the other hand, Massachusetts “exemplifies the passive model.”120 The Massachusetts Supreme Judicial Court, around the same time as the New Jersey court, proceeded past the first hurdle of justiciability, finding that the state’s education clause established an enforceable duty to educate which had not been satisfied.121 Rather than pressing on the remedy, as did the New Jersey court, the court chose to defer to the legislature’s judgment for resolution.122 Although this is not an explicit invocation of the political question doctrine, it does reflect the underlying concerns of what the state court’s proper judicial role should be in line with the political question doctrine. One might view Massachusetts’s position as the highest-achieving state public school system as an indicator of the benefits of the passive

117 Heise, supra note 91, at 100–01. The New Jersey legislature eventually enacted the Public School Education Act. Id. at 101.
120 Heise, supra note 91, at 103.
122 Id. at 555.
model. In invoking the separation of powers intuition of Marbury v. Madison, the Massachusetts Supreme Judicial Court “[l]eft it to the magistrates and the Legislatures to define the precise nature of the task which they face in fulfilling their constitutional duty to educate our children today, and in the future.”

However, Massachusetts’s academic success might actually counter this contention. In McDuffy v. Secretary of the Executive Office of Education, the court’s remedy merely served as a judicial expression of public norms. Massachusetts has a deeply rooted tradition of investing in education, evincing this institution as a high priority; therefore, the Massachusetts populace might be more likely to enact school funding schemes that satisfy constitutional guarantees. However, not all states may experience success after passive remedies from their courts. The McDuffy court noted, albeit in a footnote, that other states choose to leave the task of determining precise remedies to their legislative and administrative bodies. For states that continue to face challenges to the adequacy of their state funding schemes, the passive model may be an unwise allocation of risk.

C. Follow the Yellow Brick Road: Why Kansas’s Model Proves Superior

Recognizing the gravity presented by chronically inadequate funding schemes, this Note—in a risk-averse spirit—endorses the active participation model. When weighing the potential of a judicial–legislative standoff against the possibility that the judiciary will roll over for the legislature, the former should seem more favorable. Active participation more closely aligns with the judicial obligations vested in state courts: to conduct judicial review and evaluate the constitutionality of challenged legislative schemes. Of course, it is possible that one might believe that a legislature’s inaction is a reflection of the populace’s preference—that the current educational approach is not qualitatively out of line with its constitutional guarantees. Yet the recurrence

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124 McDuffy, 615 N.E.2d at 550 (indicating the court’s caution in its statement that it has a duty to adjudicate “[w]ithout in any way attempting to invade the rightful province of the Legislature to conduct its own business” and citing that such responsibility “is of the very essence of judicial duty” (quoting Colo v. Treasurer & Receiver Gen., 615 N.E.2d 516, 550 (Mass. 1993))).

125 Id. at 555.


127 McDuffy, 615 N.E.2d at 554 n.92.
of suits challenging the constitutionality of school funding schemes suggests this is not the case.

Perhaps the most instructive example is the more modern replay of the New Jersey model in Kansas. In Kansas, the state supreme court refused to back down from an extended showdown with its legislature that repeatedly failed to enact legislation in compliance with the Kansas constitution. Over the course of seven different iterations of *Gannon v. State*,\(^\text{128}\) the Kansas state court proved to its citizenry that it had learned its lessons of “mistakenly assum[ing]” the best of the legislature’s ability to follow the school financing plan that it had found constitutional.\(^\text{129}\) However, *Gannon* was merely a continuation of an earlier battle from which the Kansas Supreme Court learned an important lesson the hard way: the legislature would not reliably self-correct.

Kansas courts rigorously reviewed the state’s education funding plan in a series of cases called *Montoy v. State*.\(^\text{130}\) In *Montoy I*, students and school districts sued the Kansas Legislature, Governor, Board of Education, and Department of Education.\(^\text{131}\) *Montoy II* held that the School District Finance and Quality Performance Act, although not violative of Kansas’s constitutional guarantee of equal protection of the law, still failed to satisfy the legislature’s constitutionally rooted obligation to “‘make suitable provision for finance’ of the public schools.”\(^\text{132}\) It was not until *Montoy IV* that the legislature finally cured the constitutional defects of its previous funding schemes with the passing of a new senate bill, leading the Kansas Supreme Court to dismiss the case.\(^\text{133}\)

