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## The State Judiciary's Role in Fulfilling *Brown's* Promise

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*United States Court of Appeals for the Third Circuit*

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# THE STATE JUDICIARY’S ROLE IN FULFILLING *BROWN’S* PROMISE

Quentin A. Palfrey\*

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*The nation is hardly 'indivisible' where education is concerned. It is at least two nations, quite methodically divided, with . . . liberty for some . . . and justice . . . only for the kids whose parents can afford to purchase it.*<sup>1</sup>

## INTRODUCTION

Forty-eight years after *Brown v. Board of Education of Topeka*<sup>2</sup> and twenty-nine years after *San Antonio Independent School District v. Rodriguez*,<sup>3</sup> American schools remain racially separate and radically unequal in both per pupil expenditures and student performance. In spite of efforts to equalize per pupil spending through state aid formulas, significant disparities exist within most states and among states.<sup>4</sup> Although *de jure* school segregation is illegal, *de facto* racial segregation actually increased during the 1990s.<sup>5</sup> In 1998, 70% of African-American children and more than one third of Latino children attended predominantly minority schools.<sup>6</sup>

Our legal regime underlies these shameful inequalities and offers great promise for remedying them. Plaintiffs in many states have convinced state courts to declare that state legislatures have failed in their state constitutional obligations to distribute educational resources equally or to provide meaningfully adequate educational opportunities to all students. Sadly, even where legislatures have diligently and swiftly acted to implement reform efforts, courtroom victories have often not translated into success in the classroom for children in under-resourced and under-performing schools.

Applying the lessons of the past five decades of education reform litigation, this Article seeks to sketch an appropriate judicial role in the remedial phase of state constitutional litigation. By ensuring the proper roles for a broad array of local and state actors, courts can create a framework for education reform that maximizes the possibility that successful litigation efforts will eventually lead to adequate educational opportunities for all children.

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1. JONATHAN KOZOL, *Savage Inequalities: Children in American Schools* 212 (1991).

2. 347 U.S. 483 (1954); *see also* *Bolling v. Sharpe*, 347 U.S. 497 (1954) (holding that racial segregation in the Washington, D.C. public schools violated the due process clause of the Fifth Amendment).

3. 411 U.S. 1 (1973) (holding that the Texas school financing system, based on local property taxes, does not violate the U.S. Constitution).

4. *See infra* notes 46–50 and accompanying text.

5. Gary Orfield, The Civil Rights Project, *Schools More Separate: Consequences of a Decade of Resegregation 2* (July, 2001), available at [http://www.civilrightsproject.harvard.edu/research/deseg/Schools\\_More\\_Separate.pdf](http://www.civilrightsproject.harvard.edu/research/deseg/Schools_More_Separate.pdf) (last visited December 4, 2002) [hereinafter Orfield, *Schools More Separate*] (on file with the Michigan Journal of Race & Law).

6. *Id.* at 32.

After a brief overview of school finance litigation since *Rodriguez* and school desegregation cases since *Brown*, Part I argues that the “adequacy” model of reform addresses many of the underlying concerns of the equity model<sup>7</sup> without sharing its methodological and strategic shortcomings. Additionally, the adequacy model creates the potential for a much more dynamic and multifaceted remedial order than courts generally issue in successful equity suits. Furthermore, this Part contends that courts should view racial integration as an important component of an adequate education. School reform must not limit itself to *Plessy v. Ferguson*'s<sup>8</sup> flawed conception of a racially-divided America.

Part II focuses in more detail on *Campaign for Fiscal Equity v. State*<sup>9</sup> (“CFE”). On January 9, 2001, a state trial court held that the New York education finance system violated the state constitution and had “an adverse and disparate impact” on minority students in violation of the implementing regulations<sup>10</sup> of Title VI of the Civil Rights Act of 1964.<sup>11</sup> However, the Appellate Division reversed on June 25, 2002 and held that the state had not failed in its constitutional obligations to New York City schools and that a recent U.S. Supreme Court case had overruled the trial court on the Title VI claim. The plaintiffs are appealing to the New York Court of Appeals.

Once a court declares that a school system violates a state constitution, it faces the difficult task of structuring a remedy. Parts III–VI wade into the murky area of translating success in the courtroom into success in the classroom and make a number of recommendations for drafting a remedial decree in states like New York, should the Court of Appeals

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7. See generally Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101, 101 (1995) (arguing that “poorer school systems and advocates of expanded educational funding might be better served by leaving equality arguments behind, in favor of a strategy relying instead on adequacy arguments.”) [hereinafter Enrich, *Leaving Equality Behind*]; but see Erin E. Buzuvis, “A” for Effort: Evaluating Recent State Education Reform in Response to Judicial Demands for Equity and Adequacy, 86 CORNELL L. REV. 644, 689 (2001) [hereinafter Buzuvis, “A” for Effort] (arguing that “regardless of the catalyst for reform, education reform can and should include elements of both equity and adequacy.”).

8. 163 U.S. 537 (1896) (sustaining a Louisiana law requiring separate but equal accommodations on railroads). “The most common instance of this is connected with the establishment of separate schools for white and colored children, which have been held to be a valid exercise of legislative power even by courts of States where the political rights of the colored race have been longest and most earnestly enforced.” *Id.* at 544.

9. 719 N.Y.S.2d 475 (N.Y. Sup. Ct. 2001); 744 N.Y.S.2d 130 (N.Y. App. Div. June 25, 2002). In New York, the Supreme Court is a trial court, the Supreme Court Appellate Division is the intermediate appellate court, and the highest court is the Court of Appeals. To avoid confusion, this Article will generally refer to the Supreme Court as the “trial court” and the Supreme Court Appellate Division as the “Appellate Division.”

10. 34 C.F.R. § 100.3 (2002).

11. 42 U.S.C. § 2000d (2002).

conclude that a constitutional violation exists.<sup>12</sup> On the one hand, unequal school financing systems represent a failure of majoritarianism and a concrete demonstration of the wisdom of the framers' vision of a tripartite system of government.<sup>13</sup> The judiciary must protect fundamental values enshrined in constitutional norms, especially when democratic institutions fail to provide them over time. On the other hand, courts are poorly situated to make budgetary decisions and to determine what reform measures will work best for individual school districts.

Part III argues that education reform that is implemented after a finding that a state has violated a state constitutional duty should: (1) equalize funding to the extent necessary to guarantee certain minimum necessary inputs such as qualified teachers, small class sizes, adequate physical infrastructure, and other instrumentalities of learning; and (2) take seriously *Brown's* proclamation that racial separation is inherently unequal.

Part IV encourages courts to structure education reform remedies that: (1) envision a firm but limited judicial role to protect the constitutional rights of minorities from majoritarian failures without exceeding the courts' limited expertise and authority; (2) define adequacy specifically enough to minimize inter-branch tension and provide political cover for legislators who must make difficult decisions to implement education reform; and (3) prioritize collaborative decision-making involving courts, legislatures, state agencies, local school boards, unions, parents, local businesses, and civic organizations, partially through a process analogous to negotiated rulemaking in the administrative law context.

Part V borrows several elements from environmental law and proposes a method for implementing education reform that makes state legislatures ultimately accountable for educational outcomes. By analogy to the Clean Air Act, Part V suggests that courts should be goal-setters, defining the contours of the constitutional requirement—based on inputs and outcomes—and monitoring the state legislatures' efforts in meeting these requirements. After a roadmap is crafted and approved, legislatures should delegate much of the task of implementation to local decision makers. School districts would be divided into attainment and non-attainment districts and compliance would be assessed district-by-district based on whether the measures utilized were realistically calculated to address the constitutional inadequacy. Legislatures would remain ultimately responsible for fulfilling their constitutional duties—as measured by inputs and outcomes.

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12. See Molly S. McUsic, *Law's Role in the Distribution of Education: The Promises & Pitfalls of School Finance Litigation*, in *LAW & SCHOOL REFORM: SIX STRATEGIES FOR PROMOTING EDUCATIONAL EQUITY* 88, 107 (Jay P. Heubert ed., 1999) [hereinafter McUsic, *Law's Role*] (arguing that "winning in the courtroom is not the same as winning in the classroom.").

13. See *infra* notes 323–27 and accompanying text.

Finally, Part VI explores some of the daunting challenges faced by education reform efforts and suggests that rigid *ex ante* injunctions may fail to account for the wide range of obstacles faced by school districts. Flexibility, collaboration, and a holistic approach to education reform may be necessary to remedy inadequate schools because children attending under-resourced and under-performing schools confront other daunting educational impediments besides large class sizes, crumbling school buildings, and schools' limited resources to purchase necessary school supplies and to hire and train teachers. Illiteracy, concentrated poverty, unemployment, and racial segregation are interrelated cyclical and multigenerational phenomena.

In America today, 20% of children are born into poverty, 26% percent live with parents who do not have full-time, year-round jobs, and 22% have mothers with less than twelve years of education.<sup>14</sup> Children are less likely to learn to read when the adults in their households cannot read.<sup>15</sup> Education reform must consider the fact that parents are the first teachers of children in a nation where ninety million adults have limited literacy skills.<sup>16</sup> In order to make steady progress towards outcome-based goals, courts may be more successful if they encourage innovation beyond traditional education finance litigation remedies and allow state legislatures and school districts to consider K-12 education alongside other efforts including family literacy, early education, and housing policy. Courts should therefore structure remedies that are flexible enough to allow state and local actors to consider the unique problems created by concentrated poverty and other structural obstacles.<sup>17</sup>

#### PART I.

The courts have been important battlegrounds in the struggle for education reform. Employing a range of theories, plaintiffs have

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14. See National Institute for Literacy, *Fast Facts on Literacy*, at [http://novel.nifl.gov/nifl/facts/facts\\_overview.html](http://novel.nifl.gov/nifl/facts/facts_overview.html) (last visited March 28, 2002) [hereinafter *Fast Facts*] (on file with the Michigan Journal of Race & Law).

15. Roger G. Schwartz, *Comment: Why Johnny's Parents Can't Read . . . Or Vote, Or Work, Or Participate: The National Literacy Crisis and a Proposal to Integrate Illiterate Adults into Mainstream American Society*, 4 U. CHI. L. SCH. ROUNDTABLE 183, 192 (1997) [hereinafter Schwartz, *Why Johnny's Parents Can't Read*].

16. According to the 1992 National Adult Literacy Survey ("NALS"), 40-44 million adult Americans have the lowest level of prose, document, and qualitative literacy skills ("NALS Level 1"). Some, but not all, of these adults can total an entry on a deposit slip, locate the time and place of a meeting on a form, and identify specific pieces of information in news articles. Approximately 50 million adult Americans performed at a NALS Level 2; these adults could calculate the cost of a purchase, determine the difference between two items, locate a particular intersection on a street map, and enter background information on a simple form. See *Fast Facts*, *supra* note 14.

17. See generally *infra* notes 395-412 and accompanying text.

challenged state education systems in both state and federal courts on the basis of racial segregation, funding disparities, and overall inadequacy of schooling. The results have been mixed. After a landmark success in *Brown*, plaintiffs seeking meaningful racial integration struggled to force compliance with the Supreme Court's ruling<sup>18</sup> and have been largely unsuccessful in arguing that states and localities have an obligation to remedy *de facto* rather than *de jure* segregation.<sup>19</sup> Similarly, plaintiffs arguing that radical inequalities in per pupil expenditures violated either the federal or the state constitutions faced a series of legal, theoretical, and practical obstacles that prevented them from structuring remedial orders that meaningfully transformed public school systems.<sup>20</sup>

Since 1989, however, a legal theory has emerged that has the potential to address both the effects of radical funding disparities and potentially the shameful *de facto* racial segregation of states' public school systems. By arguing that state constitutions create an *affirmative duty* for the legislature to provide every child with an adequate education, plaintiffs' lawyers have convinced several state courts that educational systems are constitutionally inadequate. In practice, even the most dramatic victories under the adequacy theory have not translated immediately into integrated and adequate schools across the state. However, as a theoretical model, the adequacy theory holds great potential for overcoming challenges stemming from underfunding, racial segregation, and cyclical poverty.

After a brief overview of the history of education finance litigation and litigation seeking to force racial integration of schools, this Part argues that the adequacy theory is conceptually preferable to the equity theory and that constitutional definitions of adequacy must include an entitlement to meaningful *de facto* racial integration of schools.

### A. Disparities in Funding

States and localities are the primary providers of public education in the United States. Every state constitution contains an education clause requiring the state legislature to establish a system of free public schools.<sup>21</sup>

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18. See *infra* notes 218–26 and accompanying text.

19. See *infra* notes 227–36 and accompanying text. But see *Sheff v. O'Neill*, 678 A.2d 1267, 1282–85 (Conn. 1996) (holding that failure to remedy *de facto* segregation of a school system violated an affirmative duty under Connecticut's constitution).

20. See *infra* notes 137–76 and accompanying text.

21. There is some debate over whether Mississippi's constitution requires Mississippi to establish public schools. See Molly McUsic, *The Use of Education Clauses in School Finance Reform Litigation*, 28 HARV. J. ON LEGIS. 307, 311 n.5 (1991) [hereinafter *Use of Education Clauses*]. Mississippi's constitution states that “[t]he legislature shall, by general law, provide for the establishment, maintenance, and support of free public schools upon such conditions and limitations as the Legislature may prescribe.” MISS. CONST. art.VIII, § 201.

Outside of the areas of special education and bilingual education, states are responsible for almost all aspects of K-12 public education.<sup>22</sup> The federal government provides only about 6.8% of funding for public education in the United States.<sup>23</sup>

States in turn delegate much of the decision-making authority to local school districts.<sup>24</sup> Most states rely primarily on local property taxes<sup>25</sup> as the main revenue source for funding public schools.<sup>26</sup> Once the property value is assessed,<sup>27</sup> the school board must adopt a budget. The amount to be raised by local property taxes equals the projected expenditures of the school district minus contributions from other sources.<sup>28</sup> To get the property tax rate to be used to fund local schools, one must divide the amount to be raised by local property taxes by the assessed valuation of the property in the district.<sup>29</sup> This is sometimes known as the district's "willingness" or "effort" to support its schools.<sup>30</sup> The standard way of comparing the ability of school districts to raise revenues is to divide the

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22. U.S. CONST., amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."); McUsic, *Law's Role*, *supra* note 12, at 97 ("Outside the federal requirements for special education and compensatory aid, the basic legal structure of schooling in the United States . . . is left to the states.").

23. Since compulsory legal education was established in the 1800s, responsibility for financing and structuring public schools has been the states' responsibility. See McUsic, *Law's Role*, *supra* note 12, at 93-94. "In the 1998-99 school year, federal funding was a mere 6.8% of total public secondary school funding." U.S. CENSUS BUREAU, STATISTICAL TABLES - PUBLIC ELEMENTARY-SECONDARY/FINANCES: 1998-99, p.1, table 1, available at <http://www.census.gov/govs/school/99tables.pdf> (last visited Dec. 4, 2002) [hereinafter U.S. CENSUS BUREAU, STATISTICAL TABLES] (on file with the Michigan Journal of Race & Law).

24. See R. CRAIG WOOD & DAVID C. THOMPSON, EDUCATIONAL FINANCE LAW: CONSTITUTIONAL CHALLENGES TO STATE AID PLANS-AN ANALYSIS OF STRATEGIES 11 (2nd ed. 1996) [hereinafter WOOD & THOMPSON, EDUCATIONAL FINANCE LAW]. Hawaii is the only state that does not have geographically-delineated school districts as a basis for raising funds. Joseph S. Patt, *School Finance Battles: Survey Says? It's All Just a Change in Attitudes*, 34 HARV. C.R.-C.L. L. REV. 547, 551 n.20 (1999) [hereinafter Patt, *School Finance Battles*].

25. For a discussion of property taxes, see generally WALTER I. GARMS, J.W. GUTHRIE, & L.C. PIERCE, SCHOOL FINANCE: THE ECONOMICS AND POLITICS OF PUBLIC EDUCATION 132-48 (1978).

26. MARK G. YUDOF ET AL., EDUCATION POLICY & THE LAW 768 (4th ed. 2002) [hereinafter Yudof, EDUCATION POLICY & THE LAW IV]. Hawaii and Michigan are two exceptions. See Michael Heise, *State Constitutions, School Finance Litigation, & the "Third Wave": From Equity to Adequacy*, 68 TEMPLE L. REV. 1151, 1151 n.6 (1995) [hereinafter Heise, *State Constitutions*].

27. Assessment of property values poses difficult technical and political problems. MARK G. YUDOF ET AL., EDUCATION POLICY & THE LAW 592-94 (3d ed. 1992). It is often difficult to assess the value of different types of property. Politically, there is significant pressure to keep assessed values down. *Id.* at 592.

28. *Id.*

29. *Id.*

30. *Id.* at 593.



total value of the district's assessed property by the number of pupils in the district.<sup>31</sup> The amount of revenue per pupil can be determined by multiplying the district's "effort" by its assessed valuation per pupil.<sup>32</sup>

Variations in per pupil taxable property base from one district to the next often lead to large per pupil spending inequalities.<sup>33</sup> For example, disparities in assessed valuation per pupil between the wealthiest and the poorest districts in Arizona are greater than 7,000 to 1.<sup>34</sup> No state draws the boundaries of its districts to equalize the value of the property base from which these taxes are raised.<sup>35</sup> Districts are therefore able to raise differing amounts of money for their schools.<sup>36</sup> Even at high tax rates, districts with low property values cannot adequately fund their schools, whereas wealthy districts can raise large amounts of funding even at lower tax rates.<sup>37</sup>

In addition to disparities in property wealth per pupil, *inter*-district disparities also result from differences in tax rates and property assessment practices.<sup>38</sup> For example, a high ratio of land value to school-aged children can be maintained through exclusionary zoning and other tactics.<sup>39</sup> As Professor Molly McUsic explains, "[p]roviding public education through a geographically based structure . . . means that the inequities in residential housing are reflected in schools."<sup>40</sup> Other factors, such as inflation, expanding enrollments, new state and federal mandates, and higher

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31. *Id.* at 592–93.

32. *Id.* at 593.

33. *Id.*

34. See *Roosevelt Elementary Sch. Dist. v. Bishop*, 877 P.2d 806, 809 (Ariz. 1994).

35. McUsic, *Law's Role*, *supra* note 12, at 98.

36. *Id.*

37. *Id.*; see also Erin E. Kelly, Note: *All Students Are Not Created Equal: the Inequitable Combination of Property-Tax-Based School Finance Systems and Local Control*, 45 DUKE L.J. 397, 397 (1995) [hereinafter Kelly, *All Students Are Not Created Equal*] (explaining that "[w]ealthy school districts raise a large amount of money from low tax rates, whereas poor school districts levy a much higher tax rate but generate less revenue. Thus, these school finance schemes enable wealthy students to attain educational luxuries while poor districts lack basic necessities.") (citations omitted).

