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Amy Conant

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* Juris Doctor, Washington and Lee University School of Law, 2013; Bachelor of Arts, Washington and Lee University, 2010. The author would like to thank Professor Russell Miller for serving as her advisor for this Note.

I. Introduction

> "Today, education is perhaps the most important function of state and local governments[;] . . . it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."[1]

The landmark decision of *Brown v. Board of Education*[2] set the precedent for the judiciary's role in policymaking in public education, and since the decision, the role has evolved to the point of being commonplace in America.[3] The majority view is that the Court's active role in *Brown* was

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

2. *See* Brown v. Bd. of Educ., 347 U.S. 483 (1954) (holding that *de jure* discrimination was a violation of the Equal Protection Clause of the Fourteenth Amendment).

3. *See* Frank J. Macchiarola et al., *The Judicial System and Equality in Schooling*, 23 FORDHAM URB. L. J. 567, 567 (1996) (stating that since the decision in Brown, the judiciary has increasingly become involved in resolving education issues, even those outside of the Constitution).

necessary to alleviate a crisis in education that had been prolonged and exacerbated by majoritarian politics, and had it not been for the courts, de-segregation would not have occurred.[4] The most effective way to correct this crisis was to put the decision in the hands of the judiciary.

Today, America's public schools face a similar crisis in the form of state-mandated seniority layoff policies—more commonly known as "last hired, first fired"—in which school districts use seniority to determine layoff decisions during "reductions-in-force," or "RIFs."[5] While an overwhelming majority of school districts use seniority as the most important factor in layoff decisions, most states do not mandate that seniority be the determinant factor.[6] Fourteen states, however, actually mandate seniority policies.[7]

"Last hired, first fired" policies deny children the right to an adequate education by creating an unstable education environment, replete with overcrowded classrooms and high teacher turnover.[8] As discussed more thoroughly *infra*, these education rights are legally enforceable, the denial of which results in a violation of these students' civil rights.[9] "Last hired, first fired" laws widen the education gap between minority and other students, as high poverty inner-city schools are disproportionately affected by these policies.[10] Despite the detrimental effects of seniority-based layoffs, little attention has been paid to this issue. If "last hired, first fired" policies continue unchecked, poor and minority students will continue to fall further behind as they are denied their constitutional right to an equal educational opportunity.

Unlike the heavily-litigated issue of education finance reform, until very recently courts had largely remained silent on the issue of "last hired, first fired" policies in assessing the constitutionality of education rights.[11]

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4. *See* JENNIFER L. HOCKSCHILD, THE NEW AMERICAN DILEMMA: LIBERAL DEMOCRACY AND SCHOOL DESEGREGATION 134 (1984) ("[W]ere it not for [the] courts, there would be little reduction in racial isolation [in public schooling].").

5. *See* NAT'L COUNCIL ON TEACHER QUALITY, TEACHER LAYOFFS: RE-THINKING "LAST-HIRED, FIRST FIRED" POLICIES 3 (2010), *available at* http://www.nctq.org /p/docs/nctq_dc_layoffs.pdf (describing the process for district-wide layoffs).

6. *See id*. at 6.

7. *See id.* (discussing the various state and district layoff policies).

8. *See* discussion *infra* Part II.C. (detailing the negative effects of seniority-based layoff policies).

9. *See* discussion *infra* Part II.E. (suggesting that denial of education rights through "last hired, first fired" policies is the civil rights issue of our time).

10. *See id.*

11. *See* Amy L. Moore, *When Enough Isn't Enough: Qualitative and Quantitative*

The silence was broken with the January 2011 California Superior Court decision in *Reed v. State of California*,[12] which approved a class action settlement halting "last hired, first fired" layoffs in the Los Angeles Unified School District.[13] Some academics have predicted that the decision in *Reed* could spark a new wave of education litigation to reform "last hired, first fired" policies.[14] This Note will argue that "last hired, first fired" policies adversely affect students' educational rights and must be reformed. While *Reed* is the first case to address these policies, it is possible to analyze the role of the judiciary in education finance reform in order to predict whether the judiciary will be an effective vehicle to bring about reform of state-mandated seniority layoff policies, and how the courts will affect the reform.

Part Two of this Note will provide an overview of "last hired, first fired" policies, how they manifest themselves in different states and school districts, the adverse effect they have on students' educational opportunity, and why such policies are ripe for reform. Part Three will analyze state constitutional provisions as a mechanism for reform by addressing three factors: the qualifying language of a state constitution's education clause, the state's rejection or acceptance of education as a fundamental right, and the state's success in education finance reform. Part Three will also analyze the emerging jurisprudence in order to determine the most effective way to succeed in "last hired, first fired" reform, comparing "equity" claims to "adequacy claims" using two recent reform cases. Finally, Part Four will propose that emerging jurisprudence provides two viable options for "last hired, first fired" reform, depending on each state's acceptance or rejection of education as a fundamental right, and will address solutions to potential reform challenges.

Assessments of Adequate Education in State Constitutions by State Supreme Courts, 41 U. TOL. L. REV. 545, 546-47 (2010).

12. No. BC432420 1 (Cal. App. Dep't Super. Ct. 2011) (determining that seniority-based layoff policies violated students' rights to an equal educational opportunity).

13. *See id.* (approving the proposed class action settlement that haled layoffs for up to forty-five schools).

14. *See* Simone Wilson, *L.A. Teachers Union Loses Historic Lawsuit to ACLU: No More 'Last Hired, First Fired'* L.A. WEEKLY, (Jan. 21, 2011, 3:30 PM), http://blogs.laweekly.com/informer/2011/01/aclu_wins_lawsuit_utla_seniori.php (last visited Mar. 2, 2012) (describing the potential effects of the *Reed* decision on other states).

II. Background: State-Mandated Seniority Layoff Policies in Public Schools: "Last Hired, First Fired"

In the face of tangible problems such as funding disparities and class sizes, teacher quality is a facet often overlooked in education reform analysis.[15] Studies have shown, however, that teacher effectiveness is a powerful tool in implementing student outcomes nationally.[16] One study suggests increasing the effectiveness of teachers by one deviation—for example, from "average" to "very good,"—produces the same effect as decreasing a class size by thirteen students.[17] The New Teacher Project published a study addressing the "Widget Effect:" "The tendency to treat teachers like interchangeable parts rather than individual professionals, based on the false assumption that one teacher is the same as another."[18] The "Widget Effect" illustrates the problem inherent in "last hired, first fired" policies.

A. "Last Hired, First Fired" Defined

1. Reductions-in-Force

"Last hired, first fired" policies come into play during district-wide layoffs, known as reductions-in-force, (or "RIFs") in which districts are not contractually obligated to reassign teachers, meaning that teachers lose not just their current assignments, but also their jobs.[19] Usually, when a teaching position is cut because of a program or school closing, teacher contracts guarantee new assignments.[20] During a district-wide layoff (RIF),

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15. *See* THE NEW TEACHER PROJECT, *How Federal Education Policy Can Reverse the Widget Effect: Transforming ESEA Title II to Improve Teacher Effectiveness and Student Outcomes* 3 (2006), *available at* http://www.eric.ed.gov/PDFS/ED518132.pdf ("An outsized focus on class size reduction perpetuates the widget effect by overlooking and failing to act upon the differences in effectiveness among teachers.").

16. *See id.* (stating that research has shown teacher effectiveness to have a greater impact than reducing class size).

17. *See id.* (comparing the importance of effective teachers to the importance of reducing class size).

18. THE NEW TEACHER PROJECT, *The Widget Effect: Our National Failure to Acknowledge and Act on Differences in Teacher Effectiveness* (2009), *available at* http://widgeteffect.org/downloads/%20TheWidgetEffect.pdf.

19. *See* NAT'L COUNCIL ON TEACHER QUALITY, *supra* note 5, at 3 (distinguishing layoffs from the "routine ebb and flow of positions among a district's individual schools that occur every school year").

20. *See id.* (explaining the reassignment process for routine position cuts).

however, districts have no contractual obligation to reassign teachers.[21] Declining enrollment in public schools, inadequate financing, and the elimination of programs all result in RIFs, triggering these last hired, first fired policies.[22] Currently, The New Teacher Project places fourteen states at "high risk," meaning those states mandate quality-blind layoffs during RIFS, thirty-three states are at "medium risk," where they leave the decision to local school districts or allow (but do not require) multiple factors to be considered during RIFs, and three states are at "low risk," requiring that teacher performance be a major factor in layoff decisions.[23]

2. How the Policies Work

Seniority-based layoff polices come by several names, such as "last hired, first fired" or "last in, first out" (also known as "LIFO"), but they all work in largely the same way in every district that employs them.[24] The district first determines the layoff pool, either by targeting a particular grade or subject area—in which all teachers in that grade or subject area are included—or decides to make reductions in every grade, in which case every teacher is included in the layoff pool.[25] Once the pool is determined, districts with state-mandated seniority-based layoff policies have no discretion in selecting which teachers are fired—those with the least seniority are the first to go.[26] In other words, "last hired, first fired."

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21. *See id.* (contrasting normal position cut policies with district-wide layoff policies).

22. *See* BONNIE B. TAYLOR, EDUCATION AND THE LAW: A DICTIONARY 202 (1996) (defining "reductions-in-force").