What had seemed like a comfortable resolution to a repetitive process of judicial review would, in three short years, prove otherwise. The Kansas

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\(^{129}\) Wade L. Dickey, Comment, *A Never-Ending Battle over How to Fund Kansas State Public Schools*, *Gannon v. State*, 402 P.3d 513 (Kan. 2017), 72 Rutgers U. L. Rev. 1045, 1050 (2020) (referring to the previous adequacy litigation saga of *Montoy v. State*, a four-part case that initially held a funding scheme inadequate and then approved a revised plan as constitutional). The initial proposal for funding, the School District Finance and Quality Performance Act, served as the foundational plan from which the school funding scheme in *Gannon* was later derived. *Id.* at 1049–50.


\(^{131}\) *Montoy I*, 62 P.3d at 230.

\(^{132}\) *Montoy II*, 120 P.3d at 308.

\(^{133}\) *Montoy IV*, 138 P.3d at 765–66.
Legislature began cutting education funds due to an economic recession and to “help patch a budget hole blamed on deep income tax reductions [then-Governor Sam Brownback] signed into law.”134 No longer was the plan that the legislature had endorsed in compliance with the state’s constitution. The people of Kansas, though they possess the “authority to change the standards in their constitution,” had not made such qualitative revisions to their supreme law; thus, the legislature’s spending cuts robbed them of the quality of education promised by the Kansas constitution.135

Then came Gannon I. As “the final authority to determine adherence to the standards of the people’s constitution,”136 the Kansas Supreme Court remanded the matter back to the district court to make determinations about what levels of funding would satisfy the adequacy standard the state constitution imposes.137 In response to the Kansas Supreme Court, the Kansas Legislature enacted the Classroom Learning Assuring Student Success Act and Senate Bill 19.138 When plaintiffs took these legislative acts to the courts again to challenge them, claiming inadequacy, the Kansas Supreme Court invalidated both of them.139 At almost every step of the Gannon challenge, the state attempted to invoke the political question doctrine or challenge the court’s ability to review the matter, seeking to moot the dispute as nonjusticiable.140 But the court held strong to its judicial obligation, asserting that “the State’s [newly brought] twist on the political question issue” was “greatly undermine[d]” by the legislature’s own acknowledgment of certain curricular goals that it required the State Board of Education to meet.141


136 Id. at 1235.

137 Id. at 1237.


140 See Gannon I, 319 P.3d at 1216–18 (rejecting the state’s argument that this matter is a “nonjusticiable” political question); Gannon II, 368 P.3d 1024, 1056–60 (Kan. 2016) (clarifying the court’s power to review this dispute); Gannon III, 372 P.3d at 1195–96 (discussing the state’s invocation of “political expediency” to “shield” the issue from review); Gannon IV, 390 P.3d 461, 468 (Kan. 2017) (affirming that this matter is not a political question).

141 Gannon IV, 390 P.3d at 474.
Furthermore, for the court to declare defeat at the abstruse task of defining adequacy would be inconsistent with its ability to define and discern the difference between “probable cause” and “reasonable suspicion” or determine what “cruel and unusual” punishment is.\(^{142}\)

Gannon concluded in 2019 when the Kansas Supreme Court finally found the legislature in compliance with its orders to provide constitutionally adequate education.\(^{143}\) The court retained jurisdiction of this matter at the plaintiffs’ request, a lesson learned from Montoy, and the state has since seemed to remain compliant.\(^{144}\) In fact, as recently as 2023, the Kansas Legislature approved another education package that “provides an inflation adjustment for the base state aid per pupil for each of the next three school years.”\(^{145}\)

While the Kansas courts were steadfast in ensuring the constitutional guarantee of quality education, some courts have not been as resolute in their jurisprudence. The next Part seeks to better understand the oscillation between judicial “deference” and judicial “activism” through an examination of adequacy litigation in Pennsylvania.

### III. Pennsylvania: When Courts Say “Never Mind”

The story of adequacy litigation and the appearance of justiciability concerns in Pennsylvania predate Rodriguez. While the Pennsylvania courts’ use of the political question doctrine may rest on established precedent, this Part seeks to uncover and understand the shaky foundation on which this precedent rests, one that may have portended its eventual demise. This Part provides background to how Pennsylvania courts rationalized the justiciability of adequacy litigation, the erosion of its raison d’être, and recent developments in light of William Penn’s holding.

