POVERTY, "MEANINGFUL" EDUCATIONAL OPPORTUNITY, AND THE NECESSARY ROLE OF THE COURTS

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Through state standards-based education reform initiatives and the Federal No Child Left Behind Act, the United States has made an unprecedented and extraordinary commitment to ensuring that all children will meet challenging academic proficiency standards. To date, however, little progress has been made toward meeting this ambitious mandate, largely because state and federal educational policies fail to deal with the enormous impediments to learning that are posed by the conditions of poverty in which millions of school children live. This Article argues for a commitment to "meaningful educational opportunity" that, in essence, would require school districts and local public and nonprofit agencies to provide a comprehensive range of specific in-school and coordinated out-of-school services to children from backgrounds of concentrated poverty. The Article finds support for its theory of meaningful educational opportunity in federal equal educational opportunity laws and court decisions and in the state education adequacy cases. It further contends that the needed reforms, which are feasible and affordable, cannot be achieved without the continued and expanded involvement of the courts in enforcing constitutional requirements for educational opportunity and educational adequacy, and that through a functional model of effective collaboration between the executive, legislative, and judicial branches of government, the nation's challenging educational objectives can actually be attained.

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INTRODUCTION

"All children can learn" is the fundamental premise of the standards-based reforms adopted over the past decade in forty-nine of the fifty states.[1] Furthermore, the federal government has mandated that *all* children must "meet or exceed the State's proficient level of academic achievement . . . [on] challenging academic content standards and challenging student academic achievement standards" by 2014.[2] Given the enormous deficits in the current academic functioning levels of most poor and minority

1. "All children can learn; and we can change our system of public elementary, middle, and secondary education to ensure that all children do learn at world-class levels." N.Y. STATE BD. OF REGENTS, ALL CHILDREN CAN LEARN: A PLAN FOR REFORM OF STATE AID TO SCHOOLS 1 (1993) (on file with the North Carolina Law Review). For general descriptions of the standards-based reform approach, see generally DESIGNING COHERENT EDUCATION POLICY: IMPROVING THE SYSTEM (Susan H. Fuhrman ed., 1993); ROBERT ROTHMAN, MEASURING UP: STANDARDS, ASSESSMENT, AND SCHOOL REFORM (1995); MARC S. TUCKER & JUDY B. CODDING, STANDARDS FOR OUR SCHOOLS: HOW TO SET THEM, MEASURE THEM, AND REACH THEM 40–43 (1998).

2. No Child Left Behind Act of 2001, Pub. L. No. 107-110, § 101, 115 Stat. 1425, 1444–45, 1448 (2002) (codified at 20 U.S.C. § 6311 (2000 & Supp. II 2002)).

students,[3] this national commitment to significant educational opportunity for all students—a commitment grounded in a realization that economic competitiveness in a global economy and effective functioning of a democratic society in the twenty-first century require a well-educated citizenry—cannot be met without sustained efforts by all three branches of government, including the courts. This Article analyzes the challenges posed by America's unprecedented commitment to ensuring that all children are educated to high levels and sets forth an approach for actually realizing this goal by providing "meaningful" educational opportunities for all children.

Part I begins with a review of the enormous impediments to learning that are posed by the conditions of poverty and a discussion of the need for a comprehensive approach to overcome them. Such an approach must respond not only to the need for improved instructional opportunities in the classroom, but also to the health, nutrition, housing, family support, and other out-of-school factors that directly impede a child's readiness to learn. Part II discusses the ironic reality that the educational finance systems in most states, instead of providing these students more resources to overcome these severe deficits, actually provide them less. Insult is added to the injury being perpetrated on these students by the argument advanced by some critics of judicial efforts to rectify these inequities that "money doesn't matter" in overcoming educational disadvantages. The virtually unanimous findings of researchers and of the numerous courts that have recently reviewed this issue strongly repudiate that proposition.

Part III considers the implications of the uneven history of the implementation of the egalitarian vision that was articulated by the United States Supreme Court more than fifty years ago in *Brown v. Board of Education*.[4] *Brown* articulated a new concept of equal educational opportunity and initiated a new era of commitment to equity goals as an ongoing policy commitment of the federal and state governments. Although the history of implementation of equal educational opportunity by the federal courts and the Congress since *Brown* has been a saga of major advances and significant retreats, overall, an important egalitarian dynamic in the American political culture has been maintained and extended in recent years. This is reflected in both the state court decisions requiring "adequate" educational opportunities for all children and the national

3. *See infra* Part I.
4. 347 U.S. 483 (1954).

commitment to ensuring that all children have a "fair, equal, and *significant* opportunity"[5] to become proficient in rigorous state academic standards that is set forth in the Federal No Child Left Behind Act ("NCLB").[6]

Part IV argues that in order to achieve sustained progress toward the national egalitarian goals and to substantially narrow or eliminate achievement gaps, a consistent and coherent concept of "significant" or "meaningful" educational opportunity must be adopted. A commitment to "meaningful" educational opportunity would require making substantial revisions to NCLB, providing a comprehensive range of specific in-school and out-of-school services to children from backgrounds of concentrated poverty, developing new approaches to questions of feasibility and accountability, countering the trends toward widening the income gaps between "haves" and "have nots" in society as a whole, and, at some stage, putting the issue of fully implementing school desegregation back on the table.

A "meaningful" educational opportunity for all children cannot be achieved, however, without the continued and expanded involvement of the courts in educational policy matters. This is the subject of Part V. The state courts' insistence in contemporary education finance and education adequacy cases that states provide adequate resources and meaningful opportunities for all children has been met with charges of "judicial activism"[7] in some quarters. These allegations of judicial usurpation and judicial incompetence, which stem from political opposition to the desegregation decrees of the 1960s and 1970s, have little doctrinal or empirical substance. Many of these criticisms have in recent years essentially been mooted by legislative decisions to authorize and even to require additional judicial involvement in education and other areas of social policy.[8] Moreover, empirical analyses have demonstrated that the courts have proved capable of evaluating complex social science evidence and of formulating effective remedial decrees.

Detractors of judicial intervention claim that the there is " 'scant evidence' of any success in improving student academic performance" following court interventions.[9] At the same time, however, they

5. 20 U.S.C. § 6301 (2000 & Supp. II 2002) (emphasis added).

6. *Id.* § 6311.

7. *See infra* note 258 and accompanying text.

8. *See infra* note 276 and accompanying text.

9. Williamson M. Evers & Paul Clopton, *High-Spending, Low-Performing School Districts*, *in* COURTING FAILURE: HOW SCHOOL FINANCE LAWSUITS EXPLOIT JUDGES'

acknowledge that "there is no denying that the political branches, for all their rhetoric, have not succeeded in solving our educational shortcomings after decades of effort."[10] Thus, they fault the courts for not instantly solving complex educational and social problems that have eluded solutions by the other branches of government for decades.

The appropriate way to understand the important and necessary role that courts should play in remedying inequities in education is through comparative institutional analysis. This approach considers how the courts, legislatures, and executive agencies, acting collaboratively, can determine not only what level of spending is necessary, but also how these funds should effectively be spent in order to ensure meaningful educational opportunities and thereby achieve the nation's ambitious but essential goal of ensuring that all children are educated to high levels.

I. IMPEDIMENTS TO LEARNING CREATED BY THE CONDITIONS OF POVERTY

In 2005, at least thirty-seven million people in the United States lived in poverty.[11] This represents 12.6% of the population.[12] The poverty rate for blacks and Hispanics, however, was almost twice as high, amounting to 24.9% and 21.8%, respectively.[13] Between one-fourth and one-third of African-American families with children (28%) and nearly one in three Latino families with children (31%) experienced either overcrowded housing, hunger, or lack of medical care—the three struggles most associated with poverty.[14]

The United States has the highest rate of childhood poverty among the affluent nations in the world.[15] The rate of childhood

GOOD INTENTIONS AND HARM OUR CHILDREN 103, 105 (Eric A. Hanushek ed., 2006) [hereinafter COURTING FAILURE].

10. Eric A. Hanushek, *Introduction* to COURTING FAILURE, *supra* note 9, at xiii, xix.

11. CARMEN DENAVAS-WALT ET AL., BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2005, at 13 (2006), *available at* http://www.census.gov/prod/2006pubs/p60-231.pdf.

12. *Id.*

13. *Id.*

14. ARLOC SHERMAN, CTR. ON BUDGET & POLICY PRIORITIES, AFRICAN AMERICAN AND LATINO FAMILIES FACE HIGH RATES OF HARDSHIP 1–2 (2006), *available at* http://www.cbpp.org/11-21-06pov.pdf. The Latino family percentage assumes the family is headed by a Latino citizen; the rate is even higher (47%) for Latino families headed by a non-citizen. *Id.*

15. David C. Berliner, *Our Impoverished View of Educational Research*, 108 TCHRS. C. REC. 949, 956–61 (2006) (discussing the extent and permanence of poverty in America compared to other nations).

poverty in America is 21.9%, compared with less than 3% in Denmark and Finland, the countries with the lowest rates among the rich countries in the world.[16] The United States also leads the industrialized world in the percentage of its population that is permanently poor (14.5%), an indication that, "[u]nlike other wealthy countries, we have few mechanisms to get people out of poverty once they fall in to poverty."[17]

This poverty rate among children, of course, is not random but is "unequally distributed across the many racial and ethnic groups that make up the American nation."[18] Furthermore, these figures most likely minimize the actual incidence of childhood poverty in America, since the poverty threshold established at the outset of the "War on Poverty" in 1969 was set at "three times the cost of a nutritionally adequate diet" and has not been changed since, despite major lifestyle changes and resulting proportionate cost increases in areas such as child care and health care.[19]

The impact of poverty on children's readiness for learning is profound. Children from low-income households are more likely to have severe vision impairments, hearing problems, untreated cavities, exposure to lead dust and poisoning, and/or asthma, all of which affect their ability to learn.[20] For example, "[c]hildren with vision problems have difficulty reading and seeing what teachers write on the board,"[21] and "asthma keeps children up at night, and, if they do make it to school the next day, they are likely to be drowsy and less attentive."[22] Influences during pregnancy also affect children from

16. Childhood poverty rates in other countries include: France, 7.5%; Germany, 10.2%; Canada, 14.9%; United Kingdom, 15.4%; Ireland, 15.7%; and Mexico, 27.7%. UNICEF INNOCENTI RESEARCH CTR., REPORT CARD NO. 6, CHILD POVERTY IN RICH COUNTRIES 2005, at 4 (2005), *available at* http://www.unicef.org/brazil/repcard6e.pdf.