23. *See* THE NEW TEACHER PROJECT, *The Case Against Quality-Blind Teacher Layoffs. Why Policies that Ignore Teacher Quality Need to End Now* 1 (Feb. 2011), http://tntp.org/assets/documents/TNTP_Case_Against_Quality_Blind_Layoffs_Feb2011F.pdf?files/TNTP_Case_Against_Quality_Blind_Layoffs_Feb2011F.pdf (illustrating the layoff risk level for each state).

24. *See* NAT'L COUNCIL ON TEACHER QUALITY, *supra* note 5, at 3 (describing the layoff process for districts that employ seniority based layoff policies).

25. *See id.* (describing how districts determine the pool of teachers eligible to be laid off).

26. *See id.* (describing the layoff process in districts with state-mandated seniority layoff policies).

B. How "Last Hired, First Fired" Policies Are Manifested in Public Schools

1. Bargaining Agreements

Because states have governance over public schools, it is within each state's discretion whether districts can engage in collective bargaining; all states except five, however, currently require or permit collective bargaining.[27] With the exception of Hawaii (where teachers negotiate employment agreements at a statewide level), bargaining occurs at the district level between the board of education and a union representative.[28] State policy, however, still influences collective bargaining in a number of ways, such as prohibiting strikes or dictating the terms of arbitration.[29] Currently, thirty-four states require collective bargaining for public sector employees, eleven states permit collective bargaining, and five states explicitly prohibit collective bargaining.[30]

In collective bargaining agreements, the principle of seniority often occurs in three forms: determining compensation, determining the order in which teachers are transferred, and—most importantly to this discussion—determining the order in which teachers are laid off during RIFs.[31] Of the forty-five states that allow collective bargaining, three states—California, Nevada, and Iowa—have layoff policies that are a mandatory subject of bargaining.[32] Illinois and Ohio *permit* layoffs to be a subject of bargaining, while five states *prohibit* layoffs policies to be a subject of bargaining: Idaho, Wisconsin, Michigan, Indiana, and Tennessee. Every other state

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27. *See* Emily Cohen, Kate Walsh & RiShawn Biddle, *Invisible Ink in Collective Bargaining: Why Key Issues Are Not Addressed*, NATIONAL COUNCIL ON TEACHER QUALITY, July 2008, at 4 (assessing the state role in establishing the scope of bargaining).

28. *See* M. Finch and T. Nagel, *Collective Bargaining in the Public Schools: Reassessing Labor Policy in an Era of Reform*, WIS. L. REV. 1573, 1579 (1984) (discussing the recent growth of teacher unionism and collective bargaining).

29. *See* Michael Colasanti, *State Collective Bargaining Policies for Teachers*, State Notes, Education Commission of the States, Jan. 2008, at 1 (addressing each state's policy with regard to collective bargaining agreements).

30. *See* James Joyner, *Public Employee Bargaining Rights*, OUTSIDE THE BELTWAY (Feb. 18, 2011), http://www.outsidethebeltway.com/public-employee-bargaining-rights/ (providing a map of collective bargaining rights by state).

31. *See id.*

32. *See* NAT'L COUNCIL ON TEACHER QUALITY TR3 DATABASE: TEACHERS' RULES, ROLES, AND RIGHTS, *State Bargaining Rules*, http://www.nctq.org/tr3/scope/ (last visited Feb. 21, 2013) (illustrating the bargaining policies of each state).

either fails to address the issue in state law or administrative code, or has no state statute regarding public sector collective bargaining.[33]

2. State Law

From a historical perspective, the state legislatures have been the most common tool for regulating the operation of public schools, either directly or through state boards of education.[34] Many school governance decisions are relegated to individual school districts, but certain elements such as licensing standards and the extent they are enforced are governed at the state level.[35] With regard to RIFs, many states leave layoff determination criteria to the individual school districts.[36] Fourteen states, however, have mandated "last hired, first fired" policies: Alaska, California, Hawaii, Illinois, Kentucky, Minnesota, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island, West Virginia, and Wisconsin.[37]

C. The Negative Effects of "Last Hired, First Fired"

The problem inherent in "last hired, first fired" policies is very similar to the problem vocalized by the "Widget Effect," i.e. teachers are not evaluated based on quality or effectiveness. In the District of Columbia, this lack of attention to teacher quality resulted in widespread controversy surrounding District layoffs.[38] When Washington, D.C. Schools Chancellor Michelle Rhee performed a layoff of close to 400 teacherS in 2009, she took advantage of the fact that the District does *not* have mandated seniority-based layoff policies.[39] She refused to use seniority as a determining factor in who would be laid off, basing her decision on a D.C.

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33. *See id.*

34. *See* EDUCATION POLICY AND THE LAW 438 (David L. Kirp et al. eds., 3d ed. 1992) (providing an overview of the reform, regulation, and restructuring of public school systems).

35. *See* Linda Darling-Hammond, *Teacher Quality and Student Achievement: A Review of State Policy Evidence*, 8 EDU. POLICY ANALYSIS ARCHIVES 1, 10 (2000) (providing an overview of the differences in state policy regarding teaching).

36. *See* NAT'L COUNCIL ON TEACHER QUALITY, *supra* note 5, at 6 (detailing states' latitude in last hired, first fired policies).

37. *See* THE NEW TEACHER PROJECT, *supra* note 23, at 6 (summarizing state latitude in determining criteria for teacher layoff policies).

38. *See id.* at 5 ("The lack of attention to teacher quality inherent in this process is one of the reasons why Washington, DC's layoffs raised so much controversy.").

39. *See id.* at 1 (summarizing the controversy surrounding the 2009 D.C. layoff).

Regulation clause that made "school needs" the determining factor rather than seniority.[40]

In the wake of the D.C. controversy, the National Council on Teacher Quality (NCTQ) conducted a study to examine district policies for making layoff decisions in order to answer the important question emphasized by the D.C. decision: "what factors should be considered when school districts must decide who will stay and who will go?"[41] The study examined data from 100 school districts, representing twenty percent of all public schools in the United States.[42]

The study found that seniority-based layoff policies have several legitimate advantages: the system is objective, protects those teachers who are most invested in a school district, and supports teachers who would have the most trouble finding a new job late in their careers.[43] Proponents of "last hired, first fired" policies also contend that the system benefits students by providing them with more experienced teachers.[44] The NCTQ study, however, firmly rejects the longstanding assumption that experience correlates to quality.[45] Other studies have reached the same conclusion when measuring teacher effectiveness over time. One study conducted in 2009, *Assessing the Potential of Using Value-Added Estimates of Teacher Job Performance for Making Tenure*, concluded that after three years of teaching, teachers generally hit a plateau and no longer increase in teaching effectiveness, thus illustrating that third-year teachers are no less effective than long-tenured teachers.[46] Another study even suggests that long-tenured teachers decrease in performance toward the end of their careers. In sum, as one study stated, "[w]hile the simplicity and transparency of a

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40. *See* NAT'L COUNCIL ON TEACHER QUALITY, *supra* note 5, at 1 (describing the legal basis on which the D.C. Chancellor rested her decision to base her layoff decision on factors other than seniority).

41. *Id.*

42. *See id.* (providing an overview of the Teacher Rules, Roles, and Rights (TR3) database used to conduct the study).

43. *See id.* at 1–2 (outlining seniority's pros and cons).

44. *See id.* at 2 ("It has long been assumed that a seniority system produces the best results for children, under the assertion that the most experienced teachers are better teachers.").

45. *See id.* (stating that the assumption that most experienced teachers are better teachers proves not to be true).

46. *See* Dan Goldhaber & Michael Hansen, *Assessing the Potential of Using Value-Added Estimates of Teacher Job Performance for Making Tenure Decisions* (Nat'l Ctr. for Analysis of Longitudinal Data in Educ. Research, Working Paper No. 31, 2010), *available at* http://www.urban.org/uploadedpdf/1001369_assessing_the_potential.pdf.

seniority-based system certainly has advantages, it is hard to argue that it is a system in the best interest of student achievement."[47]

Additionally, the NCTQ study illustrates that "last hired, first fired" policies indirectly lead to an increase in classroom size. Because new teachers cost less than tenured teachers, when districts use seniority-based layoff policies they are forced to fire a greater number of teachers.[48] Firing a greater number of teachers naturally results in fewer teachers per district and therefore increased class sizes. The study gives an illustration of closing a ten million dollar deficit in a district serving 34,500 children with a current average class size of 23 students. The study estimates the cost of a twenty-year veteran at $100,000, meaning 100 teachers would be fired and class sizes would increase from twenty-three to twenty-five.[49] In contrast, the cost of a new teacher is estimated at $50,000, resulting in a layoff of twice as many teachers and an increased classroom size from twenty-three to twenty-seven.[50] Other comparisons to seniority-neutral models yield similar results. One researcher from the University of Washington suggests that a nationwide ten percent school budget cut, allowing districts to look at factors other than seniority, could save over 250,000 jobs.[51] Studies have shown that these increases in class size have a direct effect on student achievement, especially in the lower grades.[52]

Moreover, it is not just an assumption that seniority-based rather than quality-based layoff policies result in a less effective corps of teachers. According to two recent studies, only thirteen to sixteen percent of the teachers laid off in a seniority-based system would also have been given pink slips in a quality of effectiveness based system, meaning that more than eighty percent of seniority-based layoffs would result in more effective teachers being cut.[53] These studies also found that ineffective teachers

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47. Dan Goldhaber & Roddy Theobold, *Assessing the Determinants and Implications of Teachers Layoffs* (Nat'l Ctr. for Analysis of Longitudinal Data in Educ. Research, Working Paper No. 55, 2010), *available at* http://www.urban.org/uploadedpdf/1001496-Assessing-Teacher-Layoffs.pdf.

