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INTRODUCTION

Recent school finance litigation illustrates yet again how law can generate unintended policy consequences. Seeking to improve student achievement and school accountability, more states now turn to educational standards and assessments. However, courts increasingly allow litigants and lawsuits to transform standards and assessments into constitutional entitlements to additional resources. Thus, increased legal and financial exposure for school districts follows from the implementation

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of what many consider a plausible educational policy. The judiciary's participation in this development uncovers old and new problems that arise when courts are asked to set educational policy.

In this instance, the unintended consequences flow from an interaction between two distinct but increasingly related factors: educational standards and school finance litigation. States' development and implementation of educational standards and assessments flow from the educational excellence movement and rank among the more significant educational policy developments during the past few decades. These programs typically articulate goals and measure progress by students and schools toward those goals.[1] The second factor, school finance litigation, reflects a multi-decade effort to use the courts to secure additional funding for public schools from state legislatures.[2] This litigation is frequently nested in a broader push for greater equality of opportunity for a state's poor and minority schoolchildren. The transition of school finance litigation from an equity to an adequacy mooring, initiated in 1989,[3] facilitated an interaction with standards and assessments policy.

Recently, educational standards and school finance litigation converged in a way that enables school districts to gain financially from their inability to meet desired achievement levels. These failures are used in court to bolster legal claims that such schools underachieve because their resources are inadequate and, therefore, unconstitutional. Thus, paradoxically, litigants transform failure in the classroom into success in the courtroom. Those who join the effort to link standards and school finance lawsuits typically include teachers' unions, education professionals, and public school districts, as well as others with a vested stake in preserving — indeed, enhancing — the educational status quo, especially those who desire and stand to gain from additional educational resources. Their efforts reveal organized interests' honed ability to adapt to an ever-changing policy milieu.

Efforts to transform educational standards and assessments into legal entitlements for enhanced funding through the judiciary raise important legal and policy questions. Courts' institutional limitations hamstring their ability to formulate and implement educational policy. Public and private attention to lawyers and lawsuits often deflects school administrators' resources and focus from more pressing challenges, such as improving student achievement and addressing structural impediments

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[1] *See* Eric A. Hanushek & Margaret E. Raymond, *The Confusing World of Educational Accountability*, 54 NAT'L TAX J. 365 (1995).

[2] *See, e.g.*, Ala. Coalition for Equity v. Hunt, 624 So. 2d 107 (Ala. 1993); Sheff v. O'Neill, 678 A.2d 1267 (Conn. 1996); Rose v. Council for a Better Educ., 790 S.W.2d 186 (Ky. 1989); Abbott v. Burke, 643 A.2d 575 (N.J. 1994); DeRolph v. Ohio, 677 N.E.2d 733 (Ohio 1997).

[3] *See infra* Subpart II.C.

to educational reform. The weight of these unanticipated costs is borne largely by schoolchildren and, consequently, our nation.

I begin in Part I by describing recent litigation in two states, New York and North Carolina, that illustrates my central contention: Courts increasingly converge educational standards and school finance litigation. Part II explores the two main components of this emerging trend in greater detail, as well as how these trends interact. Part III considers the consequences of this interaction. I conclude with a note of caution that flows largely from the institutional stress that emerges from judicial involvement in the development of education policy in this manner.

I. AN EMERGING TREND

Unlike the federal Constitution,[4] every state constitution directly addresses education, though in varying degrees.[5] State constitutional commands range from a "general and uniform"[6] to a "thorough and efficient"[7] education.[8] Through education clauses, states assign themselves the obligation of educating students and, to a lesser extent, articulate the level of a state's obligation.

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

[5] *See* ALA. CONST. art. XIV, § 256; ALASKA CONST. art. VII, § 1; ARIZ. CONST. art. XI, § 1; ARK. CONST. art. XIV, § 1; CAL. CONST. art. IX, § 1; COLO. CONST. art. IX, § 2; CONN. CONST. art. VIII, § 1; DEL. CONST. art. X, § 1; FLA. CONST. art. IX, § 1; GA. CONST. art. VIII, § 1; HAW. CONST. art. X, § 1; IDAHO CONST. art. IX, § 1; ILL. CONST. art. X, § 1; IND. CONST. art. VIII, § 1; IOWA CONST. art. IX, 2D, § 3; KAN. CONST. art. VI, § 1; KY. CONST. § 183; LA. CONST. art. VIII, § 1; ME. CONST. art. VIII, pt. 1, § 1; MD. CONST. art. VIII, § 1; MASS. CONST. pt. 2, ch. 5, § 2; MICH. CONST. art. VIII, § 2; MINN. CONST. art. XIII, § 1; MISS. CONST. art. VIII, § 201; MO. CONST. art. IX, § 1(A); MONT. CONST. art. X, § 1; NEB. CONST. art. VII, § 1; NEV. CONST. art. XI, § 2; N.H. CONST. pt. 2, art. LXXXIII; N.J. CONST. art. VIII, § 4, ¶ 1; N.M. CONST. art. XII, § 1; N.Y. CONST. art. XI, § 1; N.C. CONST. art. IX, § 2; N.D. CONST. art. VIII, § 1; OHIO CONST. art. VI, § 2; OKLA. CONST. art. XIII, § 1; OR. CONST. art. VIII, § 3; PA. CONST. art. III, § 14; R.I. CONST. art. XII, § 1; S.C. CONST. art. XI, § 3; S.D. CONST. art. VIII, § 1; TENN. CONST. art. XI, § 12; TEX. CONST. art. VII, § 1; UTAH CONST. art. X, § 1; VT. CONST. ch. 2, § 68; VA. CONST. art. VIII, § 1; WASH. CONST. art. IX, § 1; W. VA. CONST. art. XII, § 1; WIS. CONST. art. X, § 3; WYO. CONST. art. VII, § 1.

[6] MINN. CONST. art. XIII, § 1.

[7] N.J. CONST. art VIII, § 4, ¶ 1.

[8] William E. Thro places state constitutions into three categories. William E. Thro, *A New Approach to State Constitutional Analysis in School Finance Litigation*, 14 J.L. & POL. 525, 53–40 (1998). Some state constitutions have only "establishment provisions" and only create a public school system (e.g., Alabama). *Id.* at 539. Other constitutions have "quality provisions" and mandate some specific quality (e.g., Arkansas). *Id.* In the last category, "high duty provisions" place education high on a state's priority list (e.g., Georgia). *Id.* at 539–40. For an alternate evaluation of state constitutional provisions, see Robert M. Jensen, *Advancing Education Through the Education Clauses of State Constitutions*, 1997 BYU EDUC. & L.J. 1, 3–8 (organizing state education clauses in terms of the textual commitment to education as well as by degree of specificity).

Historically, most state courts declined requests by litigants to translate these education clauses into specific educational policies or spending mandates. In the past, courts typically noted the clauses' vagueness and, in any event, the absence of traditional judicial tools to develop them.[9] Consequently, prior to the 1970s, state courts generally displayed greater levels of institutional modesty and deference to their legislative and executive counterparts as well as to political processes aimed at developing and implementing educational policies.

Beginning in the 1970s, this judicial modesty and reluctance waned, and some — but not all — states' courts ventured into the educational policymaking terrain through school finance lawsuits.[10] Following a path cleared by increasingly active federal courts, litigants in state courts began pushing judges into cases with broad public policy and budgetary ramifications. Some state judges welcomed litigants' push and perceived their judicial authority in broader, more expansive terms.[11]

More recently, litigants have forged a nascent trend of combining educational standards and assessments with school finance adequacy litigation. This trend will accelerate and steepen the courts' trajectory into educational policymaking. Court decisions in two states — New York and North Carolina — illustrate this trend and hint at its potential contours and impact.

A. NEW YORK

New York's constitution guarantees its citizens a "sound basic education."[12] New York's Board of Regents — the body charged with broad, statewide education policymaking authority — is among those responsible for translating the state constitutional command into concrete education policies. Not surprisingly, the board's policymaking activities have included consideration of standards and assessments. After more than a decade of development and debate, New York adopted the Re-

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9 *See, e.g.*, Robinson v. Schenck, 1 N.E. 698 (Ind. 1885) (discussing how lawmakers and not courts should assess what constitutes a general and uniform public school system).

10 *See* James E. Ryan, *The Influence of Race in School Finance Reform*, 98 MICH. L. REV. 432, 448–54 (1999).

11 For discussion about some state courts' more activist postures, see, e.g., John B. Weffing, *The New Jersey Supreme Court 1948–1998: Fifty Years of Independence and Activism*, 29 RUTGERS L.J. 701, 702 (1998) ("The New Jersey Supreme Court's reputation is based on a long history of activist decisions"); Ronald J. Bacigal, *The Federalism Pendulum*, 98 W. VA. L. REV. 771, 785 (1996) (discussing how state courts are perceived as more hospitable than federal courts for those who seek "expanded protection of human rights and civil liberties").

12 New York's constitution states, "The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated." N.Y. CONST. art. XI, § 1. New York's Court of Appeals has interpreted the term "education . . . to connote a sound basic education." Bd. of Educ. v. Nyquist, 439 N.E.2d 359, 369 (N.Y. 1982).

gents Learning Standards in 1996.[13] The standards articulate expectations at three educational stages (elementary, intermediate, and high school graduation[14]) in such core subjects as English, math, and science.[15] New York's standards align with the state's Regents Exams[16] that, for many students throughout New York, especially the college-bound, have become a familiar rite of passage. At present, successful performance on the Regents Exams is necessary to earn a Regents Diploma. By 2004, however, successful performance will be required to receive a standard high school diploma in New York.[17]

Unlike most of its urban counterparts, per-pupil spending in New York City's public schools ($9,623 in 1998–99) falls just below the state's average ($10,317 in 1998–99).[18] Frustrated with unsuccessful appeals to lawmakers for increased resources, New York City turned to the courts.[19] In the most recent round of school finance litigation, the plaintiffs — students, parents, and organizations concerned with New York City public schools — sought assistance from the courts to gain for city schools an increased share of the state's educational spending. Litigants argued that the application of the state funding formula denied city schoolchildren the opportunity to receive a sound and basic education.[20] More specifically, the plaintiffs sought increased state assistance to enhance numerous aspects of its schools, including class size and teacher quality.[21]

In defending its school finance system, the state argued that educational spending in New York City as well as its share from the state were "adequate" and met constitutional requirements. Implicit in the state's argument was that the constitutional command for educational "adequacy" requires only that the state lift all students to a minimal floor.

