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Let's Try This Again, Separate Educational Facilities Are Inherently Unequal: Why Minnesota Should Issue a Desegregation Order and Define Adequacy in *Cruz-Guzman v. State*

Christie Geter†

Introduction

Nikole Hannah-Jones,¹ a reporter for The New York Times, remembers watching the nightly news in 2014.² Eighteen-year-old Michael Brown had just been shot and killed by a Ferguson police officer. His mother, Lezley McSpadden,³ was “standing in a crowd of onlookers, a few feet from where her son was shot down, where he would lie face down on the concrete for four hours, dead,” and

†. J.D. University of Minnesota Law School, 2019; B.A., University of New Mexico, 2012. The author expresses her appreciation to Professor Myron Orfield and JaneAnne Murray for their guidance and support, as well as the staff and editors of *Law & Inequality: A Journal of Theory and Practice* for their dedication in preparing this article for publication. The author would also like to thank her parents, Larry and Val for their strength and tenacity in overcoming obstacles, support, and encouragement for their children, and faith and hope in a better tomorrow.

1. Nikole Hannah-Jones, <https://nikolehannahjones.com> [<https://perma.cc/BKR7-XSEN>] (“Nikole Hannah-Jones is an award-winning investigative reporter covering racial injustice for The New York Times Magazine . . .”) She investigates the way racial segregation in housing and schools is maintained through official action and policy. Nikole Hannah-Jones, *Choosing a School for My Daughter in a Segregated City*, N.Y. TIMES MAG. (June 9, 2016), <https://www.nytimes.com/2016/06/12/magazine/choosing-a-school-for-my-daughter-in-a-segregated-city.html> [<https://perma.cc/WV7T-ADN9>] (“I rode the bus an hour each morning across town to the ‘best’ public school my town had to offer . . . I have no doubt my parents’ decision to pull me out of my segregated neighborhood school made the possibility of my getting from there to here — staff writer for The New York Times Magazine — more likely.”).

2. *This American Life: The Problem We All Live With—Part One*, CHI. PUB. RADIO (July 31, 2015) (downloaded using iTunes) [hereinafter *This American Life*].

3. Lezley McSpadden ran for Ferguson city council in 2018. Though she did not secure one of the six council seats, she garnered national attention for the historic run. See Eli Rosenberg, ‘This Is One of My First Steps’: Michael Brown’s Mother Plans to Run for Ferguson City Council, WASH. POST (Aug. 10, 2018, 9:18 PM), https://www.washingtonpost.com/news/politics/wp/2018/08/10/this-is-one-of-my-first-steps-michael-browns-mother-plans-to-run-for-ferguson-city-council/?utm_term=.03faaf4ad73d [<https://perma.cc/8AAM-J658>].

she said, “You took my son away from me. You know how hard it was for me to get him to stay in school and graduate? Do you know how many [B]lack men graduate? Not many!”⁴ Hannah-Jones recalls, “of all the ways [McSpadden] could have expressed her grief and outrage, this is what was on her mind[—]school, getting her son through school.”⁵

Hannah-Jones began investigating the Normandy school district in Missouri, which Michael had attended. The optics were not great. “Each year, the Missouri Department of Elementary and Secondary Education puts out a report that shows how each of its 520 school districts is doing. It’s a numeric snapshot of the type of education students are receiving.”⁶ In 2014, Normandy received zero points in math, English, science, social studies, and college placement.⁷ The district received just 10 points out of the 140 points possible.⁸ Hannah-Jones describes these ten points as “points just for existing.”⁹ It is no surprise that the Normandy school district lost its accreditation.¹⁰ What is a surprise, however, is that this “event triggered a little-known Missouri law called the transfer law.”¹¹ Under the transfer law, students in the Normandy school district had the option of staying at Normandy or busing into other, whiter, districts.¹² “Most [B]lack kids will not be shot by the police but many of them will go to a school like Michael Brown’s . . . almost completely [B]lack, almost completely poor, and failing badly.”¹³

Normandy, Missouri, is not an outlier. Racial segregation in schools is not simply a problem of the South, reflecting old adages of political divides. Here in Minnesota, the largest school districts in the state are almost completely segregated.¹⁴ States all across the

4. *This American Life*, *supra* note 2.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. John Gordon, Teresa Nelson, William Z. Pentelovich & Jesse D. Mondry, *Counterpoint: ‘Education Clause’ Lawsuit Simply Asks the Legislature to Do Its Duty*, STAR TRIB. (Oct. 12, 2018, 5:59 PM), <http://www.startribune.com/counterpoint-education-clause-lawsuit-simply-asks-the-legislature-to-do-its-duty/497299441/> [<https://perma.cc/XTS6-JK73>] (“Minnesota has some of the worst achievement gaps in the country between [W]hite children and children of color. Our children of color are far behind their [W]hite peers, and segregated schools are part of the problem. Our

nation have been re-segregating, and much faster than they were ever desegregating. In efforts to combat the inequalities of minority schools, “education finance litigation [has] traditionally [been] divided into three waves: federal equality litigation, state equality litigation, and state adequacy litigation.”¹⁵ In the past decade a fourth wave of education finance litigation has begun, seeking a federal adequacy right.¹⁶ The cruxes of these suits have asked: ‘Do minority schools have equal funding? Do they have adequate funding?’ These cases are seemingly unwilling to ask if racial segregation alone can create a poor education.

Part I of this Note will provide background information, including: (1) social science that repeatedly links inequalities in education to lifelong barriers creating stress on the United States; (2) a brief history of the United States’ sordid relationship with school segregation; and (3) the four waves of litigation attempting to right past wrongs. Part II will introduce a current Minnesota case that asks if racial segregation alone can create an inadequate education. Part III will analyze other states’ responses to inequalities in public schools under the four waves framework. Part IV analyzes Minnesota’s civil rights legacy in context with current segregation lawsuits. Part V argues that for a remedy to come to fruition, the Minnesota Supreme Court will need to define what an adequate education encompasses and issue a desegregation order for the first time in almost fifty years.

I. Background

Inequalities in education have a rippling effect creating instability across the United States. Consequently, the United States addressed this issue more than a half a century ago, but poor enforcement has prevented any major progress. Litigation has persisted over the past seven decades in an effort to alleviate these inequalities.

country’s painful history has taught us that separate is not equal.”); Complaint at 9–12, *Cruz-Guzman v. State*, No. 27-CV-1519117 (D. Minn. 2015), *rev’d*, 892 N.W. 2d 533 (Minn. Ct. App. 2017), *rev’d*, 916 N.W.2d 1 (Minn. 2018) [hereinafter *Cruz-Guzman Complaint*].

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

16. *Id.* at 991, 1015.

A. *Social Science Repeatedly Links Inequalities in Education to Lifelong Barriers.*

The effects of an inadequate education are costly, not just to the individual, but to the United States. In fact, it would be more expensive to leave education policy in its current form than to invest the time and resources into fixing it.¹⁷ Inadequate education negatively affects the economy and increases the costs of criminal justice and healthcare.¹⁸ These effects pervade society, creating an unstable environment.

i. *Inadequate and Segregated Education is a Costly Correlative to Criminal Justice.*

With an ever-increasing prison population, much of the country has called for criminal justice reform for two primary reasons: (1) over-incarceration for low-level drug offenses leads to recidivism and unstable family units, and (2) it is expensive.¹⁹ In 2013, the “Council on Black Minnesotans found that state taxpayers spend more than \$48,000 per prison inmate per year, just less than a year of tuition at Carleton College, the highest tuition in the state.”²⁰

Over two-thirds of men incarcerated in the United States have not completed high school.²¹ The two are no doubt correlated, but, if there is a causal relationship, which is the dependent variable? In other words, “do youth drop out of school because they want to sell drugs all day or do they sell drugs because they dropped out of

17. See Clive R. Belfield & Henry M. Levin, *The Education Attainment Gap: Who's Affected, How Much, and Why It Matters*, in *THE PRICE WE PAY* 1, 2 (Clive R. Belfield et al. eds., 2007). (“[P]oor education leads to large public and social costs in the form of lower income and economic growth, reduced tax revenues, and higher costs of public services such as health care, criminal justice, and public assistance. Therefore we can view efforts to improve educational outcomes for at-risk populations as public investments that may yield benefits considerably *in excess of investment costs.*”) (emphasis added).

18. *Id.*

19. Enrico Moretti, *Crime and the Costs of Criminal Justice*, in *THE PRICE WE PAY* 142 (Clive R. Belfield et al. eds., 2007).

20. Brandt Williams, *High School Dropouts Try to Get Back in the Game*, MPR NEWS (Mar. 7, 2016, 12:05 AM), <https://www.mprnews.org/story/2016/03/07/graduation-gap-dropout> [<https://perma.cc/RQ6H-BGHA>].

21. Kathryn Hanson & Deborah Stipek, *Schools v. Prisons: Education's the Way to Cut Prison Population*, MERCURY NEWS (May 16, 2014), <https://www.mercurynews.com/2014/05/15/schools-v-prisons-educations-the-way-to-cut-prison-population/> [<https://perma.cc/9QKS-YYJW>] (“Nationally, 68 percent of all males in prison do not have a high school diploma.”).

school?”²² Lochner²³ suggests the latter, i.e., increased education leads to reduced propensity to engage in criminal activity,²⁴ for four main reasons. First, education raises individual income, making crime and incarceration costlier for the individual.²⁵ Second, education may directly affect how crime is perceived by the perpetrator, either positively or negatively.²⁶ Third, education may increase an individual’s patience, lowering their propensity for risky behavior.²⁷ Fourth, education affects “the social networks or peers of individuals” and Locher suggests that dropping out of school may introduce an individual to peers who exacerbate tendencies to engage in criminal activities.²⁸ Further study coincides with Lochner’s assessment, revealing that “schooling significantly reduces criminal activity.”²⁹ Furthermore, if dropout rates amongst men improved by just one percent,³⁰ such improvement could save the United States “\$1.4 billion per year in reduced costs from crime incurred by victims and by society at large.”³¹

ii. Healthcare Expenditures Increase with Inadequate Education.

Education has a large impact on a person’s health and in the aggregate has a large impact on the United States’ healthcare system.³² With more education comes higher incomes, more

22. Lance Lochner, *Education and Crime*, in INTERNATIONAL ENCYCLOPEDIA OF EDUCATION 5 (Penelope Peterson et al. eds., 3d ed. 2008), https://economics.uwo.ca/people/lochner_docs/educationandcrime.pdf [<https://perma.cc/SH4Q-Q4PJ>].

23. Lance Lochner is a professor of economics at the University of Western Ontario whose many publications address the cross-sections of crime, education, race, and poverty. Dep’t of Econ., *Lance Lochner*, W. UNIV. SOC. SCI., <https://economics.uwo.ca/people/faculty/lochner.html> [<https://perma.cc/8N2T-8UJS>].

24. Lochner, *supra* note 22, at 5 (“For most crimes (except, possibly, white collar crimes), one would expect these forces to induce a negative effect of schooling on crime.”).

25. *Id.* at 9. In other words, the more they gain, the more they have to lose.

26. *See id.* at 3 (“To the extent that schools ‘socialize’ students to become better citizens and to treat others better, education may also reduce the psychic returns to crime causing individuals to forego lucrative criminal opportunities.”).

27. *Id.*

28. *Id.* at 4–5 (“Youth who drop out of school may be influenced by a more negative set of peers, which may exacerbate any tendencies to engage in crime. Similarly, youth who join gangs or who otherwise engage in crime may be encouraged to leave school by their peers.”).

29. Moretti, *supra* note 19, at 157.

30. *Id.* (referring specifically to 1% of all men ages 20–60).

