STATE CONSTITUTIONAL LAW—MINIMALLY ADEQUATE EDUCATION—QUALITATIVE EDUCATION STANDARDS IN THE SOUTH CAROLINA CONSTITUTION—*ABBEVILLE COUNTY SCHOOL DISTRICT V. STATE*, 767 S.E.2D 157 (S.C. 2014).

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I. INTRODUCTION

In *Abbeville County School District v. State*,[1] the South Carolina Supreme Court was tasked with deciding whether the State's education funding scheme was constitutional pursuant to the education clause of the South Carolina Constitution.[2] First, to make this determination, the

* J.D., Rutgers Law School, May 2017.

1. Abbeville Cty. Sch. Dist. v. State (*Abbeville II*), 767 S.E.2d 157 (S.C. 2014).

2. The education clause of the South Carolina Constitution states: "[t]he General Assembly shall provide for the maintenance and support of a system of free public schools open to all children in the State and shall establish, organize and support such other public institutions of learning, as may be desirable." S.C. CONST. art. XI, § 3.

Supreme Court held that the question presented was a justiciable one. It then held that the education-funding scheme was unconstitutional because it failed to provide children with "the opportunity for a minimally adequate education."[3] Although the court decided that judicial intervention was appropriate, it declined to mandate a specific solution to the constitutional violation and instead directed the parties to reappear and present a plan to address the violations.[4]

This Comment will discuss the pertinent facts of *Abbeville II*, examine the court's reasoning behind its decision, analyze the soundness of the court's decision compared to education finance on a national scale, and consider the impact of this decision on the future of South Carolina education finance.

II. STATEMENT OF THE CASE

At issue in *Abbeville II* was the funding scheme established by the South Carolina legislature to finance the public school system. The plaintiffs in *Abbeville II* included eight school districts,[5] students, parents, and taxpayers (hereinafter "Plaintiff Districts").[6] The case came before the South Carolina Supreme Court when both the Plaintiff Districts and the defendants (hereinafter "Defendants") appealed the decision of the trial court on remand in *Abbeville I*.[7] On remand, the trial court commenced a non-jury trial from July 18, 2003, to December 9, 2004.[8] It held that the Defendants met the constitutional requirement to provide an opportunity for minimally adequate education except with respect to their failure to adequately fund early childhood intervention programs.[9] Both parties appealed the decision.[10]

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3. *Abbeville II*, 767 S.E.2d at 159.

4. *Id.* at 179.

5. The eight school districts were as follows: Allendale County School District ("Allendale"); Dillon County School District 2 ("Dillon 2"); Florence County School District 4 ("Florence 4"); Hampton County School District 2 ("Hampton 2"); Jasper County School District ("Jasper"); Lee County School District ("Lee"); Marion County School District 7 ("Marion 7"); and Orangeburg County School District 3 ("Orangeburg 3"). *Id.* at 159 n.2.

6. *Id.* at 159.

7. *Id.* at 161 (citing Abbeville Cty. Sch. Dist. v. State (*Abbeville I*), 515 S.E.2d 535 (S.C. 1999)).

8. *Id.*

9. *Id.*

10. *Id.*

All of the Plaintiff Districts are largely rural and contain a high percentage of students living in poverty.[11] Furthermore, each district serves several hundred to several thousand students and employs its own administrative staff, including a superintendent.[12] To measure the presence or absence of the opportunity for minimally adequate education, the trial court examined two categories of evidence: inputs and outputs.[13] It defined inputs as "the instrumentalities of learning and resources provided to the Plaintiff Districts, including money, curriculum, teachers, and programming."[14] Conversely, outputs means "the success of students within the Plaintiff Districts as demonstrated primarily by test scores and graduation rates."[15]

The South Carolina Supreme Court used the same method of examining the inputs and outputs to determine whether students in the Plaintiff Districts were afforded the opportunity for a minimally adequate education.[16] After first determining that the question presented was a justiciable one, it held that there was "a clear disconnect between the inputs and outputs of the education system."[17] For that reason, the court affirmed the trial court's decision with respect to funding of early childhood intervention programs but reversed with respect to the rest of the education funding scheme.[18] Lastly, while the court determined that judicial intervention was appropriate, it held that it could not fashion a specific remedy.[19] Instead, it directed both parties to reappear and present a plan to remedy the constitutional violation.[20]

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11. *Id.* at 164. Since a high percentage of students qualified for free and reduced lunches under the federal guidelines, the court considered that to be a reliable indicator of the percentage of students living in poverty. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* The court also initially determined that the case was not moot. *Id.* at 162. An appellate court will not rule on moot and academic questions or make adjudication where there remains no actual controversy. *Id.* (citing Jackson v. State, 489 S.E.2d 915, 917 n.2 (S.C. 1997)). Defendants argued that the only constitutional violation noted by the trial court was the failure to fund early childhood intervention programs and that an early childhood intervention program had since been created, making the controversy moot. *Id.* at 162. However, the court held that since the Defendants had not "substantially changed the baseline funding mechanisms," the Plaintiff Districts could validly argue that the overall funding scheme continues to disadvantage them in the same fundamental way. *Id.* at 163.