38. Yudof, *EDUCATION POLICY & THE LAW III*, *supra* note 27, at 593.

39. McUsic, *Law's Role*, *supra* note 12, at 98.

40. *Id.*; cf. DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 83 (1993) [hereinafter MASSEY & DENTON, *AMERICAN APARTHEID*] (explaining that "[t]he spatial isolation of black Americans was achieved by a conjunction of racist attitudes, private behaviors, and institutional practices that disenfranchised blacks from urban housing markets and led to the creation of the ghetto. Discrimination in employment exacerbated black poverty and limited the economic potential for integration, and black residential mobility was systematically blocked by pervasive discrimination and White avoidance of neighborhoods containing blacks.") (citations omitted).

spending by rich districts also exacerbate the difference between rich and poor school districts.<sup>41</sup>

All state governments attempt to address funding disparities through supplemental appropriations to local school districts.<sup>42</sup> In no state does the supplemental funding actually eliminate funding disparities.<sup>43</sup> Although the ratio of local to state contribution varies greatly between states,<sup>44</sup> the reliance on local property tax seems to be rising relative to the state contribution.<sup>45</sup>

Despite efforts to equalize funding disparities through state aid formulas, significant disparities exist in most states. Per pupil expenditures in Texas range from \$2,112 to \$19,333.<sup>46</sup> Some Vermont schools spend 160% of what others spend.<sup>47</sup> Public schools on Long Island spend almost twice as much per pupil as schools in New York City, despite much lower costs.<sup>48</sup> In addition to these *intrastate* disparities, *interstate* disparities are also stark.<sup>49</sup> For example, New Jersey spends on average \$10,230 per pupil each year, whereas the average in Utah is just \$4,169.<sup>50</sup> Of course, differences in expenses from one location to the next limit the usefulness of direct comparisons of per pupil expenditures. However, the mere scope of the disparities has played an important role in litigation and reform efforts.

The federal government, through Title I of the Elementary and Secondary Education Act,<sup>51</sup> provides grants for educational and secondary school programs for children of low-income families. However, the dollar amounts are low relative to the overall costs of public education and funding tends to be equal across states and districts rather than equalizing.<sup>52</sup>

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41. Mark Yudof, *School Finance Reform in Texas: The Edgewood Saga*, 28 HARV. J. ON LEGIS. 499, 499 (1991).

42. No state relies exclusively on local property taxes to fund its schools. Patt, *School Finance Battles*, *supra* note 24, at 551.

43. McUsic, *Law's Role*, *supra* note 12, at 99.

44. Yudof, EDUCATION POLICY & THE LAW III, *supra* note 27, at 592.

45. *Id.*

46. See McUsic, *Law's Role*, *supra* note 12, at 89.

47. *Id.* at 88.

48. See Campaign for Fiscal Equality, *The State of Learning: a Report from the Regents & State Education Department to the Governor & the Legislature* (June, 2001) cited at [www.cfequity.org](http://www.cfequity.org) (last visited Feb. 21, 2002).

49. This Article will focus on intrastate disparities, segregation, and remedies rather than interstate issues. Also beyond the scope of this Article are: (1) questions regarding the advisability of alternative proposals for reforming public education, such as vouchers, charter schools, and tuition tax credits; and (2) the question of whether the American public school system, as a whole, is "failing."

50. See U.S. CENSUS BUREAU, STATISTICAL TABLES, *supra* note 23, p. 10, table 8.

51. 20 U.S.C. §§ 6301-8962 (1994).

52. See McUsic, *Law's Role*, *supra* note 12, at 94 (explaining that 90% of school districts received funding in 1993).

Critics have suggested that Title I's complicated funding scheme sometimes gives less funding to the neediest schools than other schools receive, though revisions in 1994 have mitigated this concern somewhat.<sup>53</sup>

In important ways, federal law may actually exacerbate funding disparities. Title VI of the Civil Rights Act<sup>54</sup> and the Equal Education Opportunities Act<sup>55</sup> require that local schools provide certain services for bilingual education students. Similarly, the Individuals with Disabilities Education Act ("IDEA")<sup>56</sup> requires that local schools provide students with a free, appropriate public education ("FAPE"). Although Congress provides some money for these purposes, the federal funding appropriated is not sufficient to provide the services Congress demands.<sup>57</sup> Thus, it is an unfunded mandate<sup>58</sup>—local school systems must make up the difference.

As an empirical matter, special education students and bilingual education students are disproportionately located in poor neighborhoods.<sup>59</sup> Thus, these unfunded mandates affect poor schools more than rich schools.<sup>60</sup> Even if the state funding formulas provided precisely equal funding for students across school districts, the spending levels for non-special education students in poor districts would be lower than the spending levels for non-special education students in rich districts.<sup>61</sup>

There is vigorous debate about the effect of educational spending on educational opportunity. Some scholars, such as Professors James Coleman and Eric Hanushek, contend that money has little effect.<sup>62</sup> In contrast, Professor Ronald Ferguson argues that after controlling for a number of family and community background factors, more literate teachers, fewer large classes, and more experienced teachers predict better test scores

53. See *id.*

54. 42 U.S.C. § 2000d (2002).

55. 20 U.S.C. §§ 1701 *et seq.* (1994).

56. 20 U.S.C. §§ 1400–1490 (1994).

57. McUsic, *Law's Role*, *supra* note 12, at 96–97.

58. *Id.* at 96.

59. See Paul A. Jargowsky & Mary J. Bane, *Ghetto Poverty in the United States, 1970–1980 in THE URBAN UNDERCLASS* 235–53 (Christopher Jencks & Paul Peterson eds., 1991) [hereinafter Jargowsky & Bane, *Ghetto Poverty*].

60. McUsic, *Law's Role*, *supra* note 12, at 97.

61. *Id.* at 96 (arguing that the IDEA “practically assures that a nonspecial education student in a state with a high population of special education students will have more education funding diverted from his or her instruction than will a nonspecial education student in a state with a low population of special education students”).

62. See, e.g., JAMES S. COLEMAN ET AL., *EQUALITY OF EDUCATIONAL OPPORTUNITY* (1966) (arguing that school resources have minimal effect on student achievement); Eric A. Hanushek, *When School Finance “Reform” May Not Be Good Policy*, 28 HARV. J. ON LEGIS. 423, 425 (1991) (arguing that “[t]here is no systematic relationship between school expenditures and student performance”) (emphasis in original).

among students.<sup>63</sup> Professor Ferguson further contends that equal salaries will not attract equally qualified teachers to dissimilar districts and that states should pay higher salaries to attract a proportionate share of the best teachers to poorer districts.<sup>64</sup>

To the extent that disparities in funding levels are reflected in other factors, such as “class size, teacher salaries, libraries, sports equipment, and guidance counseling”,<sup>65</sup> inadequate funding causes serious problems for poor schools. Additionally, some school districts cannot even afford structurally safe buildings.<sup>66</sup> Common sense suggests that money is not irrelevant to educational opportunity.<sup>67</sup> As one scholar has argued, “one cannot reasonably believe that children in poor districts have the same educational opportunities as children in rich districts.”<sup>68</sup> African-American and Latino children are much more likely to drop out of high school than White children.<sup>69</sup> Poor children do not read as well as wealthy children.<sup>70</sup>

### B. *From Equity to Adequacy*

In light of these disturbing disparities in resources and outcomes, many education reform advocates have sought to force changes in the school financing system through the court system. Roughly speaking, litigators have challenged systems of school finance from two perspectives: “equity” and “adequacy.” Historically, equity claims predominated at the federal and state levels in the 1970s and 1980s, and adequacy claims have emerged as the dominant litigation and reform strategy over the last thirteen years. Following William Thro, this Article divides the last twenty-nine years of school finance reform cases into three waves.<sup>71</sup>

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63. Ronald F. Ferguson, *Paying for Public Education: New Evidence on How and Why Money Matters*, 28 HARV. J. ON LEGIS. 465, 488 (1991) [hereinafter Ferguson, *Paying for Public Education*].

64. *Id.* at 489.

65. Julie Zwibelman, Note, *Broadening the Scope of School Finance and Resource Comparability Litigation*, 36 HARV. C.R.-C.L. L. REV. 527, 528 (2001) [hereinafter Zwibelman, *Broadening the Scope*].

66. See, e.g., *DeRolph v. State*, 677 N.E.2d 733, 762–68 (Ohio 1997).

67. See *Campaign for Fiscal Equity*, 719 N.Y.S.2d at 525 (holding that “increased educational resources, if properly deployed, can have a significant and lasting effect on student performance”).

68. Patt, *School Finance Battles*, *supra* note 24, at 552 n.31.

69. McUsic, *Law's Role*, *supra* note 12, at 89.

70. *Id.*

71. William E. Thro, *The Third Wave: The Impact of the Montana, Kentucky, and Texas Decisions on the Future of Public School Finance Reform Litigation*, 19 J.L. & EDUC. 219 (1990); see also Thro, *Judicial Analysis During the Third Wave of School Finance Litigation: The Massachusetts Decision as a Model*, 35 B.C. L. REV. 597 (1994) [hereinafter Thro, *Judicial Analysis*].

To oversimplify somewhat,<sup>72</sup> the first two waves focused on “equity” and the current, third wave focuses on “adequacy.”

The first wave was based on the federal equal protection clause<sup>73</sup> and is exemplified by *Serrano v. Priest*<sup>74</sup> and *Rodriguez*.<sup>75</sup> The basic argument was that the federal constitution guaranteed that all children would have the same amount of money spent on their education or at least that children were entitled to equal educational opportunities.<sup>76</sup> The second wave took place exclusively at the state level,<sup>77</sup> but retained the basic contours of the equal protection (or “equity”) model.<sup>78</sup> The third wave is still taking place at the state level and focuses on claims of adequacy.<sup>79</sup> Plaintiffs within the third wave make the argument that all children are entitled to a certain quality of education and that more money is often necessary to bring under-performing school districts up to the minimum level mandated by the state education clause.<sup>80</sup> Additionally, third wave cases focus more on the state education clauses than on equal protection clauses<sup>81</sup> and insist on sweeping reforms accompanied by continued court supervision.<sup>82</sup>

When a school system is challenged on adequacy grounds, litigators focus on ensuring that every school district provides a certain quality of education, regardless of the resources expended to achieve that quality. If all of the schools in a state are inadequate, the court’s decision will demand that all schools be elevated to a state-prescribed minimum adequacy level.<sup>83</sup> If only a part of the system is inadequate, or if certain groups are not meeting state performance goals, an adequacy-based reform measure will require the state to provide the requisite quality of education to that group.

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72. See *infra* note 118.

73. U.S. CONST. amend. XIV (“[N]or [shall any state] deny to any person within its jurisdiction the equal protection of the laws.”).

74. 487 P.2d 1241, 1244 (Cal. 1971).

75. Thro, *Judicial Analysis*, *supra* note 71, at 600; see *infra* notes 100–13 and accompanying text.

76. *Id.* at 600–601.

77. For an analysis of the differences between state constitutions and the federal constitution, see generally Robert F. Utter, *Freedom & Diversity in a Federal System: Perspectives on State Constitutions & the Washington Declaration of Rights*, in DEVELOPMENTS IN STATE CONSTITUTIONAL LAW 239, 241–42 (Bradley D. McGraw ed., 1984).

78. Thro, *Judicial Analysis*, *supra* note 71, at 601–602. See generally *infra* notes 115–76 and accompanying text.

79. See *infra* notes 177–201 and accompanying text.

80. Thro, *Judicial Analysis*, *supra* note 71, at 603.

81. *Id.* at 603–04; but see Buzuvis, “A” for Effort, *supra* note 7, at 689 (arguing that “regardless of the catalyst for reform, education reform can and should include elements of both equity and adequacy.”).

82. Thro, *Judicial Analysis*, *supra* note 71, at 604.

83. See Buzuvis, “A” for Effort, *supra* note 7, at 669.

This Article argues that the adequacy theory addresses the core concern of equity cases without falling prey to its methodological and theoretical shortcomings. Instead of focusing on per pupil expenditures as an imperfect proxy for educational opportunity, an adequacy theory suggests that the state's real duty should be to provide a certain level of educational quality to each child, regardless of her economic or geographic circumstances. In the remedies phase, an adequacy theory permits courts to structure a framework that addresses the myriad components of a quality education rather than confining it to the narrower and less promising task of equalizing a finite set of inputs. Furthermore, while the shift from equity to adequacy does not obviate plaintiffs' need to argue that more money may be required to address specific deficiencies in a state educational system, it does mitigate the concern that a state's duty to provide a public education to all students will be measured by how many dollars are spent on each child.

### 1. The First Wave: Federal "Equity" Claims

Until 1973, plaintiffs' attorneys hoped to reform school finance structures through federal litigation. In *McInnis v. Shapiro*,<sup>84</sup> Illinois students alleged that a state financing scheme violated the equal protection<sup>85</sup> and due process<sup>86</sup> clauses of the Fourteenth Amendment because they permitted wide variations in per pupil expenditures from district to district, resulting in some students being deprived of a good education.<sup>87</sup> A federal district court in Illinois found that the claim was not justiciable because there were no discoverable and manageable standards to determine when the constitution is satisfied.<sup>88</sup> Likewise, in *Burruss v. Wilkerson*,<sup>89</sup> a federal district court in Virginia relied on *McInnis* when it urged the plaintiffs to

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84. 293 F.Supp. 327 (N.D. Ill. 1968).

85. See *supra* note 73.

86. U.S. CONST. amend. XIV, § 1 ("[N]or shall any state deprive any person of life, liberty, or property, without due process of law.>").

87. Professor Yudof argues that the reasons plaintiffs advanced for the unconstitutionality of the differences were different and conflicting because plaintiffs argued on the one hand that only a financing scheme that apportions funds according to the needs of the students would satisfy the Fourteenth Amendment. On the other hand, plaintiffs argued that a system that allocated funds on the basis of flat dollar equality or assured that equal tax rates led to equal spending would be constitutionally permissible. See YUDOF, ET AL., EDUCATION POLICY & THE LAW IV, *supra* note 26, at 776.

88. 293 F.Supp. 327, 329 (N.D. Ill. 1968) *aff'd*, 394 U.S. 322 (1969). The court also declined to strike down the funding scheme because the state's action was rational in light of its interest in local control; allocation of public revenues was a legislative issue rather than a judicial issue; and the United States Constitution did not require allocation on the basis of need or equal dollars per pupil. *Id.* at 336-37.

89. 310 F.Supp. 572 (W.D.Va. 1969).

seek relief from the legislature.<sup>90</sup> As one scholar remarked “[n]either suit was successful because the courts, having construed the plaintiffs’ claims as seeking a system which provided resources on the basis of educational ‘need,’ felt there were no manageable standards for a court to determine such ‘need.’”<sup>91</sup>

After these initial failures, plaintiffs’ attorneys began to rely on a simpler theory based on the scholarship of Professor John Coons.<sup>92</sup> The idea was to sever the link between per capita expenditures and district property wealth.<sup>93</sup> The plaintiffs’ theory was based on a “principle of fiscal neutrality”<sup>94</sup>—essentially that the quality of public education may not be a function of wealth other than the wealth of an entire state. Professor Coons’ theory played a major role in the plaintiffs’ victory in *Serrano v. Priest I*,<sup>95</sup> in which the California Supreme Court accepted the principle of fiscal neutrality and held that the state education finance system violated both the state constitution<sup>96</sup> and the federal constitution.<sup>97</sup> *Serrano I* quickly led to the first wave of school finance litigation.<sup>98</sup> Suits were filed in more than two thirds of the states.<sup>99</sup>

The first wave ended abruptly when a divided Supreme Court decided *San Antonio Independent School District v. Rodriguez*.<sup>100</sup> In *Rodriguez*, a group of parents brought suit against Texas on behalf of poor and Mexican-American students who resided in school districts with low

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90. *Id.* at 574.

91. Betsy Levin, *Current Trends in School Finance Reform Litigation: A Commentary*, 1977 DUKE L.J. 1099, 1101 (1977) [hereinafter Levin, *Current Trends*].

92. See J. COONS, W. CLUNE, & S. SUGARMAN, *PRIVATE WEALTH & PUBLIC EDUCATION* (1970).

93. Levin, *Current Trends*, *supra* note 91, at 1101.

94. Although districts would not be required to choose the same tax rates, equal tax rates would achieve equal results. The goal was not to eliminate inequalities, but rather to sever the correlation between per pupil district property wealth and per pupil spending without undermining local control. See YUDOF, ET AL., *EDUCATION POLICY & THE LAW II*, at 776. Cf. *Griffin v. Illinois*, 351 U.S. 12 (1956) (holding that a state must provide indigent criminal defendants appealing convictions with a free trial transcript); *Douglas v. California*, 372 U.S. 353 (1963) (holding that a state must provide indigent criminal defendants appealing convictions with a free attorney).

95. 487 P.2d 1241, 1244 (Cal. 1971).

96. The California constitution provides that “All laws of a general nature shall have uniform operation.” CAL. CONST. art. IV, § 16.

97. The *Serrano I* court relied heavily on federal equal protection analysis, finding that the school finance system affected a suspect class of citizens and burdened a fundamental right. The California Supreme Court found that the school finance system could not survive strict scrutiny. *Serrano I*, 487 P.2d 1241, 1250–62 (Cal. 1971).

98. Thro, *Judicial Analysis*, *supra* note 71, at 601 n.22.

99. Levin, *Current Trends*, *supra* note 91, at 1101.

100. 411 U.S. 1 (1973).

property tax bases.<sup>101</sup> The plaintiffs brought suit under the federal equal protection clause.<sup>102</sup> Based largely on substantial inter-district disparities in school expenditures,<sup>103</sup> a federal district court<sup>104</sup> ruled that the Texas school finance system violated the federal equal protection clause because: (1) education was a fundamental interest; and (2) poverty was a “suspect classification.”<sup>105</sup>

On appeal, the United States Supreme Court ruled that poverty was not a suspect classification<sup>106</sup> and that the equal protection clause did not require absolute equality of educational expenditures.<sup>107</sup> The Supreme Court also rejected the district court’s finding that education was a fundamental right.<sup>108</sup>

If the plaintiffs had succeeded on either claim, the Court would have applied strict scrutiny to Texas’ education finance system,<sup>109</sup> and it is likely that the plaintiffs would have succeeded in establishing a constitutional violation. Since the plaintiffs failed on both claims, however, the Supreme Court required only that the state’s system bear a rational relationship to a legitimate state purpose.<sup>110</sup> The Supreme Court held that the Texas school financing system survived rational basis review.<sup>111</sup> The majority expressed concern about a slippery slope. If the Court created an entitlement to education—which is not explicitly mentioned in the federal constitution—there would be no principled way to differentiate education from

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101. *Id.* at 4–5.

102. *Id.* at 6.

103. *Rodriguez v. San Antonio Indep. Sch. Dist.*, 337 F.Supp. 280, 282 (W.D.Tex. 1971).

104. 337 F.Supp. 280 (W.D.Tex. 1971).

105. 411 U.S. at 16. For an overview of suspect classifications and forbidden discrimination, see generally KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 628–647 (14th ed. 2001) [hereinafter SULLIVAN & GUNTHER, CONSTITUTIONAL LAW]. For an overview of fundamental interests in the equal protection context, see generally *id.* at 794–862.

106. *Cf.* *Korematsu v. United States*, 323 U.S. 214 (1944) (holding that racial classifications should be held to the “most rigid scrutiny” but finding that internment of United States citizens survived that scrutiny because of “pressing public necessity”).

107. 411 U.S. at 18 (holding that “. . . we find neither the suspect-classification nor the fundamental interest analysis persuasive.”); see also 411 U.S. at 25 (“For these two reasons—the absence of any evidence that the financing system discriminates against any definable category of ‘poor’ people or that it results in the absolute deprivation of education—the disadvantaged class is not susceptible of identification in traditional terms”).

