GLIMPSES OF REPRESENTATION-REINFORCEMENT IN STATE COURTS

Jane S. Schacter

The fortieth anniversary of John Hart Ely’s singular book, Democracy and Distrust, offers an opportunity to appraise its legacy. There can be no question that Ely and the principles espoused in the book have had a landmark and lasting impact on constitutional scholarship. Ely’s work has inspired numerous law review symposia, and has been cited in a whopping 6,459 journal articles and over 1,200 books, including many leading works of constitutional scholarship. Nor is the book fading from scholarly view, as one might imagine it might in its fifth decade, and in an era marked by the ascent of constitutional originalism. In the last five years alone, the book has been cited in some 600 journal articles. And the book is likewise woven into the teaching of constitutional law as a staple of casebooks.

1. William Nelson Cromwell Professor, Stanford Law School. Thanks to Nicolas Gonzalez and Hanna McGinnis for excellent research assistance, and to the symposium participants for engaging.
4. According to a Google Scholar search filtered to include only results from Google Books, there were 1,210 citations to “Democracy and Distrust” as of June 7, 2021.
Moreover, the reach of Ely and the book have not been limited to scholarly domains. It seems fair to say that the principle of representation-reinforcement, in particular, informs key structural axioms of constitutional law. The clearest example is the idea embedded in tiers-of-scrutiny doctrine, that courts ought to view with special skepticism laws affecting politically disadvantaged groups. This fundamental institutional point was, of course, sketched out in the canonical footnote four forty-odd years before Ely wrote, and the Supreme Court began to develop the idea of “political powerlessness” as a criterion for heightened scrutiny doctrine in the decade before Ely published his book. By elegantly elaborating a rationale for these undeveloped ideas, however, Ely helped to more coherently ground modern equal protection doctrine. Both federal and state courts have cited Ely for the core institutional proposition that the Court’s skepticism about policies adopted by the democratic process should increase in the face of political malfunctions. In Ely’s words, meaningful


judicial review is most appropriate when “representative
government cannot be trusted.”

I would like to explore an issue that has not been the subject of sustained scholarly attention: the role that the idea of representation-reinforcement has played in the domain of state courts and state constitutions. It is perhaps not that surprising that *Democracy and Distrust* hasn’t been cited much in state courts. A Westlaw search turns up only forty-four citations in all state courts, compared to about three times that number in the federal courts. There are likely several reasons for that. One is not specific to Ely: The high priests of academic constitutionalism are simply unlikely to be on the radar screen of many state judges. But there is an Ely-specific explanation that virtually suggests itself. The principle of representation-reinforcement was crucially premised on a sharp distinction between institutions: Ely thought *unelected* federal judges could use his process-perfecting principles to police democracy-distorting flaws in the *elected* branches. While “elected representatives are the last persons we should trust” to identify such malfunctions in the democratic process, Ely wrote, “[a]ppointed judges . . . are comparative outsiders in our governmental system, and need worry about continuance in office only very obliquely.” For most states, however, that distinction does not hold because judges are *also* elected, meaning they are either initially chosen by voters or appointed and then required to be retained by the voters at a specified interval. Even in states where judges don’t face the voters at all, most provide for a measure of political accountability

12. ELY, supra note 10, at 103.
13. See Judicial Selection: Significant Figures, BRENNAN CTR. FOR JUST. (May 8, 2015), https://www.brennancenter.org/our-work/research-reports/judicial-selection-significant-figures (noting that “39 states use some form of election at some level of court” as “some part of their selection process,” with 38 using elections to choose justices on the state supreme court). There are a host of differences in how states use elections, including whether judges run with a partisan affiliation, whether the governor makes an initial appointment with the judge later facing voters, and others. See id. (noting the “dizzying assortment of methods” used by states). For a fifty-state survey of how judges are selected and retained in every state, see Methods of Judicial Selection, NAT’L CTR. FOR STATE CTS., http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state=.
by requiring some form of approval by elected officials before reappointment, such as re-nomination by the governor or legislative confirmation. These various forms of answerability mean that judges may risk their seats by virtue of controversial or unpopular decisions. While rates of incumbent retention for judges are very high, the threat of accountability cannot be discounted. As is true with incumbent legislators—who also typically win re-election—judges cannot know when an entrepreneurial opponent will seize on a controversial decision in ways that jeopardize the judge’s retention. This possibility is more plausible in the context of publicly salient decisions, especially in the realm of criminal law, where the evidence of electoral effects on judicial decision-making is strongest. Thus, while incumbent judges enjoy a pronounced advantage, it would not be unreasonable to suppose that they might consider the reaction of voters (or a gubernatorial or legislative retention body, if appropriate) if they are perceived to be unduly solicitous of unpopular or subordinated groups. All this suggests that if, like Ely, one worries that the persistence of prejudice tilts elected officials against historically disadvantaged groups, judges might not be entirely immune to that dynamic.

But let’s turn the inquiry around and consider Ely’s assumptions about life-tenured federal judges. Their insulation from political accountability has hardly delivered an Elyan federal

14. There are only a few states with lifetime appointment or retention methods that do not involve elected officials at all. As noted above, there are many different methods of selection. To simplify, I will refer in this article to state court judges with some form of political accountability as elected.


16. See Luke Seeley, State Supreme Court Incumbents Won Re-election 93% of the Time from 2008 to 2019, THE CTR. SQUARE (Feb. 11, 2020), https://www.thecentersquare.com/national/state-supreme-court-incumbents-won-re-election-93-of-the-time-from-2008-to-2019/article_85835cbe-4d16-11ea-8eb7-bf0b5f16e2c.html (“Across all types of state supreme court elections, incumbent justices running for re-election won 93% of the time from 2008 to 2019. No more than six incumbent justices have lost in a single year during this time frame. 2008 was the year with the lowest incumbent win rate at 89%.”).

17. See generally R. DOUGLAS ARNOLD, THE LOGIC OF CONGRESSIONAL ACTION (1990) (arguing that representatives seeking re-election try to anticipate future public opinion and predict issues that may become grist for challengers).

judiciary. While it is true that federal judges do not have to consider the possibility of losing re-election, being recalled, or seeing voters enact a ballot measure to reverse controversial decisions, there is nevertheless no evidence that unelected federal judges have been enthusiastic representation-reinforcers. Needless to say, the fact that there are somewhat more citations to Ely in federal than state court opinions is a far cry from any track record of systematic judicial protection of disadvantaged minorities. Indeed, on some accounts, the Supreme Court in recent years has inverted Elyan principles by according judicial protections to those already advantaged in the democratic sphere, while denying such solicitude to groups traditionally recognized as disadvantaged in the political process.19

Why did Ely’s vision not materialize in the federal courts? There are surely many explanations, some of which implicate big-picture questions about courts and constitutionalism that are beyond the scope of this article. For purposes of my topic, I want to emphasize two in particular. First, the institutional ideas that shape Ely’s principles are thin and illusory. Federal judges, on his view, can and will stand apart from the biases that infect the political process and be both able and willing to correct for them. Just about everything in that assertion has not borne out: federal judges do not magically occupy a separate sphere free of the biases that plague the political process; federal judges have not shown much willingness to try to play this role; the capacity of federal judges to do so, at least on Ely’s terms, is dubious; and sometimes, the political process operates more favorably to disadvantaged minorities than does the judicial process.20

The questionable capacity of federal judges to practice Elyism leads to a second major problem: Ely’s claim that judges could implement his principles without making controversial substantive judgments has always been an Achilles heel for the model. In an early and influential book review of Democracy and Distrust, Larry Tribe persuasively challenged the assertedly procedural nature of the principles.21 It was always the case, and