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13 Campaign for Fiscal Equity v. State, 719 N.Y.S.2d 475, 483 (N.Y. Sup. Ct. 2001), *rev'd*, 744 N.Y.S.2d 130 (N.Y. App. Div. 2002).

14 *Id.* at 484.

15 *Id.* at 483 n.7.

16 *Id.* at 516.

17 C. Cora True-Frost, *Beyond* Levittown *Towards a Quality Education for All Children: Litigating High Minimum Standards for Public Education. The* CFE *Case*, 51 SYRACUSE L. REV. 1015, 1040 n.170 (2001).

18 *See* CAMPAIGN FOR FISCAL EQUITY, THE STATE OF LEARNING IN NY: THE STATE OF LEARNING IN NEW YORK STATE PUBLIC SCHOOLS, *available at* http://www.cfequity.org/ns-sta-2.htm (last visited Mar. 3, 2002) (citing NEW YORK: THE STATE OF LEARNING (June 2001), a report from the Regents and Education Department to the governor and legislature). It is worth noting that the source of these figures is a party to the ongoing school finance litigation in New York. The figures themselves, however, are a matter of public record.

19 For a helpful description of the protracted school finance litigation in New York, see Leon D. Lazer, *New York Public School Financing Litigation*, 14 TOURO L. REV. 675, 682–91 (1998).

20 *Campaign for Fiscal Equity*, 719 N.Y.S.2d at 529–34.

21 *Id.* at 550. By seeking a greater share of the state educational spending pie, the plaintiffs advanced New York City's interests as well.

From the state's perspective, this "floor" meant that it must equip students only with the basic tools necessary for active, productive citizenship.[22]

New York City construed educational adequacy differently and drew on the state's own Regents Learning Standards to help define it.[23] To bolster their argument for additional court-ordered resources, the plaintiffs cited the failure of many city students to pass the state's Regents Exams and earn Regents Diplomas. In 2000, for example, only 27% of New York City high school graduates earned Regents Diplomas; 49% did so in the rest of the state.[24] New York City's claim pivots partly on the assumption that adequate funding is the amount necessary to ensure that New York City's students meet the state's Regents Learning Standards at a level comparable with their counterparts in the rest of the state.[25]

At trial, the New York court in Manhattan agreed with much of the plaintiffs' argument and concluded that city students were not receiving a sound, adequate education.[26] The court pointed to the quality of the city's public school teaching force, surging class sizes, wanting curriculum, and dilapidated infrastructure as factors contributing to the city's woeful student achievement scores.[27] The logic of the trial court's opinion pivots on student achievement, especially the Regents Learning Standards. Paradoxically, city students' absolute and relative failure to earn Regents Diplomas proved critical to the city's success in the courtroom. As a remedy, the court ordered the state to reform its school funding system.

An appeals court reversed the trial court, agreeing with the state's interpretation of what the New York constitution requires in terms of educational services.[28] The appeals court concluded that the state's "sound basic education" standard requires that the state provide a "minimally adequate educational opportunity" rather than a guarantee for a higher entitlement, however laudable and attractive such a guarantee might be from a policy perspective.[29] The level of education owed New York's students includes those "skills necessary to obtain employment, and to discharge one's civic responsibilities."[30] Moreover, the appeals court discounted — but did not dismiss — the plaintiffs' efforts to lever-

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22 *Id.* at 483–84.

23 *Id.*

24 *See* CAMPAIGN FOR FISCAL EQUITY, *supra* note 18.

25 *Campaign for Fiscal Equity*, 719 N.Y.S.2d at 516.

26 *Id.* at 549.

27 *Id.* at 498–516.

28 Campaign for Fiscal Equity v. State, 744 N.Y.S.2d 130 (N.Y. App. Div. 2002).

29 *Id.* at 134.

30 *Id.* at 138.

age city students' low achievement scores as a basis for an educational inadequacy claim. The appeals court noted that student achievement data, while "helpful," should be interpreted "cautiously" due to the myriad other variables that influence student achievement.[31] The plaintiffs have already promised an appeal to New York's highest court. A decision on their appeal is expected in 2003.

Although the success of the plaintiffs' effort to leverage standards and assessments into increased educational funding in New York has not been finally decided, two reasons underscore the importance of the plaintiffs' effort regardless of the outcome. First, it is possible that New York's highest court could reverse the appeals court and reinstate the trial court's interpretation of the state's education clause. Second, even if the appeals court decision stands, the success (however temporary) of the plaintiffs' argument at the trial court will encourage litigants in others states to pursue similar litigation.

B. NORTH CAROLINA

North Carolina's constitution requires that the state provide a "general and uniform" educational system.[32] To discharge this constitutional obligation, North Carolina lawmakers rewrote the state's Basic Education Program in 1985.[33] Shortly afterward, the state board of education developed a Standard Course of Study designed to help all North Carolina students navigate successfully as adults and citizens. North Carolina lawmakers also implemented end-of-grade and end-of-course exams that chart student progress toward mastering the state's academic goals[34] and help increase school accountability.[35] High school graduates in North Carolina must also pass the North Carolina High School Competency test, which is currently set at approximately the eighth-grade level of skills mastery.[36]

In 1994, both low- and high-spending public school districts challenged the constitutionality of the state's school finance system.[37] All of

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31 *Id.* at 135.

32 N.C. CONST. art. IX, § 2. North Carolina's constitution also requires, in part, that "equal opportunities shall be provided for all students." *Id.*

33 N.C. GEN. STAT. § 115C-81 (2000).

34 Hoke County Bd. of Educ. v. State, 2000 WL 1639686, at *10 (N.C. Super. Oct. 12, 2000).

35 *Id.* at *68.

36 *Id.* at *77.

37 *See generally id.* The original action brought in 1994 was filed by plaintiffs from North Carolina's poorer, rural districts. After the action was filed, additional plaintiffs from relatively wealthy, urban systems were permitted to intervene. *Id.* at *1. Thus, this litigation brought together high-spending districts (such as Charlotte-Mecklenberg, whose per pupil spending exceeded the state mean) and low-spending districts (such as Hoke County, whose per pupil spending fell below the state mean).

the plaintiff districts wanted greater resources, but they advanced different reasons. The low-spending (largely rural) districts wanted more funding to close the resource gap between low- and high-spending school districts. In contrast, high-spending districts, principally located in urban areas, argued for increased funding to offset the peculiar challenges posed by city life.[38]

In a 1997 decision, the North Carolina Supreme Court considered various procedural issues related to a lawsuit challenging the state's school funding system.[39] While careful to avoid deciding the underlying substantive claims, the court held that, in construing whether a sound and basic education was being provided, courts could properly consider results from student assessments.[40] Following the supreme court's guidance, a North Carolina trial court recently decided to prompt a restructuring of the state's pre-kindergarten educational system.[41] That court, noting a wide gap between the performance of at-risk and not-at-risk students on statewide assessments, concluded that greater attention to the special needs of at-risk students was constitutionally required.[42] Similar to its counterpart in New York, the North Carolina trial court implicitly assumed that greater resources would close student achievement gaps. Another aspect that tethers the recent New York and North Carolina cases is the key role in the litigation played by results from high-stakes testing.

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38 Cost structure is among the peculiar challenges for school systems in major urban areas. Specifically, the cost of living is simply higher in most urban areas. Moreover, the cost of developing and delivering educational services to inner-city children — a disproportionate number of whom are from low-income homes and require special or supplemental services — is usually higher. For a general discussion, see ALLAN R. ODDEN & LAWRENCE O. PICUS, SCHOOL FINANCE: A POLICY PERSPECTIVE 208–41 (1992) (discussing formula adjustments for student needs, education level, scale economies, and price). *See also* Thomas A. Downes & Thomas F. Pogue, *Adjusting School Aid Formulas for the Higher Cost of Educating Disadvantaged Students*, 47 NAT'L TAX J. 89 (1994). Adjusting school funding for cost structure considerations in school finance formulas can be traced to the seminal work of PAUL R. MORT, THE MEASUREMENT OF EDUCATIONAL NEED (1924) (advancing a technique for deriving a measure of the educational need as a basis for the distribution of state aid to local school districts).

39 The state's motion to dismiss was denied at trial. *See Hoke County*, 2000 WL 1639686, at *2. The state appealed and prevailed at the appeals court. Leandro v. State, 468 S.E.2d 543 (N.C. Ct. App. 1996). The plaintiffs then appealed to the North Carolina Supreme Court and prevailed. Leandro v. State, 488 S.E.2d 249 (N.C. 1997). For a review of the procedural history, see *Hoke County*, 2000 WL 1639686, at *2–6.

40 *Hoke County*, 2000 WL 1639686, at *5 (noting that the "level of performance of the children on standardized achievement tests" could be considered by the courts).

41 *Id.* at *113.

42 For purposes of its decision, the court construed at-risk students to include "low-income" as well as "low-performing" students. *Id.* at *50. Later in its opinion, the court defined the term "at-risk students" more concretely (noting that at-risk students are those who, for example, may be disruptive, violent, from low-income or low-socioeconomic homes, or from homes where the father is absent). *Id.* at *92.

Perhaps mindful of the magnitude of the burden its decision placed on the legislative and executive branches, the North Carolina court commanded lawmakers to change the state funding formula "at a reasoned and deliberate pace."[43] While the court's language was no doubt intended to allay fears about judicial over-reaching (real or perceived), the obvious reference to the *Brown v. Board of Education II* opinion (commanding desegregation with "all deliberate speed"[44]) may have achieved the opposite effect.[45]

Individually, the lawsuits in New York and North Carolina carve new legal terrain in how they leverage policy in the courtroom.[46] Even if the appeals court decision in New York withstands review, the trial court decision will remain influential, as it will likely serve as a roadmap for other litigants in other states. Taken together, the New York and North Carolina cases illustrate a new trend in school finance litigation. Whether this trend will grow is unclear, but two factors enhance the possibility. First, while important variations exist, all state constitutions say something about education.[47] Second, most states continue to develop and implement education standards, assessments, and results-based accountability programs. Indeed, President George W. Bush's federal education initiative,[48] which features standards and high-stakes testing components, is designed to accelerate this state activity. To be sure, it is far from clear whether courts in other states might follow New York and North Carolina's lead and draw on standards and assessments policies as evidence of constitutionally inadequate education. What is clear, however, is that such a trail has been blazed.