31. *Id.*

32. *See* VA. COMMONWEALTH UNIV., CTR. ON SOC’Y & HEALTH, WHY EDUCATION

resources, social and psychological benefits, healthier behaviors, and healthier neighborhoods.³³ The reverse is also true: “job insecurity, low wages, and lack of assets associated with less education can make individuals and families more vulnerable during hard times—which can lead to poor nutrition, unstable housing, and unmet medical needs.”³⁴ One study found that individuals with the “lowest educational attainment exhibited the highest prevalence of risk factors” for cardiovascular disease.³⁵ Additionally, the Center on Society and Health found a negative correlation between education and “health-harming stresses.”³⁶ The Center’s Director, Dr. Steve Woolf, stated, “only about ten percent of our health outcomes are determined by healthcare.”³⁷ One of the initiatives at the Center is to “help people in the healthcare field understand the importance of education as a potential strategy for preventing disease and lowering healthcare costs.”³⁸

MATTERS TO HEALTH: EXPLORING THE CAUSES, 3–5 (Apr. 2014) [hereinafter VA COMMONWEALTH UNIV., WHY EDUCATION], <https://societyhealth.vcu.edu/media/society-health/pdf/test-folder/CSH-EHI-Issue-Brief-2.pdf> [<https://perma.cc/7TR2-Q793>] (“Americans with more education live longer, healthier lives than those with fewer years of schooling.”). The Center on Society and Health began in 2007 and was chartered by the Board of Visitors at Virginia Commonwealth University. The Center is an “academic research center that studies health implications of social factors—such as education, income, neighborhood, and community environmental conditions, and public policy.” VA. COMMONWEALTH UNIV., CTR. ON SOC’Y & HEALTH, *About Us*, <https://societyhealth.vcu.edu/about/> [<https://perma.cc/G4N5-6QSC>].

33. See VA. COMMONWEALTH UNIV., WHY EDUCATION, *supra* note 32, at 3–5.

34. *Id.* at 3.

35. Marilyn A. Winkleby et al., *Socioeconomic Status and Health: How Education, Income, and Occupation Contribute to Risk Factors for Cardiovascular Disease*, 82 AM. J. PUB. HEALTH 816, 817 (June 1992) (comparing education, occupation, and income as independent variable measures on cardiovascular disease); see also Peter Muennig, *Consequences in Health Status and Costs*, in THE PRICE WE PAY 128 (Clive R. Belfield et al. eds., 2007) (assessing the impact of education on mortality rates and government healthcare spending).

36. See *id.* at 4.

37. Va. Commonwealth Univ., Ctr. on Soc’y & Health, *Why Education Matters to Health: Exploring the Causes*, YOUTUBE (Apr. 29, 2014), <https://youtu.be/V3rsdBBFAN8> [<https://perma.cc/P4AR-KXP2>] (quoting Dr. Steve Woolf, Director, VCU Center on Society and Health) (“If we really want to save lives in this country and prevent disease and reduce health care costs, we have to do something about education.”).

38. *Id.*

iii. Persistent Achievement Gaps Will Destabilize the United States' Economy.

It is no surprise that the level of education a person receives is correlated to their income,³⁹ with high school dropouts being in the bottom tier of income earners.⁴⁰ As the United States continues to grow more diverse, these correlations may have new consequences. The 2020 projections by the Census Bureau reveal a “77 percent increase for the Hispanic population, a 32 percent increase for the African American, a 69 percent increase for the Asian population, and a less than 1 percent increase for the [W]hite population.”⁴¹ Additionally, a study done in 2000 revealed:

[B]lack and Hispanic students are less likely to get to twelfth grade; if they do, they are less likely to enroll in college; and if they do enroll, they are less likely to earn ten credits. Moreover, they are less likely to enroll in a B.A.-granting institution, and if they do, they are less likely to complete a degree.⁴²

These two statistics taken together mean that the United States is facing “significant growth in the population that has not even graduated high school.”⁴³ These projections, continued through 2050, reveal that “racial, ethnic, and socioeconomic groups that are overrepresented among low achievers and underrepresented among high achievers [will] make up the majority of the population and the workforce.”⁴⁴ This growing population without high school

39. See Thomas Bailey, *Implications of Educational Inequality in a Global Economy*, in *THE PRICE WE PAY: ECONOMIC AND SOCIAL CONSEQUENCES OF INADEQUATE EDUCATION* 76 (Clive R. Belfield & Henry M. Levin eds., 2007) (“Reformers have linked education and economic growth for many years, predicting economic problems resulting from inadequate education.”).

40. See VA. COMMONWEALTH UNIV., *WHY EDUCATION*, *supra* note 32, at 3 (“[W]orkers with more education tend to earn more money. In 2012, the median wage for college graduates was more than twice that of high school dropouts and more than one-and-a-half times higher than that of high school graduates.”).

41. Bailey, *supra* note 39, at 89. The sources cited in this paper utilize the term Hispanic when referring to Latinx individuals. As such, the author uses the term Hispanic interchangeably with Latinx in order to avoid confusion with the language in the sources.

42. *Id.* at 87.

43. *Id.* at 89.

44. Ronald F. Ferguson, *Toward Excellence with Equity: The Role of Parenting and Transformative School Reform*, in *THE PRICE WE PAY* 225, 226 (Clive R. Belfield et al. eds., 2007) (“By 2050 racial, ethnic, and socioeconomic groups that are overrepresented among low achievers and underrepresented among high achievers will make up the majority of the population and the workforce. Even more than today, technology and trade will pit workers head-to-head in competition with others

education translates to fewer skilled workers, greater health risks,⁴⁵ higher taxes, and a less competitive economy globally.⁴⁶ It is crucial that the United States takes steps now to close achievement gaps between races in order to correct this path.

B. The United States Has Been Grappling with Inequalities in Education for over Sixty Years.

In 1954 the United States Supreme Court, in a unanimous opinion, wrote “Separate educational facilities are inherently unequal.”⁴⁷ Some well-meaning and some not-so-well-meaning school districts tried desegregating schools, but the experiment quickly failed. In 1955, *Brown II* cut the legs out from the previous decision with three simple words: “all deliberate speed.”⁴⁸ Spoken by the Attorney General of the United States, these words proscribed remediation of segregation policies in a flexible window, deviating from the previous mandate and allowing state legislatures and school systems to delay and even curtail integration of public schools.⁴⁹ Another decade would pass before the Supreme Court stated, “The time for mere ‘deliberate speed’ has run out.”⁵⁰

C. Four Waves of Litigation All Seek to Right Past Wrongs.

While the country was still reeling from the effects of *Brown I* and *Brown II*, the first wave of education litigation began. The

around the world. The elderly will be more numerous. When young parents lack reading, math, and job skills to avoid poverty, they will compete with the elderly poor for public supports. Tax burdens on working-age adults are likely to be high. Meanwhile, internationally, the most elevated standards of living will obtain in nations where workers are most skilled and politics most stable. Where the United States will rank in this mix is uncertain. It depends on us. More than we might like to acknowledge, the social stability and vitality of the nation we leave our children depends fundamentally upon how relentlessly and effectively we pursue excellence with equity now and over the next several decades.”)

45. See VA. COMMONWEALTH UNIV., WHY EDUCATION, *supra* note 32, at 2 (“[P]eople with less education are more likely to work in high-risk occupations with few benefits.”).

46. See Bailey, *supra* note 39, at 76–79.

47. *Brown v. Board of Education (Brown I)*, 347 U.S. 483, 495 (1954). *Brown I* is a hallmark of American law, representing some of the most deeply held values in our society, but the hope it prescribed remains an illusion. Accord Jim Chen, *Poetic Justice*, 28 CARDOZO L. REV. 581, 581–83 (2006).

48. *Brown v. Board of Education (Brown II)*, 349 U.S. 300, 301 (1955).

49. See Chen, *supra* note 47, at 582–83, 588.

50. *Griffin v. Cty. Sch. Bd.*, 377 U.S. 218, 234 (1964).

Burger-led⁵¹ Supreme Court found that the United States Constitution neither explicitly nor implicitly provides a fundamental right to an education.⁵² The Court held, “[T]he importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause.”⁵³ This holding is directly adverse to *Brown*’s reasoning, putting an impetus on the importance of education when it held that separate facilities led to unequal educational opportunities.⁵⁴ This decision foreclosed the possibility of bringing a federal equality of education lawsuit under the Equal Protection Clause of the United States Constitution. Consequently, future plaintiffs were left to bring these grievances through state constitutional claims. Unlike the United States Constitution, all fifty states’ constitutions have education clauses,⁵⁵ and the *San Antonio* decision opened the door to the second wave of education litigation.⁵⁶

The second wave of litigation mirrored that of *San Antonio* but focused on education clauses in state constitutions.⁵⁷ For example, in *Leandro v. State*, plaintiffs sued the State of North Carolina and the State Board of Education, claiming a violation of the right to an “equal educational opportunit[y].”⁵⁸ The North Carolina Supreme

51. Chief Justice Burger replaced Chief Justice Earl Warren and his decidedly activist tenure on the Supreme Court. Chief Justice Burger, a Minnesota native, was nominated by President Nixon and ushered in a new conservative era. *Warren E. Burger: U.S. Supreme Court Justice: Overview*, MINN. HISTORY CTR., GALE FAMILY LIBRARY, <https://libguides.mnhs.org/burger> [<https://perma.cc/6NAX-VDJT>].

52. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 34–35 (1973).

53. *Id.* at 30.

54. *Brown I*, 347 U.S. at 493.

55. Molly A. Hunter, *State Constitution Education Clause Language*, EDUC. JUSTICE, <http://www.edlawcenter.org/assets/files/pdfs/State%20Constitution%20Education%20Clause%20Language.pdf> [<https://perma.cc/YT87-MDMK>]; Emily Parker, *Constitutional Obligations for Public Education*, EDUC. COMM’N OF THE STATES (Mar. 2016), <https://www.ecs.org/wp-content/uploads/2016-Constitutional-obligations-for-public-education-1.pdf> [<https://perma.cc/3DJW-VRKC>].

56. See Catharine Hansard, *Searching for the Missing Piece: An Examination of the Constitutional Language in Texas’s Education Clause that Continues to Fuel the Puzzling School Finance Saga*, 48 TEX. TECH L. REV. ONLINE EDITION 1, 2 n.7 (2016) (“While the Supreme Court of the United States declined to recognize education as a fundamental right under the Equal Protection Clause of the Fourteenth Amendment, every state constitution contains an education clause, and all states require children to enroll in school with the ultimate goal of preparing students to graduate from high school ready to attend college.”).

57. See Gillespie, *supra* note 15, at 998 (“Litigants in the earliest state court suits continued to make an equality-based argument, now grounded in the equal protection clauses of various state constitutions.”).

58. *Leandro v. State*, 488 S.E.2d 249, 252 (N.C. 1997); see *infra* notes 106–108;

Court found that there was nothing in the state's constitution to mandate equal funding,⁵⁹ but did find there was a qualitative component mandating a "sound basic education."⁶⁰ On the other hand, in Texas, the state supreme court found that the financing scheme created unequal access to educational materials violating the state's constitution.⁶¹ The second wave of education was met with varied success for plaintiffs. With more courts willing to define adequacy or, in *Leandro's* case a "sound basic education," a third wave of litigation began.

The third wave was comprised of state adequacy litigation lawsuits, which were premised on qualitative components that articulated the type of education state constitutions prescribed. For example, in Kentucky, plaintiffs sued claiming the state financing system failed to provide adequate educations to all students.⁶² The state supreme court decisively found in favor of plaintiffs stating, "A child's right to an adequate education is a fundamental one under our Constitution."⁶³ The court then defined 'adequate' using seven criteria that the state had to provide to fulfill its obligation under the Kentucky Constitution.⁶⁴ Similarly, in Kansas, the state supreme court found that the legislature had violated the state constitution, as its financing scheme failed to provide adequate education for all students.⁶⁵ Unlike Kentucky, the Kansas legislature has grappled with this ruling for a decade, and remains in noncompliance with the court's mandate.⁶⁶ Adequacy lawsuits sidestepped the issue of equality, but, like the second wave of lawsuits, they sought resolution through state financing.