20. I address some of the large literature criticizing Ely and explore a number of these problems in Schacter, supra note 8.
remains so, that Ely's model cannot be operationalized without making contestable substantive judgments about whom to protect and when, what counts as a political malfunction, what the underlying theory of democracy ought to be, and so on.22

The question I would like to explore is how state courts might fit into this picture. I will not argue that turning to state courts and state constitutions could or would solve these fundamental problems with Ely's theory. My claim is decidedly not that a change of venue will rescue Elyism in its original form. By the same token, it is tempting, but not necessarily correct, to write off the possibility that state courts could deploy some meaningful version of representation-reinforcing principles, if only in desultory ways. What falls within the category of representation-reinforcement in state courts, I will suggest, is less elaborate and less self-conscious than the principles outlined in Ely's theory. It is not likely that state court judges are setting out to deploy Elyan theory. But they are, in some circumstances, taking meaningful actions that protect groups that have a plain lack of political clout. My proposition is this: if we abstract out from Ely the idea that courts can take meaningful steps to overcome the systematic political disadvantages of certain groups, there are reasons to believe that some state courts and some state constitutions can be, and on occasion have been, usefully harnessed in service of that task, notwithstanding that most state judges are elected. I should underscore the focus on “some” courts because “state courts” are no monolith. State courts applying state constitutions are heterogeneous methodologically, ideologically, in terms of the constitutional text they apply, and otherwise. That variability is reflected in the Elyan state court activity I will describe.

I will consider three bodies of state constitutional law or other judicial activity on the part of some state courts that can be seen in the register of representation-reinforcement: (1) early state court decisions on the road to Obergefell and marriage equality; (2) state educational finance decisions; and (3) recent activity by state courts in the area of fines, fees, and bail. I will suggest that these episodes point toward some conceptual insights about Ely's theory. Most centrally, the examples show the possibility of some version of representation-reinforcement, but it is a version with marked differences from Ely's original model.

22. Schacter, supra note 8.
One obvious difference is the fact that most state judges are subject to some mechanism of political accountability, so stand in contrast to the Elyan federal judge, whose distance from, and independence of, the political process helped drive the model. The episodes I describe suggest that the capacity for representation-reinforcement does not crucially depend on life-tenured judges. A second difference is that several of the episodes described here feature the court interacting with the political process rather than strictly overriding it. Thus, the institutional picture is less simplistic and more textured than the one that underlies Ely’s model. Finally, one of the examples I will discuss involves not state constitutional law and the exercise of judicial review, but the deployment of the courts’ administrative powers in service of reforms in the criminal justice setting. This example usefully illustrates that constitutional rulings are not the only mechanism for representation-reinforcement.

I. THREE EXAMPLES OF REPRESENTATION-REINFORCEMENT IN STATE COURTS

A. EARLY MARRIAGE EQUALITY DECISIONS

The first category bears, in some ways, the closest resemblance to Ely’s vision. Years before the Supreme Court ruled on marriage equality in its landmark decisions in United States v. Windsor and Obergefell v. Hodges, state supreme courts were ruling on marriage claims made by same-sex couples under state constitutions. Methodologically, many of these cases looked like federal constitutional cases because the state courts chose to borrow key elements of federal equal protection doctrine, including the tiers of scrutiny, and the associated criteria for heightening scrutiny, articulated in Supreme Court case law. Indeed, the national debate over marriage equality was first precipitated in the early 1990s by a state constitutional ruling about level of scrutiny. In 1993, the Hawaii Supreme Court’s announced in Baehr v. Lewin that it would apply strict scrutiny in

25. For an analysis of the dynamics of “lockstepping,” through which state courts interpreting their own constitutions elect to follow federal methodology, see Robert F. Williams, State Courts Adopting Federal Constitutional Doctrine: Case-by-Case Adoptionism or Prospective Lockstepping?, 46 WM. & MARY L. REV. 1499 (2005).
a challenge to a law restricting marriage to opposite-sex couples.\(^{\text{26}}\) That holding telegraphed the probability of a ruling in favor of marriage equality and was the spark that ignited years of widespread backlash, including in Hawaii itself.\(^{\text{27}}\)

Within about a decade of \textit{Baehr}, two state supreme courts issued major rulings favorable to same-sex couples. The Vermont Supreme Court ruled in 1999 that the “common benefits clause” in the state constitution required the state to offer same-sex couples access either to marriage itself or to a parallel institution conferring all the same rights,\(^{\text{28}}\) and four years later, the Massachusetts Supreme Judicial Court famously found that the state constitution protected the right of same-sex couples to marry.\(^{\text{29}}\) While neither of these groundbreaking decisions sounded in the fully elaborated logic of representation-reinforcement, both saw the exclusion of same-sex couples as shaped by what Ely might have called the distorting “lens” of prejudice,\(^{\text{30}}\) and both took action that the state legislatures were not willing to take.\(^{\text{31}}\)

Several post-\textit{Goodridge} marriage equality rulings by state supreme courts moved further in Ely’s direction by placing specific reliance on the idea that the LGBTQ community was sufficiently politically powerless to merit heightened judicial

\(^{\text{26}}\) Baehr v. Lewin, 852 P.2d 44 (Haw. 1993) ruled that strict scrutiny was applicable under the state constitution’s equal rights amendment.


\(^{\text{30}}\) See \textit{Ely}, supra note 10, at 153 (noting that “prejudice is a lens that distorts reality”).

\(^{\text{31}}\) \textit{Baker}, 744 A.2d at 885 (noting that “to the extent that state action historically has been motivated by an animus against a class, that history cannot provide a legitimate basis for continued unequal application of the law”); \textit{Goodridge}, 798 N.E. 2d at 968 (noting that “[t]he marriage ban works a deep and scarring hardship on a very real segment of the community for no rational reason,” and that the “absence of any reasonable relationship between, on the one hand, an absolute disqualification of same-sex couples who wish to enter into civil marriage and, on the other, protection of public health, safety, or general welfare, suggests that the marriage restriction is rooted in persistent prejudices against persons who are (or who are believed to be) homosexual.”). It is worth noting that justices of the Massachusetts Supreme Judicial Court are unusual in that they serve lifetime appointments. By contrast, when Vermont justices complete their terms, they must be reappointed by the state general assembly. See \textit{Methods of Judicial Selection}, supra note 13.
To varying degrees and in various ways, the supreme courts of Connecticut, Iowa, and California took specific account of perceived political disadvantages as part of their core rationale. The most extended analysis was offered by the Connecticut Supreme Court, which parsed at length the idea of “political powerlessness” cited by the U.S. Supreme Court as relevant to heightened scrutiny under federal equal protection doctrine. Kerrigan focused on what I have elsewhere called the preclusion thesis—the idea that a group that has achieved some legislative victories can no longer be said to lack political power, and thus ought not receive heightened scrutiny. An Elyan lack of political power, on this view, is an on/off switch more than a continuum. A group that secures some legislative victories cannot qualify for heightened scrutiny. Ultimately, the Kerrigan court rejected that binary view and concluded that:

We apply this facet of the suspectness inquiry not to ascertain whether a group that has suffered invidious discrimination borne of prejudice or bigotry is devoid of political power but, rather, for the purpose of determining whether the group lacks sufficient political strength to bring a prompt end to the prejudice and discrimination through traditional political means. Consequently, a group satisfies the political powerlessness factor if it demonstrates that, because of the pervasive and sustained nature of the discrimination that its members have suffered, there is a risk that that discrimination will not be rectified, sooner rather than later, merely by resort to the democratic process. Applying this standard, we have little difficulty in concluding that gay persons are entitled to

32. See Varnum v. Brien, 763 N.W. 2d 862, 893–95 (Iowa 2009); Kerrigan v. Pub. Health, 957 A.2d 407, 440–44 (Conn. 2008); cf. In re Marriage Cases, 183 P.3d 384, 443 (Cal. 2008) (rejecting argument that scrutiny should not be raised because LGBT persons are politically powerful in California by: observing that a group’s “current” political power is not relevant to analysis, identifying as most important a history of prejudice, and recognizing that the trait used by the state to exclude is not relevant to the group’s ability to participate). Two state supreme courts that denied marriage equality claims also addressed the political powerlessness issue and came out the opposite way. Andersen v. King Cnty, 138 P.3d 963, 974–75 (Wash. 2006). Conaway v. Deane, 932 A.2d 571, 609–14 (Md. 2007).

