How Do Judges Determine Educational Rights?

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Abstract

There is an old riddle that asks, what do constitutional school funding lawsuits and birds have in common?

The answer: every state has its own. Yet while almost every state has experienced hotly-contested school funding litigation, the results of these suits have been nearly impossible to predict. Scholars and advocates have struggled for decades to explain why some state courts rule for plaintiff school children—often resulting in billions of dollars in additional school spending—while others do not.

If there is rough agreement on anything, it is that "the law" is not the answer: variation in the strength of state constitutional education clauses is uncorrelated with the odds of plaintiff success. Just what factors do explain different outcomes, though, is anybody's guess. One researcher captured the academy's state of frustration aptly when she suggested that whether a state's school funding system will be invalidated "depends almost solely on the whimsy of the state supreme court justices themselves."

In this Article, we analyze an original data set of 313 state-level school funding decisions using multiple regression models. Our findings confirm that the relative strength of a state's constitutional text regarding education has no bearing on school funding lawsuit outcomes.

But we also reject the judicial whimsy hypothesis. Several variables—including the health of the national economy (as measured by GDP growth), Republican control over the state legislature, and an appointment-based mechanism of judicial selection—are significantly and positively correlated with the odds of a school funding system being declared unconstitutional. After presenting these findings, the Article discusses the important implications for school finance advocates and for constitutional and legal theory more broadly.

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INTRODUCTION

Suppose parents of school-aged children file separate lawsuits in two different states. The suits contain the same basic allegations. Average per-pupil spending is below the national average. Funding is distributed in a way that affords children in poorer school districts inferior access to critical resources like quality teachers. As a result, these children enjoy lower levels of educational attainment. Each lawsuit therefore seeks a declaration that the school funding system violates the state's constitution.

State X's constitution declares that "the legislature shall appropriate a sum of money sufficient to ensure that the state's system of public education meets quality goals established by law." State X concedes that its legislature underfunds the state's public education system by nearly $1 billion each year.

By contrast, State Y's constitution provides merely that "the legislature shall provide for the maintenance and support of a system of free public schools open to all children in the state." Although State Y's schools are underfunded at levels similar to State X's, it is undisputed that State Y's schools are free and open to all children.

Assume, now, that the plaintiff parents prevail in one of these school funding lawsuits but not the other. What do you think best explains the divergent outcomes?

We suspect most people would offer the following (perhaps obvious) answer: the law! More precisely, one might respond that the outcome of each lawsuit was determined by the relevant state constitutional provision as applied to the facts in each case. And since the facts are largely the same, the only difference that could explain the opposing outcomes is the constitutional text. So whereas State X's education clause clearly entitles the plaintiffs to relief, State Y's education clause does not.

This is a neat and intellectually coherent answer to give. But it is also wrong. The plaintiffs in State X lost,[1] despite the state (Oregon) conceding that it had failed to provide a "sum of money sufficient to ensure that the state's system of public education meets quality goal established by law."[2] The plaintiff children in State Y won,[3] even though the state (South Carolina) argued with some force that the duty to "provide for the maintenance and support of a system of free public schools" gives rise to no clear qualitative standard for how much funding is necessary.[4]

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[1] *Pendleton School Dist. 16R v. State*, 200 P.3d 133 (Or. 2009) (en banc).
[2] Or. Const. art. VIII, § 8.
[3] *Abbeville County School Dist. v. State*, 515 S.E.2d 58 (S.C. 1999).
[4] S.C. Const. art. XI, § 3.

Counterintuitive outcomes like these are common in school funding lawsuits, and the academy has struggled for years to explain them.[5] The only conclusion on which there is some consensus is that the most intuitive explanation is incorrect: when it comes to deciding the fate of school funding lawsuits, the bare meaning of the law has little do with it.[6]

But if not the law, then what? Surely *something* explains why judges rule for some plaintiffs who demand billions of dollars in additional public education expenditures,[7] but not for others.[8] The scholarship to-date, however, has failed to identify a convincing explanation.[9]

In this Article, we draw on an original data set to present evidence of variables that help to explain the outcomes of school finance lawsuits. First, to borrow from the leading explanation of Bill Clinton's successful presidential bid in 1992: "It's the economy, stupid."[10] Our analysis thus finds that for each 1% increase in national GDP growth as measured from the year preceding a court's decision, a judge is 6% more likely to rule for school finance plaintiffs. When economic conditions are strong and state coffers are flush with cash, in other words, judges are more likely to side with plaintiffs and issue orders calling for the legislature to increase school spending. When the economy is sputtering and state governments face steep deficits, judges are far less likely to impose new spending mandates.

Indeed, attention to prevailing economic conditions helps to provide the simplest explanation for the seemingly irreconcilable Oregon and South Carolina decisions. The Oregon Supreme Court heard oral argument in

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[5] *See, e.g.*, William S. Koski, *The Politics of Judicial Decision-Making in Educational Policy Reform Litigation*, 55 Hastings L. J. 1077 (2004) (arguing that "little is known about why state supreme court choose to intervene in educational finance policy in the first place," and concluding that judicial attitude was an important variable in explaining divergent outcomes in Ohio and Wisconsin); Paula Lundberg, *State Courts and School Funding: A Fifty-State Analysis*, 63 Alb. L. Rev. 1101, 1145-46 (2000) (performing regression analysis of forty-one state court decisions and identifying four significant variables, two of which had the opposite of predicted relationships); Karen Swenson, *School Finance Reform Litigation: Why Are Some State Supreme Courts Activist And Others Restrained?* 63 Alb. L. Rev. 1147, 1178 (2000) (conceding that "the proffered model of judicial decision-making in school finance cases has not performed well").

[6] *See, e.g.*, Paul L. Tractenberg, *Education*, *in* 3 Constitutions for the Twenty-First Century: The Agenda of State Constitutional Reform 293 n.137 (G. Alan Tarr & Robert F. Williams eds., 2006) ("[D]isembodied parsing of constitutional terminology may be of limited or no value."); William E. Thro, *The Role of Language of the State Education Clauses in School Finance Litigation*, 79 Ed. Law Rep. 19, 22, 28 (1993) (recognizing that "the distinctions between education clauses apparently have not made a difference" in school finance lawsuits).

[7] *See* Sharon Otterman, "Last Days, Perhaps for Group That Sued for Poor School Districts," NY Times, June 8, 2011 (noting that the *Campaign for Fiscal Equity* litigation in New York produced "billions of additional dollars" for poor school districts in the state).

[8] *Campaign for Quality Education v. State*, 209 Cal. Rptr. 3d 888 (Cal. Ct. App. 2016).

[9] *See infra* Part I.

[10] *See* Caleb Galoozis, "It's The Economy, Stupid," Harvard Political Review, Oct. 17, 2012.

Pendleton School District 16R v. State on October 8, 2008—just three weeks after Lehman Brothers declared bankruptcy and nine days after the stock market crashed.[11] Shortly after the argument, the November 2008 jobs report revealed a loss of 533,000 jobs—the single largest monthly job loss total in more than thirty years.[12] Then, in December 2008, while the case was still pending, the National Bureau of Economic Research officially declared that the U.S. economy was in a recession.[13] Oregon's Supreme Court Justices could not have been blind to this dire economic downturn when they elected not to issue a liability order in the *Pendleton* case—a downturn that inevitably affected the state's fiscal health[14] and thus its ability to actually satisfy any adverse judgment. By contrast, the South Carolina Supreme Court's seminal *Abbeville* decision was issued in 1999. The economy was humming along quite nicely, growing at a 6.3% clip from the previous year—a far cry from the 2.1% *decrease* in national GDP that took place in the year before Oregon's *Pendleton* ruling.[15]

The second significant variable we find is control over the state legislature. When Republicans are in control of the state legislature, judges are more likely to rule in favor of school finance plaintiffs than when the legislature is controlled by Democrats. This result may be surprising at first blush, since one might expect judges to be more willing to impose additional school spending mandates on legislatures that are more likely to comply with them. And Democrats are often thought to be more amenable to raising school spending (and the taxes that go along with it).[16]

The data would seem to tell a different story, one of calculated judicial intervention. On this account, judges may be more willing to declare school funding systems unconstitutional when Republicans are in control because they perceive a heightened need to prod lawmakers into action.[17] Insofar as Republican control reduces the likelihood of a legislature-driven increase in school spending, in other words, courts feel a greater need to grab the steering wheel themselves. By contrast, when Democrats are in control,

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[11] *See* Kimberly Amadeo, "Stock Market Crash of 2008," TheBalance.com, Mar. 14, 2018.

[12] David Goldman, "Lost: 1.9 Million Jobs," CNN Money, Dec. 5, 2008.

[13] Chris Isidore, "It's Official: Recession Since Dec. '07," CNN Money, Dec. 1, 2008.

[14] Mike Rogoway, "Oregon's Economy Soars Yet State Budget Gap Grows: Here's Why," The Oregonian, Apr. 9, 2017 (noting that "the general fund plunged by nearly 20 percent" during the great recession).

[15] All GDP data is obtained from the Bureau of Economic Analysis's Interactive Data Application, online at https://www.bea.gov/itable/.

[16] Michael B. Henderson, "How Far Apart are Democrats and Republicans on School Reform?" The Brookings Institution, Aug. 3, 2015 ("Nearly three-fourths of Democrats favor more spending on public schools, and 54 percent of Republicans oppose it.").

[17] *See generally* Michael Rebell, *Courts and Kids: Pursuing Educational Equity Through the State Courts*, Chicago University Press (2009) (arguing that courts should view their constitutional role as starting up an active "colloquy" with the political branches regarding school finance).

courts may prefer not to intervene (a move that carries potentially great costs for their own institutional legitimacy[18]) because there is a greater chance the legislature will choose to ramp up financial support for public education on its own. Yet again, Oregon and South Carolina are consistent with this story. At the time of the relevant decisions, Oregon's legislature was controlled by Democrats, while South Carolina's was not.

This paper proceeds in five parts. Part I describes the academy's existing limited knowledge regarding the determinants of school finance litigation outcomes. Although a handful of law review and social science articles have performed statistical analyses to identify explanatory variables in school funding cases, the results of those studies are inconclusive at best.[19] This paper aims to improve on this general state of fog.

One major reason for our lack of understanding thus far is the unusually limited data set that the leading scholarly accounts have relied upon: the single most recent school finance decision from forty state courts of last resort.[20] In Part II, we explain how we are able to create a far larger data set encompassing more than three hundred state court decisions. Some of this is a function of time; the primary accounts in the literature are now nearly two decades old, and a great many school finance lawsuits have been brought and decided since then.[21] But there is another explanation. The earlier analyses were unduly self-limiting. State courts of last resort are not the only ones to decide school finance lawsuits; trial courts and intermediate courts of appeal do, too. Because school finance cases typically turn on questions of law, appellate courts approach lower court rulings on a *de novo* standard of review.[22] That means each level of court reaches a legal judgment that is *independent* of the one preceding it—a fact that allows us to expand the relevant data set quite significantly.[23]

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[18] *See, e.g.*, Koski, *supra* n.5 ("Courts are aware of th[e] potential loss of legitimacy and the risk of entering the morass of educational finance policy before rendering their first decisions in any school finance case.").

[19] *See infra* Part I.

[20] *See, e.g.*, Swenson, *supra* n.5 (relying on data set of 40 state Supreme Court decisions); Lundberg, *supra* n.5 (data set of 41 decisions).

[21] *See id*. Of course, even when the initial analyses were run, many states had multiple rounds of litigation that prior authors chose to neglect. We explain below why we include these additional rounds of state court litigation. *See infra* Parts I.B & II.

[22] *See, e.g.*, *Lobato v. State*, 304 P. 1132, 1137-38 (Colo. 2013) ("This case requires us to interpret relevant portions of the Colorado Constitution, assess the trial court's application of the rational basis test . . . and review the trial court's legal conclusion that the state public school financing system is unconstitutional. We review these questions of law de novo."); Vincent v. Voight, 614 N.W.2d 388, 402 (Wisc. 2000) ("We interpret constitutional provisions de novo."); *Campaign for Quality Educ. v. State of California*, 246 Cal. App. 4th 896, 904 (2016), review denied (Aug. 22, 2016) (applying de novo review to trial court's ruling on motion to dismiss).

[23] We are further able to expand the universe of relevant data points by considering subsequent state court decisions considering *different legal issues*. After all, it is a common observation that state level school finance cases have proceeded in distinct waves raising

Part III explains our methodology, and Part IV presents our results. As previewed above, our major findings include two variables with significant relationships to plaintiff victories in school finance decisions: national economic health as indicated by GDP growth from the year preceding a court's decision and whether the state legislature was controlled by Republicans. In addition, we find a significant positive relationship between judicial elections and state defendant victories: state courts on which judges face re-election pressures are more likely to uphold school funding systems against constitutional challenge—a sign that elected judges are sensitive to the remedial (e.g., tax) consequences of costly liability orders. Our analysis also finds no meaningful relationship between litigation outcomes and several other variables often discussed in the literature, including the "key facts" of the case (e.g. levels of educational spending inequity) and the relative "strength" of a state constitution's education clause.[24]

Finally, Part V considers the implications of our findings for the school funding advocacy community as well as for legal theory more broadly. The primary lesson for school finance plaintiffs is straightforward, albeit counter-intuitive: lawsuit are best brought during boom times, when the state can most afford a substantial liability award.[25] In that respect, it might be wiser to conceive of the strategic aim of school finance litigation as the creation of a rainy-day fund than as a last ditch tactic during a flood.

The implications for legal theory are more nuanced. One takeaway concerns the general project of constitutional interpretation. With the recent confirmation of Justices Gorsuch and Kavanaugh to the Supreme Court, there has perhaps never been greater public attention to the methodological question of how constitutional cases ought to be decided. Some commentators have argued that current legal practice reflects a sufficient

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different legal theories, such that each new round of cases will in theory raise an independent data point for analysis. *See* William S. Koski, *Beyond Dollars? The Promises and Pitfalls of the Next Generation of Educational Rights Litigation*, 117 Colum. L. Rev. 1896, 1903-07, 1915-23 (describing the two earliest waves of state-level school finance litigation and identifying an emerging third wave).

[24] We also find some interesting results when the data is analyzed in cross-sections. For example, the significance of party control over the legislature is most prominent in cases that count as "liability rulings," or cases where the state's liability is effectively determined in either direction. Judges seem to show no such sensitivity to party control, however, when deciding procedural issues that do not determine the state's liability.

[25] Of course, our findings suggest that other variables will affect judicial decisionmaking, too, but they may be less within plaintiffs' control. For instance, some states are likely never to be controlled by a Democratic legislature; others will presumably always be so-controlled. So it would be unwise for litigators to await such shifts. Likewise, while school spending will likely increase naturally during periods of economic prosperity, notice that it should do so with relative uniformity across the nation (all else equal), such that a state's *relative* spending levels are likely to remain more constant.

degree of consensus to conclude that "originalism is indeed our law,"[26] a view that is seemingly bolstered by the originalist dispositions of Justice Gorsuch[27] and (arguably) Justice Kavanaugh.[28] The results of our analysis illuminate originalism's positive law claim, at least as it applies to state constitutional law.[29] For our study suggests that at least in one prominent area of state constitutional law, the original public meaning of the text carries less weight than prudential considerations such as the state's fiscal health or which party controls the legislature.[30]

A second takeaway concerns what Professor Darryl Levinson has called the "remedial equilibration" model of constitutional law.[31] Under this model, the meaning of constitutional rights is not settled in a vacuum; it is instead shaped by judicial appraisals of "the threat of undesirable remedial consequences" that "motivat[e] courts to construct the right in such a way as to avoid those consequences."[32] Our findings offer strong support for this thesis, as state court judges appear to be heavily influenced in their construction of the state constitutional right to education by the real-world (i.e., budgetary) effects of their decision.

One final caveat is in order. We do not mean to suggest that the variables we find are the *only* determinants of school finance litigation outcomes. Judges are undoubtedly attuned to numerous factors, some of which our models surely fail to identify. But until now, the literature had yet to convincingly identify *any* significant variable with the confidence generated by regression against a robust sample size. Ours is thus a first

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[26] William Baude, *Is Originalism Our Law?* 115 Colum. L. Rev. 2349, 2351-52 (2015); *see also* Stephen E. Sachs, *Originalism As A Theory of Legal Change*, 38 Harv. J. L & Pub. Pol'y 817 (2015).

[27] *See* Nina Totenberg, "Judge Gorsuch's Orignalism Contrasts With Mentor's Pragmatism," NPR Feb. 6, 2017 (describing Gorsuch as a "self-proclaimed originalist").

[28] Ann E. Marimow, "Brett Kavanaugh, Trump's Supreme Court Pick, Has Sided With Broad Views of Presidential Powers," Washington Post, July 9, 2018 (arguing that "Kavanaugh is a proponent of 'originalism,'"). *But see* Eric Posner, "Is Brett Kavanaugh An Originalist," Eric Posner Blog, July 18, 2018 (finding little evidence that he is).

[29] *See* Baude, *supra* n.26 at 2399-2400 (observing that "[m]any scholars seem to assume that the case for originalism in state constitutional law simply mirrors that for originalism in federal constitutional law" but noting that the strength of originalism's claim in each state "will turn on each state's political and legal culture").

[30] As we will explain, *infra* Part V.B.2, our findings are actually consistent with so-called new originalism, which recognizes the distinction between constitutional interpretation and construction and permits normative values to inform judicial decisionmaking at the construction stage. *See* Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 Fordham L. Rev. 453, 472 (2013), *see also infra* Part V. But it is in conflict with the kind of originalism suggested by those such as Justice Gorusch himself, who once explained that judges should not consider the policy consequences of their decisions but "should instead strive to apply the law as they find it, focusing backwards." Totenberg, *supra* n.27 (quoting then-Judge Gorsuch).