48. *See* NAT'L COUNCIL ON TEACHER QUALITY, *supra* note 5, at 2 (illustrating that seniority-based layoffs lead to more jobs lost and consequently larger classroom sizes).

49. *Id.*

50. *Id.*

51. *See id.* (referencing the research of Marguerite Roza, which suggests that switching to a seniority neutral policy could reduce teacher layoffs from 875,000 to 612,000 in a 10% nation-wide school budget cut).

52. *See* Steven G. Rivkin, Eric A. Hanushek, & John F. Kain, *Teachers, Schools, and Academic Achievement*, 73 ECONOMETRICA 417, 444–45 (2005).

53. *See* THE NEW TEACHER PROJECT, *supra* note 23, at 4; *see also* Goldhaber

result in 2.5 to 3.5 fewer months' worth of academic progress in one year, compared to a teacher of average effectiveness.[54]

D. The Need for "Last Hired, First Fired" Reform

Despite the problems inherent in seniority-based layoff policies, seventy-five percent of the districts analyzed in the NCTQ study use seniority as the determining factor in teacher layoffs.[55] As previously noted, while many states leave layoff determination criteria to the individual school districts, fourteen states have mandated "last hired, first fired" policies.[56] The NCTQ urges states to pass laws mandating teacher performance as the determinant factor rather than seniority: "Because state law trumps local policy, even that of collectively bargained contracts, any state could pass a law that requires performance to be a factor in layoffs."[57] Such a policy would be in line with other white-collar professions where seniority-based layoff policies are very uncommon.[58] While states *could* pass these laws, the more pertinent question is whether they will exercise this power. Currently, only Arizona has a law prohibiting seniority from being used as the determinant factor in teacher layoffs.[59] As analyzed below, this Note predicts that prohibition of "last hired, first fired" policies could become the next wave of education reform.

&,Hansen, *supra* note 46.

54. *See* THE NEW TEACHER PROJECT, *supra* note 23, at 5 (explaining why seniority-based layoffs drag down student achievement).

55. *See id.* at 4 (providing an overview of the current policies in 100 districts in the TR3 database). In the twenty-five districts where seniority was not determinant, sixteen districts used teacher performances as a weightier factor, six districts used a case-by-case determination (though usually seniority-based) and three districts used multiple criteria. *See id.*

56. *See id.* at 6 (summarizing state latitude in determining criteria for teacher layoff policies).

57. *See* NAT'L COUNCIL ON TEACHER QUALITY, *supra* note 5, at 6.

58. *See id*. at 1 ("The factory model approach of last-hired, first-fired is unusual among white collar professions. For example, struggling newspapers have usually chosen to buy out fewer senior, higher paid employees rather than layoff larger numbers of younger, less-expensive employees.").

59. *See id.* at 6.

E. "The Civil Rights Issue of Our Time"

Until very recently, education reform has focused predominantly on education finance.[60] During this time, the courts were largely silent on other matters of education quality.[61] The evolution from federal to state law and from equity to adequacy illustrated in the evolution of reform strongly suggest that the new wave of reform could move away from finance and toward teacher quality. President Obama has called education reform the "civil rights issue of our time" and has made efforts to eliminate achievement gaps between minorities and other students.[62] Speaking to teacher effectiveness specifically, he has said, "I reject a system that rewards failure and protects a person from its consequences. The stakes are too high. We can afford nothing but the best when it comes to our children's teachers and the schools where they teach."[63]

"Last hired, first fired" policies affect inner-city (and consequently minority) students more than others. Research shows that reverse-seniority layoffs hit inner-city schools the hardest because less-experienced teachers tend to aggregate there.[64] For example, one report concluded that teacher layoffs would be unevenly distributed in the Los Angeles Unified School District, the school district at issue in *Reed,* because the district was forced to use "last hired, first fired" policies.[65] Because twenty percent of the

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60. *See* William F. Dietz, *Manageable Adequacy Standards in Education Reform Litigation*, 74 WASH. U. L. REV. 1193, 1193 (1996) (discussing the three waves of education finance reform). Reform has typically been categorized into three waves: The Equal Protection Clause of the Fourteenth Amendment, the Equal Protection Clause of state constitutions, and education adequacy under state constitutions. *See id.* at 1193–94.

61. *See* K.T. Cochran, *Beyond School Financing: Defining the Constitutional Rights to an Adequate Education*, 78 N.C. L. Rev. 399, 399–400 (2000) ("American courts have steadfastly refused to hold teachers and school systems liable for failing to educate individual students. Despite widespread concern about the quality of education offered in the nation's public schools, state courts have refused to hear so-called 'educational malpractice' claims brought against local schools.").

62. *See* Helene Cooper, *"Obama Takes Aim at Inequality in Education*," N.Y. TIMES, Apr. 6, 2011, *available at* http://www.nytimes.com/2011/04/07/us/politics/07obama.html?_r=0 (describing President Obama's goals for education reform).

63. President Barack Obama, Remarks at the meeting of the Hispanic Chamber of Commerce (Mar. 10, 2009) (transcript available at http://www.whitehouse.gov/the_press_office/Remarks-of-the-President-to-the-United-States-Hispanic-Chamber-of-Commerce).

64. *See* Mark Osmond, *Taking Failing Schools to Court*, EDUCATIONNEXT (Sept. 12, 2011), http://educationnext.org/taking-failing-schools-to-court/.

65. *See* INSTITUTE FOR DEMOCRACY, EDUCATION, AND ACCESS, *Sharing the Burden? The Impact of Proposed Teacher Layoffs Across LAUSD*, http://idea.gseis.ucla.edu/

district's first-year and second-year teachers are assigned to high-poverty schools that have high concentrations of minority students, these students would be the most adversely affected.[66] The New Teacher Project asserts that in seniority-based layoffs, the poorest schools are subject to 25% more layoffs than the wealthiest schools.[67] Another study reports:

> Also problematic is the uneven effect seniority-based layoffs may have on various schools. It has been extensively documented that in higher-poverty, higher-minority schools, teachers tend to be less experienced than their colleagues at wealthier, lower-minority schools. Where these patterns hold, minority and poor students will undoubtedly see more turnover in their teachers from seniority-based layoffs. When this happens, the district's remaining teachers are shuffled as staff are imported from elsewhere in the district to backfill some of the disparate teacher losses in schools with more junior teachers.[68]

As such, seniority-based layoff policies make an ideal candidate for reform, now that *Reed v. State of California* has called the constitutionality of such policies into question.

As shown above, state mandated "last hired, first fired" results in sharp declines in teacher quality. In itself, however, this cannot instigate a new wave education reform. Seniority-based layoff policies very clearly have an adverse effect on public school system,[69] but until recently, the policies were not regarded as unconstitutional. In *Reed*, a court for the first time addressed this issue of whether the adverse effects of "last hired, first fired" policies go so far as to interfere with students' state constitutional right to "basic equality of educational opportunity."[70]

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publications/files/Layoffs-LAUSD.pdf (last visited July 24, 2013) (concluding that inner-city schools are adversely impacted by the state-mandated seniority-based layoff policies in California).

66. *Id.*

67. *See* THE NEW TEACHER PROJECT, *supra* note 23, at 7.

68. *See* Cristina Sepe & Marguerite Roza, *Schools in Crisis: Making Ends Meet. The Disproportionate Impact of Seniority-Based Layoffs on Poor, Minority Students*, May 20, 2010, http://files.eric.ed.gov/fulltext/ED516845.pdf (highlighting the negative impact of last hired, first fired on high-poverty and high-minority schools).

69. *See* discussion *supra*, Section II.C. (discussing the problems inherent in seniority based layoff policies).

70. *Reed*, No. BC432420 at 1 (citing Butt v. State of California, 4 Cal. 4th 668, 685 (1992)).

III. Analysis: State Constitutional Provisions as a Mechanism for Reform

A. Past Success: The Story of Education Finance Reform

1. The Evolution of the Judiciary's Role in Education Reform: Brown v. Board of Education and San Antonio Independent School District v. Rodriguez

Until the recent developments in *Reed*, education reform focused primarily on education finance.[71] Education finance reform has typically been categorized into three waves: the Equal Protection Clause of the Fourteenth Amendment, the education equity arguments under state constitutions, and education adequacy under state constitutions.[72] Beginning with *Brown v. Board of Education* in 1954, the judiciary began to take a more active role in education reform. Although it concerned a federal Equal Protection Clause issue, *Brown* provides an appropriate starting point because it illustrates "the special place of educational opportunity in our social system as a justification for the exercise of searching constitutional review."[73] Nonetheless, after declaring in *San Antonio Independent School District v. Rodriguez*[74] that there is no federal constitutional right to education, the Supreme Court's role has been somewhat limited. As the Court stated in *Rodriguez*:

> Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected. As we have said, the undisputed importance of education will not alone cause this Court to depart from the usual standard for reviewing a State's social and economic legislation.[75]

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71. *See* William F. Dietz, *Manageable Adequacy Standards in Education Reform Litigation*, 74 WASH. U. L. REV. 1193, 1193 (1996) (stating that though the legislative branch is obligated to set up education finance, reform of financing systems has often been litigation-based).