33. I do not mean to simplify or take at face value the very idea of political powerlessness or the Ely theory more generally. As I have written elsewhere, these ideas are especially confounding in the realm of LGBTQ rights, and are, more generally, riddled with “uncertainties, vacuities, anachronisms, internal contradictions, empirical implausibilities, and assorted other difficulties, large and small.” Schacter, supra note 8, at 1369, 1390–1402.

34. Id. at 1381.
heightened constitutional protection despite some recent political progress.\footnote{Kerrigan, 957 A. 2d at 444.}

As this language reflects, the court was grappling with the contemporary complexities of measuring the property that is central to representation-reinforcement: the existence of an actionable malfunction in the democratic process. But Ely’s work was conspicuously short on metrics and did not address the question whether the ability to achieve some legislative successes defeats the need for representation-reinforcement because it shows the process is functioning fairly. Yet that question must be addressed, because even classic footnote four groups—like racial minorities—have won the enactment of anti-discrimination legislation.\footnote{This larger issue was addressed succinctly by the California Supreme Court in the context of same-sex marriage. In re Marriage Cases, 183 P.3d at 443 (citations omitted) (“Indeed, if a group’s current political powerlessness were a prerequisite to a characteristic’s being considered a constitutionally suspect basis for differential treatment, it would be impossible to justify the numerous decisions that continue to treat sex, race, and religion as suspect classifications.”).}

The discussion of political powerlessness in Kerrigan was the most sustained of the state marriage rulings, but the Varnum decision in Iowa might be most noteworthy in a discussion of Elyism in the state courts. Varnum echoed Kerrigan in its general approach, citing footnote four\footnote{Varnum, 763 N.W. 2d at 880.} and ultimately concluding that “the political powerlessness factor of the level-of-scrutiny inquiry does not require a showing of absolute political powerlessness,” that “the touchstone of the analysis should be ‘whether the group lacks sufficient political strength to bring a prompt end to the prejudice and discrimination through traditional political means,’” and that “[i]t is also important to observe that the political power of gays and lesbians, while responsible for greater acceptance and decreased discrimination, has done little to remove barriers to civil marriage.”\footnote{Id. at 894 (citations omitted).} The key distinctive feature about Varnum is its aftermath. The unanimous decision was issued in April 2009. In November 2010, three of the justices faced a retention election—normally a ho-hum affair, given the very high rates at which state court judges are returned to office.\footnote{See Seeley, supra note 16.} But the ruling ignited a backlash and the three justices—Chief Justice
Marsha Ternus and Justices Michael Streit and David Baker—lost their seats. Ternus later said, when the three were given an award for their courage, that they “knew that our decision would be unpopular with many people, and we even knew in the back of our minds that we could lose our jobs because of our votes in that case.” But “we took an oath of office in which we promised to uphold the Iowa Constitution without fear, favor or hope of reward, and that is what we did.”

Varnum reminds us that, while the path to judicial retention is not often obstructed, it can be when the issues are of sufficient public saliency and controversy.

The Varnum episode is a fascinating one for thinking about Elyism in state courts. It is not the only example of marriage backlash; the California Supreme Court’s marriage equality ruling was quickly and conspicuously overturned by Proposition 8 in 2008. Moreover, there were decades of anti-marriage equality backlash measures all over the country after the Hawaii Supreme Court’s pivotal early decision in Baehr v. Lewin. But Varnum involves the kind of specific electoral backlash against judges themselves that Ely might have anticipated when he suggested that appointed judges were uniquely situated to carry out representation-reinforcement. Contrary to Ely’s assumptions, however, these justices accepted a duty to protect a group they expressly saw as disadvantaged in the political process. They thus quite visibly challenge the assumption that those who are elected would naturally or necessarily be more subject to biases than those who don’t have to face voters. Here we have elected judges—aware of the risk to their job security—going out on a constitutional limb for marriage equality years before almost any


41. Id.

42. Other prominent examples include the successful campaign to deny reelection to Rose Bird and two of her colleagues on the California Supreme Court based on their rulings about the death penalty, and the recall of trial judge Aaron Persky based on the sentence he gave Brock Turner in the so-called “Stanford swimmer” case of campus sexual assault. See Steve Koslovsky, Recall Elections Equal More Politicization of the Judiciary, JURIST (Feb. 9, 2018), https://www.jurist.org/commentary/2018/02/steve-koslovsky-politicization-of-the-judiciary.

43. Months after the California Supreme Court decided In re Marriage Cases, 183 P.3d 384 (Cal. 2008), the voters passed Proposition 8, which amended the state constitution and nullified the decision, until Prop 8 was itself struck down as unconstitutional in federal court. See Schacter, supra note 27, at 1156–59.

44. For a brief summary of the backlash, see Schacter, supra note 27, at 1154–58.
appointed federal judges acted. Granted, marriage equality litigators largely kept their cases out of federal courts until 2009, but the very fact that the sophisticated legal strategists behind the marriage equality movement avoided federal court supports the basic idea I wish to press: Elected versus appointed was not the relevant question.

I do not mean to distill a general proposition here. The willingness of the Varnum judges to reinforce representation at great personal and professional cost is an exception, not a rule. It is, in the end, only a “glimpse” and surely does not mean that elected judges are in any more general sense willing or inclined to do so. Indeed, marriage equality cases were lost in three state courts in the same time period, and two of those courts rejected the idea that same-sex couples suffered any relevant political disadvantage. Moreover, in many culturally conservative states, advocates would never have thought it wise to bring such a case. But the Iowa case, along with the other early marriage equality cases, are a striking example of how some version of Elyism could play out in state courts, or has done so, with consequence. There is a good case to be made that, while the early state court marriage equality decisions engendered near-term backlash, they also crucially paved the road for the development of more favorable public opinion, the later legislative embrace of marriage equality in several states, and, ultimately, the landmark Obergefell ruling.

B. EDUCATIONAL FINANCE CASES

Perhaps the area with the clearest track record of state courts acting in ways that reinforce the representation of disadvantaged groups is educational funding litigation. In this context, large funding disparities between higher- and lower-income school districts are common and have spawned litigation all over the country. It is clear enough whose interests are getting short shrift in the political process: lower income students in underfunded school districts.