#### A. Ossifying the Political Question Doctrine on a Shaky Foundation

Despite the seemingly insuperable posture of the political question doctrine in Pennsylvania’s education-litigation jurisprudence, this justiciability tool is not as deeply rooted as later opinions appear to suggest. In the 1937 case Wilson v. School District of Philadelphia, taxpayers sued the Philadelphia School District’s Board of Education for collecting taxes pursuant to a Pennsylvania statute passed in 1929 which delegated legislative

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142 Id. at 473.
144 Id. at 304.
power to school districts to levy taxes to cover their increasing expenses.\textsuperscript{146} The lower court believed this delegation of power could go unchecked, effectively welcoming a fiscal crisis where school districts had unlimited power to increase their expenses.\textsuperscript{147} Unhappy taxpayers sought to enjoin the school district from collecting those taxes.\textsuperscript{148}

On appeal, the Pennsylvania Supreme Court invoked broad principles of separation of powers to discuss a school district’s power to levy and collect taxes for school funding purposes.\textsuperscript{149} Although it did not expressly refer to its proper role in evaluating how public schools should be funded, the Pennsylvania Supreme Court did carve out a great amount of deference to the legislature’s judgment. In describing the Pennsylvania courts’ lack of fitness to evaluate adequacy of school systems, the Court referenced the legislature’s relative expertise and ability to define adequacy as one of its traditional powers, such as taxation.\textsuperscript{150} The Court found merit to what school directors may define as appropriate measures in staffing schools and achieving requisite funding, among others.\textsuperscript{151} The court did not initially touch on the merits of whether the school tax “in excess of nine and one-quarter mills on the assessed valuation”\textsuperscript{152} would maintain a “thorough and efficient system of public education.”\textsuperscript{153} Yet, \textit{Wilson} appears to be the genesis of the now-inconsistently applied justiciability tool.\textsuperscript{154}

In a matter of months after \textit{Wilson}, the Pennsylvania Supreme Court, in an attempt to discuss the state constitution’s obligations relating to government functions, established a new “reasonable relationship” test to decide educational adequacy claims in \textit{Malone v. Hayden}.\textsuperscript{155} \textit{Malone}’s holding required that the legislation at issue carry only a “reasonable relation” to the constitutional purpose of Article X, Section 1: the provision in the state’s constitution describing “[p]ublic schools to be maintained.”\textsuperscript{156}

\begin{footnotesize}
\begin{enumerate}
\item Id. at 187–88.
\item Id. at 178.
\item Wilson v. Sch. Dist. of Phila., 195 A. 90, 93–95 (Pa. 1937).
\item Id. at 97.
\item See id. at 97–98.
\item Id. at 101–02.
\item PA. CONST. art. III, § 14 (amended 1967).
\item The case regarding school funding immediately following \textit{Wilson—Malone v. Hayden}—cites to \textit{Wilson} as the high court’s “occasion to discuss the origin of [its] present public school system.” \textit{Malone v. Hayden}, 197 A. 344, 352 (Pa. 1938).
\item Id.
\item PA. CONST. art. X, § 1 (1874) (”The General Assembly shall provide for the maintenance and support of a thorough and efficient system of public schools, wherein all the children of this Commonwealth above the age of six years may be educated, and shall appropriate at least one million dollars each year for that purpose.”).
\end{enumerate}
\end{footnotesize}
Teachers sued the Board of School Directors of the School District of Georges Township, challenging the constitutionality of the Teachers’ Tenure Act. The Act directed procedures for entering and terminating employment contracts for public school teachers. Ultimately, this case dealt with the constitutional protection against the impairment of contracts rather than with the constitutional right to public education, but the Pennsylvania Supreme Court broadly declared that “[i]n considering laws relating to the public school system, courts will not inquire into the reason, wisdom, or expediency of the legislative policy.”

Much like the rational basis test for the federal Constitution’s Equal Protection Clause, Malone’s “reasonable relation” test would offer a merits-based analysis for why a court should uphold a legislative act, placing the burden on the petitioner to show why the act “clearly, plainly, and palpably” violates the state’s constitution. This may not have been a full-throated embrace of the political question doctrine yet, but the stage was being set for it. In spite of the limited relevance the Teachers’ Tenure Act has to Pennsylvania’s education clause, Malone became the source of authority cited by adequacy litigation cases following it.