18. *Id.* at 173.

19. *Id.* at 179.

20. *Id.*

III. HISTORY OF THE AREA

A. The Right to Educational Equality in the Federal Constitution

As an initial matter, it is important to determine why education finance claims are not analyzed under the Equal Protection Clause of the Federal Constitution.[21] Indeed, in what has been termed the "first wave" of education finance litigation, plaintiffs brought these challenges in both federal and state court based on the Equal Protection Clause of the Fourteenth Amendment.[22]

In 1973, the United States Supreme Court closed the door to these federal challenges: it held in *San Antonio Independent School District v. Rodriguez*[23] that education is not a federal fundamental right and that wealth is not a suspect classification for the purpose of analysis under the Equal Protection Clause.[24] Therefore, the Court used a rational basis review to uphold Texas's school finance system, despite broad inequalities in funding, based on what the Court determined to be the legitimate governmental objective of preserving local control over educational decision making.[25] The result of this decision was that education finance litigation has since been relegated to state courts.[26]

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21. The Equal Protection Clause of the Fourteenth Amendment states in pertinent part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

22. Scott R. Bauries, *Is There an Elephant in the Room?: Judicial Review of Educational Adequacy and the Separation of Powers in State Constitutions*, 61 ALA. L. REV. 701, 704–05 (2010); *see also* Michael Heise, *State Constitutions, School Finance Litigation, and the "Third Wave": From Equity to Adequacy*, 68 TEMP. L. REV. 1151, 1151–54 (1995) (adopting the wave metaphor); William E. Thro, *A New Approach to State Constitutional Analysis in School Finance Litigation*, 14 J.L. & POL. 525, 530 n.14 (1998) (same).

23. 411 U.S. 1 (1973).

24. *Id.* at 28–29, 37. *Rodriguez* involved a challenge brought by Mexican-American parents of poorer schoolchildren in San Antonio on behalf of all students who lived in districts with a low tax base. *Id.* at 4–5. The Texas Minimum Foundation School Program was in place to provide adequate education at the elementary and secondary levels. *Id.* at 9–10. However, twenty percent of this program was funded by taxes that were distributed relative to the property taxes that the district collected. *Id.* The result was that poorer districts failed to collect adequate funding compared to more affluent districts. *Id.* at 15–16.

25. *Id.* at 54–55.

26. Bauries, *supra* note 22, at 705.

B. *The Right to Educational Equality in South Carolina*

The Abbeville legacy began in 1999 with the decision of *Abbeville I*.[27] Forty Plaintiff Districts brought a declaratory judgment action challenging the Defendants' funding of public primary and secondary education.[28] Specifically, they contended that the funding scheme violated the education clause of South Carolina's constitution, the state and federal equal protection clauses, and the Education Finance Act ("EFA").[29] The South Carolina Supreme Court affirmed the circuit court's ruling that the Plaintiff Districts failed to state a claim in regard to the state and federal equal protection claims and the EFA claim.[30] However, it reversed the ruling with respect to the state constitution's education clause, finding that the Plaintiff Districts did state a claim.[31]

Therefore, the remaining issue in the case was whether the funding scheme violated the education clause of the South Carolina Constitution.[32] The education clause requires the General Assembly to "provide for the maintenance and support of a system of free public schools."[33] Interpreting the ambiguous language of the education clause, the court held that the South Carolina Constitution required the General Assembly to provide "the opportunity for each child to receive a

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27. *Abbeville I*, 515 S.E.2d 535 (S.C. 1999).

28. *Id.* at 538.

29. *Id.* The *Abbeville I* court noted:

> In South Carolina, public education is funded by the federal, state, and local governments. State funding of education is done primarily through mechanisms established by two acts: the EFA and the Education Improvement Act (EIA). The EFA distributes funds using a wealth-sensitive formula, which results in the [Plaintiff Districts] receiving proportionately more state money than wealthier districts. Unlike the EFA, the EIA distributes funds without regard to the school district's tax base.

Id. (citing Education Finance Act, S.C. CODE ANN. §§ 59-20-10 to -80 (1990); Education Improvement Act, S.C. CODE ANN. §§ 59-21-420 to -450 (1990)).

30. *Id.*

31. *Id.* The court denied the equal protection causes of action based on its decision in *Richland County v. Campbell*. *Id.* at 538 (citing Richland Cty. v. Campbell, 364 S.E.2d 470 (S.C. 1988)). In *Campbell*, the court held that the EFA and the EIA, on their face, did not violate either the state or federal equal protection clauses. *Campbell*, 364 S.E.2d at 472. Furthermore, the federal equal protection claim was foreclosed by the United States Supreme Court's decision in *Rodriguez*. *See supra* notes 23–26 and accompanying text. Finally, Plaintiff Districts' claim that the EIA violated the state equal protection clause since it has a disparate impact failed because facially neutral laws having a disparate impact only violate equal protection if there is discriminatory intent. *Abbeville I*, 515 S.E.2d at 538 (citing State v. Brown, 451 S.E.2d 884 (S.C. 1994)). The EFA claim itself was dismissed since the EFA does not create a private cause of action. *Id.* at 539.