Since 1973, it has been clear that the federal courts will largely stay out of these disputes. The pivotal decision was San

45. Id. at 1158.
47. Andersen, 138 P.3d at 974; Conaway, 932 A.2d at 611–613.
48. I develop this idea in Schacter, supra note 27, at 1182–90.
Antonio Independent School District v. Rodriguez.\(^49\) The plaintiffs challenged the stark funding disparities between poor and rich school districts in Texas and grounded their case in a fundamental right to education, as well as a case for heightened scrutiny under the equal protection clause. In the litigation, they specifically framed plaintiffs as a “discrete and insular minority” under footnote four for whom “special solicitude” by the Court was appropriate, and challenged the Texas system because it denied plaintiffs “an equal ability to communicate in a meaningful fashion,” and thereby “diminish[ed] their influence in the political and social processes.”\(^50\) Their framing did not prevail. In an opinion by Justice Powell, the Court denied all the federal constitutional claims and explicitly relegated matters of education equality to the states. The most significant post-Rodriguez victory for plaintiffs was Plyler v. Doe,\(^51\) in which the Supreme Court struck down a Texas law barring undocumented children from access to public schools. Recent attempts in federal court to leverage Plyler to create a new grounding for a federal constitutional right to education have thus far mostly fallen short.\(^52\)

The contrast between federal and state courts is sharp here. For some fifty years, state courts have been highly active in the domain of school finance. They have a specific textual basis to act,
as all state constitutions have some form of an education clause that imposes on the state specific obligations relating to the provision of education. The wording varies, as does the precise obligation specified, and some clauses are vague. The first wave of state court decisions focused on educational equity, while the wave that began in 1989 has focused on adequacy. Equity claims typically challenge educational funding plans based on the state constitution’s equal protection clause or language in the state’s education clause that is framed in terms of equality. On this view, school funding schemes that lead to unequal per-pupil funding violate constitutionally mandated fairness or equality. By contrast, adequacy claims rely on minimum standards of educational adequacy found in the state constitution and attack funding schemes said to fall below the minimum threshold required by the state constitution. Over time, several state courts have used state constitutional provisions to rule in favor of both


2021] REPRESENTATION-REINFORCEMENT 363

55. A non-exhaustive set of examples includes DuPree v. Alma Sch. Dist. No. 30 of Crawford Cnty., 651 S.W.2d 90 (Ark. 1983) (striking down Arkansas’ system reliant on the tax base of each district because it had no legitimate state purpose and made the quality of the school district and development of vocational programs dependent in part on local property wealth); Serrano v. Priest (Serrano I), 487 P.2d 1241 (Cal. 1971); Serrano v. Priest (Serrano II), 557 P.2d 929 (Cal. 1976) (series of rulings striking down California’s property-tax based system because it made the quality of a child’s education a function of wealth); Horton v. Meskill, 376 A.2d 359 (Conn. 1977) (holding that the right to education is so fundamental that it requires strict scrutiny, and striking down Connecticut’s property-tax based system with no significant equalizing state support, because students are entitled to equal enjoyment of the right to education regardless of wealth); Helena Elementary Sch. Dist. No. 1 v. State, 769 P.2d 684 (Mont. 1989) (striking down Montana’s property and other tax-based system, because it resulted in inadequate funding for poorer districts that constituted a denial of equality of educational opportunity); Robinson v. Cahill, 303 A.2d 273 (N.J. 1973), modified on reh’g, 351 A.2d 713 (N.J. 1975) (striking down New Jersey’s system, which relies heavily on local taxation, because it leads to significant disparity in dollar input per student, depending on the district of residence); Tenn. Small Sch. Sys. v. McWherter, 851 S.W.2d 139 (Tenn. 1993) (striking down Tennessee’s property-tax and local options sales-tax-based system, because it caused substantial disparities across school districts and violated the equal protection clause of the constitution, which requires educational opportunities to be substantially equal); Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391 (Tex. 1989), subsequent mandamus proceeding, 804 S.W.2d 491 (Tex. 1991) (striking down Texas’ property-tax based system, because it resulted in district spending varying from $2,112 to $19,333 per student, depending on the wealth of the district, which violated the constitutional requirement for an “efficient” system permitting the “general diffusion of knowledge”); Brigham v. State, 692 A.2d 384 (Vt. 1997) (striking down Vermont’s property-tax based system, because it violated the common benefits and education clauses of the State constitution, which require that the state provide substantially equal educational opportunity to all students); Washakie Cnty. Sch. Dist. No. 1 v. Herschler, 606 P.2d 310 (Wyo. 1980) (striking down Wyoming’s property-tax based system that results in low-wealth districts receiving less revenue per student than high-wealth districts, because equal opportunity to education is a fundamental right).

56. A non-exhaustive set of examples includes Op. of the Justs., 624 So. 2d 107 (Ala. 1993) (issuing an advisory opinion requiring Alabama to comply with an order of the Circuit Court of Montgomery, holding that the state’s system is unconstitutional because funding inequities denied equitable and adequate educational opportunity); Roosevelt Elementary Sch. Dist. No. 66 v. Bishop, 877 P.2d 806 (Ariz. 1994) (striking down Arizona’s system because it did not provide to all districts the facilities and equipment necessary to offer all students the opportunity to master the State student learning standards); Lake View Sch. Dist. No. 25 of Phillips Cnty. v. Huckabee, 91 S.W.3d 472 (Ark. 2002), supplemented, 189 S.W.3d 1 (Ark. 2004) (striking down Arkansas’ system as inadequate and inequitable, because it violated the state constitution’s education article equal protection provision); Idaho Schs. for Equal Educ. Opportunity v. Evans, 850 P.2d 724 (Idaho 1993) (holding that although the term “uniform” in the Idaho Constitution’s education article did not require equality of education spending, the term “thorough” guaranteed students a certain level of education); Montoy v. State, 112 P.3d 923 (Kan. 2005) (striking down Kansas’ new financing formula for school funding because the funding under this statute was inadequate and inequitable); Rose v. Council for Better Educ., Inc., 790 S.2d 186 (Ky. 1989) (holding that Kentucky’s General Assembly did not satisfy the constitutional requirement to provide an efficient system of common schools throughout the state, because it produces great disparity and inadequacy); McDuffy v. Sec’y of Exec. Off. of Educ., 615 N.E.2d 516 (Mass. 1993) (holding that Massachusetts’
a handful of states have decided cases in this area, and more than half have ruled in some fashion for plaintiffs. Over time, plaintiffs have found considerably more success with adequacy lawsuits. Such claims have produced a victory in roughly 60% of adequacy cases, compared to the success rate of about a third in the context of equity claims.

Although the specificity of the text varies across states, the education clauses in state constitutions do provide a foothold for judicial involvement in this domain. The state court activity in this area thus equates to something like representation-reinforcing results with a textual justification. That differs from the classic Ely system violated the state constitution’s education clause, which imposes a duty on the Commonwealth to ensure the adequate education of all children; Columbia Falls Elementary Sch. Dist. No. 6 v. State, 109 P.3d 257 (Mont. 2005) (holding Montana’s system to be unconstitutional because it did not meet the state’s constitutional requirement to provide quality public education); Claremont Sch. Dist. v. Governor, 703 A.2d 1353 (N.H. 1997) (holding that New Hampshire has a duty to provide adequate education and the burden of funding public schools must be shared by all citizens, because education is a fundamental right that benefits the State); Abbott v. Burke, 495 A.2d 376 (N.J. 1985) (first of long series of decisions culminating in invalidation of school funding statutes, because they violate New Jersey’s constitutional duty to provide a thorough and efficient education to all students); Campaign for Fiscal Equity v. State, 801 N.E.2d 326 (N.Y. 2003) (upholding the trial court’s declaration that New York’s system was unconstitutional because it denied students the opportunity for a sound basic education, which is necessary to enable children to be productive civic participants); Hoke Cnty. Bd. of Educ. v. State, (Leandro II) 599 S.E.2d 365 (N.C. 2004) (striking down North Carolina’s system because it failed to provide adequate resources to give students the opportunity for a sound basic education); DeRolph v. State, 681 N.E.2d 424 (Ohio 1997) (first of series of decisions culminating in striking down Ohio’s system, because of heavy reliance on local property taxes); Abbeville Cnty. Sch. Dist. v. State, 515 S.E.2d 535 (S.C. 1999) (holding that the South Carolina Constitution’s education clause provides each child with the opportunity to receive an adequate education, which includes safe facilities in which they can learn fundamental skills); Seattle Sch. Dist. No. 1 of King Cnty. v. State, 585 P.2d 71 (Wash. 1978) (holding that the Washington Constitution’s education article creates a judicially enforceable duty and a right on behalf of all resident children to have the state amply fund their education); Pauley v. Kelly, 255 S.E.2d 859 (W. Va. 1979) (holding that education is a fundamental right, declaring West Virginia’s system unconstitutional, and ordering implementation of a “master plan” to remedy the constitutional defects); Campbell Cnty. Sch. Dist. v. State, 907 P.2d 1238 (Wyo. 1995), as clarified on denial of reh’g, Dec. 6, 1995 (holding that Wyoming’s system, which resulted in funding disparities among local districts, failed to satisfy the State’s obligation under the education article to provide equal educational opportunity).