The bold declaration that adequacy litigation was a political question finally came in 1998 from the Pennsylvania Commonwealth Court in Marrero ex rel. Tabalas v. Commonwealth (Marrero I). The fact pattern in Marrero I was typical of most adequacy litigation cases: students who attended a school district claimed that its operation in an urban environment required more financial resources which were not being adequately provided.}

157 Malone, 197 A. at 351.

158 Id.

159 Id. at 352.


162 See, e.g., Danson, 382 A.2d at 1245 (citing Malone for the proposition that “courts will not inquire into the reason, wisdom, or expediency of the legislative policy with regard to education”); Chartiers Valley Joint Sch. v. Cnty. Bd. of Sch. Dirs. Of Allegheny Cnty., 211 A.2d 487, 500 n.30 (Pa. 1965) (citing Malone to assert that public school systems “must at all times be subject to future legislative control”); Smith v. Sch. Dist. of Darby Twp., 130 A.2d 661, 667 (Pa. 1957) (citing Malone to support the courts’ interpretation of the Teachers’ Tenure Acts to be “free from political or arbitrary interference”).

through the local tax base.\textsuperscript{164} Because the legislature had not appropriated more funds for this area, the petitioners had sought a declaration that the State had failed to meet its constitutional obligations outlined in its education clause.\textsuperscript{165} The Pennsylvania Commonwealth Court found a "textually demonstrable constitutional commitment of the [adequacy] issue to a coordinate political department" in the Pennsylvania constitution.\textsuperscript{166} Because the court claimed that the relevant amendment to the current funding scheme contained "a lack of judicially manageable standards for resolving the instant claims," it found it impossible to resolve the adequacy claims "without making an initial policy determination of a kind which is clearly of legislative, and not judicial, discretion."\textsuperscript{167} Ultimately, the Pennsylvania Supreme Court affirmed the lower court’s holding, deeming judicial review over school funding schemes one of the "certain powers which our Constitution confers upon the legislative branch."\textsuperscript{168} Restating the \textit{Baker} factors,\textsuperscript{169} the Pennsylvania Supreme Court then invoked the "reasonable relation" test from \textit{Malone v. Hayden}, establishing a virtually per se rubber stamp of approval to the legislature’s "free experimentation" of a program of educational services.\textsuperscript{170} The reasonable relationship test is unrelated to the political question doctrine as it is not a portion of the \textit{Baker} factors; the Pennsylvania Supreme Court, however, did not acknowledge this.\textsuperscript{171} In this way, \textit{Marrero II} established a doctrinally unsound ground for Pennsylvania courts to embrace justiciability as a reason to dismiss subsequent adequacy litigation cases.

A year later, in a case involving a statute that sought to address school districts with track records of low test scores, the Pennsylvania Supreme Court continued to intermix \textit{Malone}'s "reasonable relation" test and nonjusticiability language. In \textit{Harrisburg School District v. Hickok}, the court dismissed the matter as nonjusticiable and claimed that the political question doctrine precluded judicial intervention.\textsuperscript{172} The citation to \textit{Marrero II} as

\textsuperscript{164} Id. at 958.
\textsuperscript{165} Id.
\textsuperscript{166} Id. at 966 (first citing \textit{Baker}, 369 U.S. at 217; then citing \textit{Sweeney v. Tucker}, 375 A.2d 698, 705 (Pa. 1977)).
\textsuperscript{167} Id.
\textsuperscript{169} For an enumeration of the \textit{Baker} factors, see supra text accompanying note 96.
\textsuperscript{170} \textit{Marrero II}, 739 A.2d at 112–14 (stating that "the very essence" of Pennsylvania’s education clause is to allow successive legislatures to adopt a changing program to "keep abreast of educational advances" (quoting \textit{Marrero I}, 709 A.2d at 964)).
\textsuperscript{171} See id.
supporting the application of the political question doctrine, and therefore, the nonjusticiable nature, of any challenge involving Article III, Section 14 of Pennsylvania’s constitution173 began to ossify, becoming a rote practice that ignored its foundational confusion.174 There was no acknowledgment—deliberate or not—that the rational relationship test that was to apply to Article X, Section 1 of Pennsylvania’s constitution suddenly commingled with the political question doctrine of Article III, Section 14.175 This commingling of the former’s rational relationship test with the latter’s resulted in a dismissal on the merits.176 Ordinarily, political questions do not result in dismissals on the merits—as the issue itself is not justiciable; on the other hand, the rational relationship test provides a deferential merits-based analysis of the challenged legislative act. These two justifications are inherently contradictory, but they together somehow became the generally accepted rationale of why Pennsylvania’s education system continued to appear constitutionally deficient. By employing the political question doctrine and the rational relationship test, the Pennsylvania Supreme Court set itself up for a much-needed explanation that did not come until years later.