The new fourth wave of education litigation seeks what the *San Antonio* decision left many thinking was impossible: a federal

see also infra note 106 at 342.

59. *Leandro*, 488 S.E.2d at 256–57 ("[W]e see no reason to suspect that the framers intended that substantially equal educational opportunities beyond the sound basic education mandated by the Constitution must be available in all districts. A constitutional requirement to provide substantial equality of educational opportunities in every one of the various school districts of the state would almost certainly ensure that no matter how much money was spent on the schools of the state, at any given time some of those districts would be out of compliance.").

60. *Id.* at 254–55.

61. *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989). *But see infra* notes 135–141 and accompanying text.

62. *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 190 (Ky. 1989).

63. *Id.* at 212.

64. *Id.* at 212–13; *see infra* notes 149–162 and accompanying text.

65. *Gannon v. State*, 319 P.3d 1196, 1239 (Kan. 2014).

66. *See infra* notes 163–171 and accompanying text.

right to an adequate education. This wave differs from the first wave because the crux is not equality of education, but adequacy. For example, in Michigan a group of high-school students sought a federal right to literacy.⁶⁷ The court ultimately dismissed the complaint with prejudice, holding the state was not required to provide a minimally adequate level of education, nor was there a fundamental right to literacy under the United States Constitution.⁶⁸ While this outcome left some disheartened, many believe there is a groundswell of opinion and precedent to find a federal right to an adequate education in the near future.⁶⁹

These four waves of litigation highlight the inequalities of education and each seeks a change in financing schemes. After sixty years of lawsuits, however, is financing really the answer? Minnesota's most urban school districts, Minneapolis and St. Paul, are receiving more funding than any other district in the state.⁷⁰ Yet their students are falling far behind their suburban counterparts.⁷¹ Nikole Hannah-Jones has investigated school districts across the United States, all parroting the same new strategies: magnet programs, earning college credit in high school, improving teacher quality, replacing principals, and implementing more testing.⁷² She said, "[Y]ou could take these conversations and go from district to district to district, and you will always hear the same things."⁷³ All these solutions are financing-based resolutions, and none have effectively reduced the achievement gap between

67. *Gary v. Snyder*, 313 F. Supp. 3d 852, 856 (E.D. Mich. 2018) *superseded by*, 329 F. Supp. 3d 344 (E.D. Mich. 2018) (stating plaintiffs alleged they were denied the right of access to literacy under the Due Process and Equal Protection Clauses of the United States Constitution).

68. *Snyder*, 329 F. Supp. 3d at 366; *see infra* notes 177–193 and accompanying text.

69. *See Gillespie, supra* note 15 at 1010 (“[T]he Court has supported students’ receipt of a meaningful educational opportunity and shown a willingness to consider and articulate the features that contribute to an adequate education.”).

70. *See Skeen v. State*, 505 N.W.2d 299, 302 (Minn. 1993) (explaining the higher property tax rate of commercial entities going towards Minneapolis and St. Paul schools); *see also* Megan Burks, *Minnesota’s School Funding Formula Provides Some Students of Color Less than Their White Peers*, MPR NEWS (Mar. 5, 2019, 5:56 PM), https://www.mprnews.org/listen?name=/minnesota/news/features/2019/03/05/school_funding_20190305_128.mp3 [<https://perma.cc/EJ77-QN9N>] (“Overall, Minnesota districts with mostly students of color receive 8 percent more funding than predominantly white districts . . .”).

71. Cruz-Guzman Complaint, *supra* note 14, at 20.

72. *This American Life, supra* note 2.

73. *Id.*

White and minority students.⁷⁴ In her research, Hannah-Jones found “one thing that really worked, that cut the achievement gap between black and white students by half. . . . But it’s the one thing that we are not really talking about, and that very few places are doing anymore . . . [i]ntegration.”⁷⁵

II. *Cruz-Guzman v. State* Seeks Injunction to State Sponsored Segregation.

On November 5, 2015, seven individuals⁷⁶ and one non-profit organization⁷⁷ sued the state of Minnesota,⁷⁸ claiming the state had perpetuated a pattern of discrimination among its school systems, resulting in segregated institutions and inadequate educations. The complaint alleged violations of the equal protection,⁷⁹ due process,⁸⁰ and education⁸¹ clauses of the Minnesota Constitution, resulting in

74. *Id.*

75. *Id.*

76. Plaintiffs are Alejandro Cruz-Guzman, guardian and next friend of his three minor children, who attend St. Paul schools; Me’Lea Connolly, guardian and next friend of her three minor children, who attend Minneapolis schools; Ke’Aundra Johnson, guardian and next friend of her minor child, who attends a Minneapolis school; Izreal Muhammad, guardian and next friend of his two minor children, who attend a Northern suburb school; Roxxanne O’Brien, guardian and next friend of her two minor children, who attend a Hawthorne neighborhood school in Minneapolis; Diwin O’Neal Daley, as guardian and next friend of his two minor children, who attend a Seward neighborhood school in Minneapolis; and Lawrence Lee, as guardian and next friend of his two minor children, who attend a Saint Paul school. Cruz-Guzman Complaint, *supra* note 14, at 4–5.

77. One Family One Community is a Minnesota nonprofit corporation whose purpose is to ensure and provide for adequate educational opportunities for economically-disadvantaged children and children of color. Cruz-Guzman Complaint, *supra* note 14, at 5.

78. The Defendants collectively referred to as “the State” were originally comprised of the State of Minnesota; Minnesota Department of Education; Dr. Brenda Cassellius, Commissioner of Minnesota Department of Education; Mark Dayton, Governor of Minnesota; Minnesota Senate; Sandra L. Pappas, President of the Minnesota Senate; Minnesota House of Representatives; and Kurt Daudt, Speaker of the Minnesota House of Representatives. Cruz-Guzman Complaint, *supra* note 14, at 5–7. *But see* Cruz-Guzman v. State, 916 N.W.2d 1, 5 n.2 (Minn. 2018) (“The district court dismissed Governor Dayton from this suit based on separation-of-powers concerns. The district court also dismissed the two individual legislators, concluding that they are ‘immune in this suit’ under the Speech or Debate Clause of the Minnesota Constitution, Minn. Const. art. IV, § 10. The dismissal of these defendants is not at issue in this appeal.”).

79. MINN. CONST. art. I, § 2 (“No member of this state shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers.”).

80. MINN. CONST. art. I, § 7 (“No person shall be . . . deprived of life, liberty or property without due process of law.”).

81. MINN. CONST. art. XIII, § 1 (“The stability of a republican form of government

de jure and de facto segregation⁸² across Minnesota schools.⁸³ Additionally, the complaint brought claims under the Minnesota Human Rights Act⁸⁴ for “unlawful discrimination in education on the basis of race and status.”⁸⁵ The state contended the complaint should be dismissed “on multiple grounds, including lack of subject matter jurisdiction, failure to state a claim upon which relief can be granted, and failure to join all interested persons.”⁸⁶ The district court dismissed the Human Rights Act claims⁸⁷ brought against three defendants on the ground of legislative immunity,⁸⁸ but denied the state’s motion in all other respects. The state then appealed, claiming the district court erred in four separate ways: (1) by refusing to dismiss the claims against the Minnesota Senate

depending mainly upon the intelligence of the people, it is the duty of the legislature to establish a general and uniform system of public schools. The legislature shall make such provisions by taxation or otherwise as will secure a thorough and efficient system of public schools throughout the state.”)

82. See *Segregation*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining de facto segregation as “[s]egregation that occurs without state authority, usu. on the basis of socioeconomic factors” and de jure segregation as “[s]egregation that is permitted by law.”); see also CONSTITUTIONAL LAW: CASES, COMMENTS AND QUESTIONS 1411–12 (Choper et al. eds., 12th ed. 2015) (“[I]ntentional (or ‘de jure’) discrimination may exist even though the law in question is racially ‘neutral’ on its face: the law may be deliberately administered in a discriminatory way; or the law, although neutral in its language and applied in accordance with its terms, may have been enacted with a purpose (or motive) of disadvantaging a ‘suspect’ class.”). Compare *Plessy v. Ferguson*, 163 U.S. 537 (1896) (holding the enforced separation of the races is a legitimate exercise of each state’s police power), *abrogated by* *Brown v. Bd. of Educ.*, 347 U.S. 438, 494–95 (1954) (“Any language in *Plessy v. Ferguson* contrary to this finding is rejected . . . We conclude that in the field of public education the doctrine of ‘separate but equal’ has no place.”), with *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (holding San Francisco municipal code, though facially neutral, served to discriminate against Chinese laundromat owners), and *Keyes v. School Dist.*, 413 U.S. 189 (1973) (holding that school boards cannot rely on racially neutral explanations when defending accusations that segregated schools are the result of intentional segregation, rather than “racially neutral” policies).

83. Cruz-Guzman Complaint, *supra* note 14, at 28–33.

84. Minn. Human Rights Act § 363A.13, subd. 1 (“It is an unfair discriminatory practice to discriminate in any manner in the full utilization of or benefit from any educational institution, or the services rendered thereby to any person because of race, color, creed, religion, national origin, sex, age, marital status, status with regard to public assistance, sexual orientation, or disability . . .”).

85. Cruz-Guzman Complaint, *supra* note 14, at 2.

86. Cruz-Guzman v. State, 916 N.W.2d 1, 6 (Minn. 2018).

87. Cruz-Guzman v. State, 892 N.W.2d 533, 536 (Minn. Ct. App. 2017) (“The district court also dismissed respondents’ claim under the Minnesota Human Rights Act, concluding that respondents lacked standing.”).

88. *Id.* (“The district court dismissed the complaint as to Governor Dayton, Senate President Pappas, and Speaker Daudt, concluding that they are entitled to legislative immunity under the Speech or Debate Clause of the Minnesota Constitution.”).

and House of Representatives on legislative immunity grounds;⁸⁹ (2) by refusing to dismiss the complaint in its entirety due to a nonjusticiable political question;⁹⁰ (3) by refusing to dismiss the complaint because of a failure to join all interested parties;⁹¹ and (4) by refusing to dismiss the complaint because the state of Minnesota is “not a proper party defendant.”⁹² Judge Larkin of the Minnesota Court of Appeals held for the State, finding the complaint brought a nonjusticiable political question. Because this finding was dispositive, the court did not reach the state’s other contentions.⁹³ The plaintiffs then sought review by the Minnesota Supreme Court, and the state sought cross-review for further clarification on the issues not addressed by the appellate court, including legislative immunity and proper joinder of parties.⁹⁴ The Minnesota Supreme Court granted the petitions for review and cross-review and ultimately reversed the appellate court’s holding, finding that the plaintiffs’ claims under the due process, equal protection, and education clauses of the Minnesota Constitution were justiciable.⁹⁵ Additionally, the court found that the Minnesota Senate and House of Representatives were not entitled to immunity, nor did the suit require the joinder of other interested parties.⁹⁶

In *Cruz-Guzman v. State* the court was set to determine the fate of all segregation and adequacy in education lawsuits while navigating the tumultuous waters of the separation of powers doctrine. If the court shied away from its decision here and held, as the appellate court did, that the plaintiffs’ claims were nonjusticiable, the legal remedy to state sponsored segregation of primary and secondary schools would be nonexistent. In addressing the justiciability question, the court stated, “Deciding that appellants’ claims are not justiciable would effectively hold that the judiciary cannot rule on the Legislature’s noncompliance with a constitutional mandate, which would leave Education Clause claims without a remedy.”⁹⁷ Consequently, the court did not intend to step into the legislature’s shoes and determine education policy,

89. *Cruz-Guzman*, 916 N.W. 2d at 12–13.