II. HOW THESE UNINTENDED POLICY CONSEQUENCES AROSE

Real or perceived failure of existing education policy typically ignites efforts to develop and implement reforms. The condition of American education continues to worry many people, especially parents of school-age children. Perhaps even more alarming is the likelihood

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43 *Id.* at *114.

44 Brown v. Bd. of Educ., 349 U.S. 294, 301 (1955) (*Brown II*).

45 One consequence was that North Carolina Gov. Michael Easley recently established a task force to study the state's education system and develop a long-range plan to improve the public schools. As a consequence, the North Carolina Supreme Court, on its own motion pursuant to N.C. R. CIV. P. 54(b), amended its earlier order and vacated only that portion directing the state to conduct a statewide self-study of the educational system. Hoke County Bd. of Educ. v. State, Order of May 29, 2001 (N.C. Super. Ct.), *available at* http://www.ncforum.org/pdf/52901_order.pdf.

46 For a prediction of this development, see Michael Heise, *The Courts vs. Educational Standards*, 120 PUB. INT. 55 (1995).

47 *See supra* note 5.

48 The No Child Left Behind Act of 2001, Pub. L. No. 107–110, 115 Stat. 1425 (2002).

that American elementary and secondary school student academic achievement will remain stubbornly mediocre and immune to reform efforts, especially those that involve increasing resources.[49]

A. STAGNANT ACADEMIC ACHIEVEMENT

Leading educational indicators indicate a decline during the past several decades.[50] The average verbal and math SAT scores declined more than fifty points and almost forty points, respectively, between 1963 and 1980.[51] Despite slight occasional increases during the mid-1980s, the overall downward trend in SAT scores persisted through 1991.[52] Performance of American students also fell in comparison with their foreign counterparts.[53] In a 1990 assessment of student achievement involving fifteen industrialized nations, American thirteen-year-olds ranked thirteenth in mathematics and science.[54] A Congressional Budget Office survey summarized related data and concluded:

> The existence of a sizable drop in test scores during the 1960s and 1970s has been well known for some time. The decline was remarkably pervasive affecting many different types of students in most grades, in all regions of the United States, in Catholic as well as public schools and even Canadian schools. The drop was apparent in the results of different kinds of tests covering many subject areas.[55]

Many scholars echo the similar message that "during the past three decades student achievement has, at best, stayed constant and may have

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49 *See, e.g.*, Lewis D. Solomon, *The Role of For-Profit Corporations in Revitalizing Public Education: A Legal and Policy Analysis*, 24 U. TOL. L. REV. 883, 886–87 (1993); DAVID W. GRISSMER ET AL., STUDENT ACHIEVEMENT AND THE CHANGING AMERICAN FAMILY 3, 16 (1994); NAT'L COMM'N ON EXCELLENCE IN EDUC., A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM 8 (1983) [hereinafter NATION AT RISK]; U.S. DEP'T OF EDUC., INTERNATIONAL EDUCATION COMPARISONS 7, 22 (1992); ERIC A. HANUSHEK ET AL., MAKING SCHOOLS WORK: IMPROVING PERFORMANCE AND CONTROLLING COSTS xviii (1994).

50 Solomon, *supra* note 49, at 886.

51 NATION AT RISK, *supra* note 49, at 8–9 (examining the quality of education in the United States and offering practical recommendations for reform and improvement).

52 Charles Murray & R.J. Hernstein, *What's Really Behind the SAT-Score Decline?*, 106 PUB. INT. 32, 33 fig.1 (1992). *But see* David W. Grissmer, *The Continuing Use and Misuse of SAT Scores*, 6 J. PSYCH., PUB. POL'Y, & LAW 223, 224–26 (2000) (arguing that the expanded pool of SAT test-takers explains much of the SAT score decline over the past decades).

53 Solomon, *supra* note 49, at 886; NATION AT RISK, *supra* note 49, at 8. *See generally* U.S. DEP'T OF EDUC., *supra* note 49.

54 Solomon, *supra* note 49, at 886.

55 CONG. BUDGET OFFICE, EDUCATIONAL ACHIEVEMENT: EXPLANATIONS AND IMPLICATIONS OF RECENT TRENDS (1987), *quoted in* Sam Peltzman, *The Political Economy of the Decline of American Public Education*, 36 J.L. & ECON. 331, 333 (1993).

fallen."[56] Even the more sanguine note that optimistic interpretations of achievement data underscore problems. If the performance of American students has remained constant over time in absolute terms, it has fallen in relative terms due to improved performances of many foreign students.[57] Concurrently, the demands of the workplace increase.[58] Levels of achievement and mastery of skills that might have sufficed a generation ago no longer appear adequate.[59]

To be sure, not all agree that American student academic achievement has slipped over the years. Given its complexity, it is not surprising to find discord on the issue of whether achievement levels have declined over time, as conventional wisdom suggests.[60] A recent RAND Corporation report[61] as well as a book by professors David Berlinger and Bruce Biddle[62] present a dissenting viewpoint and argue that American student academic achievement has not declined during the past few decades.[63] However, even if one accepts questions about the precise magnitude of the crisis confronting American student performance generally, markedly few serious scholars dissent from the proposition that many urban public schools confront substantial challenges in their efforts to serve their students, many of whom are members of minority groups or come from low-income households or both.[64]

High-poverty schools, especially high-poverty urban schools, almost always have lower levels of academic achievement than do low-poverty schools. Studies reaching this conclusion abound. A 1997 longitudinal study of 40,000 students, for example, concluded that "the pov-

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56 HANUSHEK, *supra* note 49, at xviii.

57 *Id.*

58 *See generally* RAY MARSHALL & MARC TUCKER, THINKING FOR A LIVING: EDUCATION AND THE WEALTH OF NATIONS (1992); NAT'L CTR. ON EDUC. AND THE ECON., AMERICA'S CHOICE: HIGH SKILLS OR LOW WAGES! (1990).

59 Indeed, lingering concern over the competitiveness of the American workforce has generated recent calls for legislation. *See, e.g.*, *Joint Approach to Raising Skills of Workforce Sought*, 140 LAB. REL. REP. (BNA) 116 (May 25, 1992) (discussing labor union officials' support for incentives for increased worker training as well as union support for the High Skills Competitive Workforce Act of 1991, S. 1790, 102d Cong.) (1991) (the House and Senate both held hearings on the bill but never brought it to a vote on the floor).

60 *See, e.g.*, GRISSMER, *supra* note 49, at xvii, 3, 16 (1994).

61 *See id.* at 16.

62 DAVID C. BERLINGER & BRUCE J. BIDDLE, THE MANUFACTURED CRISIS (1995).

63 The Berlinger and Biddle thesis has not been widely accepted. For a recent discussion about the nature and extent of the decline in American educational performance, see David W. Murray, *Waiting for Utopia*, 2 EDUC. NEXT 73, 74–75 (2002) (discussing the weight of evidence rebutting the Berlinger and Biddle thesis), *available at* http://www.educationnext.org/20022/73.html.

64 In 1988, forty-seven of the nation's largest urban public school systems enrolled more than 37% and 31% of the nation's black and Hispanic schoolchildren, respectively. *See* COUNCIL OF THE GREAT CITY SCH., NATIONAL URBAN EDUCATION GOALS: BASELINE INDICATORS, 1990–91, at 9–10 figs.9 & 11 (1992).

erty level of the school (over and above the economic status of an individual student) is negatively related to standardized achievement scores."[65] This study confirmed that "the poverty level of certain schools places disadvantaged children in double jeopardy. School poverty depresses the scores of all students in a school where at least half the students are eligible for subsidized lunch[ ] and seriously depresses the scores when over 75% of students live in low-income households."[66] A similar study conducted in 1993 found that students in low-poverty schools typically score 50% to 75% higher on reading and math tests than students in high-poverty schools.[67]

In addition to depressing achievement, attending a high-poverty school also adversely affects academic attainment. Students attending high-poverty schools are more likely to drop out than students attending low-poverty schools.[68] This partly explains why dropout rates remain alarmingly high in many cities. The average dropout rate in 1990 in the nation's forty-seven largest school districts was more than twice the national average of 12.1%.[69] In some individual districts, the dropout rates astonish. In 1998, for example, the overall dropout rate in Cleveland was 72%; in both Memphis and Milwaukee it exceeded 56%.[70] Moreover, additional problems persist for those students who remain in high-poverty, urban schools. Urban teachers report spending more time on classroom order and discipline than their non-urban counterparts,[71] as well as more problems relating to student absenteeism,[72] pregnancy,[73] and weapons possession.[74] Finally, those who manage to graduate from high-poverty, urban schools are less likely to attend college than those who graduate from low-poverty schools.[75]

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65 U.S. DEP'T OF EDUC., PROSPECTS: FINAL REPORT ON STUDENT OUTCOMES 73 (1997).

66 *Id.* at 12.

67 MICHAEL J. DUMA ET AL., PROSPECTS: THE CONGRESSIONALLY MANDATED STUDY OF EDUCATIONAL GROWTH AND OPPORTUNITY — INTERIM REPORT 44 (1993).

68 *See* RICHARD D. KAHLENBERG, ALL TOGETHER NOW: CREATING MIDDLE-CLASS SCHOOLS THROUGH PUBLIC SCHOOL CHOICE 54 (2001).

69 *Compare* COUNCIL OF THE GREAT CITY SCH., *supra* note 64, at xvi (urban school data), *with* NAT'L CTR. FOR EDUC. STATISTICS, DIGEST OF EDUCATION STATISTICS, 2000, tbl.107 (national data), *available at* http://nces.ed.gov/pubs2001/digest/dt107.html (Dec. 2000).

70 *See* JAY P. GREENE, MANHATTAN INSTITUTE, HIGH SCHOOL GRADUATION RATES IN THE UNITED STATES (2001). Greene's definition of dropout is fairly expansive and includes some students who are typically left out of dropout calculations, such as students who dropped out but later earned a GED.