[31] Darryl Levinson, *Rights Essentialism and Remedial Equilibration*, 99 Colum. L. Rev. 857, 858 (1999).

[32] *Id*. at 885.

step towards a better understanding of why some state courts vindicate the rights of disadvantaged children to an adequate or equitable education while others don't.

I. OUR LIMITED KNOWLEDGE

In this section, we situate our study in an existing body of literature regarding the determinants of judicial outcomes. The section begins with a brief discussion of judicial prediction models generally, before presenting the limited universe of findings specific to the school finance litigation arena.

A. A Brief Primer on the Study of Judicial Decisionmaking

Since the reign of Legal Formalism ended at the turn of the 20th century, scholars have generally abandoned the proposition that judicial decisionmaking is strictly determined by the text of the law itself. Most legal scholars now believe that legal categories are under-determined—their application subjective and their meaning mutable.[33] As scholars working in a variety of fields have come to suspect that legal decisions do not stem directly from legal texts themselves, they have generated a growing body of scholarship aimed at describing the factors that *do* influence judicial decisionmaking. These factors can be grouped under several broad headings—legal, ideological, institutional, and political—though, in practice, analyses usually adopt a model that blends factors from each.

The first set of factors that might influence judicial decisionmaking, and the one most consistent with traditional notions of judging, encompasses certain legal factors such as the presence of specific fact patterns, the strength of existing precedent, or the particular wording of statutory or constitutional clauses.[34] Sometimes these legal models take on more elaborated forms with scholars arguing that judges are constrained by legal categories but engage in strategic behavior about, for instance, when to

[33] There have been a variety of different traditions of legal scholarship that ascribe to some or all of these propositions that have gone variously under the titles Legal Realism, Law and Society, and Critical Legal Studies. *See, e.g.*, LAURA KALMAN, LEGAL REALISM AT YALE 1927-1960 (1986); Lawrence Friedman, *The Law and Society Movement*, 38 STAN. L. REV. 763 (1986); Robert W Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57. Even the emergent camp of New Originalists recognizes the under-determined nature of certain constitutional disputes. *See infra* Part V.C.2

[34] Jeffrey A. Segal, *Predicting Supreme Court cases probabilistically: The search and seizure cases, 1962-1981*, 78 AMERICAN POLITICAL SCIENCE REVIEW 891–900 (1984); Jeffrey A. Segal, *Supreme Court justices as human decision makers: An individual-level analysis of the search and seizure cases*, 48 THE JOURNAL OF POLITICS 938–955 (1986) (finding that fact patterns in search and seizure cases are associated with court rulings).

follow precedent or how quickly to respond to new precedent.[35] Likewise, judges may be more persuaded by the rulings or legal reasoning offered by some courts more than others.[36]

A second set of factors focuses on what might be termed judicial ideology. This is the general idea that judges, far from simply "calling balls and strikes," have specific preferences for certain specific policy outcomes or kinds of outcomes (e.g. limited government).[37] Scholars, using a variety of data and analytic techniques, have tried to identify the composition and strength of these ideologies as well as their association with certain personal characteristics of judges.[38] Though the value, strength, and predictive power of these variables has been subject to debate[39], scholars have examined the influence of variables such as party affiliation[40], the party of the appointing official, or, for federal judges, an ideology score of his home state senator[41]

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[35] *See* Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals Essay*, 107 YALE L.J. 2155–2176 (1997) (noting that changes in precedent constrain judicial preferences by creating the possibility of a "whistleblower" who will call deviations from precedent); Paul Brace & Melinda Gann Hall, *Studying courts comparatively: The view from the American states*, 48 POLITICAL RESEARCH QUARTERLY 5–29 (1995) (noting the importance of facts in death penalty cases); Sara C. Benesh & Malia Reddick, *Overruled: An event history analysis of lower court reaction to Supreme Court alteration of precedent*, 64 THE JOURNAL OF POLITICS 534–550 (2002) (noting that legal complexity of decisions and area of law, specifically criminal procedure, are significant factors).

[36] *See, e.g.,* Gregory A. Caldeira, *The transmission of legal precedent: A study of state Supreme Courts*, 79 AMERICAN POLITICAL SCIENCE REVIEW 178–194 (1985); Robert J. Hume, *The Impact of Judicial Opinion Language on the Transmission of Federal Circuit Court Precedents*, 43 LAW & SOCIETY REVIEW 127–150 (2009); Rorie Spill Solberg, Jolly A. Emrey & Susan B. Haire, *Inter-Court Dynamics and the Development of Legal Policy: Citation Patterns in the Decisions of the US Courts of Appeals*, 34 POLICY STUDIES JOURNAL 277–293 (2006).

[37] To be clear, scholars, even those who adhere solely to the study of legal texts and the development of legal doctrines, recognize that individual judges differ in their personal views and stance toward the law—that they are "liberal" or "conservative" or have expansive views on the role of the judiciary. What distinguishes the work referenced here is the push to quantify these views and subject them to hypothesis testing. For a nice discussion of the history of these efforts and the debates they produced, see Howard Gillman, *What's law got to do with it? Judicial behavioralists test the "legal model" of judicial decision making*, 26 LAW & SOCIAL INQUIRY 465–504 (2001).

[38] *See, e.g.,* Jeffrey A. Segal & Harold Spaeth, The Supreme Court and the Attitudinal Model (1993); Andrew D. Martin & Kevin M. Quinn, *Dynamic ideal point estimation via Markov chain Monte Carlo for the US Supreme Court, 1953–1999*, 10 POLITICAL ANALYSIS 134–153 (2002) (creating MQ scores - a way of measuring justice ideology); Lee Epstein et al., *Ideological drift among supreme court justices: Who, when, and how important*, 101 NW. UL REV. 1483 (2007).

[39] *See, e.g.*, Segal and Spaeth *supra* n. 38; Gillman, *supra* n. 37.

[40] *See, e.g.,* Stuart S. Nagel, *Political party affiliation and judges' decisions*, 55 AMERICAN POLITICAL SCIENCE REVIEW 843–850 (1961); Gerard S. Gryski & Eleanor C. Main, *Social Backgrounds as Predictors of Votes on State Courts of Last Resort: The Case of Sex Discrimination*, 39 WESTERN POLITICAL QUARTERLY 528–537 (1986); Segal & Spaeth, *supra* n. 38.

[41] This is the basis of the increasingly common "Judicial Common Space" Score. See:

as well as some social background characteristics[42] like race[43], gender[44], or prior professional experience.[45] Though recent efforts to develop a common "score" of judicial ideology show some promise,[46] in general, scholars have found the explanatory power of these variables quite limited.[47]

A third set of potentially influential factors relate to the larger institutional arrangements in which courts are embedded. For instance, judges may seek to maintain their professional and institutional legitimacy by following a consensus position reached by other courts.[48] Likewise, judges may feel more or less constrained by the security of their position on the court. Judges who are required to stand for election may be more likely to hew to the views of the broader public than those who receive a lifetime appointment.[49] These institutional arrangements are unlikely to be strictly determinative but may nevertheless be an important factor.

Finally, if we believe that judges are, at least in part, policy actors who seek to use the law to secure their preferred policy outcomes, then we would expect that, like legislatures, they would be attuned to the broader political context. Thus, scholars have examined the extent to which judicial decisionmaking is associated with measures of the political environment.

Micheal W. Giles, Virginia A. Hettinger & Todd Peppers, *Picking federal judges: A note on policy and partisan selection agendas*, 54 POLITICAL RESEARCH QUARTERLY 623–641 (2001); Lee Epstein et al., *The Judicial Common Space*, 23 JOURNAL OF LAW, ECONOMICS, & ORGANIZATION 303–325 (2007).

[42] We incorporate these into the discussion of ideology because, unless one believes that personal characteristics like gender mechanically produce certain worldviews, the variable is serving as a proxy for some broader set of personal experiences that work to influence one's policy preferences and views of the law.

[43] Susan Welch, Michael Combs & John Gruhl, *Do black judges make a difference?*, AMERICAN JOURNAL OF POLITICAL SCIENCE 126–136 (1988); David S. Abrams, Marianne Bertrand & Sendhil Mullainathan, *Do judges vary in their treatment of race?*, 41 THE JOURNAL OF LEGAL STUDIES 347–383 (2012); Gregory Sisk et al Charting the Influences on the Judicial Mind 73 NYU L Rev (1998) (finding no significant influence of race on decisionmaking).

[44] Thomas G. Walker & Deborah J. Barrow, *The diversification of the federal bench: Policy and process ramifications*, 47 THE JOURNAL OF POLITICS 596–617 (1985); Christina L. Boyd, Lee Epstein & Andrew D. Martin, *Untangling the causal effects of sex on judging*, 54 AMERICAN JOURNAL OF POLITICAL SCIENCE 389–411 (2010).

[45] Orley Ashenfelter, Theodore Eisenberg & Stewart J. Schwab, *Politics and the judiciary: The influence of judicial background on case outcomes*, 24 THE JOURNAL OF LEGAL STUDIES 257–281 (1995); Gerard S. Gryski & Eleanor C. Main, *Social Backgrounds as Predictors of Votes on State Courts of Last Resort: The Case of Sex Discrimination*, 39 WESTERN POLITICAL QUARTERLY 528–537 (1986) (each concluding finding that prior judicial experience of limited predictive value).

[46] For example, Epstein et al, *supra* n.41; Ryan C. Black & Ryan J. Owens, *Agenda setting in the Supreme Court: The collision of policy and jurisprudence*, 71 THE JOURNAL OF POLITICS 1062–1075 (2009).

[47] For a useful recent summary, Joshua B. Fischman & David S. Law, *What is judicial ideology, and how should we measure it*, 29 WASH. UJL & POL'Y 133 (2009).

[48] E.g. Caldeira, *supra* n. 36.

[49] E.g. Brace & Hall, *supra* n. 35.

For example, some researchers have investigated whether judges consider the partisan composition of the legislative and executive branches in reaching their decisions. Judges may exercise restraint, for instance, if they suspect their decision will result in legislative backlash against the ruling or jeopardize their legitimacy with the public at large[50] or try to calibrate their rulings to the values and partisan leanings of the public at large.[51] Beyond considerations of political control there are also questions concerning the general policymaking environment. For example, judges may look ahead to the costs associated with complying with a ruling and, for instance, be more reluctant to create new financial liabilities for the state in the midst of a recession.[52]

Although scholars have explored the explanatory power of variables from each of these broad categories in the context of several areas of law ranging from the death penalty[53] to search and seizure[54] to products liability,[55] one challenge is often the lack of heterogeneity in key variables of interest. For instance, there is no alternative wording of the U.S. Constitution for scholars to exploit in studying the association of constitutional clause wording to civil rights jurisprudence. For these reasons, one fruitful area for exploring judicial decisionmaking has been state school finance litigation. Not only has school finance litigation been attempted in nearly every state over a period spanning nearly half a century—providing considerable variation in political, institutional, and ideological variables—but state constitutions differ in the wording of their education clauses, providing an ideal test for a key legal variable. Indeed, to date there have been five empirical quantitative investigations of the factors associated with outcomes of school finance cases as well as several additional qualitative investigations of the same question. In the next section we briefly discuss the analytic approach to investigating the sets of

[50] Scholars have begun to evaluate these choices using Game Theory. See, e.g. Jeffrey A. Segal, Chad Westerland & Stefanie A. Lindquist, *Congress, the Supreme Court, and judicial review: Testing a constitutional separation of powers model*, 55 AMERICAN JOURNAL OF POLITICAL SCIENCE 89–104 (2011).

[51] E.g. Paul R. Brace & Melinda Gann Hall, *The interplay of preferences, case facts, context, and rules in the politics of judicial choice*, 59 THE JOURNAL OF POLITICS 1206–1231 (1997).

[52] Staci L. Beavers & Jeffrey S. Walz, *Modeling Judicial Federalism: Predictors of State Court Protections of Defendants' Rights Under State Constitutions, 1969–1989*, 28 PUBLIUS: THE JOURNAL OF FEDERALISM 43–59 (1998) (finding that court decisions are associated with state wealth).

[53] E.g. Tracey E. George & Lee Epstein, *On the nature of Supreme Court decision making*, 86 American Political Science Review 323–337 (1992).

[54] E.g. Segal, *supra* n. 34.

[55] E.g. Robert C. Bird & Donald J. Smythe, *Social Network Analysis and the Diffusion of the Strict Liability Rule for Manufacturing Defects, 1963-87*, 37 LAW & SOCIAL INQUIRY 565–594 (2012).

variables discussed above, their findings, limitations, and the need for additional empirical investigations.

B. Prior Studies of School Funding Lawsuit Determinants

There is no shortage of papers that have examined the judicial and political dynamics of individual school funding lawsuits on a qualitative basis.[56] For example, in an exquisitely detailed study, William Koski examines the divergent outcomes of school finance cases in Ohio and Wisconsin.[57] The two states exhibited similarities on a variety of key variables: both states are diverse; varied in their economies and geographies; had strong Republican governors who opposed efforts to changes to the finance system; and had state supreme courts that had previously rejected constitutional challenges to the school finance scheme. Yet, as Koski details, the Ohio Supreme Court declared the state's funding scheme unconstitutional while the Wisconsin Supreme Court reached the opposite outcome. In explaining these contrary rulings, Koski engages in a close study of each of the individual judges' particular ideologies on a range of legal issues to determine that judicial policy preferences (as well as the variation in political support for the litigation between the two states) played a meaningful role in driving the ultimate result of the lawsuits.[58] As Koski points out, however, a subsequent shift in electoral support in Ohio put the court on the defensive and raised questions about the court's institutional legitimacy.[59]

These case-by-case qualitative studies are helpful in painting a picture of courts that are attentive to both the broader political climate as well as to questions of institutional legitimacy and, in turn, institutional constraints. But given the substantial legal, factual, political, and cultural differences

[56] *See, e.g.*, Douglas S. Reed, *People v. the Court: School Finance Reform and the New Jersey Supreme Court*, 4 CORNELL JL & PUB. POL'Y 137, 143, 153-54 (1994) (arguing that the New Jersey Supreme Court's ruling in favor of plaintiffs in *Abbott II* led to electoral backlash against Democrats and "cost the Court its political allies"); Michael Paris, *Legal Mobilization and the Politics of Reform: Lessons From School Finance Litigation in Kentucky, 1984-1995*, 26 LAW & SOCIAL INQUIRY 631–681 (2001), 676 (arguing that the Kentucky Supreme Court's pro-plaintiff decision led to policy successes because "by the time the courts reached their decision points, reformers had generated a good deal of political support among citizens and other strategic interests groups . . . [such that] judges inclined to think in strategic terms would have had less and less to fear in terms of opposition from other institutions or citizens"). *See also generally*. William H. Clune, *The shift from equity to adequacy in school finance*, 8 EDUCATIONAL POLICY 376–394 (1994); William S. Koski, *Of fuzzy standards and institutional constraints: A re-examination of the jurisprudential history of educational finance reform litigation*, 43 SANTA CLARA L. REV. 1185 (2002).

[57] William S. Koski, *The politics of judicial decision-making in educational policy reform litigation*, 55 HASTINGS LJ 1077 (2003).

[58] Id., 1167-1170.

[59] *Id*.

across the 50 states, these qualitative studies do not lend themselves to confident conclusions about how judges decide school finance cases generally. Our primary interest in this paper is therefore to extend prior quantitative investigations of school finance outcomes on a systematic basis.

Before doing so, it makes sense to consider the existing quantitative literature. The first such paper involved an examination of the rulings of forty state supreme courts on the question of the constitutionality of the state's school finance system.[60] The author, Karen Swenson, elected to use the outcome of the most recent state high court decision in each state along with a variety of legal, political, and institutional covariates including variables for the strength of the state's education clause; method of judicial selection; rulings of other state high courts; whether the legislature recently passed school finance legislation; measures of school spending and spending inequities; as well as several measures of the character and strength of state political ideology.[61] Using logistical regressions, the author used these data to test a series of hypotheses about the relationship between these variables and the outcomes of the constitutional challenges.

These analyses identified very few variables as associated with the rulings in each case. For instance, Swenson found no association between outcomes and the method of judicial selection, the strength of the education clause, size of wealth disparities, recent legislative reform, or the sitting governor's party affiliation.[62] She did find, however, some limited support for the significance of per pupil expenditures (states with higher expenditures were less likely to have their systems ruled unconstitutional) and the strength of the ideological leanings of the state (supreme courts in states with more liberal electorates were more likely to declare funding systems unconstitutional).[63] These results, and the general lack of support for most of author's hypotheses, led Swenson to conclude that whether "a state scheme of school finance will be declared unconstitutional depends almost solely on the whimsy of the state Supreme Court justices themselves."[64]

A second article by Paula Lundberg took up the same question with a slightly different analytic approach.[65] Similar to Swenson, Lundberg examined the relationship between a variety of legal and extra-legal variables and state supreme rulings on school finance cases. Lundberg also

[60] Karen Swenson, *School finance reform litigation: Why are some state supreme courts activist and others restrained*, 63 ALB. L. REV. 1147 (1999).

[61] Id., 1170 (providing a full list of variables included in the model).

[62] Id., 1177-1778.