17. Berliner, *supra* note 15, at 960.

18. *Id.* at 958.

19. UNICEF INNOCENTI RESEARCH CTR., *supra* note 16, at 19.

20. RICHARD ROTHSTEIN, CLASS AND SCHOOLS 37–42 (2004); *see also* Jeanne Brooks-Gunn & Greg J. Duncan, *The Effects of Poverty on Children*, FUTURE OF CHILD., Summer/Fall 1997, at 55 (summarizing studies of the effects of long-term poverty on children's welfare and cognitive abilities); Whitney C. Allgood, *The Need for Adequate Resources for At-Risk Children* (Econ. Policy Inst., Working Paper No. 277, 2006), *available at* http://www.epinet.org/workingpapers/wp277.pdf (comprehensively reviewing studies and literature on the impact of poverty on children's readiness to learn and setting forth a "model for determining the components and costs of an adequate education for at-risk students").

21. ROTHSTEIN, *supra* note 20, at 37.

22. *Id.* at 40. "Low-income children with asthma are about 80% more likely than middle-class children with asthma to miss more than seven days of school a year from the

poverty backgrounds. Their mothers are more likely to partake in harmful prenatal behaviors such as binge drinking and smoking, which cause babies to be born prematurely or with low birth weights.[23] "[L]ow-birth-weight babies, on average, have lower I.Q. scores and are more likely to have mild learning disabilities and attention disorders."[24]

Lack of food, lack of adequate housing, and residential mobility also affect children's performance in school. In 2002, not less than "2% of children from low-income families seem to have experienced real hunger at some time in the year."[25] Inadequate housing often deprives children of quiet study space and contributes to frequent moves and, therefore, a high mobility rate for lower-class children. A government report in 1994 indicated that 30% of the poorest children (household incomes less than $10,000) had attended at least three different schools upon entering the third grade.[26]

Most black and Latino students in the United States attend schools that are de facto segregated. In 2000, over 70% of all black and Latino students attended predominantly minority schools, a higher percentage than thirty years earlier.[27] "Latino and Black students comprise 80% of the student population in extreme poverty schools (90 to 100% poor),"[28] and more than 60% of black and Latino students attend high-poverty schools, compared with 18% of white students.[29]

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disease. . . . Drowsy and more irritable, they also have more behavioral problems that depress achievement." *Id.*

23. *Id.* at 43.

24. *Id.*; *see also* Brooks-Gunn & Duncan, *supra* note 20, at 57–60 (describing the higher frequency of low-birth-weight babies to mothers below the federal poverty line and the effects on the children).

25. ROTHSTEIN, *supra* note 20, at 44.

26. *Id.* A large number of black and Hispanic parents do not have high school diplomas, a factor that affects their ability to provide academic support to their children. Minority children also often enter school experiencing lowered expectations and damaging stereotypes, and often must deal with a curriculum that does not draw upon their own cultural experiences. Edmund W. Gordon & Beatrice L. Bridglall, *The Challenge, Context, and Preconditions of Academic Development at High Levels*, *in* SUPPLEMENTARY EDUCATION 10, 15 (Edmund W. Gordon et al. eds., 2005).

27. ERICA FRANKENBERG ET AL., CIVIL RIGHTS PROJECT, HARVARD UNIV., A MULTIRACIAL SOCIETY WITH SEGREGATED SCHOOLS: ARE WE LOSING THE DREAM? 28 (2003), *available at* http://www.civilrightsproject.harvard.edu/research/reseg03/AreWeLosingtheDream.pdf.

28. GARY ORFIELD & CHUNGMEI LEE, CIVIL RIGHTS PROJECT, HARVARD UNIV., WHY SEGREGATION MATTERS: POVERTY AND EDUCATIONAL INEQUALITY, 21 (2005), *available at* http://www.civilrightsproject.harvard.edu/research/deseg/Why_Segreg_Matters.pdf.

29. *Id.* at 18 (defining high-poverty schools as those with 50 to 100% poor students).

The "achievement gap" results directly from the fact that high proportions of African-American and Latino students live in conditions of poverty and that by and large they attend segregated schools.[30] Looking at the national performance averages on the National Assessment of Educational Progress ("NAEP") in recent years, the scores of white students continuously remain in the sixtieth percentile for both fourth and eighth grades in all subjects, while black student scores remain on average in the thirtieth percentile.[31] In 1998, the national graduation rate of white students was 78%, significantly higher than African-American students (56%) and Latino students (54%).[32]

The impact of these poverty conditions and of low academic achievement upon the life chances of millions of low-income and minority children is stark. Whereas thirty years ago a high school dropout earned about 64% of the amount earned by a diploma recipient, in 2004, he or she would earn only 37% of the graduate's amount.[33] Nor is this an issue of concern only to the affected

30. Conditions of concentrated poverty compound the impediments to learning experienced by students with socioeconomic disadvantages. *See* James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 284–96 (1999) (providing an overview of research and commentary on the impact of concentrated poverty); *see also* Russell W. Rumberger, *Parsing the Data on Student Achievement in High Poverty Schools*, 85 N.C. L. REV. 1293, 1310–11 (2007) (discussing a national longitudinal study of almost ten thousand students which indicates that attending a high-poverty school has a significant effect on the achievement of students from poverty backgrounds).

31. Richard Rothstein & Tamara Wilder, *The Education Achievement Gap: Who's Affected and How Much*, *in* THE PRICE WE PAY: THE SOCIAL AND ECONOMIC COSTS OF INADEQUATE EDUCATION (Clive Belfield & Henry Levin eds., forthcoming 2007) (manuscript at 17–25, on file with the North Carolina Law Review). *See generally*, THE BLACK-WHITE TEST SCORE GAP (Christopher Jencks & Meredith Phillips eds., 1998) (defining and explaining causes of the gap). It should be pointed out, however, that since the early 1970s (but less so in recent years), the scores of African-American students on the NAEP exams have risen, but so have the scores of white students, thus leaving a continuing gap. *See* INST. OF EDUC. SCIS., U.S. DEP'T OF EDUC., THE CONDITION OF EDUCATION 2006, at 143 (2006), *available at* http://nces.ed.gov/pubs2006/2006071.pdf (reading scores from 1971 to 2004); *id.* at 144 (math scores from 1973 to 2004); *see also* Ross Wiener, *Opportunity Gaps: The Injustice Underneath Achievement Gaps in Our Public Schools*, 85 N.C. L. REV. 1315, 1317 (2007) (finding "that less than half of students from low-income families have demonstrated even basic skills in reading by the fourth grade, whereas more than three of every four non-poor students have surpassed this level," and that in eighth-grade mathematics, "half of all low-income students have below basic skills, compared to just 21% of non-poor students").

32. JAY P. GREENE, MANHATTAN INST. FOR POLICY RESEARCH & BLACK ALLIANCE FOR EDUC. OPTIONS, HIGH SCHOOL GRADUATION RATES IN THE UNITED STATES 3 (2002), *available at* http://www.manhattan-institute.org/pdf/cr_baeo.pdf.

33. Cecilia E. Rouse, *Income and Tax Revenues*, *in* THE PRICE WE PAY: THE SOCIAL AND ECONOMIC COSTS OF INADEQUATE EDUCATION, *supra* note 31 (manuscript at 1, on file with the North Carolina Law Review).

individuals. Inadequate education dramatically raises crime rates and health costs, denies the nation substantial tax revenues, and raises serious questions about the civic competence of the next generation to function productively in a complex democratic society.[34] Over the next twenty years, the students from minority groups who are disproportionately represented among the dropout and low-achieving student population will constitute a majority of the nation's public school students. If they are not competent "knowledge workers," America's ability to compete effectively in the global marketplace will be seriously jeopardized.[35]

One of the ironies regarding educational opportunities for low-income and minority children in America is that the United States devotes proportionately more resources and attention to providing educational opportunity than it does to any other area of social welfare. In other words, "as other industrialized countries built and enlarged comprehensive social welfare systems to create more equality among their citizens" with subsidized income, health care, pensions, and housing programs, the United States saw the "public schools as the central means by which the government would help improve the lives of the poor and disadvantaged."[36] Resources and

34. *See, e.g.*, Enrico Moretti, *Crime and Costs of Criminal Justice*, *in* THE PRICE WE PAY: THE SOCIAL AND ECONOMIC COSTS OF INADEQUATE EDUCATION, *supra* note 31 (manuscript at 2, on file with the North Carolina Law Review) (explaining the correlation between education and crime, and the policy implications thereof); Peter Muennig, *Health Status and Social Costs*, *in* THE PRICE WE PAY: THE SOCIAL AND ECONOMIC COSTS OF INADEQUATE EDUCATION, *supra* note 31 (manuscript at 2–3, on file with the North Carolina Law Review) (calculating health losses of $57.9 billion associated with high school non-graduates of 2004); Rouse, *supra* note 33 (manuscript at 1–3) (finding "if an individual does not complete high school his income is lower which also means he is less able to contribute to society . . . as reflected in tax revenues").