90. *Id.* at 7–10.

91. *Id.* at 13–15.

92. *Cruz-Guzman*, 892 N.W.2d at 536.

93. *Id.* at 541; *Cruz-Guzman*, 916 N.W.2d at 6.

94. *Cruz-Guzman*, 916 N.W.2d at 7.

95. *Id.* at 1.

96. *Id.* at 13–14.

97. *Id.* at 9.

rather, it intended to operate as a check and balance on the legislature's duty to fulfill the mandate given to it by the Minnesota Constitution.⁹⁸ Additionally, the court held that the joinder of school districts and charter schools was not necessary to pursue the litigation.⁹⁹ This decision is important because the court effectively held the state responsible for the adequacy of educating Minnesota's students—adequacy which, the complaint alleges, is failing due to hyper-segregated schools throughout the Minneapolis and St. Paul areas.¹⁰⁰ If, as the state purported, the school districts and charter schools were deemed necessary parties, the state could deflect blame onto particular school policies and avoid its responsibility for rolling back desegregation efforts and implementing new segregative measures.¹⁰¹ The court was not asked to rule on whether the state had violated the equal protection, due process, and education clauses of the Minnesota Constitution, but because of the court's strong and decisive ruling on the fundamental issues above, plaintiffs are now able to pursue their claims in district court.

III. There Is No Remedy to Segregated Schools Except Integration.

The four waves of education litigation all seek to remedy the achievement gap between White and minority students, but all hesitate to point the finger directly at segregation. The second and third waves focus on state financing schemes, after the *San Antonio* decision knocked down a federal right to education.¹⁰² The fourth wave returns to the United States Constitution, this time seeking a

98. *Id.* at 8–9 (“In fact, the Education Clause is the only section of the Minnesota Constitution that imposes an explicit ‘duty’ on the Legislature.”).

99. *Id.* at 14.

100. The plaintiffs detail in their complaint that “children of color comprise only approximately 29 percent of Minnesota’s public school population,” but Minneapolis schools are comprised of “66 percent children of color” and St. Paul schools are comprised of “78 percent of children of color.” In fact, twenty-seven Minneapolis schools have populations of at least 80% children of color, and in St. Paul, thirty schools have populations of at least 85% children of color. Meanwhile charter schools are operating almost entirely on racially segregated grounds. Forty-two charter schools in Minneapolis and St. Paul have populations over 95% children of color, and twenty-seven charter schools have populations over 80% White children. The complaint contrasts these numbers of hyper-segregated schools in Minneapolis and St. Paul with the neighboring suburbs, expounding on graduation and employment rates stemming from segregated versus non-segregated schools. Cruz-Guzman Complaint, *supra* note 14, at 7–15.

101. *See infra* notes 233–239 and accompanying text.

102. *Supra* notes 52–65 and accompanying text.

right to adequate teachers, facilities, and resources as opposed to equality.¹⁰³ With mixed results, education litigation has, thus far, left minority Americans on shaky ground.

A. *Second Wave: Equality in State Financing Leads to Decades of Litigation with Little Change for Students.*

The Supreme Courts of North Carolina and Texas reached opposite conclusions when equality was sought under their respective state constitutions. The North Carolina Supreme Court found nothing in the state's constitution that mandated the equal financing of schools,¹⁰⁴ whereas the Texas Supreme Court found the state's financing scheme created unequal access to educational materials in violation of the state's constitution.¹⁰⁵

i. North Carolina Struggles with Decades of Litigation Where Equal Financing is Not Required by State Constitution.

In 1997, in Raleigh, North Carolina, the state supreme court held that two provisions of the state constitution “combine to guarantee every child . . . an opportunity to receive a sound basic education in . . . public schools.”¹⁰⁶ In *Leandro v. State*,¹⁰⁷ the court further itemized particular factors that create a “sound basic education,” including the ability to read, write, speak English, and having sufficient knowledge of mathematics, science, history, geography, economics, politics, and vocational skills.¹⁰⁸ Seven years later, as the legislature struggled to implement a funding system sufficient to accomplish these goals, the court again reviewed the issue, this time holding that the state's new funding scheme did not appropriately identify and fund “at-risk”¹⁰⁹ students as to provide them an opportunity to a “sound basic education.”¹¹⁰ The court also took the opportunity to applaud the trial court's judicial restraint by stating the court did not “dictate how existing problems should

103. Complaint at 24–25, *Gary v. Snyder*, 313 F. Supp. 3d 852 (E.D. Mich. 2018), *superseded by*, 329 F. Supp. 3d 344 (E.D. Mich. 2018) [hereinafter *Snyder Complaint*].

104. *Leandro v. State*, 488 S.E.2d 249, 256 (N.C. 1997).

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

106. *Leandro*, 488 S.E.2d at 255.

107. *Id.*

108. *Id.*

109. *Hoke Cty. Bd. of Educ. v. State*, 599 S.E.2d 365, 391–96 (N.C. 2004).

110. *Id.* at 390.

be approached and resolved . . . [r]ecognizing that education concerns were the shared province of the legislative and executive branches . . .”¹¹¹ Despite the progress, subsequent litigation has lasted over two decades.

In 2012, the Court of Appeals of North Carolina affirmed a trial court’s decision to order the unrestricted admission of “at-risk” four-year-olds into existing pre-kindergarten programs.¹¹² A year later this decision was dismissed and the appeal vacated because of the legislature’s amendments to the pre-kindergarten program.¹¹³ Then in 2017, both parties to the on-going saga jointly requested an independent consultant be appointed by the court.¹¹⁴ This consultant would work with the newly appointed Governor’s Commission on Access to Sound Basic Education to “assist in the development of a comprehensive plan to address compliance with the constitutional mandates set forth in [*Leandro*]” and “develop specific recommendations as to the means to achieve such compliance.”¹¹⁵ Most recently, Judge David Lee denied a motion from the State Board of Education asking to be dismissed from the case. He stated in part:

There is an ongoing constitutional violation of every child’s right to receive the opportunity for a sound basic education. This court not only has the *power* to hear and enter appropriate orders declaratory and remedial in nature, but also has a *duty* to address this violation. This court retains both subject matter jurisdiction and jurisdiction over the parties as it undertakes this duty. Both state defendants have been proper parties to this litigation since its inception and each remain so.¹¹⁶

111. *Id.* at 391.

112. *Hoke Cty. Bd. of Educ. v. State*, 731 S.E.2d 691, 698 (N.C. Ct. App. 2012), *vacated*, 749 S.E.2d 451 (N.C. 2013).

113. *Hoke Cty. Bd. of Educ. v. State*, 749 S.E.2d 451, 454–55 (N.C. 2013).

114. *North Carolina Litigation Map*, SCHOOLFUNDING: A PROJECT OF THE CTR. FOR EDUC. EQUITY AT TEACHERS COLL. (2019), <http://schoolfunding.info/litigation-map/north-carolina/#1484027095865-59e41679-8ab6> [<https://perma.cc/4ZTS-9EME>].

115. Joint Motion for a Case Management and Scheduling Order at 4, *Hoke Cty. Bd. of Educ. v. State*, No. 95 CVS 1158 (Wake County Super. Ct. Mar. 13, 2018), <http://schoolfunding.info/wp-content/uploads/2017/08/N.Carolina-Joint-Motion-2.pdf> [<https://perma.cc/A5YH-QELP>].

116. *Hoke Cty. Bd. of Educ. v. State*, No. 95 CVS 1158, slip op. at 6 (Wake County Super. Ct. Mar. 13, 2018), <http://schoolfunding.info/wp-content/uploads/2018/10/Leandro-order-denying-SBE-motion-pdf> [<https://perma.cc/FU8Q-QGZ7>] (emphasis in original).

The judge's finite words make clear this case is going nowhere; neither, apparently, are the state's education woes. In 2014, the Charlotte Observer reported that North Carolina is still struggling to effectively address failing schools, and nearly 56% of students are "at risk of academic failure."¹¹⁷

One response to the ongoing educational dispute is the utilization of charter schools. Charter schools began in North Carolina in 1997 as a compromise between Republican and Democrat leaders. Both parties wanted to avoid vouchers to private schools that could potentially further disadvantage minority students.¹¹⁸ The early requirements of charter schools in North Carolina reflected a concern for racial imbalance. Some requirements included a "racial and ethnic mix" that reflected "the community in which it [was] located,"¹¹⁹ preference to at-risk children,¹²⁰ and transportation plans "so that transportation would not be a barrier to any student who lived within the district of the charter school."¹²¹ Early in the charter school experiment, the percentage of minority enrollees was higher than that of the traditional public schools, but over time that trend began to change.¹²² As more White students entered charter schools and the amount of charter schools tripled,¹²³ racial imbalance began to grow. Soon, minority students made up an even smaller portion of charter schools than traditional public schools.¹²⁴

117. Jane Stancill, *Too Many NC Children Aren't Receiving Adequate Education, Court Filings Say*, CHARLOTTE OBSERVER (May 9, 2014, 6:17 AM), <https://www.charlotteobserver.com/news/local/education/article9120011.html> [<https://perma.cc/7DK2-54EE>].

118. Helen F. Ladd, et al., *The Growing Segmentation of the Charter School Sector in North Carolina 4* (Nat'l Ctr. for Analysis of Longitudinal Data in Educ. Research, Working Paper No. 133, Aug. 2015), https://caldercenter.org/sites/default/files/WP%20133_0.pdf [<https://perma.cc/K9DN-RJAZ>].

119. *Id.* at 4.

120. *Id.* ("[T]he State Board of Education was encouraged to give preference to applications that demonstrated the capability of serving students at risk of academic failure.").

121. *Id.*

122. *Id.* at 6–7.

123. *Id.* at 6.

124. *Id.* at 7; see also Valerie Strauss, *The Myth of 'School Choice' in North Carolina*, WASH. POST (Aug. 10, 2018 8:19 AM), https://www.washingtonpost.com/news/answer-sheet/wp/2018/08/10/the-myth-of-school-choice-in-north-carolina/?utm_term=.338f9a8c605c [<https://perma.cc/NJ3F-EXXP>] ("If our state legislators are really serious about providing families with good choices, they must enact policies that move us in the direction of racial and economic integration.").

The achievement of charter schools followed a similar trend. In the early years, many charter school students were being outperformed by their public school peers, but by 2012 this flipped with charter school students outperforming public school students at every grade level.¹²⁵ One analysis explains that achievement rose where there was a higher return rate of students, and the schools with higher return rates had a greater percentage of White students than minority students.¹²⁶ It concluded that:

[T]he apparent gains in the test scores of charter school students over time have far more to do with selection than with the quality of the programs they offer. Taken together, our findings imply that the charter schools in North Carolina have become segmented over time, with one segment increasingly serving the interests of middle class [sic] [W]hite families.¹²⁷

ii. Texas Finds Funding System Unequal but Refuses to Draw a Cost-Quality Relationship.

Texas has been grappling with school finance lawsuits since the mid-1980s. In *Edgewood Independent School District v. Kirby*, the Texas Supreme Court found that the school financing system was unconstitutional because it was neither “financially efficient” nor did it provide for a “general diffusion of knowledge” as required by the Texas Constitution.¹²⁸ “A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools.”¹²⁹ Here, the financing system, which relied on 42% of funding from the state and 50% from independent districts, left a disparity of 700 to 1 because of the vast differences in the ability of school districts to garner funds from property taxes.¹³⁰ The court found that despite the efforts of the legislature,¹³¹ this scheme was unconstitutional

125. Ladd et al., *supra* note 118, at 9, 19–20.

126. *Id.* at 15, 34–36.

127. *Id.* at 26.