B. William Penn: A New Hope

Because the recitation of Marrero II and its application of the political question doctrine had become so familiar to Pennsylvania courts, the 2015 case William Penn I likely came as no surprise when the commonwealth court dismissed the petitioners’ challenge to the state’s funding scheme as nonjusticiable. The commonwealth court applied Baker and cited Marrero II as justification for denying judicial review.177 To the petitioners’ delight, however, a two-year appeal unearthed the weak ground in which the political question justification had rooted itself. Noting that it “did not specifically

173 PA. CONST. art. III, § 14 (“The General Assembly shall provide for the maintenance and support of a thorough and efficient system of public education to serve the needs of the Commonwealth.”).
175 See cases cited supra note 174.
176 See, e.g., William Penn I, 114 A.3d at 461 (failing to include a discussion of the rational relationship test but resulting in a dismissal on the merits as evinced by the preliminary objections being “in the nature of a demurrer”).
177 Id. at 462–64. The court also cited Danson v. Casey, 382 A.2d 1238 (Pa. Commw. Ct. 1978); for a discussion of Danson, see supra note 161.
decline to decide the constitutional challenge as a political question\textsuperscript{179} in \textit{Malone v. Hayden}, the Pennsylvania Supreme Court continued to clarify that \textit{Malone} and \textit{Marrero II} formed an unstable foundation on which to base their opinion.\textsuperscript{179}

With the 2017 opinion for \textit{William Penn II} came the reckoning that textual commitments of a given function to a branch were not dispositive of justiciability;\textsuperscript{180} rather, the court would have to ensure that a political question actually existed “in the close relationship between the textual commitment factor and the lack of judicially discoverable and manageable standards factor.”\textsuperscript{181} Given the lack of opportunity given to petitioners to “develop [a] historic[al] record concerning what . . . thoroughness and efficiency were intended to entail,” they had been denied a proper chance at judicial review.\textsuperscript{182} The court’s awareness of its own jurisprudential imprudence counseled a remand to the commonwealth court for the petitioners to provide standards that the lower court could apply to evaluate whether the funding scheme was indeed constitutional.\textsuperscript{183}

This short success fell flat on remand. The State raised other objections in the lower court, resulting in an en banc panel that overruled the objections.\textsuperscript{184} When the legislature made some adjustments to the school funding scheme in 2018, the Pennsylvania Supreme Court deferred concerns about the case’s mootness when the petitioners failed to file an amended petition for review.\textsuperscript{185} Five more years passed, and then \textit{William Penn IV} appeared on the commonwealth court’s docket. The almost-decade-old dispute restarted and, this time, concluded.

In an opinion reaching over 400 pages, President Judge Cohn Jubelirer credited \textit{William Penn II} for holding for the first time that “the constitutional issues raised in this school funding challenge could be heard by the Court without offending the political question doctrine.”\textsuperscript{186} Refusing to hide behind the shield of justiciability or remain silent, President Judge Cohn Jubelirer analyzed the record that \textit{William Penn II} had sought and found the

\textsuperscript{179} Id. at 445. Further notable here is Danson’s role in deeming low expenditures as a “patently nonjusticiable” injury when viewed in the context of educational needs of children. Danson, 382 A.2d at 1246.
\textsuperscript{180} William Penn II, 170 A.3d at 446.
\textsuperscript{181} Id.
\textsuperscript{182} Id. at 457.
\textsuperscript{183} Id. at 464.
\textsuperscript{185} Id.
\textsuperscript{186} William Penn IV, 294 A.3d 537, 962 (Pa. 2023).
Pennsylvania legislature in violation of its duty to provide a “thorough and efficient” education to its citizens.\textsuperscript{187} Through a historical analysis of education in Pennsylvania, President Judge Cohn Jubelirer concluded that the constitutional guarantee of education required that “all students have access to a comprehensive, effective, and contemporary system of public education”\textsuperscript{188} and that “findings regarding inputs, such as funding, courses, curricula and programs, staffing, facilities, and instrumentalities of learning, demonstrate manifest deficiencies between low-wealth districts . . . and their more affluent counterparts.”\textsuperscript{189} And so, the Pennsylvania courts finally vindicated what was evident to students and parents for decades: the public school system’s funding scheme was unconstitutional.