108. Compare 337 F.Supp. at 282 with 411 U.S. 1 at 14–15. *Brown* referred to education as “perhaps the most important function of state and local governments” but did not use the term “fundamental right.” 347 U.S. 483, 493 (1954).

109. *Cf.* 337 F.Supp. at 282–84.

110. 411 U.S. at 40.

111. *Id.* at 54–55. In contrast, the district court had ruled that the defendants had failed to state even a reasonable basis for the classifications. See 337 F.Supp. at 284.



other potentially “fundamental” interests such as food and shelter.<sup>112</sup> The Court was also reluctant to diminish local control over taxing and spending decisions.<sup>113</sup>

## 2. The Second Wave: State “Equity” Claims

Since *Rodriguez*, the battleground of education finance reform has shifted to the states.<sup>114</sup> *Rodriguez* itself ironically opened the door to a second wave of litigation under state constitutions. *Rodriguez* stressed that “education . . . is not among the rights afforded explicit protection under our Federal Constitution.”<sup>115</sup> Plaintiffs seized on this language to suggest that “since education was explicitly mentioned in the state constitutions, [education] was a fundamental right for state equal protection purposes.”<sup>116</sup> Less than two weeks after *Rodriguez* was decided, the New Jersey Supreme Court ruled in *Robinson v. Cahill*<sup>117</sup> that the New Jersey education finance system violated its state constitution.<sup>118</sup>

The second wave began in 1973 and ran until 1989.<sup>119</sup> During second wave, plaintiffs asserted the same basic arguments they had used in

112. See 411 U.S. at 37 (explaining that “the logical limitations on appellees’ nexus theory are difficult to perceive. How, for instance, is education to be distinguished from the significant personal interests in the basics of decent food and shelter.”).

113. 411 U.S. at 49–50. Cf. *infra* note 418 (discussing the advantages of retaining significant dependence on local property taxes to fund schools).

114. See Thro, *Judicial Analysis*, *supra* note 71, at 600–02. Some scholars have contended that school reform efforts based on the federal constitution are still possible after *Rodriguez*. See Julius Chambers, *Adequate Education for All: A Right, an Achievable Goal*, 22 HARV. C.R.-C.L. L. REV. 55, 68–72 (1987). *Rodriguez* suggested in dicta that the Constitution might guarantee “some identifiable quantum of education” as a means to the exercise of free expression or other fundamental rights. *Rodriguez*, 411 U.S. 1, 36 (1973). No effort so far has been successful. McUsic, *Law’s Role*, *supra* note 12, at 103. However, Justice White suggested in *Papasan v. Allain*, 478 U.S. 265 (1986), that the issue was not fully resolved, explaining that “[a]s *Rodriguez* and *Plyler* indicate, this Court has not yet definitively decided whether a minimally adequate education is a fundamental right and whether a statute alleged to discriminatorily infringe that right should be accorded heightened equal protection review.” *Id.* at 285. Justices O’Connor, Brennan, Marshall, Blackmun, and Stevens joined in that part of the opinion.

115. 411 U.S. at 35.

116. Patt, *School Finance Battles*, *supra* note 24, at 559.

117. 303 A.2d 273 (N.J. 1973).

118. Thro argues that *Robinson v. Cahill*, 303 A.2d 273 (N.J. 1973), is the quintessential phase two case. Thro, *Judicial Analysis*, *supra* note 71, at 601. Ironically, though the New Jersey Supreme Court used an equality rationale to strike down the state’s financing scheme, it declined to rest its decision on the state equal protection clause, holding instead that the school finance system failed to meet the state constitution’s thorough and efficient requirement. *Robinson*, 303 A.2d at 295.

119. Thro, *Judicial Analysis*, *supra* note 71, at 601.

*Rodriguez* under state constitutions.<sup>120</sup> Although plaintiffs sometimes brought suit under both state equal protection clauses and state education clauses,<sup>121</sup> the basic claim was that students were entitled to substantial educational equality. In addition to the standard equal protection analysis,<sup>122</sup> plaintiffs often argued that the education clauses themselves demanded equality of funding<sup>123</sup> because of terms like “general,”<sup>124</sup> “uniform,”<sup>125</sup> “system,”<sup>126</sup> and “efficient.”<sup>127</sup>

Plaintiffs based their equal protection arguments either on the idea that public school education constitutes a fundamental right or that district wealth constitutes a suspect classification.<sup>128</sup> Alternatively, plaintiffs argued that neither an interest in local control nor any other interest constituted a rational basis for a property wealth based system.<sup>129</sup>

In these cases, state Supreme Courts generally utilized an analytical scheme similar to the one used in federal equal protection cases.<sup>130</sup> Where racial classifications were used or where poverty was treated as a suspect classification, strict scrutiny applied and the state generally lost. Where education was treated as a fundamental right,<sup>131</sup> strict scrutiny applied and the state generally lost. Where no fundamental interests or suspect classifications were implicated, the state merely had to demonstrate that the policy was rationally related to a legitimate state objective.<sup>132</sup> The asserted interest was generally local control<sup>133</sup> and the states usually won (but not

120. *Id.*

121. Unlike the federal constitution, every state—except, arguably, Mississippi—has an education clause. *Use of Education Clauses*, *supra* note 21, at 311 n.5. One advantage to combining state equal protection claims with references to state education clauses is that such litigation has fewer implications for other areas of law than a straight equal protection analysis, thus avoiding the slippery slope problem that troubled the *Rodriguez* court. See Heise, *State Constitutions*, *supra* note 26, at 1159.

122. States are not required to adopt federal equal protection doctrine when interpreting analogous state clauses, but it is common practice to do so. McUsic, *Law's Role*, *supra* note 12, at 103.

123. Patt, *School Finance Battles*, *supra* note 24, at 559.

124. See, e.g., *Dupree v. Alma Sch. Dist.*, 651 S.W.2d 90, 91 (Ark. 1983).

125. See, e.g., *Olsen v. State*, 554 P.2d 139, 148 (Or. 1976).

126. See, e.g., *Board of Education v. Nyquist*, 439 N.E.2d 359, 368–69 (N.Y. 1982).

127. See, e.g., *Hornbeck v. Somerset Cty Bd. Of Educ.*, 458 A.2d 758, 764 (Md. 1983).

128. Enrich, *Leaving Equality Behind*, *supra* note 7, at 106–7.

129. *Id.* at 107.

130. McUsic, *Law's Role*, *supra* note 12, at 103.

131. California, Connecticut, West Virginia, Wyoming decided that education was a fundamental right for equal protection purposes in part because of the inclusion of education clauses in the state constitutions. McUsic, *Law's Role*, *supra* note 12, at 144–45 n.93.

132. The school financing schemes in Tennessee and Arkansas failed rational basis review because the courts held the state's interest in local control was not even rationally related to the financing scheme. *Tennessee Small Sch. Sys. v. McWherter*, 851 S.W.2d 139 (Tenn. 1993); *Dupree v. Alma Sch. Dist.*, 651 S.W.2d 90 (Ark. 1983).

133. McUsic, *Law's Role*, *supra* note 12, at 103.

always).<sup>134</sup> Under this constellation of theories, plaintiffs prevailed about half the time<sup>135</sup> but with decreasing success over time.<sup>136</sup>

The equality regime was flawed on a number of levels. Professor Enrich argues that equalization threatens to demand too much and to overwhelm other important concerns.<sup>137</sup> Defendants fought equalization schemes in part because of their zero sum aspects—more money for poor schools often meant less money for rich schools or higher taxes in rich communities.<sup>138</sup> Even equity's non-zero sum aspects are threatening to parents in wealthy school districts. To the extent that unequal schools give wealthy children a higher likelihood of access to exclusive colleges and concomitant post-graduate economic opportunities, the wealthy have a vested stake in not merely their schools' excellence, but also their superiority.<sup>139</sup>

Another problem is definitional. Equality has enormous appeal as a rhetorical concept, but its actual meaning is murky in the educational context.<sup>140</sup> The equity of a school finance system can be measured in at least three ways: (1) horizontal equity; (2) vertical equity; and (3) fiscal neutrality.<sup>141</sup> Horizontal equity involves a comparison of the per pupil expenditures of the wealthiest districts with the poorest districts.<sup>142</sup> Reform efforts that focus on horizontal equity aim to narrow revenue gaps to eliminate wealth-based allocations of benefits.<sup>143</sup> Vertical equity analysis considers the costs associated with educating various kinds of students (for example, special education students, bilingual education students, and gifted students).<sup>144</sup> Fiscal neutrality seeks to equalize tax efforts and burdens across school districts.<sup>145</sup>

A central question is how to determine what should be equalized. Possibilities include: (1) disparities in capacity to fund education;<sup>146</sup> (2) disparities in actual funding provided for schools;<sup>147</sup> (3) disparities in

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134. See *supra* note 132.

135. See Heise, *State Constitutions*, *supra* note 26, at 1159.

136. See *infra* notes 168–76 and accompanying text.

137. See Enrich, *Leaving Equality Behind*, *supra* note 7, at 144–45.

138. *Id.* at 156.

139. *Id.* at 158.

140. *Id.* at 144.

141. Kelly, *All Students Are Not Created Equal*, *supra* note 37, at 402.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. See Enrich, *Leaving Equality Behind*, *supra* note 7, at 145.

147. See *id.* at 147.

caliber of educational services (i.e., inputs);<sup>148</sup> or (4) disparities in outcomes.<sup>149</sup> If the legislature's goal is to advance equity (however defined), there are at least four strategies it can pursue: (1) implementing a foundation program<sup>150</sup> to ensure minimum per student expenditures ("leveling up");<sup>151</sup> (2) spending caps<sup>152</sup> and recapture provisions<sup>153</sup> that limit the spending of the richest districts ("leveling down");<sup>154</sup> consolidating tax bases and school districts;<sup>155</sup> and (4) a variety of other strategies to equalize tax bases.<sup>156</sup>

In practice, whatever equalization definition or strategy is adopted, the equity scheme achieved through education finance litigation does not actually eliminate funding disparities.<sup>157</sup> Equality-based reform often fails to account for differences in the costs of teaching poorer children that are associated with higher teaching costs, security costs, repairs, health

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148. See *id.* at 149; see also *id.* at 150 (arguing that "even identical services and facilities will not afford an equal educational opportunity to students who come to school with sharply different needs and abilities.").

149. See *id.* at 151 n.253 (noting that some scholars have referred to output measurement as "true equity" rather than "mere equality."). Efforts to equalize inputs and outcomes rather than funding or capacity to fund have been portrayed in some contexts as "equality" concepts. See *id.* at 148–51. However, they also blur into the definition of adequacy. The *CFE* opinion, discussed *infra* notes 259–87 and accompanying text, is generally seen as an "adequacy" suit, but the trial court's opinion relies in part on the idea that inputs and outputs need to be substantially equalized in order to meet the constitutional requirement of a sound, basic education.

150. A foundation program is based on the school district's ability to pay for a minimum education program. The state funds the difference between a legislatively determined local share and the cost of a minimum program. School districts may exceed the minimum standards. See generally WOOD & THOMPSON, *EDUCATION FINANCE LAW*, *supra* note 24, at 25–28.

151. Buzuvis, "A" for Effort, *supra* note 7, at 664–65. True "leveling up"—in the sense of bringing every district up to the spending levels of the highest spending districts—might be prohibitively expensive. For example, the Texas Supreme Court predicted that bringing all districts up to the level of the highest spending districts would cost approximately four times the annual cost of running the entire state government. *Edgewood Indep. Sch. Dist. v. Kirby*, 804 S.W.2d 491, 495–96 (Tex. 1991) (Edgewood II).

152. Buzuvis, "A" for Effort, *supra* note 7, at 665–66.

153. *Id.*

154. *Id.* at 665–67. In "penny pool plans," school districts can set any tax rate they want; but excess funds above a state-set minimum are redistributed across the state according to the tax effort of the district. Patt, *School Finance Battles*, *supra* note 24, at 552. A variation on this plan is called a "floating cork plan" where districts can avoid redistribution if they have revenue above a set amount. *Id.* at 552 n.27.

155. Buzuvis, "A" for Effort, *supra* note 7, at 667–68.

156. See generally *id.* at 668–69 (describing equity remedies contained in the Texas plan). For example, "funding equalization plans" attempt to guarantee the same level of funding for the same rate of taxation. See Patt, *School Finance Battles*, *supra* note 24, at 551–52.

157. McUSIC, *Law's Role*, *supra* note 12, at 99.

problems, disabilities, hunger, family disruption, and violence.<sup>158</sup> Unfunded federal mandates also have a disparate effect on students in poor districts who do not need special education or bilingual education services.<sup>159</sup>

Legislatures have had a very difficult time implementing “equity” in a way that actually improves educational opportunity for students in under-performing schools. Even truly equal funding will often fail to provide equal opportunities.<sup>160</sup> Increases in funding may not immediately overcome the cumulative effect of years of inadequate education.<sup>161</sup> Additionally, as discussed *infra* Part VI,<sup>162</sup> “[t]he effects of racial and socioeconomic isolation . . . cannot be adequately addressed by school finance reform, because students in schools with high concentrations of poverty need more than increased funding to improve their achievement.”<sup>163</sup> Equality-based theories may fail to distinguish school finance from other important variables that influence educational opportunity.<sup>164</sup> As Professor Enrich explains:

In short, equalization of outcomes, or even of actual services, has proven too ambitious a standard in the political process. And yet, mere equalization of tax capacity, or even the significant progress some states have achieved towards equalization of school budgets, has proven insufficient to put the educational opportunities of disadvantaged children on a par with those of their better-off peers.<sup>165</sup>

Another major problem is that equality-based reform sometimes leads to a leveling down of expenditures. It is possible to create equal situations that are inadequate; this is essentially what happened in California after plaintiffs won a huge victory in *Serrano v. Priest*.<sup>166</sup> California’s per

158. See *id.* at 106; James E. Ryan, *Schools, Race, & Money*, 109 YALE L.J. 249, 256–57 (1999) [hereinafter Ryan, *Schools, Race, & Money*] (explaining that “[b]ecause poor students typically have greater needs, schools composed of poor students are costlier to run than schools composed of middle- and upper-income students”); see also *Campaign for Fiscal Equity*, 719 N.Y.S.2d at 547 (rejecting the state’s argument that its state aid formula sufficiently accounts for differences in student need).

159. See generally *supra* notes 54–61 and accompanying text.

160. See McUsic, *Law’s Role*, *supra* note 12, at 106 (arguing that “[e]qual funding of unequal needs is not true equality”).

161. See Zwibelman, *Broadening the Scope*, *supra* note 65, at 530.

162. See *infra* notes 383–99 and accompanying text.

163. See Ryan, *Schools, Race, & Money*, *supra* note 158, at 256.

164. See Heise, *State Constitutions*, *supra* note 26, at 1162; see also *infra* Part VI.

165. Enrich, *Leaving Equality Behind*, *supra* note 7, at 154.

166. 557 P.2d 929 (Cal. 1977). See YUDOF, ET AL., *EDUCATION POLICY & THE LAW IV*, *supra* note 26, at 774.

pupil expenditures were near the national average in 1976–77, but only thirty-eighth in 1999–2000.<sup>167</sup>

Finally, after some initial successes, equity was not a particularly successful strategy for plaintiffs, especially in the 1980s. From 1980 on, plaintiffs using equity-based strategies lost in Georgia,<sup>168</sup> New York,<sup>169</sup> Colorado,<sup>170</sup> Maryland,<sup>171</sup> Oklahoma,<sup>172</sup> North Carolina,<sup>173</sup> and South Carolina<sup>174</sup> and were only successful in Wyoming<sup>175</sup> and Arkansas.<sup>176</sup>

### 3. The Third Wave: State “Adequacy” Suits

Many of the methodological and practical shortcomings of the equity theory can be overcome through the use of an adequacy theory. Adequacy emerged as the dominant theory utilized by plaintiffs during the third wave of education finance reform which began in the late 1980s with plaintiffs’ victories in Montana, Kentucky, and Texas.<sup>177</sup> Third wave plaintiffs emphasize adequacy of educational opportunity rather than equality of educational expenditures.<sup>178</sup> They allege that state constitutions prohibit disparities in the quality of education from one district to another regardless of funding levels. Rather than relying primarily on state equal protection clauses, the plaintiffs focus on state education clauses.<sup>179</sup> At least in theory, this eliminates the slippery slope problem inherent in the earlier equal protection claims because there is little danger of spillover into other areas of government services.<sup>180</sup> According to Professor Thro, state courts responded to this shift in strategy by imposing more aggressive judicial remedies where constitutional violations were demonstrated.<sup>181</sup>

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167. See Education Data Partnership, *California's Rankings, 1999–2000*, at <http://www.ed-data.k12.ca.us/calrankings.asp> (last visited Dec. 4, 2002) (on file with the Michigan Journal of Race & Law).

168. *McDaniel v. Thomas*, 285 S.E.2d 156 (Ga. 1981).

169. *Board of Educ. v. Nyquist*, 439 N.E.2d 359 (N.Y. 1982).

170. *Lujan v. Bd. of Educ.*, 649 P.2d 1005 (Colo. 1982).

171. *Hornbeck v. Board of Educ.*, 458 A.2d 758 (Md. 1983).

172. *Fair Sch. Fin. Council of Okla. v. State*, 746 P.2d 1135 (Okla. 1987).

173. *Britt v. N.C. State Bd. of Educ.*, 357 S.E.2d 432 (N.C. Ct. App. 1987).

174. *Richland County v. Campbell*, 364 S.E.2d 470 (S.C. 1988).

175. *Washakie County Sch. Dist. No. 1 v. Herschler*, 606 P.2d 310 (Wyo. 1980).

176. *Dupree v. Alma Sch. Dist. No.*, 651 S.W.2d 90 (Ark. 1983).

177. Thro, *Judicial Analysis*, *supra* note 71, at 603.

178. *Id.*

179. *Id.*

180. See *id.*; but see Enrich, *Leaving Equality Behind*, *supra* note 7, at 16–62 (noting that in spite of this limitation, the slippery slope issue has recurred in state constitutional cases).

181. See Thro, *Judicial Analysis*, *supra* note 71, at 604. But see Patt, *School Finance Battles*, *supra* note 24, at 572–74 (arguing that increased plaintiff successes of the third wave are not the result of a shift away from equal protection claims towards adequacy claims, but rather

Adequacy plaintiffs contend that students are constitutionally entitled to a minimum quality of education. The dispute becomes one about what level of quality is required and what resources are necessary to acquire it. Rather than demanding that every child receive the same dollar amount of educational expenditures, adequacy plaintiffs contend that a certain amount of money may be required to bring the lowest-performing school districts up to the minimum level of quality. Theoretically, then, a school that spent very little money but provided an adequate education would not give rise to a claim (even if other districts spent much more), but a poorly performing school district might give rise to a claim, even if its per pupil expenditures were high.

In determining the level of the state's obligation, it may matter how the state's education clause is phrased. Some state constitutions create an entitlement only to free public schools, while others demand a certain level of quality. Gershon Ratner has divided the state education clauses into four categories,<sup>182</sup> in ascending order of constitutional obligation: (1) committing states to educating their children in very general language; (2) imposing greater obligations by emphasizing the quality of education that must be provided; (3) adding language and preambles to strengthen the legislative duty; and (4) granting the highest level of educational opportunity, including specific duties and using terms like "the paramount duty of the state."<sup>183</sup> There is some debate over whether in practice there is a positive correlation between stronger constitutional language and plaintiff victories in school finance litigation suits.<sup>184</sup>

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can be explained by political developments in individual states and evolving attitudes towards education).