72. *See id.* at 1193–94 ("Commentators often categorize education reform litigation into three waves.").

73. *See* Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101, 117 (1995).

74. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (holding that a school-financing system based on local property taxes was not unconstitutional because education is not a fundamental right).

75. *Id.* at 35.

Despite this limitation, "the Supreme Court has provided a framework for consideration of certain student rights."[76] These rights, however, have been limited to issues of equality and integration.[77] While rejecting plaintiff's Fourteenth Amendment argument, the Court in *Rodriguez* nonetheless explicitly called for state courts to take on the issue through state constitutions.[78] In the majority opinion, Justice Powell stated that the matter should be addressed in state rather than federal courts, using "judicial principles sensitive to the nature of the State's efforts and to the rights reserved to the States under the Constitution."[79] Thus, despite the limitations in *Rodriguez*, the judicial system remains a powerful vehicle for education reform advocates.[80]

2. The Shift to State Courts

a. Equal Protection Claims

Advocates for education reform thus found an alternative outlet for relief—through state constitution clauses.[81] While state constitutions vary widely, they typically contain a provision synonymous with the Equal Protection Clause and an "education clause" that provides for a system of public schools, allowing plaintiffs to brings claims of constitutionally inadequate schooling.[82] When plaintiffs first turned to state law claims in the wake of *Rodriguez*, they brought challenges based on both education

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76. Macchiarola et al., *supra* note 3, at 582.

77. *See, e.g.*, Plyler v. Doe, 457 U.S. 202 (1982); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943), Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969), Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457 (1982).

78. *See* Ken Gormley, *Education as a Fundamental Right: Building a New Paradigm*. Forum on Public Policy at 207 ("It is important to underscore that the majority of the U.S. Supreme Court in *San Antonio v. Rodriguez*, even as it rejected plaintiffs' argument that a fundamental right to education was buried in the Fourteenth Amendment of the federal Constitution, issued a broad invitation for states to examine the issue under their own constitutions.").

79. *See Rodriguez*, 411 U.S. at 39.

80. *See* Dietz, *supra* note 71, at 1193 ("Litigation has long been a tool of education reform advocates.").

81. Josh Kagan, *A Civics Action: Interpreting "Adequacy" in State Constitutions' Education Clauses*, 78 N.Y.U. L. REV. 2241, 2242 (2003) ("The U.S. Constitution contains no clause directly addressing education, thus state constitutions' education clauses provide plaintiffs with claims that could avoid a federal bench unwilling to hear right to education cases.").

82. *See* Enrich, *supra* note 73, at 105 (providing an overview of state constitution education provisions).

clauses and equal protection rights.[83] Equal protection challenges for education reform, however, were not as successful.[84] Courts rejected equal protection challenges for a myriad of reasons: courts found that students were not entitled to equal amounts of funding, that district wealth was not a suspect class, and that education was not a fundamental right.[85]

b. Equity Claims

Thus, courts moved from equal protection clauses to state educational clauses—this wave of litigation is commonly referred to as the "equity cases."[86] As one scholar described, "[u]nder an equity theory, plaintiffs argue that the education clause of the state constitution mandates some measure of equality that the state financing laws fail to provide. The remedy they seek is substantial equality of funding for all school districts."[87] In this line of cases, courts sidestepped the equal protection problems because the focus was not on an equal education generally, but on an equal system, including facilities, curriculum, and classroom sizes as well as money.[88]

However, even under the more versatile groundwork of state education clauses, courts were reluctant to require uniformity between funding in

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83. Avidan Y. Cover, *Is "Adequacy" A More "Political Question" Than "Equity?:" The Effect of Standards-Based Education on Judicial Standards for Education Finance*, 11 CORNELL J. L. & PUB. POL'Y 403, 404 (2002) (describing the initial wave of education finance reform).

84. *See* Robinson v. Cahill, 303 A.2d 273, 281 (N.J. 1973) (stating a reluctance to decide an education reform case upon the State equal protection clause because "the equal protection clause may be unmanageable if it is called upon to supply categorical answers in the vast area of human needs"); *see* Pauley v. Kelly, 255 S.E.2d 859, 865 (S. Ct. App. W. VA. 1979) (stressing that it would be very difficult to use equal protection as a basis because of the demands on inflexible statewide uniformity).

85. *See* Enrich, *supra* note 73, at 1200 (stating the reasons that the vast majority of second-wave challenges failed) (citing Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005, 1018 (Colo. 1982); Hornbeck v. Somerset County Bd. of Educ., 458 A.2d 758, 770 (Md. 1983); Kukor v. Grover, 436 N.W.2d 568 (Wis. 1989)).

86. *See* Molly McUsic, *The Use of Education Clauses in School Finance Reform Litigation*, 28 HARV. J. ON LEGIS. 307, 317–18 (1991) ("Education clauses provide a basis independent of equal protection clauses for rejecting a state's school finance scheme on equity grounds.").

87. *See id.* at 319.

88. *See id.* at 317 ("Unlike equal protection arguments, education clause arguments do not demand an equal *education*, but an equal *system*, which involved facilities, curriculum offerings, teacher-student ratios, and money.").

different school districts.[89] Courts proved hesitant to accept equality because of the difficulty in determining what education equality actually required, because "state constitutional guarantees of equal protection are commonly couched in broad and indefinite terms."[90] Additionally, an interest in local power and the immense cost the equalization would place on taxpayers have added to the courts' opposition to equality claims.[91] For example, in *Hornbeck v. Somerset County Board of Education*,[92] the Maryland court failed to find an equity claim in the "thorough and efficient" language of the state constitution, instead finding that such language mandated some minimum quantum of education.[93] This marked the next of education reform: education adequacy under state constitutions.

c. Adequacy Claims

Courts took their cue from *Rodriguez*, in which the court hinted at a possible adequacy claim, stating that "[e]ven if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either right, we have no indication that the present levels of educational expenditures in Texas provide an education that falls short."[94] In this wave of reform, state supreme courts began for the first time to analyze the meaning of adequacy in their state constitution education clauses, resulting in a new body of law addressing the right to an education.[95] The shift to adequacy broadened the scope of interpretation because, though the issue was still finance reform, the focus was no longer a comparison of monetary distributions, and instead shifted to whether the state had fulfilled its constitutional obligation to

89. *See id.* at 327 (stating that when state courts denied equity claims, they often held that qualifying language such as "thorough and efficient" was never meant to ensure uniformity).

90. *See* Enrich, *supra* note 73, at 163–64.

91. *See id.* at 160 (explaining courts' reluctance to engage in equity claims).

92. *See* Hornbeck v. Somerset County Bd. of Educ. 458 A.2d 758 (Md. 1983) (holding that the state constitution did not mandate equality in per-pupil spending).

93. *See id.* at 639 (stating that a thorough and efficient education need not be equal).

94. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 36–37 (1973).

95. *See* Allen W. Hubsch, *The Emerging Right to Education Under State Constitutional Law*, 65 TEMP. L. REV. 1325, 1325 (1992) ("More recently, plaintiffs in education rights litigation have placed greater emphasis on whether the money provided for education by the states is minimally adequate to provide the level of education attainment required by the education articles of state constitutions.").

provide certain quality of educational opportunity.[96] The details of the equity versus adequacy arguments will be discussed in more detail *infra*, but here they serve to illustrate the evolution of education reform from federal to state courts, and from equal protection to education clause arguments.[97]

This evolution, however, was hardly clear-cut; in many decisions, courts addressed both equity *and* adequacy claims.[98] Well into the evolution of the adequacy claims, courts were still addressing equality problems; in Ohio, for instance, the court focused primarily on the disparity between the richest and poorest school districts.[99] As one noted education reform scholar described, "[d]espite this momentous shift in the legal and substantive educational underpinnings of school finance litigation and despite the modestly visible shift toward a more reform-oriented state judiciary in school finance cases, a review of the judicial opinions in the 'third wave' cases suggests that education reform litigation in the 1990's was hardly monolithic."[100]

B. The Role of the State Legislatures in Education Reform

Advocates of "last hired, first fired" reform will—as they did in finance reform—face the issue of judicial deference to the state legislature.[101] The landmark case for this conflict was *Lujan v. Colorado*,[102] which, though not a Supreme Court case, established a trend for rational basis review of education legislation.[103] Other states followed *Lujan*'s lead.

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96. *See id.* (describing the evolution of education finance reform challenges from equity to adequacy).

97. *See* discussion *infra* Part III.E.1–2.

98. *See* William S. Koski, *Of Fuzzy Standards and Institutional Constraints: A Re-Examination of the Jurisprudential History of Educational Finance Reform Litigation*, 43 SANTA CLARA L. REV. 1185, 1192-93 (2003) (noting that "a review of the judicial opinions in the "third wave" cases suggests that educational reform litigation in the 1990's was hardly monolithic. First, in those judicial opinions, one sees as much talk of 'equity' as 'adequacy'").

99. *See generally* DeRolph v. Ohio, 677 N.E. 2d 733, 746 (Ohio 1997).

100. *See generally* Koski, *supra* note 98, at 1192–93.

101. *See* Hubsch, *supra* note 95, at 1326 (1992) ("The single most difficult issue facing advocates of educational entitlement is state judicial deference to the state legislatures' efforts to establish and maintain a state-wide system of education.").

102. Lujan v. Colorado, 649 P.2d 1005 (Colo. 1982) (rejecting a challenge to the state school funding system that was based on the state's education clause).