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

129. TEX. CONST. art. VII, § 1.

130. *Edgewood Indep. Sch. Dist.*, 777 S.W.2d at 392.

131. *Id.* at 397 (“By statutory directives, the legislature has attempted through the years to reduce disparities and improve the system The legislature’s recent efforts have focused primarily on increasing the state’s contributions. More money allocated under the present system would reduce some of the existing disparities between districts but would at best only postpone the reform that is necessary to

and inefficient.¹³² “Efficiency does not require a per capita distribution, but it also does not allow concentrations of resources in property-rich school districts that are taxing low when property-poor districts that are taxing high cannot generate sufficient revenues to meet even minimum standards.”¹³³ The court elaborated that “districts must have substantially equal access to similar revenues per pupil at similar levels of tax effort.”¹³⁴ Essentially, the legislature had to work with the individual school districts to devise a way for all students to have equal access to education materials while refraining from hiking up property taxes in poorer districts.¹³⁵

Sixteen years later, the defendants in *Neeley v. West Orange-Cove Consolidated Independent School District*, claimed the judiciary’s intrusion on school finance matters in *Edgewood* left the legislature and schools on shaky ground, stating “issues of adequacy, suitability, and efficiency under article VII, section 1 are all nonjusticiable political questions”¹³⁶ The court rejected these claims, doubling-down on its ruling in *Edgewood* that the judiciary is well-equipped to decide whether the legislature has met its constitutional duty of supplying an adequate education.¹³⁷ Furthermore, the court found that the public school financing system was adequate,¹³⁸ but that the state’s control of local taxation for education amounts to a state property tax in violation¹³⁹ of the state constitution.¹⁴⁰ The state legislature was once again back at

make the system efficient. A band-aid will not suffice; the system itself must be changed.”).

132. *Id.* at 399 (“Although we have ruled the school financing system to be unconstitutional, we do not now instruct the legislature as to the specifics of the legislation it should enact; nor do we order it to raise taxes. The legislature has primary responsibility to decide how best to achieve an efficient system.”).

133. *Id.* at 397.

134. *Id.*

135. *Id.*

136. *Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 777 (Tex. 2005).

137. *Id.* at 778–79 (“The judiciary is well-accustomed to applying substantive standards the crux of which is reasonableness Litigation over the adequacy of public education may well invite judicial policy-making, but the invitation need not be accepted.”).

138. *Id.* at 792–94.

139. *Id.* at 795 (“[A]n ad valorem tax is a state tax . . . when the State so completely controls the levy, assessment and disbursement of revenue, either directly or indirectly, that the authority employed is without meaningful discretion.”) (quoting *Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist.*, 826 S.W.2d 489, 502 (Tex. 1992)).

140. See TEX. CONST. art. 8, § 1(e) (abolishing ad valorem property taxes).

the drawing board to devise “structural changes” to the public education system to provide adequate and equal access to education.¹⁴¹

Most recently in *Morath v. Texas Taxpayer & Student Fairness Coalition*, the Texas Supreme Court found, “[d]espite the imperfections of the current school funding regime, it meets minimum constitutional requirements.”¹⁴² In a 100-page opinion, the court found the Texas public school system met both the financial¹⁴³ and qualitative efficiency requirements;¹⁴⁴ students’ achievement satisfied the “general diffusion of knowledge” requirement;¹⁴⁵ and such requirement did not require adequate funding.¹⁴⁶ The court echoed the sentiments of *San Antonio Independent School District v. Rodriguez*, stating, “[t]o determine as a matter of fact that specific funding levels are required to achieve the constitutional threshold of a general diffusion of knowledge, a court not only must find that a cost-quality relationship exists, but also must assign specific quantitative measures to that relationship.”¹⁴⁷ While the court again rejected the state’s claims that the political question doctrine prevented the court from assessing the state’s educational system,¹⁴⁸ its broad ruling on school financing makes a future claim seem unpromising.

B. Third Wave: State Adequacy Lawsuits Have Mixed Results.

The supreme courts of Kentucky and Kansas have both held that their respective state has failed to provide adequate education for students, but the legislatures have differed greatly on how to implement changes. The Kentucky Supreme Court uses qualitative criteria to define “adequacy” giving the legislature a roadmap for the necessary changes. Whereas the Kansas Supreme Court relied on the already robust state constitution to hold the legislature in non-compliance for almost a decade.

141. *Neeley*, 176 S.W.3d at 800.

142. *Morath v. Tex. Taxpayer & Student Fairness Coal.*, 490 S.W.3d 826, 833 (Tex. 2016).

143. *See id.* at 876.

144. *Id.* at 878–79.

145. *Id.* at 868.

146. *See id.* at 850–51.

147. *Id.* at 851.

148. *Id.* at 846.

i. Kentucky Leads the Way in Adequacy Lawsuits Through Developing A Strong Definition with Qualitative Criteria.

Kentucky sets the standard for adequacy in education lawsuits. In the late-1980s, a group of plaintiffs brought a declaratory judgment action claiming the school financing system is inadequate and discriminatory, violating the Equal Protection, Due Process, and Education Clauses of the Kentucky Constitution.¹⁴⁹ The Education Clause in Kentucky is quite trimmer than that of Kansas, stating in full: “The General Assembly shall, by appropriate legislation, provide for an efficient system of common schools throughout the State.”¹⁵⁰ Here, the legislature also fought back relying on the separation of powers doctrine, claiming the question was purely political.¹⁵¹ The court rejected this claim,¹⁵² and in a decisive manner set forth a definition for an “efficient system of education.”¹⁵³

[A]n efficient system of education must have as its goal to provide each and every child with at least the seven following capacities: (i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization; (ii) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices; (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation; (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness; (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage; (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and (vii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.¹⁵⁴

149. *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 190–91 (Ky. 1989).

150. KY. CONST. § 183.

151. *Rose*, 790 S.W.2d at 191.

152. *Id.* at 208–09.

153. *Id.* at 212.

154. *Id.*

In response to this audacious standard, the legislature enacted education reforms that increased school funding dramatically.¹⁵⁵ The legislature's quick and faithful response¹⁵⁶ to the *Rose* decision not only benefitted Kentucky students and teachers, but also acted as a shield in later litigation.¹⁵⁷ The seven *Rose* factors have been adopted by five other states: Alabama, Massachusetts, New Hampshire, Ohio, and Kansas.¹⁵⁸

The carefully crafted definition of adequate has improved student "output measures,"¹⁵⁹ but has failed to close achievement gaps between White and minority students. Thirty years after *Rose*, "achievement gaps between student populations continue to be incredibly disturbing."¹⁶⁰ The 2017–2018 student assessment results from the Kentucky Department of Education measured White students nearly doubling Black students in "transition readiness"¹⁶¹ and significantly outweighing Hispanic students.¹⁶² The gold standard of third wave education litigation has still failed to close achievement gaps in Kentucky schools.

155. See *Kentucky Litigation Map*, SCHOOLFUNDING: A PROJECT OF THE CTR. FOR EDUC. EQUITY TEACHERS COLL., <http://schoolfunding.info/litigation-map/kentucky/#1484023070798-ae032cc2-e640> [<https://perma.cc/B4GG-3YYQ>].

156. See Susan Perkins Weston & Robert F. Sexton, *Substantial and Yet Not Sufficient: Kentucky's Effort to Build Proficiency for Each and Every Child*, EDUC., EQUITY, & LAW, Dec. 2009, at 9.

157. In later litigation, a Kentucky district court dismissed plaintiffs' claim that funding was inadequate, finding that "output measures indicate that Kentucky is making substantial progress toward its education goals" and that plaintiffs failed to show actual, objective inadequacy. *Id.* at 20–22.

158. See Catharine Hansard, *Searching for the Missing Piece: An Examination of the Constitutional Language in Texas's Education Clause That Continues to Fuel the Puzzling School Finance Saga*, 48 TEX. TECH. L. REV. ONLINE EDITION 1, 8 n.49 (2016).

159. *Morath v. Tex. Taxpayer & Student Fairness Coal.*, 490 S.W.3d 826, 868 (Tex. 2016).

160. See Wayne Lewis et al., *Achievement Remains Flat, Gaps Persist in Kentucky Schools*, KY. TCHR., (Sept. 26, 2018), <https://www.kentuckyteacher.org/news/2018/09/achievement-remains-flat-gaps-persist-in-kentucky-schools/> [<https://perma.cc/9RWV-KH56>].

161. *Id.* ("[T]ransition-ready — prepared with knowledge, skills and essential dispositions to succeed in the next educational setting or career pathway. Students ready for the next level are transition ready.")

162. *Id.* (demonstrating that 65% of White students are transition ready, whereas only 32% of Black students and 44% of Hispanic students have been designated transition ready by the Kentucky Department of Education).

ii. Kansas Legislature and Supreme Court Continue to
Duel Over Adequacy Requirements.

In November 2010, thirty-nine plaintiffs filed a complaint in the Kansas district court alleging the state of Kansas grossly underfunded education in direct violation of the state constitution.¹⁶³ Kansas has one of the more robust education clauses, stating in part, “The legislature shall provide for intellectual, educational, vocational and scientific improvement by establishing and maintaining public schools”¹⁶⁴ This clause means, “[t]he Kansas Constitution . . . imposes a mandate that our educational system cannot be static or regressive but must be one which ‘advance[s] to a better quality or state.’”¹⁶⁵ Plaintiffs’ complaint details the legislature’s continuous failure to meet this high bar by surreptitiously cutting funding and bleeding Kansas’s education budget.¹⁶⁶ The Kansas Supreme Court has issued seven opinions in *Gannon v. State*, most recently in June of 2019.¹⁶⁷ The court revisited the case after the “legislative passage of 2019 House

163. KAN. CONST., art. VI, § 6(b) (“The legislature shall make suitable provision for finance of the educational interests of the state”); Complaint at 17–18, *Gannon v. State*, No. 10C1569, 2013 WL 146092 (Kan. Dist. Ct. Jan. 10, 2013), *rev’d*, 298 Kan. 1107 (2014).

164. KAN. CONST., art. VI, §1.

165. *Montoy v. State*, 120 P.3d 306, 309, *supplemented*, 112 P.3d 923 (Kan. 2005) (quoting *Improve*, in WEBSTER’S II NEW COLLEGE DICTIONARY 557 (1999)).

166. *Gannon v. State*, 319 P.3d 1196, 1213–14 (Kan. 2014).

167. *Gannon v. State*, 309 Kan. 1185, 1201 (2019) (finding the State’s legislature in substantial compliance with previous judicial mandates.); *Gannon v. State*, 443 P.3d 294, 304 (Kan. 2018) (finding the state’s legislature in substantial compliance with previous judicial mandates); *Gannon v. State*, 420 P.3d 477, 488 (Kan. 2018) (holding the state’s remediation plan “with some financial adjustments” could “bring the K-12 system into compliance with the adequacy requirement in Article 6 of the Kansas Constitution.”); *Gannon v. State*, 402 P.3d 513, 525 (Kan. 2017) (holding the state again failed to meet its burden to show compliance with “this remedy phase” of the litigation, but also failed to show its work towards compliance); *Gannon v. State*, 390 P.3d 461, 488 (Kan. 2017) (holding the CLASS finance system acted as a “stopgap and merely freeze[s] the K–12 funding levels for fiscal years 2016 and 2017 at the levels for fiscal year 2015.”); *Gannon v. State*, 372 P.3d 1181, 1187 (Kan. 2016) (holding, while H.B. 2655 corrected funding regarding the unconstitutional inequalities of the capital outlay, other portions of the funding bill remained unconstitutional); *Gannon v. State*, 368 P.3d 1024, 1026 (Kan. 2016) (holding the state failed to demonstrate that it had cured the unconstitutional inequalities of the capital outlay, and failed to provide supplemental general state aid in an amount that would allow “aid-receiving districts to provide substantially similar educational opportunities through tax efforts similar to their wealthier counterparts.”); *Gannon v. State*, 319 P.3d 1196, 1236–37 (Kan. 2014) (holding that the adequacy requirement in the education clause would be met if the financing system was “reasonably calculated to have all Kansas public education students meet or exceed the standards set out in *Rose* and presently codified in K.S.A. 2013 Supp. 72-1127.”).