After William Penn \textit{IV}, the State filed a posttrial motion for relief, alleging President Judge Cohn Jubelirer and the Commonwealth Court committed over 100 errors that warranted reversing William Penn \textit{IV}.\textsuperscript{190} The motion failed, and William Penn \textit{IV} remains intact to this day.\textsuperscript{191} A year after William Penn \textit{IV}, the universe of public school funding in Pennsylvania looks somewhat brighter than before.\textsuperscript{192} Governor Josh Shapiro has proposed a budget including $872 million to cure the constitutional deficiency.\textsuperscript{193} The budget increase does “fall[] short of the $6.2 billion that expert[] witnesses in the Commonwealth court case said would bring education funding up to its legally required level.”\textsuperscript{194} Nonetheless, advocates are optimistic about Shapiro’s commitment to improving education in the state. All this was only possible when the commonwealth court rejected the Pennsylvania Supreme Court’s poorly reasoned reliance on the political question doctrine.

\textsuperscript{187} \textit{Id.} at 962–63.
\textsuperscript{188} \textit{Id.} at 962.
\textsuperscript{189} \textit{Id.}
\textsuperscript{191} \textit{Id.} at *3.
\textsuperscript{192} Oliver Morrison, \textit{Shapiro Proposes ‘Historic’ $1 Billion Increase in Education Fundings to Address Inequities, WHYY} (Feb. 6, 2024), https://whyw.org/articles/shapiro-historic-1-billion-increase-education-funding-pennsylvania-budget/ [https://perma.cc/BK2Z-T8E7].
\textsuperscript{193} \textit{Id.}

1694
IV. WAITING FOR THE OTHER SHOE TO DROP

State courts that still shy behind the political question doctrine should take seriously the Pennsylvania Supreme Court’s approach in William Penn II and III and question their use of it. Students and their parents should not have to live in a limbo of constitutional deficiency or the perpetual fear that their state courts will change their minds. The current legal reality is that challenges to the adequacy of school funding one day will no longer be dignified responses from courts, and citizen’s constitutional rights will no longer be evaluated. This Part encourages courts to abandon the use of the political question doctrine in adequacy litigation by pointing out the absence of a doctrinal need for it and greater due process concerns that outweigh potential arguments for using it.

A. Challenging the Doctrinal Necessity for Political Questions in State Courts

Whether the active or passive model of judicial participation is “favorable” is a matter of subjective belief. Nevertheless, a state court’s choice to adopt either model has a material effect on the articulation and realization of a constitutionally guaranteed right. Invoking federal justiciability doctrines, namely the political question doctrine, hinders citizens from meaningfully exercising their constitutionally guaranteed right to education. If state courts otherwise comfortably discharge duties that their federal counterparts are forbidden from carrying out, why should state courts invoke federal principles to which they are not bound when asked to resolve important issues? Concerns for institutional legitimacy or desire to maintain electoral appeal might explain state courts’ piecemeal loyalty to federal doctrines of justiciability. However, in her 2001 article on state courts and their judicial function, Professor Helen Hershkoff posited that the


196 See Katyal, supra note 113, at 1710 (endorsing active judicial participation). But see BICKEL, supra note 84, at 197 (promoting judicial modesty to protect institutional legitimacy).

197 Hershkoff, supra note 80, at 1837–38.
distinct nature of state courts should insulate them from the specter of illegitimacy when they engage in active judicial participation.\footnote{\textit{Id.} at 1842; see also Heise, \textit{supra} note 91, at 92–93 (attributing the different institutional roles of state and federal courts for similar reasons expounded by Hershkoff as bases for less institutional concern regarding legitimacy).}