103. *See id.* at 1022 (refusing to apply strict scrutiny to legislation involving economic and social policy).

This standard of review asks only whether a state legislature's school financing system rationally furthers a legitimate state purpose.[104]

The main argument set forth by critics of judicial activism in education reform is that educational adequacy is largely a legislative issue.[105] Consequently, the most difficult issue facing state courts is deference to state legislative attempts to create state-wide systems of education.[106] Furthermore, the judiciary has no federal constitutional right to an education to fall back upon; the Supreme Court in *San Antonio Independent School District v. Rodriguez* stated explicitly that there is no fundamental right to an education under the Constitution.[107] The Supreme Court's dismissal of a federal constitutional right, however, does not circumvent the judiciary's role in education reform, and in the past quarter century education reform has slowly worked its way into the courtroom, but not through federal rights.[108] Instead, the issue is relegated to state courts.[109] While the Supreme Court might have rejected a *federal* constitutional right to an education, nearly every state constitution notes a right to an education.[110] In order for the judiciary to play an active role in reforming state mandated seniority layoff policies, the argument must be framed to portray education as a state constitutional right.

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104 *See id.* ("Having concluded that no suspect class or fundamental right is involved, the remaining step in equal protection analysis is to determine whether the Colorado public school finance system rationally furthers a legitimate state purpose.").

105. *See* Martha McCarthy & Paul Deigan, *What Legally Constitutes an Adequate Public Education? A Review of Constitutional, Legislative, and Judicial Mandates*, PHI DELTA KAPPA EDUCATIONAL FOUNDATION 54 (explaining that most states impose statutory program specifications in order to gauge educational adequacy).

106. *See* Hubsch, *supra* note 95, at 1326 (noting that the complexity of education issues and the controversial nature of judicial activism in education cause state courts to defer to the legislature).

107. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973) ("Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.").

108. *See* Hubsch, *supra* note 95 at 1326 (noting that since the 1970s, state supreme courts have begun to address the issue of state constitutional education clause meanings).

109. *See id.* ("Recently, several state courts have, with varying degrees of enthusiasm, begun to determine whether education articles in state constitutions contain a legally enforceable constitutional guarantee.").

110. *See* Kagan, *supra* note 81, at 2241–42 (noting that after *Rodriguez*, education advocates turned to state education clauses, since nearly every state constitution requires the state to provide its children with an education).

C. Analyzing the Language of Education Clauses

The education clauses of each state vary somewhat in the language used to establish a duty to maintain and fund public schools, though the vaguely-worded statutes leave much room for interpretation.[111] Since 1971 when the first major school-funding suit was filed in California, forty-five state courts have addressed challenges to the constitutionality of state funding for public schools.[112] As one scholar notes, "[t]he jurisprudential logic employed by state courts in invalidating school funding provisions has been as varied as the provisions they have relied on."[113] Wording ranges from "general and uniform," "general and efficient," "quality," "high quality," and "sufficient."[114] As such, "the outcome of an education rights case may depend heavily on the language of the state constitution's education article."[115] This language diversity in education clauses must be taken into account when analyzing different state systems. The state constitutions can loosely be categorized by language focusing on equity[116] and language focusing on adequacy.[117]

1. Equity Language in Education Clauses

A number of state education clauses use language either explicitly or implicitly mandating an equal educational opportunity.[118] The most common language implying equality is the word "uniform." Fourteen states require that the state provide a uniform education: Arizona mandates a "general and uniform" system,[119] Colorado requires "thorough and

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111. *See Hubsch*, *supra* note 95, (highlighting the difficulties in defining the standards set forth in state education clauses).

112. *See* Gormley, *supra* note 78, at 213–14 (discussing the success of lawsuits challenging the constitutionality of states' education funding schemes).

113. *See id.* at 215.

114. *See* Hubsch, *supra* note 95, at 1335 (explaining that the diverse descriptions provide a good source of state jurisprudence for education reform).

115. *Id.*

116 . *See* McUsic, *supra* note 86, at 320 ("The state constitutions may be categorized according to the strength of their support for an equity claim.").

117. *See id.* at 326 ("Under a standards theory, a plaintiff argues that the education article of the state constitution mandates some absolute minimum level of education that certain districts are failing to meet.").

118. *See id.* at 319 (stating that the language of some state constitutions requires that the state provide for an equal education).

119. *See* ARIZ. CONST. art. XI, § 1 ("The Legislature shall enact such laws as shall provide for the establishment and maintenance of a general and uniform public school

uniform,"[120] Florida requires "uniform, efficient, safe, secure, and high quality,"[121] Idaho mandates a "general, uniform, and thorough" system,[122] five states require a "general and uniform" system (Indiana,[123] North Carolina,[124] Oregon,[125] South Dakota,[126] and Washington[127]), three states solely require uniformity (Nevada,[128] Wisconsin,[129] and North Dakota[130]),

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system . . . .").

120. *See* COLO. CONST. art. IX, § 2 ("The general assembly shall, as soon as practicable, provide for the establishment and maintenance of a thorough and uniform system of free public schools throughout the state, wherein all residents of the state, between the ages of six and twenty-one years, may be educated gratuitously.").

121. *See* FLA. CONST. art. IX, § 1(a) ("Adequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education and for the establishment, maintenance, and operation of institutions of higher learning and other public education programs that the needs of the people may require.").

122. *See* IDAHO CONST. art. IX, § 1 ("The stability of a republican form of government depending mainly upon the intelligence of the people, it shall be the duty of the legislature of Idaho, to establish and maintain a general, uniform and thorough system of public, free common schools.").

123. *See* IND. CONST. art. 8, § 1 ("Knowledge and learning, generally diffused throughout a community, being essential to the preservation of a free government; it should be the duty of the General Assembly to encourage, by all suitable means, moral, intellectual scientific, and agricultural improvement; and provide, by law, for a general and uniform system of Common Schools, wherein tuition shall without charge, and equally open to all.").

124. *See* N.C. CONST. art. IX, § 2 ("The General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools, which shall be maintained at least nine months in every year, and wherein equal opportunities shall be provided for all students.").

125. *See* ORE. CONST. art. VIII, § 3 ("The Legislative Assembly shall provide by law for the establishment of a uniform, and general system of Common schools.").

126. *See* S.D. CONST. art. VIII, § 1 ("The stability of a republican form of government depending on the morality and intelligence of the people, it shall be the duty of the Legislature to establish and maintain a general and uniform system of public schools wherein tuition shall be without charge, and equally open to all; and to adopt all suitable means to secure to the people the advantages and opportunities of education.").

127. *See* WASH. CONST., art. IX, § 2 ("The legislature shall provide for a general and uniform system of public schools. The public school system shall include common schools, and such high schools, normal schools, and technical schools as may hereafter be established.").

128. *See* NEV. CONST. art. 11, § 2 ("The legislature shall provide for a uniform system of common schools, by which a school shall be established and maintained in each school district at least six months in every year . . . and the legislature may pass such laws as will tend to secure a general attendance of the children in each school district upon said public schools.").

129. *See* WIS. CONST. art. X, § 3 ("The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable . . .").

130. *See* N.D. CONST. art. 8, § 2 ("The legislative assembly shall provide for a uniform

New Mexico mandates "uniform and sufficient"[131] and Wyoming calls for a "complete and uniform" system.[132]

Additionally, two of these states—New Mexico and North Carolina—as well as two states with no uniformity requirement—Montana and Louisiana—have state constitutions that explicitly require education equality.[133] New Mexico's clause deals specifically with Hispanic children, stating that they "shall forever enjoy perfect equality with other children in all public schools."[134] However, as one scholar notes, "[a]lthough appearing limited in scope, the clause may have as broad an impact as a more general clause. Since more school finance inequities occur primarily in minority schools, it is likely that a financing regime that would provide equality between Latinos and Anglos in New Mexico's public schools would provide equality to all children."[135] The other three states provide for general equal opportunity: Montana states that "[e]quality of educational opportunity is guaranteed to each person of the state,"[136] Louisiana's constitution states that the purpose of the public educational system is so that "every individual may be afforded an equal opportunity to develop his full potential,"[137] while North Carolina's states that "equal opportunities shall be provided for students."[138]

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system of free public schools throughout the state, beginning with the primary and extending through all grades up to and including schools of higher education . . . .").

131. *See* N.M. CONST. art. XII, § 1 ("A uniform system of free public schools sufficient for the education of, and open to, all the children of school age in the state shall be established and maintained.").

132. *See* WYO. CONST. art. 7, § 1 ("The legislature shall provide for the establishment and maintenance of a complete and uniform system of public instruction, embracing free elementary schools of every needed kind and grade, a university with such technical and professional departments as the public good may require and the means of the state allow, and such other institutions as may be necessary.").

133. *See* McUsic, *supra* note 86, at 320 ("The first group of state constitutions—those of Montana, Louisiana, New Mexico, and North Carolina—provide the strongest commitment to equality, be actually using the word 'equality' in defining the state's obligation.").

134. N.M CONST. art. XII, § 10.

135. *See* McUsic, *supra* note 86, at 320.

136. MONT. CONST. art. X, § 1(1).

137. LA. CONST. art. VIII, preamble.

138. N.C. CONST. art. IX, § 2(1).

2. Adequacy Language in Education Clauses

A second line of state education clauses focuses on standards rather than equality, which formed the basis for "adequacy" claims during education finance reform.[139] A number of states that use equity language fall into this category as well—Colorado, for example, requires its education system to be both "thorough and uniform."[140] Florida, Idaho, Minnesota, New Mexico, and Wyoming all also contain both equity and adequacy language in their education clauses.