57. See MICHAEL PARIS, FRAMING EQUAL OPPORTUNITY: LAW AND THE POLITICS OF SCHOOL FINANCE REFORM 45 (2010) (forty-three state high courts have decided cases, with twenty-six victories and seventeen losses for plaintiffs); Koski, supra note 54, at 1901 (as of 2016, the high courts of forty-four states had issued decisions, with “challengers prevailing or achieving mixed results in all but eighteen cases”).

58. The comparative success rates are noted at School Funding Court Decisions, SCHOOLFUNDING.INFO, http://www.schoolfunding.info/school-funding-court-decisions/.
approach, which focused on interpreting the open texture of constitutional clauses with reference to the purportedly procedural logic of representation-reinforcement. Nevertheless, there is an unmistakably-Elyan element to many of these cases, perhaps a nearly inherent one. Given that children cannot vote, and that the adults in low-income children’s lives are likely to lack political power, the area is especially ripe for representation-reinforcement.

Sometimes the Elyan orientation of these cases appears quite explicitly, such as when the Delaware Supreme Court expressed concern that the state’s funding system “favors more privileged students” and operates to disadvantage “discrete and insular minorities.” In other cases, the Elyan frame is somewhat more diffuse, as when courts stress the essential role of education in equipping people to participate in the democratic process, and thus to make representative democracy work. This rhetoric appears in numerous decisions. For example, in its landmark decision on educational adequacy, the Kentucky Supreme Court quoted Brown v. Board of Education to underscore that education is the “very foundation of good citizenship” and “must be made available to all on equal terms.” The Washington Supreme Court held that the children in the state have a “positive constitutional right to an amply funded education,” and that education “means the basic knowledge and skills needed to compete in today’s economy and meaningfully participate in this state’s democracy.” In striking down a school finance plan, the New York Court of Appeals asserted that the opportunity for a sound education must enable students to “function productively as civic participants capable of voting and serving on a jury.” And the Massachusetts Supreme Judicial Court asserted that the state “has a duty to provide an education for all its children, rich and poor,” and said the “duty is designed not only to serve the interests of the children, but, more fundamentally, to prepare them to participate as free citizens of a free State to meet the

59. On the overlap between economic and representational inequality, see MARTIN GILENS AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA (2012).
needs and interests of a republican government."

Rhetoric of this kind reflects a kind of preventive Elyism: educating children is designed to facilitate democracy and, presumably, to ensure that a vulnerable segment of the population can meaningfully participate, and assert its interests, in the political process. Reinforcing this idea, there is intriguing historical evidence that at least some state education clauses were adopted with, precisely, the link between education and democratic citizenship in mind.

Without diminishing the import of state court activity in this area, it is important to note that rhetoric is not the same thing as results. While there have been numerous litigation victories, state constitutional litigation has struggled to achieve its goals. Notwithstanding the textual basis to act, for example, plenty of state courts have rejected plaintiffs’ claims or used institutionally-based rationales to decline or limit relief, with debates about judicial activism common in this realm. There is, moreover, some evidence that the judicial appetite for robust intervention has diminished over time. And, even those courts that have ruled in plaintiffs’ favor have often been daunted by the considerable remedial complexity and institutional commitment required to create meaningful change in states with systems that severely disadvantage low income students. The latter point bears emphasis: Contrary to an interpretation of Elyan judges as countermajoritarian heroes, the school finance setting vividly illustrates courts interacting with the political process, not

65. Derek Black makes this argument about the education clauses in the constitutions of the southern states that had to seek readmission to the union to meet congressional demands. As part of his argument that education should be seen as within the Privileges or Immunities of citizenship protected by the Fourteenth Amendment, he marshals evidence tying the enactment of education clauses in these states’ constitutions to congressional beliefs about the link between education, voting and citizenship. Derek W. Black, The Constitutional Compromise to Guarantee Education, 70 STAN. L. REV. 735, 765–800 (2018).
67. See Koski, supra note 54, at 1907–15.
68. Id. The issue of remedial complexity is, of course, not limited to school finance. For a seminal work on the institutional challenges of litigation directed at reforming various public institutions, see Abram Chayes, Foreword: Public Law Litigation and the Burger Court, 90 HARV. L. REV. 4 (1982).
replacing, nor wholly ousting, it.

In sum, the state educational finance cases have not been an unfettered success for Ely-inspired principles, but there have been important victories. And it is the context in which state courts have engaged most extensively with circumstances calling for representation-reinforcement.

C. FEES, FINES, AND BAIL

A third variant of representation-reinforcement in the state courts can be seen in the increased recent activity of state courts on the issues of fees, fines, and bail in the criminal justice system. The problems in this area are not new. The text of the Eighth Amendment addresses this subject by providing that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” The Supreme Court has addressed the constitutional dimensions of fees, fines, and bail under both the Eighth69 and Fourteenth Amendments.70

Notwithstanding some limitations imposed by the Supreme Court, however, controversy about the abuse of fines, fees, and bail has increased substantially in recent years. The profile of the issue was raised after a police officer killed Michael Brown in Ferguson, Missouri in 2014. The shooting drew attention to the many racially-biased policing practices in that city. Not only was the use of force racially disproportionate, but so were citations given for traffic violations and minor infractions. 71 The 2015 report by the Department of Justice sharply criticized the ways that both the city’s police department and its municipal court used

---

69. See, e.g., Stack v. Boyle, 342 U.S. 1, 5 (1951) (pretrial bail set at “a figure higher than an amount reasonably calculated to fulfill th[e] purpose [of assuring the presence of the defendant] is ‘excessive’ under the Eighth Amendment”); United States v. Bajakajian, 524 U.S. 321, 334 (1998) (asset forfeiture is unconstitutional under the Excessive Fines Clause when “grossly disproportional to the gravity of a defendant’s offense”).