The reality is that the foundations of justiciability—thus, the political question doctrine—are tethered to Article III of the federal Constitution and the federal courts.\footnote{Hershkoff, \textit{supra} note 80, at 1835 (asserting that techniques comprising justiciability doctrines “mediate concerns that Article III judges, unelected and of limited competence, will make decisions irrevocably binding future democratic majorities”).} This creates an absurdity when the political question doctrine appears in state courts; the principles of justiciability that these state courts raise are ones to which they have no obligation to be faithful.\footnote{Many state courts emphasize this when faced with issues that would traditionally be declined by federal courts. \textit{See, e.g.}, Asarco Inc. v. Kadish, 490 U.S. 605, 617 (1989) (“[T]he constraints of Article III do not apply to state courts . . . . “); Life of the Land v. Land Use Comm’n, 623 P.2d 431, 438 (Haw. 1981) (“[T]he courts of Hawaii are not subject to a ‘cases or controversies’ limitation like that imposed upon the federal judiciary by Article III . . . . “).} Hershkoff thus proposes “incremental revisions in which state and localities carefully consider their distinct needs in constructing their judicial systems.”\footnote{Hershkoff, \textit{supra} note 80, at 1934–35.} Hershkoff suggests the common use of elections for judicial selection, lack of obligation to adhere to all strictures of Article III, and breadth of subject matter in state constitutions to support her argument.\footnote{\textit{Id.} at 1836–37, 1887–88.}

However, if it is true that state courts have no obligation to adhere to Article III, there is a concern that certain states will not choose to recognize adequacy litigation suits as justiciable even with the abundance of constitutional challenges raised by their constituency.\footnote{\textit{See, e.g.}, Conn. Coal. for Just. in Educ. Funding, Inc. v. Rell, 990 A.2d 206, 225–26 n.24 (Conn. 2010) (noting that, despite some outlying decisions, “the vast majority of jurisdictions ‘overwhelmingly’ have concluded that claims that their legislatures have not fulfilled their constitutional responsibilities under their education clauses are justiciable” (quoting Sheff v. O’Neill, 678 A.2d 1267, 1276 n.18 (Conn. 1996))).} So why would some state courts conclude that an educational adequacy case is a “political question” or a “political case” while others do not? The judicial selection mechanisms of the state may provide somewhat of an answer.

\textbf{B. Elected State Judges and Due Process Concerns}

Systems of state judicial selection differ considerably from the system that Article III sets into motion. In fact, “[m]ost states use elections as some
Such variance in judicial selection methods raise two points of interest for adequacy litigation: (1) whether elected judges are intrinsically problematic institutional actors to oversee adequacy litigation compared to appointed judges; and (2) whether other considerations incidental to the judicial selection system may influence judicial decision-making.

The primary concern over judicial selection systems is the doubt that politically accountable, elected judges can effectively carry out their duties without bias. Regarding electoral loyalty and inclinations to hew judgments to popular beliefs, there are robust arguments for and against elected state judges. Some scholars suggest that elected state judges pose a serious problem to the integrity of the judicial system and the broader rule of law. Others believe this process is “the most robust mechanism . . . to connect the lay citizen to constitutional decisionmaking [and] . . . enshrin[e] the people’s supremacy over the courts.”

Finally, as discussed, the federal courts are not a viable forum for adequacy litigation. In many ways, state courts refusal to find adequacy litigation justiciable operates as the foreclosure of the only possible venue for remedy. That refusal may be seen as a functional jurisdiction strip, curbing courts of the power to hear cases and litigants of any opportunity to be heard. The political question should not be employed to rob litigants of

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206 David E. Pozen, The Irony of Judicial Elections, 108 COLUM. L. REV. 265, 328 (2008). Such concerns are thought to figure here because there are “obvious political implications of statewide education finance rulings and remedies.” Bauries, supra note 21, at 716–17. Some evidence shows—with important qualifications—that elected judges are more likely than appointed judges to serve the political agenda of their electorate by upholding or striking down school finance schemes. If the reality is that the majority of state judges are political actors in some capacity, then courts should at least let judges answer the questions that they will be held politically accountable for. Swenson, supra note 18, at 1154.

207 This is not too far from a legislature “displace[ing] a judicial interpretation of the Constitution’s meaning with its own” through the use of the political question doctrine. Christopher Jon Sprigman, Congress’s Article III Power and the Process of Constitutional Change, 95 N.Y.U. L. REV. 1778, 1780–81 (2020).
the only place they can ostensibly challenge the laws that deny them their constitutional rights.