35. *See, e.g.*, THOMAS L. FRIEDMAN, THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY 237–43, 265–75 (2005) (discussing the sharp challenge to America's economic competitiveness posed by information technology and rising education levels in India, China, and other third-world nations); Thomas Bailey, *Implications for Future Workforce*, *in* THE PRICE WE PAY: THE SOCIAL AND ECONOMIC COSTS OF INADEQUATE EDUCATION, *supra* note 31 (manuscript at 16–17, on file with the North Carolina Law Review) (asserting that while the past effects of educational inequality were limited to those individuals with minimal educations, "increasingly it will be a problem for everyone" due to damaging effects on productivity and competition); NAT'L CTR. ON EDUC. & THE ECON., COMM. ON THE SKILLS OF THE AM. WORKFORCE, TOUGH CHOICES OR TOUGH TIMES: EXECUTIVE SUMMARY 8–9 (2007), *available at* http://www.skillscommission.org/pdf/exec_sum/ToughChoices_EXECSUM.pdf (proposing innovative policies to reverse impending harmful consequences to America's position in the world economy due to continuing educational inequality).

36. AMY STUART WELLS, OUR CHILDREN'S BURDEN: A HISTORY OF FEDERAL EDUCATION POLICIES THAT ASK (NOW REQUIRE) OUR PUBLIC SCHOOLS TO SOLVE

opportunities provided in school, even when ample, cannot, however, fully overcome the heavy impact of poverty on shaping children's readiness to learn.[37] To dramatically improve learning opportunities for disadvantaged children and substantially improve their educational outcomes, a proactive national policy agenda must focus on ensuring the coordinated provision of opportunities in a broad range of equity areas, including not only qualified teachers, up-to-date textbooks, adequate facilities, and other aspects of K–12 education, but also in regard to areas like health, nutrition, housing, and family support.

Over the past few decades, there have, in fact, been numerous initiatives, programs, projects, and activities that fall under the umbrella of what might be called "comprehensive educational equity" (i.e., an approach to education that seeks to integrate a broad range of out-of-school supports and services with school-based activities in order to enhance students' abilities to succeed). The delivery models employed include community, full-service, and extended schools; comprehensive early childhood programs; school-linked services projects; school-community partnerships; private interagency commissions; family support and education programs; integrated-services initiatives; and comprehensive community initiatives. The need now is to understand how the best of these approaches can be made to work in a cost-effective manner and to incorporate the concept of comprehensive education into students' rights to equal educational opportunity, if real progress toward overcoming poverty and substantially reducing achievement gaps is to be achieved.

II. MONEY MATTERS

Despite the enormity of the deprivations suffered by children from poverty backgrounds and the magnitude of their learning needs, ironically, in the United States today the children with the greatest needs generally have the fewest resources provided to them. The Education Trust has estimated that nationwide, on average, spending on children in high-poverty districts is $907 less per student than spending on students in low-poverty districts.[38] The situation is even

SOCIETAL INEQUALITY 2 (2006), *available at* http://www.tc.edu/centers/EquitySymposium/symposium06/resource.asp.

37. ROTHSTEIN, *supra* note 20, at 37–47; Allgood, *supra* note 20, at 15–16.

38. EDUC. TRUST, THE FUNDING GAP 2005: LOW-INCOME AND MINORITY STUDENTS SHORTCHANGED BY MOST STATES 2 (2005), http://www2.edtrust.org/NR/rdonlyres/31D276EF-72E1-458A-8C71-E3D262A4C91E/0/FundingGap2005.pdf. Of course, as the number of students enrolled in a school increases, the aggregate spending

worse in particular states.[39] For example, my home state of New York stands at the apex of national inequities, reporting a funding gap of $2,280 between students in rich and low-income districts.[40]

These averages mask the even more stark inequities that are revealed by specific district-to-district comparisons. For example, in New York, per capita spending on students in New York City, where 81% of the students come from poverty backgrounds,[41] is $12,896,[42] compared to $23,344 in Manhasset,[43] where only 4.4% are from poverty backgrounds.[44] Even greater disparities exist in other parts of the State. For example, spending on students in rural Whitney Point, where 46.2% of the students come from poverty backgrounds,[45] is $9,931,[46] compared to $20,775 in Great Neck,[47] where less than 10% of the students are low-income.[48]

The root cause of these dramatic inequities is the fact that the system for funding public schools in almost every state is based

gap for that particular school increases proportionately. *See id.* at 8 (highlighting in real dollars the aggregate per school funding gap as student size increases). Thus, using the national average gap of $907 per student, an elementary school of twenty-five students would face a total gap of $22,675 a year, while a high school with 1,500 students would experience an aggregate annual gap of $1,360,500. *Id.* at 2.

39. *Id.* at 3 tbl.1.

40. *Id.*

41. N.Y. STATE EDUC. DEP'T, NEW YORK, THE STATE OF LEARNING: STATISTICAL PROFILES OF PUBLIC SCHOOL DISTRICTS 26 tbl.1 (2005), http://www.emsc.nysed.gov/irts/655report/2005/volume2/Vol2_655_July2005_wBkmrks.pdf [hereinafter N.Y. STATISTICAL PROFILES] (compiling extensive educational statistics for New York schools). The "poverty background" statistics in the main text are based on the proportion of students eligible for free or reduced price lunch, which is the most widely used poverty statistic for educational purposes. *Cf.* N.Y. STATE EDUC. DEP'T, NEW YORK, THE STATE OF LEARNING: STATEWIDE PROFILE OF THE EDUCATIONAL SYSTEM 102 (2005), http://www.emsc.nysed.gov/irts/655report/2005/volume1/volume1.pdf (discussing variables used to measure student poverty).

42. N.Y. STATISTICAL PROFILES, *supra* note 41, at 48 tbl.2 (showing the "Expended per Pupil Unit" variable).

43. *Id.* at 47 tbl.2.

44. *Id.* at 26 tbl.1.

45. *Id.* at 18 tbl.1.

46. *Id.* at 40 tbl.2.

47. *Id.* at 47 tbl.2.

48. *Id.* at 25 tbl.2. For further discussion of the gross inequities in educational funding throughout the United States, see, for example, JONATHAN KOZOL, SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS 57, 73 (1991); Lawrence O. Picus & Minaz B. Fazal, *Why Do We Know What Money Buys?*, *in* WHERE DOES THE MONEY GO? RESOURCE ALLOCATION IN ELEMENTARY AND SECONDARY SCHOOLS 1, 5–7 (Lawrence O. Picus & James L. Wattenbarger eds., 1996); BRUCE J. BIDDLE & DAVID C. BERLINER, EDUC. POLICY STUDIES LAB., WHAT RESEARCH SAYS ABOUT UNEQUAL FUNDING FOR SCHOOLS IN AMERICA 10 (2002), http://epsl.asu.edu/eprp/EPSL-0206-102-EPRP.doc.

largely on local funding and local property taxes. The American system of local control and local funding of public schools originated in an agricultural economy at a time when wealth was relatively evenly distributed and land provided the tangible and predominant basis for taxation.[49] Given the current large differences in property wealth between urban, rural, and suburban areas, however, the traditional property tax system has become anachronistic. Other developed countries either equalize funding across the board or have systems that effectively compensate for any disparities in local funding.[50]

In the face of the overwhelming reality that the United States has one of the most inequitable education finance systems in the world, the retort of many politicians and pundits is that money really does not matter in education. "Dollar bills don't educate students," said President George H.W. Bush in 1991;[51] "[j]ust as more money has not provided a remedy in the past, it will not miraculously do so in the future,"[52] noted the editors of the *Wall Street Journal* nearly a decade later. Many policymakers believe, therefore, that the schools have ample resources, and the reason that large numbers of students in the inner cities, in many rural areas, and in pockets of underachievement in the suburbs are not performing at satisfactory levels is that either they or their teachers are not sufficiently motivated.[53]

Those with the closest ties to the schools, however, uniformly reject this way of thinking. Certainly, no parent, teacher, or school administrator in any low-wealth school district in the United States—

49. ELLWOOD P. CUBBERLEY, PUBLIC EDUCATION IN THE UNITED STATES 734 (Houghton Mifflin Co. 1934) (1919).

50. Robert E. Slavin, *How Can Funding Equity Ensure Enhanced Achievement?*, 24 J. EDUC. FIN. 519, 519–20 (1999); *see also* Allan R. Odden, *Toward the Twenty-First Century: A School-Based Finance*, *in* RETHINKING SCHOOL FINANCE: AN AGENDA FOR THE 1990S, at 322, 333–34 (Allan R. Odden ed., 1992) (describing Britain's national funding system).

51. Susan Chira, *Spending and Learning: Money's Role Questioned in Schools Debate*, N.Y. TIMES, May 4, 1991, at 1.

52. Editorial, *More Money?*, WALL ST. J., Dec. 20, 2000, at A22.

53. This perspective in fact permeates the No Child Left Behind Act:

> [One explanation] for the . . . massive underperformance by black and Latino youths. . . . blames a dysfunctional school culture and a lax system of governance and incentives that permits school systems to avoid making unpopular decisions, even when those are essential to improving performance. . . . The law is premised on the notion that local education politics are fundamentally broken, and that only strong, external pressure on school systems, focused on student achievement, will produce a political dynamic that leads to school improvement.