182. Erica Black Grubb was the first to develop this classification system in an article regarding bilingual education; Ratner adapted it to fit the state education clauses. See Erica Black Grubb, *Breaking the Language Barrier: The Right to Bilingual Education*, 9 HARV. C.R.-C.L. L.REV. 52, 66-70 (1974); Gershon Ratner, *A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills*, 63 TEX. L. REV. 777, 815-816 (1985) [hereinafter Ratner, *New Legal Duty*].

183. See Ratner, *New Legal Duty*, *supra* note 182, at 815-16; but see *Use of Education Clauses*, *supra* note 21, at 309 n.4 (arguing that Ratner and others failed to distinguish between education clauses that invite equity claims and those that invite minimum standards claims).

184. Compare Paula J. Lundberg, *State Courts & School Funding: A Fifty-State Analysis*, 63 ALB. L. REV. 1101, 1108 & 1145 (2000) (using Ratner's categories and arguing that where state constitutions contained specific language regarding the legislative duty to support education, plaintiffs were more likely to be successful in convincing state courts that the education finance system is unconstitutional), with Patt, *School Finance Battles*, *supra* note 24, at 555 (arguing that the strength of education clauses has little determinative effect on the plaintiffs' rates of success). Cf. Thro, *Judicial Analysis*, *supra* note 71, at 611 (arguing that the weak language of the Tennessee and Massachusetts clauses fail to explain the strong quality standard imposed by the court).

Building from the language of the education clause, judicial precedent, and other factors, courts must determine what quality standard the state constitution requires. Professor Thro has argued that the outcome of third wave cases is largely determined by the quality standard that the court sets. Where the required quality standard is high, the system fails and where it is low, the system passes.<sup>185</sup> Professor Thro argues that courts do not use principled criteria for determining the quality standard, but rather impose the value judgment of a majority of their members.<sup>186</sup>

Many of the most progressive third wave courts follow the lead set by the Kentucky Supreme Court in *Rose v. Council for Better Education*.<sup>187</sup> The *Rose* court held that education was a fundamental right<sup>188</sup> and that Kentucky schools were not "efficient."<sup>189</sup> The decision called for a fundamental overhaul of the public elementary and secondary school system and specified detailed standards necessary to any "efficient" system of education.<sup>190</sup> The *Rose* court identified seven capabilities that an educated child must possess:

- (i) sufficient oral and written communications skills to enable students to function in a complex and rapidly changing civilization;
- (ii) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices;
- (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation;
- (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness;
- (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historic heritage;
- (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently;
- and (vii) sufficient level of academic or vocational skills to enable public school students to compete

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185. Thro, *Judicial Analysis*, *supra* note 71, at 614.

186. *Id.* at 612.

187. 790 S.W.2d 186 (1989).

188. *Id.* at 206.

189. *Id.* at 212. The state of education in Kentucky in the 1980's was indeed dismal. Kentucky was fiftieth among states in adult literacy and adults with high school diplomas, forty-ninth in college attendance rates, forty-eighth in per pupil expenditures, and forty-eighth in per capita expenditures. Molly A. Hunter, *All Eyes Forward: Public Engagement and Educational Reform in Kentucky*, 28 J.L. & EDUC. 485, 486 (1999) [hereinafter Hunter, *All Eyes Forward*]. Kentucky students also ranked very low in most measures of student achievement. *Id.*

190. 790 S.W.2d at 209-13.



favorably with their counterparts in surrounding states, in academics or in the job market.<sup>191</sup>

The Kentucky legislature responded rapidly by enacting the Kentucky Education Reform Act (“KERA”).<sup>192</sup> Reform efforts included a more equitable division of funding among school districts, ungraded primary schools, school-based decision-making, preschool programs, extended school services, a reorganized state Department of Education, and a testing system.<sup>193</sup> Results from 1993–1997 were promising, but on the whole the performance gap between advantaged and disadvantaged schools has widened dramatically since KERA’s passage.<sup>194</sup> The Kentucky data suggest that even when courts, legislatures, and other actors work together, school reform efforts face daunting challenges in helping children overcome generations of poverty and underperformance.<sup>195</sup>

These results are sobering because in many ways Kentucky is a model for reform that other states have sought to emulate. By specifically defining the contours of the constitutional entitlement, the Kentucky Supreme Court created a structure for the legislature to follow and political cover for the painful budgetary decisions that would be required to enact the needed reforms. Kentucky’s experience demonstrates that under certain circumstances, courts and legislatures can work together as partners in education reform. On the other hand, as discussed *infra* Part VI, sometimes effective reforms may require attention to factors outside of the K-12 system that were not fully incorporated into KERA.

Massachusetts offers another model for collaboration between state courts and state legislatures. Soon after *Rose*, the Massachusetts Supreme Judicial Court decided *McDuffy v. Secretary of the Executive Office of Education*.<sup>196</sup> Perhaps because a legislative effort to reform the education finance system was already underway in Massachusetts, the *McDuffy* court was more deferential to the legislature. Quoting *Rose*, the *McDuffy* court outlined the same seven elements as guidelines for fulfilling the constitutional duty.<sup>197</sup> However, the *McDuffy* court deferred to the legislature’s ongoing efforts to give content to those broad standards: “Thus, we leave it to the magistrates and the Legislatures to define the precise nature of the task

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191. *Id.* at 212.

192. 1990 Ky. Acts 476 (codified as amended in scattered sections of KY. REV. STAT. ANN. Tit. XIII).

193. See Zwibelman, *Broadening the Scope*, *supra* note 65, at 534.

194. See Philip W. Roeder, EDUCATION REFORM AND EQUITABLE EXCELLENCE: THE KENTUCKY EXPERIMENT 3 (updated Feb. 2000), at <http://www.uky.edu/~proeder/kerabkupdate.pdf> (last visited Dec. 4, 2002) [hereinafter Roeder, KENTUCKY EXPERIMENT] (on file with the Michigan Journal of Race & Law).

195. See *id.*

196. 615 N.E.2d 516 (Mass. 1993).

197. *Id.* at 554.

which they face in fulfilling their constitutional duty to educate our children today, and in the future.”<sup>198</sup>

The Massachusetts state legislature's reforms increased state funding for public schools, created stricter teacher certification standards, mandated curricular frameworks, and linked competency in some areas of the curriculum to education standards.<sup>199</sup> The Massachusetts Department of Education relied on high stakes testing to evaluate the success of the reforms.<sup>200</sup> This approach has been highly controversial.<sup>201</sup> Test results suggest that reform efforts still have a long way to go to remedy inequalities in educational opportunities and performance. In 1998 and 1999, failure rates remained high and there was a large gap between White and minority performance.<sup>202</sup>

### C. Adequacy and Race

Efforts to remedy racial segregation have historically been litigated separately from school finance reform and the two fields of law fit together awkwardly. Professor James Ryan makes a powerful argument that education finance reform scholars and litigators have historically failed to pay sufficient attention to the potential relationship between school finance reform and desegregation.<sup>203</sup> This Article argues that the adequacy

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198. *Id.* at 557.

199. 1993 Mass. Acts 71 (codified as amended in scattered sections of MASS. GEN LAWS ch. 71).

200. *Id.*

201. See, e.g., Zwibelman, *Broadening the Scope*, *supra* note 65, at 536 (arguing that “[a]s in Kentucky, Massachusetts is trying to measure outcome, but it is doing so in a way that often harms the students it intends to help”); *Boston Globe Editorial: MCAS Meaning*, *Boston Globe*, March 14, 2002, at A14 (criticizing a Department of Education proposal that MCAS results be placed on students’ transcripts because the MCAS are for measuring school systems not students); *but see* Acting Governor Jane Swift, State of Education Address 2001, (Aug. 30, 2001), available at <http://www.state.ma.us/gov/speech/sp083001stateofeducation.htm> (last visited Dec. 4, 2002) (on file with the Michigan Journal of Race & Law) (arguing that “[t]est scores are the best tools parents and educators have to identify where schools and students are succeeding or struggling. And they prevent all of us . . . from hiding from our obligations. I firmly believe that kids don’t fail because we raise expectations; we fail kids if we don’t.”).

202. See Zwibelman, *Broadening the Scope*, *supra* note 65, at 536; Steve Leblanc, *Racial Gap Evident in MCAS*, *So. COAST DAILY*, July 26, 2001, available at <http://www.s-t.com/daily/07-01/07-26-01/a03lo015.htm> (last visited March 16, 2002) (on file with the Michigan Journal of Race & Law). For a summary of Massachusetts Comprehensive Assessment System (“MCAS”) results, see *MCAS Tests*, *BOSTON GLOBE*, at <http://www.boston.com/mcas/> (last visited Dec. 4, 2002) (on file with the Michigan Journal of Race & Law).

203. See Ryan, *Schools, Race, & Money*, *supra* note 158, at 255 (arguing that scholars and litigators have failed to pay sufficient attention to the relationship between school finance and desegregation); see also Zwibelman, *Broadening the Scope*, *supra* note 65, at 528 (arguing that “[r]eform efforts are further complicated by the willingness of many on both sides of

approach offers the theoretical flexibility necessary to accommodate core concerns of both school finance and racial segregation cases. Indeed, some scholars and courts seem to be moving in the direction of a more race-conscious approach to school finance reform.<sup>204</sup>

Racial segregation has a demonstrably adverse effect on educational opportunity<sup>205</sup> and on the whole, racial integration improves educational outcomes for most students.<sup>206</sup> Historical data suggest a correlation between racial integration and improved academic performance of minority students. Professor Orfield demonstrates that the period of desegregation corresponded with a dramatic narrowing of the achievement gap in test scores between whites and African Americans; likewise, he found that during the period of resegregation, the gap widened.<sup>207</sup> A recent study of Cambridge, Massachusetts school children suggests positive educational effects of racial and ethnic integration.<sup>208</sup> Likewise, a longitudinal study of students at the University of Michigan showed that by exposing students to multiple perspectives, diversity of racial backgrounds helps students to think critically and to understand more complex issues.<sup>209</sup> Racial integration in schools benefits students in terms of college attendance rates, employment, and living in integrated settings as adults.<sup>210</sup> Socioeconomic

the political aisle to abandon racial integration as an issue in education”); but see Richard D. Kahlenberg, *Race-Based Remedies: Rethinking the Process of Classification and Evaluation: Class-Based Affirmative Action*, 84 CAL. L. REV. 1037, 1037–38 (1996) (arguing that the United States should “provide preferences in education, employment, and government contracting based on class or socio-economic status, rather than race or gender – implicitly addressing the current-day legacy of past discrimination without resorting to the toxic remedy of biological preference.”).

204. See, e.g., *Sheff v. O’Neill*, 678 A.2d 1267, 1281 (Conn. 1996) (holding that “the existence of extreme racial and ethnic isolation in the public school system deprives schoolchildren of a substantially equal educational opportunity and requires the state to take further remedial measures”); *Campaign for Fiscal Equity*, 719 N.Y.S.2d at 551 (directing New York state to take steps to remedy the negative effect of racial isolation on student achievement); Zwibelman, *Broadening the Scope*, *supra* note 65, at 528.

205. *Campaign for Fiscal Equity*, 719 N.Y.S.2d at 551.

206. See Michael Kurlaender & John T. Yun, *Impact of Racial and Ethnic Diversity on Educational Outcomes: Cambridge, MA School District 2* (January, 2002), available at [http://www.civilrightsproject.harvard.edu/research/diversity/Cambridge\\_diversity.pdf](http://www.civilrightsproject.harvard.edu/research/diversity/Cambridge_diversity.pdf) (last visited December 4, 2002) [hereinafter Kurlaender & Yun, *Impact of Racial and Ethnic Diversity*] (on file with the Michigan Journal of Race & Law).

207. Orfield, *Schools More Separate*, *supra* note 5, at 10.

208. See Kurlaender & Yun, *Impact of Racial and Ethnic Diversity*, *supra* note 206.

209. See *id.* at 3 (citing Patricia Gurin, “The Compelling Need for Diversity in Higher Education,” expert testimony in *Gratz v. Bollinger*, 1998 U.S. Dist. LEXIS 11807 (E.D. Mich. 1998), and *Gruttner v. Bollinger*, 16 F.Supp. 2d 797 (E.D. Mich. 1998)).

210. Orfield, *Schools More Separate*, *supra* note 5, at 9.

diversity also seems to benefit poorer students both academically and socially.<sup>211</sup>

This Article argues that a workable constitutional definition of adequacy should include the social and educational benefits of integrated schools.<sup>212</sup> After a series of dramatic victories during the Warren Court era, plaintiffs have recently faced seemingly insuperable obstacles to desegregating schools through the federal courts. State adequacy litigation rather than traditional federal desegregation litigation offers the most promising avenue for remedying the continuing racial segregation in our school systems.

#### D. School Desegregation Cases

*Brown*<sup>213</sup> famously declared the *Plessy v. Ferguson*<sup>214</sup> regime of “Separate but Equal” to be unconstitutional and outlawed *de jure* segregation of public schools.<sup>215</sup> At the time, there was significant debate within the civil rights community about whether to seek integration of the schools or to pursue a strategy that demanded separate but truly equal schools.<sup>216</sup>

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211. Ryan, *Schools, Race, & Money*, *supra* note 158, at 255 n.19 (arguing that integrating students of different socioeconomic backgrounds benefits poorer students academically and socially); *but see* McUsic, *Law's Role*, *supra* note 12, at 91 (arguing that “poor students perform better when studying among students who are not poor, [but that] students who are not poor do worse studying among those who are”).

212. Part VI returns to these issues and suggests that the true integration of schools may require policy-makers to address related issues such as housing policy in order to make meaningful strides in this area.

213. 347 U.S. 483 (1954); *see also* *Bolling v. Sharpe*, 347 U.S. 497 (1954) (holding that racial segregation in Washington, D.C. public schools violated the due process clause of the Fifth Amendment).

214. 163 U.S. 537 (1896) (sustaining a Louisiana law requiring separate but equal accommodations on railroads); *see also id.* at 544 (“The most common instance of this is connected with the establishment of separate schools for White and colored children, which have been held to be a valid exercise of legislative power even by courts of States where the political rights of the colored race have been longest and most earnestly enforced.”).

215. In *Brown*, the court declared that “[t]oday, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and great expenditures for education both demonstrate our recognition of the importance of education to our democratic society . . . In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.” *Brown*, 347 U.S. at 493.

216. JAMES T. PATTERSON, *BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS MILESTONE & ITS TROUBLED LEGACY* xxvi–xxvii (2001) [hereinafter PATTERSON, *CIVIL RIGHTS MILESTONE*]. Additionally, some African-American leaders, such as Julius Chambers, wondered if *de jure* desegregation would do much for racial justice. *See id.* at xxvi. Others, such as Zora Neale Hurston, criticized *Brown* for insinuating that all-black institutions were second rate. *See id.* at xxvi–xxvii.

Thurgood Marshall and the NAACP Legal Defense Fund decided that ending *de jure* segregation of schools was the best strategy for remedying injustice in education.<sup>217</sup> Almost fifty years later, the promise of *Brown* remains unfulfilled.

Compliance with *Brown* was slow and contentious. After *Brown II*,<sup>218</sup> the Supreme Court responded to “massive resistance”<sup>219</sup> to desegregation in the South on a couple of occasions.<sup>220</sup> In 1964, 98% of African-American children in the South were still attending 100% African-American schools.<sup>221</sup> When Congress passed the Civil Rights Act of 1964,<sup>222</sup> it created incentives for desegregation and penalties for resistance by making federal funding contingent upon nondiscrimination and authorizing the Justice Department to bring suit to enforce the law.<sup>223</sup> In *Green v. County School Board*,<sup>224</sup> the Supreme Court infused some urgency into *Brown*’s mandate, holding that “[t]he burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work now.”<sup>225</sup> The 1971 decision in *Swann v. Charlotte-Mecklenburg Board of Education*<sup>226</sup> rejected the argument that neighborhood school assignments could legitimize segregation in areas with a history of discrimination and authorized busing as a remedy.

Plaintiffs faced significant obstacles when they could not demonstrate that desegregation resulted from a history of *de jure* segregation. In

217. See PATTERSON, CIVIL RIGHTS MILESTONE, *supra* note 216, at 21.

218. 349 U.S. 294 (1955) (requiring that defendants “make a prompt and reasonable start” toward complying with *Brown I*).

219. See SULLIVAN & GUNTHER, CONSTITUTIONAL LAW, *supra* note 105, at 733.

220. *Cooper v. Aaron*, 358 U.S. 1 (1958) (affirming *Brown* in light of resistance in Little Rock, Arkansas); *Griffin v. County Sch. Bd. of Prince Edward County*, 377 U.S. 218 (1964) (holding that a county’s plan to close its public schools and give grants to White children to attend private schools was unconstitutional).

221. Gary Orfield, *Conservative Activists and the Rush Toward Resegregation*, in *LAW & SCHOOL REFORM: SIX STRATEGIES FOR PROMOTING EDUCATIONAL EQUITY* 39, 42 (Jay P. Heubert ed., 1999) [hereinafter Orfield, *Conservative Activists*]; see also *id.* at 42–43 (arguing that while the Supreme Court provided “important symbolic leadership” in the 1950s and 1960s, the only period in which there was “clear and effective judicial leadership” was from 1968–1973, “immediately following the most active period of political and social mobilization for civil rights since reconstruction.”).

222. Pub. L. 88–352, (codified as amended at 42 U.S.C. § 2000) (2000).

223. Orfield, *Conservative Activists*, *supra* note 221, at 46.

224. 391 U.S. 430 (1968) (rejecting freedom of choice rules that failed to produce a “unitary, nonracial system of public education”).

225. *Id.* at 439; see also SULLIVAN & GUNTHER, CONSTITUTIONAL LAW, *supra* note 105, at 734 (explaining that *Green* clearly shifted the emphasis from purification of the decisional process to achievement of a result on the theory that integration was the only acceptable evidence that the process had been purified).

226. 402 U.S. 1 (1971).

*Keyes v. School District No. 1*,<sup>227</sup> the Supreme Court declined to rule that segregation was inherently illegal regardless of its origins, but did hold that segregation could be the result of deliberate acts by government officials even where state law had never explicitly mandated segregation. Thus, *Brown's* mandate did not require desegregation of school systems that were segregated *de facto* because of housing patterns rather than intentional state actions, but state action could be deemed to include segregation in the north under some circumstances.

After *Keyes*, the trend towards defendants' victories continued. By the mid-1970s, the Supreme Court decisions on desegregation became much less favorable to plaintiffs. In *Milliken v. Bradley*,<sup>228</sup> predominantly White-suburban schools were not required to participate in an inter-district remedy without evidence that the suburban schools had discriminated against minority students.<sup>229</sup> As Professor Molly McUsic writes: "[a]fter *Milliken* there was no practical remedy for minority students concentrated in school districts with few white students; and that describes most minority students in the north and west."<sup>230</sup> On remand, the district court ordered educational improvements to make up for the harms of segregation,<sup>231</sup> essentially reverting to *Plessy's* implicit goal of making separate schools equal.<sup>232</sup> The Supreme Court affirmed in *Milliken II*.<sup>233</sup>

Judicial decisions in the 1990s swung sharply away from desegregation.<sup>234</sup> For example, *Jenkins v. Missouri*<sup>235</sup> limited the compensatory remedies available to successful plaintiffs by disallowing attempts to draw suburban Whites into urban Black schools, efforts to raise salaries to attract and retain teachers, and efforts to examine test scores to ensure that the remedies were effective over time. Other recent cases have also hindered desegregation efforts.<sup>236</sup>

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227. 413 U.S. 189 (1973).