71 LAURA LIPPMAN ET AL., U.S. DEP'T OF EDUC., URBAN SCHOOLS: THE CHALLENGES OF LOCATION AND POVERTY 116 (1996).

72 *Id.* at 114 figs.4.41 & 4.42.

73 *Id.* at 124 figs.4.56 & 4.57.

74 *Id.* at 120 figs.4.50 & 4.51.

75 KAHLENBERG, *supra* note 68, at 54 ("Few students graduating from high-poverty high schools are likely to be going on to college: just 15% of inner-city graduates do").

Persistent and nagging gaps between minority and non-minority student achievement also trouble observers. Based on her review of National Assessment of Educational Progress data, Professor Diane Ravitch concludes that while minority students have made progress in closing the achievement gap, significant statistical differences endure.[76] Due largely to the particular challenges that confront many urban school districts as well as lingering student achievement gaps, school reform advocates now focus increasing attention on approaching the reform of urban public schools in a distinct manner. That urban school systems might receive particular emphasis or heightened scrutiny from reformers demonstrates the magnitude and distinctiveness of the challenges now facing many urban school systems.[77]

Understandable concerns about American schools and student academic performance persist. Two separate policy initiatives seek to address some of these concerns: (1) educational standards and assessments and (2) school finance litigation.

B. STANDARDS AND ASSESSMENTS

For years, and particularly since the 1980s, educational reformers pushed the development and implementation of academic standards as well as assessment instruments designed to gauge progress toward those standards.[78] This approach reflects the belief that what matters most is whether children are learning and that this can only be assured if regular assessments are administered to measure progress toward clear performance standards. Proponents of standards and assessments justified them partly as a way to increase student achievement and school accountability.[79]

States' embrace of the standards and assessments movement can be partly attributed to increased bipartisan federal political activity. A movement for national education goals was launched by President George Bush and his hosting of the nation's first education summit in

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[76] DIANE RAVITCH, NATIONAL STANDARDS IN AMERICAN EDUCATION 72 (1995). *See also* Anemona Hartocollis, *Analysis Finds Race Disparity in School Tests*, N.Y. TIMES, Mar. 28, 2002, at A24 (discussing gaps in student achievement between white and non-white students in New York); John E. Chubb & Terry M. Moe, *Effective Schools and Equal Opportunity*, *in* PUBLIC VALUES, PRIVATE SCHOOLS 161–83 (Neal E. Devins ed., 1989).

[77] For an example focusing on education reform in urban schools, see NEW SCHOOLS FOR A NEW CENTURY: THE REDESIGN OF URBAN EDUCATION (Diane Ravitch & Joseph P. Viteritti eds., 1997).

[78] For a helpful summary of the social history of the standards and assessment movement, see generally DIANE RAVITCH, LEFT BEHIND: A CENTURY OF FAILED SCHOOL REFORMS (2000); CHESTER E. FINN JR., WE MUST TAKE CHARGE: OUR SCHOOLS AND OUR FUTURE (1991).

[79] *See id.*

1989.[80] President Bill Clinton's administration followed through legislatively on a modified version of the Bush initiative.[81] Finally, recent legislation signed into law by President George W. Bush deploys new federal funds to help entice states to develop new or enhance existing educational standards and assessments regimes.[82] In the past decade, forty-nine states have implemented (or enhanced) some form of educational standards and assessments program.[83] Not surprisingly, the quality of these programs varies, sometimes tremendously.[84] Moreover, their efficacy as a policy designed to assist students and schools remains the subject of debate.[85]

As standards developed and implementation plans progressed, policy discussions about accountability and consequences have become more animated and focused.[86] More states link test results to high-stakes consequences, including New York and North Carolina. At the institutional level, schools or districts in some states risk a state takeover for consistently unsatisfactory performance.[87] At the student level, students

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80 The education summit produced a report: THE NATIONAL EDUCATIONAL GOALS: A REPORT TO THE NATION'S GOVERNORS (1990). *See also* H.R. REP. No. 103-168 (1994), *reprinted in* 1994 U.S.C.C.A.N. 63.

81 Goals 2000: Educate America Act, Pub. L. No. 103-227, 108 Stat. 125 (1999) (codified in part at 20 U.S.C. § 5801). *See also* William Celis III, *New Education Legislation Defines Federal Role in Nation's Classrooms*, N.Y. TIMES, Mar. 30, 1994, at B10.

82 *See* The No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002).

83 Iowa is the exception. *See* ROBERT L. LINN, THE DESIGN AND EVALUATION OF EDUCATIONAL ASSESSMENT AND ACCOUNTABILITY SYSTEMS 1 (April 2001) (noting that Iowa, although it has not adopted new content standards, has "a long tradition of testing"), *available at* http://cresst96.cse.ucla.edu/CRESST/pages/reports/TR539.pdf. *See also, e.g.*, N.Y. COMP. CODES R. & REGS. tit. 8, §§ 100.3(b)(2), 100.5(a)(4) (2002); N.C. GEN. STAT. § 115C-81 (2002).

84 THE STATE OF STATE STANDARDS 2000 (Chester E. Finn, Jr. & Michael J. Petrilli eds., 2000), *at* http://www.edexcellence.net/library/soss2000/Standards2000.pdf; MARGARET E. GOERTZ ET AL., CONSORTIUM FOR POLICY RESEARCH IN EDUCATION, ASSESSMENT AND ACCOUNTABILITY SYSTEMS IN THE 50 STATES, 1999–2000 (2001), *available at* http://www.cpre.org/Publications/rr46.pdf. Sometimes, standards are set too low. *See* MARK D. MUSICK, SETTING EDUCATION STANDARDS HIGH ENOUGH, *at* http://www.sreb.org/main/highschools/accountability/settingstandardshigh.asp (2000).

85 *See, e.g.*, *Position Statement of the American Educational Research Association Concerning High-Stakes Testing in Pre K-12 Education*, EDUC. RESEARCHER, Nov. 2000, at 24–25, *available at* http://www.aera.net/pubs/er/pdf/vol29_08/AERA290807.pdf; Robert Hauser et al., *Initial Responses to AERA's Position Statement Concerning High-Stakes Testing*, EDUC. RESEARCHER, Nov. 2000, at 27–29, *available at* http://www.aera.net/pubs/er/pdf/vol29_08/AERA290808.pdf.; William A. Mehrens, *Consequences of Assessment: What is the Evidence?*, 6 EDUC. POL'Y ANALYSIS ARCHIVES 13 (July 14, 1998), *at* http://epaa.asu.edu/epaa/v6n13.html.

86 LINN, *supra* note 83, at 3–6; Ulrich Boser, *Pressure Without Support*, EDUC. WEEK, Jan. 2001, at 68, *available at* http://www.edweek.org/sreports/qc01/articles/qc01story.cfm?slug=17policy.h20.

87 For example, New Jersey gives the state education agency the power to take over a school district that is performing poorly in terms of student achievement. *See* N.J. STAT. ANN.

who do not achieve a certain mastery of core academic subjects are not promoted or graduated, or they receive a "certificate of attendance" rather than a full academic diploma.[88]

Most observers assumed that lawsuits would quickly follow in states where standards and assessments triggered palpable consequences for students and schools. While fears of litigation from disappointed schools and students are not misplaced,[89] careful planning by policymakers, attention to policy implementation details, focused deployment of additional resources, student preparation, remediation, and an almost unlimited supply of second chances for students substantially reduced the number of lawsuits challenging the legality of high-stakes standards and assessments.[90]

Not surprisingly, many in the educational establishment strongly resisted standards and assessments policies until resistance became too awkward and have now resigned themselves to a world that includes standards and tests.[91] As their policy world shifted beneath them, many in the schools' establishment set out to make the best of an uncomfortable situation by joining the standards and assessments programs with evolving school finance theory.

C. SCHOOL FINANCE LITIGATION: THE EMERGENCE OF ADEQUACY

As the standards movement unfolded, school finance litigation changed in a fundamental way. That change involved the replacement of equity with adequacy as the theoretical basis for school finance lawsuits.

School finance lawsuits advancing an equity theory sought to close gaps in spending between low- and high-spending districts and dominated the education landscape during the 1970s and 1980s. Most famously, the *Serrano*[92] litigation in California articulated school finance equity theory and was quickly mimicked in other states. Over the years, however, equity theory lost steam. For every lawsuit that succeeded, an-

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§§ 18A:7A-15, 7A-15.1, 7A-34 to -35, 7A-38 to -40, 7A-42, 7A-44 to -45 (West 1989 & Supp. 1997). For a description of this process, see Sally B. Pancrazio, *State Takeovers and Other Last Resorts*, *in* SCHOOL BOARDS: CHANGING LOCAL CONTROL 71 (Patricia F. First & Herbert J. Walberg eds., 1992) (describing the state's takeover of the Jersey City schools).

88 *See, e.g.*, TENN. CODE ANN. § 49-6-6001 (2001).

89 *See, e.g.*, Debra P. v. Turlington, 644 F.2d 397 (5th Cir. Unit B 1981) (striking down Florida's use of a minimum competency exam, which was a requirement for a full academic diploma, due to the lingering legacy of school segregation).

90 *But see* Paul O'Neill, *Special Education and High Stakes Testing for High School Graduation: An Analysis of Current Law and Policy*, 30 J.L. & EDUC. 185, 195–216 (2001).

91 Nevertheless, the National Educational Association still voices some opposition to testing. *Premature Retreat on Testing Threatens Students' Progress*, USA TODAY, July 31, 2001, at A14. *See also* Hagit Elul, *Making the Grade, Public Education Reform: The Use of Standardized Testing to Retain Students and Deny Diplomas*, 30 COLUM. HUM. RTS. L. REV. 495, 536 (1999) (arguing against the use of high-stakes testing).