70. See, e.g., Timbs v. Indiana, 139 S. Ct. 682 (2019) (holding Excessive Fines Clause to be incorporated against the states under the Fourteenth Amendment); Bearden v. Georgia, 461 U.S. 660, 672 (1983) (“[I]n revocation proceedings for failure to pay a fine or restitution, a sentencing court must inquire into the reasons for the failure to pay,” because failing to do so would “deprive the probationer of his conditional freedom simply because, through no fault of his own, he cannot pay the fine,” and thus deny “the fundamental fairness required by the Fourteenth Amendment.”); United States v. Salerno, 481 U.S. 739 (1987) (rejecting due process-based challenge to pretrial detention under Bail Reform Act).

the tools of law enforcement as a revenue generator for the city. The result was a pattern of accumulating fines and penalties that hit African-Americans especially hard. Those policies shone a national light on the ways that inability to pay fees and fines can drive people to “debtor’s prison” for minor infractions, and lead to what some term the “criminalization of poverty.” 72 Two years after the DOJ report, the United States Commission on Civil Rights issued its report on the racial dynamics of the issue. 73 That report highlighted the phenomena of “cash register justice,” “policing for profit,” and the debilitating cycle of “poverty penalties,” and called for reforms to criminal justice fines and fees. 74 Bail practices have been increasingly called into question for similar reasons: the widespread use of cash bail selectively harms poorer defendants who cannot afford it, and thus results in much higher rates of pretrial detention for a group that is disproportionately drawn from communities of color. 75

Actions by state courts in this area have taken two forms. One is the issuance of significant judicial decisions interpreting provisions in the state constitution. In 2021, for example, the California Supreme Court sharply limited the use of cash bail, banning the use of “pretrial detention to combat an arrestee’s risk of flight unless the court first finds, based upon clear and convincing evidence, that no condition or conditions of release can reasonably assure the arrestee’s appearance in court.” 76 The In re Humphrey opinion emphasized that a court could only impose cash bail as a condition of pretrial release if non-financial mechanisms (such as electronic monitoring and pretrial check-ins) had been found inadequate. Even in such a case, the Court held, judges must consider ability to pay and could only set bail at

74. Id. at 1–2.
“a level the arrestee can reasonably afford.” 77 Other state supreme courts have likewise issued important rulings. 78

These state constitutional decisions are of great importance, but they are not the only actions taken by state courts in this sphere and they are not the ones on which I will focus. State courts have also used their administrative and rulemaking powers to pursue reforms. In recent years, many state courts have convened working groups or task forces to report on issues and recommend changes courts can make in this area. 79 The National Center for State Courts (NCSC) has also taken an active role in shaping state court policies. Even before the Ferguson report, NCSC and related entities, including the Conference of State Court Administrators, published materials addressing this problem. 80

The year after the DOJ’s Ferguson Report, these entities stepped up their work by creating the National Task Force on Fines, Fees, and Bail Practices. 81 They articulated for the Task Force the goals, among others, of “drawing attention to these issues and

77. Id.
78. See, e.g., Valdez-Jimenez v. Eighth Jud. Dist. Court of Nev., 460 P.3d 976, 984 (Nev. 2020) (holding that under Nevada’s constitution, substantive due process mandates that bail be imposed only where necessary to ensure a defendant’s appearance or to protect community, and that heightened procedural due process requirements apply when bail is set in an amount that a defendant cannot afford); Brangan v. Commonwealth, 80 N.E.3d 949, 954 (Mass. 2017) (concluding that under federal and state constitutions, a court must consider a defendant’s financial resources in setting bail, and setting bail at a price the defendant cannot afford resulted in the functional equivalent of pretrial detention and violated due process); cf. State v. Letscher, 888 N.W.2d 880 (Iowa 2016) (finding it impermissible for a court to order forfeiture of a pretrial bail bond to satisfy financial obligations imposed as a part of the sentence).


81. See National Task Force on Fines, Fees and Bail, supra note 79.
promoting ongoing improvements” and “ensur[ing] that no citizen is denied access to the justice system based on race, culture, or lack of economic resources.” Since its inception, the Task Force has published a host of papers and created practical resources like model language for policy initiatives and a bench card for state court judges to use in assessing a defendant’s ability to pay court-ordered financial obligations. That bench card specifies procedural requirements, includes income guidelines, and provides a list of “alternative sanctions to imprisonment that courts should consider when there is an inability to pay.”

In recent years, several state supreme courts have used their administrative or rulemaking powers to address the problems associated with fees, fines, and bail. Consider these examples:

<table>
<thead>
<tr>
<th>STATE</th>
<th>ORDERS/ADMINISTRATIVE ACTIVITY</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arizona</td>
<td>State supreme court mandated evidence-based pretrial release decisions (2014), and later required lower courts to offer payment plans and granted judges more discretion to reduce a defendant’s court debt (2017).</td>
</tr>
</tbody>
</table>

84. The measures reflected in the table exclude COVID-19 measures, which likewise have their greatest force for those with the fewest resources, but are probably best seen as sui generis. For a collection of state measures prompted by Covid, see, e.g., Covid-19 Fines & Fees Policy Tracker, FINES & FEES JUST. CTR., https://finesandfeesjusticecenter.org /covid-19-policy-tracker/reform-tracker/.
### 2021] REPRESENTATION-REINFORCEMENT

#### STATE | ORDERS/ADMINISTRATIVE ACTIVITY
--- | ---
California | California Rules of Court, Rule 4.335 adopted, requiring opportunity for ability to pay determination (2017).[^87]
Illinois | State supreme court adopted multiple new rules to “address the confusion, inconsistency and financial hardship caused by the old system for assessing fines and fees.” (2019).[^88]
Indiana | State supreme court adopted Criminal Rule 26 to implement an evidence-based pretrial release system in state courts (2016).[^89]

[^87]: Cal. R. of Ct. R. 4.335. In 2018, the state legislature took more dramatic action to replace cash bail, California SB-10 Pretrial Release or Detention: Pretrial Services (History), CAL. LEGIS. INFO., https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB10. A working group convened by the Chief Justice had laid the groundwork for this kind of reform. A Brief Guide to the California Chief Justice’s Pretrial Detention Reform Workgroup, JUD. BRANCH OF CAL. (2017), https://www.courts.ca.gov/documents/pdrwg-brief-guide.pdf. In 2020, however, the state’s voters rejected that law. That vote was followed by the In re Humphrey decision discussed above.

[^88]: In pursuit of those stated goals, the Supreme Court of Illinois announced changes reforming the assessment system by which fees, fines, and other court costs are paid by civil and criminal case litigants, including changes to Rule 298 and adoption of the new Rule 404. See Press Release, Supreme Court of Illinois, Supreme Court Announces Changes to Make Court Costs More Manageable (Feb. 13, 2019), https://courts.illinois.gov/Media/PressRel/2019/021319.pdf.

[^89]: Ord. Adopting Crim. Rule 26, No. 94500-1602-MS-86 (Ind. Sept. 7, 2016), https://www.co.monroe.in.us/egov/documents/1531251675_94268.pdf (explaining that Criminal Rule 26 was the product of the committee composed of judges, prosecutors, public defenders, probation officers, and legislators that the Indiana Supreme Court had convened “to study evidence-based pre-trial release assessments and to make recommendations to the Court, including proposed new or amended rules and procedures to facilitate the implementation of such recommendations”).
<table>
<thead>
<tr>
<th>STATE</th>
<th>ORDERS/ADMINISTRATIVE ACTIVITY</th>
</tr>
</thead>
<tbody>
<tr>
<td>Kentucky</td>
<td>State supreme court authorized expedited pretrial release in specified circumstances, as well as expanded sliding scale fees and urged that unduly burdensome fees be avoided (2017).</td>
</tr>
<tr>
<td>Maryland</td>
<td>State’s highest court vote leads to new rule requiring “least onerous” conditions for bail for defendants posing no flight risk (2017).</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>State supreme court amended rule to require greater attention to a defendant’s ability to pay fees (2016).</td>
</tr>
<tr>
<td>Michigan</td>
<td>State supreme court enacted ten rule changes intended to limit unpaid fines and fees leading to incarceration (2016).</td>
</tr>
</tbody>
</table>


92. In 2017, the Maryland Court of Appeals, voted unanimously to overhaul the state’s bail policies. Rule 4-216.1 now requires judges to impose “the least onerous” conditions when setting bail for defendants who do not pose a danger or a flight risk. See Md. R. 4-216.1(b)(3). See also Ovetta Wiggins & Ann E. Marimow, Maryland’s Highest Court Overhauls the State’s Cash-Based Bail System, WASH. POST. (Feb. 7, 2017), https://www.washingtonpost.com/local/md-politics/maryland-highest-court-overhauls-the-states-cash-based-bail-system/2017/02/07/36188114-ed78-11e6-9973-c5efb7ccfb0d_story.html.