Substitute for Senate Bill 16 (S.B. 16), which the Governor signed into law on April 6, 2019.”¹⁶⁸ The court found that the new legislation addressed their lingering concerns from 2018, when the court stated, “with some financial adjustments” the legislature’s current bill could satisfy the constitutional mandate.¹⁶⁹ S.B. 16 added approximately \$90 million to education each year from 2019 to 2023, specifically addressing inflation and virtual school state aid.¹⁷⁰ However, the court retained jurisdiction over the case “to ensure continued implementation of the scheduled funding”¹⁷¹ (citing specifically to a 2018 “legislative attempt to reclaim educational funds . . .”).¹⁷²

In April 2018, the Kansas House Judiciary Committee “narrowly advanced a measure that would declare ‘the power to establish adequacy of financing for education as exclusively within the legislative power of the state.’”¹⁷³ Essentially, this measure attempts to prevent the court from evaluating the legislature’s compliance with the financing section of the Education Clause of the Kansas Constitution, by amending the state’s constitution.¹⁷⁴ As Senator Julia Lynn stated, “I think as long as we let this go on, as long as we let the court push us around and come over and do our jobs, th[ere] . . . will never be enough money.”¹⁷⁵ This aggressive measure did not make it to the ballot in November 2018, but the court clearly deemed it a continuous threat to the litigation as the Kansas legislature grounded their rebellion in the separation of

168. *Gannon*, 309 Kan. 1185, 1186 (2019).

169. *Gannon*, 420 P.3d at 488 (holding the State’s remediation plan “with some financial adjustments” could “bring the K-12 system into compliance with the adequacy requirement in Article 6 of the Kansas Constitution.”).

170. *Gannon*, 309 Kan. at 1193–98.

171. *Id.* at 1201. Plaintiffs pointed to an attempt by the legislature to reclaim educational funding during the 2018 session as support for their argument that the court should retain jurisdiction.

172. *Id.*

173. Hunter Woodall, *Constitutional Amendment on Education Funding Heads to the House Floor*, KAN. CITY STAR (Apr. 4, 2018 8:09 PM), <https://www.kansascity.com/news/politics-government/article207953054.html> [<https://perma.cc/259U-MLRK>].

174. See Jonathan Shorman, *Kansas Conservatives Renew Push for a Constitutional Amendment on Schools after Ruling*, WICHITA EAGLE (June 26, 2018 5:57 PM), <https://www.kansas.com/news/politics-government/article213856059.html> [<https://perma.cc/3RLT-JS9L>] (explaining the proposed constitutional amendment that will limit judicial oversight of education finance).

175. Dion Lefler et al., *Kansas School Funding Still Inadequate, Supreme Court Says*, KAN. CITY STAR (June 25, 2018), <https://www.kansascity.com/news/politics-government/article213797099.html> [<https://perma.cc/G8TF-79LE>].

powers theory. The Court clapped back, stating “[i]nherently the supreme court must have the power to protect its own jurisdiction, its own process, its own proceedings, its own orders, and its own judgments.”¹⁷⁶

C. Fourth Wave: Federal Right to Adequate Education Is Hopeful but Not Optimistic.

Michigan students brought a federal claim for a right to literacy. Though ultimately unsuccessful, the case demonstrates the beginning of a new wave of litigation: a federal right to an adequate education.

i. Michigan Tests the Waters of Federal Adequacy Right.

In 2016, seven students in Detroit brought an action against the State of Michigan, specifically claiming that literacy is a fundamental right under the federal constitution, which they have been denied.¹⁷⁷ The complaint alleged the state’s failure to create “any system for literacy instruction and remediation in Plaintiffs’ schools.”¹⁷⁸ Additionally, the complaint used test scores and statistical data to show that the “Priority Schools”¹⁷⁹ that Plaintiffs attend are continuously in the bottom tier of Michigan schools, ranking only one to six percent out of a hundred.¹⁸⁰ The complaint also alleged unsafe conditions and vermin infestations inside these

176. *Gannon*, 443 P.3d at 304 (quoting *Chi., Kan. & W. R.R. Co. v. Comm’rs of Chase Cty.*, 21 P. 1071, 1071 (Kan. 1989)). The Court also cited to *Montoy v. State*, a previous school finance case where the court held “the State had enacted legislation in substantial compliance with our orders And we dismissed the case. Before the State fully implemented the financial solution we accepted in *Montroy IV*, however, it started making significant cuts to education funding in school year . . . 2008–09 (fiscal year 2009).” *Id.* at 296 (citing *Montoy v. State*, 138 P.3d 755 (Kan. 2006)).

177. Snyder Complaint, *supra* note 103, at 24–25.

178. *Id.* at 73.

179. *Id.* at 20 (“Priority Schools are those schools in the bottom 5% of a complete top-to-bottom list of schools published annually. The ranking is based on a number of factors, including minimal students outcomes in a number of subject areas, low achievement coupled with declining performance or large achievement gaps, or a combination of multiple of these factors.”).

180. *Id.* at 66–67 (“A school’s percentile rank reflects how the school ranks against all other schools in the State. For example, a score of 70 means that the school performed better than 70% of Michigan’s ranked schools Plaintiffs’ schools are among the very lowest-performing schools in the State. For the most recent ranking, the 2013-2014 school year, the State assigned Hamilton a 4 percentile rank; Osborn MST a 1 percentile rank; Osborn Evergreen a 2 percentile rank; and Cody MCH a 6 percentile rank.”).

schools.¹⁸¹ After detailed examples of how these Detroit schools are failing Plaintiffs, the complaint puts forth data showing graduation rates,¹⁸² employment rates,¹⁸³ and health studies¹⁸⁴ all indicating literacy plays a fundamental role on an individual's life and affects the community at large.

Despite the surplus of information, Plaintiffs' complaint was dismissed with prejudice.¹⁸⁵ The court held that Plaintiffs failed to compare other Michigan schools with different racial compositions demonstrating that the schools Plaintiffs attended, comprised largely of children of color, were treated differently than schools with a greater population of White students.¹⁸⁶ Therefore, they failed to demonstrate that they were treated differently on account of their race in violation of the Equal Protection Clause.¹⁸⁷ Additionally, the court held that the state was not required to provide a minimally adequate level of education, and there was no fundamental right to literacy under the Due Process Clause.¹⁸⁸

This first attempt at a federal adequacy right proved disappointing for Plaintiffs. In many states the claims would have been better brought under a state education clause, but the Michigan Constitution does little more than encourage education:¹⁸⁹ "Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."¹⁹⁰ The Michigan Constitution goes on to mandate a free education¹⁹¹ and enumerate the duties of the State Board of Education,¹⁹² but nowhere does it

181. *Id.* at 10, 77–98.

182. *Id.* at 70–73.

183. *Id.* at 34–35 ("Adults with low literacy face a significant economic disadvantage, earning lower wages and experiencing higher unemployment rates. NAAL data reveals that 43% of adults with the lowest levels of literacy live in poverty, as compared to only 4% of those with the highest levels of literacy.").

184. *Id.* at 37–39 (citing Terry C. Davis et al., *Low Literacy and Violence Among Adolescents in a Summer Sports Program*, 24 *J. ADOLESCENT HEALTH* 401, 411 (1999) ("One study of adolescents from low-income neighborhoods found that youth who read two years or more below grade level were more likely to engage in risky behaviors and be in a physical fight that required medical treatment than youth who were reading at grade level.")).

185. Gary v. Snyder, 329 F. Supp. 3d 344, 369 (E.D. Mich. 2018).

186. *Id.* at 367–68.

187. *Id.*

188. *Id.* at 365.

189. MICH. CONST. art. VIII, § 1.

190. *Id.*

191. *Id.* § 2.

192. *Id.* § 3.

provide for an ‘adequate’ or any other measured type of education. Because the education clause here provides little instruction to the legislature or to the courts, young Michigan adults who cannot read¹⁹³ have no remedy under the state or United States Constitution.

IV. Minnesota’s Civil Rights Legacy Turns Disappointing in Late Twentieth Century, but *Cruz-Guzman* Has the Capacity to Right Past Wrongs.

Cruz-Guzman provides an opportunity for Minnesota to return to its proud legacy of civil rights after decades of segregated facilities plaguing educational stability. The court decisively ruled on foundational issues allowing *Cruz-Guzman* to continue to the next phase of litigation.

A. Minnesota Legislature Abandons Promise to Desegregate.

Minnesota has long been one of the greatest champions for civil rights,¹⁹⁴ carrying that title through the passage of the Civil Rights Act of 1964.¹⁹⁵ For many years, Minnesota sought to make the sentiments of *Brown* a reality for school children.¹⁹⁶ In the 1980s and 90s, however, regression began to plague the Twin Cities and segregation became a familiar reality. In a series of unfortunate but predictable, events, the Minnesota legislature and school boards began moving further away from a unitary school system.¹⁹⁷

In 1972, Minneapolis was subject to a desegregation order, stemming from *Booker v. Special School District No. 1*.¹⁹⁸ Following

193. See Alia Wong, *Students in Detroit are Suing the State Because They Weren’t Taught to Read*, ATLANTIC (July 6, 2018), <https://www.theatlantic.com/education/archive/2018/07/no-right-become-literate/564545/> [<https://perma.cc/QSG4-DYUK>] (discussing reasons for dismissal).

194. See MYRON ORFIELD, INST. OF METRO. OPPORTUNITY, INTEGRATION AND NEW-SEGREGATION IN MINNESOTA: DRAFT REPORT, 5 (2018) [hereinafter ORFIELD].

195. *Id.* at 1, 9–16.

196. *Id.* at 16.

197. See *Green v. Cty. Sch. Bd. of New Kent Cty.*, 391 U.S. 430, 436 (1968) (“The transition to a unitary, nonracial system of public education was and is the ultimate end to be brought about . . .”).

198. *Booker v. Special Sch. Dist. No.1*, 351 F. Supp 799, 809 (D. Minn 1972); Brief of Amicus Curiae Myron Orfield at 4, *Cruz-Guzman v. State*, 892 N.W.2d 533 (Minn. Ct. App. 2017) (No. A16-1265) [hereinafter Orfield Brief]; INST. OF METRO. OPPORTUNITY, WHY ARE THE TWIN CITIES SO SEGREGATED? 5 (2015), <https://www.law.umn.edu/sites/law.umn.edu/files/metro-files/why-are-the-twin-cities-so-segregated-2-26-15.pdf> [<https://perma.cc/2NVR-4GWK>].

that decision, “the court helped guide policies such as school boundary decisions, and conducted annual reviews of the district’s progress towards integration.”¹⁹⁹ A ‘short’ ten years later, the desegregation order dissolved without a ruling that Minneapolis schools were “integrated or unitary.”²⁰⁰ Without the order and with a noticeable uptick in minority student populations, districts began to re-segregate.²⁰¹ In response, the Minnesota State Board of Education proposed a desegregation rule that used “flexible racial ratios as integration targets.”²⁰² A wave of “political backlash” destroyed these proposals and forced the Board to dismantle.²⁰³

Later in 1998, a new Statement of Need and Reasonableness (SONAR)²⁰⁴ was released that starkly contradicted the 1978 version²⁰⁵ released after *Booker*.