Few states explicitly call for adequacy—in fact, Georgia is the only state that does so.[141] Montana mandates only that the education be "quality,"[142] while Virginia specifies "high quality."[143] New Mexico calls for the system to be "sufficient."[144] Wyoming states that the education shall be "complete"[145] and Louisiana simply mandates a "minimum foundation of education."[146] The majority of "adequacy" language constitutions, however, use the terms "thorough," "efficient," or both. Colorado and Idaho specify "thorough" but have no efficiency language, Arkansas, Delaware, Illinois, Kentucky, and Texas call for an "efficient" system with

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139. *See generally* McUsic, *supra* note 86 ("Under a standards theory, a plaintiff argues that the education article of the state constitution mandates some absolute minimum level of education that certain districts are failing to meet.").

140. *See* COLO. CONST. art. IX, § 2 ("The general assembly shall, as soon as practicable, provide for the establishment and maintenance of a thorough and uniform system of free public schools throughout the state, wherein all residents of the state, between the ages of six and twenty-one years, may be educated gratuitously.").

141. *See* GA. CONST. art. 8 (stating that "an adequate public education for the citizens shall be a primary obligation of the State of Georgia.").

142. *See* MONT. CONST., art. X § 1. ("The legislature shall provide a basic system of free quality public elementary and secondary schools.").

143. *See* VA. CONST. art. VIII, § 1. ("The General Assembly shall provide for a system of free public elementary and secondary schools for all children of school age throughout the Commonwealth, and shall seek to ensure that an educational program of high quality is established and continually maintained.").

144. *See* N.M. CONST. art. XII, § 1 ("A uniform system of free public schools sufficient for the education of, and open to, all the children of school age in the state shall be established and maintained.").

145. *See* Wyo. CONST. art. 7, § 1 ("The legislature shall provide for the establishment and maintenance of a complete and uniform system of public instruction, embracing free elementary schools of every needed kind and grade, a university with such technical and professional departments as the public good may require and the means of the state allow, and such other institutions as may be necessary.").

146. *See* LA. CONST. part. VIII §13 (stating that schools shall be funded "in order to insure a minimum foundation of education in all public elementary and secondary schools.").

no "thorough" language. Six states—Maryland, Minnesota, New Jersey, Ohio, Pennsylvania, and West Virginia—all require the education system to be both "thorough and efficient." The most prevalent illustration of the "thorough and efficient" challenge occurred in New Jersey in *Abbott v. Burk*,[147] which is the New Jersey Supreme Court's twentieth opinion dealing with education finance.[148] The series of opinions in the *Abbot* litigation has focused on one issue: whether the plaintiffs have been deprived of the right to a thorough and efficient education.[149]

Other states, however, contain no qualifying language at all. Nineteen states have education clauses phrased in very general terms. Alaska, for example, states only that "the legislature shall by general law establish and maintain a system of public schools open to all children of the State."[150] The other eighteen states without qualifying language contain similar clauses—mandating a system of public schools without providing any guidance as to the quality of those schools. This lack of qualifying language, however, has not precluded courts from finding funding schemes unconstitutional.[151] As discussed in the next section, courts have varied wildly from state to state on their interpretations of these qualifying phrases, or lack thereof.

D. Outcomes in Education Finance Reform

1. Education as a Fundamental Right

Since 1971—the year of the first major school-funding suit—all but five states have addressed the constitutionality of their education financing systems.[152] Often, the state courts' decisions turned upon whether they

147. *See* Abbott v. Burke (Abbot XX), 971 A.2d 989 (N.J. 2009) (holding that the School Funding Reform Act was constitutional because it satisfied the requirements of the through and efficient education clause).

148. *See* McUsic, *supra* note 86, at 334 (summarizing the holding of major cases in education finance reform).

149. *See Abbott*, 971 A.2d at 991 ("Finding that more severely disadvantaged pupils require more resources for their education, the Court held that the State must develop a funding formula that would provide all children, including disadvantaged children in poorer urban districts, which an equal educational opportunity as measured by the Constitution's thorough and efficient clause.").

150. AK. CONST. art. VII, § 1.

151. *See* discussion *infra* Part III.D.

152. *See* Gormley, *supra* note 78, at 213–14 ("Since 1971, the year of the first major school-funding suit in California, litigants in forty-five states have challenged the constitutionality of their states' educational funding schemes using the federal and state

found education to be a fundamental right; however, such a requirement was only dispositive when plaintiffs used an equity argument.[153] Currently, twenty states have found that education is a fundamental right.[154] Of those twenty states, courts of sixteen states invalidated their education finance systems as unconstitutional: Alabama, Arizona, California, Connecticut, Kentucky, Missouri, Montana, New Hampshire, New York, North Carolina, North Dakota, South Dakota, Texas, Washington, West Virginia, and Wyoming.[155] Four states, however, upheld education finance systems despite finding a fundamental right to an education: Minnesota, Oklahoma, Virginia, and Wisconsin.[156] The court in Minnesota, for example, found that education was a fundamental right, but that this right does not extend to the funding of the education system.[157] The court in Virginia reached a similar conclusion.[158] The Oklahoma Supreme Court found that education was a fundamental right, but that the legislature had sole discretion to decide how to distribute state funds.[159] The court in Wisconsin found education to be a fundamental right, yet still used a rational basis standard, reasoning that plaintiffs had not been denied an equal opportunity for a sound basic education and thus no fundamental right was violated in the funding disparity.[160]

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constitutions.").

153. *See* McUsic, *supra* note 86, at 313 (noting that invalidating an education finance system on the basis of an equity argument "virtually requires" that education be a fundamental right).

154. *See* EDUCATION JUSTICE, THE EDUCATION LAW CENTER, http://www.educationjustice.org/ (providing an overview of the education finance litigation in every state) (last visited Feb. 28, 2012).

155. *Id.*

156. *Id.*

157. *See* Skeen v. State, 505 N.W.2d 299 (Minn. 1993) (finding that students have a fundamental right to a "general and uniform" education, but that such a right does require full equalization of funding).

158. *See* Scott v. Commonwealth, 443 S.E.2d 138, 141–42 (Va. 1994) (holding that "education is a fundamental right under the Constitution," but that "nowhere does the Constitution require equal, or substantially equal, funding or programs among and within the Commonwealth's school divisions").

159. *See* Fair Sch. Fin. Council of Oklahoma, Inc. v. State, 746 P.2d 1135, 1149 (Ok. 1987) (stating that children had a fundamental right to an adequate education according to standards set forth by the State Board of Education).

160. *See* Kukor v. Grover, 436 N.W.2d 568, 579 (1989) (finding that education was a fundamental right but that funding disparities did not implicate the right).

2. The Rejection of Education as a Fundamental Right

Coincidentally, just as many states as have found education to be a fundamental right have rejected the claim that education is a fundamental right—twenty states currently hold that education is not a fundamental right under state educational clauses.[161] Of those twenty, fourteen states have upheld their financing systems as constitutional: Alaska, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Louisiana, Maryland, Michigan, Nebraska, Oregon, Pennsylvania, and Rhode Island.[162] Six of the twenty have determined that education is not a fundamental right but have nonetheless overturned their state financing systems: Arkansas, Kansas, Massachusetts, New Jersey, Ohio, and Tennessee.[163] An additional three states have not addressed the fundamental right issue but have still overturned their financing systems (Maine, New Mexico, and Vermont), while two states have pending legislation.[164]

No patterns emerge, however, between a state's constitutional provision and that state's success in overturning its education financing system. States overturning their finance systems have equity language (Arizona, North Carolina, North Dakota, South Dakota, Washington, and Wyoming), adequacy language (Kentucky, Montana, Texas, and West Virginia), both equity *and* adequacy language (Wyoming and New Mexico), and some have no qualifying language at all (Alabama, California, Connecticut, Missouri, New Hampshire, New York, Maine, and Vermont).[165]

This lack of a clear pattern, while certainly suggesting that there is no specific formula that courts use in overturning education systems, illustrates that reform is possible even when states do not consider education a fundamental right, nor does reform require specific language in the state's education provision. The diversity of the education finance outcomes suggests that both equity and adequacy arguments could be used to overturn "last hired, first fired" mandates. The two cases examined below illustrate the emerging jurisprudence in this area: the first is an adequacy claim, which recent scholarship has hailed as the education reform argument *du jour*. The second is the only case to have addressed the constitutionality of

161. *See* EDUCATION JUSTICE, *supra* note 154.

162. *Id.*

163. *Id*.

164. *Id*.

165. *See supra* Section III.C.

"last hired, first fired" systems specifically and which, despite the current success of adequacy claims, uses an equity argument to overturn "last hired, first fired" systems in the Los Angeles Unified School District.