FREDERICK M. HESS & MICHAEL J. PETRILLI, NO CHILD LEFT BEHIND 22–23 (2006).

or, for that matter, in any affluent community—genuinely believes that money does not matter in education. If money did not matter, wealthy parents would not send their children to private schools with annual tuitions that often exceed $25,000, nor would parents move to wealthy suburbs that spend in excess of $20,000 to educate their students well.[54] As a state court judge in North Carolina bluntly put it after hearing extensive evidence on the subject, "Only a fool would find that money does not matter in education."[55]

A. The Academic Debate

The "money matters" debate has been carried out in academic circles in recent years through technical discussions of "education production function" analyses.[56] Simply stated, an "education

54. *See, e.g.*, Yilu Zhou, *Despite Uncertain Times, Parents See Private School as a Necessity*, N.Y. TIMES, Jan. 10, 2002, at B1 (noting that wealthy parents continue to enroll their children in private schools with annual tuitions in excess of $20,000 notwithstanding adverse market conditions); *cf.* Valerie Strauss, *For Many Parents, Sending Children to Private Schools Is Worth the Sacrifice*, WASH. POST, Feb. 18, 1996, at B1 (describing financial strain on middle class families who send their kids to expensive private schools out of perceived necessity).

55. Hoke County Bd. of Educ. v. State, No. 95CVS1158, 2000 WL 1639686, at *57 (N.C. Super. Ct. Oct. 12, 2000), *aff'd*, 358 N.C. 605, 599 S.E.2d 365 (2004).

56. The original impetus for the focus on the effect of additional resources on student achievement was the famous "Coleman report" completed in 1966. JAMES S. COLEMAN ET AL., U.S. DEP'T OF HEALTH, EDUC., & WELFARE, EQUALITY OF EDUCATIONAL OPPORTUNITY (1966). The study, led by James S. Coleman, a respected sociologist, concluded that the largest determinants of student achievement are the "educational backgrounds and aspirations of other students in the school." *Id* at 22. It went on to say that "schools bring little influence to bear on a child's achievement that is independent of his background and general social context." *Id* at 325.

In the years since the release of the Coleman report, a vast literature has pinpointed significant methodological flaws in its analysis. Extensive empirical investigations, more advanced regression analyses, and other techniques have substantially refuted the report's overstated conclusions. According to Biddle and Berliner, the major errors by Coleman and his colleagues included "fail[ure] to use available scaling techniques to validate their procedures . . . and fail[ure] to measure crucial variables now known to be associated with school effects," as well as use of "non-standard procedures for statistical analyses that generated falsely deflated estimates for school effects." BIDDLE & BERLINER, *supra* note 48, at 15. James Guthrie sees as the major flaw of the Coleman report its failure—because of the limitations of data at the time—to disaggregate school-based expenditures per pupil from district-level expenditures per pupil. James W. Guthrie, *Implications for Policy: What Might Happen in American Education if It Were Known How Money Actually Is Spent?*, *in* WHERE DOES THE MONEY GO?, *supra* note 48, at 253, 260.

In any event, the proper conclusion to be drawn from Coleman's work is not that we should invest less in students' education; on the contrary, Coleman himself concluded that society needs to make much greater investments in creating the kind of "social capital" that makes up for the deficiencies created by poverty backgrounds and that

production function" analysis means using a regression analysis to measure the effects of certain "inputs" (such as per pupil funding or teacher salaries or textbooks) on an outcome (such as student achievement, measured in terms of standardized test scores or graduation rates).

Eric Hanushek, an economist at Stanford University's Hoover Institution, has been the leading academic proponent of the use of production function analyses to defend the proposition that money does not matter. He has argued that "key resources—ones that are the subject of much policy attention—are not consistently or systematically related to improved student performance,"[57] and that increases in school funding to needy schools "could actually be harmful" to students.[58] Hanushek's position was initially based on production function analyses he had undertaken on 187 regressions based on thirty-eight primary studies of the relationship between teacher/student ratios, teacher education, teacher experience, teacher salary, facilities, and other such inputs, with outcomes mostly in terms of standardized test scores, but that also include some instances of "dropout rates, college continuation, student attitudes, or performance after school."[59]

Production function analyses generally, and Hanushek's work in particular, have been widely challenged as being simplistic and misleading because they "do not adequately address serious questions of causation,"[60] and because they do not "adequately account[] for across-district variations" in the costs of educational services (such as teacher salaries), and "in the proportion of students with special needs, who require additional, more costly services."[61] A related

"children and youth need to succeed in schools and as adults." JAMES S. COLEMAN, EQUALITY AND ACHIEVEMENT IN EDUCATION 339 (1998); *see infra* Part IV.

57. Eric A. Hanushek, *The Quest for Equalized Mediocrity: School Finance Reform Without Consideration of School Performance*, *in* WHERE DOES THE MONEY GO?, *supra* note 48, at 20, 26–27.

58. *Id.* at 20.

59. Eric Hanushek, *When School Finance "Reform" May Not Be Good Policy*, 28 HARV. J. ON LEGIS. 423, 434 (1991); *see also* Eric Hanushek, *The Impact of Differential Expenditures on School Performance*, EDUC. RESEARCHER, May 1989, at 45, 45–65 (arguing for school funding policies that provide performance incentives).

60. Richard J. Murnane, *Interpreting the Evidence on "Does Money Matter"*, 28 HARV. J. ON LEGIS. 457, 458 (1991) (arguing that educational production functions are an inappropriate measure for evaluating whether money matters because many such studies fail to adequately address causation issues such as "school districts [with] relatively high expenditure levels, including state and federal compensatory education funds, *because* they serve students with low achievement levels").

61. Corrine Taylor, *Does Money Matter? An Empirical Study Introducing Resource Costs and Student Needs to Education Production Function Analysis*, *in* U.S. DEP'T OF

issue is that the production function analyses almost always measure outcomes solely in terms of standardized test scores, which are not complete and accurate measures of meaningful success.[62]

The most extensive rebuttal of Hanushek's methodology was undertaken in a series of articles by University of Chicago education researchers Rob Greenwald, Larry Hedges, and Richard Laine.[63] They first closely analyzed the thirty-eight specific studies that Hanushek had identified in his work, rejecting the "vote-counting" approach he used to subjectively decide on the aspects of each study that would be counted in the overall analysis;[64] then, using broader and more precise decision rules for conducting a comprehensive meta-analysis of the relevant literature, they concluded that nine of Hanushek's basic studies were inappropriate and that thirty-one other studies should have been included.[65] Analyzing in depth this larger universe, they concluded that "a broad range of school inputs are positively related to student outcomes, and that the magnitude of the effects are sufficiently large to suggest that moderate increases in spending may be associated with significant increases in achievement."[66] More recent studies concur in the view that

EDUC., NAT'L CTR. FOR EDUC. STAT., PUBL'N NO. 98-212, DEVELOPMENTS IN SCHOOL FINANCE 1997, at 75, 78 (William L. Fowler Jr. ed., 1998), *available at* http://nces.ed.gov/pubs98/98212-5.pdf.

62. For example, economists David Card and Alan Krueger have argued that test scores are only one measure of the impact of school quality. David Card & Alan B. Krueger, *Does School Quality Matter? Returns to Education and the Characteristics of Public Schools in the United States*, 100 J. POL. ECON. 1, 1–2 (1992). They offer compelling evidence that, after controlling for socioeconomic status and geographic cost variations, men educated in states with high-quality schools had, on average, more years of schooling and higher earnings in the workforce. *Id.* at 3; *see also* David Card & Alan B. Krueger, *Labor Market Effects of School Quality: Theory and Evidence*, *in* DOES MONEY MATTER? THE EFFECT OF SCHOOL RESOURCES ON STUDENT ACHIEVEMENT AND ADULT SUCCESS 97, 97 (Gary Burtless ed., 1996) (highlighting differences in studies based on test score outcomes and studies based on labor market outcomes).

63. Rob Greenwald et al., *Does Money Matter?: A Meta-Analysis of Studies on the Effects of Differential School Inputs on Student Outcomes*, EDUC. RESEARCHER, Apr. 1994, at 5.

64. *Id.* at 6.

65. Richard Laine et al., *Money Does Matter: A Research Synthesis of a New Universe of Education Production Function Studies*, *in* WHERE DOES THE MONEY GO?, *supra* note 48, at 44, 46–47 (explaining decision rules for excluding and including studies in analysis); *see also id.* at 52 tbl.3.1 (reporting results of meta-analysis of education production function studies using as input variables per pupil expenditure, teacher ability, teacher education, teacher experience, teacher salary, teacher-pupil ratio, and school size).

66. Rob Greenwald et al., *The Effect of School Resources on Student Achievement*, 66 REV. EDUC. RES. 361, 362 (1996). Hanushek's reaction to the findings of Greenwald is set forth in Eric A. Hanushek, *A More Complete Picture of School Resource Policies*, 66 REV. EDUC. RES. 397, 397–98 (1996) (contending that inefficient use of resources presents a

educational expenditures are correlated with positive student outcomes,[67] a view that Hanushek himself no longer fully contests.[68]

The argument that money does not matter has also been fueled by an erroneous view that real education spending has tripled in the past few decades.[69] Richard Rothstein and Karen Hawley Miles, in an extensive analysis of this question, have shown that with inflation adjustment, total real education spending per pupil increased by 61% from 1967 to 1991, and that most of this increase went to funded programs and services for students with disabilities, as mandated by new federal laws granting educational rights to these students and their families.[70] The share of expenditures going to general education during this period dropped from 80% to 59%, and the share going to special education increased from 4% to 17%.[71]

B. The Courts' View

Not surprisingly, the national pattern of gross inequity and inadequacy in school funding has spawned a wave of litigation in the

more important problem for schools than lack of funding); *see also* Alan B. Krueger, *Understanding the Magnitude and Effect of Class Size on Student Achievement*, *in* THE CLASS SIZE DEBATE 7, 8–9 (Lawrence Mishel & Richard Rothstein eds., 2002). In deconstructing Hanushek's methodology, Krueger demonstrates that Hanushek places substantially more weight on studies based on small samples; a correct analysis of Hanushek's own data indicates that "*class size is systemically related to student performance.*" *Id.* at 9.