[63] Id., 1177

[64] Id., 1178

[65] Paula J. Lundberg, *State courts and school funding: A fifty-state analysis*, 63 Alb. L. Rev. 1101 (1999).

restricted her case sample to a single decision by the highest court in each state that had considered the constitutionality of the state's school funding system. Unlike Swenson, however, Lundberg included two cases each from Arizona and Ohio because in both states an initial state high court ruling upholding the constitutionality of the school finance system was supplanted by a subsequent state high court ruling that the systems were, in fact, unconstitutional.[66]

In addition to this slight modification in inclusion criteria, Lundberg makes a more extensive change to the covariates included in her logistical regression model. Lundberg includes the same general categories of variables—legal, political, institutional—but in a more elaborated form. For instance, in addition to variables for the ratio of state per pupil spending to the national average, Lundberg includes a variable comparing average state and national teacher salaries. Likewise, she includes not just a measure of state liberalism but, for instance, incorporates measures of state per capital income; a measure of whether the state generally has "traditionalistic," "moralistic," or "individualistic" political cultures; and, with respect to institutional measures, whether judges are elected, the length of their term, and party identification.[67]

Despite these much more extensive set of control variables, Lundberg's analysis does not offer much more illumination about the relationship between school finance decisions and legal, political, institutional, or ideological variables included in the study. None of the features of the state school system (e.g. expenditures) were associated with the rulings nor were any of the measures of judicial partisanship or institutional design (e.g. elected judges). Lundberg did find a small relationship between the state court outcomes and several of the political variables in her data set. State per capita income was positively associated with rulings in favor of the plaintiffs as was the characterization of the state's political culture as "traditionalistic"—a finding the author considered counter-intuitive.[68] Lundberg also found a negative relationship between the percent urban population and rulings in favor of challenges to state funding systems.[69]

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[66] See *Shofstall v Hollins*, 515 P.2d 590 (Ariz 1973) and *Hull v Albrecht*, 960 P.2d 634 (Ariz 1998) and *Board of Educ. V Walter*, 390 N.E. 2d 813 (Ohio 1979), *DeRolph v State*, 677 N.E.2d 733 (Ohio 1997).

[67] Lundberg, *supra* n. 5 at 1123-1124.

[68] Lundberg adopts the measures used by DANIEL J. ELAZAR, AMERICAN FEDERALISM: A VIEW FROM THE STATES 114-15 (3d ed.1984). According to Elazar, traditionalistic political cultures are generally suspicious of government action and government intervention into people's problems. Lundberg hypothesized that traditionalistic states would likely be the most unequal on account of their legislative restraint, judges "as products of that culture, would vote to uphold their respective legislative funding schemes." Lundberg, *supra* n. 5 at 1126.

[69] Lundberg, *supra* n. 5 at 1146.

Swenson and Lundberg deserve a great deal of credit for undertaking the first systematic analyses of the factors influencing school funding lawsuit outcomes. Both studies, however, suffer from significant weaknesses. First and foremost, the decision to include only a single state high court decision unnecessarily limits each article's statistical and analytical power.[70] Lundberg herself recognizes the analytical significance of the fact that state supreme courts can, and do, revisit constitutional questions and often change the meaning of constitutional rights in the process. But having made the decision to include subsequent re-hearings in Ohio and Arizona, it is hard to justify the exclusion of other instances when state supreme courts have revisited the question of the constitutional sufficiency of school finance systems.

Though Lundberg insists that "the court determination of the constitutional meaning of the state's education and equal protection clauses is contained in the original decisions, while subsequent cases are generally concerned with judicial enforcement,"[71] this is a view that is at odds with the large body of doctrinal and qualitative analyses of school finance litigation. Indeed, the whole notion of "third wave" school finance cases is premised on the idea that courts in many states could change the substantive meaning of the state's education right—substituting adequacy for equity—without needing to overturn the courts initial determination.[72] Treating these cases as a one way ratchet captures, at best, only part of the picture of factors associated with rights adjudication and at worst distorts the picture by creating an observation criteria that is selectively inclusive.

And in any case, decisions that Lundberg would qualify as mere "enforcement" disputes are themselves of profound importance in cashing out the concrete meaning of educational rights. Much like the right to school desegregation announced in *Brown* was cashed out (for better or worse) through decades' worth of enforcement decisions,[73] the right to equal or adequate educational access is ultimately empty until it is given shape and substance by subsequent judicial review of legislative responses. There is no reason to believe that judges would be sensitive to extra-legal considerations in the first instance and not subsequently. Moreover, just as with the *Brown* legacy, the stiffest test of a court's ideological and political commitment to secure educational rights may come after—not before—the initial recognition of the state's obligation. Indeed, the qualitative,

[70] For a discussion of why our study is able to analyze a far greater number of decisions without raising the kinds of auto-correlation concerns feared by Swenson and Lundberg, *see infra* Part II.A.

[71] Id., 1104

[72] E.g. Clune, *supra* n.56 at 385.

[73] *See, e.g.*, Levinson, *supra* n.31 at 874-78.

historical, and doctrinal analyses of school finance cases are full of descriptions of courts making a bold start before losing their nerve.[74]

A third investigation by Yohance Edwards and Jennifer Stern[75] takes the work of Swenson and Lundberg as its starting point (the authors use all the same variables[76]) and seeks to extend it by investigating whether the variation in judicial outcomes is explained by differences in the predominant race and setting (city/non-city/coalition) of the plaintiff districts in each case.[77] Edwards and Stern seek to examine this hypothesis by performing an analysis of the most recent state high court decisions in each state (41 total).

Given the small sample size, the authors decided not to attempt regression analysis and to instead report the differences in the variables of interest by case outcome (plaintiff win or state win). The authors also created a cross-tabulation to examine the relationships between the variables of interest and the variables for predominant race of plaintiff school districts and the district setting. The authors argue that because they used the entire population of relevant cases (rather than a sample) they do not need to subject their results to statistical testing.[78] On this basis the authors conclude that predominantly minority districts and city school districts were less likely to succeed in school finance challenges than non-minority, non-city districts. The authors also found that plaintiffs succeeded more often in cases in front of elected judges; in cases when there were more plaintiff school districts involved; and, as with Lundberg, in cases brought in states with a "traditionalistic" political culture.[79]

While providing suggestive evidence for their hypothesis, the value of this analysis is significantly limited by the authors' decision to use cross-tabulations and the decision not to subject the mean differences they found to tests of statistical significance. Likewise, the analytical approach did not allow the authors to control for other potentially salient variables as they calculated their cross-tabulations, making it impossible to say whether there are confounding variables that account for the differences they report. These challenges are in addition to the definitional challenges concerning which

[74] The case of New Jersey mid-course shift from an equity to an adequacy standard is but one of many examples.

[75] Yohance C. Edwards & Jennifer Ahern, *Unequal treatment in state supreme courts: Minority and city schools in education finance reform litigation*, 79 NYUL Rev. 326 (2004).

[76] Id., 333

[77] The impetus for this investigation was a qualitative analysis by James Ryan that argued that urban and minority plaintiffs have been less successful as plaintiffs and that the level of public and legislative backlash to successful judgements (e.g. New Jersey, Arizona, Texas) has been qualitatively different than those in cases brought by white and/or rural plaintiffs (e.g. Kentucky, Tennessee, Vermont, Massachusetts). See: James E. Ryan, *The influence of race in school finance reform*, 98 MICHIGAN LAW REVIEW 432–481 (1999).

[78] Edwards & Ahern, *supra* n.75, 353.

[79] Id., 348-349.

cases should be included in the analysis. The choice to use only the most recent case from each state, rather than the full sample of state supreme court rulings, not only incorporates all the conceptual analytical problems about the nature of "the law" included in the Swenson and Lundberg analyses, but the decision also temporally biases the sample significantly toward more recent ('third wave') outcomes. The selective inclusion also prevented the authors from providing even a suggestive, straight-forward count for the most direct test of their hypothesis. After all, what better way to test the relationship between plaintiff traits and outcomes than to compare outcomes in the same state with different plaintiffs?

More recently, two additional papers by social scientists have tried to create a more complex picture of judicial decisionmaking in school finance cases by bringing state supreme court decisions into relationship with the actions of state legislatures and with the rulings of other state supreme courts.

The first of these articles, by Roch and Howard, begins from the premise that courtrooms are essentially policy venues. Reformers looking to secure changes in school finance systems, therefore, make decisions about whether to pursue those changes by legislative or judicial means. Legislators and judges, in turn, recognize this "venue shopping," so to speak, on the part of reformers and strategically determine their own behavior in response to what the other branch of government might do. Roch and Howard operationalize this insight by estimating two separate statistical models—one each for judicial "reform" (court ruling) and legislative reform. In both models the authors incorporate a set of variables relating to the legal, political, institutional, and ideological aspects of the state as well as variables that seek to capture "strategic considerations" on the part of the judiciary and legislature respectively.[80]

On the basis of these models the authors conclude that both legislatures and courts engage in strategic behavior. Specifically, they find that legislatures are more likely to engage in legislative reform in states that have appointed judiciaries, which they interpret as a sign of legislatures taking matters into their own hands rather than leaving it to an unaccountable (appointed) judiciary.[81] Roch and Howard also find that appointed state supreme courts are *less* likely to overturn school finance systems, though appointed judges are more likely to do so in instances of large disparities in

[80] Christine H. Roch & Robert M. Howard, *State policy innovation in perspective: Courts, legislatures, and education finance reform*, 61 POLITICAL RESEARCH QUARTERLY 333 (2008), 339, 341.

[81] Id., p. 339; they also find several political variables to be significant: disparities in educational resources increased the likelihood of legislative reform; strong teachers unions, constitutional provisions, and greater levels of state income inequality all *decreased* the likelihood of legislative reform.

educational spending.[82] Again, they interpret these results as judges being strategically selective when stepping into the "policy reform" arena.

Though Roch and Howard argue that they provide evidence of the "interactive process of legislative and judicial decision making,"[83] their argument is not totally convincing. First, despite the article's framing, neither of their models actually includes a measure of governmental branch interaction: the legislative model does not control for prior actions of the judiciary and vice versa.[84] Not only is there no direct measure of this interaction, but the legislative model treats legislative reform as a one-time event—states drop out of the data set after they have enacted legislative reform.[85] Given the history of school finance reform has been described as an on-going dialog—a "colloquy"[86]—between the legislature and judiciary this is a peculiar operationalization of the article's core analytic interest. Second, the significant variables in the specified models do not appear to tell a coherent story. It is not clear why, for instance, legislatures would be more likely to act in states with appointed judiciaries and in states with *weaker* constitutional protections and *weaker* teachers unions. Weaker constitutional protections would make it harder for the judiciary to act, thereby reducing pressure on the legislature to enact reform, and teachers unions are almost always in favor of increased educational spending and would seem to provide precisely the kind of political cover required of the strategic policy maker. If all of this is evidence of strategic inter-governmental behavior, it is of a very peculiar sort that, at the very least, requires further investigation.

In a final paper, Howard, Roch, and Schorpp try to analyze whether judicial rulings on school finance systems "diffuse" across state lines in the same way that scholars have shown policy ideas diffusing among state legislatures. The theory runs that following a ruling of unconstitutionality by a court in one state, courts in other states may "emulate" this behavior either, for example, because they are persuaded by the ruling's logic or because they do not want to be seen as out of step with other courts—responding to what institutional theorists might call isomorphic pressures.[87]

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[82] Id., p. 341. They also find that the strength of the constitutional provision increases the likelihood of judicial action.

[83] Id., p. 342

[84] The models do include a measure of whether a neighboring state has engaged in either legislative or court ordered reform, but they are not statistically significant. Id., 341.

[85] Id., p. 339 ("state years are included in the data set until legislative reform occurs in a particular state.").

[86] Michael A. Rebell, COURTS AND KIDS: PURSUING EDUCATIONAL EQUITY THROUGH THE STATE COURTS (2009).

[87] The authors do not use this phrase, opting for "emulation," but we think it is useful descriptively especially given that neo-institutionalists place an emphasis on *formal* emulation even when the underlying substance can vary widely—a description that would seem to capture the large variation in meaning of school finance cases even as states have

They predict that courts are likely to follow rulings from other states that are most ideologically and politically similar. They operationalize this emulation model by creating dyads in which every state appears twice—once in which they are "receiving" the opportunity of emulation from another state that has enacted court-ordered reform; and once in which, if they have enacted court-ordered reform, they are "sending" to other states an invitation to emulate their decision.[88] Each state in the dyad has a set of independent covariates and the dyad itself also has a set of co-variates (e.g. a measure of the ideological similarity between the pair of states). The authors run the model twice, one time for each of the time periods reflecting the second and third waves of school finance litigation. On this basis the authors find that there are differences between the sender and receiver characteristics between the two waves and that as the ideological differences between states' courts and governments decrease, the likelihood of "emulation" increases.[89]

This paper represents a substantial advance from prior work in its more inclusive view of the relevant cases—incorporating all state supreme court cases not just the first or most recent—and its more robust conception of historical time—not just the recognition of the waves of reform but the notion that states, themselves, are repeat players in the process. Unfortunately, the methodological approach taken in the analysis is not fully able to support this more expansive historical approach to the subject matter. For instance, the authors conclude that "sender courts are less likely to act as leaders if legislative reform has already occurred in their state."[90] But this is almost certainly a function of the way the authors have operationalized their variables. A state becomes a "sender state" from the time of its first decision for each year going forward. The longer a state has been a sender state, the more likely it will have engaged in legislative reform. When a receiver state does finally "emulate" the sender states, it will appear (statistically) as though it is following the most recent sender states (i.e. the ones who are least likely to have engaged in legislative reform). This conclusion seems more likely a statistical artifact than a political or strategic one on the part of those involved.

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formally converged on finding in favor of educational adequacy rights. This is also true because, as we explain below, the authors are not capturing actual 'emulation,' what they are measuring, if anything, would be more accurately described as formal mimicry. On the potential fruitful exchange between neo-institutionalism and legal studies, see: Mark C Suchman & Lauren Edelman, *Legal rational myths: The new institutionalism and the law and society tradition*, 21 LAW & SOCIAL INQUIRY 903–941 (1996).

[88] Robert M. Howard, Christine H. Roch & Susanne Schorpp, *Leaders and Followers: Examining State Court–Ordered Education Finance Reform*, 39 LAW & POLICY 142–169 (2017), p. 155.

[89] Id., 160.

[90] Id., 159

This challenge of interpreting the authors' findings points to a larger difficulty with the paper: the authors do not model emulation as the term is generally understood—the authors count a state as emulating *all* prior states that have enacted court-ordered reform—but instead model changes in variables associated with decisions over time. To the extent that more states necessarily entertain constitutional challenges over time, the interpretive meaning of this "emulation" breaks down. This breakdown is hinted at when the authors' model finds that, in the third wave, courts were *more likely* to engage in emulation the *further* apart they were ideologically and the *further* apart their states were in their political ideologies. Without an account of the substantive content of the emulation, it seems more accurate to say that, by 2002, courts began to engage in a kind of formal signaling in the recognition of student fiscal adequacy rights.[91] The model, however, tells us very little about the circumstances under which courts did so or how the meaning and substance of children's education rights evolved as a result.

* * *

Considered together, these studies provide suggestive evidence for the general value of examining how different factors—legal, political, ideological, and institutional—are associated with judicial decisionmaking in school finance cases. The studies correctly identify that the long, variegated history of state school finance cases provides a uniquely rich opportunity to analyze these questions quantitatively. But the statistical approaches used to analyze this history have not done that history justice. All but one of these studies mechanically constrained the relevant data and even the most inclusive approach rendered its view too narrow by including all the supreme court cases through the period in question but ignoring the hundreds of other instances of courts at all levels considering these issues.

Put simply, a full account of judicial decisionmaking on the constitutionality of school finance systems must include a full account of the judicial *decisions* on the constitutionality of school finance systems. The section that follows explains how we are able to build a broader data set to drive our analysis.

II. DATA

Our study utilizes a unique data set comprising 318 school finance decisions issued by state courts between 1971 and 2017. This part explains the selection criteria used to delimit the relevant sample of state court decisions before describing the variables included in our analysis.

[91] This is similar to courts value signaling the importance of discrimination and colorblindness even as they began to invert its meaning. This issue was a major theme of commentary on *Parents Involved in Community Schools v. Seattle School District No. 1* 127 S. Ct. 2738 (2007). See, for instance: James E. Ryan, *The Supreme Court and voluntary integration*, 121 HARV. L. REV. 131 (2007).

A. The Sample

As mentioned, previous attempts to identify variables capable of predicting the outcome of school funding lawsuits have utilized uncommonly small sample sizes. The leading law review articles by Karen Swenson and Paula Lundberg ran regressions on data sets containing just the most recent forty and forty-one state high court rulings,[92] respectively.[93] The stated reason for this limited number of observations was "to avoid problems with autocorrelation" that might arise if previous state high court rulings were included.[94]

In our view, this self-imposed limitation was unnecessary in three key respects. First, and most significantly, Swenson and Lundberg seem to assume without explanation that only decisions issued by state courts of last resort should count for purposes of identifying variables that may predict school finance lawsuit outcomes. The best argument we can think of in defense of that assumption is that in our system of appellate judicial review, higher courts often grant significant deference to lower court findings of fact, particularly when factual determinations are based on witness credibility.[95] Including opinions issued by a trial court and an appellate court in the same case might thus raise issues of autocorrelation, insofar as higher court rulings would in theory correlate heavily with those from the trial courts.[96]

The argument is incorrect. For one thing, the level of autocorrelation is something to be demonstrated statistically rather than preemptively as a decision rule, which was not done by prior authors. For another, school funding lawsuits do not commonly turn on findings of fact; they turn on questions of law such as the legal meaning of the state's education clause or whether the dispute raises a non-justiciable political question.[97] When

[92] A note on terminology: to avoid confusion, we use the terms "state high court" and "state court of last resort" to denote what most people think of a state's Supreme Court. We do so because some states (e.g., New York) refer to their trial courts as "supreme courts" and use the term "Court of Appeals" to refer to their highest appellate court.

[93] *See* Swenson, *supra* n.5; Lundberg, *supra* n.5.

[94] Swenson, *supra* n.5 at 1151.

[95] *See, e.g.*, Fed. R. Civ. P. 52(a)(6) ("Findings of fact . . . must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge [a] witness's credibility").

[96] Of course, if the logic of this argument were correct, that might actually counsel in favor of running a regression on the initial trial court decisions in state school finance lawsuits, since the greatest predictor of state Supreme Court outcomes would be how the trial court ruled as an initial matter.