E. The Emerging Jurisprudence

1. Campaign for Fiscal Equality v. New York

The first case study provides an illustration of how courts have successfully overturned education systems based on an adequacy argument. While no court has yet overturned "last hired, first fired" policies based on an adequacy argument, the use of adequacy in finance reform could easily be shifted to "last hired, first fired" reform, as illustrated by the case below.[166] The shift to adequacy broadened the scope of interpretation because, though the issue was still finance reform, the focus was no longer a comparison of monetary distributions, and instead shifted to whether the state had fulfilled its constitutional obligation to provide a certain quality of educational opportunity.[167]

A leading New York case in adequacy litigation, *Campaign for Fiscal Equity, Inc. v. State*[168] illustrates how the evolution from adequacy to equity claims opens the door for "last hired, first fired" reform. Though the case addressed finance problems, the trial court's (*CFE II*) definition of adequacy moved beyond monetary challenges, defining an adequate education in terms of basic skills necessary for civic participation. [169] In 2003, the Court of Appeals—the highest court in New York—affirmed the lower courts and emphasized educational "inputs" as the primary measure of adequacy.[170] As one scholar notes, "[t]he New York Court of Appeals made three crucial interpretive choices: to entertain an adequacy case, to define adequacy in terms of schools' role in preparing children for their role as citizens, and to measure adequacy using education inputs identified by

166. *See* Campaign for Fiscal Equity, Inc. v. State, 655 N.E.2d 661 (N.Y. 1995), discussed *infra*.

167. *See* Hubsch, *supra* note 95, at 1325 (describing the evolution of education finance reform challenges from equity to adequacy).

168. *Campaign for Fiscal Equity*, 655 N.E.2d at 661 (holding that underfunded schools denied children of their right to an adequate educational opportunity).

169. Campaign for Fiscal Equity, Inc. v. State, 719 N.Y.S.2d 475 (Sup. Ct. 2001) [hereinafter CFE II Trial].

170. *See* Campaign for Fiscal Equity, Inc. v. State, 100 N.Y.2d 893 (N.Y. 2003) [hereinafter CFE II].

the court itself, mixed with education outputs."[171] The court determined that an adequacy argument was not too vague to entertain, defining adequacy as "the basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting a serving on a jury."[172]

Notably, the court focused on educational "inputs" rather than educational "outputs."[173] The court based adequacy on curriculum implementation, school buildings, class size, and—most importantly to this discussion—the quality of teachers, stating that "minimally adequate teaching" was a constitutional requirement.[174] Though the court in *CFE II* measured teacher quality by the number of certified teachers, certification exam results, and undergraduate education,[175] it is not a far leap from inadequacy based on these measurements to inadequacy based on "last hired, first fired" policies. The *CFE* case therefore marks an important shift toward education inputs as the primary measure of adequacy, rather than outputs or some measure designed by the legislature.[176] The *CFE* decision consequently illustrates a trend toward education inputs—and specifically teacher quality—as a measure of adequacy, creating viable groundwork for input-based reform focusing on "last hired, first fired" policies.

2. Reed v. California

Despite the current trend of adequacy claims in education reform, the first and only court to specifically address "last hired, first fired" reform reverted back to an equity rather than an adequacy argument.[177] As the decision notes, the equity claim succeeds because California considers education a fundamental right.[178]

In January 2011, the California Superior Court approved a class action settlement halting "last hired, first fired" layoffs in Los Angeles public

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171. *See* Kagan, *supra* note 81, at 2245.

172. *See id.*

173. *See CFE II* at 919 (stating that improved inputs yield better student performance).

174. *See id.* at 492–500.

175. *See id.*

176. *See* Kagan, *supra* note 81, at 2241 ("Thus, the judiciary's consideration of inputs would form the primary measure of adequacy, rather than pure reliance on outputs or some other legislatively crafted measure.").

177. *See* Reed v. State, No. BC432420 1, 1 (Cal. App. Dep't Super. Ct. 2011)

178. *See id.* at 12 (describing the impact on students' fundamental right to an education).

schools.[179] The settlement resulted from a claim brought by parents of children in three inner-city schools, arguing that state-mandated seniority based layoff policies violated their children's state constitutional right to an equal and adequate educational opportunity.[180] Pursuant to Education Code section 44955 and its collective bargaining agreement, the Los Angeles Unified School District (LAUSD) had administered teacher layoffs in reverse-seniority order.[181] In May 2010, before the settlement, the court issued a preliminary injunction to prevent layoffs, finding that "Plaintiffs had shown a really and appreciable impact on their constitutional right to an equal educational opportunity and that there was no compelling interest justifying the seniority-based layoffs at Plaintiffs' schools."[182]

While the equal educational opportunity has traditionally been used in support of finance reform, the California Superior Court interpreted the term to include "the failure to deliver in the classroom."[183] In approving the settlement, the court relied on evidence that high teacher turnover "destroys the teacher support infrastructure necessary for the quality delivery of educational content . . . destroys the student-teacher relationship necessary to deliver quality education . . . [and] is associated with low standardized scores."[184] The court found that because of these problems, students' educational opportunities were compromised.[185] According to the court, the fact that the seniority layoff system was the result of a union bargaining agreement made no difference: "Under no circumstance can LAUSD bargain away students' constitutional rights."[186]

In setting forth the unconstitutionality of "last hired, first fired" reform, the court first looked to the state constitution's education clause. Though California is one of the nineteen states with no qualifying language in its constitution, California nonetheless considers education to be a fundamental right.[187] As such, the court stated that "[t]he California

179. *See id*. at 1.

180. *See* Osmond, *supra* note 64 (summarizing the settlement approval in *Reed*).

181. *See Reed*, No. BC432420 at 1 (giving the background on the settlement decision).

182. *Id.* at 1.

183. *See* Reed v. State, No. BC432420 1, 1 (Cal. App. Dep't Super. Ct. 2011) ("In its reductions in force (RIFs) in 2009 and again in 2010, LAUSD administered teacher layoffs in reverse-seniority order pursuant to Education Code section 44955 and its collective bargaining agreement.").

184. *See id.* at 25–27.

185. *See id.* at 29 ("The evidence clearly demonstrates the impact of layoffs at struggling LAUSD schools.").

186. *See id.* at 4.

187. *See id.* at 3 (stating that education is a fundamental right in California) (citing Butt

Constitution guarantees to all California public school students a fundamental right to basic equality of educational opportunity."[188] After finding that the high teacher turnover was detrimental to the quality of educational opportunities afforded, the court then used an equity argument to illustrate why the school district's seniority-based layoff system was unconstitutional.[189] Because California considers education a fundamental right, the court applied strict scrutiny.[190] The court found that purely seniority-based layoffs fell disproportionately on schools that were already struggling academically, and found no compelling interest justifying the policies[191] As such, the court found that the district's seniority-based RIFs violated the plaintiffs' "fundamental constitutional right to a basic education (a right cognizable as a subset of constitutional equal protection rights)."[192]

IV. Proposal: Applying Finance Reform Strategies to Effect "Last Hired, First Fired" Reform

The evolution of education finance reform, states' abilities to broadly construe their education clauses, and the emerging jurisprudence set forth above all illustrate that both the equity and adequacy strategies utilized in education finance reform can be used by state courts to effect "last hired, first fired" reform.

A. Applying Finance Reform Strategies: Equity v. Adequacy

The analysis of the *CFE* and *Reed* decisions illustrates that courts have two viable options in effecting last hired reform—both an equity argument and an adequacy argument.[193] The move from equity to adequacy in

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v. State, 4 Cal. 4th 668 (1992).

188. *See id.* at 2 (internal quotations omitted).

189. *See* Reed v. State, No. BC432420 1, 27–28 (Cal. App. Dep't Super. Ct. 2011) (noting the devastating effects of teacher turnover, which result in children being denied an equal educational opportunity).

190. *See id.* at 3 (finding that "strict scrutiny is triggered under equal protection because of the fundamental right of education").

191. *See id.* at 32 ("LAUSD's data show that LAUSD's academically struggling schools receive a disproportionate share of layoffs.").

192. *See id.* at 6.

193. *See* discussion *supra* Part III.E.1–2 (comparing the adequacy approach in *CFE* to the equity approach in *Reed*).

education reform was not a clear shift, but instead resulted in cases in which the courts addressed both claims.[194] As Koski notes: "[t]hat courts often intertwined the language of equity and adequacy demonstrates both their inability to articulate a clear standard for constitutional compliance and their desire to maintain flexibility in school finance jurisprudence."[195] This flexibility allows for two possible solutions: an equity claim for states that consider education a fundamental right and an adequacy claim for those that do not.

1. The Equity Argument

With regard to states the consider education to be a fundamental right, the analysis of *Reed* suggests that an equity argument would prove to be the most viable option.[196] As previously noted, equity arguments in finance reform sought equality of funding for all school districts.[197] The decision in *Reed*, however, illustrates that such a claim works for education "inputs" such as teacher quality as well.[198] As such, equity claims lend themselves well to "last hired, first fired reform." As discussed *supra* Part III.D.1, equity arguments are virtually limited to those states that consider education a fundamental right.[199] Thus for the twenty states recognizing education as a fundamental right, the equity claim provides the strongest argument for "last hired, first fired" reform.[200] The twenty states rejecting education as a fundamental right—as well as the eight states that have not addressed the issue—nevertheless have the ability to effect reform through an adequacy claim.

2. The Adequacy Argument

States rejecting education as a fundamental right still have an alternative remedy for reform. As illustrated by the fact that more than a quarter of the states rejecting education as a fundamental right nonetheless

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194. *See supra* notes 98–100 and accompanying text (discussing the murky line between equity and adequacy claims).

195. Koski, *supra* note 98, at 1187–88.

196. *See* discussion *supra* Part III.E.2 (analyzing the equity claim in *Reed*).

197. *See supra* note 88 and accompanying text.