228. 418 U.S. 717 (1974); *see also id.* at 745 ("without an inter-district violation and inter-district effect, there is no constitutional wrong calling for an inter-district remedy"); *but see Hills v. Gautreaux*, 425 U.S. 284 (1976) (authorizing consideration of an area-wide remedy in the housing-discrimination context).

229. *Milliken v. Bradley*, 418 U.S. at 744-45. The court also declined to consider the role of housing, despite the fact that decades of discrimination in federal, state, and local housing policy contributed significantly to school segregation in the first place. *See infra* note 402.

230. McUsic, *Law's Role*, *supra* note 12, at 102.

231. *Bradley v. Milliken*, 402 F.Supp. 1096 (E.D. Mich. 1975).

232. *See Orfield, Conservative Activists, supra* note 221, at 48.

233. 433 U.S. 267 (1977).

234. *See Orfield, Conservative Activists, supra* note 221, at 43 (arguing that the activism by the Supreme Court in the 1990s was "toward resegregation").

235. 515 U.S. 70 (1995).

236. *See, e.g., Freeman v. Pitts*, 503 U.S. 467 (1992); *Bd. of Educ. v. Dowell*, 498 U.S. 237 (1991).

Plaintiffs' recent failure to remedy racial segregation through federal equal protection litigation is particularly troubling given the recent trend towards racial *resegregation*.<sup>237</sup> Today, our nation and particularly our public education system remain racially separate and radically unequal.<sup>238</sup> Although *de jure* racial segregation of schools is illegal, *de facto* segregation in fact increased in the 1990s.<sup>239</sup> In the 1998 academic year, 70% of African-American children attended predominantly minority schools, up from 66% in 1991 and 63% in 1980.<sup>240</sup> In 1968, about 20% of Latino students attended largely segregated schools. In 1998, that number has grown to more than one-third of students.<sup>241</sup> In New York, 60.3% of African-American students attended schools that were 90–100% minority in 1998; only 13.8% of African Americans attended predominantly White schools.<sup>242</sup> Racial segregation produces schools that are deeply unequal in ways that go beyond unequal budgets.<sup>243</sup>

The resegregation of public schools came in spite of—not because of—popular opinion.<sup>244</sup> Gallup Poll data show that a large percentage of Americans want integrated schools and believe that integrated schools are good for African Americans.<sup>245</sup> Half of those polled also believed racial integration improved the education of whites.<sup>246</sup> In fact, 59% of Americans believe more needs to be done to improve racial integration in schools.<sup>247</sup>

Equity strategies of school finance reform at best would accomplish *Plessy's* goal of a separate but equal America. Though even this deeply flawed goal remains elusive, more ambitious reform measures must seek to fulfill *Brown's* promise as well.

State litigation under an adequacy theory—rather than federal litigation or state equity litigation—offers the most promise for desegregating public schools. After *Keyes v. School District No. 1*,<sup>248</sup> a federal constitutional

237. Orfield, *Schools More Separate*, *supra* note 5, at 2.

238. See Erwin Chemerinsky, *Lost Opportunity: The Burger Court & the Failure to Achieve Equal Educational Opportunity*, 45 MERCER L. REV. 999, 999 (1994) [hereinafter *Lost Opportunity*] (arguing that “American schools are separate and unequal. To a very large degree, schools are not equal in their resources or their quality . . . forty years after *Brown* . . . proclaimed that separate can never be equal in public education, American schools are racially segregated and grossly unequal.”).

239. Orfield, *Schools More Separate*, *supra* note 5, at 2.

240. *Id.* at 32.

241. *Id.*

242. *Id.* at 41.

243. *Id.* at 11.

244. *Id.* at 7.

245. *Id.* at 6.

246. *Id.*

247. *Id.*

248. 413 U.S. 189 (1973).

challenge would probably not lead to an order desegregating school systems that were segregated *de facto* because of housing patterns rather than intentional state actions. However, it may sometimes be possible to find the judicial and political will to address racial segregation directly through the state courts.

Recently, a progressive decision in Connecticut took seriously the idea that integration was an important component of an adequate education. In *Sheff v. O'Neill*,<sup>249</sup> minority school children alleged that *de facto* racial segregation deprived them of an adequate education.<sup>250</sup> African Americans and Latinos constituted 25.7% of the public school population in Connecticut, but more than 98% of certain school districts in Hartford.<sup>251</sup> The Connecticut Supreme Court found that the Connecticut constitution imposed on the legislature an affirmative obligation to provide the minority children with an education substantially equal to that enjoyed by non-minority children.<sup>252</sup> This ruling was made possible in part by a unique clause in the Connecticut constitution that “[n]o person shall be denied the equal protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment of his or her civil or political rights because of religion, race, color, ancestry, national origin, sex or physical or mental disability.”<sup>253</sup> The court did not require that the discrimination result from intentional government action and held that failure to remedy was sufficient to create a justiciable issue.<sup>254</sup> The *Sheff* court proclaimed access to an un-segregated educational environment was a significant component of equal educational opportunity.<sup>255</sup>

In response to the Connecticut Supreme Court’s ruling, the state legislature passed a law that sought to reduce racial segregation in schools. The Connecticut state legislature required the state board of education to develop a five-year implementation plan, and allowed the state to sue to enforce the law.<sup>256</sup> School districts that fail to meet the law’s objectives can lose state funding.<sup>257</sup> A subsequent suit claiming that racial segregation in the Hartford schools had in fact increased between 1996 and 1999 was dismissed as premature.<sup>258</sup>

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249. 678 A.2d 1267 (Conn. 1996).

250. *Id.* at 1281.

251. *Id.* at 1272–73.

252. *Id.* at 1281–82.

253. CONN. CONST. art. I, § 20.

254. *Sheff*, 678 A.2d at 1283.

255. *Id.* at 1281–82.

256. 1997 Conn. Acts 97-290 (Reg. Sess.).

257. *Sheff v. O'Neill*, 733 A.2d 925, 927 (Conn. 1999) (quoting 1997 Conn. Acts 97–290, § 1).

258. *Id.* at 938.



PART II.  
EDUCATION REFORM IN NEW YORK

Like *Sheff*, a recent trial court decision in New York also looked at school finance reform and racial integration efforts as related legal questions. The Appellate Division reversed and the case is up on appeal to the Court of Appeals.

The "savage inequalities" of the New York public school system have been dramatically publicized by activists such as Jonathan Kozol.<sup>259</sup> In *Campaign for Fiscal Equity v State*,<sup>260</sup> the plaintiffs convinced a New York trial court that the education finance system: (1) violated the state constitution;<sup>261</sup> and (2) had "an adverse and disparate impact" on minority students in violation of the implementing regulations<sup>262</sup> of Title VI of the Civil Rights Act of 1964.<sup>263</sup>

The trial court's first task was to determine what constitutes a "sound basic education."<sup>264</sup> Justice DeGrasse found that the term "sound basic education" connotes an education that provides students with the skills needed to become productive citizens.<sup>265</sup> Rejecting the state's assertion that this requirement could be met by passing the Regents Competency Tests,<sup>266</sup> the court determined that schools should impart the skills necessary to: (1) be informed voters;<sup>267</sup> (2) be competent

259. See KOZOL, SAVAGE INEQUALITIES, *supra* note 1, at 83–132.

260. 719 N.Y.S.2d at 478.

261. The New York Constitution mandates that "[t]he 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. It is interesting to note that this clause falls within the weakest category in Professor Ratner's taxonomy of education clauses. See Ratner, *supra* note 182, at 815 n.143. Justice DeGrasse's progressive opinion was aided by the fact that the New York Court of Appeals has interpreted this to require that the state provide a "sound basic education." *Board of Educ. v Nyquist*, 439 N.E.2d 359, 369 (N.Y. 1982). Nevertheless, the trial court opinion seems to lend some support for Patt's contention that the strength of education clauses has little determinative effect on the plaintiffs' rates of success. See Patt, *School Finance Battles*, *supra* note 24, at 555; see generally *supra* note 184.

262. 34 C.F.R. § 100.3 (2002).

263. 42 U.S.C. § 2000d (2002).

264. *Cf. Bd. of Ed. Levittown Union Free School Dist. v. Nyquist*, 439 N.E.2d at 369 (finding that where the average per pupil expenditure of New York State exceeded that in all other States but two, a sound basic education had been provided).

265. *Campaign for Fiscal Equity*, 719 N.Y.S.2d at 487.

266. *Id.* at 485. The Regents Competency Tests measure the reading, writing and mathematic competency required of eighth to ninth graders. *Id.*

267. Students must be given the skills necessary to understand complex issues such as campaign finance reform, tax policy, and global warming. *Id.*

jurors;<sup>268</sup> and (3) compete for employment.<sup>269</sup> Justice DeGrasse also declined to use the Regents Learning Standards to define a “sound basic education,” fearing that this would delegate to a state agency the power to define a constitutional right.<sup>270</sup>

To assess whether New York was failing to provide all students with a sound, basic education, the trial court opinion proceeded to evaluate both inputs and outputs. Under the input inquiry, the court determined that New York had failed to provide (1) qualified personnel;<sup>271</sup> (2) adequate facilities and small class size;<sup>272</sup> and (3) instrumentalities of learning.<sup>273</sup> Likewise, the court determined that educational outputs were inadequate, including: (1) graduation/dropout rates;<sup>274</sup> (2) performance on standardized tests;<sup>275</sup> (3) nature of the degrees received; and (4) performance of those who pursue higher education. Furthermore, the court revisited the debate over the causal link between funding inadequacies and educational opportunity,<sup>276</sup> and held that etiology had been sufficiently established by the plaintiffs.<sup>277</sup>

The brief remedial order focused primarily on ensuring that the state remedy the input-based deficiencies by providing qualified teachers, appropriate class sizes, adequate physical infrastructure, sufficient instrumentalities of learning, suitable curricula, adequate resources for students with extraordinary needs, and a safe, orderly environment.<sup>278</sup> The court instructed the state as a threshold matter to ascertain the actual costs of providing a sound basic education,<sup>279</sup> with particular emphasis on:

268. Schools must provide the “verbal, reasoning, math, science, and socialization skills” necessary to determine questions of fact in a jury trial involving DNA evidence, statistical analysis, or financial fraud. *Id.*

269. *Id.* at 487.

270. *Id.* at 484.

271. Among other things, the court found that the least qualified teachers by objective measurements were disproportionately concentrated in New York City’s lowest performing schools. *Id.* at 493–97. The court also pointed to salary differentials and shrinking investment in arts and physical education as obstacles that made delivery of the core curriculum even harder. *Id.* at 498–500.

272. *Id.* at 501–13.

273. The court found that New York failed to provide sufficient textbooks, library books, classroom supplies and equipment, and instructional technology. *Id.* at 513–15.

274. *Id.* at 515–17. Rejecting the defendants’ argument that they should not be blamed for high dropout rates, Justice DeGrasse found that “when 30% of students drop out of school without obtaining even a GED, serious questions arise about system breakdown.” *Id.* at 517.

275. *Id.* at 517–19.

276. See *supra* notes 62–70 and accompanying text.

277. *Campaign for Fiscal Equity*, 719 N.Y.S.2d at 520–26.

278. *Id.* at 550.

279. The current estimate is that the overhaul would cost at least 1 billion dollars per year. See Abby Goodnough, *State Asks Court to Overturn School Financing Ruling*, N.Y. TIMES, Oct. 26, 2001, at D3 [hereinafter *Goodnough State Asks Court*].

(1) ensuring that every school district has adequate resources; (2) taking into account variations in local costs; (3) providing stable funding to ensure long-term planning; (4) providing transparency so that the public may understand how New York distributes school aid;<sup>280</sup> and (5) ensuring a system of accountability to measure whether the reforms implemented by the legislature actually provide the opportunity for a sound basic education and remedy the disparate impact of the school finance system.<sup>281</sup> Finally, with reference to James Ryan,<sup>282</sup> the trial court directed the state to examine the effects of racial isolation and its relationship to student achievement; the court suggested that in some cases increased racial and socioeconomic integration might be a more cost effective solution to historically under-performing schools than an approach that focused exclusively on increased funding to schools with a high percentage of minorities.<sup>283</sup> Like the Connecticut Supreme Court in *Sheff*, Justice DeGrasse took seriously the idea that extreme *de facto* segregation is itself a problem that the state should be required to overcome as part of an education reform remedy.

On June 25, the Appellate Division reversed. Justice Lerner, writing for the court, held that the New York state constitution's guarantee of a "sound basic education" required that schools provide only an eighth or ninth grade skill level.<sup>284</sup> The court concluded that the plaintiffs had not proven that the education provided by the New York City schools failed to provide this minimum level of adequacy<sup>285</sup> or that any insufficiencies were caused by the state funding system.<sup>286</sup> Finally, the court concluded that the plaintiff's Title VI claim had been overruled by the United States Supreme Court.<sup>287</sup>

The parties agreed that some of the disparities in test scores resulted from demographic factors such as poverty, high crime rates, high rates of single parenting, homes where English is not spoken, or homes where parents offer little motivation or assistance with homework.<sup>288</sup> One of the plaintiffs' witnesses, Dr. David Grissmer, conceded that investing money in the family rather than in the schools, might pay off even more.<sup>289</sup> On the

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280. *Cf. id.* (describing the "bewildering array of formulas used by New York to distribute state aid").

281. *Campaign for Fiscal Equity*, 719 N.Y.S.2d at 550–51.

282. See *supra* note 203 and accompanying text.

283. *Campaign for Fiscal Equity*, 719 N.Y.S.2d at 551.

284. *Campaign for Fiscal Equity v. State*, 744 N.Y.S.2d 130, 138 (N.Y.App. Div. 2002)

285. *Id.* at 139.

286. *Id.* at 144.

287. *Id.* at 146; see also *Alexander v. Sandoval*, 532 U.S. 275 (2001) (holding that there is no private right of action to enforce Title VI regulations).

288. 744 N.Y.S.2d at 144.

289. *Id.*

basis of these obstacles, the Appellate Division concluded that “more spending on education is not necessarily the answer . . . the cure lies in eliminating the socio-economic conditions facing certain students.”<sup>290</sup> Earlier in the opinion, Justice Lerner reasoned that “the State must offer all children the opportunity of a sound basic education, not ensure that they actually receive it.”<sup>291</sup> The Appellate Division implicitly concluded, therefore, that the state can theoretically fulfill its obligation to provide the “opportunity” for a sound basic education by providing minimally adequate inputs to students in communities where systematic obstacles prevent any of them from actually receiving an adequate education. As Justice Saxe argued in dissent:

The State . . . contend[s] that deficiencies in student performance that are attributable to socioeconomic conditions extrinsic to the education system are not relevant to assessing whether schools are meeting constitutional standards. It takes the position that once socioeconomic factors are factored out, spending has no significant impact on students obtaining an education. Stated another way, this argument limits the State’s responsibility to that of providing whatever educational experience would be necessary for some theoretical student, without any socioeconomic disadvantages, to obtain the requisite education . . . To properly weigh whether a minimally adequate education is being offered to New York City’s public school students, the actual circumstances and needs of all the students must be considered. It is not enough that a portion of the City’s students can obtain an adequate education, where it is demonstrated that another large segment of students is unable to do so, especially when this inability is caused by the school system’s failure to provide the necessary programs, facilities and educational approaches due to a lack of sufficient funding.<sup>292</sup>

At its core, the dispute between the trial court and the Appellate Division centers around the scope of the state’s duty and the meaning of causality. The Appellate Division treats the state’s duty as limited to the provision of minimally adequate inputs, even where predictable and ascertainable obstacles prevent a large percentage of the city’s poorest children from actually obtaining a “sound, basic education” when confronted with these obstacles. Similarly, the Appellate Division’s view of causality suggests that the causal link is disrupted when socioeconomic factors extrinsic to the school system also present obstacles to the attainment of a

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290. *Id.*

291. *Id.* at 143.

292. *Id.* at 153–54.

sound, basic education, even where the trial court reasonably concluded that the school financing system itself created myriad imposing obstacles. Thus, the Appellate Division's conception of the state's duty to educate children stops abruptly at the schoolhouse door. By radically limiting the notion of educational "opportunity" in this way, the Appellate Division renders the notion of a "sound basic education" virtually meaningless.

The parties agree that socioeconomic factors extrinsic to the K-12 educational system present significant obstacles to the provision of a sound basic education to the city's poorest schoolchildren. Nevertheless, the trial court structured a narrow remedy that focused almost entirely on factors intrinsic to the school system. In contrast, the Appellate Division concluded that the existence of extrinsic factors limited the state's educational duties to minimal inputs and ignored the possibility of a broader remedial strategy. This Article takes issue with both approaches and instead suggests that the state's duty to provide an adequate education is rendered meaningless if it stops abruptly at the schoolhouse door and suggests that a meaningful remedial order must also target a limited number of extrinsic factors that have a direct effect on educational opportunity.

Poverty, racial segregation, and other concomitant obstacles indubitably limit the educational opportunities of poor children in New York and elsewhere. For this reason, a remedial order that ignores factors extrinsic to the school system (narrowly defined) is unlikely to result in significant progress. Radically limiting the definition of educational "opportunity" undermines the very purpose of creating a state duty to provide a "sound basic education." In contrast, a remedial order that acknowledges that educational opportunity is inextricably interwoven with other socioeconomic factors offers great potential for fulfilling the state's constitutional obligation to provide a "sound basic education" to all its school children.

### PART III.

#### REMEDIES: TRANSLATING SUCCESS IN THE COURTROOM INTO SUCCESS IN THE CLASSROOM

As Professor McUsic points out, "winning in the courtroom is not the same as winning in the classroom."<sup>293</sup> Some of the most successful school litigation cases have not immediately led to significant changes in the actual educational opportunities of children. Disparities still exist in funding levels and/or outcomes in both Kentucky<sup>294</sup> and Massachusetts.<sup>295</sup> California slipped from around the median in the country in per pupil education expenditure to thirty-eighth during the time since its landmark

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293. McUsic, *Law's Role*, *supra* note 12, at 108.

294. See *supra* note 194 and accompanying text.

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

school finance case.<sup>296</sup> The plaintiffs' initial victory in New Jersey required twelve more proceedings over the past twenty years.<sup>297</sup> In Connecticut, racial segregation has actually increased since *Sheff* was decided in 1996.<sup>298</sup> This is not to say that education reform litigation has failed, just that much remains to be done even in states where plaintiffs have won significant victories in the courts.

The *CFE* case will ultimately be decided by the New York Court of Appeals. If the plaintiffs prevail, it will probably require a legislative response and additional spending in excess of one billion dollars per year.<sup>299</sup>

The challenges facing the Court of Appeals are immense. If the court determines that the state school system is unconstitutionally inadequate, it should issue a remedial order that sets goals, allocates roles, catalyses steps towards meaningful reform, enables on-going mechanisms for evaluating progress (or lack thereof), and creates a structure for further judicial action in the event that the unconstitutional inadequacy continues.