32. *Id.*

33. S.C. CONST. art. XI, § 3.

minimally adequate education."[34] In other words, the education clause requires a "qualitative component."[35] It then defined "minimally adequate education" as follows:

> We define this minimally adequate education required by our Constitution to include providing students adequate and safe facilities in which they have the opportunity to acquire: 1) the ability to read, write, and speak the English language, and knowledge of mathematics and physical science; 2) a fundamental knowledge of economic, social, and political systems, and of history and governmental processes; and 3) academic and vocational skills.[36]

Despite the court's holding that the education clause of the South Carolina Constitution included qualitative standards, it stressed that the constitutional duty to ensure the provision of a minimally adequate education still rests with the legislature.[37] Intending a narrow holding, it explained that it only defined "within deliberately broad parameters, the outlines of the constitution's requirement of minimally adequate education."[38] It did "not intend the courts of [South Carolina] to become super-legislatures."[39] When the trial court determined on remand in 2004 that the Defendants' funding scheme withstood the "minimally adequate" constitutional standard—with the exception of early childhood intervention programs—the stage was set for the South Carolina Supreme Court to decide exactly how far it would take the qualitative standards set in *Abbeville I*.

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34. *Abbeville I*, 515 S.E.2d at 540.

35. *Id.* The court relied on similar holdings from other states. *See, e.g.*, Opinion of the Justices, 624 So. 2d 107 (Ala. 1993) (quoting ALA. CONST. § 256) (holding qualitative standards were created by the clause "[t]he Legislature shall establish, organize, and maintain a liberal system of public schools throughout the state for the benefit of the children thereof"); R.E.F.I.T. v. Cuomo, 655 N.E.2d 647, 648 (N.Y. 1995) (quoting N.Y. CONST. art. XI, § 1) (holding that the clause "[t]he legislature shall provide for the maintenance and support of a system of free common schools" requires that each student receive a sound basic education); Fair Sch. Fin. Council of Okla. v. State, 746 P.2d 1135, 1150 (Okla. 1987) (quoting OKLA. CONST. art. XIII, § 1) (holding that the constitutional provision requiring the "establishment and maintenance of a system of free public schools" means a basic adequate education).

36. *Abbeville I*, 515 S.E.2d at 540.

37. *Id.* at 541.

38. *Id.* at 540.

39. *Id.* at 541.

IV. THE COURT'S REASONING

The South Carolina Supreme Court issued its decision on November 12, 2014. Before the court could address whether the funding scheme afforded students in the Plaintiff Districts the opportunity for minimally adequate education, it first held that the question presented was a justiciable one. Then, once the court determined that the Defendants did not provide the opportunity for minimally adequate education, it held that it was appropriate for the court to become involved in the controversy. Finally, the court addressed whether it could fashion a remedy. The reasoning for each of the court's holdings is thoroughly examined below.

A. The Question of Whether Minimally Adequate Education Was Provided Is Justiciable

"The South Carolina Constitution vests the legislative power of the State in the General Assembly and the judicial power in the courts."[40] As such, judges are prohibited from acting as legislators.[41] The *Abbeville II* dissent argues that the question presented is non-justiciable because the term "minimally adequate" is "purposefully ambiguous [and] unworkable in a judicial setting."[42] For that reason, the dissent believes that it is inappropriate for a court to interpret the constitution "in a manner that creates rights and duties out of thin air, such that one's policy preference is accorded constitutional status."[43]

The majority counters by reasoning that "imprecision does not necessarily signify that courts cannot determine when a party's actions, or the results of those actions, fall outside the boundaries of such constitutional parameters."[44] More importantly, as the United States

40. *Abbeville II*, 767 S.E.2d 157, 180 (S.C. 2014) (Kittredge, J., dissenting) (citing S.C. CONST. art. III, § 1; *id.* art. V, § 1).

41. *Id.*

42. *Id.* at 181.

43. *Id.* More specifically, the dissent quotes the Supreme Court in *Marbury v. Madison* to say that political questions that a constitution submits to the legislature can never be answered by a court. *Id.* at 181 (citing Marbury v. Madison, 5 U.S. 137, 170 (1803)). The dissent goes on to remind that *Abbeville I* was intended to be a narrow holding since it stressed that the constitutional duty still "rests on the legislative branch." *Id.* at 182. Finally, it argues that an "opportunity" for education is different than actual achievement and that a court "cannot legislate outcomes." *Id.* at 185. This is the case because the majority's decision will demand additional funding to the Plaintiff Districts, and the dissent argues that the legislature, not the judiciary, "commands the purse." *Id.* at 188.