67. *See, e.g.*, Allgood, *supra* note 20, at 73–103 (reviewing extensive studies correlating pre-kindergarten programs, lower class sizes, teacher qualifications, teacher working conditions, and other academic supports with improved student outcomes); Kristen Harknett et al., *Do Public Expenditures Improve Child Outcomes in the U.S.? A Comparison Across Fifty States* 17 (Ctr. for Policy Research, Maxwell Sch., Syracuse Univ., Working Paper Series No. 53, 2003), *available at* http://www-cpr.maxwell.syr.edu/cprwps/pdf/wp53.pdf (finding "particularly strong and positive effects" between additional educational expenditures and student test scores and adolescent behavior).

68. *See infra* note 93 and accompanying text.

69. *See, e.g.*, Hanushek, *supra* note 10, at xxx (stating that there has been a "tripling in cost-adjusted per-student spending since 1960"); Frederick Hess, *When Unaccountable Courts Meet the Dysfunctional Schools*, AM. ENTERPRISE, July–Aug. 2006, at 23, 25 ("[A]fter-inflation school spending has more than tripled since 1960.").

70. RICHARD ROTHSTEIN & KAREN HAWLEY, ECON. POLICY INST., WHERE'S THE MONEY GONE? CHANGES IN THE LEVEL AND COMPOSITION OF EDUCATION SPENDING 1 (1995), http://www.epi.org/books/moneygone.pdf.

71. *Id.* A follow-up study by Rothstein covering the period 1991–1996 indicated that nationally, real school spending grew at a rate of only 0.7% for the whole five-year period. During this time, the share of total spending going to special education, bilingual education and school lunch and breakfast programs increased, while the total proportion devoted to general education continued to decline. RICHARD ROTHSTEIN, ECON. POLICY INST., WHERE'S THE MONEY GONE? CHANGES IN THE LEVEL AND COMPOSITION OF EDUCATION SPENDING, 1991–96, at 1 (1997), http://www.epi.org/books/moneygoing.pdf.

state courts over the past three decades.[72] Since 1973, litigation has been filed in forty-five states, and plaintiffs have prevailed in the majority of the forty-three states where courts have issued decisions.[73]

The cases clearly demonstrate how inequities in funding cause resource deprivations that directly affect students' educational opportunities. For example, many high schools in California's low-income and minority communities do not offer the curriculum students must take just to *apply* to the state's public universities.[74] Passing an examination in a laboratory science course is required for high school graduation in New York State, but thirty-one New York City high schools have no science lab.[75] In South Carolina, annual teacher turnover rates exceed 20% in eight poor, rural, mostly minority school districts,[76] and in those districts graduation rates fall between 33% and 57%.[77]

72. In *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), a case involving inequities in education finance in Texas, the United States Supreme Court held that education was not a "fundamental interest" under the Fourteenth Amendment to the U.S. Constitution, *id.* at 35, and that students in property-poor districts did not constitute a "suspect class" for purposes of federal equal protection analysis, *id.* at 28. The closing of the doors of the federal courts to challenges of inequities in education finance led advocates to file litigations in the state courts, as discussed in the main text. For a detailed discussion of *Rodriguez*, the subsequent state court litigations and their significance, see Michael A. Rebell, *Education Adequacy, Democracy and the Courts*, *in* ACHIEVING HIGH EDUCATIONAL STANDARDS FOR ALL 218, 219–28 (Timothy Read et al. eds., 2002); *see also* PETER SCHRAG, FINAL TEST: THE BATTLE FOR ADEQUACY IN AMERICA'S SCHOOLS 76–77 (2003).

73. Plaintiffs have prevailed in twenty-six of the forty-three cases (60%). Of the more recent subset of "adequacy" litigations decided since 1989, plaintiffs have prevailed in twenty of twenty-seven final decisions of the highest state courts or unappealed trial court decisions (74%). NATIONAL ACCESS NETWORK, "EQUITY" AND "ADEQUACY" SCHOOL FUNDING COURT DECISIONS (Sept. 18, 2006), http://www.schoolfunding.info/litigation/equityandadequacytable.pdf; NATIONAL ACCESS NETWORK, SCHOOL FUNDING "ADEQUACY" DECISIONS SINCE 1989 (Oct. 2006), http://www.schoolfunding.info/litigation/adequacydecisions.pdf.

74. *See* First Amended Complaint for Injunctive and Declaratory Relief at 63, Williams v. State, No. 312236 (Cal. Super. Ct. Aug. 14, 2000), *available at* http://www.decentschools.org/courtdocs/01FirstAmendedComplaint.pdf; *see also* Robert Teranishi et al., *Opportunity at the Crossroads: Racial Inequality, School Segregation, and Higher Education in California*, 106 TCHRS. C. REC. 2224, 2238 (2004) (showing that schools with greater proportions of blacks and Latinos were more likely to have fewer AP courses).

75. Campaign for Fiscal Equity v. State (*CFE II*), 801 N.E.2d 326, 334 n.4 (N.Y. 2003).

76. *See* Abbeville County Sch. Dist. v. State, 93-CP-31-0169, slip op. at 93–94 (S.C. Ct. Com. Pl. Dec. 29, 2005), *available at* http://www.schoolfunding.info/states/sc/Abbeville%20Trial%20Court%20Order%2012-29-05.pdf.

77. *See* Molly A. Hunter, Plaintiff Witnesses Decry Conditions in South Carolina Schools, Seeking Equal Opportunity 50 Years After *Brown v. Education*, Nat'l Access Network, Tchr's. C., Columbia U. (Oct. 13, 2003), http://www.schoolfunding.info/states/sc/10-14-03Abbeville.php3 (reporting abysmal graduation rates).

In most of these litigations, the question of whether "money matters" has been a central legal issue, and extensive expert testimony on "production functions" and other technical economic and social science issues was a critical aspect of the trial. For example, in the recent Kansas litigation,[78] more than half a dozen experts on both sides of the issue presented detailed testimony on whether money matters.[79] After summarizing its findings regarding the detailed testimony, the court concluded that

> there is a causal connection between the poor performance of the vulnerable and/or protected categories of Kansas students and the low funding provided their schools. . . . Accordingly, the Court finds as a matter of fact and law that the funding scheme presently in place and as applied in Kansas by its underfunding in general and by its mid and large-school underfunding specifically, clearly and disparately injures vulnerable and/or protected students and thus violates both Article 6 of the Kansas Constitution and the equal protection clauses of both the United States and Kansas Constitutions.[80]

Overall, the issue of whether money matters in education was directly considered by the state courts in thirty of these cases.[81] In twenty-nine of them, the courts determined that money does indeed

78. Montoy v. State, No. 99-C-1738, 2003 WL 22902963 (Kan. Dist. Ct. Dec. 2, 2003), *aff'd*, 112 P.3d 923 (Kan. 2005).

79. *See id.*

80. *Id.* *49. In New York, the Court of Appeals in its preliminary decision remanding the case for trial had stated that in order to prevail, the plaintiffs must "establish a correlation between funding and educational opportunity . . . [and] a causal link between the present funding system and any proven failure to provide a sound basic education to New York City school children." Campaign for Fiscal Equity v. State (*CFE I*), 655 N.E.2d 661, 667 (N.Y. 1995). When the case returned to the State's highest court years later, after an extensive trial that included a similar "battle of the experts," the Court of Appeals concluded that:

> The trial court reasoned that the necessary "causal link" between the present funding system and the poor performance of City schools could be established by a showing that increased funding can provide better teachers, facilities and instrumentalities of learning. . . . We agree that this showing, together with evidence that such improved inputs yield better student performance, constituted plaintiffs' prima facie case, which plaintiffs established.

CFE II, 801 N.E.2d at 340; *see also* Rose v. Council for Better Educ., 790 S.W.2d 186, 197 (Ky. 1989) ("[A]chievement test scores in the poorer districts are lower than those in the richer districts and expert opinion clearly established that there is a correlation between those scores and the wealth of the district.").

81. For a specific listing of these cases, see Michael A. Rebell, Does it Matter?, May 4, 2007 (on file with the North Carolina Law Review).

matter.[82] In many of the cases, as in Kansas and New York, experts explicitly testified on the specific issue of whether money matters. In others, the courts implicitly considered this issue in their analyses of whether the guarantee in the state constitution's education article of an "equal" educational opportunity or of an "adequate" education had been met if children in certain districts were deprived of critical educational resources, such as certified teachers, up-to-date textbooks, and decent facilities.[83] In certain of these situations, the court found that although many aspects of the state's education finance system met constitutional requirements, additional funding was needed to establish or expand particular programs or resources in order to meet constitutional standards.[84] Some cases emphasize the challenging nature of new state and national standards and hold that additional resources are needed so that children can meet them.[85]

Significantly, the courts that have found in favor of the defendants in school finance litigations have not done so because they have found that money does not matter, but for other reasons. When defendants' positions have been upheld in these cases, it generally has been because of either (1) separation of powers principles that hold that these issues should be determined exclusively by the legislative and executive branches, and not by the courts;[86] or (2) the tradition of

82. *Id.* Eric Hanushek, the economist whose writings are discussed *supra* at notes 57 to 71, appeared as the prime witness for the defense on this issue in eleven of these cases. Of the eleven cases in which he has testified, Hanushek has been on the losing side in nine and on the winning side in two, but in those two cases where the state ultimately prevailed, *Board of Education*, *Levittown Union Free School District v. Nyquist*, 439 N.E.2d 359 (N.Y. 1982) and *Hornbeck v. Somerset County Board of Education*, 458 A.2d 758 (Md. 1983), the highest state courts upheld the defendants' positions on other grounds and did not reverse the lower courts' specific findings of fact that money does indeed matter.

83. *See, e.g.*, Claremont Sch. Dist. v. Governor, 635 A.2d 1375, 1376 (N.H. 1993) (holding that the New Hampshire Constitution requires the State "to provide a constitutionally adequate education . . . and to guarantee adequate funding"); Brigham v. State, 692 A.2d 384, 390 (Vt. 1997) ("[T]here is no reasonable doubt that substantial funding differences significantly affect opportunities to learn.").