In structuring a remedial order, the court also faces a number of other delicate tasks. It must work out the scope of an *affirmative* right in a society accustomed to negative liberties. It must effectively orchestrate relationships between three co-equal branches of government. It must avoid overstepping the boundaries of its expertise and authority, without abdicating its responsibility for ensuring that constitutional rights will be vindicated and constitutional duties will be fulfilled. Finally, it must offer guidelines specific enough to make the constitutional obligation meaningful, but simultaneously flexible enough to adjust to practical difficulties of implementation and the highly individualized needs of each community.

Justice DeGrasse's remedy is a compelling start, but it does not begin to answer many of the thorniest questions of institutional design, oversight, and implementation. Building from the trial court's opinion in the *CFE* case, this Article argues that an education reform proposal that is implemented today after a finding that a state has violated a state constitutional duty should have the following characteristics: (1) it should equalize funding to the extent necessary to set input-based minima; (2) it should take seriously *Brown's* proclamation that separate is inherently unequal;

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296. See *supra* note 167 and accompanying text.

297. *Robinson v. Cahill*, 303 A.2d 273 (N.J. 1973); *Robinson v. Cahill*, 396 A.2d 65 (N.J. 1973); *Robinson v. Cahill*, 339 A.2d 193 (N.J. 1975); *Robinson v. Cahill*, 351 A.2d 713 (N.J. 1975); *Robinson v. Cahill*, 335 A.2d 129 (N.J. 1976); *Robinson v. Cahill*, 358 A.2d 457 (N.J. 1976); *Abbott v. Burke*, 495 A.2d 376 (N.J. 1985); *Abbott v. Burke*, 575 A.2d 359 (N.J. 1990); *Abbott v. Burke*, 643 A.2d 575 (N.J. 1994); *Abbott v. Burke*, 693 A.2d 417 (N.J. 1997); *Abbott v. Burke*, 710 A.2d 450 (N.J. 1998); *Abbott v. Burke*, 751 A.2d 1032 (N.J. 2000). It is interesting to note, however, the New Jersey now has the highest per pupil spending of any state in the nation. See *supra* note 50 and accompanying text.

298. *Sheff v. O'Neill*, 733 A.2d 925, 938 (Conn. 1999).

299. See Goodnough, *State Asks Court*, *supra* note 279.

(3) it should create a firm but limited role for the courts to protect the constitutional rights of minorities from majoritarian failures without exceeding the courts' limited expertise; (4) it should be specific enough to minimize inter-branch tension; (5) it should facilitate broad-based collaboration between courts, legislatures, state agencies, local school boards, unions, parents, local businesses, and civic organizations; (6) it should make states accountable for outcomes; and (7) it should be flexible enough to allow state and local decision-makers to view the problem holistically and to innovate beyond traditional education finance remedies.

#### A. Setting Input Floors

As discussed above, there has been significant debate regarding the effect of money on education.<sup>300</sup> After extensive testimony from scholars like Eric Hanushek and Ronald Ferguson and other evidence, Justice DeGrasse found that the plaintiffs had shown a causal link between funding and educational opportunity.<sup>301</sup> The Appellate Division, in contrast, held that the plaintiffs had failed to establish a causal link by anything more than a *res ipsa loquitor* rationale.<sup>302</sup> To the extent that funding levels are reflected in other factors such as class size, teacher salaries, facilities, and infrastructure, this Article argues that Justice DeGrasse was wise to incorporate this data into his remedy, which set the minimum inputs states would be responsible for ensuring that each school district provides.<sup>303</sup> After controlling for family and community background factors, Professor Ferguson suggests that educational opportunities improve when schools have more literate and experienced teachers and fewer large classes.<sup>304</sup> It may be necessary to ensure that poorer schools have enough funding to provide higher salaries as an incentive for the best teachers to accept jobs in poorer districts.<sup>305</sup> Where schools districts cannot afford structurally safe buildings,<sup>306</sup> this may need to be remedied to provide a minimum adequate learning environment. Although causality is extremely controversial in the education finance context, Justice DeGrasse heard extensive testimony throughout a seven-month trial and reasonably concluded that there was a causal link between the funding structure and the under-performance of many New York City schools.

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300. See *supra* notes 62–70 and accompanying text.

301. *Campaign for Fiscal Equity*, 719 N.Y.S.2d at 520–26.

302. *Campaign for Fiscal Equity*, 744 N.Y.S. 2d at 143.

303. See Zwibelman, *Broadening the Scope*, *supra* note 65, at 528.

304. See Ferguson, *Paying for Public Education*, *supra* note 63, at 488.

305. *Id.* at 489.

306. See, e.g., *DeRolph v. State*, 677 N.E.2d 733, 762–68 (Ohio 1997).

The trial court's remedy would be expensive, but it is well worth the investment. Early estimates suggest that Justice DeGrasse's order would cost more than one billion dollars per year.<sup>307</sup> A recent poll conducted by Zogby International found that 59% of New Yorkers believe that state funding for education should be increased and 64% feel that improving education is more important than holding down taxes.<sup>308</sup> Governor Pataki's proposed 2003 budget would reduce aid to school districts by about \$284 million.<sup>309</sup> Even in a budget crisis, this approach may prove penny wise and pound foolish.

The costs of meeting input-based minima are dwarfed by the likely costs of inaction. The Commerce Department estimates that the United States suffers a productivity loss of between \$140 billion and \$300 billion annually that is directly traceable to adult worker illiteracy.<sup>310</sup> Other studies suggest that functional illiteracy has an annual cost of around \$224 billion in welfare, crime, incompetence, tax losses, and remedial education.<sup>311</sup> Finally, three-quarters of the five hundred biggest companies in America spend about \$300 million annually on remedial training for almost eight million workers.<sup>312</sup> Systematically inadequate schools also hurt the economy by contributing to cycles of unemployment and poverty.<sup>313</sup>

Low levels of literacy may also increase health care costs. The National Institute for Literacy has found that 26% of adults with low literacy levels reported health conditions that prevented them from fully participating in productive activities.<sup>314</sup> Likewise, adults at low literacy levels have difficulty availing themselves of health care services, taking medication, understanding Medicare applications, and understanding health conditions like asthma.<sup>315</sup>

Failure to invest in education may also lead to higher prison costs. Studies have shown that prisoners tend to be less literate than the general

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307. See Goodnough, *State Asks Court*, *supra* note 279.

308. Press Release, Alliance for Quality Education, Voters Overwhelmingly Prefer State Tax Increases to Cuts in Education, at <http://www.allianceforqualityeducation.org/zrelease.html> (last visited Dec. 4, 2002) (on file with the Michigan Journal of Race & Law).

309. See Citizens Budget Commission, *Achieving a Better Balance: Recommendations for the New York State Budget for Fiscal Year 2003* 1, 18 (March 21, 2002), at [http://www.cbcny.org/cbc\\_nys03.pdf](http://www.cbcny.org/cbc_nys03.pdf) (on file with Michigan Journal of Race & Law).

310. Schwartz, *Why Johnny's Parents Can't Read*, *supra* note 15, at 191.

311. *Id.* at 192.

312. *Id.*

313. See, e.g., Hunter, *All Eyes Forward*, *supra* note 189, at 487 (describing this phenomenon in Kentucky in the 1980s).

314. See National Institute for Literacy, *Literacy & Health*, at <http://novel.nifl.gov/nifl/facts/health.html> (last visited Dec. 4, 2002) [hereinafter *Literacy & Health*] (on file with the Michigan Journal of Race & Law).

315. See *id.*



adult population and that prisoner education programs reduce recidivism rates.<sup>316</sup>

As Justice DeGrasse recognized, setting input-based minima is necessary but not sufficient for reforming historically under-resourced and under-performing schools.

### B. *Taking Race Into Account—Separate is Inherently Unequal*

The trial court's opinion in *CFE* follows *Sheff* in directly addressing *de facto* racial segregation, with explicit reference to Professor Ryan's compelling thesis that school finance reform is incomplete without efforts to overcome racial segregation.<sup>317</sup> In spite of the fact that the Title VI claim in *CFE* is no longer tenable, the final order would be wise to reinstate the injunction that the state seek ways to remedy racial isolation as part of its duty to provide a "sound basic education." As *Brown* warns, "[s]eparate educational facilities are inherently unequal."<sup>318</sup> Likewise, at least in the abstract, voters seem to favor more racial integration in education.<sup>319</sup> Even in the absence of the state constitutional language utilized in *Sheff*<sup>320</sup> and the implementing regulations of Title VI,<sup>321</sup> state courts should consider the educational benefits of racial integration in defining the contours of state constitutional adequacy requirements.<sup>322</sup>

## PART IV.

### COURTS SHOULD PLAY A FIRM BUT LIMITED ROLE AND ENCOURAGE BROAD COALITIONS

#### A. *Balancing the Judicial Role*

Courts should use their power and legitimacy to demand that the political branches actually live up to their constitutional obligations to minorities when majoritarian institutions fail over time. What courts do well is protect minorities from the tyranny of the majority. For this reason, constitutional law trumps acts of legislation. Alexander Hamilton argued that "[a] constitution is in fact, and must be, regarded by judges as a fun-

316. See National Institute for Literacy, *Fact Sheet: Corrections Education*, 1, 1–2 (2001) at <http://novel.nifl.gov/nifl/policy/prisonlitfactsheet.doc> (last visited Dec. 4, 2002) [hereinafter *Corrections Education*] (on file with the Michigan Journal of Race & Law).

317. *Campaign for Fiscal Equity*, 719 N.Y.S.2d at 551.

318. 347 U.S. at 495.

319. See Orfield, *Schools More Separate*, *supra* note 5, at 6–7.

320. *Sheff*, 678 A.2d at 1281–82; see also CONN. CONST. art. I, § 20.

321. 34 C.F.R. § 100.3 (2002).

322. Cf. *supra* note 206.

damental law . . . [and that] the constitution ought to be preferred to the statute, the intention of the people to the intention of their agents."<sup>323</sup> Since *Marbury v. Madison*,<sup>324</sup> it is settled law that it is "the province and duty of the judicial department to say what the law is."<sup>325</sup>

Constitutions place certain priorities outside of the scope of majoritarian influence and declare them fundamental. State constitutions have chosen to make education one of the fundamental rights the government has an obligation to provide even if the political process would otherwise not provide it.<sup>326</sup> Justice DeGrasse took an appropriately firm approach when he declared that:

. . . the court's deference to the coordinate branches of State government is contingent on these branches taking effective and timely action to address the problems set forth in this opinion. The parlous state of the City's schools demands no less. The court will not hesitate to intervene if it finds that the legislative and/or executive branches fail to devise and implement necessary reform.<sup>327</sup>

What courts do not do well is create implementation plans and make budgetary decisions. In addition to courts' general lack of expertise, we should also be concerned about judicial activism because it cannot easily be corrected through the electoral process.<sup>328</sup> While this is a very real concern in the school finance and school desegregation contexts, the accepted role of the judiciary has evolved somewhat in the twentieth century as public law litigation has developed.<sup>329</sup> The culmination of this process, according to Professor Abram Chayes, is the remedial decree.<sup>330</sup> Professor Chayes explained that under the new model "[t]he subject matter of the lawsuit is not a dispute between private parties about private rights, but a grievance about the operation of public policy."<sup>331</sup>

323. See Alexander Hamilton, *The Federalist No. 78*, in *SELECTED WRITINGS AND SPEECHES OF ALEXANDER HAMILTON* 179, 182 (Morton J. Frisch ed., 1985).

324. *Marbury v. Madison*, 1 Cranch 137 (1803).

325. *Id.* at 177.

326. See *supra* note 21 and accompanying text.

327. *Campaign for Fiscal Equity*, 719 N.Y.S.2d 475, 550 (N.Y. Sup. Ct. 2001).

328. Cf. 744 N.Y.S.2d at 149 (Tom, J., concurring) ("For constitutional purposes, once we as judges start micro-managing how a school system as vast and complicated as this one is to be administered, and how funding is to be distributed to ensure that portions of the student body are better served, we are really traversing a very problematic region that is quintessentially administrative and perhaps even political in nature. We should do so only with the greatest circumspection.").

329. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976) [hereinafter Chayes, *Role of the Judge*].

330. *Id.* at 1298-1302.

331. *Id.* at 1302.

Judicial restraint may be less appropriate in the unusual context of an affirmative duty than in the usual case where judges seek to prevent infringement of negative liberties. State education clauses are *sui generis* in that they create an affirmative obligation to provide a certain level of services. As the *Sheff* court explained:

The affirmative constitutional obligation of the state to provide a substantially equal “educational opportunity . . . differs in kind from most constitutional obligations. Organic documents only rarely contain provisions that explicitly require the state to act rather than to refrain from acting . . . educational equalization cases are in significant aspects *sui generis* and not subject to analysis by accepted conventional tests or the application of mechanical standards. The wealth discrimination found among school districts differs materially from the usual equal protection case where a fairly defined indigent class suffers discrimination to its peculiar disadvantage. The discrimination is relative rather than absolute.”<sup>332</sup>

A firm and continuing—but flexible—judicial role is essential to ensure that constitutional standards of adequacy are indeed met over time.

#### B. *Specific Remedial Orders May Minimize Inter-branch Tension*

Failure by courts to be specific in defining the state’s constitutional duty can lead to further proceedings and tension between the courts and the legislature. In *Robinson v. Cahill*,<sup>333</sup> a vaguely worded finding that the state system was unconstitutional led to twelve subsequent court opinions over the course of more than two decades in New Jersey.<sup>334</sup> New Jersey’s experience has recently recurred in Ohio. In *DeRolph v. State I*,<sup>335</sup> the Ohio Supreme Court found that the Ohio school financing system was unconstitutional, but deferred to the state legislature in crafting the remedy.<sup>336</sup> As a result, the legislative remedy was soon challenged in the courts.<sup>337</sup> Recently, the Ohio Supreme Court evaluated the legislative remedy and expressed concern that the system increased academic

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332. *Sheff v. O’Neill*, 678 A.2d 1267, 1281 (Conn. 1996)(quoting *Horton v. Meskill*, 376 A.2d 359, 373 (Conn. 1977)).

333. 303 A.2d 273 (N.J. 1973).

334. *See supra* note 297.

335. 677 N.E.2d 733 (Ohio 1997).

336. *Id.* at 747.

337. *DeRolph v. State*, 728 N.E.2d 993, 1001 (Ohio 2000); *DeRolph v. State*, 712 N.E.2d 125 (Ohio Ct. Com. Pl. 1999).

requirements without providing adequate funding to meet the higher standards.<sup>338</sup>

By deferring to the legislature in broad terms to construct a remedy, the *DeRolph I* court invited further proceedings. In contrast, in Kentucky, the *Rose* opinion was very specific and KERA was passed soon afterwards.<sup>339</sup> Like *Rose*, Justice DeGrasse's *CFE* opinion clearly defines the content of the constitutional requirement with reference to the skills necessary to be an informed voter, a thoughtful juror, and a successful worker in an increasingly competitive job market.<sup>340</sup> Additionally, bold judicial action can encourage a strong legislative response in part by creating political cover for legislators who must make difficult decisions regarding taxation or budget cuts in order to implement costly education reform measures.<sup>341</sup>

### *C. A Collaborative Model of Reform*

Beyond setting outcome-based goals and input-based minima, actually deciding what measures are necessary to implement reform requires a level of expertise courts simply do not possess. Additionally, concerns about judicial activism and aggrandizement should be mitigated by including a wide variety of stakeholders in implementing courts' remedies. Finally, from *Brown* to the present, courts have had great difficulty implementing education reform when they have had to struggle against public opinion and other branches of state government.

To overcome these challenges, sound institutional design, careful role allocation, and dialogical management techniques are fundamental components of effective remedial orders that aim to remedy unconstitutional inadequacies. The proper role of the court is to act as a goal-setter and overseer, delegating implementation where possible but remaining involved enough to ensure that progress is made towards fulfilling the constitutional requirements.

Armed with the court's definition of the constitutional requirement, legislators should be required to identify strategies for moving towards adequacy, providing funding to make reform efforts feasible, and giving content to broad, judicially-crafted goals. Likewise, through its implementing regulations, the state Department of Education should act as a goal setter, a manager, and an implementer with still greater specificity.

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338. 728 N.E.2d at 1018. In many ways, *DeRolph II* is a very innovative and promising opinion. Like the trial court in *CFE*, 719 N.Y.S.2d at 534, the Ohio Supreme Court in *DeRolph II* recognized that "funding is only one aspect of a thorough and efficient system of school." 728 N.E.2d at 1001.

339. See *supra* notes 191–92 and accompanying text.

340. See *supra* notes 264–69 and accompanying text.

341. See, e.g., Hunter, *All Eyes Forward*, *supra* note 189, at 485–86 (describing this phenomenon in Kentucky).

Education reform will fail, however, if it is simply a collaborative effort between the three statewide branches of government. A school reform strategy that works for an entire state will draw on the expertise and involvement of a diverse group of stakeholders including school boards, school administrators, teachers, teachers' unions, parents, community leaders, and local businesses to address the individual needs and values of a local community. Although highly-localized funding structures contribute to the problem of "savage inequalities" in educational expenditures,<sup>342</sup> local involvement in education may also be essential for overcoming the problems faced by under-performing and under-resourced schools. Limiting local control of schools is not a panacea.<sup>343</sup>

Some advocates have emphasized the importance of promoting public dialogue in the implementation of education reform. For example, Professor Michael Rebell (the plaintiffs' attorney in *CFE*) has argued that "[i]n highly charged institutional reform litigation, courts should promote broad-based public discussion and involvement in both the formulation of the remedial principles and the implementation of the remedial scheme."<sup>344</sup> Desegregation and school finance experiments along these lines have shown promise in Massachusetts, Kentucky, and Alabama.<sup>345</sup> This approach is also consistent with notions of discursive democracy such as those advanced by contemporary German philosopher Jürgen Habermas.<sup>346</sup>

Kentucky provides one model of collaboration. In Kentucky, a broad coalition of stakeholders—brought together in part by a not-for-profit, independent, volunteer citizens' advocacy organization called the *Prichard Committee*—was instrumental in encouraging judicial and legislative action on school reform.<sup>347</sup> Likewise, a nonpartisan coalition of

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342. See *supra* notes 24–50 and accompanying text.

343. Cf. *infra* note 418.

344. Michael A. Rebell & Robert L. Hughes, *Efficacy and Engagement: The Remedies Problem Posed by Sheff v. O'Neill—and a Proposed Solution*, 29 CONN. L. REV. 1115, 1153 (1997) [hereinafter Rebell, *Efficacy and Engagement*]; see also James S. Liebman & Charles F. Sabel, *A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform* 10 at <http://www.law.columbia.edu/sabel/papers/deweylab4.doc> (last visited Dec. 4, 2002) [hereinafter Liebman & Sabel, *Public Laboratory*] (on file with the Michigan Journal of Law) (arguing that "a central lesson of the emerging school reforms is that neither the separation of powers, the traditional forms of regulation associated with it, nor even the fundamental distinction between a public and private—or political and technical—spheres can today be assumed. Consequently, the process of continuing regulatory adjustment requires a more profound and pervasive process of institutional renovation and a larger circle of participation in public decision making that redraws the distinction between public and private.").

345. See Rebell, *Efficacy and Engagement*, *supra* note 344, at 1155–58.

346. See *id.* at 1153 (citing JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS* Ch. 8 (1996)).

347. See Hunter, *All Eyes Forward*, *supra* note 189, at 489–94.

businesspeople, government officials, agricultural interests, labor leaders, and educators called the *Partnership for Kentucky Schools* and other groups have played key roles in implementing Kentucky's reform efforts.<sup>348</sup> Though education reform in Kentucky has had mixed results thus far, in this respect at least it provides a helpful example for state courts seeking to craft an education reform process that will avoid acrimony and promote collaboration in catalyzing, structuring, and implementing comprehensive education reform.