44. *Id.* at 163 (majority opinion). By example, the majority discusses how courts have defined obscenity. *Id.* (citing Miller v. California, 413 U.S. 15, 24 (1973) (providing a three-part test to determine whether material is obscene and thus not protected

Supreme Court has stated, "[i]t is emphatically the province and duty of the judicial department to say what the law is."[45] For that reason, it decided that "interpretation of the law—and evaluation of the government's acts pursuant to that law—are critical and necessary judicial functions."[46] Therefore, it held that judicial intervention was both appropriate and necessary.[47]

B. Students in the Plaintiff Districts Were not Afforded the Opportunity for Minimally Adequate Education

Moving to the merits of the case, the court held that the Defendants failed to provide students in the Plaintiff Districts with the constitutionally required opportunity for a minimally adequate education. To measure the presence or absence of that opportunity, the court examined evidence of inputs and outputs—the same method applied by the trial court.[48]

The court first considered the inputs—"the instrumentalities of learning and resources provided to the Plaintiff Districts"—and found that they constituted a "robust educational scheme" that was at the very least minimally adequate.[49] These inputs included funding, curriculum, teachers, and programs.[50]

South Carolina's basic funding scheme is established by the EFA.[51] Among the purposes of the EFA is "[t]o guarantee each student in the public schools . . . the availability of at least minimum educational programs."[52] The EFA relies on "weightings" to account for the differences between programs developed for different students to allow for the equitable distribution of funding based on needs.[53] At the time of the trial, the Plaintiff Districts relied heavily on this funding, receiving as high as eighty-six percent of the total costs for educational programs from the State.[54] In 1984, the General Assembly enacted the EIA, which raised many educational standards, including raising the academic

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under the First Amendment); Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart. J., concurring) (finding that obscenity "may be indefinable" but also famously stating, "I know it when I see it")).

45. *Marbury*, 5 U.S. at 177.
46. *Abbeville II*, 767 S.E.2d at 164.
47. *Id.*
48. *Id.*
49. *Id.* at 164, 167.
50. *Id.* at 164.
51. *Id.* at 164; *see also supra* note 29.
52. *Abbeville II*, 767 S.E.2d at 165.
53. *Id.* (citing S.C. CODE ANN. § 59-20-40(1)(c) (2004)).
54. *Id.*

requirements for a high school diploma.[55] Additionally, the EIA raised the sales tax in order to generate additional revenue to fund education, which was distributed to school districts.[56]

To encourage development of the State's curriculum, in 1994 the General Assembly passed the South Carolina School-to-Work Transition Act.[57] This Act's goal was to facilitate a school-to-work transition for high school students who sought to enter the job market immediately after high school.[58] The mechanisms established by the Act included integrating career counseling activities into curriculums and providing structured work-based opportunities.[59]

In support of South Carolina's teachers, the General Assembly passed the Educator Improvement Act in 1997.[60] This Act directed the Department of Education to adopt nationally recognized training that would provide a comprehensive system for the training and development of public educators.[61] Finally, the South Carolina's school districts are held accountable to the public through annual assessment and reporting mandated by the Education Accountability Act of 1998.[62] Concluding its analysis of the inputs, the court found that these enactments are "indicative of a comprehensive education regime."[63]

The court then moved on to examine the outputs—the success of students within the Plaintiff Districts—and found them troubling.[64] When it considered annual report cards, student test scores, graduation rates, and other factors, it concluded that the inputs did not translate into outputs; the Defendants, therefore, did not provide the opportunity for minimally adequate education.[65]

When the court considered annual report cards, it determined that the Plaintiff Districts were "largely unfit to provide students with the

55. *Id.* (citing S.C. CODE ANN. § 1236-2620 (2014); S.C. CODE ANN. §§ 29-21-420, -1010(A)–(B) (2004)).

56. *Id.* at 165–66. The General Assembly also enacted the Early Childhood Development and Academic Assistance Act, which provided for kindergarten through third grade programs based on a poverty metric. *Id.* at 166 (citing S.C. CODE ANN. §§ 59-139-05 to -90 (2004)). The Plaintiff Districts received higher than average per-pupil funding from this Act. *Id.*

57. *Id.* (citing S.C. CODE ANN. §§ 59-52-50 to -150 (2004), *repealed by* Act No. 88, 2005 S.C. Acts 588, 601).

58. *Id.*

59. *Id.*

60. *Id.* (citing S.C. CODE ANN. §§ 59-26-10 to -100 (2004)).

61. *Id.*

62. *Id.* (citing S.C. CODE ANN. § 59-18-300 (2004)).

63. *Id.*

64. *Id.* at 167.