[97] *See, e.g.*, *Rose v. Council for Better Educ., Inc*., 790 S.W.2d 186, 211 (Ky. 1989) ("In defining [the constitution's use of the term] 'efficient,' we use all the tools that are made available to us. In spite of any protestations to the contrary, we do not engage in judicial legislating. . . . We simply take the plain directive of the Constitution, and, armed

higher courts review these kinds of *legal* conclusions reached by lower courts, hornbook law instructs them to apply a *de novo* standard of review.[98] And at the point at which intermediate appellate and state high courts are literally considering the constitutionality of a school funding system "anew," it seems reasonable to treat each level of decision as an independent event worthy of analysis.

A second aspect of Swenson and Lundberg's autocorrelation concern involves decisions by state courts on *remedial* questions issued after the state court of last resort's initial liability finding.[99] Again, however, we think this is unduly self-limiting. It's true that school finance plaintiffs will often return to court to argue that a state legislature's proposed remedy is constitutionally deficient.[100] But why should a state court's disposition of these follow-on challenges necessarily be correlated with the outcome of the initial liability ruling, as opposed to the proper meaning of the education clause or some other variable? To assume that follow-on remedial disputes are determined by earlier liability rulings is to assume that school finance plaintiffs who won an initial ruling will win subsequent challenges ad infinitum (no matter how much the state legislature has done to make good on its duty!), simply because the plaintiffs won the first time around. Needless to say, that assumption is belied by the record.[101]

Finally, the choice to include only a single state high court ruling in the data set fails to capture that subsequent rounds of school finance litigation in the same state often involve different legal theories. Scholars have long recognized that state level school finance litigation has encompassed different waves of litigation founded on two distinct kinds of litigation

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with its purpose, we decide what our General Assembly must achieve in complying with its solemn constitutional duty."); *Connecticut Coal. for Justice in Educ. Funding, Inc. v. Rell*, 990 A.2d 206, 218 (2010) ("because an issue regarding justiciability raises a question of law, our appellate review is plenary.").

[98] *See supra* n.22.

[99] *See* Swenson, *supra* n.5 at 1151 ("Also excluded are follow-up cases reaching the high courts addressing the sufficiency of the remedy enacted by the state legislature.").

[100] One of the most significant state school finance cases, the *Abbott v. Burke* saga in New Jersey, has been ongoing since the initial complaint was filed in 1981. Since that time, the New Jersey Supreme Court has issued twenty-one opinions in the case, many of which resolve challenges to the sufficiency of particular legislative remedies. *See generally* The Education Law Center, "The History of Abbott v. Burke," online at http://edlawcenter.org/litigation/abbott-v-burke/abbott-history.html.

[101] For instance, our analysis finds nine pro-plaintiff New Jersey Supreme Court rulings post-dating the initial plaintiff's liability victory in *Abbott v. Burke*, 119 N.J. 287 (1990) but also six rulings in favor of the state. And after the Wyoming Supreme Court ruled for plaintiffs in *Campbell County School Dist. v. State*, 907 P.2d 1238 (Wyo. 1995), the state prevailed in the two major remedial challenges thereafter. *See State v. Campbell County School Dist*., 32 P.3d 325 (Wyo. 2001); *Campbell County School Dist. v. State*, 181 P.3d 43 (Wyo. 2008).

strategies known as the "equity" and "adequacy" theories.[102] In the earlier equity wave, plaintiffs typically alleged that unequal school finance systems violate state equal protection guarantees; in the latter they alleged that the same funding systems failed to provide some absolute level of "adequate" education guaranteed under a state education clause.[103]

For present purposes, what matters is that plaintiffs have sometimes failed on one of these theories only to succeed on the other. Thus, for example, an early equal protection claim failed in New York, but a later adequacy claim based on the state's education clause succeeded.[104] The opposite pattern occurred in California, where plaintiffs won a famous 1976 equity ruling, *Serrano v. Priest,*[105] only to lose a more recent adequacy lawsuit.[106] These examples show that subsequent rounds of state court litigation often implicate different legal questions. Where that is so, it is reasonable to include each round as an independent observation.

All of this explains our decision to include state decisions irrespective of court level and why our data set includes many more cases than prior analyses. Still, despite the many reasons to think that subsequent rounds of litigation can be treated as essentially independent observations, there remains a lingering possibility that there may be other unobservable factors particular to each state (perhaps a particular reverence for precedent or a cultural expectation about educational rights) that might interfere with the independence of school finance litigation outcomes within a given state. So in order to be conservative in our estimates and to reduce the possibility that our results are biased by collinearity within a state (whatever the source), we take the additional methodological step below of clustering the standard errors in our analytic models by state.[107]

But of course we must also offer a principled account of the kinds of cases we rule *out*. This was a somewhat less difficult task two decades ago, when there was less variety in the kinds of education reform lawsuits brought in state court.[108] Yet now that a growing number of suits are being

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[102] *See, e.g.*, Koski, Beyond Dollars, *supra* n.23 at 1903-1907 (describing the differences between these legal theories); Clune, *supra* n.56.

[103] *Id*.

[104] *Compare Bd. of Educ., Levittown Union Free Sch. Dist. v. Nyquist*, 57 N.Y.2d 27, 42-47 (1982) (rejecting equal protection challenge to school finance system); *with Campaign for Fiscal Equity, Inc. v. State*, 86 N.Y.2d 307, 316 (1995) (denying motion to dismiss plaintiffs' adequacy claim based on the state education clause and holding that the clause "requires the State to offer all children the opportunity of a sound basic education").

[105] *Serrano v. Priest*, 557 P.2d 929 (1976).

[106] *Campaign for Quality Education v. State of California*, 209 Cal.Rptr.3d 888 (Cal. Ct. App. 2016).

[107] *See infra* Part III.

[108] *See id.* at 1915-16 (describing a more recent "next-generation" of educational rights litigation that focuses on "specific, identifiable educational 'wrongs,'" specific groups of "identifiable students," and that targets "particular statutes" or the "denial of a specific resource").

filed on behalf of a range of groups and seeking a range of remedies,[109] it is particularly important to identify what, exactly, qualifies a case as a "school finance lawsuit" that counts for purposes of our study—and what does not.

Each of the state court decisions in our data set satisfies four criteria. First, the decision had to involve a particular kind of legal challenge: an alleged violation of a *state constitutional* provision. Lawsuits alleging violations of federal or state *statutory* law fall outside the scope of our analysis because they fail as a definitional matter to inform our core question: what determines the outcome of school finance lawsuits alleging state constitutional violations?[110] Examples of cases touching on important education policy matters that were excluded under this rule include *Renee v. Duncan*,[111] a lawsuit challenging teacher qualification rules promulgated under the federal No Child Left Behind Act, and *L.M. v. Michigan*,[112] a lawsuit alleging violations of a Michigan statute concerning students needing special assistance in reading.

Under our second criteria, a case must have been one in which plaintiffs sought a particular kind of relief—namely, an order invalidating the state's system for funding its public schools. We include this condition because we are interested in school finance cases where a finding for plaintiffs would impose a substantial burden on state lawmakers to redesign the way in which tax revenues are distributed for public education. By contrast, cases that are brought under state constitutional provisions but do not target the state's school funding system are not included—recent high-profile challenges to state teacher tenure laws are an example of cases excluded by this rule.[113]

Third, we did not include cases where the remedy sought by plaintiffs was financial in nature, yet circumscribed due to geographic limitations in the nature of the suit. For example, the California Supreme Court ruled in a case called *Hartzell v. Connell* that a school district's practice of charging a $25 fee for participation in extracurricular activities violated a state

[109] *See id*. at 1916-23 (describing recent lawsuits).

[110] That is not to say that state or federal statutory claims are unimportant or uninteresting. It is to say, however, that the predictors of the outcomes of those cases may differ systematically from the predictors of statewide school finance lawsuits, whether because statutes are typically drafted in much clearer fashion or because they involve less sweeping remedial obligations by defendants.

[111] 686 F.3d 1002 (9th Cir. 2012) (invalidating Department of Education regulation permitting teachers participating in alternative certification programs to count as "highly qualified" for purposes of the No Child Left Behind Act).

[112] 862 N.W.2d 246 (Ct. App. Mich. 2014) (finding no private right of action in state statute requiring school officials to provide "special assistance" to underperforming students to bring their "reading skills to grade level within 12 months").

[113] *See Vergara v. California*, 209 Cal. Reptr. 3d 532 (Cal. Ct. App. 2016), *review denied* Aug. 22, 2016 (rejecting argument that California teacher tenure laws violate the state equal protection clause).

constitutional provision guaranteeing access to free public schools.[114] This ruling satisfies the first two criteria because it is both predicated on a state constitutional violation and concerns school funding. However, the crux of the legal claim was that a single school district in Santa Barbara should cease its extracurricular fee practice. Narrow invalidations of this sort lie outside our area of primary concern, which is to identify variables that predict judicial behavior in cases raising substantial statewide liability against the state itself.[115]

Finally, our data set excludes cases where relief is sought on behalf of special subgroups of student plaintiffs. To illustrate, in *School Districts' Alliance for Adequate Funding of Special Education v. Washington*, plaintiff advocacy groups sued the state of Washington arguing that the legislature's failure to fully fund special education violated the state constitution.[116] The case satisfies each of the three previous criteria, as it is premised on a state constitutional violation, seeks an order invalidating the state's system for funding K-12 education (albeit solely with respect to special education), and applies statewide. We do not include it in our data set, however, because we cannot rule out the possibility that the ultimate outcome was influenced by considerations relating to the particular identity of the plaintiff children, all of whom had disabilities and thus received special education services.[117]

To be sure, the plaintiff students in the set of school finance cases that *are* included in our population—children who attend low-income, low-achieving school districts—are also in some sense a "special" population that is distinguishable from all public K-12 education students writ large. But what matters for our purposes is that we are able to hold that affected population group constant across all of the cases in our study. To do so necessitates excluding cases brought solely on behalf of different sub-groups of students.

A team of research assistants generated a list of all decisions with a plausible claim of satisfying our four criteria. Two primary sources were used to generate this initial list: a comprehensive, interactive database of state-level school finance decisions compiled by the Center for Educational

[114] 679 P.2d 35 (1984) (en banc).

[115] We recognize that this criteria is in some sense a matter of degree, insofar as rulings in favor of plaintiff children often result in targeted funding increases for particular at-need districts, which in turn implies a geographic limitation. *See, e.g.*, *Abbott v. Burke*, 119 N.J. 287 (1990) (establishing 28 "*Abbott* districts" entitled to a remedy for state constitutional violations). But we can still safely rule out cases like *Hartzell v. Connell*, where a ruling for plaintiffs does not lead to the restricting of the state's entire school funding apparatus.

[116] 244 P.3d 1 (2010) (en banc) (finding no constitutional violation).

[117] Likewise, a case like *D.J. v. California*, which involves claims brought specifically on behalf of English language learners, is not included in our data set. *See D.J., et al. v. State of California*, B.S. 142775, online at http://schoolfunding.info/wp-content/uploads/2017/01/DJ-v.-State-of-California.pdf.

Equity at Teachers College,[118] and Westlaw, which includes reported and unreported decisions searchable on a state-by-state basis. The authors then analyzed each decision for consistency with the stated criteria, and performed independent searches to identify cases that may have been missed during the initial pass through. The result is a total universe of 318 state court decisions included in the Appendix.[119]

B. Variables

We coded a number of variables corresponding to each court decision in our data set. Two variables are self-explanatory: the year of decision and the level of court that issued the ruling (trial, intermediate appellate, or court of last resort). Several other variables warrant further discussion.

Who prevailed? This is the dependent variable we seek to explain. For each decision in our data set, we coded whether the state or plaintiffs prevailed. In cases implicating just a single issue for resolution, this was simple. But other rulings required judgement. That is because in some decisions, courts resolve more than one legal question. If the court rules in favor of the state on one question but the plaintiffs on another, a judgment call must be made as to whether the case is really a "win" for one side or the other.

To illustrate, consider the trial court's ruling in the path-breaking New York case, *Campaign for Fiscal Equity v. State of New York.*[120] Plaintiffs in that case sued on both equity and adequacy grounds.[121] The trial court dismissed the plaintiffs' equity claim, but found in plaintiffs' favor on the adequacy claim.[122] We code this outcome as a win for plaintiffs because by denying the motion to dismiss the adequacy count, the trial court opened the state to significant potential liability—liability which was ultimately upheld by the state court of last resort.[123] Other instances of mixed rulings are coded a state victory;[124] still other split decisions were removed from the sample altogether for lack of a clear prevailing party.[125] We recognize

[118] *See* www.schoolfunding.info (last visited on August 15, 2018).

[119] The total number of cases that met our criteria for inclusion is 318. Because of incomplete data for the other variables in our regression models, the maximum number of cases used in our analysis is 313. The full data file, including coded variable data, is available upon request.

[120] 162 Misc.2d 493 (1994).

[121] *Id*. at 495-96.

[122] *Id*. at 500.

[123] *Campaign for Fiscal Equity v. State*, 100 N.Y.2d 893 (2003).

[124] *See, e.g.*, *Pendleton*, 345 Or. 596, 610 (agreeing with plaintiffs' demand for a "declaratory judgment that the legislature failed to fully fund the public school system" but refusing to issue a judgment that the legislature must actually fund the public school system at the requested levels).

[125] *See, e.g.*, *Abbott v. Burke*, 172 N.J. 294 (2002) (granting state's request to suspend some remedial requirements for one year in light of a budget crisis, but rejecting the state's

some of these cases involved close judgement calls, in all cases this outcome was independently coded twice with any coding disagreement settled through further discussion by the authors.

Was the decision a liability or non-liability ruling? Because our sample includes court decisions both leading up to the actual entry of judgment in a case and after it (at least in the case of plaintiffs' victories where subsequent follow-on challenges are filed), the possibility arises that different variables could possess varying levels of explanatory force across two kinds of decisions: those that effectively resolve the state's substantive legal liability (in either direction) and those that do not. In other words, judges may be more sensitive to certain variables (such as economic conditions or party control over the legislature) in substantive rulings than in procedural rulings (and vice versa). We accordingly code each decision as either a liability ruling or a non-liability ruling.

Where a case falls between these two categories is readily apparent in some cases. A court's decision to strike down the state's school finance system clearly qualifies as a liability ruling,[126] as does a decision on the other end (e.g., a decision dismissing a lawsuit because the state's education clause imposes no actionable duty or because the suit is a non-justiciable political question).[127] Conversely, a decision by a higher court to defer a ruling on whether the state is in violation of its constitution so that lawmakers have additional time to remedy deficiencies is plainly a procedural, non-liability ruling.[128]

Other cases are more difficult, such as when an appellate court rules that the plaintiffs' complaint contains legally sufficient allegations to establish liability, but remands the matter to the trial court for further investigation into the uncertain evidentiary basis for those allegations.[129] We code such decisions as non-liability rulings because the implication is that the state's ultimate liability remains an open question. Another complex choice arises when plaintiffs who have prevailed in initial challenges to school funding

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plea to terminate the procedure by which urban districts could seek supplemental funding above established limits in order to maintain needed reforms).

[126] *See, e.g.*, *Campaign for Fiscal Equity*, 100 N.Y.2d 893 (2003); *Abbeville*, 515 S.E.2d 58 (S.C. 1999); *Rose v. Council for Better Education*, 790 S.W.2d 186 (Ky. 1989).

[127] *See, e.g.*, *Pendleton*, 345 Or. 610 (state education clause imposes no actionable duty on the state to fund public education at prescribed amounts); *Committee for Educational Rights v. Edgar*, 672 N.E.2d 1178, 1191-93 (Ill. 1996) (dismissing adequacy claim as a nonjusticiable political question).

[128] *See, e.g.*, *DeRolph v. State*, 728 N.E.2d 993, 1021 (Ohio 2000) (*"DeRolph III*").

[129] *See, e.g.*, *Montoy v. State*, 62 P.3d 228, 235-36 (Kan. 2003) (reversing the trial court's *sua sponte* grant of summary judgment in the defendant state's favor because "there remain genuine issues of material fact" that the trial court must resolve before entering judgment); *Leandro v. State*, 488 S.E.2d 249, 261 (N.C. 1997) (reversing dismissal of case and remanding to trial court to determine whether "competent evidence [exists] to the effect that defendants in this case are denying children of the state a sound basic education.").

systems file follow-up challenges (often years after the initial ruling) arguing that the legislature has failed to satisfy its constitutional obligations.[130] Our approach is to code such rulings on a case-by-case basis depending on the scope of the relief sought.[131]

The remaining twelve variables in our study are included as plausible determinants of school finance outcomes. They include the following:

% State Population Urban. This refers to the percentage of a state's population that resided in an urban area during the decade in which a decision was announced.[132]

% State Population Minority. This variable refers to the percentage of a state's population that is non-white during the decade in which a decision was announced.[133]

Traditionalistic State Culture. The political scientist Daniel Elazar famously categorized the fifty United States into three types of political subcultures.[134] In traditionalistic states, citizens and their elected officials are thought to display a general distaste for governmental interventions to resolve social problems.[135] In moralistic states, by contrast, the government's role is thought of in more positive terms, as an active force for good.[136] Individualistic states occupy a middle ground, where politicians have no pre-set inclination in either direction.[137] Lundberg found an indicator of traditionalistic states to be significant (although in the opposite direction as expected, as judges in traditionalistic states are actually more likely to rule for plaintiffs), so we include it in our analysis, too.[138]

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[130] *See, e.g., supra* n.101.

[131] *Compare, e.g.*, *Campbell County School Dist. v. State*, 181 P.3d 43 (upholding the state legislature's finance system in light of substantial improvements to its funding system) (coded as non-liability ruling), *with Abbott v. Burke*, 20 A.3d 1018, 1034 (N.J. 2011) (finding New Jersey legislature out of compliance with its constitutional duty after it failed to fully fund its statewide school finance formula by a staggering $1.6 billion).