92 Serrano v. Priest, 557 P.2d 929 (Cal. 1976).

other failed.[93] Even successful litigants often failed to garner their desired levels of increased school spending.[94]

In addition, equity lawsuits began to lose support from many of the nation's large, urban school districts. Urban districts lost their appetite for equity lawsuits even as they continued to struggle mightily with delivering basic educational services.[95] Many urban districts realized that, despite the obvious challenges they confront in serving children, gaps in educational spending between urban and non-urban districts were not the key problem. Indeed, in most states (New York is a notable exception), major urban school systems benefit from spending levels that exceed state averages.[96] As a result, in successful equity-based school finance lawsuits, urban schools stood to lose or, at best, not gain additional resources.[97]

In 1989, the school finance litigation world changed in a way that welcomed urban districts back into the fold. Many observers point to a 1989 decision by the Kentucky Supreme Court[98] as ushering in the adequacy theory of school finance litigation.[99] Unlike the equity theory that sought to close spending gaps between high- and low-income districts, adequacy-based lawsuits challenge state school finance systems not be-

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93 *Compare* Washakie County Sch. Dist. No. 1 v. Herschler, 606 P.2d 310 (Wyo. 1980) (holding the Wyoming school finance system unconstitutional partly because it failed to provide substantially equal funding), *with* Hornbeck v. Somerset County Bd. of Educ., 458 A.2d 758 (Md. 1983) (holding Maryland's school finance system constitutional, as neither the state equal protection clause nor the education clause required equal funding).

94 *See* James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 267–68 (1999); Michael Heise, *Equal Educational Opportunities, Hollow Victories, and the Demise of School Finance Equity Theory: An Empirical Perspective and Alternative Explanation*, 32 GA. L. REV. 543, 618–28 (1998); Note, *Unfulfilled Promises: School Finance Remedies and State Courts*, 104 HARV. L. REV. 1072, 1072 (1991).

95 However, despite conventional wisdom to the contrary, some observers note improvement in some urban schools. *See, e.g.*, GENE BOTTOMS ET AL., THE 2000 HIGH SCHOOLS THAT WORK ASSESSMENT: IMPROVING URBAN HIGH SCHOOLS (2000), *available at* http://www.sreb.org/programs/hstw/publications/pubs/Improving_Urban_HS.pdf.

96 *See, e.g.*, NAT'L CTR. FOR EDUC. STATISTICS, DISPARITIES IN PUBLIC SCHOOL DISTRICT SPENDING, 1989–1990, apps. A–E (1995) (illustrating that on an unadjusted per-pupil spending basis, urban districts outspend their suburban and rural counterparts). For comparisons between specific city and state means, see NAT'L CTR. FOR EDUC. STATISTICS, STATISTICS IN BRIEF, REVENUES AND EXPENDITURES FOR PUBLIC ELEMENTARY AND SECONDARY EDUCATION: SCHOOL YEAR 1998–99, tbl.5 (Mar. 2001) (1998–99 per-pupil spending data, by state); NAT'L CTR. FOR EDUC. STATISTICS, CHARACTERISTICS OF THE 100 LARGEST PUBLIC ELEMENTARY AND SECONDARY SCHOOL DISTRICTS IN THE UNITED STATES: 1989–99, 30 tbl.10 (Sept. 2000) (1998–99 per-pupil spending data for the nation's 100 largest cities).

97 For a fuller discussion of the urban school dimension, see Michael Heise, *State Constitutions, School Finance Litigation, and the "Third Wave": From Equity to Adequacy*, 68 TEMPLE L. REV. 1151, 1172–74 (1995).

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

99 *See, e.g.*, Ryan, *supra* note 94, at 268–69 (noting how *Rose* contributed to the transition from equity to adequacy theory).

cause some districts benefit more but because the quality of education in some districts is inadequate.

As adequacy eclipsed equity theory in the school finance litigation world, one critical step remained. Specifically, courts were left with the vexingly difficult task of defining educational "adequacy." Some state courts balked, effectively deferring to legislative definitions.[100] However, other courts did not flinch as they leapt into the fray and generated judicial definitions of educational adequacy.[101] Many followed the lead of the Kentucky Supreme Court and construed adequacy in terms of a constitutional requirement for competency in core academic subjects and skill sets.[102]

It is into this definitional void that litigants in New York and North Carolina maneuvered their states' standards and assessments programs. Many in the educational establishment, still smarting from their failure to forestall systematic efforts to increase their accountability and searching for ways to increase resources, seized upon a subtle opportunity and joined educational standards and assessments policies to school finance litigation. More specifically, equal education is now defined in terms of educational adequacy.[103] And school finance litigants increasingly turn to standards and assessments results for key evidence supporting their assertions that schools are constitutionally inadequate. By joining these disparate movements, litigants seek to transform failure in the classroom into success in the courtroom and leverage educational standards into legal entitlements for additional resources.

III. THE CONSEQUENCES OF UNINTENDED CONSEQUENCES

The New York and North Carolina cases illustrate five critical issues that would benefit from careful consideration by education policymakers and lawmakers.

A. COURTS AS EDUCATIONAL POLICYMAKERS

One issue involves the courts' role in educational policymaking. The courts played an integral role almost fifty years ago in ensuring equal educational opportunity.[104] Indeed, the courts' influence over schools and education policy exploded after the Supreme Court's *Brown*

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100 *See, e.g.*, City of Pawtucket v. Sundlun, 662 A.2d 40, 58 (1995) (holding that school finance lawsuits involve political questions).

101 *See, e.g.*, *Rose*, 790 S.W.2d at 208–11.

102 *See, e.g.*, McDuffy v. Sec'y of Executive Office of Educ., 615 N.E.2d 516, 554 (Mass. 1993) (citing *Rose*, 790 S.W.2d at 186).

103 *See, e.g.*, Ryan, *supra* note 94, at 266–72.

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

v. Board of Education decision in 1954.[105] Today, it is difficult to name a single aspect of school and educational policy not influenced by laws, regulations, lawyers, and courts. However, a dispassionate assessment of the historic record of the efficacy of judicial involvement with developing and implementing educational policy reveals mixed evidence.

1. *Special Education*

The courts' ability to influence special education statutes and mandates provides one source of optimism for those who look to the courts to develop and implement education policy reform. The nation's historical record on making good on promises for education services sensitive to special-needs children was particularly shameful, especially before the 1970s. Until the latter half of the twentieth century, educating children with disabilities was considered a matter of little public importance.[106]

Starting from a baseline of little more than abject general neglect of special-needs schoolchildren and on the heels of the civil rights movement seeking racial equality that gained momentum during the 1960s, advocates for the disabled began pressing claims of their own. Advocates for students with disabilities established as an initial target public schools and education, much like the model forged by those seeking racial justice. Another common theme linking advocates for racial and special-needs students' equity is the focus on the federal courts.

Pennsylvania's constitution grants its citizens a "thorough and efficient" education.[107] However, the state's treatment of special education children[108] ranged from inappropriate and inferior special education services to exclusion from public schools. To remedy this situation, advocates turned to the courts. In *Pennsylvania Association for Retarded Children v. Pennsylvania*,[109] the state was sued for its treatment of special education children. As part of a consent decree, Pennsylvania was required to provide special education students with a "free" and appropriate educational program.[110] The basis for the requirement was that since the state had undertaken to provide free public education to all children, including Pennsylvania's "exceptional" children, the state could not deny

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105 *Id.*

106 *See* Anne P. Dupre, *Disability and the Public Schools: The Case Against "Inclusion"*, 72 WASH. L. REV. 775, 783 (1997) (citing Philip T.K. Daniel & Karen B. Coriell, *Traversing the Sisyphean Trails of the Education for All Handicapped Children Act: An Overview*, 18 OHIO N.U. L. REV. 571, 571–74 (1992) (discussing the history of special education)).

107 PA. CONST. art. III, § 14.

108 The *PARC* litigation discussed in the text dealt with children suffering from varying levels of mental retardation. *See* Dupre, *supra* note 106, at 785.

109 334 F. Supp. 1257 (E.D. Pa. 1971), 343 F. Supp. 279 (E.D. Pa. 1972) [hereinafter *PARC*].

110 *PARC*, 334 F. Supp. at 1260.

similar service to children with developmental disabilities.[111] Although the *PARC* litigation culminated in a consent decree, the case is generally considered as the nation's first to articulate the developmentally disabled's "right to education."[112]

A second leading case, *Mills v. Board of Education*,[113] expanded upon *PARC* in part by involving a larger, broader class of plaintiffs. Whereas the plaintiffs in *PARC* were developmentally disabled children, *Mills* involved all children in the District of Columbia who were excluded from traditional public education. In *Mills*, the court concluded that the District's board of education had violated federal due process guarantees afforded to special needs children denied public education services. The court concluded that no child otherwise eligible for public education could be denied access to a public education unless the District provided "adequate alternative educational services" and after a "constitutionally adequate prior hearing."[114]

Individually, *PARC* and *Mills* carved new and important terrain in the then-emerging special education field. Together, the lawsuits spawned an explosion of scholarly attention and similar litigation in more than thirty states.[115] Complementing the successful litigation was that the *PARC* and *Mills* cases helped spark a demand for legislation. The two leading legislative responses at the federal level include Section 504 of the Rehabilitation Act of 1973[116] and the Education for All Handicapped Children Act.[117]

Section 504 and IDEA (the successor to the Education for All Handicapped Children Act) perform similar yet distinct tasks. Section 504 advances a broad prohibition against discrimination by public schools and is pegged to a public school's eligibility for receipt of federal education funds.[118] That is, public schools may elect to ignore Section 504 requirements but at the cost of forgoing federal education funding. Although perhaps slightly narrower in scope, IDEA places upon public schools specific substantive and procedural affirmative duties toward special-needs children and is far more detailed in what it requires. One notable policy position embodied within IDEA is a preference for edu-

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111 *Id.* at 1259. I use the term "developmentally disabled" as a substitute for the term "mentally retarded," the language used by the court in its opinion.

112 MARK G. YUDOF ET AL., EDUCATIONAL POLICY AND THE LAW 692 (4th ed. 2002); Dupre, *supra* note 106, at 784.

113 348 F. Supp. 866 (D.D.C. 1972).

114 *Id.* at 875.

115 YUDOF, *supra* note 112, at 693.

116 29 U.S.C. § 794 (1994).

117 20 U.S.C. §§ 1401–61 (1976) [hereinafter EAHCA]. EAHCA is now part of the Individuals with Disabilities Education Act, Pub. L. 101-476, 104 Stat. 1103 (1990) (codified as amended at 20 U.S.C. §§ 1400-91 (1994)) [hereinafter IDEA].