65. *Id.*

constitutionally mandated opportunity."[66] Based on a rating system that designated districts as Excellent, Good, Average, Below Average, or Unsatisfactory, not one of the Plaintiff Districts from 2007–2011 received anything above an Average rating.[67] In 2013, five of the Plaintiff Districts received either Below Average or Unsatisfactory ratings.[68]

The results were no better when the court looked at student test scores. South Carolina's method of student testing was the Palmetto Achievement Challenge Test ("PACT"), which measured each student's grade-level knowledge as Advanced, Proficient, Basic, or Below Basic.[69] A student need only receive a Basic rating to demonstrate the minimum knowledge necessary to advance to the next grade level.[70] The court categorized the scores in the Plaintiff Districts as "alarmingly low."[71] Excluding Orangeburg 3, which had a passage rate of sixty percent, *at least half* of the students in the Plaintiff Districts could not perform academic work at a Basic level—the level required to move to the next grade.[72]

The only positive aspect appeared to be the graduation rates of students within the Plaintiff Districts. While the graduation rates at the time of trial ranged between twenty-six percent and forty-one percent for six of the Plaintiff Districts, the most recent graduation rates showed drastic improvement.[73] In 2013, the Plaintiff Districts' graduation rates ranged between sixty-eight percent and seventy-nine percent, with five of the districts exceeding the seventy-five percent state average.[74]

66. *Id.* at 168.

67. *Id.* Specifically, five of the Plaintiff Districts—Allendale, Dillon 2, Hampton 2, Jasper, and Lee—consistently received either Below Average or Unsatisfactory ratings. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* The PACT has since been replaced by the Palmetto Assessment of State Standards ("PASS"). However, the failure rates continue to hover around fifty percent, and a comparison of test results from 2001 and 2010 in the Plaintiff Districts demonstrates a general decline in student performance. *Id.*

73. *Id.* at 169.

74. *Id.*

Finally, the court examined other factors such as transportation[75] and teacher quality.[76] These factors pointed to a lack of student success and further demonstrated the disconnect between the inputs and outputs. Therefore, when examining all of the outputs, the court concluded that the funding scheme is a "fractured formula denying students in the Plaintiff Districts the constitutionally required opportunity."[77]

C. *Although Judicial Intervention in the Education Funding Scheme Is Appropriate, the Court Cannot Mandate a Specific Remedy*

To justify judicial intervention, the court relied on the United States Supreme Court's decision in *Brown v. Board of Education*.[78] In *Brown*, the Court struck down the "separate but equal" doctrine in the field of public education.[79] It reasoned that even if "tangible" factors were equal, segregation based on race still deprived children of the minority group of equal educational opportunities.[80] Therefore, *Brown* prohibited segregation of schools to fix the constitutional violation.[81] The *Abbeville II* court purported to follow the reasoning of *Brown*.[82] It argued that just as the United States Supreme Court in *Brown* was able to recognize when a constitutional opportunity was not met and require that the defendants then meet the constitutional requirement, it can do the same.[83] Although it recognized that it could not suggest methods to fix the problem, it could "recognize a constitutional violation when [it] see[s] one."[84]

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75. "School children without access to adequate transportation cannot obtain the constitutionally required opportunity." *Id.* While it is the district's duty to provide the transportation, the Plaintiff Districts cannot afford the responsibility. *Id.* Due to a lack of buses, a five-year-old student in a Plaintiff District may spend up to four hours of travel time in a single day. *Id.* at 170. Additionally, a lack of busing for after-school programs prevented students from taking advantage of the full range of academic opportunities. *Id.*

76. The court determined that "'relatively lower levels' of certain positive teacher characteristics" correlated to the lower levels of student achievement. *Id.* For example, students in the Plaintiff Districts were four times more likely to be taught by a teacher holding a substandard certification—a certification obtained by someone who has previously failed the Praxis Exam. *Id.* at 171. Furthermore, the teacher turnover rate in the Plaintiff Districts was far higher than that of other districts. *Id.*

77. *Id.* at 173.

78. 347 U.S. 483 (1954).

79. *Id.* at 495.

80. *Id.* at 493.

81. *Id.* at 495.

82. *Abbeville II*, 767 S.E.2d at 174–75.

83. *Id.*

84. *Id.* at 175. The dissent strongly disagreed with the majority's reliance on *Brown* and believed that judicial intervention was inappropriate. *Id.* at 189–90 (Kittredge,

When the court discussed what remedy it could require, it noted at the outset that the principle of separation of powers directs the legislature, not the judiciary, to make major educational policy choices.[85] For that reason, it refused to provide the General Assembly with a specific solution to the constitutional violation.[86] The court first mandated that the Defendants take a "broader look at the principal causes for the unfortunate performance of students . . . beyond mere funding" in order to fix the constitutional violation.[87] However, the court additionally required that the Plaintiff Districts work in concert with the Defendants.[88] Therefore, it directed both parties to reappear within a reasonable time and present a plan to address the constitutional violation of a failure to provide the opportunity for minimally adequate education.[89]

V. ANALYSIS AND IMPLICATIONS

The South Carolina Supreme Court's decision is sound in both finding whether Defendants provided the opportunity for minimally adequate education to be a justiciable issue, and in proscribing a non-specific remedy. The balance that the court struck when it retained jurisdiction over the case without requiring a specific remedy will hopefully spark real reforms that will provide South Carolina children with the opportunity for minimally adequate education.