84. *See, e.g.*, Abbeville County Sch. Dist. v. State, 93-CP-31-0169, slip op. at 149 (S.C. Ct. Com. Pl. Dec. 29, 2005), *available at* http://www.schoolfunding.info/states/sc/Abbeville%20Trial%20Court%20Order%2012-29-05.pdf (finding funding levels for teachers, class size and facilities generally acceptable, but holding that funding must be appropriated to programs for at-risk youth from early childhood through at least third grade).

85. *See* Columbia Falls Elementary Sch. Dist. No. 6 v. State, No. BVD-2002-528, 2004 WL 844055, at *13 (Mont. Dist. Ct. 2004).

86. *See, e.g.*, Coal. for Adequacy & Fairness in Sch. Funding v. Chiles, 680 So. 2d 400, 408 (Fla. 1996) (ruling that plaintiffs did not meet the burden of showing that court involvement in education finance issues would not violate separation of powers precepts); McDaniel v. Thomas, 285 S.E.2d 156, 167–68 (Ga. 1981) (reversing lower court ruling in

local control of education.[87] In a number of these cases the district court had specifically found that money does matter only to be overruled by the state's high court based on justiciability or procedural grounds.[88] Some courts that have found in favor of the defendants have also noted that the state constitution does require a base level of adequate funding, but the plaintiffs in the case had not alleged or proved that current funding was below that level.[89]

Only one court has clearly held that money does not matter. The Supreme Court of Rhode Island in *City of Pawtucket v. Sundlun*[90] used a combination of textual interpretation and legislative intent to hold that the education finance system was constitutional. It also relied on a vaguely referenced study that claimed that parental involvement was the most influential aspect of a child's educational opportunities and that increased spending did not necessarily have an impact on the education a child received.[91] The court did not, however, discuss any specific reasons for rejecting the evidentiary holding of the trial court that there was a clear causal link between insufficient funding and poor student performance.[92]

favor of plaintiffs on the grounds that decisions regarding school finance are the realm of the legislature and not of the court).

87. *See., e.g.*, Comm. for Educ. Rights v. Edgar, 672 N.E.2d 1178, 1191 (Ill. 1996) (finding that the need to maintain local control of education overrode funding concerns); Sch. Admin. Dist. No. 1 v. Comm'r, 659 A.2d 854, 858 (Me. 1995) (holding that the issue of education funding should be left to localities and legislatures and not to the courts).

88. For example, the high court of Colorado in *Lujan v. Colorado State Board of Education*, 649 P.2d 1005 (Colo. 1982), wrote, "We refuse, however, to venture into the realm of social policy," *id*. at 1018, even though the trial court had held that "[t]he level of expenditures per pupil is directly related to the ability of a school district to provide a measure of educational quality in its curricula and overall program." *Id*. at 1035.

89. *See, e.g.*, *Sch. Admin. Dist. No. 1*, 659 A.2d at 857 ("Plaintiffs presented no evidence at trial that any disparities in funding resulted in their students receiving an inadequate education."); Scott v. Commonwealth, 443 S.E.2d 138, 142 (Va. 1994) ("[T]he Students do not contend that the manner of funding prevents their schools from meeting the standards of quality."); Skeen v. State, 505 N.W.2d 299, 302 (Minn. 1993) ("[U]nlike many cases in other states, this case never involved a challenge to the *adequacy* of education in Minnesota.").

90. 662 A.2d 40 (R.I. 1995).

91. *Id.* at 63 n.10.

92. In *Abbeville County School District v. State*, 93-CP-31-0169 (S.C. Ct. Com. Pl. Dec. 29, 2005), *available at* http://www.schoolfunding.info/states/sc/Abbeville%20Trial%20Court%20Order%2012-29-05.pdf, the court stated, "It is clear that there is little, if any, relationship between spending and achievement. The Plaintiff districts tend to be the highest spending districts in the state, yet their achievement is lower . . . ." *Id.* at 145. Despite this finding, however, the court mandated funding for early childhood education, indicating that although this court believed that additional money for lowering class sizes or improving facilities would not improve student achievement, money to provide additional opportunities at the preschool level would be a worthwhile investment. *Id.* at 157.

In the end, all of the elaborate economic production analyses and discussions in the academic literature and in the legal decisions about whether money matters really comes down to a basic consensus that, of course, money matters—if it is spent well. Eric Hanushek, historically the chief supporter of the "money doesn't matter" theory, has himself recently acknowledged that "money spent wisely, logically, and with accountability would be very useful indeed."[93] There is no doubt that in order to obtain a meaningful educational opportunity, low-income and minority children need qualified teachers, adequate facilities, lower class sizes, more time on task, and sufficient, up-to-date instrumentalities of learning. They also need early childhood education, health services, good nutrition, family support, and other programs and services that can successfully offset the severe effects of poverty.[94] The extent to which legal interventions can ensure adequate funding—and appropriate accountability measures to ensure that the funds are, in fact, used well—will be the subjects of the balance of this Article.

III. IMPLEMENTING *BROWN*'S VISION OF EQUAL EDUCATION

A. Brown*'s Historical Significance*

Egalitarianism, and especially equality of educational opportunity, has historically been a significant imperative of American democracy. The founding fathers expected schools to assist in building the new nation by "the deliberate fashioning of a new republican character."[95] This new republican citizen was to be

93. Montoy v. State, 99-C-1738, 2003 WL 22902963, at *49 (Kan. Dist. Ct. Dec. 2, 2003), *aff'd*, 112 P.3d 923 (Kan. 2005). The court also noted that Hanushek concluded his testimony by "agreeing with this statement: 'Only a fool would say money doesn't matter.' " *Id.*; *see also* Hanushek, *supra* note 57, at 37–38 ("[T]he real problem is . . . [that n]othing in the current structure . . . moves us to better use of resources.").

94. In other words, the findings of the Coleman report that socioeconomic factors significantly affect children's ability to learn are correct, although the report's indication that the effects of schooling are minimal was exaggerated. *See supra* note 56. Clearly, for students from poverty backgrounds to become proficient in challenging state standards, sufficient resources must be provided to offer them the opportunity for an adequate education in school and to supplement their in-school experiences with programs and activities that can reduce the detrimental impacts of poverty.

95. LAWRENCE CREMIN, AMERICAN EDUCATION: THE NATIONAL EXPERIENCE 1783–1873, at 3 (1980). For a detailed discussion of the founders' views on the importance of education for the new democratic society, see Lorraine Smith Pangle & Thomas L. Pangle, *What the American Founders Have To Teach Us About Schooling for Democratic Citizenship*, *in* REDISCOVERING THE DEMOCRATIC PURPOSES OF EDUCATION 21 (Lorraine M. McDonnell et al. eds., 2000).

molded through a radically new educational system, which, as John Adams put it, "instead of being confined to a few schools and universities for the instruction of the few, must become the national care and expense for the formation of the many."[96] The common school movement of the nineteenth century was, in essence, a delayed implementation of the egalitarian education ideals of the founding fathers. As its name implies, the common school movement was an attempt to educate in one setting all the children living in a particular geographic area, whatever their class or ethnic background.[97]

But the implementation of this ideal of equal educational opportunity has been inconsistent and far from effective. At the outset, egalitarian ideals, though extended to the "deserving" poor, generally excluded women, recent immigrants,[98] and other minorities, especially black slaves and their emancipated descendants. Inherent tensions between the country's competitive and egalitarian ideals[99] have also moved the country in conflicting directions. Generally, substantial movement toward equality has tended to occur sporadically in the wake of war, major protest movements, or economic cataclysm.[100]

During the first half of the twentieth century, egalitarian reform seemed to be at its nadir: "[i]nequalities of wealth, inequalities of power and associated inequalities of opportunity seemed to dominate all possible patterns for the future."[101] The U.S. Supreme Court's

96. Letter from John Adams to Mathew Robinson (Mar. 23, 1786), *quoted in* DAVID MCCULLOUGH, JOHN ADAMS 364 (2001).

97. The common schools, forerunners of the contemporary public school system, replaced the prior patchwork pattern of town schools partially supported by parental contributions, church schools, "pauper schools," and private schools, with a new form of democratic schooling. For further discussions of the history of the common schools, see CREMIN, *supra* note 95; *see also* CARL KAESTLE, PILLARS OF THE REPUBLIC: COMMON SCHOOLS AND AMERICAN SOCIETY 1780–1860 (1983).

98. ROGERS SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY (1997) presents a detailed historical account of how "U.S. leaders always fostered senses of what made Americans a distinct 'people' that relied in part on inegalitarian ascriptive themes." *Id.* at 471.

99. *See* JENNIFER N. HOCHSCHILD, FACING UP TO THE AMERICAN DREAM: RACE, CLASS AND THE SOUL OF THE NATION 27–28 (1995) (describing the inherent competitive tension of the "American dream," which promises that individual success will result from hard work in a competitive, capitalist society that is inherently incapable of delivering such rewards to all strivers).

100. *See* PHILIP A. KLINKNER & ROGERS M. SMITH, THE UNSTEADY MARCH: THE RISE AND DECLINE OF RACIAL EQUALITY IN AMERICA 3–4 (1999) (arguing that movement toward greater equity occurs only in the wake of wars and pressures of domestic political protest movements that bring pressure on national leaders to live up to their "justificatory rhetoric").