118 29 U.S.C. § 794(a) (1994).

cating special needs children in classrooms alongside "children who are not disabled" to the maximum extent appropriate.[119] Both statutes seek as a goal to ensure that special needs children receive a "free and appropriate education."[120]

To be sure, challenges confronting special education children remain. The effort to provide all children, special or otherwise, with robust and meaningful equal education is by no means complete. Moreover, serious questions have arisen regarding the fiscal consequences to local school districts imposed by a federal statutory mandate.[121] Specifically, local school districts, operating in a world of hard budget constraints, continue to struggle with distributing scarce resources to meet the needs of disabled students as well as the legitimate needs of non-disabled students who do not benefit from a federal mandate.[122] Finally, disputes about policies such as inclusion endure.[123] Indeed, the fact that current disputes dwell on the relative merits of such policies as mainstreaming and inclusion provides inferential evidence of the degree of progress on special education policy since the 1970s.

My point is that the special education context supplies at least a plausible example of how courts have been successfully deployed to assist in bringing about a change in education policy. When Congress enacted the Education For All Handicapped Children Act of 1975, in direct response to the *PARC* and *Mills* litigation, Congress found that more than one million children had been entirely excluded from public schools and that many other children struggled in school because of unmet special education needs.[124] Today, more than six million children (about thirteen percent of the entire school-age population) receive some form of special education service.[125] Despite lingering disputes, most observers would agree that the nation has made significant strides in serving the

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119 20 U.S.C. § 1412(a)(5)(B) (1994). For a more detailed discussion, see Dupre, *supra* note 106, at 786–77.

120 20 U.S.C. § 1412(a)(1) (1994).

121 *See* Dupre, *supra* note 106, at 777–78.

122 *See, e.g., id.* (questioning the direct and indirect costs to local school districts for complying with the federal special education mandate); Note, *Special Education, Equal Protection and Education Finance: Does the Individuals with Disabilities Education Act Violate a General Education Student's Fundamental Right to Education?*, 40 B.C. L. REV. 633 (1999) (same).

123 *Compare* Alan Gartner & Dorothy Kerzner Lipsky, *Beyond Special Education: Towards a Quality System for All Students*, 57 HARV. EDUC. REV. 367, 385–90 (1987) (favoring mainstreaming and inclusion), *with* Dupre, *supra* note 106 (arguing against inclusion).

124 *See* 20 U.S.C. § 1400(b)(4–5)(D) (1994).

125 Terry J. Seligmann, *An Idea Schools Can Use: Lessons from Special Education Legislation*, 29 FORDHAM URBAN L.J. 759, 760 (2001).

special education population.[126] And the courts played a distinct role in generating progress.

2. *Racial Integration*

Far less successful, however, has been the federal courts' multi-decade effort to integrate public schools.[127] School enrollment patterns and residential patterns remain tightly linked in this country because the overwhelming majority of public school students attend neighborhood schools. Public schools therefore tend to reflect the neighborhoods in which they are located. Neighborhoods in most metropolitan areas remain remarkably segregated by income and by race.[128]

The numbers tell a startling story. Despite almost fifty years of a federal judicial effort to integrate public schools, most black and Hispanic students attend urban schools that are predominantly minority. In 1996–97, for example, almost 70% of black students and almost 75% of Hispanic students attended schools that were between half and entirely minority.[129] Perhaps even more striking, more than one-third of black and Hispanic students attended schools that were almost exclusively (more than 90%) minority.[130] The overwhelming majority of white students, in turn, attended schools that were predominantly white; indeed, the average white student attended a school that was 81.2% white.[131]

A focus on some large, urban districts reveals the intensity of racial and ethnic segregation in American public schools. In 1995, *all* of the students in East St. Louis, Illinois, and Compton, California, were minority.[132] Almost all — between 93% and 96% — of the students in Washington, D.C.; Hartford, Connecticut; New Orleans; San Antonio; Camden, New Jersey; Los Angeles; Oakland; and Atlanta were minorities.[133] In Richmond, Virginia, and Newark, New Jersey, more than 90%

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126 *See, e.g.*, Thomas Hehir & Sue Gamm, *Special Education: From Legalism to Collaboration*, *in* LAW AND SCHOOL REFORM: SIX STRATEGIES FOR PROMOTING EDUCATIONAL EQUITY 208–09 (Jay P. Heubert ed., 1999) (discussing empirical evidence on positive trends for special needs students); Seligmann, *supra* note 125, at 759 (discussing the positive impact of IDEA on special-needs students' education).

127 Here I distinguish the Court's successful effort to rid the nation of de jure school segregation from its less successful effort to integrate public schools or rid the nation of de facto school segregation.

128 *See generally* DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (1993).

129 GARY ORFIELD & JOHN T. YUN, HARV. UNIV., RESEGREGATION IN AMERICAN SCHOOLS tbl.9, *available at* http://www.law.harvard.edu/groups/civilrights/publications/resegregation99/resegregation99.html (June 1999).

130 *Id.*

131 *Id.* at 16, tbl.11.

132 Craig D. Jerald & Bridget K. Curran, *By the Numbers: The Urban Picture*, EDUC. WK., Jan. 8, 1998, at 56.

133 *Id.*

of the students were minority.[134] In Chicago, 1996–97 minority enrollment was just less than 90%, while in Detroit in the same year, close to 95% of the students were minorities.[135] In 1998 in New York City, meanwhile, almost 84% of the more than one million public school students were minorities.[136]

Commentators note that current student enrollment trends in larger public school systems temper any hope one might glean from school desegregation's results. Simply put, it is unlikely that school desegregation measures will improve by any meaningful degree in the future.[137] If anything, they are likely to worsen. By definition, school integration programs require a sufficient number of white students. And white students are becoming increasingly scarce in many public school systems, particularly urban ones, due to demographic reasons as well as "white flight."[138] As a result, an increasingly desegregated public school experience is less likely for many minority students, including Hispanics.[139] Again, and this point bears repeating, these dim prospects for integrated public school settings exist despite almost fifty years of judicial efforts to the contrary. Paradoxically, within the elementary and secondary education sector, private schools — especially inner-city parochial schools — are far more likely to be diverse in terms of student race and socioeconomic status.[140]

3. *Structural Barriers*

That courts sometimes struggle in the educational policy setting should not surprise. Courts are structurally ill-equipped to make the sometimes delicate policy tradeoffs incident to the school finance enterprise. Formal litigation, designed to resolve legal disputes in an adversarial manner, was never meant to serve as a dispassionate, thoughtful,

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134 *Id.*

135 ORFIELD & YUN, *supra* note 129, at tbl.4.

136 Jerald & Curran, *supra* note 132, at 56.

137 *See, e.g.*, DAVID J. ARMOR, FORCED JUSTICE: SCHOOL DESEGREGATION AND THE LAW 208 (1995).

138 How and to what degree white flight contributes to the present demographic profile of American public schools remains the subject of some debate. For a summary, see *id.* at 174–80.

139 James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043, 2093–96 (2002) (noting the evolving demographic profile of America's public schools and the particular implications for Hispanic students).

140 *See, e.g.*, Nicole Garnett, *The NAACP's Parent Trap*, WKLY. STANDARD, Dec. 30, 1996–Jan. 6, 1997, at 16–17 (reporting that "[m]any of the private and religious schools in inner-city Milwaukee are more integrated than their public counterparts, some of which are virtually all black"). *See* Paul E. Peterson & Jay P. Greene, *Race Relations & Central City Schools: It's Time for an Experiment with Vouchers*, BROOKINGS REV., Mar. 22, 1998, at 33 (reporting statistics that show that private schools are typically "less racially isolated than their public school peers").

deliberate forum to consider and weigh competing policy and funding objectives and goals.[141] The adversarial setting is a blunt instrument and ill-suited to generate the political consensus that is often necessary to carry out policy decisions. This is not to say that the legislative process is perfect. Clearly, it is not. Rather, the smaller point is that, at least at a general level, despite their defects, the political processes, legislative and, to a lesser extent, executive branches remain comparatively better structured than courts to set and implement general school finance policy.[142]

In this regard, New Jersey's three-decade-long school finance litigation spectacle provides one vivid example of the difficulties with translating judicial victories into educational victories, especially where strong political consensus is lacking.[143] On the one hand, litigants succeeded in raising New Jersey's per-pupil spending level to among the nation's highest.[144] On the other hand, despite increased spending, student achievement levels in New Jersey's urban districts continue to lag behind national averages.[145] Moreover, in response to the "forced exchange" between New Jersey taxpayers and schools, New Jersey voters in 1990 directed their anger over a tax increase, partly a result of the court decisions, toward Gov. Jim Florio by denying him a second term in office.[146]

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141 Even those who applaud litigation efforts may doubt the efficacy of such litigation in improving student achievement. *See, e.g.*, Tomiko Brown-Nagin, *"Broad Ownership" of the Public Schools: An Analysis of the "T-Formation" Process Model for Achieving Educational Adequacy and Its Implications for Contemporary School Reform Efforts*, 27 J.L. & EDUC. 343, 347 (1998).

142 For a comprehensive treatment of comparative institutional analysis, see NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY (1994).

143 *See* Abbot v. Burke, 643 A.2d 575 (N.J. 1994). For a discussion of the political history surrounding New Jersey's school finance litigation, see DOUGLAS S. REED, ON EQUAL TERMS: THE CONSTITUTIONAL POLITICS OF EDUCATIONAL OPPORTUNITY ch.7 (2001).

144 NAT'L CTR. FOR EDUC. STATISTICS, STATISTICS IN BRIEF, *supra* note 96, at tbl.5.

145 *See, e.g.*, NAT'L ASSESSMENT OF EDUC. PROGRESS, 1996 MATHEMATICS: STATE REPORT FOR NEW JERSEY (1997), tbl.2-6 (reporting that New Jersey fourth-graders attending central city school districts lag the nation in mathematics), *available at* http://nces.ed.gov/nationsreportcard/pdf/stt1996/97974NJ.pdf; 1994 NAEP Trial State Assessment (1995), tbl.2-2 (reporting the same for reading in 1994), *available at* http://nces.ed.gov/nationsreportcard/pdf/stt1994/s34.pdf. *See also* REED, *supra* note 143, at 82–88.