198. *See supra* notes 184–188 and accompanying text (noting that in *Reed* the court determined that teacher quality affected a student's fundamental right to an education).

199. *See supra* note 153 and accompanying text.

200. *See* discussion *supra* Part III.D.1 (providing an overview of the states that recognize education as a fundamental right).

overturned their financing systems as unconstitutional illustrates the fact that "last hired, first fired" reform is not limited to states that consider education a fundamental right.[201] As illustrated by the New York court's opinion in *CFE*, adequacy claims, like equity claims, can move beyond monetary challenges to focus on more qualitative inputs, such as adequate curriculum, class size, and teacher quality[202]—all factors that are adversely affected by seniority-based layoff policies.[203] The court's focus on "inputs" as the primary measure of adequacy provides solid groundwork for adequacy based "last hired, first fired" reform.[204]

Equity and adequacy claims thus prove to be equally viable—and very similar—options for "last hired, first fired" reform. As Koski notes, however, "[t]hat courts have fused their equity and adequacy analyses suggests not only that the supposed demarcation between 'second wave' equity cases and 'third wave' adequacy cases is not so distinct, but also that courts instrumentally adopt either equity or adequacy analyses to meet their own policy objectives and maintain their institutional legitimacy and role in state governance." Such a comment highlights the main critique and biggest hurdle for "last hired, first fired" reform—the claim that such reform is akin to judicial activism.[205]

B. Overcoming Challenges to Reform

1. The Least Dangerous Branch?

As previously noted, "last hired, first fired" advocates will face the challenge of judicial deference to state legislature.[206] In light of the *Reed* decision, some legal academics have predicted that this judicial intervention in education reform could "inspire a new wave of litigation to improve this

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201. *See supra* note 156 and accompanying text (noting that of the twenty states rejecting education as a fundamental right, six still overturned their education financing systems as unconstitutional).

202. *See supra* note 170 and accompanying text.

203. *See* discussion *supra* Part II.C. (illustrating the negative effects of seniority-based layoff policies).

204. *See supra* note 172 and accompanying text (noting the shift toward input-based standards of adequacy).

205. *See supra* note 102 and accompanying text (noting that advocates of "last hired, first fired" reform will have to overcome the argument that education adequacy is largely a legislative issue).

206. *See* discussion *supra* Part III.B. (analyzing the role of state legislatures in education reform).

country's troubled schools."[207] David Gregory, a law professor at St. John's College called the decision "a shifting of the tectonic plates . . . [i]f this were to move forward, every major district in the country is going to look to this as the model . . . It would be the most innovative system in the country. . . ."[208] This case, some say, could provide the transition from education finance reform to a new wave of quality reform.[209]

An obvious critique of this predicted solution is the threat of judicial activism.[210] The critique is one of checks and balances: "[I]f the court abuses its power and intrudes in areas reserved to the other branches, there is no 'check' within the constitution itself to bring the courts back into the fold . . . Therefore, the potential for judicial 'tyranny' from adequacy suits is very real. . . ."[211]

In *The Least Dangerous Branch? Consequences of Judicial Activism*, Stephen Powers and Stanley Rothman present a critique of judicial activism in general, but address education specifically in the context of *Brown v. Board of Ed.*[212] Though the critique focuses on federal courts, the general contentions are easily applied to the state courts at issue in education reform.[213] Powers and Rothman look specifically at *Brown* and the wide-spread use of busing as a means of desegregating schools, calling it "[o]ne of the more protracted, complex, and controversial court-initiated policies."[214] They contend that evidence illustrates how busing was a narrow and simplistic response to a large social problem.[215] Linking the example to a broader critique of judicial activism, they state that "the principles advanced by the courts were less problematic than the remedies that they often imposed in their wake, [leading to] unintended consequences that did not necessarily serve even the interests of the intended beneficiaries

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207. Osmond, *supra* note 64.

208. Simone Wilson, *L.A. Teachers Union Loses Historic Lawsuit to ACLU: No More 'Last Hired, First Fired,'* L.A. Weekly (Jan. 21, 2011), http://blogs.laweekly.com /informer/2011/01/aclu_wins_lawsuit_utla_seniori.php (last visited Nov. 30, 2011).

209. *See* Osmond, *supra* note 64 (detailing the potential impacts of the *Reed* decision).

210. *See* Koski, *supra* note 98, at 789 (stating that "some have labeled the recent trend toward judicial intervention in education governance unwelcome 'activism'").

211. *Id.* at 99.

212. STEPHEN P. POWERS & STANLEY ROTHMAN, THE LEAST DANGEROUS BRANCH? CONSEQUENCES OF JUDICIAL ACTIVISM 1 (2002) (stating that the evaluation will include an examination of how the judiciary has intervened to alter the operation of public schools).

213. *See id.* (noting that in the past fifty years the federal judiciary has been engaged in judicial activism).

214. *See id.* at 37.

215. *See id.* at 57–58 (criticizing busing as a solution to school desegregation).

of these changes in law and policy."[216] This critique, however, focuses primarily on the judiciary's intervention into the *means* of reform. As such, it can be distinguished from the judicial intervention in later education reform in which the courts limited their decisions to findings of constitutional inadequacy but left the means for reform to the legislature.[217] If courts, in reforming "last hired, first fired" policies, limit their decisions to constitutional findings, they avoid the risk of judicial activism and therefore remain an appropriate vehicle for reform. Examining whether "last hired, first fired" policies are inadequate remains strictly a question of constitutional interpretation, in which the courts clearly have authority. In limiting decisions to this question, then, the courts would not overstep into determining what policies the legislature must use to provide an adequate education.

Koski contends that the judiciary, rather than being an inappropriate vehicle for reform, is uniquely suited to do just that: "Because courts do not need to be responsive to majoritarian politics and because their decision-making is based on constitutional text and values . . . court participation in social policy-making through judicial review is not only legitimate, it is necessary to ensure the just treatment of all individuals and groups in a democracy."[218] Koski argues that even judges who are not elected are checked by more than the vague notion of "separation of powers."[219] Instead, even electorally unaccountable judges are checked by the notion that if their decisions are not viewed by the public as legitimate, they run the risk of being ignored and consequently ineffective.[220] As such, courts have inevitably become part of the educational policy-making landscape in spite of the fact that this role of the judiciary places the power in the hands of a select few, possibly unelected, officials.[221] In spite of criticism, the recent trend has been an increasing level of judicial

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216. *Id.* at 58.

217. *See, e.g.*, Rose v. Council for Better Educ., Inc., 790 S.W.2d 186 (1989) (holding that Kentucky's entire education system was unconstitutional in that inequitable financing had adversely affected students in the state, but leaving the means of reform to the state legislature).

218. Koski, *supra* note 98, at 798.

219. *See id.* (noting that even with regard to judges who are not held electorally accountable to the public, judges do not wield unchecked power).

220. *See id.* (explaining why judicial intervention is necessary and does not pose a threat to judicial legitimacy).

221. *See id.* (arguing that the question should not be whether judicial intervention is appropriate but rather under what conditions it is necessary and effective).

involvement; as the modern state becomes more administrative and managerial, judicial policy making becomes more and more necessary.[222]

2. Taking Reed Beyond California

The second major challenge to "last hired, first fired" reform involves taking the court's landmark reform in *Reed* beyond the California borders. As previously discussed, many state courts have been successful in overturning unconstitutional education finance decisions, but California is the only state to specifically address "last hired, first fired" reform.[223] Legal scholarship on education reform, however, suggests that state courts when interpreting state constitutional provisions, states often look beyond their own jurisdictions to those with similar clauses.[224] As one scholar notes, "[w]hile one state's interpretation may legitimately vary from another's based on a different history, state courts would lose valuable resources if they did not look beyond their borders to the history and interpretation of other states' similar clauses.[225] As previously discussed, many states share similar qualifying language in their education provisions, focusing on terms such as "general," "uniform," and "efficient."[226] Because "the discursive context of state education clauses lies in other states' clauses, the shared history that led states to adopt such clauses, and subsequent development of those clauses," it follows that state constitutional interpretation considers other relevant state clauses.[227] As such, "last hired, first fired" reform is not destined to remain inside California's borders.

V. Conclusion

Since the rejection of education as a federal constitutional right in *Rodriguez*, states have taken it upon themselves to provide students with an educational opportunity. "Last hired, first fired" policies interfere with a

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222. *See id.*

223. *See* discussion *supra* Part III.D. (providing an overview of education finance challenge outcomes).

224. *See* Kagan, *supra* note 81, at 2260 (stating that Justice Robert R. Utter of the Washington Supreme Court suggested that "an innovative state court can create a laboratory for constitutional interpretation applicable to other states.").

225. *See id.*

226. *See* discussion *supra* Part III.C. (analyzing the language of state education clauses).

227. *See* Kagan, *supra* note 81, at 2260.

student's education opportunity, regardless of whether a state regards the right as fundamental. From an adequacy standpoint, these policies result in inadequate teacher quality and curriculum through high turnover rates, as well as an increased classroom size. From an equity standpoint, these policies adversely affect the low-income, inner-city schools that already lag behind in educational performance.

Through their education clauses, states have a viable tool with which to reform these policies. The flexibility of the language itself, coupled with courts' ability to broadly interpret these clauses in education finance reform, suggest that courts may use these clauses to effect "last hired, first fired" reform. The emerging jurisprudence sets forth a solid ground upon which state courts can bring both equity and adequacy claims to enjoin this harmful policy.