94. In May 2016, the Michigan Supreme Court changed ten Michigan Court Rules to ensure that unpaid fines and fees do not lead to incarceration. See Michigan Supreme Court ADM File No. 2015-12: Nonpayment Incarceration, Ability to Pay, FINES & FEES JUST.
Chief justice spoke out against, and then issued guidance to limit the imprisonment for failure to pay fees and fines (2014), and later appointed task force that issued report urging comprehensive reform of bail (2019).

Texas’s Office of Court Administration reformed collection in larger cities to enhance enforcement without imposing undue hardship on defendants.

---

<table>
<thead>
<tr>
<th>STATE</th>
<th>ORDERS/ADMINISTRATIVE ACTIVITY</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ohio</td>
<td>Chief justice spoke out against, and then issued guidance to limit the imprisonment for failure to pay fees and fines (2014), and later appointed task force that issued report urging comprehensive reform of bail (2019).</td>
</tr>
<tr>
<td>Texas</td>
<td>Texas’s Office of Court Administration reformed collection in larger cities to enhance enforcement without imposing undue hardship on defendants.</td>
</tr>
</tbody>
</table>

95. Chief Justice Maureen O’Connor warned all judges in her state to stop jailing indigent defendants for failing to pay fines. She then issued guidance in 2015 to clarify the procedures that local judges must take before imprisoning debtors for failure to pay. See The Sup. Ct. of Ohio, Off. of Jud. Servs., Collection of Court Costs & Fines in Adult Trial Courts (revised May 2021), http://www.supremecourt.ohio.gov/Publications/JCS/finesCourtCosts.pdf.

96. Chief Justice O’Connor convened a task force to change how Ohio courts set bail for those awaiting their day in court, which then issued a comprehensive report and reform proposals for Ohio’s bail system. See Laura A. Bischoff, Ohio Chief Justice Looks to Make Major Changes to Criminal Justice System in Final Years of Term, Dayton Daily News (July 13, 2019), https://www.daytondailynews.com/news/crime—law/chief-justice-forceful-advocate-for-criminal-justice-system/E4DgKG4WYz12E9phRlqNNL/. The recommended reforms include a risk assessment tool for judges when setting bond or conditions of bond, a uniform bond schedule, and offering alternatives to pretrial detention. See The Sup. Ct. of Ohio, Report and Recommendations of the Supreme Court of Ohio Task Force to Examine the Ohio Bail System—5–6, 8 (2019).

97. The programs applied to cities and counties with populations over 100,000 where a defendant is put on a payment plan. The programs were offered to improve the enforcement of fines and fees “without imposing an undue hardship on the defendant or the defendant’s dependents.” Chapter 175 Collections Improvement Program (1 TAC 175), Fines & Fees Just. Ctr., https://finessandfeesjusticecenter.org/content/uploads/2018/12/2018-texas-collections-court-improvement-program-rules.pdf. Changes to Chapter 175 include: requiring program staff to conduct an interview with the defendant to assess ability-to-pay information and share that information with the court for it to consider alternatives to fines/fees where appropriate, and to keep defendants abreast of options available to them when they have to miss a payment. See id.
Virginia State supreme court adopted rule requiring judges to consider ability to pay when assessing fines and fees (2016).98

Washington Pretrial Reform Task Force led by chief justice issued report addressed to making pretrial proceedings fairer and more effective.99

In addition to these states, Mississippi100 and Missouri101 took action that was, at least in part, the product of pressure by forces external to the court.


100. In July 2017, the Mississippi Supreme Court changed its Rules of Criminal Procedure related to fines and fees. See Mississippi Rules of Criminal Procedure, Rules 26.6 and 27.3: Fine, Restitution, and/or Court Costs Following Adjudication of Guilt, FINES & FEES JUST. CTR. (July 2, 2017), https://finesandfeesjusticecenter.org/articles/mississippi-criminal-procedure-rules-26-6-27-3-fine-restitution-court-costs/. The Court changed Rule 26.6 to prohibit automatic incarceration for nonpayment of fines and fees unless the failure to pay was willful and, if not willful, to provide flexibility in paying the fees. Similarly, Rule 27.3 now prohibits automatic incarceration for failure to pay fines and fees where such nonpayment violates probation unless the nonpayment is willful. See MISS. R. CRIM. P. 26.6; MISS. R. CRIM. P. 27.3. These changes were made following various lawsuits challenging debtor’s prisons in Mississippi. See Brown v. City of Corinth, 1:17-CV-204-DMB-DAS, 2018 WL 11227350, at *1 (N.D. Miss. July 6, 2018) (settling a class action suit alleging that defendant violates the Fourth, Sixth, and Fourteenth Amendments by operating “a modern-day debtors’ prison, jailing the poor for the inability to pay money bail and fines.”); Kennedy v. City of Biloxi, 1:15-CV-348-HSO-JCG (settling claims against for-profit probation company for unlawful fine and fee collection processes); Bell v. City of Jackson, No. 3:15-CV-00732-TSL-RHW, 2016 WL 6405833 (S.D. Miss. June 20, 2016) (issuing a declaratory judgment that “no individual may be held in jail for nonpayment of fines, fees, and/or costs imposed by a court without a determination, following a meaningful inquiry into the individual’s ability to pay, that the individual willfully refuses or willfully failed to make payment”).

101. In the wake of the Ferguson report, the Missouri Supreme Court adopted various reforms, including new ability-to-pay rules, proscriptions on excessive fines, costs, or surcharges, and other reforms to prevent the appearance of conflicts of interests by judicial officers who previously relied on those fees to fund municipal courts. See Missouri Rule 37.04 Supervision of Courts Hearing Ordinance Violations and Minimum Operating Standards for Missouri Courts: Municipal Divisions, FINES & FEES JUST. CTR. (June 12, 2018), https://finesandfeesjusticecenter.org/articles/missouri-rule-37-04-supervision-of-courts-hearing-ordinance-violations-and-minimum-operating-standards-for-missouri-courts-municipal-divisions/.
There are several interesting points of contrast between these exercises of administrative power and the marriage and school finance examples. For one obvious thing, these initiatives in the criminal justice domain do not involve the direct application of the state constitution or an exercise of judicial review. For another, this activity is distinctive because in some states—not all—courts are acting in an area in which the political process is also engaged with the issue. For example, there has been significant legislative reform of bail practices in a number of states, as well as some reform of fines and fees in some states and localities. In some states, then, courts are acting in their domains while the political processes act in theirs. That configuration is meaningfully different from the early marriage equality cases, where the state courts were overriding the products of the political process. The configuration also differs from the school finance cases, where the courts must not only decide constitutional questions, but also oversee changes mandated by their orders and interact with administrative and legislative officials as necessary in the remedial phase of the litigation.

Multiple institutional configurations are possible when state courts become active in the realm of fines, fees, and bail. State courts might be part of multi-institutional task forces, so their work is cooperative. State courts might, instead, issue orders where the political process has not acted. Alternatively, judicial activity may catalyze legislative action or, in some circumstances, be trumped by legislative reforms. Whichever of these circumstances obtain, though, courts will retain an important role because, irrespective of what other branches do, state court judges will be the ones to implement the prevailing rules and be the key decision-makers in individual criminal cases.