C. Taking Deference Seriously

Fortunately, Kansas and Pennsylvania courts may have a consequential influence on other states’ courts. Earlier, this Note acknowledged the deference that state judges employ when defining the right to education guaranteed in state constitutions.\(^\text{208}\) Considering the way judges have previously looked to other state supreme courts for guidance when making determinations about educational adequacy, there is good reason to hope that other states will follow Kansas and Pennsylvania’s leads.\(^\text{209}\)

Again, the category to which the state’s constitutional language belongs appears important to how state judges conceive of the constitutional promise to education. Curiously, the states discussed in this Note that take judicial review of adequacy litigation seriously—Kansas and Pennsylvania—are Category I and II states, respectively. Despite the lack of textual or qualitative guidance provided in these states’ constitutions, these courts are still able to conduct fact-intensive reviews to determine what qualifies as a constitutional violation. Most of the remaining states invoking the political question doctrine in adequacy litigation contain constitutional language in their education clauses that is stronger than Kansas’s and Pennsylvania’s.\(^\text{210}\) Given that Kansas and Pennsylvania, states that are textually “less committed” to a robust right to education, have engaged in merits-based review of the constitutionality of school funding schemes, states in Categories III and IV should take William Penn as an opportunity to recalibrate their judicial priorities.

Finally, deference to the William Penn way makes room for functional considerations regarding the urgency of judicial review. All but three states in which the use of the political question doctrine persists rank lower than Kansas and Pennsylvania in a national survey evaluating school funding.\(^\text{211}\) Given the concerning metrics of academic performance and the realities of public education, it may be prudent for state courts to reframe the inquiry posed by adequacy litigation. A legislature’s power to develop and outline

\(^\text{208}\) See supra Section I.B.2.

\(^\text{209}\) See supra note 71 and accompanying text.

\(^\text{210}\) Florida, Georgia, Illinois, Indiana, Maine, Michigan, Missouri, Nebraska, Nevada, and Rhode Island are all Category III or Category IV states. The remaining five states—Alabama, Louisiana, Mississippi, Oklahoma, and Oregon—are Category I or II states.

school funding schemes does not give it the power to determine the
constitutionality of the scheme. That is squarely within the province of the
state’s judiciary.

CONCLUSION

More now than ever, it is time for state courts to abandon the political
question doctrine in educational adequacy litigation. Where state courts do
apply the doctrine, they foreclose the protection of a constitutionally
protected right. Where they do not yet apply the doctrine, the genuine
possibility of the courts’ changing course to apply the doctrine leaves open
the risk of revoking a right that once existed.212 And the situation is dire.
America’s competitive edge in the global education field is deteriorating,213
and the physical condition of many American school buildings is
atrocious.214 But litigants that ask state courts to remedy these concerns
cannot be heard when courts shut their doors due to the “political” nature of
the issue.

A political case is not necessarily a “political question.” The decades-
old question of whether state legislatures are providing enough funds for a
quality education system must be answered, and that often must begin with
a state court’s determination that the status quo is not enough. Sure,
dignifying the problem with an answer is just the starting point. But with no
starting point, there can never be a solution. Certainly, no state court should
accept the possibility of its children experiencing a perpetual state of
constitutional violation. The kids are awaiting an answer.

212 Consider a situation similar to that of Moore v. Harper, in which the North Carolina Supreme
Court once believed that the question of partisan gerrymandering was justiciable, only to find it
nonjusticiable due to the political question doctrine upon rehearing. 143 S. Ct. 2065, 2075–77 (2023).
213 Amadeo, supra note 11.
214 Christina Zdanowicz & Holly Yan, US Public Schools Get a D+ for Poor Conditions, and Experts
Say Problems Are Getting Worse. Here’s What Kids Are Facing, CNN (Sept. 18, 2022),
Among school-infrastructure concerns are leaking ceilings, cockroach infestations, and broken air
conditioners that require students to go home early. Id.
## Table 1: Consolidated Data Points on Education in the Fifty States

<table>
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<tr>
<th>State</th>
<th>Chance for Success Ranking</th>
<th>School Funding Ranking</th>
<th>Court Finds Issue Justiciable</th>
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<tr>
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<td>1</td>
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</tr>
<tr>
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</tr>
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<td>1</td>
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<td>17%</td>
</tr>
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* Note. * California's judicial selection methods for a first full term are uniquely hybrid in contrast to other states, evading appropriate categorization as elected or appointed. ** Key: 0 – elected; 1 – appointed. *** Key: I-IV as Arabic numbers.