101. J.R. POLE, THE PURSUIT OF EQUALITY IN AMERICAN HISTORY 214 (1978).

landmark decision outlawing school segregation in *Brown v. Board of Education*[102] effected an abrupt turnaround in this state of affairs: it reinvigorated America's historic egalitarian dynamic and initiated a new era of ongoing egalitarian reform that has resulted in thoroughgoing institutional change and a significant shift in political attitudes. Thus, "[f]or the first time in American history, equality became a major object of government policy . . . government agencies, and above all the courts, have been obliged to examine constitutional principles in light of egalitarian pressures . . . ."[103] This sustained egalitarian drive began with the elimination of state-enforced racial segregation in 1954 and culminated almost fifty years later in the bipartisan enactment of the No Child Left Behind Act that mandates as national policy that *all* children must be proficient in challenging state academic standards by 2014.[104]

Brown's impact has been enormous. It proclaimed a broad vision of "equal educational opportunity"[105] that has been accepted as a precedent, an inspiration, and an imperative for change in a vast range of legal and political contexts. As Senator Hillary Clinton recently put it, "Without a doubt, the impact of *Brown* has been so profound that it is hard to imagine how things could have been otherwise. We witness the effects of *Brown* when we ride a train, eat at a restaurant, or go to the beach."[106] This vision fueled the civil

102. 347 U.S. 483 (1954).

103. POLE, *supra* note 101, at 326.

104. *See* 20 U.S.C. § 6311(b)(1)(A), (b)(2)(F) (Supp. II 2002)

105. The phrase was mentioned no less than six times in the short decision. *See Brown*, 347 U.S. at 493.

106. Hillary Rodham Clinton, Brown *at Fifty: Fulfilling the Promise*, 23 YALE L. & POL'Y REV. 213 (2005). *But see* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE 46, 52–53 (1991) (disputing this view). Rosenberg argues that the widely held assumption that *Brown* and other Supreme Court decisions have had a major impact on the direction of social reform is overstated. He discusses in detail the Southern resistance to *Brown* and the wavering response of the federal courts to implementing desegregation in the decades following *Brown*. He does not, however, give sufficient credence to the enormous impact of major court decisions on value formation and on followup legislation. *See, e.g.*, MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION 4 (1994) (demonstrating the manner in which rights established through litigation fueled the political movement for equal pay); DOUGLAS S. REED, ON EQUAL TERMS: THE CONSTITUTIONAL POLITICS OF EDUCATIONAL OPPORTUNITY 16 (2001) (analyzing the impact of courts on education finance reform, partially as "a rejoinder to Rosenberg"); STUART A. SCHEINGOLD, THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY AND POLITICAL CHANGE 98–107 (1974) (discussing the relationship between legal rights and progressive social movements). Similarly, Stephen Halpern argues that litigation focused on Title VI distorted priorities and distracted efforts and attention from *Brown*'s core concern, that is, the need to overcome the impact of poverty and provide significant

rights movement, and, as commentators have noted, *Brown* "transformed the Court's role in the modern quest for equality . . . [and] unleashed a new era in constitutional jurisprudence."[107]

Although the explicit holding of the decision was focused on terminating racial segregation in education,[108] the Court's ruling quickly led to the articulation and implementation of new rights in regard to ensuring equal opportunities in school discipline practices,[109] bilingual education,[110] and a host of other educational policy areas. The *Brown* precedent also was extended beyond the school context to outlaw state-supported racial discrimination in virtually every other area of American public life.[111] *Brown* has also

educational opportunities to black students. STEPHEN C. HALPERN, ON THE LIMITS OF THE LAW: THE IRONIC LEGACY OF TITLE VI OF THE 1964 CIVIL RIGHTS ACT 3–4 (1995). Halpern ignored, however, the role of the state court adequacy litigations in highlighting this need and mandating remedies to meet it. *See id.* at 3. Halpern also ignores the fact that without judicial intervention, the federal executive and legislative branches are not likely to muster the "political will" to take significant action in this regard. *See infra* Part IV.

107. David J. Garrow, *The Supreme Court's Pursuit of Equality and Liberty and the Burdens of History*, *in* REDEFINING EQUALITY 205, 205 (Neal Devins & Davison M. Douglas eds., 1998); *see also* Jack M. Balkin, *A Critical Introduction* to WHAT *BROWN V. BOARD OF EDUCATION* SHOULD HAVE SAID 3, 5 (Jack M. Balkin ed., 2001) (*Brown* exemplifies "the Constitution reflect[ing] America's deepest ideals, which are gradually realized through historical struggle and acts of great political courage").

108. *Brown*, 347 U.S. at 495 ("We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal.").

109. *See, e.g.*, Goss v. Lopez, 419 U.S. 565, 579 (1975). For a recent analysis of the impact of *Goss* on the educational process, see generally RICHARD ARUM, JUDGING SCHOOL DISCIPLINE: THE CRISIS OF MORAL AUTHORITY (2003).

110. *See, e.g.*, Lau v. Nichols, 414 U.S. 563, 566 (1974).

111. *See, e.g.*, New Orleans City Park Improvement Ass'n v. Detiege, 358 U.S. 54 (1958) (per curiam) (affirming lower court decision extending the decision to public parks); Gayle v. Browder, 352 U.S. 903 (1956) (per curiam) (buses); Holmes v. City of Atlanta, 350 U.S. 879 (1955) (per curiam) (golf courses); Mayor of Balt. v. Dawson, 350 U.S. 877 (1955) (per curiam) (beaches); *see also* Civil Rights Act of 1964, 42 U.S.C. §§ 1971–2000h-6 (2000) (outlawing, inter alia, racial segregation in public accommodations). The NAACP Legal Defense Fund, which developed and implemented the legal strategy of multifaceted challenges to the separate but equal doctrine that eventually led to the *Brown* decision, deliberately focused on education because they expected a breakthrough in this sector to have large implications for other areas of social policy. *See* RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 365, 370 (1975) (describing in detail the development and implementation of the Legal Defense Fund's long-range litigation strategy); JAMES T. PATTERSON, *BROWN V. BOARD OF EDUCATION*: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY 12–45 (2001) (same); *see also* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 290–92 (2004) (discussing the political and legal factors that led to the *Brown* decision).

been the foundation for a doctrinal extension of egalitarian precepts to other historically disadvantaged groups, including women, the aged, and the disabled.[112] In addition, *Brown* spurred judicial involvement in combating unconstitutional practices in a diverse range of other social policy areas, including institutions for the mentally ill[113] and the developmentally disabled,[114] prison systems,[115] and local regulation of land use practices.[116]

112. The early constitutional law decisions concerning the rights of the disabled explicitly relied on *Brown*. *See, e.g.*, Mills v. Bd. of Educ., 348 F. Supp. 866, 874–75 (D.D.C. 1972); *see also* Dennis E. Haggerty & Edward S. Sacks, *Education of the Handicapped: Towards a Definition of an Appropriate Education*, 50 TEMP. L.Q. 961, 962 (1977) (claiming that "[c]hallenges by the handicapped to their exclusion from public education" sprung from *Brown*). Similarly, many of the early antidiscrimination laws created by Congress were expressly modeled after Title VI of the Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 601–05, 78 Stat. 241, 252–53 (codified as amended at 42 U.S.C. § 2000d (2000)), which was the congressional codification of *Brown*'s desegregation mandate. *See* Education Amendments of 1972, Pub. L. No. 92-318, §§ 901–07, 86 Stat. 235, 373–75 (codified as amended at 20 U.S.C. § 1681(2) (2000)) (prohibiting sex discrimination in education programs receiving federal financial assistance); Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 87 Stat. 355, 394 (codified as amended at 29 U.S.C. § 794 (2000)) (prohibiting discrimination against the disabled in federally funded programs); Age Discrimination Act of 1975, Pub. L. No. 94-135, 89 Stat. 713 (codified as amended at 42 U.S.C. §§ 6101–07 (2000)) (prohibiting discrimination on the basis of age in federally funded programs); *see also* Cmty. Television v. Gottfried, 459 U.S. 498, 509 (1983) (asserting that § 504 was patterned on Title VI); Cannon v. Univ. of Chi., 441 U.S. 677, 684–85 (1979) (upholding a private right of action for sex discrimination); ROSEMARY C. SALOMONE, EQUAL EDUCATION UNDER LAW: LEGAL RIGHTS AND FEDERAL POLICY IN THE POST-*BROWN* ERA 124–36 (1986) (exploring the history of Title IX); Peter H. Schuck, *The Graying of Civil Rights Law: The Age Discrimination Act of 1975*, 89 YALE L.J. 27, 29 (1979) ("The ADA is the offspring of—indeed, is expressly modeled upon—Title VI of the Civil Rights Act of 1964 . . . ."). For a discussion of the legislative history of Title VI, see MICHAEL A. REBELL & ARTHUR R. BLOCK, EQUALITY AND EDUCATION: FEDERAL CIVIL RIGHTS ENFORCEMENT IN THE NEW YORK CITY SCHOOL SYSTEM 38–48 (1985).

113. *See, e.g.*, Wyatt v. Stickney, 344 F. Supp. 373, 374 (M.D. Ala. 1972), *aff'd in part sub nom.* Wyatt v. Alderholt, 503 F.2d 1305 (5th Cir. 1974).

114. N.Y. State Ass'n of Retarded Children v. Rockefeller, 357 F. Supp. 752, 765 (E.D.N.Y. 1973). For a case study analysis of this case, see generally DAVID J. ROTHMAN & SHEILA M. ROTHMAN, THE WILLOWBROOK WARS: A DECADE OF STRUGGLE FOR SOCIAL JUSTICE (1984).

115. The extensive involvement of the federal courts in reforming unconstitutional practices in state prison systems is discussed in detail in MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS (1998)

116. *See, e.g.*, Hills v. Gautreaux, 425 U.S. 284, 299 (1976) (holding that a federal district court had power to order HUD to "attempt to create housing alternatives for the respondents"). For a case study discussion of the New Jersey Supreme Court's extensive involvement in *Burlington County NAACP v. Township of Mt. Laurel*, 336 A.2d 713 (1975), see DAVID L. KIRP ET AL., OUR TOWN: RACE, HOUSING AND THE SOUL OF SUBURBIA (1995).