#### D. Negotiated Rulemaking

A more aggressive approach to this dialogical model of remedies implementation could be modeled on the administrative law concept of Negotiated Rulemaking. In 1990, Congress passed the Negotiated Rulemaking Act<sup>349</sup> to encourage negotiations between agencies and affected parties prior to the "notice and comment" period required by the Administrative Procedure Act.<sup>350</sup> In a Negotiated Rulemaking, the agency head appoints a convener to identify stakeholders and the topics to be decided.<sup>351</sup> The affected parties form a committee with no more than twenty-five members to seek consensus about how to implement the legislative mandate.<sup>352</sup> The committee may then recommend that the agency adopt the proposed rule. The agency still controls the process and has final say on whether to promulgate a specific rule,<sup>353</sup> but seeks to reach a unanimous agreement among affected stakeholders rather than to impose a top-down solution.<sup>354</sup> The primary goals of negotiated rulemaking are to save time, reduce transaction costs, craft better rules, gather information efficiently, foster trust among stakeholders, and prevent subsequent judicial challenges to the final regulation.<sup>355</sup> Perhaps most importantly, proponents

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348. See *id.* at 504–12.

349. Pub.L. 101-648, § 3(a), 104 Stat. 4969 (codified as amended at 5 U.S.C.A. §§ 561–70 (1996 & supp. 2000)), permanently reauthorized by the Administrative Dispute Resolution Act of 1996, Pub.L. No. 104-320, § 11(a), 110 Stat. 3870, 3873. For a summary of Negotiated Rulemaking, see generally ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, *ADMINISTRATIVE LAW* 298–300 (2001) [hereinafter *ADMINISTRATIVE LAW*].

350. 5 U.S.C. § 553 (1994).

351. 5 U.S.C. § 563 (1994).

352. 5 U.S.C. §§ 564–65 (1994).

353. A committee's power is limited to transmitting a report to the agency concerning promulgation under the rule under consideration. See 5 U.S.C. § 566 (f) (1994). An agency official's promise to abide by the ultimate consensus of participants in a regulated industry is not enforceable in court. See *U.S.A. Group Loan Services, Inc. v. Riley*, 82 F.3d 708, 714–15 (7th Cir. 1996).

354. *U.S.A. Group Loan Services, Inc.*, 82 F.3d at 714.

355. There is significant debate over whether Negotiated Rulemaking accomplishes its goals of reducing time spent developing regulations and reducing judicial challenges to rulemaking. See *ADMINISTRATIVE LAW*, *supra* note 349, at 299–300.

of negotiated rulemaking suggest that it increases the legitimacy of the final rule in the eyes of those involved in its development.<sup>356</sup>

In the education reform context, this approach offers great promise for crafting a strategy that takes advantage of the expertise of non-governmental actors and considers the needs of individual communities. After the court has specifically delineated the contours of the constitutional entitlement, the court could instruct the legislature to convene an ad hoc education reform committee chaired by the Secretary of Education and including school board members, school administrators, teachers, teachers' unions, parents, community leaders, and local businesspeople. For reasons discussed *infra* in Part VI, representatives from agencies charged with housing reform, family literacy, early childhood education, and other related efforts should also participate in an advisory capacity.

The committee would be charged with creating a "blueprint" for education reform, including: (1) costing out the input based minima;<sup>357</sup> (2) suggesting mechanisms for remedying *de facto* racial segregation of schools and communities;<sup>358</sup> (3) suggesting evaluation methods (such as high stakes testing, graduation rates, drop-out rates, etc.) based on the best available empirical research and the court's definition of what the constitution requires; (4) suggesting implementation steps based on the individual resources, needs, and values of individual communities or regions; (5) recommending to the legislature what resources underperforming school districts will need to take the required implementation steps; (6) drafting best practice methods to assist school districts in using those resources effectively;<sup>359</sup> (7) establishing a procedure for determining whether individual school districts are actually making progress towards meeting the articulated goals and to help those that are falling behind; and (8) determining the conditions under which a school district's persistent inadequacy will give rise to more drastic steps (such as receivership) and outlining a procedure for state takeover of consistently failing schools.

To whatever extent possible, the ad hoc committee should be committed to principles of consensus. Such an approach would create a broad sense of ownership and involvement in the process and take advantage of diverse opinions, values, and resources, while maintaining accountability through judicial review and ultimate legislative accountability for outcomes. As with negotiated rulemaking in the administrative law context, if

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356. See Jody Freeman & Laura I. Langbein, *Regulatory Negotiation & the Legitimacy Benefit*, 9 N.Y.U. ENVTL. L.J. 60, 63 (2000).

357. See *Campaign for Fiscal Equity*, 719 N.Y.S.2d at 550-51.

358. See *id.* at 551.

359. I.e., helping schools make choices about whether to use resources to decrease class size, increase teacher salaries, hire more teaching aids, invest in more teacher training, provide more technological resources to students and teachers, or involve parents more in their children's education.

the parties fail to reach a consensus, the state Department of Education will be charged with unilateral imposition of an acceptable blueprint. Either way, the plan should be presented to the court for review under a highly deferential standard. Judicial review of a plan submitted after this process should assess whether it is realistically calculated to move the state's schools towards adequacy within a set time period.<sup>360</sup>

#### PART V.

#### MAKE STATES ACCOUNTABLE FOR OUTCOMES

“Standards-based reform” has become a central component of the federal education policy and the education policy of most states.<sup>361</sup> The vices and virtues of high stakes testing have been vigorously debated<sup>362</sup> and states such as Massachusetts that have linked education reform efforts to high-stakes testing may function as laboratories for what works and what does not.<sup>363</sup> Likewise, in determining that educational outcomes in New York City were unconstitutionally inadequate, Justice DeGrasse took in account students' performance on standardized tests,<sup>364</sup> graduation/dropout rates,<sup>365</sup> nature of the degrees received, and performance of those who pursued higher education.

Determining what outcome-based measures to use to evaluate outcomes presents an enormous challenge to courts both in the goal-setting phase and in implementation phase. This may be an area where courts should require the ad hoc committee to submit a recommendation for judicial approval. Additionally, given the dynamic nature of education reform, some flexibility should be retained for judicial modification of the outcome measurement tools based on new information, other states' experiences, or an emerging consensus in the education profession.

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360. Cf. Liebman & Sabel, *Public Laboratory*, *supra* note 344, at 90 (arguing that “the court's intervention in effect institutionalizes the crisis, stripping the tatters of legitimacy from the old system and obliging a choice between two imponderables—a court order that will just as surely be fraught with unintended consequences as it is difficult to modify, and a solution of the parties' own devising, subject to very general conditions imposed by the court, but with the virtue that it can be adjusted again and again as circumstances require”).

361. See James Traub, *The Test Mess*, N.Y. TIMES, Apr. 7, 2002 at § 6, p. 46 [hereinafter Traub, *Test Mess*].

362. See generally *id.*

363. See *supra* note 201 (discussing the debate over high stakes testing in Massachusetts).

364. *Campaign for Fiscal Equity*, 719 N.Y.S.2d at 517–19.

365. *Id.* at 515–17. Rejecting the defendants' argument that they should not be blamed for high dropout rates, the CFE trial court found that “when 30% of students drop out of school without obtaining even a GED, serious questions arise about system breakdown.” *Id.* at 517.



*A. Environmental Law as a Model for Goal-Setting  
and Coordinated Implementation*

Once the courts, the legislature, the state Department of Education, and the ad hoc committee have developed an approved blueprint, a procedure should be developed to make state legislatures ultimately accountable for outcomes. One way of implementing a dynamic, outcome-oriented approach to education reform where courts act as goal-setters but encourage broad-based and highly localized participation in implementation draws on two areas of environmental law. In the area of criteria pollutants,<sup>366</sup> the Clean Air Act<sup>367</sup> combines two distinctive governmental roles: federal standard-setting and state implementation. The federal government sets the ends and the states choose the means. First, the Environmental Protection Agency (“EPA”) defines a certain number of pollutants it wants to control and certain goals for how much of each a state can have. These goals are called National Ambient Air Quality Standards (“NAAQS”).<sup>368</sup> Every state must submit a state implementation plan (“SIP”) to the EPA outlining its plan for meeting (or exceeding) these goals.<sup>369</sup> It can meet the goals in whatever way it chooses, and the EPA cannot order a state to choose one feasible plan over another.<sup>370</sup> If a state fails to submit a SIP or submits a SIP that is inadequate, it becomes subject to sanctions.<sup>371</sup> After two years, if a state has failed to win EPA approval for its SIP, the EPA must impose a federal implementation plan (“FIP”).<sup>372</sup> The EPA can also request a SIP revision if an existing plan is “substantially inadequate to attain or maintain the relevant [NAAQS]” or meet other requirements.<sup>373</sup>

Superimposed on this model is another structure that classifies parts of the country that continue to exceed the NAAQS as nonattainment areas and imposes substantial additional conditions on polluting activities in order to move them into compliance.<sup>374</sup> In contrast, areas that have air quality better than the NAAQS are classified according to a “Prevention of Significant Deterioration” program.<sup>375</sup>

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366. PM10, PM2.5, SO<sub>2</sub>, CO, NO<sub>x</sub>, Ozone, and Lead.

367. 42 U.S.C. §§ 7401–7642 (1994).

368. 42 U.S.C. § 7409.

369. 42 U.S.C. § 7410.

370. *Union Electric Co. v. EPA*, 427 U.S. 246, 256–58 (1976) (holding that the EPA cannot reject a SIP because it is economically or technologically unfeasible).

371. 42 U.S.C. § 7509.

372. 42 U.S.C. § 7410(c).

373. 42 U.S.C. § 7410(k)(5).

374. 42 U.S.C. §§ 7501–7508.

375. 42 U.S.C. §§ 7470–7479.

The analogy is somewhat loose, but this Article proposes a framework for school finance reform that follows along roughly the same lines with minor modifications. As discussed above, courts would be the goal-setters, defining the contours of the constitutional requirement—based on inputs and outcomes—and monitoring the state legislatures' efforts in meeting these requirements. After the court has defined the constitutional requirement, the ad hoc committee would be convened to lay out the blueprint for reform. Once the blueprint has been approved by the court, the state legislature should pass legislation designed to implement the plan.

The ad hoc committee should participate alongside the state Department of Education to oversee the implementation of the legislative design. The agency would retain control of the process but would actively solicit feedback from other members of the committee. Each school district would look at its individual needs and obstacles and would submit a district implementation plan annually to the state Department of Education.

From the start of the reform process, school districts should be divided between attainment areas and non-attainment areas on the basis of whether a certain percentage of the students are meeting the outcome-based goals over time.<sup>376</sup> For the reasons outlined in *Sheff*, districts with high degrees of racial segregation should be *prima facie* considered to be in non-attainment if the constitutional definition of adequacy includes racial integration. The state's ability to provide an adequate education to children in non-attainment areas would be scrutinized more closely than its efforts in historically affluent or high-performing schools—though these schools would not be allowed to deteriorate significantly.

In "attainment areas," districts would still be required to meet the input minima (i.e., teacher training requirements, maximum class sizes, adequacy of physical infrastructure, basic instrumentalities of learning, etc.) and would be required to prevent significant deterioration in outcome measures.

In "non-attainment" areas, the state legislature and the ad hoc committee would work closely with the school districts to create a district implementation plan to meet the outcome-based goals. The same input-based goals should serve as a floor for the non-attainment districts and the state would be required to ensure that the funding was available to purchase these inputs at their local market prices. On top of this input-based floor, there should be a constitutional requirement that the outcome-based goals be met within a certain timeframe. A funding structure should be set up to give non-attainment districts additional assistance in meeting the output-based goals. This implementation plan should focus on the best judgment of

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376. A statistical analysis should be conducted to ensure that a district will not be called an attainment area if the district only met the goals because extraordinary achievement by socio-economically privileged groups offset consistent underperformance by less advantaged groups.

the school district and the state as to what measures are necessary to meet the output-based goals.

Above the input-based minima, a wide variety of policy proposals might be effective in reforming school systems, depending on the needs of the individual community. As discussed in Part VI *infra*, complicated problems often require holistic solutions. Even in non-attainment areas, the process of reviewing and approving district implementation plans should be flexible enough to encourage innovation according to local needs. The plan should be reviewed frequently by state agencies and the ad hoc committee to ensure that progress is being made towards the goals and that the district implementation plan is reasonably calculated to meet the goals within a set period of time.

Persistent underperformance would require increasing scrutiny over time, and increasing pressure from the state Department of Education and the ad hoc committee to adopt best practice standards if the initial, locally-devised approach proves ineffective. If a district consistently fails to meet its outcome-based goals over a certain time period, the state should have the first opportunity to correct the deficiency along the lines anticipated in the blueprint created by the ad hoc committee and approved by the court. Because of its affirmative constitutional duty, the state legislature would remain ultimately responsible for providing an adequate education to students in each district.

After several years of persistent underperformance, if the state's remedial efforts fail, courts themselves must step in. Parents of students in a persistently underperforming district should eventually be permitted to sue the state for an injunction and would have a rebuttable presumption that the state is failing in its constitutional duty to provide equal educational opportunities if the district consistently fails to meet the output-based goals. Under these circumstances, a court should order the state to fulfill its constitutional obligations. This is a kind of "technology forcing" or strict liability approach.

Eventually, in extreme circumstances, the court should order the state to implement the court's own implementation plan or require that the state take over the school district's administrative functions. If many districts at a time are in non-attainment, the court might instead order the state legislature to enact a new comprehensive reform program reasonably calculated to meet the constitutional mandate statewide.

Furthermore, there should also be a mechanism for revising the judicially-crafted goals and the blueprint in light of new information, other states' experiences, or an emerging consensus in the education profession.<sup>377</sup>

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377. Cf. Liebman & Sabel, *Public Laboratory*, *supra* note 360, at 120 (arguing that a court in Texas can use the same information available to parents concerning comparable schools in order to determine if a particular school district is flaunting the law).

## PART VI.

## ENCOURAGE INNOVATION/HOLISTIC UNDERSTANDING OF THE PROBLEM

The results of early education reform efforts are sobering. A collaborative process that leads to investment of new resources into under-resourced and under-performing schools may not be enough to lead to dramatic improvements in educational outcomes. Flexibility, a holistic approach, and an emphasis on the individual needs of each community are important components of a sound education reform remedy. In evaluating blueprints presented by the ad hoc committee and in considering whether district implementation plans are realistically calculated to lead to adequacy within a set time period, courts should be flexible enough to encourage other decision-makers to develop innovative and holistic responses to structural problems.

As Kentucky's experience shows, insisting that the legislature invest enough money to provide input-based minima is just the beginning. Money matters, but investing increasing sums into failing schools is not a panacea.<sup>378</sup> As the Ohio Supreme Court explained in *DeRolph II*:

Even if the system were very generously funded, if other factors are ignored, it might still not be thorough and efficient. If teachers are ill prepared and students are unaware of what is expected of them, then our state has failed them . . . . If students have the most up-to-date textbooks but cannot comprehend the material in those books, then our state has failed them.<sup>379</sup>

The trial court in *CFE* sounded a similar note when it found that:

Fundamentally, spending comparisons cannot erase the facts . . . which demonstrate—as measured by the inputs and outputs included in the Court of Appeals' template—that New York City public school students are not receiving a sound basic education. A sound basic education is gauged by the resources afforded students and by their performance, not by the amount of funds provided to schools. The State's recent increases in school funding can only begin to address long-standing problems in New York City's public schools . . . . Since there has been no fundamental change in the structure and operation of the State education finance system,

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378. See *supra* notes 62–70 and accompanying text.

379. *DeRolph v. State*, 728 N.E.2d 993, 1001 (Ohio 2000).

there is no guarantee that recent increases are sufficient or will be sustained.<sup>380</sup>

The Appellate Division in *CFE* accepted the importance of extrinsic obstacles, but reached a different conclusion. Reasoning that money might be better spent on eliminating the socio-economic conditions facing some students,<sup>381</sup> Justice Lerner reversed the trial court's opinion rather than accepting the challenge of structuring a remedy that would provide meaningful educational opportunity to all students in New York. This Article suggests that this narrow a definition of educational "opportunity" recklessly vitiates the state's constitutional duty to provide a "sound basic education." Instead, the Court of Appeals should have structured a remedial order that acknowledges the complex and multifaceted nature of the obstacles facing impoverished students and directs reform efforts towards factors that are both intrinsic to the school system and extrinsic to it.

On the level of implementation, courts, legislators, and other actors should be partners in creating a strategy that looks at the problem of under-resourced and under-performing schools in a way that: (1) acknowledges that certain tangible inputs—that are linked to money—can make a difference in creating educational options; (2) assists local school districts in identifying best practice methods to use the new resources effectively.<sup>382</sup>

Equally importantly, courts should encourage reform efforts that: (3) treat education reform as a project that is inextricably interwoven with other cultural and socio-economic reform efforts such as family literacy, early childhood education, and housing reform; and (4) adapt the education reform strategy to the needs of an individual community or region. To the extent that these other problems are ineluctably intertwined with educational opportunities, courts should look sympathetically at district implementation plans for non-attainment districts (or blueprints for entire states) that look beyond K-12 reform in their efforts to provide an adequate education to all students.

#### *A. Thinking Beyond K-12 Reform*

Part of the appeal of education reform is the idea that true educational opportunity can lead to cyclically-reinforcing results. Even if raised in poverty, a child who receives a quality education and works diligently can secure a stable, fulfilling job, housing, health care benefits, and retirement security. She can become a leader in her community, acting as a

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380. *Campaign for Fiscal Equity*, 719 N.Y.S.2d at 534.

381. *Campaign for Fiscal Equity*, 744 N.Y.S.2d at 144.

382. See *supra* note 359.

representative voice in local politics or the courts. She can offer opportunities for her children to which she herself did not have access as a youth.

Another way to look at education reform is to see it as dependent upon these other factors. In a country where 20% of children are born into poverty and 26% percent live with parents who do not have full-time, year-round employment,<sup>383</sup> education reform may face insuperable obstacles if it ignores communities and family, health and the environment, employment and training.

In some cases, reforming schools may require looking beyond the schools themselves. Education reform litigation has traditionally focused on schools in abstraction from housing, adult literacy, health care, and employment rates. Effective reform may require a broader perspective. Courts can encourage legislatures and other stakeholders to take a more holistic view of the problem—though it would be appropriate for the courts to tread lightly in using their equitable powers in school reform litigation to order changes in non-school policies. By way of illustration only, this Article briefly discusses links between education reform and other policy efforts to advance family literacy, early education, and housing reform.

### 1. Family Literacy and Early Education Programs

There are approximately ninety million American adults with limited literacy skills.<sup>384</sup> Illiteracy correlates strongly with race, ethnicity, and poverty.<sup>385</sup> In 2000, 43% of adults with the lowest literacy levels lived in poverty, 17% received food stamps, and 70% had no job or only a part-time job.<sup>386</sup>

Illiteracy has strong cyclical qualities. Children who grow up in households where adults read are more likely to learn to read themselves.<sup>387</sup> One explanation for this phenomenon is that when a child grows up in an environment where literacy skills are not emphasized, the child is unlikely to develop or value those skills.<sup>388</sup> Additionally, when education is not valued in the home, children miss out on important early educational opportunities and consequently start out behind other children in school.<sup>389</sup> Family members are important educational

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383. See *Fast Facts*, *supra* note 14.