[132] This data derives ultimately from decennial census data, which explains our inability to provide year-on-year figures. A convenient decade-by-decade table can be found at https://www.icip.iastate.edu/tables/population/urban-pct-states.

[133] This data also derives from decennial census data. Note that "non-white" population includes persons who identify as Hispanic on the census. For a convenient table of state-by-state figures in each decade, see https://en.wikipedia.org/wiki/List_of_U.S._states_by_non-Hispanic_white_population#Historical_population_by_state_or_territory.

[134] Daniel J. Elazar, *American Federalism: A View From The States* 114-125 (3d ed. 1984).

[135] *Id*. at 118.

[136] *Id*. at 117.

[137] *Id*. at 115.

[138] We follow Lundberg's dichotomous approach of coding traditionalistic states as 1 and all other states 0. Lundberg, *supra* n.5 at 1126.

Elected judges.[139] We also code each ruling based on the mechanism through which the relevant level of judicial decision maker obtained her office. We include two dichotomous variables: whether the judge was elected (1) or not (0), and whether the judge was initially appointed and then subject to a retention election (1) or not (0). The reference (omitted) category here is whether judges were appointed and not subject to election thereafter.[140]

Party Legislature Control. We code variables that indicate which political party controlled the state legislature during the year of decision. One variable indicated uniform Democratic control. Decisions issued in a

[139] We recognize that selection procedure captures only one potential influence on a judge's consideration of a case. Ideally we would like to include a 'judicial ideology' score for the judges. Unfortunately, sophisticated mechanisms that allow scholars to calculate judicial ideology over time, such as the Judicial Common Score, involve leveraging the norm of senatorial courtesy in the appointment of federal court judges. Since our cases involve state court judges and different appointment procedures across states, these techniques are unavailable to us.

Another potential variable would be to draw on party identification as measured by a judge's own party (in states with elected judiciaries) or the party affiliation of the governor who made the relevant appointment. Yet this variable is also beset by data and accuracy limitations. As to data, a significant number of judges are elected via non-partisan elections. At last count, 22 states elect trial court judges in this way, 15 elect appellate court judges via non-partisan ballots, and 13 elect members of their courts of last resort in this manner (accounting for 31% of all state high court Justices). *See* Ballotpedia, Nonpartisan Election of Judges, online at https://ballotpedia.org/Nonpartisan_election_of_judges. Perhaps even more importantly, prior research suggests that party identification is an inaccurate measure of judicial ideology. For one thing, the vast majority of studies focused on federal court judges, not state court judges—with even fewer still focused on lower court state judges. Moreover, the most comprehensive survey of the literature, a meta-analysis, concluded that "no meaningful weighted-mean estimates of party's impact in lower state courts are available" based on the existing literature (Pinello, p. 243). Though many studies have found modest associations between party identification and court rulings, these findings suggest the size of the association is strongly dependent on the kind of case with criminal cases having the largest associations. The correlations are much smaller for cases involving economic regulation and civil rights (p. .241). Daniel Pinello, "Linking Party to Judicial Ideology in American Courts: A Meta-analysis" *The Justice System Journal*, vol. 20, no. 3 (1999): 219-254. In the one instance that we are aware of where research examined judge party identification in the context of school finance case, the party identification was not a useful predictor of judges' rulings. See: Koski, Politics of Judicial Decisionmaking, supra n. 5 at 1227 (finding that the Ohio Supreme Court that ruled declared the state's finance system unconstitutional in *DeRolph* consisted of five Republicans and two democrats; and that these five judges, despite their Republican party identification, were "liberal on economic issues"). All in all, the combination of missing data and the limited utility of data that exists counseled against inclusion of a party identification variable in our study. Still, we acknowledge the possibility that judicial ideology—however defined or measured—may play a meaningful (if hard-to-measure) role in the outcomes of school finance cases.

[140] This data was drawn from Ballotpedia's helpful judicial selection database. *See* "Judicial Selection in the States," Ballotpedia, online at https://ballotpedia.org/Judicial_selection_in_the_states#Details_by_state.

period when the legislature was split were indicated by a second variable. Republican control served as the omitted reference category.[141]

National Unemployment. We include a variable reflecting the national unemployment rate during the month of decision.[142]

State Unemployment. We also include a similar variable corresponding to the state unemployment rate during the month of decision.[143]

National GDP Change. This variable refers to the percentage change in the national GDP from the year before the year of decision. For example, for a decision issued in May 2016, we would input the percentage change in national GDP from 2015 to 2016.[144]

State GDP Change. This is the corresponding percentage change in GDP calculated on a state-by-state level. Again, the data used reflects the change in GDP from the year preceding the relevant decision to the year of the decision itself.[145]

Strength of Education Clause. Legal scholars have long wondered whether variation in school finance outcomes might be explained by differences in the strength of the education clauses across state constitutions.[146] Building on the work of Erica Black Grubb's 1974 article examining state constitutional provisions in the context of the right to bilingual education, Professor Gershon Ratner established a four-tier

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[141] We obtain this data from the National Conference of State Legislature's State Partisan Composition timelines, available online at http://www.ncsl.org/research/about-state-legislatures/partisan-composition.aspx. We were required to deviate from the methodology described above for Nebraska, the only state with a non-partisan legislature. Because our inquiry is whether Nebraska *judges* will be sensitive to perceptions of the legislature's partisan composition, we coded Nebraska court decisions for this variable based on the parties' respective shares of the following statewide offices: the governorship, U.S. Senate seats (2), and U.S. House of Representative seats (3). When Republicans possessed a majority of those six statewide offices at the time of decision, a decision was coded 1 (for Republican control). When Democrats held a majority, a decision was coded 2. We coded 3 for decisions where the six statewide offices were split evenly.

[142] We obtain this data from the Bureau of Labor Statistics, *see* https://beta.bls.gov/dataViewer/view/timeseries/LNS14000000;jsessionid=1C1CF215CBF34671B0B340C987BC2A14 (data collected in July 2017). Note that in a few cases, where we know the year but not the specific month of decision, we used the unemployment rate during the month of June on the theory that it is likely to show the least variance from the actual decision date.

[143] This data is also taken from the Bureau of Labor Statistics, *see* https://beta.bls.gov/dataQuery/find?fq=survey:%5Bla%5D&s=popularity:D (data collected in July 2017).

[144] Data was obtained from the Bureau of Economic Analysis's interactive data application, online at https://www.bea.gov/itable/index.cfm. Data for all decisions from 1972 through 2016 were collected in July 2017. Data for decisions in 2018 were collected in August 2018.

[145] State-by-state data was likewise obtained from the Bureau of Economic Analysis's interactive data tool, *see id*.

[146] *See supra* n.6.

typology of state education clauses that continues to be influential today.[147] Both of the empirical analyses discussed above rely on Ratner's typology,[148] which rank-orders education clauses from weak (Tier I, "contain[ing] only general education language"), to modest (Tier 2, "emphasiz[ing] the quality of public education"), to strong (Tier 3, "contain[ing] a stronger and more specific education mandate"), to strongest (Tier 4, "mandating [a] strong[] commitment to education").[149] For the sake of consistency, we use the same four-step scale to code the strength of the education clause in each state court decision. We use separate indicator variables for each level of the scale, omitting Tier 1 as the reference category.

Education Spending vs. the Nation. We include a variable representing each state's relative spending level on education in comparison to the then-prevailing national average. The variable is a percentage representing the per-pupil spending level in each state as a percentage of the national average during the year of the court decision.[150]

Ratio of Lowest to Highest District Spending. Finally, we included a variable intended to capture the level of inequality in educational spending within a state. This variable was constructed by creating a ratio of the lowest to highest per pupil expenditure among school districts in the state.[151] So a higher ratio would be evidence of a state with less inequality in school spending between districts.[152]

Descriptive statistics for the data are presented in Table 1.

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[147] Gershon M. Ratner, A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills, 63 Tex. L. Rev. 777, 815 (1985)

[148] *See* Lundberg, *supra* n.5 at 1108 (describing Ratner's four-point scale); Swenson, *supra* n.5 at 1157-58 (describing four tiers of clauses as explicated by William Thro, who in turn relies on Professor Ratner's typology).

[149] Ratner, *supra* n.147 at 815-16.

[150] Data for this variable is obtained from the most proximate annual "Public Education Finances" reports issued by the U.S. Census Bureau, available online at https://www.census.gov/programs-surveys/school-finances/library/publications.html.

[151] The ratio was calculated based on data contained in the U.S. Census Bureau's Public Education Finances reports. *See id.* The reports include per-pupil expenditure data for all districts in a state with more than 10,000 students. For each decision, we calculated the ratio of the lowest reported spending district to the highest reported spending district in the year closest to the decision.

[152] These last two variables—spending versus the nation and ratio of low district to high district—represent our effort to control for the relative strength of the 'facts' of the plaintiff's case. We recognize that there might be unobserved variables that relate to the timing of bringing certain cases. We acknowledge that advocates spend a great deal of time strategizing and trying to pick the right moment to file, but given the lack of agreed upon factors associated with success in this type of litigation we are skeptical that this type of guesswork biases our results. Also, given that these cases often last for years (if not decades), even if advocates successfully select the right moment for the initial filing, it is hard to imagine they are simultaneously able to predict that the environment will remain favorable until the final resolution of the case.

TABLE 1.
Descriptive Statistics of Study Cases.

Variable	Mean	Std. Dev.	Min	Max
Ruling in favor of state	0.50	0.50	0	1
Percent urban population	72.63	14.57	32.2	95
Percent minority population	22.08	12.53	1.9	59.9
Traditionalistic	0.31	0.46	0	1
Judges appointed	0.20	0.40	0	1
Judges elected	0.52	0.50	0	1
Judges appointed then elected	0.28	0.45	0	1
Republican legislative control	0.38	0.40	0	1
Democrat legislative control	0.42	0.49	0	1
Split legislative control	0.20	0.40	0	1
National unemployment rate	6.02	1.44	3.9	10.2
State unemployment rate	5.79	1.83	2.3	14.5
National GDP change	5.68	2.64	-2.1	12.9
State GDP change	6.05	4.02	-4.2	29.3
Education amendment strength (1)	0.30	0.46	0	1
Education amendment strength (2)	0.48	0.50	0	1
Education amendment strength (3)	0.11	0.32	0	1
Education amendment strength (4)	0.11	0.31	0	1
State education spending v. nation	1.01	0.27	0.61	1.87
Ratio of low/high district funding	0.69	0.15	0.26	1

III. METHOD

We use linear probability models to predict the probability courts rule in favor of the state.[153] Our models take the general form

$$Y_{ijk} = \beta_0 + X_{ijk}\beta_1 + \varepsilon_{ijk}.$$

Here, Y_{ijk} is a variable that indicates whether the court ruled in favor of state i in case j in year k. X_{ijk} is the vector of covariates whose relationship with court decisions in favor of the state we are testing and ε_{ijk} is an observation-specific error term.

As we've explained above, there are strong reasons to think that individual state court decisions are independent of one another given the de novo standard of review of legal questions and the fact that subsequent rounds of litigation often involve distinct issues. Still, given the possibility that decisions by one court may still influence the subsequent decisions of courts in similar cases in the same state or the possibility that states have

[153] We use linear probability models for ease of interpretation but confirm our results with logistic regressions that are more theoretically appropriate for our dichotomous outcomes. Our logistic regression results are not qualitatively different from the linear probability results and are available from the authors upon request.

particular cultures around these types of cases, it is possible that each decision observation in our data is not strictly independent of others in the same state. This represents a potential violation of the main assumptions of linear regression. To account for this, we cluster our standard errors at the state level.

Because of some missingness in the data, we run four separate models, each including an increasing number of covariates. This choice serves two purposes. First, it allows us to run the models for as many cases with complete data as we can. Second, it allows us to check for the consistency of our results as more covariates are added and as cases are dropped from the model because they include missing data. Model (1) controls for the state population that is non-white and the percentage that lives in urban areas as well as whether the state is traditionalistic, the indicators for whether judges are elected or appointed and then elected, the indicators for the control of the state legislature, and the national unemployment rate. Model (2) includes all of the covariates from Model (1), but adds the state unemployment rate, national and state GDP change, and indicators for the strength of the state's education amendment. Model (3) adds to Model (2) the state's education spending versus the rest of the nation. Finally, Model (4) adds the ratio of state spending between the highest and lowest funded district.[154]

Because the average results for all cases may hide variation between different ruling types (e.g. liability vs. non-liability) and court levels, we repeat all four models for six subsets of the data. First, we run the analysis including all cases in the data. Second, we include only liability rulings. Third, we look only at non-liability rulings. Finally, we look separately at rulings issued by trial courts, intermediate courts, and courts of last resort.

IV. RESULTS

Table 2 gives the results of our analysis for all cases in the data. Across most model specifications, the factors most consistently related to state victories include how judges are selected for and maintain their positions, the control of the state legislature, and state and national economic performance. Relative to judges who are appointed for life, judges who are appointed and thereafter face election to maintain their position are between 17 and 25 percentage points more likely to rule in favor of states. These relationships are roughly similar in size to how much more likely judges are

[154] We ran additional models with other covariates including the percent of the state population that lives in poverty, measures of the state debt, and national and state unemployment and GDP change in the prior rather than current year. Because of high missingness in these variables, and because they did not appear related to whether courts ruled in favor of the state, we omit these variables from the analysis. Results that include these variables are available from the authors upon request.

to rule in favor of the state when Democrats control the state legislature than when Republicans do. Judges also appear more likely to rule in favor of the state when the legislature is split between Democrats and Republicans than when the Republicans have sole control. Finally, across all cases, judges appear about five to six percentage points less likely to rule in favor of the state for each percentage point of national GDP growth. There is some evidence that state GDP growth is also related to judges' decisions in favor of the state, though this relationship is smaller and less consistent across all the models.

TABLE 2.

Linear Probability Models of the Likelihood a Case was Decided in Favor of the State, All Cases.

	(1)	(2)	(3)	(4)
% Urban	0.000	0.003	0.004	0.003
	(0.004)	(0.004)	(0.004)	(0.005)
% Minority	0.001	-0.004	-0.006	-0.007
	(0.004)	(0.005)	(0.005)	(0.005)
Traditionalistic	-0.134	-0.045	0.021	-0.035
	(0.096)	(0.112)	(0.118)	(0.126)
Elected Judges	0.174+	0.168+	0.143	0.196
	(0.091)	(0.094)	(0.115)	(0.120)
Judges Appointed then Elected	0.225**	0.166*	0.173+	0.255*
	(0.069)	(0.082)	(0.099)	(0.119)
Democrat Legislative Control	0.156*	0.201**	0.199**	0.212*
	(0.066)	(0.068)	(0.070)	(0.081)
Split Legislative Control	0.129	0.196*	0.168+	0.219*
	(0.088)	(0.087)	(0.087)	(0.092)
National Unemployment	-0.013	-0.029	-0.020	-0.020
	(0.021)	(0.027)	(0.028)	(0.027)
State Unemployment		-0.004	-0.013	-0.006
		(0.021)	(0.022)	(0.022)
National GDP Change		-0.063**	-0.063**	-0.049**
		(0.014)	(0.013)	(0.014)
State GDP Change		0.019*	0.020*	0.019+
		(0.008)	(0.009)	(0.010)
Ed Amendment Strength (2)		-0.007	0.034	-0.024
		(0.076)	(0.083)	(0.079)
Ed Amendment Strength (3)		-0.016	-0.018	0.022
		(0.098)	(0.092)	(0.125)
Ed Amendment Strength (4)		0.043	0.100	0.000
		(0.113)	(0.112)	(0.106)
Education Spending v. Nation			0.133	0.143
			(0.132)	(0.154)
Ratio of Low/High District Funding				-0.332
				(0.330)
Intercept	0.343	0.541*	0.339	0.552
	(0.276)	(0.258)	(0.323)	(0.474)
N	313	297	278	247

Notes. Variables indicating whether judges are appointed, Republicans control the state legislature, or the education amendment strength is tier 1 are all omitted from the regressions as reference categories. + p<0.10, * p<0.05, ** p<0.01.

The results for just liability cases are presented in Table 3. In part because liability cases represent a majority of the cases in a total data set, these results largely mirror the results in Table 2. The relationship between Democratic legislative control and an increased likelihood of a ruling in favor of the state remains strong and consistent across the models. So, too, is the relationship between a strong national economy and rulings in favor of plaintiffs. One difference in considering the results of liability cases is that the relationship between a ruling in favor of the state and judicial selection procedures is stronger than it is overall. Judges who are appointed and then elected are anywhere from 22 to 36 percentage points more likely to rule in favor of the state in liability decisions than when they are appointed without the need for re-election. Though the results are only marginally significant, judges who are always elected are similarly 19 to 26 percentage points more likely to rule in favor of the state. We also find that in liability cases the state's education funding relative to the nation is marginally significant. That is, within the subset of liability cases only, courts are more likely to rule in favor of the state when it spends a greater amount relative to the national average.

TABLE 3.

Linear Probability Models of the Likelihood a Case was Decided in Favor of the State, Liability Cases Only.