146 *See* Denise C. Morgan, *The New School Finance Litigation: Acknowledging That Race Discrimination in Public Education Is More Than Just a Tort*, 96 NW. U. L. REV. 99, 142 (2001) (asserting that "New Jerseyites vented their anger on their elected officials" in response to the tax increases needed to respond to the court decisions in the *Robinson* and *Abbott* cases). Morgan notes that "Jim Florio was the first (and still the only) governor in the modern history of New Jersey to be denied a second term." *Id.* at 142 n.214. *See also* David Kocieniewski, *Florio's Style, Like Tax Rise, Remains Issue in Senate Race*, N.Y. TIMES, May 24, 2000, at A1 (noting that even after ten years, Florio's decision to raise taxes necessary to fund the school finance court decisions remains "the single act that has most defined his career"); REED, *supra*

The school finance area in particular is fraught with peril for many. The overwhelming majority of judges (and their clerks) are not trained as policy analysts and thus possess little expertise in school finance minutiae. School finance litigation frequently forces judges into unfamiliar technical and policy terrain. For example, in the most recent chapter of the decade-long *DeRolph* litigation, the Ohio Supreme Court all but admitted that its understanding of the state's complicated school funding formula in a recent decision was flawed.[147]

Judges' struggles with the asserted relation between educational spending and student achievement also inform. Despite decades of attention, scholars continue to explore the precise relation between educational resources and achievement. Complicated debates continue to smolder in the academic literature.[148] Despite significant social scientific uncertainty surrounding the nature and contour of the relation between resources and achievement, many court opinions demonstrate judges' willingness to assume clarity where none exists, at least among social scientists.[149]

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note 143, at 86 (describing the "New Jersey taxpayer revolt of 1990 and the subsequent installation of a solid Republican majority in the legislature and a Republican governor").

147 The Ohio Supreme Court recently brought to a close the state's decade-long school finance litigation. In its third decision since the case was docketed in 1995, the court ruled, entered judgment, and ceded its jurisdiction in the matter. DeRolph v. State, 754 N.E.2d 1184 (Ohio 2001). However, soon afterward, the Ohio Supreme Court again engaged in the matter, referring lingering disputes to a master commissioner. DeRolph v. State, 758 N.E.2d 1113 (Ohio 2001). It is widely agreed that the basis of the lingering disputes pivots on flaws in the Ohio Supreme Court's analysis of the state's complex school funding formula. *See, e.g.*, *The Court Punts Again*, CINCINNATI POST, Nov. 21, 2001, at 16A.

148 *See Position Statement*, *supra* note 85, at 24; Hauser, *supra* note 85, at 27; Mehrens, *supra* note 85. For articles generally skeptical of a correlation between educational spending and educational opportunity, see also Eric A. Hanushek, *The Impact of Differential Expenditures on School Performance*, 18 EDUC. RESEARCHER 45 (1989); Eric A. Hanushek, *Throwing Money at Schools*, 1 J. POL'Y ANALYSIS & MGMT. 19 (1981); ALLAN R. ODDEN & LAWRENCE O. PICUS, SCHOOL FINANCE: A POLICY PERSPECTIVE 277–81 (1992); Eric A. Hanushek, *When School Finance "Reform" May Not Be Good Policy*, 28 HARV. J. ON LEGIS. 423 (1991); Eric A. Hanushek, *Money Might Matter Somewhere: A Response to Hedges, Laine, and Greenwald*, 23 EDUC. RESEARCHER 5 (1994); ERIC A. HANUSHEK, *supra* note 49; Clayton P. Gillette, *Opting Out of Public Provision*, 73 DENV. U. L. REV. 1185, 1213–16 (1996). For articles generally supportive of a correlation between expenditures and educational opportunity, see also Larry V. Hedges et al., *Does Money Matter? A Meta-Analysis of Studies of the Effects of Differential School Inputs on Student Outcomes*, 23 EDUC. RESEARCHER 5 (1994); Ronald F. Ferguson, *Paying for Public Education: New Evidence on How and Why Money Matters*, 28 HARV. J. ON LEGIS. 293 (1991); Christopher F. Edley Jr., *Lawyers and Education Reform*, 28 HARV. J. ON LEGIS. 457 (1991).

149 *See* Eric A. Hanushek, *Conclusions and Controversies About the Effectiveness of School Resources*, ECON. POL'Y REV., Mar. 1998, at 11, *available at* http://www.ny.frb.org/rmaghome/econ_pol/398ehan.pdf; ERIC A. HANUSHEK, DO HIGHER SALARIES BUY BETTER TEACHERS?, NAT'L BUREAU OF ECON. RES. (1999), *available at* http://papers.nber.org/papers/W7082. *Compare* Opinion of the Justices, 624 So. 2d 107, 140 (Ala. 1993) ("there is a positive correlation between spending on education and student performance in this state"), *with*

Another worrisome aspect of courts' involvement in education policymaking is their seeming inability to disengage from judicial supervision once begun. The nation's experience with school desegregation aptly illustrates this point. Although almost fifty years have passed since the *Brown* decision, federal courts remain embroiled in many desegregation plans.[150] As litigants continue to squabble about what it means for a school district to be "unitary" or "fully integrated," the direct and indirect costs associated with school desegregation plans mount. Analogous battles over school finance issues promise to become just as contentious and prolonged.

B. CHILLING EDUCATIONAL POLICY

Even if courts were suitably structured or judges well-trained or both, such judicial activity would nonetheless likely chill educational policymaking. The policymaking chill flows largely from the economic consequences triggered by legal judgments resulting from successful school finance lawsuits. When educational policymakers assess the costs and benefits of possible standards and assessments policies, the prospect that a policy initiative could enhance the prospects (and possible success) of a school finance lawsuit must now enter into the equation. The potential financial consequences of the lawsuits in New York and North Carolina to policymakers (and taxpayers) illustrates why a new variable must be included into cost-benefit analyses of education policies, at least standards and assessments policies.

When New York policymakers adopted the Regents Learning Standards and related exams in 1996 after more than a decade of development and debate,[151] it is safe to assume, they did not do so in an effort to increase the state's legal exposure to school finance litigation. However, as previously discussed, results from Regents Exams were used successfully by school finance litigants suing the state at the trial court, though not at the appellate court.[152] Whether the state will be ordered by a court to reform its school funding scheme in a manner that addresses the chal-

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City of Pawtucket v. Sundlun, 662 A.2d 40, 61 (R.I. 1995) ("money alone may never be sufficient to bring about 'learner outcomes' in all students").

150 Unfortunately, data describing the extent of the nation's current engagement are scarce. In 1990, the U.S. Department of Education's Office for Civil Rights reported that 256 school districts, with a total combined student enrollment exceeding two million, operated under court supervision in school desegregation cases brought by the Justice Department. *See* David S. Tatel, *Desegregation Versus School Reform: Resolving the Conflict*, 4 STAN. L. & POL'Y REV. 61, 63 n.20 (citing OFFICE FOR CIVIL RIGHTS, DEP'T OF EDUC., 1990 ELEMENTARY AND SECONDARY SCHOOL CIVIL RIGHTS SURVEY: COURT-ORDERED SCHOOL DISTRICTS (1990)).

151 Campaign for Fiscal Equity v. State, 719 N.Y.S.2d 475, 483 (N.Y. Sup. Ct. 2001).

152 *See supra* Subpart I.A.

lenges confronting New York City's public schools is not yet clear. Fiscal data hint at the magnitude of the issue that remains in litigation.

The amount of money at stake is significant, even by New York standards. According to the U.S. Department of Education, New York state spent $26.9 billion in 1989–99 on its public elementary and secondary schools.[153] In fiscal 1997, $3.7 billion (42.5%) of New York City's $8.7 billion total revenue for its public elementary and secondary students came from the state.[154]

While no firm consensus exists on how much more funding New York City schools needs to achieve constitutional adequacy, estimates include an additional $1 billion or more *per year*.[155] An additional $1 billion per year to New York City schools would amount to an immediate 11% boost to New York City's annual education revenue stream and 3.7% of the state's entire K–12 public education budget. Thus, from either an absolute or relative vantage point, the fiscal implications of the litigation are vast. If this estimate is even close to accurate and if the trial court decision is reinstated, what it means is that New York residents might need to generate an additional $1 billion of new education spending, redistribute existing state funds, or devise some combination of both.

Such significant financial consequences surely influence education policymakers as well as policy. To assume otherwise is to blink at reality. Policymakers contemplating developing and implementing standards and assessments must now ask themselves whether the real (or perceived) benefits to student performance and school accountability warrant the increase in legal exposure to successful school finance judgments that can fuel significant budgetary pressure. Rational assessments of otherwise desirable policies could plausibly change if the effective cost of such a policy reaches the levels suggested by recent school finance decisions in New York and North Carolina.

To be sure, whatever the ultimate cost of the *Campaign for Fiscal Equity* decision in New York, it will not likely dislodge New York policymakers from their reliance on the state's Regents Learning Standards and exams. After all, New York's standards and assessments have

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153 NAT'L CTR. FOR EDUC. STATISTICS, REVENUES AND EXPENDITURES FOR PUBLIC ELEMENTARY AND SECONDARY EDUCATION, *supra* note 96, at 9 tbl.3.

154 NAT'L CTR. FOR EDUC. STATISTICS, 100 LARGEST PUBLIC ELEMENTARY AND SECONDARY SCHOOL DISTRICTS, *supra* note 96, at 28 tbl.10. Also, preliminary budget figures for fiscal year 2003 paint a similar picture. According to the New York comptroller, New York City schools are projected to receive $12.7 billion in fiscal 2003. Of this amount, 44% (approximately $5.6 billion) will come from the state. *See* H. CARL MCCALL, STATUS REPORT: NEW YORK CITY BOARD OF EDUCATION (April 2002).

155 *See* Abby Goodnough, *State Asks Court to Overturn School Financing Ruling*, N.Y. TIMES, Oct. 26, 2001, at D3.

trenched deeply into that state's education fabric. Consequently, any policy chilling in New York flowing from the court decision will likely be indirect and long-term. However, more direct policy chilling is possible in states that have not yet progressed as far as New York and North Carolina on the standards and assessments front. After all, unlike New York and North Carolina, other states benefit from seeing the possibilities *ex ante* and are in a better position to adjust policy decisions in anticipation of possible litigation.