The SONAR’s rendering of the law would flip the logic of many integration plans on their head: rather than being mandatory in cases of *de jure* segregation, and voluntarily implementable elsewhere, race-conscious remedies would be forbidden in all cases except where there was proof of intentional discrimination. Most voluntary integration plans would become illegal.²⁰⁶

De facto segregation of students would become the harsh reality across Minnesota schools. During the following two decades,

199. Orfield Brief, *supra* note 198, at 4.

200. ORFIELD, *supra* note 194, at 6 (citing Memorandum Order at 5, *Booker v. Special Sch. Dist. No. 1*, 4–71 Civil 282) (June 8, 1983)) (“The Minneapolis desegregation order was dissolved in 1983, in order give [sic] the district ‘the opportunity for autonomous compliance with constitutional standards.’ Notably, the court did not find that the Minneapolis school district was integrated or unitary, and received assurances that the State Department of Education was ‘willing and able to assume the duty of monitoring the further implementation of the District’s desegregation/integration plan.’”) (internal citations omitted).

201. *Id.* at 6.

202. *Id.* at 6–7.

203. *Id.* at 7–8.

204. See Minn. Dep’t of Educ., Statement of Need and Reasonableness for Proposed Amendments to Rules Governing Desegregation (1998) [hereinafter SONAR 1998].

205. Orfield Brief, *supra* note 198, at 4–5. (“In a 1978 Statement of Need and Reasonableness (SONAR) supporting a rule regulating *de facto* school segregation, the Attorney General and the Board of Education declared that, reading the 1869 prohibition on segregation *in pari materia* with the 1967 Minnesota Human Rights Act, the legislature’s intent to regulate *de facto* discrimination was clear.”).

206. *Id.* at 9 (citing Margaret Hobday et al., *A Missed Opportunity: Minnesota’s Failed Experiment with Choice-Based Integration*, 35 WM. MITCHELL L. REV. 936, 955–58 (2009)).

the Minnesota legislature and Department of Education²⁰⁷ continued to weaken the State's ability to correct rampant segregation occurring across school districts.²⁰⁸ Today, the 1999 Minnesota Desegregation/Integration Rule,²⁰⁹ adopting the 1998 SONAR requirements, remains the authority on Minnesota desegregation.²¹⁰

Coincidentally, in 1993, Minnesota became one of a growing number of states to find a fundamental right to education in the state constitution.²¹¹ In *Skeen v. State*, the Minnesota Supreme Court decided a school financing case that included seventy-six school districts, where the plaintiffs were complaining that the increase of student population in their districts in comparison to the decrease in population of other districts led to "disparities in educational opportunity" based on the current financing scheme.²¹² However, the plaintiffs did not "challenge . . . the adequacy of education in Minnesota," because the plaintiff districts all "met or exceeded the educational requirements of the state."²¹³ Nor, were inner-city districts, like Minneapolis, St. Paul, or Duluth, parties to the case,²¹⁴ because the State placed a "higher property tax rate on commercial entities."²¹⁵ The Minnesota Supreme Court found the state's financing system was constitutional in all respects, but also held that "education is a fundamental right under the state constitution."²¹⁶ This decision is important because it provides an avenue through which future education litigation may be brought.

207. The State Board of Education was dismantled among the "political backlash" that spurred from the Board's proposal in 1994 where they would have the authority to define "racial balance" and "equal educational opportunities." *See id.* at 21–22.

208. *Id.* at 9–15; Margaret C. Hobday et. al., *A Missed Opportunity: Minnesota's Failed Experiment with Choice-Based Integration*, 35 WM. MITCHELL L. REV. 936, 938 (2009). *Contra* Cindy Lavorato & Frank Spencer, *Back to the Future with Race-Based Mandates: A Response to Missed Opportunity*, 36 WM. MITCHELL L. REV. 1747, 1751 (2010) (arguing the current Desegregation/Integration rule is sufficient to encourage diversity of public schools).

209. *See* Minn. R. 3535.0100–.0180 (2009).

210. In 2015 the Department of Education released a new SONAR defending a proposed rule that failed to strengthen desegregation efforts and in many ways weakened the previous rule. The one positive provision mandated charter schools would now have to be in compliance with the rule. However, this rule never passed. Minnesota desegregation is still governed by the 1999 rule. *See* ORFIELD, *supra* note 194, at 25–26.

211. *Skeen v. State*, 505 N.W.2d 299, 313 (Minn. 1993).

212. *Id.* at 303.

213. *Id.* at 302.

214. *Id.* at 302–03.

215. *Id.* at 302.

216. *Id.* at 313 (emphasis added).

B. Promising New Case Could Right Old Wrongs.

In *Cruz-Guzman v. State* the court held in a sweeping victory for plaintiffs that their claims under the education, due process, and equal protection clauses of the Minnesota Constitution were justiciable.²¹⁷ Additionally, the legislature was not protected by the speech or debate clause, nor were school districts necessary parties to this litigation. These promising rulings on foundational issues indicate the court will be receptive to the claims that segregation alone can create an inadequate education.

i. Claims Brought under the Education Clause Were Justiciable.

Plaintiffs alleged that the hyper-segregation of public schools, particularly in Minneapolis and St. Paul, have led to disparities in achievement.²¹⁸ It is because of these conditions that the plaintiffs claim the legislature has failed to meet its duty under the education clause, which states in full:

The stability of a republican form of government depending mainly upon the intelligence of the people, it is the duty of the legislature to establish a general and uniform system of public schools. The legislature shall make such provisions by taxation or otherwise as will secure a thorough and efficient system of public schools throughout the state.²¹⁹

The state contended that Plaintiffs' complaints raise a purely political question and thus are not justiciable.²²⁰ The Minnesota Supreme Court held otherwise using previous case law to illustrate the many times the court has been asked to interpret the education clause.²²¹ The court concluded that the judiciary was entitled to "adjudicate whether the Legislature has satisfied its constitutional duty under the Education Clause," because if it were not that would "leave Education Clause claims without a remedy."²²² It is the judiciary's duty to interpret the constitution and adjudicate

217. See *Cruz-Guzman v. State*, 916 N.W.2d 1, 5 (Minn. 2018).

218. *Id.* at 6, 7–10.

219. MINN. CONST. art. XIII, § 1.

220. *Cruz-Guzman*, 916 N.W.2d at 7.

221. *Id.* at 7–10.

222. *Id.* at 9.

whether the legislature and other rule-making authorities are in compliance with that constitution.²²³

ii. Claims Brought under the Equal Protection and Due Process Clauses Were Justiciable.

Plaintiffs alleged the state denied students' fundamental right to an adequate education by violating the equal protection and due process clauses of the Minnesota Constitution.²²⁴ The state contended that there was no "qualitative component" to the education clause which defined "adequate." Thus, for the court to rule on Petitioners' equal protection and due process claims, it would need to define an "adequate education" and engage in educational policy-making.²²⁵ The court again rejected the state's contentions and relied on *Skeen*, stating:

The fundamental right recognized in *Skeen* was not merely a right to anything that might be labeled as "education," but rather, a right to a general and uniform system of education that is thorough and efficient, that is supported by sufficient and uniform funding, and that provides an adequate education to all students in Minnesota.²²⁶

The court did not define "adequate" in any more certain terms than previous case law, but it did establish that it was well within the judiciary's power to "assess whether constitutional requirements have been met and whether appellants' fundamental right to an adequate education has been violated."²²⁷

iii. The Legislature Is Not Protected by the Speech or Debate Clause When Defending Claims under the Education, Equal Protection, or Due Process Clauses.

The state contended that the legislature must be dismissed from the suit because the speech or debate clause "provides immunity from suit for any actions taken in their legislative capacity."²²⁸ The clause reads as follows:

223. *Id.* at 8–10; see *Marbury v. Madison*, 5 U.S. 137 (1803) (establishing judicial review).

224. See MINN. CONST. art. I, §§ 2, 7.

225. *Cruz-Guzman*, 916 N.W.2d at 11.

226. *Id.*

227. *Id.* at 12.

228. *Id.* at 13.

The members of each house in all cases except treason, felony and breach of the peace, shall be privileged from arrest during the session of their respective houses and in going to or returning from the same. For any speech or debate in either house they shall not be questioned in any other place.²²⁹

The court strongly rejected the full immunity of the legislature from any suit that arises under their legislative capacity. Explaining that the speech or debate clause has been interpreted to grant immunity for defamation when “discharg[ing] [] their official duties,”²³⁰ but does not “provide[] them with absolute immunity for violating a duty that the constitution specifically imposes on the Legislature.”²³¹ The court held that it will not interpret the speech or debate clause “to immunize the Legislature from meeting its obligation under more specific constitutional provisions—the Education, Equal Protection, and Due Process Clauses.”²³²

iv. School Districts and Charter Schools Were Not Required as Necessary Parties.

The state contended that plaintiffs’ claims “directly implicate[] actions only school districts and charter schools can take,”²³³ thus without these parties the case cannot proceed. In doing so, the state relied on section 555.11 of the Minnesota Uniform Declaratory Judgments Act, and Rule 19 of the Minnesota Rules of Civil Procedure.²³⁴ The former states, “[w]hen declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding.”²³⁵ Because the school districts and charter schools would be directly affected by the declaratory judgment of the court and any remedy sought by the plaintiffs would affect how the school districts and charter schools conducted business, the state argued that they should be parties to the suit.²³⁶ The court agreed with the district court, which stated the plaintiffs are “seeking ‘remedies

229. MINN. CONST. art. IV, § 10.

230. *Cruz-Guzman*, 916 N.W.2d at 13 (quoting *Zutz v. Nelson*, 788 N.W.2d 58, 62 (Minn. 2010)).

231. *Id.*

232. *Id.*

233. *Id.* (alteration in original).

234. *Id.*

235. MINN. STAT. § 555.11 (2016); *Cruz-Guzman*, 916 N.W.2d at 13–14.

236. *Cruz-Guzman*, 916 N.W.2d at 14.

from the State, not individual school districts or charter schools,” and are thus not necessary parties.²³⁷ The court used the same reasoning when dismissing the state’s contentions under Rule 19,²³⁸ stating “school districts and charter schools are not indispensable parties when relief is sought solely from the State.”²³⁹ Consequently, the suit could continue forward without joining school districts or charter schools as parties.

V. Let’s Try This Again: Separate Educational Facilities Are Inherently Unequal.

To provide an adequate education to all Minnesota students, the Minnesota Supreme Court in *Cruz-Guzman* must first issue a desegregation order to apply broadly and become effective immediately. Second, the court should define “adequate” education to provide the legislature with tangible grounds for effectuating change and provide plaintiffs with multiple avenues for relief.

A. Ordering Desegregation

The Minnesota Supreme Court should order the legislature to develop a desegregation plan statewide. First, the correlation between segregated schools and inadequate education has a long and sordid history. Second, the court only lifted its original segregation order²⁴⁰ because the state had assured the court it would continue to desegregate Minnesota schools, which it has failed to do.²⁴¹

Sixty-five years ago, in *Brown v. Board of Education*, the effects of school segregation were first chronicled: “[t]o separate [children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”²⁴² While the opponents of school

237. *Id.* (quoting *Cruz-Guzman v. State*, 892 N.W. 2d 533 (Minn. Ct. App. 2017)).

238. MINN. R. CIV. P. 19.01.

239. *Cruz-Guzman*, 916 N.W.2d at 15.

240. See *Booker v. Special Sch. Dist. No. 1*, 351 F. Supp. 799 (D. Minn. 1972), *aff’d*, 585 F.2d 347, 350 (8th Cir. 1978); see also Orfield Brief, *supra* note 198, at 6.