	(1)	(2)	(3)	(4)
% Urban	-0.001	0.003	0.003	0.000
	(0.005)	(0.005)	(0.005)	(0.006)
% Minority	0.005	-0.002	-0.002	-0.003
	(0.005)	(0.005)	(0.005)	(0.006)
Traditionalistic	-0.198+	-0.071	-0.017	-0.064
	(0.115)	(0.131)	(0.136)	(0.145)
Elected Judges	0.195	0.224+	0.182	0.258
	(0.116)	(0.130)	(0.139)	(0.150)
Judges Appointed then Elected	0.271*	0.231+	0.222+	0.363*
	(0.113)	(0.118)	(0.127)	(0.171)
Democrat Legislative Control	0.167*	0.209**	0.207*	0.183*
	(0.073)	(0.074)	(0.078)	(0.090)
Split Legislative Control	0.125	0.205*	0.162	0.197
	(0.107)	(0.097)	(0.101)	(0.104)
National Unemployment	-0.005	-0.011	-0.002	0.001
	(0.025)	(0.037)	(0.040)	(0.037)
State Unemployment		-0.009	-0.022	-0.025
		(0.027)	(0.029)	(0.028)
National GDP Change		-0.058**	-0.058**	-0.047
		(0.017)	(0.017)	(0.018)
State GDP Change		0.007	0.008	0.011
		(0.012)	(0.013)	(0.015)
Ed Amendment Strength (2)		-0.027	0.032	-0.020
		(0.099)	(0.108)	(0.107)
Ed Amendment Strength (3)		-0.006	0.024	0.199

		(0.110)	(0.118)	(0.120)
Ed Amendment Strength (4)		0.070	0.137	0.039
		(0.128)	(0.127)	(0.125)
Education Spending v. Nation			0.149	0.257
			(0.125)	(0.147)
Ratio of Low/High District Funding				-0.320
				(0.363)
Intercept	0.283	0.480	0.305	0.608
	(0.323)	(0.318)	(0.354)	(0.563)
N	240	227	217	191

Notes. Variables indicating whether judges are appointed, Republicans control the state legislature, or the education amendment strength is tier 1 are all omitted from the regressions as reference categories. + p<0.10, * p<0.05, ** p<0.01.

In non-liability cases, only the economic variables are significant. As shown in Table 4, for each percentage point improvement in national GDP, judges are 9 to 14 percentage points less likely to rule in favor of the state. In contrast, if the state GDP goes up by a percentage point, judges appear 6 to 7 percentage points more likely to rule for the state.

TABLE 4.

Linear Probability Models of the Likelihood a Case was Decided in Favor of the State, Non-Liability Cases Only.

	(1)	(2)	(3)	(4)
% Urban	0.004	0.000	0.000	-0.002
	(0.007)	(0.011)	(0.011)	(0.012)
% Minority	-0.021**	-0.006	-0.012	-0.010
	(0.007)	(0.013)	(0.015)	(0.017)
Traditionalistic	0.158	0.134	0.253	0.236
	(0.170)	(0.202)	(0.231)	(0.282)
Elected Judges	-0.220	-0.172	-0.069	-0.157
	(0.200)	(0.196)	(0.267)	(0.214)
Judges Appointed then Elected	-0.270	-0.414*	-0.175	-0.307
	(0.187)	(0.198)	(0.312)	(0.332)
Democrat Legislative Control	0.099	0.089	0.043	0.079
	(0.126)	(0.148)	(0.165)	(0.235)
Split Legislative Control	0.056	0.139	0.159	0.218
	(0.176)	(0.168)	(0.162)	(0.219)
National Unemployment	-0.036	-0.057	-0.047	-0.070
	(0.030)	(0.052)	(0.054)	(0.070)
State Unemployment		-0.022	-0.009	0.008
		(0.065)	(0.070)	(0.090)
National GDP Change		-0.088*	-0.096+	-0.136**
		(0.036)	(0.048)	(0.046)
State GDP Change		0.057*	0.063*	0.074**
		(0.021)	(0.029)	(0.024)
Ed Amendment Strength (2)		0.305	0.304	0.334
		(0.178)	(0.197)	(0.209)
Ed Amendment Strength (3)		0.187	-0.044	-0.157
		(0.285)	(0.304)	(0.369)
Ed Amendment Strength (4)		-0.037	-0.055	-0.079
		(0.190)	(0.194)	(0.302)
Education Spending v. Nation			0.325	0.255
			(0.346)	(0.364)

Ratio of Low/High District Funding				-0.415
				(0.823)
Intercept	0.930	1.043+	0.573	1.192
	(0.562)	(0.561)	(0.780)	(0.848)
N	72	69	60	55

Notes. Variables indicating whether judges are appointed, Republicans control the state legislature, or the education amendment strength is tier 1 are all omitted from the regressions as reference categories. + p<0.10, * p<0.05, ** p<0.01.

Because we were curious whether judges' decisions vary in their association with these variables depending on the court level, we ran our models separately for trial courts, intermediate appellate courts, and courts of last resort. We found the importance of GDP performance is still apparent when we look just at trial courts. In these cases, as before, judges are less likely to rule for the state the greater the change in national GDP (shown in Table 5). In contrast, none of the covariates we measured appear related to rulings in favor of the state at the intermediate court level (Table 6), although this may in part be due to the limited number of intermediate court observations in the data.

TABLE 5.

Linear Probability Models of the Likelihood a Case was Decided in Favor of the State, Trial Court Cases Only.

	(1)	(2)	(3)	(4)
% Urban	-0.007	-0.004	-0.002	-0.007
	(0.006)	(0.005)	(0.005)	(0.008)
% Minority	0.003	-0.003	-0.005	-0.006
	(0.006)	(0.006)	(0.007)	(0.007)
Traditionalistic	-0.066	-0.026	0.014	-0.042
	(0.110)	(0.122)	(0.161)	(0.173)
Elected Judges	-0.015	-0.040	-0.055	-0.064
	(0.145)	(0.140)	(0.142)	(0.161)
Judges Appointed then Elected	0.097	0.020	0.033	0.109
	(0.135)	(0.137)	(0.134)	(0.146)
Democrat Legislative Control	0.109	0.107	0.096	0.089
	(0.087)	(0.088)	(0.088)	(0.102)
Split Legislative Control	0.197	0.219 +	0.215 +	0.284*
	(0.119)	(0.121)	(0.121)	(0.129)
National Unemployment	0.011	-0.013	-0.016	-0.010
	(0.040)	(0.052)	(0.052)	(0.060)
State Unemployment		0.012	0.014	0.011
		(0.036)	(0.038)	(0.042)
National GDP Change		-0.076**	-0.083**	-0.084**
		(0.025)	(0.026)	(0.027)
State GDP Change		0.034*	0.037*	0.028
		(0.015)	(0.016)	(0.019)
Ed Amendment Strength (2)		-0.004	0.032	-0.023
		(0.099)	(0.100)	(0.101)
Ed Amendment Strength (3)		0.002	-0.020	0.014
		(0.134)	(0.123)	(0.168)
Ed Amendment Strength (4)		0.050	0.088	-0.041
		(0.187)	(0.183)	(0.178)
Education Spending v. Nation			0.083	0.151

			(0.187)	(0.203)
Ratio of Low/High District Funding				-0.716
				(0.520)
Intercept	0.769+	0.993*	0.800 +	1.709*
	(0.426)	(0.385)	(0.449)	(0.760)
N	131	124	120	107

Notes. Variables indicating whether judges are appointed, Republicans control the state legislature, or the education amendment strength is tier 1 are all omitted from the regressions as reference categories. + p<0.10, * p<0.05, ** p<0.01.

TABLE 6.

Linear Probability Models of the Likelihood a Case was Decided in Favor of the State, Intermediate Court Cases Only.

	(1)	(2)	(3)	(4)
% Urban	-0.010	-0.012	-0.011	-0.007
	(0.009)	(0.009)	(0.011)	(0.012)
% Minority	0.007	0.004	0.007	0.014
	(0.007)	(0.011)	(0.011)	(0.013)
Traditionalistic	-0.112	-0.082	-0.170	-0.494
	(0.166)	(0.226)	(0.319)	(0.391)
Elected Judges	0.094	-0.014	-0.031	0.061
	(0.233)	(0.231)	(0.202)	(0.201)
Judges Appointed then Elected	0.105	-0.044	-0.125	-0.130
	(0.158)	(0.189)	(0.177)	(0.160)
Democrat Legislative Control	-0.031	-0.061	-0.054	0.117
	(0.126)	(0.122)	(0.130)	(0.123)
Split Legislative Control	-0.289	-0.289	-0.300	-0.185
	(0.261)	(0.329)	(0.342)	(0.366)
National Unemployment	-0.104	-0.138+	-0.117+	-0.064
	(0.062)	(0.075)	(0.063)	(0.076)
State Unemployment		0.059	0.025	-0.027
		(0.090)	(0.070)	(0.057)
National GDP Change		-0.055	-0.054	-0.017
		(0.037)	(0.039)	(0.035)
State GDP Change		0.027	0.029	0.017
		(0.032)	(0.029)	(0.022)
Ed Amendment Strength (2)		0.050	0.043	0.037
		(0.102)	(0.133)	(0.125)
Ed Amendment Strength (3)		0.019	-0.010	-0.338
		(0.382)	(0.418)	(0.431)
Ed Amendment Strength (4)		0.160	0.153	-0.006
		(0.135)	(0.222)	(0.222)
Education Spending v. Nation			-0.242	-0.716
			(0.489)	(0.571)
Ratio of Low/High District Funding				0.319
				(0.653)
Intercept	2.006*	2.313**	2.508**	2.238*
	(0.936)	(0.782)	(0.843)	(0.988)
N	42	42	41	39

Notes. Variables indicating whether judges are appointed, Republicans control the state legislature, or the education amendment strength is tier 1 are all omitted from the regressions as reference categories. + p<0.10, * p<0.05, ** p<0.01.

In contrast to judges on trial courts, economic factors do not appear associated with rulings by courts of last result. Instead we find that legislative control is most strongly and consistently associated with these courts' judgments. At the court of last resort level, judges are up to 30 percentage points more likely to rule in favor of the state if the legislature is controlled by Democrats relative to control by Republicans. These results are presented in Table 7. There is also some suggestive evidence that judges who are appointed and then elected are more likely to rule in favor of the state than judges who are appointed but these results only achieve marginal significance in two of our models.

TABLE 7.

Linear Probability Models of the Likelihood a Case was Decided in Favor of the State, Courts of Last Resort Only.

	(1)	(2)	(3)	(4)
% Urban	0.005	0.007	0.007	0.003
	(0.005)	(0.006)	(0.006)	(0.007)
% Minority	-0.002	-0.006	-0.009	-0.004
	(0.006)	(0.008)	(0.008)	(0.009)
Traditionalistic	-0.242	-0.127	-0.009	-0.170
	(0.175)	(0.191)	(0.182)	(0.178)
Elected Judges	0.243+	0.207	0.203	0.209
	(0.134)	(0.172)	(0.256)	(0.289)
Judges Appointed then Elected	0.294+	0.285+	0.319	0.449
	(0.146)	(0.161)	(0.229)	(0.280)
Democrat Legislative Control	0.213*	0.287*	0.282*	0.296*
	(0.105)	(0.114)	(0.122)	(0.133)
Split Legislative Control	0.126	0.234+	0.164	0.221
	(0.120)	(0.124)	(0.140)	(0.156)
National Unemployment	-0.003	0.004	0.028	0.018
	(0.024)	(0.040)	(0.042)	(0.034)
State Unemployment		-0.036	-0.057+	-0.037
		(0.030)	(0.031)	(0.027)
National GDP Change		-0.037	-0.031	0.002
		(0.029)	(0.028)	(0.030)
State GDP Change		0.002	0.001	0.004
		(0.014)	(0.013)	(0.020)
Ed Amendment Strength (2)		0.099	0.150	0.099
		(0.119)	(0.139)	(0.135)
Ed Amendment Strength (3)		0.011	-0.008	0.165
		(0.169)	(0.171)	(0.155)
Ed Amendment Strength (4)		0.108	0.184	0.072
		(0.196)	(0.203)	(0.168)
Education Spending v. Nation			0.386	0.362
			(0.294)	(0.334)
Ratio of Low/High District Funding				-0.283
				(0.437)
Intercept	-0.088	0.028	-0.405	-0.198
	(0.388)	(0.401)	(0.544)	(0.847)
N	140	131	117	101

Notes. Variables indicating whether judges are appointed, Republicans control the state legislature, or the education amendment strength is tier 1 are all omitted from the regressions as reference categories. + p<0.10, * p<0.05, ** p<0.01.

V. DISCUSSION

We divide discussion of our results into three categories: major findings, implications for school finance litigation advocates and scholars, and implications for constitutional and legal theory more broadly.

A. Major Findings

Before we consider the statistically significant variables in our analysis, it is worth pointing out those factors that appear unrelated to judicial determinations in school finance cases. To start, our much more exhaustive analysis of cases confirms the insignificance of the law as reflected by the strength of a state's constitutional text. Commentators have long suspected this to be the case,[155] but it bears emphasis: the single factor one might naturally expect to be *most* predictive of school finance lawsuit outcomes—the strength of the state's constitutional guarantee regarding education—is not significantly related to actual decisions.

We also find that an extremely limited relationship between lawsuit outcomes and another set of variables one might expect to carry weight: the specific "key facts" of each case. We do not find a significant relationship between state victories and reduced levels of spending inequity among districts *within* the state. We do find some evidence among cases involving liability determinations that states that spend more relative to the nation are more likely to get the benefit of the doubt from courts—though these results achieve only marginal significance and only in this subset of cases.[156] Moreover, spending relative to the nation does not appear to make plaintiffs more likely to prevail at any particular level of court. Our analyses also lead us to reject several hypotheses about judicial behavior in school finance cases found by previous authors. For example, contrary to Lundberg, we find no support for the salience of a state's "traditionalistic" values, nor do we find any evidence that the state's demographic characteristics are associated with litigation outcomes.[157]

Though our analysis leads us to reject these hypotheses, our analysis does provide several new and important insights about the variables associated with judicial decisionmaking in school finance litigation.

[155] *See, e.g., supra* nn. 6 & 62.

[156] Thus, our findings offer tepid support of Swenson's conclusion, based on 40 state court decisions, that the odds of a state defendant victory rise as the state spends progressively greater amounts of money on education compared to other states. *See* Swenson, *supra* n.5 at 1176.

[157] *See* Lundberg, *supra* n. 5 at 1146.

Broadly speaking, these variables suggest economic, institutional, and political sensitivities.

First, our results comport with the intuitive logic that, in cases with broad fiscal implications, rulings are associated with changes in the economy. Growth in the national economy is associated with an increased likelihood of plaintiffs prevailing—a finding that held for the subset of liability cases. Though national economic growth was predictive of plaintiff victories, it is worth noting that there was a small countervailing tendency for growth in state GDP, but this association was smaller (half to a third the size), less consistently significant across our models, and not significant at all for the liability cases subset. It is also worth noting that these findings were driven almost entirely by the rulings of trial court judges and had no significant association with the rulings of intermediate courts or courts of last resort.

Second, our findings suggest that judicial decisionmaking is sensitive to the mode of by which judges obtain office. Providing support for institutional theorists and in contrast to prior findings by Roch and Howard,[158] we find evidence of a tendency of judges who face election to rule more often in favor of the state than do appointed judges. This tendency is particularly strong for judges who secured their position through an initial appointment and subsequently face reelection and is especially large in the context of liability cases. In liability cases, judges who are appointed and then elected are 36 percent more likely to rule in favor of the state than are judges who are simply appointed. Intriguingly, none of the models for trial court or intermediate courts achieve significance on this finding but two of the models for the courts of last resort do achieve marginal significance. While this court-level disparity is puzzling, our overall results provide some heft to the argument that institutional design might shape judicial decisionmaking in important ways.

Why might judges who face re-election pressures seem more inclined to rule for state defendants than appointed judges? We think the most plausible answer is rooted in the potential unpopularity of a pro-plaintiff ruling. After all, a ruling that the state's existing school finance system violates the constitutional rights of children in disadvantaged school districts all but requires one of two policy responses: increasing taxes to provide greater resources to poor districts, or leaving taxes stable but redistributing resources from wealthier to poor districts.[159] Either approach would be unpopular with influential segments of the voting population, which may deter elected judges from finding for the plaintiffs in the first

[158] *See supra* n.82.

[159] *See generally* Zachary Liscow, *Are Court Orders Sticky? Evidence on Distributional Impacts from School Finance Litigation*, 15 JOURNAL OF EMPIRICAL LEGAL STUDIES 11, 19 (2018).

place.[160] The same deterrent effect would logically apply to judges who are initially appointed but then face retention elections. The recall of three initially appointed California Supreme Court Justices in 1986 in response to their unpopular criminal justice rulings is just one example of this phenomenon.[161]

Third, our results suggest that even when we account for the relationship between judicial decisionmaking and economic and judicial selection variables, there is an independent association with another key political variable—party control of the legislature. Judges deciding school finance cases are much more likely—21 percent—to find in favor of the state when the legislature is controlled by *Democrats*. And the association is nearly identical when the legislature is under split party control. Interestingly, when we examine decisions broken down by different levels of courts, we find that these results are driven by the decision of judges on courts of last resort. In such courts, Democratic control of the legislature is associated with a 30 percent increased likelihood of a judgment for the state.

These findings imply a judiciary that sees a distinct role for itself among the branches of government. Assuming that Democratic or split legislatures are more likely, though perhaps not optimally, sensitive to please for increased educational spending, the judiciary is likely to defer to these judgments about what constitutes adequate provision for public education. Presented with similar questions in the context of a Republican legislature, the judiciary is more likely to intervene by ruling in favor of plaintiffs. Given the general lack of significance of the variables corresponding to the state's spending relative to the nation and the size of spending inequality among districts within the state, it would seem that the significance of party control over the legislature is a structural political consideration that influences decisionmaking. Judges, then, would appear to act less like activists than provocateurs—serving to raise questions of educational funding only when it is least likely to occur as part of the political process, and most likely in the context when the state can afford to ask these questions anew.

Finally, our analysis also provides the first evidence for the significance of an additional institutional variable: court level. We hypothesized, and our results confirm, that judges serving on different levels of the court rule in ways that are differentially related to the variables we consider in our analysis. Our results would seem to suggest that there is a specific arc to school finance cases with different contextual factors being salient at different points in that trajectory. Economic factors appear most salient

[160] The experience of Ohio's Supreme Court in the *DeRolph* litigation is a powerful testimony to this concern, as the unpopularity of the initial pro-plaintiff ruling eventually led the (elected) Court to terminate its jurisdiction in the matter. *See supra* n.59.