C. DEFLECTING ATTENTION AND RESPONSIBILITY

School finance litigation that leverages student standards and assessments deflects attention away from students, schools, and parents and toward school funding formulas, lawyers, and judges. The nagging gap between what citizens seek and what children (and schools) deliver in terms of academic achievement justifiably worries many people.[156] Indeed, concerns about the quality of education in this country are neither ill-founded nor lacking in empirical support. Evidence of problems with our educational system is well chronicled.[157] Many educational achievement indicators, viewed from a variety of vantage points, fuel increasingly somber assessments of the condition of American education.[158] Despite what many people — particularly parents — might want to believe, many well-intentioned efforts designed to reform education, partly by increasing student achievement, have largely failed to achieve their goals.[159] A mournful consensus has formed around two general observations: (1) American students' academic performance remains unsatisfactory and increasingly poor in comparison with many of the students' foreign counterparts, and (2) these trends have not improved over time despite numerous reform efforts.[160]

Although fingers continue to point at an array of potential sources of liability, eyes focus upon schools and, more specifically, their resources. To be sure, there is plenty of blame to go around for the disappointment, and it may well prove that school funding formulas contribute to some degree. That said, it is assuredly not the case that school finance

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156 *See generally* RAVITCH, *supra* note 78 (describing the constant drive for education reform that flows, in part, from unease with student achievement).

157 *See supra* Part II. For one summary, see generally NATION AT RISK, *supra* note 49. *See also* PETER W. COOKSON JR., SCHOOL CHOICE: THE STRUGGLE FOR THE SOUL OF AMERICAN EDUCATION 4 (1994) (describing an "educational malaise" affecting American education).

158 *See, e.g.*, Chester E. Finn Jr., *Introduction* to EDUCATION REFORM IN THE '90S xi (Chester E. Finn Jr. & Theodore Rebarber eds., 1992); Sam Peltzman, *The Political Economy of the Decline of American Public Education*, 36 J.L. & ECON. 331, 331 (1993); Lewis D. Solomon, *supra* note 49, at 886–87 (1993).

159 *See, e.g.*, Finn, *supra* note 158, at xi.

160 Peltzman, *supra* note 158, at 331.

and funding formulas are the sole cause of something as complex as underwhelming school and student performance.

Although most acknowledge the problems in American education and the need for increased accountability,[161] responsibility for the problems has proven difficult to establish. School finance litigation and the involvement of judges and courts buffer elected officials and lawmakers from responsibility for improving schools. Of course, there is no shortage of public officials who resent litigants' seeming "end-run" around the political process to the courtroom. By deploying standards and assessments in a manner that recasts school finance questions as legal questions, litigants seek to extract from courts and judges what they cannot get from legislators and governors. It is easy to understand lawmakers' angst. After all, successful school finance lawsuits threaten to cost state governments dearly and further erode lawmakers' discretion over education policymaking and budgets. Many governors and lawmakers are displeased to find that a school finance court decision has blown a multi-million-dollar (or more) hole in a state's carefully crafted, long-negotiated budget.

To be sure, some lawmakers might paradoxically welcome the judicial intrusion and seize upon a chance to point to judges and courts as the reasons for increased taxes necessary to comply with school finance decisions. Thus, some lawmakers — especially those who believe that schools merit more funding but are wary of a potential anti-tax backlash — relish judges taking the political heat, even at the cost of ceding some legislative authority. However, such a consequence raises the twin specters of an increasingly politicized judiciary and an increasingly legalized legislature. Both results place additional stress on traditional notions of separation of powers and the proper structure of government.

D. THE ADAPTABILITY OF VESTED INTERESTS

The deployment of the standards and assessments movement into school finance adequacy litigation illustrates how organized interest groups vested in the status quo can nimbly adapt to and maneuver within an ever-changing educational policy milieu. It also illustrates how litigants can successfully deploy policies and laws in a manner that generates unexpected results. The carcasses of past reform endeavors co-opted by various interest groups litter the education policy landscape.[162] Such a landscape is a testament to organized interest groups' acute abil-

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161 *See supra* Subpart II.B. *See also* Hanushek & Raymond, *supra* note 1, at 365 (discussing the increasing salience of accountability in education reform).

162 For one general history of education as well as efforts at education reform, see RAVITCH, *supra* note 78.

ity to transform well-meaning reforms into vehicles for little more than additional resources and control.

In seeking to understand the educational establishment's evolving posture toward standards and assessments, institutional self-interest and incentive structures explain a lot. Given the potential exposure, the educational establishment's initial resistance to the development and implementation of standards and assessments was predictable. Less so was its ability to see how standards and assessments might be used in a manner to enhance a lawsuit's prospect for extracting additional funding. Bolder still is how it seeks to transform classroom failure into courtroom success and additional taxpayer dollars. Education is a highly labor-intensive activity, and, as a result, labor costs consume a substantial portion of school district budgets.[163] Thus, victories in court for increased educational spending invariably inure to the benefit of the educational establishment, especially school administrators and teacher unions.

E. WHY THESE CONSEQUENCES WILL NOT GO AWAY ANYTIME SOON

The specter of merging standards and assessments and school finance litigation has arrived.[164] Many states have developed and implemented various standards and assessments programs. Recent lawsuits in New York and North Carolina illustrate how such a merger can be accomplished.[165] Despite structural problems flowing from retrofitting policy challenges into lawsuits, the litigation in New York and North Carolina provides one blueprint for future litigants.

Those seeking more funding for schools struggling to deliver acceptable educational services find judges far more receptive than lawmakers to their claims. Reflexive pleas to lawmakers for increased resources are beginning to wear thin on legislators and governors attuned to a constituency anxious to see some reliable, clear returns on their investment. Taxpayer revolts flare up with increasing regularity across the country. Big-city school districts such as New York and Chicago do not

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163 In 1998–99, instruction costs — which are largely, though not exclusively, labor-driven — accounted for more than 61% of current expenditures and 52% of total U.S. public elementary and secondary school spending. *See* NAT'L CTR. FOR EDUC. STATISTICS, DIGEST OF EDUCATION STATISTICS, *supra* note 69, at tbl.162 (national data on total expenditures for public elementary and secondary schools, by function). According to the American Federation of Teachers, one of the nation's leading teacher unions, using slightly different data, the percentage of education expenditures devoted exclusively to teachers nationwide in 1998–99 was 38%. *See* AM FED'N OF TEACHERS, DEP'T OF RESEARCH (1999) tbl.I-8, *available at* http://aft.org/research/survey99/tables/tableI-8.html.

164 For one prediction of this trend, see Heise, *supra* note 46, at 60–61 (describing the potential interaction between school standards and assessments and school finance litigation).

165 Campaign for Fiscal Equity v. State, 719 N.Y.S.2d 475 (N.Y. Sup. Ct. 2001), *rev'd*, 744 N.Y.S.2d 130 (N.Y. App. Div. 2002); Hoke County Bd. of Educ. v. State, 2000 WL 1639686 (N.C. Super. Oct. 12, 2000).

dare try to increase educational spending through appeals to the ballot box. Instead, they must turn to the more expensive capital markets. In such a political environment, it is understandable why those seeking additional resources for public schools are eager to stay clear of legislatures and the political processes and instead to embrace courts and lawsuits. Courts provide an alternative to increasingly skeptical lawmakers and a more demanding political "marketplace."

CONCLUSION

Despite notable successes, those committed to a judicial strategy for educational policy change should recall a history replete with profound resistance by numerous actors and institutions to judicial intrusions into core educational policymaking. Just as the education establishment has demonstrated, once again, its instincts for self-preservation and further entrenchment within an ever-changing policy environment, competing institutions are capable of similar adaptability.

The taxpayer revolt in California, partly prompted by that state supreme court's school finance decision, illustrates how resistance to court decisions can severely blunt the efficacy of a judicial strategy.[166] The California tax revolt reveals problems that arise when property tax-paying citizens — principally middle- and upper-income families largely satisfied with their educational situations — confront overly ambitious judicial activity seeking to influence school funding policy.[167] Before the successful school finance lawsuit, per-pupil spending in California was among the nation's highest. After the *Serrano* decision, per-pupil spending in California fell to among the nation's lowest. A judicial strategy that cleverly seeks to leverage educational standards and assessments to bolster school finance lawsuits presents its own set of risks.

Of course, even when political consensus to help schools further exists, adequate resources must also exist. Now that national defense and fighting terrorism have displaced (however temporarily) education reform as leading governmental priorities and economic growth has stagnated, how schools might fare in the annual competition for shrinking state budgets is anyone's guess.[168]

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166 Serrano v. Priest, 557 P.2d 929 (Cal. 1976).

167 *See, e.g.*, Fabio Silva & Jon Sonstelie, *Did* Serrano *Cause a Decline in School Spending?*, 48 NAT'L TAX J. 199 (1995); William A. Fischel, *Did* Serrano *Cause Proposition 13?*, 42 NAT'L TAX J. 465 (1989). *But see* ELISABETH R. GERBER ET AL., STEALING THE INITIATIVE: HOW STATE GOVERNMENT RESPONDS TO DIRECT DEMOCRACY 86–108 (2000) (challenging the thesis that *Serrano* caused Proposition 13).

168 At this point it is no doubt futile even to estimate the magnitude of the direct and indirect costs to New York state flowing from the attack of September 11, 2001. Obviously, the total cost will be nothing short of extraordinary. Equally clear is that the impact on New York's economy is severe. The severity was illustrated by Gov. George Pataki's request for an

By deflecting attention about student achievement gaps — exposed in part as a result of successful standards and assessments reforms — away from students and toward school resources, those defending the status quo seek to leverage one reform effort to fuel another. To the extent these battles find a home in the nation's courts, they promise to be contentious and protracted. Although a healthy portion of these debates remains in legislative and executive areas, a steady migration to the courts is under way. If history is any guide, once school finance policy disputes entrench in the courts, they will remain in the judiciary for decades to come. Citizens, educators, and lawmakers will find it difficult to regain control over school finance issues and their important policy consequences.

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additional $54 billion in federal funds for New York. Greg Hitt & Jim VandeHei, *New York Starts to Meet Resistance on Requests for Assistance Money from White House, Congress*, WALL ST. J., Oct. 12, 2001, at A16. What is also becoming clear is that the unanticipated drain of this magnitude on state resources, combined with persisting regional economic stagnation, will assuredly implicate state education spending. *See, e.g.*, Sandra Lockwood, *Governor's Budget Would Force School District to Hike Taxes*, POST-STANDARD (Syracuse, N.Y.), Mar. 17, 2002, at D3 (discussing implications for education funding).