241. See *supra* notes 200–201, 208, and accompanying text.

242. *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483, 494 (1954); see also Snyder Complaint, *supra* note 103, at 70 (“As social science research demonstrates, low academic achievement and a personal perception of incompetency negatively impact student motivation, engagement, and mental health, which frequently lead to dropping out.”), *dismissed with prejudice*, 329 F. Supp. 3d 344 (E.D. Mich. 2018). See generally NAT’L RESEARCH COUNCIL, INST. OF MED., ENGAGING SCHOOLS: FOSTERING

integration reform point to de-facto segregation as the result of choice, it is the same as sanctioned²⁴³ segregation by law, when the state could do something to prevent it, but chooses not to. When Minneapolis was first ordered by Judge Larson to desegregate its public schools,²⁴⁴ there was no law on the books permitting segregation. Quite the contrary, Minnesota enacted legislation to prohibit racial segregation in public schools as early as 1869,²⁴⁵ and a statute has continued the prohibition.²⁴⁶ Regardless, Minneapolis schools were found to be operating under de-facto segregation and were ordered to integrate.²⁴⁷ The state of the law has not changed. Segregation is still illegal, and de facto segregation warrants a court order to integrate, whether that be in 1972 or 2019.

Furthermore, the continued segregation of Minnesota schools will cost the state more money in the long term than spending the money now to fix the broken system.²⁴⁸ The Center on Society and Health at Virginia Commonwealth University found that “[r]acial segregation reduces educational and job opportunities and is associated with worse health outcomes.”²⁴⁹ This translates to a continuously growing class of individuals that cannot secure well-paying jobs and are forced to depend on government programs, resulting in higher taxes for everyone.²⁵⁰ The deficit between the classes will continue to grow and without a strong middle class the economy will become unstable.

HIGH SCHOOL STUDENTS’ MOTIVATION TO LEARN 13–44 (2004) (describing factors and supports that motivate students to engage); Fred M. Newmann et al., *The Significance and Sources of Student Engagement, in* STUDENT ENGAGEMENT AND ACHIEVEMENT IN AMERICAN SECONDARY SCHOOLS 11–39 (Fred M. Newmann ed., 1992) (describing what engagement is, factors that affect engagement, and why students become disengaged).

243. *Brown I*, 347 U.S. at 494 (“Segregation of [W]hite and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group.”) (internal citations omitted).

244. See *supra* note 199 and accompanying text.

245. Orfield Brief, *supra* note 198, at 2–3.

246. *Id.* at 2–3.

247. *Id.* at 4.

248. See VA. COMMONWEALTH UNIV., WHY EDUCATION, *supra* note 32, at 5 (“[U]nderperforming schools and discrimination affect not only educational outcomes but also economic success, the social environment, personal behaviors, and access to quality health care.”)

249. *Id.* at 4; see also *supra* notes 32–38 and accompanying text.

250. See *supra* notes 41–46 and accompanying text.

The Minnesota Department of Education fell short on their promises to “assume the duty of monitoring the further implementation of the District’s desegregation/integration plan.”²⁵¹ Where the court lifted the desegregation order to allow the school district “the opportunity for autonomous compliance with constitutional standards,”²⁵² the court should be equally willing to impose an order where—after thirty years—Minnesota schools are still unconstitutionally segregated.

B. Defining Adequacy

The Minnesota Supreme Court should define “adequate,” so that the legislature is better equipped to address each factor and develop policies to effectuate change. This definition would force the legislature and school boards to look beyond the financing schemes and instead place a premium on what is actually at stake: the fundamental right to an education. The court could adopt the *Rose* factors,²⁵³ or create its own definition by expanding the precedent discussed in *Cruz-Guzman*.²⁵⁴

First, if the court adopted *Rose*, the state would have seven factors to measure each grade-level, school, and district. This adoption would enable claims, like that in *Cruz-Guzman*, to demonstrate a lack of qualitative criteria to support the assertion that segregative schooling results in inadequate education. For example, where only 23% of Minneapolis’s Black students “demonstrated a proficiency in reading,”²⁵⁵ which is a fundamental building block to “sufficient oral and written communication skills,”²⁵⁶ there would be a per se violation of the first *Rose* factor. Additionally, with each factor the state could develop testing criteria to gauge student achievement. Likewise, where graduation rates for students of color are disproportionately lower than those of White students,²⁵⁷ then they would not be as equipped to

251. Orfield Brief, *supra* note 198, at 6 (quoting Memorandum Order at 4, Booker v. Special Sch. Dist. No. 1, 4-71 Civil 282 (June 8, 1983)).

252. *Id.* at 6 (quoting Memorandum Order at 5, Booker v. Special Sch. Dist. No. 1, 4-71 Civil 282 (June 8, 1983)).

253. See *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 190–91 (Ky. 1989).

254. See *Cruz-Guzman v. State*, 916 N.W.2d 1, 11–12 (Minn. 2018).

255. *Cruz-Guzman Complaint*, *supra* note 14, at 17.

256. *Rose*, 790 S.W.2d at 212.

257. *Cruz-Guzman Complaint*, *supra* note 14, at 19–20 (“Segregation by race and socioeconomic status in the Minneapolis and Saint Paul public schools has also resulted in low graduation rates for students of color. In 2014, while the overall high school graduation rate for the Minneapolis public schools was 58.7 percent, the

“compete favorabl[y] . . . in academics or in the job market”²⁵⁸ as similarly situated students nationwide, thus failing the seventh *Rose* factor. The *Rose* factors would provide plaintiffs an avenue for litigation that is not currently available. Without defining *adequacy*, plaintiffs are left to compare test scores from surrounding areas, drawing inferences of inadequacy from the achievement gap.

Second, the court appeared poised to define “adequate” in *Cruz-Guzman* and could expand on their reasoning to establish a definition. The court began by finding the fundamental right to an education established in *Skeen* “was not merely a right to anything that might be labeled as ‘education,’”²⁵⁹ nor could the government “herd children in an open field to hear lectures by illiterates.”²⁶⁰ Instead the fundamental right to an education was found in the Minnesota Constitution which has at least three qualifiers for the type of education and school system: (1) intelligent people, (2) general and uniform, (3) thorough and efficient.²⁶¹ When the Education Clause begins with an impetus on the “intelligence of the people,”²⁶² then “[t]he framers could not have intended for the Legislature to create a system of schools that was ‘general and uniform’ and ‘thorough and efficient’ but that produced a wholly inadequate education.”²⁶³

The court also pointed to the long history of adequacy expectations in Minnesota which began in 1871, when the court stated, “all may be enabled to acquire an education which will fit them to discharge intelligently their duties as citizens of the republic.”²⁶⁴ In this technological age, the duties of citizens have changed tremendously. No longer are positions in unskilled labor

graduation rate for Black (not of Hispanic origin) students was 47.3 percent, for Native American students 29.2 percent, and for Hispanic students 45.1 percent. White students had a graduation rate of 77.3 percent. In 2014, while the overall high school graduation rate for the Saint Paul public schools was 75.5 percent, the graduation rate for Black (not of Hispanic origin) students was 68.8 percent, for Native American students 51.5 percent, and for Hispanic students 69.4 percent. White students had a graduation rate of 83.6 percent. The statewide graduation rate for Minnesota was 81.2 percent.”)

258. *Rose*, 790 S.W.2d at 212; see also Bailey, *supra* note 39, at 77–78 (comparing wages of those with high school degrees and those with bachelor’s degrees).

259. *Cruz-Guzman*, 916 N.W.2d at 11.

260. *Id.* at 12 (quoting *Sheff v. O’Neil*, 678 A.2d 1267, 1292 (Conn. 1996)).

261. MINN. CONST. art. XIII, § 1.

262. *Id.*

263. *Cruz-Guzman*, 916 N.W.2d at 12.

264. *Id.* at 8 (citing *Bd. of Educ. of Sauk Ctr. v. Moore*, 17 Minn. 412, 416 (1871)).

plentiful, nor do they provide a living wage.²⁶⁵ Additionally, young Black and Hispanic men are disproportionately represented in high school dropout rates which significantly reduces their potential income while exponentially raising the likelihood of incarceration.²⁶⁶ Not only is this incongruent with “all may be enabled to acquire an education,” but it also puts a greater financial burden on society²⁶⁷ as opposed to equipping citizens with the ability to contribute to society, or to “discharge intelligently their duties as citizens of the republic.”²⁶⁸ The interpretation of the Education Clause in 1871 should ring true today. The lack of qualitative criteria, however, has allowed the state to become complacent and the fundamental right to an education hollow.

The court has the tools and the authority to craft a definition of “adequacy” using the Minnesota Constitution and legal precedent. In *Cruz-Guzman*, the court further acknowledged its role in defining terms in the constitution by stating it “is an intrinsic part of our power to interpret the meaning of the constitution’s language The very act of defining the terms used in the Education Clause and determining whether the constitutional requirements have been met inevitably requires a measure of qualitative assessment.”²⁶⁹

If the court defined “adequacy” with qualitative criteria, three results would occur. First, plaintiffs would have an avenue to pursue litigation where the criteria are not met, and the legislature could be protected where marked improvement in defined areas supports its efforts to correct the wrong.²⁷⁰ Second, the first line of defense for the state would no longer be *what is adequate and where does it say that in the Minnesota Constitution?* Instead, judicial precedent would clearly establish what the legislature’s duty is in relationship to a student’s fundamental right to an education. Third, a clear definition of “adequacy” would provide future plaintiffs an avenue for relief. Where the continued segregation of minority students and inadequate education, not financing, are in question, the claim would be even more direct by establishing how segregated schools repeatedly fail to meet the qualitative criteria of adequacy. No longer would plaintiffs rely on inferences, but instead would show the failings of particular factors of the definition, and

265. See *supra* notes 39, 40–46 and accompanying text.

266. See *supra* notes 20–30 and accompanying text.

267. See *supra* notes 20–30 and accompanying text.

268. *Cruz-Guzman*, 916 N.W.2d at 12.

269. *Id.*

270. See *supra* note 157 and accompanying text.

the legislature would have to grapple with the true causes of the failings rather than skirting the issue and pointing to financing schemes.

Conclusion

Segregation in education continues to plague the United States. Minnesota should be the first to issue a strict desegregation order and reclaim its proud tradition of leading the way for civil rights.²⁷¹ With a hopeful glance towards the future, *Cruz-Guzman* provides much needed relief to the students in the Minneapolis and St. Paul school districts. In a footnote, the court stated:

It is self-evident that a segregated system of public schools is not “general,” “uniform,” “thorough,” or “efficient” Regardless of whether the context is a “traditional” segregation claim or a different type of claim, courts are well equipped to decide whether a school system is segregated, and have made such determinations since *Brown*²⁷²

These discrete but poignant words emphasize the Court’s power to protect Minnesotan school-children from the devastating effects of segregation. *Cruz-Guzman* provides Minnesota an opportunity to again lead the nation in Civil Rights.²⁷³ On remand, the court should uphold the ideals laid out in *Brown*—separate educational facilities are inherently unequal—and move towards an education system that promotes equal opportunities for success to *all* students.

271. *See supra* notes 194–196.

272. *Cruz-Guzman*, 916 N.W.2d at 10 n.6.

273. *Id.* at 15. *Cruz-Guzman* is no longer the only case that challenges the effects of segregation on school children. In May 2018 a complaint was filed in New Jersey mirroring that of *Cruz-Guzman*. It alleges that the unlawful segregation by “race, ethnicity and poverty unconstitutionally deprives the State’s public school students of [a] thorough and efficient education” Complaint for Declaratory Judgment and Other Relief at 31, *Latino Action Network v. State*, No. L-001076-18 (N.J. Super. Ct. Law Div. May 17, 2018). The case was looking at early settlement, potentially avoiding trial, but after negotiations fell through plaintiff attorneys are again pursuing litigation for a ruling on “liability at least.” Telephone Interview with Gary Stein, former New Jersey Associate Justice and Partner at Pashman Stein Walder Hayden, P.C. (Apr. 18, 2019) (on file with author).