[161] *See* Robert Lindsey, "The Political Campaign; In California, Fierce Challenge to Judges," The NY Times, 1986.

when school finance cases are resolved by trial court judges. Though our results are not causal, it is not hard to imagine how economic growth—strongly associated with the strength of tax revenues—might factor into a trial court judge's decisionmaking. After all, a trial court ruling calling for a drastic increase in state education spending at a time when the state is already facing fiscal pressure would seem an especially obvious candidate for the state to appeal—and thus a target for potential reversal by a higher court. [162]

Yet by the time a case has found its way to the court of last resort, the salience of economic factors appears to give way to political factors. As suggested above, courts of last resort seem particularly concerned with how likely the legislature will be to address the state's educational shortcomings without judicial intervention. When Democrats are in control, these high court judges appear much more likely to defer to the legislature. The heightened salience of such political considerations at the high court level makes sense because a decision by the high court is far more likely to necessitate a political response than a lower court ruling that is subject to multiple levels—and years—of the appeals process. Though we caution that the relatively small sample in each group lead us to weigh individual findings in this vein lightly, collectively we think they provide compelling evidence for decisionmaking variation by court level and a subject worthy of additional future investigation.

B. Implications for the School Finance Community

So what, if anything, can the school finance litigation community take from this quantitative analysis of judicial decisionmaking? There are obviously many factors that litigators consider when thinking about whether to bring a case—strength of the factual record, the weight of the precedent, or public sympathy with the plaintiffs' experience—but our analysis suggests that savvy litigators might do well to add a few more elements to the scale when considering the timing of a school finance case.

The first element is the general state of the economy. Our comprehensive analysis of case outcomes suggests that the state of the public coffers likely factor into whether a judge is willing to entertain overturning the state's school finance scheme. This advice might seem counter intuitive—there is often an instinct to file lawsuits when school budgets are being cut as the result of shrinking tax revenues—but it makes

[162] Although it is only anecdotal, consider the timing of California's decision to settle (rather than litigate) the *Williams* lawsuit in 2004, a choice that committed the state to nearly $1 billion in increased school spending. *See* ACLU of Southern California, "ACLU and California Reach Settlement in Historic Williams Education Lawsuit," Aug. 13, 2004, online at https://www.aclusocal.org/en/news/aclu-and-state-california-reach-settlement-historic-williams-education-lawsuit. National GDP increased by 6.6% in 2003.

sense. The fiscal implications of school finance cases are almost impossible to ignore. So to the extent that judges consider political factors at all, it is reasonable to believe that they take account of the one most directly implicated by their decisions. Importantly, we find that this association is robust to statistical controls for whether the decision is a liability ruling—removing the possibility that judges are all-in on plaintiff's claims in the abstract only to fold when real money is on the line.

Our analysis further suggests that the association between fiscal health and school finance litigation outcomes is especially strong at the trial court level. Though litigators cannot control how long the litigation might last, they can certainly control when the case is filed. Bringing a case when the economy is strong and school budgets are, possibly, growing may feel counter-intuitive but again the evidence suggests that this counter-cyclical strategy may be the right approach. These considerations are strengthened further when one considers them alongside the growing body of evidence that the effects of school finance cases result not only in increased educational spending but also in reductions in spending disparities and increases in student achievement—findings that hold for both the equity and adequacy waves of school finance reform.[163]

Crucially, despite theoretical concerns that court rulings—perhaps reflecting their own, countermajoritarian views of school resource distribution—would result either in only temporary increases in spending that reverted toward the mean voter preference over time or in spending equalization secured by "leveling down"[164] or by overall reductions in social spending,[165] this does not appear to be the case. Instead, in the first paper to examine *how* states pay for the increased equity achieved through court-ordered school finance reform, Professor Zachary Liscow provides convincing evidence that greater parity is achieved through redistributive

[163] Advances in econometric techniques allow for causal, not just associational, interpretations of the effects of these court decisions. See, for example: C. Kirabo Jackson, Rucker C. Johnson & Claudia Persico, *The effects of school spending on educational and economic outcomes: Evidence from school finance reforms*, 131 THE QUARTERLY JOURNAL OF ECONOMICS 157–218 (2015) (examining the effects of school finance decisions on children born between 1955-1985, generally corresponding with the equity wave); Julien Lafortune, Jesse Rothstein & Diane Whitmore Schanzenbach, *School finance reform and the distribution of student achievement*, 10 AMERICAN ECONOMIC JOURNAL: APPLIED ECONOMICS 1–26 (2018) (examining the effects of school finance decisions on student achievement from 1990-2011, generally corresponding with the adequacy wave); Liscow, *supra* note 159 at 4–40 (2018) (examining data on the effects of school finance decision spanning both periods from 1972-2014).

[164] Caroline M. Hoxby, *All school finance equalizations are not created equal*, 116 THE QUARTERLY JOURNAL OF ECONOMICS 1189–1231 (2001).

[165] These concerns, at least, are not purely theoretical. See: Katherine Baicker & Nora Gordon, *The effect of state education finance reform on total local resources*, 90 JOURNAL OF PUBLIC ECONOMICS 1519, 1521 (2006) (finding that school finance decisions were offset by decreases in other forms of social spending); .

means.[166] Prior work had focused on overall changes spending, leaving open the possibility that states were achieving equalization through regressive taxation—essentially making the beneficiaries pay for the changes through other means. Liscow, however, finds that this is not the case. States secure increased spending through redistributional taxation providing further evidence that successful school finance secures its intended outcomes and that these effects persist even decades later.[167]

To reiterate, we are not suggesting that a growing economy ensures victory (or redistributional effects). But we are saying that it is a factor worth considering. Though we chose to examine the most publicly prominent measure of fiscal health—GDP—school finance litigators might take the more general point from the findings that allaying concerns about cost may be an important factor in judicial decisionmaking. To the extent that creative litigators can address those concerns, perhaps even in the absence of strong economic growth, that might be worth their while.

In addition to providing evidence for the salience of economic factors in judicial decisionmaking, our analysis also provides insights into the way judges may view the institutional role of courts in school finance litigation. At its root, the literature on judicial decisionmaking grew out of a suspicion that judges were partisan political actors in black robes. Charges of "judicial activism" have fluctuated over time and generally been replaced with more nuanced treatments of judges as political, perhaps, but only to a point.[168] They are constrained by both institutional structure and considerations of institutional legitimacy.[169] Our results offer additional nuance to this picture.

Consistent with prior research, our analysis offers little support for the claim that judges are naked political partisans. Instead, our results paint a more complex picture that generally supports the idea of judges as strategic actors aware of their institutional setting and the broader political climate. In direct contrast to Howard and Roch, we find that elected judges are much more likely to rule in favor of the state than are appointed judges. This is true both for judges who are elected and those who are initially appointed and subsequently affirmed by election.[170] Our results also provide

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[166] Liscow, *supra* note 159.

[167] Consistent with prior studies, Liscow finds a change in spending of $910 per student and that these changes persist for at least twenty five years. Id., 18.

[168] *See supra* part I.A.

[169] *Id*.

[170] Intriguingly, the tendency to rule in favor of the state is stronger for judges who are initially appointed and face election that those who are elected straight away. This would be consistent with the possibility that elected judges, while still sensitive to the political climate and more reluctant than appointed judges to create new state liabilities, feel a stronger popular mandate than do judges who were appointed and have no such initial claim of popular support.

suggestive evidence that the sensitivities of judges who are appointed and elected are particularly acute for those on the court of last resort, perhaps because their elections can become partisan rallying cries—the judicial career of California Supreme Court Justice Cruz Reynoso provides a real life example of this dynamic.[171] That these sensitivities are driven by financial considerations would seem to be underscored by our additional finding that these tendencies are only statistically significant for rulings in liability cases—a finding that also comports well with the salience of economic strength discussed above.

Though judges appeared sensitive to their institutional position and job security, they also appeared to be sensitive to the political climate in a way that, again, seems characterized more by restraint than activism. If the invalidation of state school finance systems was truly driven by the partisan preferences of activist liberal judges, then these judges seem to have consistently missed the optimal political window to redesign state finance systems via friendly, Democrat-held legislatures. Not only were judges not more likely to rule in favor of plaintiffs when the legislature was controlled by Democrats, they were actually more likely to rule *against* plaintiffs and in favor of the state by a statistically significant margin. And this tendency was driven almost entirely by the actions of state supreme courts. While lawyers challenging a school finance system might think they need to wait until Democrats hold a legislature and strategically time their lawsuit in order to provide the legislature with some political "cover" to justify the always difficult task of raising taxes, our results suggest such timing considerations are unlikely to increase the likelihood of success and may actually do the opposite. State high court justices in particular would seem to view themselves as neither judicial activists nor legal dogmatists but rather as inter-governmental interrogators—something school finance litigators might do well to remember.[172]

Michael Rebell has long argued that, as a normative matter, judges in school finance cases should approach their work as engaging in a "colloquy" with the executive and legislative branches.[173] Our results

[171] *See supra* n.161.

[172] Though Ely barely mentions education rights let alone school finance litigation in his seminal work on judicial review, many education law scholars have seen parallels between his work and the proper role of courts in educational rights cases. See: John Hart Ely, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980) (stressing the importance of both majority governance and minority rights); Chris S. Elmendorf and Darien Shanske *Solving the Problems No One Has Solved: Courts, Causal Inference, and the Right to Education*. U. ILL. REV. 693, 709-710 (2018); Koski, *supra* note 5, at 1097-1098; MICHAEL A. REBELL, COURTS AND KIDS: PURSUING EDUCATIONAL EQUITY THROUGH THE STATE COURTS 52 (2009); William E. Thro, *A new approach to state constitutional analysis in school finance litigation*, 14 JL & POL. 525, 526 (1998).

[173] REBELL, supra note 172, at 6, 56-85. On the colloquy between the judiciary and other branches more broadly see: ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH

suggest that this has been occurring not just anecdotally[174] but systematically across the long history of school finance litigation. Indeed, far from pursuing their own activist agendas, acting on their own "whimsy,"[175] or usurping responsibility from state legislatures, judges appear to be reluctant participants in school finance matters. Democratic legislatures, presumably making good faith efforts to address school inequities within the prevailing political climate, were unlikely to see their work disrupted by judges. In contrast, Republican held legislatures sitting with strong economic winds at their backs were much more likely to be called to account by judges inquiring about inequities in educational spending.

That this tendency is driven by state supreme courts is reassuring to those who recognize that giving substance to the educational rights of children is difficult, uncertain work that needs to be approached with circumspection. As Rebell and others have argued, courts have considerable institutional capacities to frame key public policy questions,[176] assemble facts,[177] weigh social science evidence,[178] and correct political failures in the efficient and equitable allocation of resources.[179] These results suggest

(1962); Shirley Abrahamson & Robert L. Hughes, *Shall We Dance? Steps for Legislators and Judges in Statutory Interpretation*, 75 MINN. L. REV. 1045 (1991).

[174] Rebell highlights the school finance litigation experiences of Vermont, Kentucky, and Massachusetts, Rebell, *supra* note 172, at 5.

[175] It is worth stressing that unlike Swenson, we find judges in school finance cases behaving in systematically discernable ways. Swenson, *supra* note 5, at 1178.

[176] Barry Friedman, *Dialogue and Judicial Review*, 91 MICH L. REV. 577, 668-70 (1993)

[177] In the context of educational policy where basic information about schools is often difficult to obtain, this may be a particularly and uniquely important role for courts. See: Chris S. Elmendorf and Darien Shanske *Solving the Problems No One Has Solved: Courts, Causal Inference, and the Right to Education*. U. ILL. REV. 693, 705-712 (2018).

[178] There is considerable disagreement on court's particular interest and competency in this regard. See: NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY (1994); Michael A. Rebell & Arthur Block, Educational Policy Making and the Courts: An Empirical Study of Judicial Activism (1982); SHEILA JASANOFF, SCIENCE AT THE BAR: LAW, SCIENCE, AND TECHNOLOGY IN AMERICA (1995); MARK A. CHESLER, JOSEPH SANDERS & DEBRA S. KALMUSS, SOCIAL SCIENCE IN COURT: MOBILIZING EXPERTS IN THE SCHOOL DESEGREGATION CASES (1988); Benjamin Michael Superfine, *The evolving role of the Courts in educational policy: The tension between judicial, scientific, and democratic decision making in Kitzmiller v. Dover*, 46 AMERICAN EDUCATIONAL RESEARCH JOURNAL 898–923 (2009). For the opposing, skeptical view see: James E. Ryan, *The limited influence of social science evidence in modern desegregation cases*, 81 NORTH CAROLINA LAW REVIEW 1659 (2002); Kevin G. Welner & Haggai Kupermintz, *Rethinking expert testimony in education rights litigation*, 26 EDUCATIONAL EVALUATION AND POLICY ANALYSIS 127–142 (2004); Gary Edmond, *Supersizing Daubert science for litigation and its implications for legal practice and scientific research*, 52 VILL. L. REV. 857 (2007).

[179] In the context of education finance lawsuits see, for instance, Liscow, *supra* note 159; DOUGLAS S. REED, ON EQUAL TERMS: THE CONSTITUTIONAL POLITICS OF EDUCATIONAL OPPORTUNITY (2003). See more generally MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION (1994). For the

that judges are using these capacities judiciously—deferring to legislatures whenever possible but not afraid to act as a venue of last resort for inquiring after the rights of children in low-income districts.

C. Implications for Legal Theory

Our findings also shed light on a pair of important debates in constitutional law, one involving the interaction between constitutional rights and remedies and another regarding methods of constitutional interpretation.

1) The Rights Essentialism – Remedial Equilibration Debate

State court adjudication of school finance lawsuits lends support to what Professor Richard Fallon has called the "constitutional pragmatist" school of thought.[180] This school holds that it is not "useful or even meaningful to talk about" how courts determine rights without also talking about how those rights are enforced via particular remedies.[181]

The leading proponent of the pragmatist camp is Professor Daryl Levinson, who, in a 1999 article, took aim at a then-prevailing view of constitutional law.[182] Under that earlier view, which Professor Levinson dubbed "rights essentialism," constitutional rights "emerge fully formed from abstract interpretation of constitutional text, structure, and history," uncorrupted by the policy tradeoffs and practical considerations that drive decisions regarding remedies.[183] This rights essentialist view is exemplified by Professor Lawrence Sager's contention that "there is an important distinction between a statement which describes an ideal which is embodied in the Constitution and a statement which attempts to translate such an ideal into a workable standard for the decision of concrete issues."[184] Rights essentialism is thus the view that constitutional "rights can be talked about and understood—indeed can be best understood—in complete isolation from (merely) remedial concerns."[185]

Levinson argues that the more accurate picture is a phenomenon he labels "remedial equilibration." Under this model of judicial

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classical skeptical view of the institutional capacities of courts to address social policy issues see: DONALD HOROWITZ, THE COURTS AND SOCIAL POLICY (1977) and GERALD ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE (1991).

[180] Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 Harv. L. Rev. 1274, 1313 (2006).

[181] *Id*. at 1313 n.173.

[182] Levinson, *supra* n. 31.

[183] *Id*. at 873.

[184] Lawrence Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norm*, 91 Harv. L. Rev. 1212, 1213 (1978).

[185] Levinson, *supra* n. 31 at 858.

decisionmaking, rights and remedies are not "hermetically sealed";[186] instead "constitutional rights are inevitably shaped by, and incorporate, remedial concerns."[187] One critical pathway through which this interaction operates is that judges will be sensitive to the costs of "undesirable remedial consequences" in the course of defining constitutional rights.[188] "At the extreme," for instance, Levinson posits that "where no viable remedy is at hand, courts may define [a] right as nonexistent."[189]

Levinson offers a rich set of cases that are consistent with, and provide support for, the remedial equilibration thesis.[190] What he lacks, however, is a way of showing remedial equilibration empirically. For as Levinson concedes, "claiming that a right would be different if a different remedy followed entails a counterfactual claim that is ordinarily highly speculative: that the right would have been *A* rather than *B* if the remedy had been *X* rather than *Y*."[191] Put another way, to prove remedial equilibration in practice, Levinson would need a method for comparing real-life outcomes in cases where judges face difficult remedial considerations (such as the high cost of enforcing a given right) against similarly situated cases where "*the relevant remedial concerns* [*do*] *not exist*."[192] Yet situations where remedial concerns magically disappear would seem to be unobservable.

Enter our school finance litigation data set. Scholars have often observed that pro-plaintiff rulings, which entail judicial imposition of potentially massive liability orders against the state (in addition to prolonged court involvement), raise the specter of what Levinson would call "undesirable remedial consequences."[193] Yet unlike most of Levinson's examples, which involve the U.S. Supreme Court's resolution of particular constitutional issues (and thus a small sample of cases), state level school finance decisions are robust in number, spanning across time and a range of economic conditions. The result is something of a natural experiment. A significant number of state court rulings are issued when remedial concerns are at their peak—that is, when the economy is performing poorly and state budgets are strained. Yet others are issued when the economy is healthy

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[186] *Id*. at 934.

[187] *Id*. at 873.

[188] *Id.* at 885. Levinson calls this pathway "remedial deterrence. *Id*. at 884-85.

[189] *Id*.

[190] *Id*. at 874-78 (describing how remedial concerns have shaped the meaning of constitutional rights in the context of school desegregation); *id.* at 882-3 (same phenomenon in the malapportionment context); *id.* at 890-91 (same for appellate review of race-based peremptory challenges).

[191] *Id*. at 890.

[192] *Id*. at 900 (emphasis in original).