J., dissenting). It argued that *Brown* was not implicated in this case because *Brown* involved an equal protection challenge on the basis of race which warranted strict constitutional scrutiny. *Id.* at 190 n.35. Since the Plaintiff Districts' equal protection claim was dismissed in *Abbeville I*, the type of constitutional claim and suspect classification found in *Brown* were not involved in this matter. *Id.* However, even if *Brown* were applicable, it argued that *Brown's* standard is one of opportunity, not outcomes. *Id.*

85. *Id.* at 176 (majority opinion).

86. *Id.*; *see also* Campaign for Fiscal Equity v. State (*CFE II*), 801 N.E.2d 326 (N.Y. 2003) (declining to direct a specific remedy for an educational constitutional violation, instead ordering defendants to create a scheme in which the constitutional requirement would be met); Campbell Cty. Sch. Dist. v. State, 907 P.2d 1238 (Wyo. 1995) (holding that it was the job of the legislature to enact a funding scheme for education that was constitutionally adequate).

87. *Abbeville II*, 767 S.E.2d at 178.

88. *Id.* The court held that while the "winner" of the case was not the Plaintiff Districts, neither were Defendants the "loser." *Id.* at 180 (emphasis omitted). Rather, the winners were the students of the Plaintiff Districts and throughout the state. *Id.* Accordingly, while the Defendants must take the principal initiative, both Plaintiff Districts and Defendants must work together to identify and solve the problems creating the constitutional violation. *Id.*

89. *Id.* at 179.

Justiciability is rooted in the doctrine of separation of powers.[90] The purpose of the justiciability doctrine is to ensure that the judiciary does not answer political questions and thereby encroach on the rights of the legislature.[91] The highest state courts nationwide do not agree on whether education finance litigation is justiciable.[92] Courts are forced to balance the legislature's power to decide political questions—such as educational questions—and the judiciary's power to interpret its respective state constitution.[93]

The varying approaches to the justiciability of education finance litigation can be loosely grouped into three categories.[94] First, approximately one-third of the highest state courts dismiss education finance litigation on non-justiciability grounds and do not reach the merits of the case.[95] Second, other courts follow what has been termed the "dialogic approach."[96] This approach believes education finance litigation to be justiciable and therefore adjudicates on the merits of the case but stops short of installing a specific remedy.[97] Third, other courts, also believing education finance litigation to be justiciable, not only adjudicate on the merits of the case but fully enter the remedial phase.[98]

This first approach, which deems education finance litigation to be non-justiciable, has been criticized because the result is that judges "stand on the sidelines" while the legislature never makes any real changes that remedy the financial scheme.[99] In the same way, the

90. Baker v. Carr, 369 U.S. 186, 210 (1962).

91. *Id.* at 217 ("Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it . . . .").

92. Bauries, *supra* note 22, at 746.

93. *Id.* at 746–49.

94. *Id.* at 746.

95. *Id.*; *see, e.g.*, Neb. Coal. for Educ. Equity & Adequacy v. Heineman, 731 N.W.2d 164, 183 (Neb. 2007); Okla. Educ. Ass'n v. State, 158 P.3d 1058, 1066 (Okla. 2007); *Ex parte* James, 836 So. 2d 813, 876 (Ala. 2002); Marrero *ex rel.* Tabalas v. Commonwealth, 739 A.2d 110, 113–14 (Pa. 1999); Coal. for Adequacy & Fairness Sch. Funding, Inc. v. Chiles, 680 So. 2d 400, 407–08 (Fla. 1996).

96. Bauries, *supra* note 22, at 746.

97. *Id.*; *see, e.g.*, *Abbeville I*, 515 S.E.2d 535, 540–41 (S.C. 1999); Gannon v. State, 319 P.3d 1196 (Kan. 2014); ISEEO v. State, 129 P.2d 1199 (Idaho 2005); Brigham v. State, 889 A.2d 715 (Vt. 2005); Rose v. Council for Better Educ., Inc., 790 S.W.2d 186 (Kan. 1989).

98. Bauries, *supra* note 22, at 746; *see, e.g.*, McCleary v. Washington, 269 P.3d 227 (Wash. 2012) (en banc); Abbott *ex rel.* Abbott v. Burke, 20 A.3d 1018 (N.J. 2011); Londonderry Sch. Dist. SAU No. 12 v. State, 907 A.2d 988 (N.H. 2006); Lake View Sch. Dist. No. 25 v. Huckabee, 220 S.W.3d 645 (Ark. 2005); Hoke Cty. Bd. of Educ. v. State, 599 S.E.2d 365 (N.C. 2004); State v. Campbell Cty. Sch. Dist., 19 P.3d 518 (Wyo. 2001).