State courts and judges thus have the ability to reinforce representation in this sphere. It is important to note, though, that the various state court rules and administrative orders on fines, fees, and bail are both meaningful and limited. They recognize the problem and the need for reform, and take some steps toward amelioration. But they fall considerably short of the goals set by advocates, many of whom call for the elimination of criminal

103. For a collection of recent measures, see Foster, supra note 72, at 28–31.
justice fees and fines and for comprehensive reform of pretrial detention, elimination of cash bail, and attention to the problems with risk assessment tools. It is possible that rules and orders of the kind noted here—and even state court constitutional decisions sharply limiting bail noted earlier—will effectuate meaningful change. It is also possible that these measures will end up creating new pleading structures and litigation frameworks that ultimately generate similar results. But the measures do, at a minimum, reflect a recognition of problems in the criminal justice system that tangibly harm the most politically disadvantaged among us.

II. REFLECTING ON ELYAN EPISODES IN THE STATE COURTS

What can we learn from the examples reviewed here? Let me suggest several takeaways.

First, and most basically, there are, in fact, significant examples of representation-reinforcement in the state courts. While Ely is generally not named or cited, his core idea is apparent in the streams of litigation and the administrative orders and rule changes I have reviewed. Perhaps unsurprisingly, what is not in evidence is any sign of courts adopting a comprehensive or systematic approach to representation-reinforcement. There is no more evidence of that in the state courts than there is in the federal courts. But the traction that some version of Ely’s principle has gotten in a subset of cases is suggestive that the idea can work in episodic ways. State courts have employed the


Recently, a coalition of advocates wrote to the Biden Administration asking them to undertake a set of new initiatives to restrict fines and fees, and to restart efforts that had begun in the Obama Administration but stopped during the Trump Administration. See Letter from Fines & Fees Justice Center, et al., to Att’y Gen. Merrick Garland and Susan Rice, Assistant to the President for Domestic Pol’y (Apr. 7, 2021), https://finesandfeesjusticecenter.org/content/uploads/2021/04/Letter-to-Biden_Harris-Administration__Fines-and-Fees-Reforms.pdf.
principle contextually, not categorically. Sometimes these courts nod to Elyan logic or at least to the principles reflected in footnote four. Other times, the courts are not explicit and it is unclear they have those sorts of ideas specifically in mind. Compared to the arguments made in Democracy and Distrust, the representation-reinforcement identified here is less self-conscious and less theoretically elaborate. Indeed, it is less theoretical, full stop. It is better described as a set of modest, pragmatic and sporadic judicial efforts protective of disadvantaged groups in some circumstances. While the picture is not one of unrestrained representation-reinforcement, the episodes I have described are not trivial either. What these glimpses reflect, then, is evidence that state courts have on occasion made meaningful judicial interventions to reinforce representation in ways that resonate with Ely's model.

Second, and relatedly, to the extent that Ely premised his theory on a structural inference from the fact that federal judges are protected by life tenure, that premise seems questionable. Recall that Ely asserted that judges would be well suited to his task because they “have to worry about continuance in office only obliquely.” But the fact that most state judges could, in theory, have a basis to “worry” because they are politically accountable has not meant the death knell for any representation-reinforcement in state courts. As noted, several state court judges ruled in favor of marriage equality well before there was any realistic prospect of appointed federal judges doing so. Likewise, state judges stepped into the breach after San Antonio v. Rodriguez mostly sidelined federal courts in school finance disputes. True, state courts had the education clauses in state

---

105. On the dynamics of retention elections and the advantages of incumbency, see supra note 16.

In theory, in a jurisdiction with a sufficiently progressive electorate, the elected status of judges could bolster judicial representation-reinforcement. This might be especially true in partisan elections. Or in states where the election of progressive prosecutors might be accompanied by election of progressive judges. See, e.g., Maura Ewing, The Search for Progressive Judges, THE ATLANTIC (May 17, 2019), https://www.theatlantic.com/politics/archive/2019/05/progressive-prosecutors-judges/589222/. In reality, there are many obstacles to progressive judges winning judicial seats on an explicit platform of progressive approaches to jurisprudence, especially in the realm of criminal law where there are more likely to be electoral effects in the opposite direction. See Kritzer, supra note 18. For a more general overview of the role of interest groups and dark money in judicial elections, see DOUGLAS KEITH, PATRICK BERRY & ERIC VELASCO, THE POLITICS OF JUDICIAL ELECTIONS, 2017–18 (2019), https://www.brennancenter.org/our-work/research-reports/politics-judicial-elections-2017-18.
constitutions to ground their activity, but many of the clauses are sufficiently open-ended and indeterminate that the choice of many state courts to wade into the controversial area and rule for low-income students remains noteworthy.

Third, to the extent Ely argued that representation-reinforcement is or could be purely procedural and avoid contestable substantive judgments, these episodes do not support that thesis. The three contexts explored here reflect state courts making substantive judgments—that equality or liberty under the state constitution demands marriage equality; that educational equity or adequacy demands changing the rules for school funding; and that onerous fines, fees, and bail have damaging effects that should be ameliorated. In each context, courts have provided some judicial remedy to a disadvantaged minority and have taken into account that disadvantage in doing so. But these courts cannot be said to have realized Ely’s aspiration for neutral proceduralism, nor have they avoided the need to draw substantive lines. Perhaps the context of fees, fines, and bail is the closest to an Elyan procedural ideal because courts tend to justify their actions in the register of equal access to justice. But decisions about the circumstances necessitating pretrial detention or the extent to which criminal justice systems should fund their operations through fines and fees is not a matter of procedure alone. It involves value-laden choices. Indeed, the calls for change in this area emphatically tie these practices to mass incarceration and racial and economic injustice in ways that go far beyond appeals to process alone.

Fourth, in the contexts explored here, courts have interacted with other institutional actors in various ways. Representation-reinforcement does not always take the form of judges standing wholly apart from the political process and striking down its outputs. As reviewed earlier, the state courts examined here, and their decisions, have interacted with the political process in different ways. The interaction varies as between the different instances I have identified. What unites these different contexts, though, is that they suggest that Ely’s picture of courts did not fully appreciate the ways that judicial actions may not only invalidate actions of the political process, but may also trigger reactions in ongoing, iterative interactions with that process. Consider the early marriage cases, which both produced legislative backlash and helped to pave the path to later legislative
embrace of marriage equality; the school finance cases enmeshing courts in the administration of schools and in ordering remedies requiring legislative action; and the various ways administrative orders in fines, fees, and bail have interacted with political efforts toward reform. These acts of judicial representation-reinforcement, then, are less atomized and isolated than Ely’s account suggested.

Finally, while Ely focused on constitutional law as the lever for courts to pull in reinforcing representation, that is not the only such lever and may not be the most effective one. The use of state court administrative powers in the setting of criminal justice stands as an example. Such orders may be lower profile than a decision like the California Supreme Court’s in In re Humphrey, but they may prove equally or more consequential by equipping working judges with specific tools that may lead to change in the quotidian daily practices that surround fees, fines and bail. And, while it is possible that these orders will not be effective in producing meaningful change, it is also possible that the workaday aspect of administrative rules could end up enhancing efficacy by flying under the radar and attracting less backlash. The long-term effect remains to be seen, but reviewing activity in this area usefully underscores that the heavy hammer of constitutional law is not the only judicial tool for representation-reinforcement.