[193] *Id*. at 885; *see, e.g.*, Joshua E. Weishart, *Reconstituting the Right to Education*, 67 Ala. L. Rev. 915, 938-42 (2016) (recognizing that when courts are "disinclined to enjoin their legislatures to perform—i.e., in most cases, to increase school funding," that is an example of Levinson's remedial equilibration n action).

and state coffers are comparatively flush with cash, such that judicial concern with the legislature's ability to afford a remedy is largely mitigated. If Levinson is right, we would expect to see judges behave more sympathetically to school finance plaintiffs when the economy is strong and remedial concerns dissipate.

The data bear out Levinson's thesis. Judges are more likely to rule for school finance plaintiffs when strong economic conditions reduce the remedial deterrent effect of a liability order. Rights essentialism is thus dubious: if rights really were on a higher plane, determined as a "Platonic ideal" logically prior to any concern for remedies,[194] one would think the state's ability to make good on a liability ruling would have no impact on what judges think a state constitution requires. That judges are significantly *less* likely to find a violation of the right to education when the economy is faltering suggests the opposite: "[c]onstitutional adjudication is functional not just at the level of remedies, but all the way up."[195]

Indeed, the finding that elected judges are especially likely to rule in favor of the state suggests that functional considerations operate at the personal level for judges, too. From this perspective, a judge will be especially likely to uphold a state's school funding system when (1) economic conditions make a costly remedial order unbearable for the state budget (e.g., such an order would command the legislature to raise taxes precisely when the state's residents are struggling the most), and (2) the judge could lose her job by ruling for the plaintiffs anyways.

A similar functionalist lesson can be gleaned from our finding regarding party control over the legislature, albeit through a different mechanism. Judicial sensitivity to economic conditions shows how courts may respond to increasingly negative remedial consequences by paring back a constitutional right—even (as in some school finance cases) to the point of defining the right as nonexistent.[196] Variance in the cost of pro-plaintiff rulings, in other words, can shape judicial behavior. But what happens when state courts are faced with changing degrees of costs that would result from a pro-*defendant* ruling? Might remedial equilibration also include judicial sensitivity to the remedial outcome of judicial inaction, too?

Such a dynamic may be hard to imagine, but the school finance litigation data set points up the possibility that courts may think of judicially-imposed remedies as more or less necessary depending on the likelihood of a self-driven legislative solution. On this view, it is not just the undesirable consequences of court-ordered relief that can drive judges to narrow the scope of constitutional rights; it is also the possibility of desirable legislative

[194] Levinson, *supra* n. 31 at 873.

[195] *Id*.

[196] *See id.* at 885; *Bonner v. Daniels*, 907 N.E.2d 516, 522 (In. 2009) ("[W]e conclude that the Education Clause of the Indiana Constitution does not impose upon government an affirmative duty to achieve any particular standard of resulting educational quality.").

progress *in the absence of* court-ordered relief. That is precisely the implication of our finding that courts are more likely to rule for state defendants when Democrats control the legislature: because the legislature is in that scenario more likely to increase school funding under its own volition, the reduced necessity of a judicial remedy leads to a narrower conception of the relevant constitutional right. Conversely, when a legislatively-initiated fix is less likely (e.g., when Republicans control the legislature), the harm of judicial inaction is greater, leaving courts more willing to recognize a robust right to education under the state constitution.[197]

2) Methods of Constitutional Interpretation

Our results also speak to the enduring debate over constitutional interpretation. The entry point into this debate is a recent move among prominent constitutional theorists away from normative arguments about constitutional interpretive theory and toward positivist ones. Professor William Baude has described this as the "positive turn," or the argument that "certain present social facts" that are "embodied in our legal practice" should determine our approach to constitutional interpretation rather than "moral considerations."[198] Arguments between originalism and non-originalism, in other words, should focus less on what is good or just, and focus instead on what judges actually do. And under that approach, Baude contends that a kind of "inclusive originalism"—a theory that permits judges to consult policy concerns and precedent so long as the original meaning of the Constitution does not forbid it—really *is* the law in view of our general legal practices, including most prominently "how the Supreme Court publicly reasons about constitutional law."[199]

Professor Baude's claim is principally one of *federal* constitutional interpretation; he recognizes that determining the socially-grounded method of constitutional interpretation in the states would depend on "each state's political and legal culture."[200] But it is also the case that state judicial practices may inform one's sense of what constitutes our shared legal practice with respect to constitutional interpretation more broadly, including at the federal level.[201] After all, one might be skeptical of the

[197] *See supra* nn.50-51

[198] Baude, *supra* n.26 at 2351 & n.5; *see also* Sachs, *supra* n.26.

[199] Baude, *supra* n.26 at 2355-2361, 2365-86.

[200] *Id*. at 2400.

[201] *See, e.g.*, Matthew D. Adler, *Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?* 100 Nw. U. L. Rev. 719, 758–59 (2006) (arguing that state court understandings of federal constitutional law could satisfy the rule of recognition and thus ground the law among a particular community); Christopher Kutz, *The Judicial Community*, 11 Phil. Issues 442, ___ (2001) (arguing that "it is dangerous to generalize from the behavior of the U.S. Supreme Court . . . to make a point about U.S.

claim that inclusive originalism (or any version) truly is a shared national legal commitment if it turned out that state courts routinely engage in non-originalist constitutional interpretation. Conversely, if every state court judge were a faithful originalist, that would make claims to the contrary at the federal level harder to substantiate.

A recent article by Jeremy Christiansen makes a forceful case that some version of originalism is indeed grounded in state judicial practice. After examining an exhaustive set of state court decisions from the founding, Christiansen supplies solid evidence that thirty-eight states subscribe to originalism as a "primary canon of state constitutional interpretation."[202] "[I]f we are going to make empirical assertions about originalism," Christiansen suggests, we ought to "account[] for th[is] full body of law."

Saying that thirty-eight states invoke originalist language in describing their approaches to constitutional interpretation is, however, a little bit like saying that most human beings describe themselves as religious. It's true, but it doesn't tell us all that much given the great deal of heterogeneity within the overarching label.[203] And to his credit, Christiansen acknowledges that his research isn't able to answer what *kind* of originalists state courts are, if they be that.[204]

Yet the question of what kind of originalist a court purports to be is arguably just as important as whether a court claims the mantle of originalism at all.[205] On one side of the broader originalist camp are the "new originalists," eminent scholars like Jack Balkin, Randy Barnett, Lawrence Solum, and Keith Whittington, who believe that although the original public meaning of the Constitution is fixed in time and constrains judicial actors, it does not determine the outcome of all (or perhaps even

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legal practice. . . . The bulk of law-determining goes on in the trial courts and courts of appeals, *state* and federal, where it is more plausible to assume that judicial determinations are made largely by reference to legal criteria whose force stems from their conventional acceptance") (emphasis added); *cf.* Joseph Blocher, *Reverse Incorporation of State Constitutional Law*, 84 S. Cal. L. Rev. 323, 347-48 (2011) (arguing that state constitutions may be a "good measure of public values").

[202] Jeremy M. Christiansen, *Originalism: The Primary Canon of State Constitutional Interpretation*, 15 Geo. J.L. & Pub. Pol'y 341 (2017).

[203] *See, e.g.*, Thomas B. Colby, The Sacrifice of the New Originalism, 99 Geo. L.J. 713, 718 (2011) ("'[O]riginalism' is a label that has been, and continues to be, affixed to a remarkably diverse array of interpretive theories that in fact share surprisingly little in common."); James E. Fleming, *Are We All Originalists Now? I Hope Not!* 91 Tex. L. Rev. 1785, 1787 (2013) (noting how under an inclusive formulation, "originalism clearly is a big tent," but that such a view "may obscure our differences more than elucidate common ground").

[204] *See id*. at 364-65 (acknowledging that his list of originalist references "intermingl[es] original-intent originalism and original public-meaning originalism," one of the important distinctions in the originalist camp).

[205] The discussion of different approaches to originalism that follows is necessarily abbreviated and glosses over several important nuances. For a more detailed discussion of some of these differences, see Colby, *supra* n.203 at 716-35; Solum, *supra* n.30 at 458-67.

many[206]) disputes.[207] To these new originalists, when the original public meaning runs out, courts enter into a "construction zone" in which normative arguments must be made to decide each case.[208] Baude's "inclusive originalism" is certainly of a piece with this approach.

On another side of the camp are older-school originalists who often focus on the original intentions or expected applications of the *framers*[209] and who believe originalist sources of meaning should decide *all* constitutional cases, precluding judges from reliance on consequentialist concerns or policy preferences.[210] As Judge Robert Bork once described this approach, "[t]he only way in which the Constitution can constrain judges is if the judges interpret the document's words according to the intentions of those who drafted, proposed, and ratified its provisions."[211]

The space between the new and old originalist camps is large and critical: it is the difference between referring to a case like *Obergefell v. Hodges* as comfortably originalist[212]—and not.[213] So which kind of originalists are the state courts? Christiansen's data doesn't answer this, and indeed the rule statements he pulls from state court opinions point in competing directions. Several state courts seem to claim a kind of older originalism, one in which judges are to "look only to the intent of the drafters, the delegates, and the voters in adopting the [State's] Constitution."[214] That kind of stringent approach would, if taken seriously,

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[206] *See* Jack Balkin, *Living Originalism* (2011)

[207] *See* Solum, *supra* n.30; Keith E. Whittington, Constitutional Construction (1999); Randy Barnett, *An Originalism for Nonoriginalists*, 5 Loy. L. Rev. 611 (1999).

[208] *See* Solum, *supra* n.30 at 472.

[209] *See, e.g.*, Richard S. Kay, Adherence to Original Intentions in Constitutional Adjudication: Three Objections and Responses, 82 NW. U. L. Rev. 226 (1988); Raoul Berger, Government by Judiciary (1977).

[210] *See, e.g.*, John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 Nw. U. L. Rev. 751, 752 (2009) ("We find no support for constitutional construction . . . at the time of the Framing . . . [r]ather, the evidence suggests that ambiguity and vagueness were resolved by considering evidence of history, structure, purpose, and intent.").

[211] Speech by Judge Robert H. Bork before the University of San Diego Law School (Nov. 18, 1985), in THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION 43, 45 (1986).

[212] *See* Baude, *supra* n.26 at 2382; William Baude & Stephen Sachs, *Originalism's Bite*, 20 Green Bag 2d 103 (2016).

[213] *See, e.g.*, *Obergefell v. Hodges*, 135 S. Ct. 2584, 2628 (2015) (Scalia, J., dissenting) ("When the Fourteenth Amendment was ratified in 1868, every State limited marriage to one man and one woman, and no one doubted the constitutionality of doing so. That resolves these cases.").

[214] *People v. Fitzpatrick*, 986 N.E.2d 1163, 1169 (Ill. 2013); *see also, e.g.*, *State v. Hernandez*, 268 P.3d 822, 824 (Utah 2011) ("In interpreting our constitution, our goal is to ascertain the drafters' intent."); *Moore v. Ganim*, 660 A.2d 742, 764 (Conn. 1995) ("[I]n determining whether unenumerated rights were incorporated into the constitution, we must focus on the framers' understanding of whether a particular right was part of the natural law, i.e., on the framers' understanding of whether the particular right was so fundamental

rule out judicial reliance on post-enactment historical practice, precedent, and prudential policy concerns—including the economic and political consequences of different constitutional remedies.

On the other hand, some state courts appear to invoke the newer brand of originalism, where original public meaning is what matters and where ambiguities may be resolved by pluralist sources of normative argument. For example, the Wyoming Supreme Court has explained that where "the language of the constitution [is] plain and unambiguous, and thus the intent of the framers' and of those who adopted the constitution is clear, we need not employ principles of construction to ascertain the constitution's intended meaning."[215] The implication, of course, is that constitutional construction *is* permissible in other cases where the constitutional text is ambiguous.

Our data suggest that one and only one of these versions of originalism can make a plausible claim to being our law. To the extent state constitutional challenges to school funding systems are determined by factors that cannot be described as the original meaning of the relevant text (or the intentions of its enactors), state judges are not behaving as "originalists" in the older-school sense. It goes without saying that consequentialist concerns such as then-prevailing economic conditions and party control over the state legislature are a far cry from a historical examination into the meaning of state education clauses at the time when they were enacted.

By contrast, state courts could be acting consistently with new originalism. An originalist approach to deciding school finance cases is actually quite an easy story to tell: the underlying constitutional text is hopelessly vague (what, exactly, is the duty to provide for a "uniform and general"[216] or "thorough and efficient"[217] system of public schools?), so courts must decide concrete cases using ordinary tools of constitutional

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to an ordered society that it did not require explicit enumeration. We can discern the framers' understanding, of course, only by examining the historical sources."); *Dawson v. Tobin*, 24 N.W.2d 737, 745 (N.D. 1946) ("[T]he sole object sought in construing a constitutional provision is to ascertain and give effect to the intention and purpose of the framers and of the people who adopted it."); *Ansel v. Means*, 172 S.E. 434, 436 (S.C. 1934) ("It is the fundamental principle of all rules governing the construction of written instruments that the intent of the makers of the instrument shall be ascertained and shall control.").

[215] Geringer v. Bebout, 10 P.3d 514, 521 (Wyo. 2000); *see also, e.g.*, *Standard Oil Co. v. City of Birmingham*, 79 So. 489, 492 (Ala. 1918) (although the "intent [of the framers] is to be found in the instrument itself," it may be permissible to "search for [a provision's] meaning beyond the instrument" in cases where the text is "ambiguous"); *see also, e.g.*, State v. Grey, 21 Nev. 378, 32 P. 190, 192 (1893) ("[W]here the words of a constitution are unambiguous, and, in their commonly received sense, lead to a reasonable conclusion, then such instrument should be read according to the natural and most obvious import of its framers, without resorting to subtle and forced construction.");

[216] Or. Const. art. VIII, § 3.

[217] Md. Const. art. VIII, § 1.

construction.[218] And one such tool includes prudential considerations such as the feasibility of a court-imposed remedy.[219]

But does our data support the conclusion that this is the *actual* story unfolding in state courts? That is much harder to say. To genuinely inform that question, we would need to code each opinion in our data set for whether it makes "originalist arguments" before arriving at a particular result.[220] As an anecdotal matter, some courts certainly do: Kentucky's Supreme Court, for instance, declared in the course of invalidating the state's school finance system that "[w]e do not direct the members of the General Assembly to raise taxes. . . . We only determine the intent of the framers."[221] Indiana's Supreme Court engaged in a historical analysis of the enactment of its operative 1851 education clause in concluding the opposite.[222]

Yet other state court rulings are devoid of originalist reasoning altogether. South Carolina's Supreme Court, for example, recognized a state constitutional right to a "minimally adequate education" without an iota of discussion regarding the original meaning of the relevant constitutional text or the intent of its framers.[223] If state courts routinely behave as South Carolina's, that would seem to us evidence of a shared practice of non-originalism in constitutional interpretation. For this reason, further inquiry into how state courts actually go about deciding constitutional challenges to school funding systems may offer useful insights into the positivist question of what our law of constitutional interpretation really is.[224] What we can say with some certainty now is that an older brand of exclusive originalism—one that forbids courts to consider factors outside of the original meaning of the text (or the intent of its

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[218] *See* Solum, *supra* n.30 at 469-71 (explaining why vague constitutional questions fall within the construction zone).

[219] *Id*. at 481-82 (explaining how an originalist constitutional pluralist would be free to rely on prudential concerns in the construction zone).

[220] Whether those arguments are correct or not, as a matter of originalism, is not the point; what matters is whether the state courts see themselves as required to apply originalism as a methodology. *See* Baude & Sachs, *supra* n.212 at 104.

[221] *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d (Ky 1989).

[222] *See Bonner v. Daniels*, 907 N.E.2d 516, 522 (2009) ("Guided as we are by the text of the constitutional provision in the context of its history, we conclude that the Education Clause of the Indiana Constitution does not impose upon government an affirmative duty to achieve any particular standard of resulting educational quality.").

[223] *See, e.g.*, *Abbeville County School Dist. v. State*, 515 S.E.2d 535, 539-540 (1999).

[224] For an argument that originalism may offer a useful mode of argument in school finance cases (but without concluding that it actually *is* a prevailing mode of judicial decisionmaking), see R. Craig Wood and William E. Thro, *Originalism and the State Education Clauses: The Louisiana Voucher Case As an Illustration*, 302 Ed. Law Rep. 875 (2014).

framers)—is inconsistent with how judges are deciding this important realm of state constitutional cases.[225]

CONCLUSION

To some, the finding that economic and political considerations influence how judges determine the nature of state constitutional education rights may possess something of a self-evident quality.[226] *Of course* judges look beyond the law, and of course they do so most in circumstances like this, where the text of the relevant constitutional provisions is so vague and the consequences of each case are so high.

Before now, however, the belief that the law and key case facts do not alone decide the outcome of educational rights litigation has largely been that—a belief (grounded, as most beliefs are, in intuition and experience). Scholarly efforts to show this empirically, however, have struggled with statistical power and methodological design flaws.

Our objective has thus been two-fold. First, we have endeavored to produce a large, high-quality dataset that can be utilized both in our project as well as future efforts to examine school funding lawsuit outcomes. In that sense, the final payoff of this effort is still to be determined, as we eagerly await the opportunity to share our data with others in the field. Second, we have tried to offer an initial analysis of our dataset along with some discussion of key takeaways. On this front we belief the payoff is more immediate. Judges, we have found, do not look only (or even significantly) to the law and key case facts when deciding school finance lawsuits. They instead train their eyes externally, to the economic and political consequences of their decisions—a finding that lends strong support to Professor Levinson's remedial equilibration thesis. Whether that should be a source of comfort or dismay is of course a major question. But it is one that will ultimately depend on each reader's view of the appropriate role for judges in our democratic society.

[225] In this sense, our findings offer some empirical grounding for Professor Baude's belief that "it is probably right that there is no way a positivist could" call exclusive originalism our law. Baude, *supra* n.26 at 2355-56.

[226] *See supra* Part I.A.