99. *McCleary*, 269 P.3d at 259.

dialogic approach, which allows the judge to adjudicate on the merits of the case but stops short of declaring a specific remedy, has also been criticized because it often results in only further litigation and fails to solve the constitutional violations.[100] This can have the effect of education finance litigation that drags on for decades.[101] However, the danger of the final approach, in which the court fully imposes a specific remedy on the schools, is that the court oversteps its bounds because it leaves nothing to the legislature—the branch that actually has the authority over education finance in the first place.[102]

The *Abbeville II* court's decision to adjudicate on the merits and retain jurisdiction over the case while not prescribing a particular remedy was sound. The court used the dialogic approach by ruling that there was a constitutional violation.[103] Yet, its approach alleviated some of the traditional dangers of the dialogic approach, since it retained jurisdiction over the case and required the Defendants to work with the Plaintiff Districts in forming a remedy to the constitutional violations.[104] The advantage to this solution is that the legislature takes a lead role in the education funding decisions, while the judiciary ensures that a child's constitutional right to adequate education is not indefinitely violated.[105] As a superintendent from Dillon 4 stated, "[a] kid that is born in Dillon, South Carolina—he or she shouldn't have less of an education than someone born in a more affluent district."[106]

Perhaps this approach is particularly appropriate in the state of South Carolina, a state that "historically approached education with stops and starts," but never "developed a program and stayed the course."[107] The Plaintiff Districts were initially hopeful that this solution would allow the parties to work together to fix the problems that prevent children from receiving minimally adequate education.[108] The Defendants created the House Education Policy Review and Reform

100. *Id.* at 258–59.

101. *Id.* In *McCleary*, the court noted that the long-term result of the dialogic approach that had formerly been applied in Washington State was "30 years of an education system that fell short of the promise of [constitutional adequacy] . . . ." *Id.*

102. *See Abbeville II*, 767 S.E.2d 157, 180–81 (S.C. 2014) (Kittredge, J., dissenting).

103. *Id.* at 178–80 (majority opinion).

104. *Id.*

105. *Id.*

106. Carolyn Click & Dawn Hinshaw, *SC Supreme Court Finds for Poor Districts in 20-Year-Old School Equity Suit*, THE STATE (Nov. 12, 2014), www.thestate.com/news/politics-government/article13911206.html (quoting Dillon 4 superintendent D. Ray Rogers).

107. *Id.* (quoting Carl B. Epps III, who argued on behalf of the Plaintiff Districts since the lawsuit's inception).

108. *Id.*

Task Force (the "House Task Force") and the Senate Finance Special Subcommittee for Response to the *Abbeville* Case (the "Senate Special Subcommittee") to develop remedies to the constitutional violations.[109] However, two years after *Abbeville II* was decided, a constitutionally adequate education is still not being provided to the children of the Plaintiff Districts.

On June 18, 2015, the Plaintiff Districts filed a motion requesting the Court to establish "a more concrete timeline for addressing the constitutional violations announced by the Court in *Abbeville II*."[110] The Court granted the motion on November 5, 2015, and ordered the following: (1) "[w]ithin one week of the conclusion of the 2016 legislative session, the Defendants will submit a written summary to the Court detailing their efforts to implement a constitutionally compliant education system, including all proposed, pending, or enacted legislation"; (2) "[t]he Court will conduct a review of the Defendants' efforts to implement a constitutionally-compliant education system"; and (3) "[t]he Court will issue an order after conducting its review of the summary analyzing whether Defendants' efforts are a rational means of bringing the system of public education in South Carolina into constitutional compliance, and whether or not the Court's continued maintenance of jurisdiction is necessary."[111]

Accordingly, the Defendants submitted a Joint Report on June 29, 2016, detailing their efforts to address the constitutional violations.[112] The Defendants' efforts since the *Abbeville II* decision included new legislation and the formation of the special legislative committees to investigate "the myriad of issues raised" by *Abbeville II*.[113]

A total of eight bills were proposed to address *Abbeville II*, four of which were passed into law.[114] Of the four bills that were passed, H. 4936 redefined the expectations of a South Carolina high school graduate;[115] H. 4939 eliminated outdated statutes and promoted

109. Abbeville Cty. Sch. Dist. v. State, 780 S.E.2d 609, 610 (S.C. 2015).

110. *Id.*

111. *Id.*

112. Joint Report to the Supreme Court of Hugh K. Leatherman and Jay H. Lucas, at 1, Abbeville Cty. Sch. Dist. v. State, 780 S.E.2d 609 (S.C. 2015) (No. 2007-065159) [hereinafter Defendants' Joint Report].