384. See *supra* note 16.

385. Schwartz, *Why Johnny's Parents Can't Read*, *supra* note 15, at 189–91.

386. See National Institute for Literacy, *Fact Sheet: Adult & Family Literacy*, 1, 1 (Apr. 2000), at <http://novel.nifl.gov/nifl/policy/familitfactsheet.doc> (last visited Dec. 4, 2002) [hereinafter *Adult & Family Literacy*] (on file with the Michigan Journal of Race & Law).

387. Schwartz, *Why Johnny's Parents Can't Read*, *supra* note 15, at 192.

388. *Id.* at 192–93.

389. *Id.* at 193.

resources<sup>390</sup> and investment to ensure that these resources are available may sometimes be as important as other inputs in creating educational opportunity.

Where adult literacy rates are low,<sup>391</sup> family literacy programs may be valuable tools to break the cycles of illiteracy in a community. Programs that focus on the intergenerational aspects of literacy and treat parents as the first teachers of children have had a measurable impact on both the education and the quality of life of children<sup>392</sup> and should be seriously considered as key components of education reform strategies in communities where parental education levels are low.<sup>393</sup>

Likewise, early education programs can help at-risk children enter public schools better prepared to learn. Recent studies suggest that at-risk children who are given supplementary pre-kindergarten education through the Head Start program benefit in terms of their reading and mathematics skills.<sup>394</sup> Increased attention to family literacy and early childhood education offers great promise as an efficient way to improve the overall performance of children in poorer communities and to overcome cyclical disadvantages.

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390. YUDOF, EDUCATION POLICY & THE LAW IV, *supra* note 26, at 775; *see also* Lawrence Picus, *Student-Level Finance Data: Wave of the Future*, 74 THE CLEARING HOUSE, 76–77 (Nov./Dec. 2000).

391. Overall, 22% of children in the United States are born to mothers with less than twelve years of education. That number rises to 27% among African Americans and 49% among Latinos. In contrast, only 13% of non-Hispanic Whites are born to mothers with less than twelve years of education. *See Fast Facts*, *supra* note 14.

392. *See Adult & Family Literacy*, *supra* note 386.

393. Additionally, family literacy is an area where the federal government can assist states and municipalities through financial and operational support without unduly threatening local control of K–12 curricula. In 1996–97, 637 local projects received 102 million federal dollars through the Even Start program and served approximately 48,000 children and 36,000 adults. U.S. Dep’t of Educ., *Even Start: Evidence from the Past and a Look to the Future*, at <http://www.ed.gov/pubs/EvenStart/highlights.html> (last visited Dec. 4, 2002) (on file with the Michigan Journal of Race & Law). This represents .04% of the ninety million adults with literacy skills of NALS Level 1 or 2. *See supra* note 384.

394. *See* Sharon L. Ramey et al., Administration for Children & Families, U.S. Dep’t of Health & Human Services, *Head Start Children’s Entry into Public School: A Report on the National Head Start/Public School Early Childhood Transition Demonstration Study* (Nov. 2000), at [http://www.acf.hhs.gov/programs/core/pubs\\_reports/hs/transition\\_study/trans\\_study.html](http://www.acf.hhs.gov/programs/core/pubs_reports/hs/transition_study/trans_study.html) (last visited December 4, 2002) (on file with the Michigan Journal of Race & Law). Ramey contests the view that the benefits of Head Start “fade out,” contending instead that a vast majority of Head Start children achieve essentially at national averages after two or three years in public schools (in contrast to lagging skills when they entered kindergarten). *Id.*

## B. Housing Policy

To the extent that housing patterns perpetuate racial segregation and unequal school financing systems,<sup>395</sup> housing reform<sup>396</sup> may have a powerful effect on educational outcomes. Where housing is inadequate or radically segregated, efforts to target these problems directly may help provide adequate educational opportunities to young people in the area.<sup>397</sup> As Justice DeGrasse explained:

There is significant social science research that indicates that this [racial] isolation has a negative effect on student achievement. There is also some nascent research that indicates that steps to increase racial and socioeconomic integration may be more cost effective in raising student achievement than simply increasing funds allocated to high percentage minority schools.<sup>398</sup>

For these reasons, courts should issue education reform remedies that are flexible enough to permit legislatures and other decision-makers to approach education reform and housing reform as part of a larger, coordinated poverty-alleviation strategy.<sup>399</sup>

Strong empirical evidence indicates that the poor have become significantly more geographically concentrated since 1970<sup>400</sup> and that this concentration is much more pronounced among African Americans and

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395. See *supra* note 40 and accompanying text.

396. Cf. Quentin A. Palfrey, *Recent Legislation: Federal Housing Subsidies*, 37 HARV. J. ON LEGIS. 567, 568 (2000) [hereinafter Palfrey, *Federal Housing Subsidies*] (arguing that housing vouchers may be preferable to additional public housing expenditures because of their cost-effectiveness, deconcentration effects, and capacity to overcome spatial mismatch between where the poor live and where jobs are created, but contending that housing voucher appropriations should permit supply-side remedies in especially tight labor markets, provide mechanisms for housing location assistance, coordinate land-use planning efforts, and be more fully funded to address a national housing crisis).

397. Cf. Ryan, *Schools, Race, & Money*, *supra* note 158, at 256 (arguing that “[i]ncreasing expenditures in racially isolated schools . . . cannot replicate the social benefits of racially integrated schools”).

398. *Campaign for Fiscal Equity*, 719 N.Y.S.2d at 551 (citation omitted).

399. Cf. Palfrey, *Federal Housing Subsidies*, *supra* note 396, at 575–77 (advocating greater coordination between housing policymakers and anti-sprawl advocates).

400. See Michael H. Schill, *Deconcentrating the Inner City Poor*, 67 CHI-KENT L. REV. 795, 798 (1991) [hereinafter *Deconcentrating*]; see also Jargowsky & Bane, *Ghetto Poverty*, *supra* note 59, at 253 (arguing that from 1970 to 1980, the number of people with incomes below the poverty level living in census tracts with over 40% poverty rates increased from 1.9 million to 2.4 million). This trend increased in the period from 1980 to 1986, when the number of inner city poor people living 20% poverty areas increased from 884,000 to 1,614,000. See Schill, *Deconcentrating*, *supra* note 400, at 798.



Latinos than among non-Hispanic whites.<sup>401</sup> Governmental policy—from Jim Crow and *de jure* segregation of schools to more seemingly innocuous housing policies—have contributed significantly to the concentration of poverty and the racial and socioeconomic segregation of America.<sup>402</sup>

Professor William Julius Wilson argues that “social dislocation” in the form of crime, joblessness, out-of-wedlock births, single motherhood, and welfare dependency is linked to the changes in the economic-class structure in inner-city neighborhoods.<sup>403</sup> In *The Truly Disadvantaged*, Professor Wilson argues that the exodus of middle-class African-American

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401. See Schill, *Deconcentrating*, *supra* note 400, at 799; see also Jargowsky & Bane, *Ghetto Poverty*, *supra* note 400, at 252 (finding in 1980 that 65% of the ghetto poor were African American, 22% Hispanic, and 13% non-Hispanic White and other races). According to Professor Wilson, African Americans constituted about 23% of the population of central cities in 1983, but were 43% of the poor. See WILLIAM J. WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, & PUBLIC POLICY*, 33 (1987) [hereinafter Wilson, *TRULY DISADVANTAGED*].

402. See Shelby D. Green, *The Search for a National Land Use Policy: For the Cities' Sake*, 26 *Fordham Urb. L.J.* 69, 88 n.118, 91 (1998) [hereinafter Green, *Search for National Land Use Policy*] (describing the link between federal slum clearance programs and racial segregation). Starting with the Housing Act of 1937, 42 U.S.C. § 1437 *et seq.* (1994), the federal government helped increase the stock of affordable housing through the construction of government-owned public housing. This legislation contained an “equivalent elimination” provision that required one unit of slum housing to be condemned for every low-income unit constructed. See *id.*; see also Green, *Search for National Land Use Policy*, *supra*, at 89 n.118. Since the slum housing was located in the inner city, that is where the new construction took place. Furthermore, until the Quality Housing and Work Responsibility Act of 1998 loosened the targeting, see Quality Housing and Work Responsibility Act, Pub. L. No. 105-276, 112 Stat. 2461 (1998), public housing was generally provided exclusively for the poorest of the poor, with a strong preference for the homeless. While in the short run this approach appears to be the most vertically equitable, it has undesirable consequences in terms of “concentrating” the poorest of the poor. Meanwhile, government policy explicitly and implicitly attracted non-Hispanic Whites to the suburbs and kept minorities out. Race-specific policies in the Home Owner’s Loan Corporation and the Federal Housing Authority policies contributed to the suburbanization of Whites and the racial segregation of the United States. It was the Federal Housing Administration’s explicit policy in its *Underwriting Manual* that “if a neighborhood is to retain stability, it is necessary that properties shall continue to be occupied by the same social and racial classes.” See MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* 18 (1995). Furthermore, community opposition made it hard to buy suburban land. See Green, *Search for National Land Use Policy*, *supra*, at 91. Restrictive zoning provisions and loan forgiveness to mostly White veterans, made it appealing for Whites to move to the suburbs and almost impossible for poor African Americans to do so. The Veteran’s Administration sought to increase the availability of private loans for housing by providing mortgage insurance to benefit lenders (including interest rate ceilings, uniform lending criteria, lower down payments, and longer than usual terms). They mandated large lots and low density and gave lower appraisal to predominantly black neighborhoods. See 12 U.S.C. §§ 1701–1750(g) (1994); see also Green, *Search for National Land Use Policy* *supra*, at 85–6.

403. See Wilson, *TRULY DISADVANTAGED*, *supra* note 401, at 49.

professionals, followed by working-class African Americans, removes an important "social buffer" that could otherwise deflect the full impact of prolonged joblessness.<sup>404</sup> More economically stable and secure families, Professor Wilson argues, act as role models that keep alive the perception "that education is meaningful, that steady employment is a viable alternative to welfare, and that family stability is the norm, not the exception."<sup>405</sup>

Professor Wilson contends that when community leaders depart the poorest communities,<sup>406</sup> they leave behind a much higher concentration of a group that Wilson refers to as the "ghetto underclass."<sup>407</sup> The ensuing social isolation excludes the "ghetto underclass" from crucial job networks. As the prospects for employment diminish, welfare, crime, drug addiction, and single motherhood come to be seen as ways of life.<sup>408</sup> When children rarely interact with employed role models, the relationship between school and employment changes and the educational system falls into a downward spiral of teacher frustration and student indifference.<sup>409</sup> Concentrated poverty also creates negative externalities that drive businesses to leave and discourage new businesses from entering the community.<sup>410</sup>

While Professor Wilson gives primary etiological significance to a structural transformation *within* the African American community, Douglas Massey and Nancy Denton contend that:

[R]acial segregation—and its characteristic institutional form, the black ghetto—are the key structural factors responsible for the perpetuation of black poverty in the United States. Residential segregation is the principal organizational feature of American society that is responsible for the creation of the urban underclass.<sup>411</sup>

Where there is residential segregation, Massey and Denton argue, an increase in poverty leads to increased geographic concentrations of

404. See *id.* at 56.

405. See *id.*

406. Professor Wilson's implicit equation of employed and relatively affluent adults with community leadership and effective role models may be an oversimplification.

407. See Wilson, *TRULY DISADVANTAGED*, *supra* note 401, at 49.

408. See *id.* at 57.

409. See *id.*; see also Ryan, *Schools, Race, & Money*, *supra* note 158, at 257 (contending that "peers generally exert a strong influence on student performance and that students from lower socioeconomic backgrounds in particular suffer from being surrounded solely or primarily by students from similarly impoverished backgrounds").

410. See Schill, *Deconcentrating*, *supra* note 400, at 805.

411. MASSEY & DENTON, *AMERICAN APARTHEID*, *supra* note 40, at 9; see also Jennifer M. Russell, *The Race/Class Conundrum and the Pursuit of Individualism in the Making of Social Policy*, 46 *HASTINGS L.J.* 1353, 1422–23 (1995).

poverty, the wholesale withdrawal of commercial institutions, deterioration of goods and services, and increases in crime, decay, and social disorder. What remains is an "underclass" defined in large part by its "oppositional culture" and behavioral norms that hinder upward social mobility.<sup>412</sup>

Just as government policy has contributed to the problem of racially segregated communities,<sup>413</sup> explicit governmental efforts may be necessary to reverse the effects racial isolation has on its ability to fulfill its obligation to provide an adequate education to students in all school districts. This is not to suggest that courts should lightly use their injunctive power to order housing reform as a solution to educational segregation in the absence of *de jure* segregation of schools. Rather, this Article suggests that courts should encourage and support innovative solutions by other actors that view residential segregation and segregated schools as related socio-economic phenomena.

Professor McUsic suggests a related but distinct way of advancing some of the same goals through a "class integration" reform strategy. By preventing the number of low-income students in any one school from reaching 50%,<sup>414</sup> a state could "shift[] the remedy from redistributing educational resources in the form of dollars to redistributing educational resources in the form of classmates."<sup>415</sup>

Although it might be politically controversial, significant gains could be accomplished by tinkering with the boundaries of school districts to pair rich school-districts with poor school-districts.<sup>416</sup> The New Jersey Supreme Court attempted a similar approach to low-income housing in the controversial *Mount Laurel* line of cases<sup>417</sup> by requiring each municipality to provide a significant percentage of the low-income housing required by the surrounding area. Since decreasing reliance on local fund-

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412. See MASSEY & DENTON, *AMERICAN APARTHEID*, *supra* note 40, at 9-16; see also Russell, *supra* note 411, at 1423.

413. See *supra* note 402 and accompanying text.

414. McUsic, *Law's Role*, *supra* note 12, at 131.

415. *Id.* at 130; see also *supra* note 206.

416. McUsic, *Law's Role*, *supra* note 12, at 131.

417. Burlington County NAACP v. Township of Mount Laurel, 456 A. 2d 390 (N.J. 1983) (finding that State Development Guide Plan serves as an adequate remedy for violations of the Mount Laurel doctrine); Burlington County NAACP v. Township of Mount Laurel, 336 A.2d 713 (N.J. 1975) (enjoining municipalities to utilize land use regulations to provide a realistic opportunity for low- and moderate-income housing); Burlington County NAACP v. Township of Mount Laurel, 290 A. 2d 465 (N.J. Super. 1972) (holding that municipal zoning ordinances and budgetary policies exhibited economic discrimination and deprived the poor of adequate housing and the opportunity to secure construction of subsidized housing).

ing may actually lead to absolute declines in school funding,<sup>418</sup> increasing the size of a rich district to increase the number of poor children may be more effective than shifting funding entirely to the state level.<sup>419</sup> One advantage to this approach is political: state aid for suburban schools might actually increase to pay them to accommodate more poor children from the surrounding area.<sup>420</sup> This fact might mitigate resistance from politically powerful suburban voters.

### *C. Tailor the Reform Efforts to the Individual Community or Region*

Concentrated poverty, low levels of adult literacy and employment, and racial segregation are serious impediments to meaningful education reform, but they are not present to the same extent in all communities with under-resourced and/or under-performing schools. One of the most compelling reasons for involving a diverse array of participants in the process of drafting a blueprint on the statewide level and putting together a district implementation plan at the local level is that one size does not fit all.

Different strategies may be required where: (1) a state's schools are *uniformly* under-performing and/or under-funded;<sup>421</sup> and where (2) wealthy areas are located near poor areas and some schools in the system function better than others.<sup>422</sup> For example, Kentucky and New York present different obstacles—perhaps suggesting that the approach to reform should be distinct. Where most of the schools in a state are under-funded and under-performing, Professor McUsic argues that adequacy-based reform will be most effective.<sup>423</sup> In contrast, where states have concentrated poverty surrounded by wealthy areas, she suggests instead that states should make an effort to deconcentrate poor schools through a “class integration model” of reform discussed above.<sup>424</sup>

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418. Retaining significant dependence on local property taxes may be the best strategy for raising funds for education. Where local property taxes fund education, suburban parents have incentives to vote for school taxes because: (1) there is a direct correlation between local taxes and the quality of their children's education; and (2) non-parents will subsidize their education. Suburban non-parents also benefit because good schools increase property values. Empirical evidence suggests that when funding is shifted to the state level, it is harder to raise funds for education. McUsic, *Law's Role*, *supra* note 12, at 113–14.

419. This approach may also have diminishing (and eventually negative) marginal effectiveness as the district size grows. *Cf. supra* note 418.

420. McUsic, *Law's Role*, *supra* note 12, at 132.

421. *Id.* at 134 (advocating a “whole state reform model” in states like Kentucky).

422. *Id.* at 128–134 (advocating a “class integration model” in states like New York where severe poverty is highly concentrated and some schools are sufficiently funded and perform well).

423. *Id.* at 134.

424. *Id.* at 131.

Likewise, states without much racial diversity do not fit neatly into a race-conscious model of reform. For example, education reform efforts in New Hampshire and Vermont may have a much more limited racial element.<sup>425</sup> In determining whether a “blueprint” or district implementation plan is reasonably calculated to remedy unconstitutionally inadequate schools, courts should take these regional variations into account and structure decision-making processes that empower local actors to tailor their plans to the unique needs of individual communities.

## CONCLUSION

The promise of *Brown* remains unfulfilled. As we begin the twenty-first century, we are a nation that provides radically unequal resources to our children in racially and socioeconomically divided schools and communities. The legal regime that underlies these inequalities also holds the key to reforming our educational system and providing truly equal opportunities to the next generation. Despite vigorous and sustained efforts involving every level of government, the results of education reform since *Brown* and *Rodriguez* have been mixed at best.

While the shift in strategy from equity to adequacy opens up exciting new possibilities for reforming under-performing schools, courts face daunting challenges when confronted with unconstitutionally inadequate school systems. Courts that are on the verge of structuring a remedial order should heed and apply the lessons of the past. Kentucky offers a model for a constructive relationship between courts, legislatures, and other stakeholders, while the experiences of New Jersey and Ohio suggests some cautionary lessons in this regard. Connecticut’s approach laudably includes race in the definition of adequacy. California’s experience suggests some of the dangers of an over-emphasis on equalization. Finally, Massachusetts’ on-going experiment with high stakes testing may provide its own lessons with regard to measuring outcomes over time.

Ultimately, however, many of the most valuable lessons have yet to be learned. The mixed results experienced in states even after dramatic plaintiffs’ victories suggest that broader structural problems may need to be addressed in order to provide truly adequate schooling to all children. Administrative law and environmental law may provide useful mechanisms for structuring a collaborative education reform process that addresses the needs of individual communities and can ultimately result in sustained and meaningful reform.

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425. Cf. Buzuvis, “A” for Effort, *supra* note 7, at 647 (observing that “because [New Hampshire and Vermont] are overwhelmingly White and therefore racially homogenous, the aspect of race-based inequality is largely eliminated from the equation, allowing for the isolation of economic inequality”).

Equality of educational opportunity is a necessary precondition for the fulfillment of the American dream. Whatever the approach, remedying “savage inequalities” and shameful racial segregation of schools belongs at the forefront of our nation’s legal and public policy agenda.