113. *Id.*

114. *Id.*

115. H. 4936, 2016 Gen. Assemb., 121st Sess., 2016 S.C. Acts 195 (codified as amended at S.C. CODE ANN. § 59-1-50 (2016)). Specifically, the new law states that "the principles outlined in the Profile of the South Carolina Graduate . . . are the standards by which [South Carolina's] high school graduates should be measured and are [South Carolina's] achievement goals for all high school students." § 59-1-50. Additionally, students should

greater efficiency, cut unnecessary expenses, and required the Department of Education to offer technical assistance to struggling districts;[116] H. 4940 created an Office of Transformation under the Department of Education for the purpose of reviewing lower performing school districts' plans and reporting back to the General Assembly with best practice suggestions;[117] and H. 4938 required a survey be conducted to identify incentives to entice new teachers to live and work in rural, lower income districts.[118]

In addition to the general legislation addressing *Abbeville II*, the FY 2016–2017 General Appropriations Act ("Appropriations Act") contained provisions intended to "ease the financial burden born [sic] by the plaintiff districts."[119] For example, the Appropriations Act provided funding to increase the Base Student Cost by $130 per student, reimburse school districts' expenses for bus driver pay, and recruit and retain teachers in the Abbeville County School District and school districts with a poverty index of eighty percent or higher.[120] The Defendants' Joint Report also described in great detail the meetings and studies of the special legislative committees.[121]

The Plaintiff Districts, while encouraged by the efforts taken by the Defendants, sharply criticized the Joint Report for not offering a plan or timeline for eliminating the constitutional violations.[122] They alleged that the four bills passed by the Defendants did "not reflect a plan to eliminate the constitutional violations through comprehensive education reform."[123] Moreover, the Plaintiff Districts believed that the new funding provisions in the Appropriations Act did not begin to fix the "fractured formula" of education funding in South Carolina.[124] This was because most of the appropriations distribute funds statewide, and the Plaintiff Districts—with their fewer numbers of students—would receive lower shares even though their needs are much greater.[125]

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have the opportunity to learn foreign languages, science, technology, engineering, mathematics, arts, social sciences, and other knowledge and skills. *Id.*

116. H. 4939, 2016 Gen. Assemb., 121st Sess., 2016 S.C. Acts 241.

117. H. 4940, 2016 Gen. Assemb., 121st Sess., 2016 S.C. Acts 178 (codified as amended at S.C. CODE ANN. § 59-18-1575 (2016)).

118. H. 4938, 2016 Gen. Assemb., 121st Sess., 2016 S.C. Acts 291.

119. Defendants' Joint Report, *supra* note 112, at 2; *see also* 2016 S.C. Acts 284.

120. Defendants' Joint Report, *supra* note 112, at 2–4.

121. *Id.* at 4–16.

122. Response to the Report of Respondents-Appellants at 3, Abbeville Cty. Sch. Dist. v. State, 780 S.E.2d 609 (S.C. 2015) (No. 2007-065159).

123. *Id.* at 3.

124. *Id.* at 5.

125. *Id.*

The supreme court was less critical. After reviewing the Joint Report and Plaintiff Districts' response, it held the "reports indicate a studied and dedicated approach has been and will continue to be taken by the defendants to resolve the issues identified by this Court in *Abbeville II* and to provide the students in the plaintiff school districts with an opportunity to obtain a minimally adequate education."[126] The court commended the Defendants on the efforts taken so far and stated that it will "await, with anticipation, reports on further implementation" of remedies to the broken education system of the state.[127]

Although the court was pleased with the progress made by Defendants, it stated that it would continue to maintain jurisdiction over the matter "to monitor the progress towards a constitutionally compliant education system."[128] The court ordered the submission of another report for June 30, 2017, by not only the Defendants but also the Plaintiff Districts in order to encourage the Plaintiff Districts to work together with Defendants, as ordered in *Abbeville II*.[129] While it remains to be seen whether the court will conclude that children in South Carolina are finally afforded a minimally adequate education, it is clear that the court's involvement has resulted in much progress to the education system in the Plaintiff Districts.

VI. CONCLUSION

In *Abbeville II*, the South Carolina Supreme Court held that the children in the Plaintiff Districts did not receive an opportunity for minimally adequate education in violation of the South Carolina Constitution, resulting in two entire generations of South Carolina students failing to receive minimally adequate education. The *Abbeville II* court was correct in retaining jurisdiction over the case without requiring a specific remedy because it did not overstep its separation of powers yet made a step towards ensuring children are given an opportunity for minimally adequate education. Only time will tell if this will be the end of the long line of *Abbeville* cases. It seems hopeful, however, that with the close involvement of the South Carolina judiciary, working in conjunction with the legislature and the Plaintiff Districts, reforms can finally be made. Far too

126. Court Order at 9, Abbeville Cty. Sch. Dist. v. State, 780 S.E.2d 609 (S.C. 2015) (No. 2007-065159).
127. *Id.*
128. *Id.*
129. *Id.* at 9–10.

many children have slipped through the South Carolina education system over the course of years of litigation that produced no results.