The extensive judicial involvement in implementing egalitarian ideals spurred by *Brown* not only placed equal opportunity issues at the top of the nation's political agenda, but it also dramatically altered the way in which these issues henceforth would be handled. Once desegregation and educational opportunity issues were incorporated into the heart of the courts' agenda, remedies to overcome inequity became imperative policy mandates, and a dynamic of ongoing egalitarian reform became embedded throughout the political culture. The strength of this dynamic has, however, advanced and ebbed over the past half century, as will be demonstrated in the next subsection.

B. Past Patterns of Implementation

In choosing education as the subject area for reversing the "separate but equal" doctrine of *Plessy v. Ferguson*,[117] the Supreme Court necessarily focused on the role of education in modern society. In doing so, it issued an oft-quoted, ringing statement about the central importance of education in contemporary American life:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship . . . . 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.[118]

117. 163 U.S. 537 (1896). In *Plessy*, the Court had considered equality issues in the context of public transportation.

118. Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954). The central importance of education in contemporary American life has since been reiterated by the Court on numerous occasions. *See, e.g.*, Plyer v. Doe, 457 U.S. 202, 221 (1982) (emphasizing "the pivotal role of education in sustaining our political and cultural heritage"); Ambach v. Norwick, 441 U.S. 68, 77 (1979) (describing schools as places where the "fundamental values necessary to the maintenance of a democratic political system" are conveyed); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 30 (1973) (" '[T]he grave significance of education both to the individual and to our society' cannot be doubted." (quoting Rodriguez v. San Antonio Indep. Sch. Dist., 337 F. Supp. 280, 283 (W.D. Tex. 1971))); Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 230 (1963) (Brennan, J., concurring) (asserting that public schools are "a most vital civic institution for the preservation of a democratic system of government").

Through a series of prior cases involving graduate school education, the Court had established the importance of educational resources and facilities to providing an equal educational opportunity and the fact that the resources and facilities provided to people of color, were, in fact, almost never equal.[119] Moreover, the Court had previously held that even if the physical factors could be equalized, intangible factors that affected a law student's "ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession," could not be adequately conveyed in a segregated setting.[120] This led directly to the Court's core holding in *Brown* that separate educational facilities are inherently unequal because

> [t]o separate [children in grade and high schools] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.[121]

Thus, the profundity of the Supreme Court's decision in *Brown* lay not merely in outlawing racial segregation in schools, but also in the manner in which, through careful analysis of extensive evidence accumulated in the immediate case and in prior precedents, and by taking note of broader social science findings, it came to understand

119. *See* Sweatt v. Painter, 339 U.S. 629, 633–34 (1950) (holding that a separate in-state black law school did not provide adequate faculty, variety of courses, and opportunity for specialization); Sipuel v. Bd. of Regents of the Univ. of Okla., 332 U.S. 631, 633 (1948) (holding that the State must provide legal education to African-American students at a white law school since it had no minority counterpart); Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337, 349–50 (1938) (payment of tuition at an out-of-state law school did not provide equal opportunity). For a discussion of the deliberate strategy of the NAACP Legal Defense Fund to bring cases involving graduate school and law school experiences, which the Justices themselves could readily appreciate, see KLUGER, *supra* note 111, at 136–37.

120. McLaurin v. Okla. State Bd. of Regents, 339 U.S. 637, 641–42 (1950) (separate "ghetto" bench in graduate school facility impeded black plaintiff's ability to learn).

121. *Brown*, 347 U.S. at 494. This finding was bolstered by the Court's famous footnote 11, which cited a number of social science studies for the proposition that, "[w]hatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority." *Id.* Footnote 11 led to a vast range of commentary on whether the social science references in that case were an essential part of the holding or obiter dicta which merely illustrated the basic legal conclusion that racial segregation in education was inherently unequal. For an overview of discussions of the issue of the Court's use of social science evidence, see generally PAUL ROSEN, THE SUPREME COURT AND SOCIAL SCIENCE (1972). *See also* Betsy Levin & Philip Moise, *School Desegregation Litigation in the Seventies and the Use of Social Science Evidence: An Annotated Guide*, LAW & CONTEMP. PROBS., Winter 1975, at 50.

precisely how the challenged practice impeded meaningful educational opportunity for the plaintiffs. Even if the physical facilities and resources could be made equivalent, the Court understood that the opportunity that would be provided in a school that was set aside from the majority culture as a matter of law could never be truly equal. To provide a meaningful opportunity, schools must remove the inherent stigma imposed by racial segregation.

Although the Court allowed about a decade to go by before it began to vigorously enforce *Brown*'s desegregation mandate,[122] when it finally did actively confront the political resistance to desegregation, it did so by insisting on meaningful and not merely pro forma compliance. It rejected stratagems like publicly funded segregated academies,[123] and the use of a "freedom of choice plan,"[124] and it emphasized the need for a desegregation plan "that promises realistically to work and promises realistically to work *now*."[125] In this regard, the Court, among other things, promulgated a series of specific standards that endorsed the use of busing, upheld reliance on numerical guidelines for racial balance in local schools, and advocated the redrawing of attendance zones to promote desegregation.[126]

At the same time that the Supreme Court began to actively implement the *Brown* mandate, Congress substantially aided the courts' efforts to provide meaningful educational opportunities for blacks and other disadvantaged children by enacting the first major federal aid to education act. Title I of the Elementary and Secondary Education Act of 1965 ("ESEA")[127] provided substantial federal funding to school districts to assist them in meeting the educational needs of economically disadvantaged students.[128] Effective enforcement of *Brown*'s desegregation mandate was also substantially aided by the passage of Title VI of the 1964 Civil Rights Act, which empowered the Federal Department of Health, Education, and Welfare to cut off federal funding to any school district that discriminated on the basis of race, color, or national

122. In *Brown v. Board of Education* (*Brown II*), 349 U.S. 294, 301 (1955), the Court addressed the remedy issue of how to implement the *Brown* decision. The Court decided to entrust the details of implementing desegregation to the federal district courts, and it advised them to act with "all deliberate speed." The initial response of most of the lower federal courts was "deliberate," but hardly "speedy."

123. *See* Griffin v. County Sch. Bd., 377 U.S. 218 (1964).

124. *See* Green v. County Sch. Bd., 391 U.S. 430 (1968).

125. *Id.* at 439.

126. *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 3 (1971).

127. 20 U.S.C. § 6301 (2000).

128. *Id.*

origin.[129] Taken together, the ESEA and Title VI provided both a carrot and a stick for effective enforcement: now that substantial amounts of federal funds were available, these funds could also be withheld if schools districts were found to be in violation of the desegregation orders of the federal courts.[130]

In addition to providing substantial funding to all economically disadvantaged students through Title I and codifying the antidiscrimination rights of racial and national origin minorities in Title VI, Congress also provided an extensive set of substantive and procedural rights for children with disabilities through the Education for All Handicapped Children Act of 1975.[131] This legislation not only set aside state statutes that had in the past excluded many children with disabilities from attending school, but it also required that school districts provide these students a truly meaningful educational opportunity. It did this by entitling all children with disabilities to a "free appropriate public education" that guarantees each child specially designed instruction, and "related services," to meet his or her unique educational needs, at no cost to parents or guardians.[132] The law also provides parents an extensive array of

129. Title VI, in essence, codified and enforced through a funding termination mechanism the Equal Protection Clause of the Fourteenth Amendment. It provides that "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d (2000). For a detailed discussion of the congressional deliberations around the enactment of Title VI, see REBELL & BLOCK, *supra* note 112, at 38–56.

130. The combination of forceful decisions by the Supreme Court and passage of Title VI and the ESEA in the 1960s had dramatic results: although more than 98% of black students in the states of the deep South had been attending schools that had 90% or more black students in 1964, by 1972 less than 9% were in such segregated facilities. Jeremy Rabkin, *Office for Civil Rights*, *in* THE POLITICS OF REGULATION 304, 338 (James Q. Wilson ed., 1980).

131. H.R. REP. NO. 94-332, 1–2 (1975). The current version of this statute is now known as the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C § 1400 (Supp. IV 2004).

132. "Special education" is defined under the Act as including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions. 20 U.S.C. § 1401(29). "Related services" are defined as "transportation, and such developmental, corrective, and other supportive services . . . including speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation." *Id.* § 1401(26A). The "*free* appropriate public education" required by the Act is tailored to meet the unique needs of the student with disabilities by means of a mandated "individualized educational program" ("IEP"), and by the requirement that to the maximum extent feasible, children with disabilities must be educated with the non-disabled. *Id.* § 1401(9) (emphasis added).

procedural opportunities and due process rights to oversee the appropriateness of the services being provided to their children.[133]

In enforcing these congressional statutes, the Court further developed the concept of meaningful educational opportunity. *Lau v. Nichols*,[134] a case involving the educational opportunities of a class of students of Chinese ancestry who did not speak English, was a prime case in point. In *Lau*, the United States Court of Appeals for the Ninth Circuit had rejected the plaintiffs' claim for additional educational services that would allow them to overcome their language limitations. The Supreme Court decisively rejected this stance. Applying the antidiscrimination precepts of Title VI, the Court held that "there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any *meaningful* education."[135]

Two decades after *Brown*, then, thoroughgoing egalitarian initiatives had taken root, and principle was turning into practice. Meaningful educational opportunities began to be provided to black children in integrated school settings, to students with disabilities in educational settings that were being shaped to accommodate their needs,[136] and to English language learners in bilingual classrooms. Shortly thereafter, however, as the venue of the desegregation confrontations moved to northern and western locales, the Supreme Court's firm efforts to enforce meaningful educational opportunities began to weaken.[137] In cases involving the Denver and Detroit school

133. *See, e.g.*, *id.* § 1415 (entitling parents to request an impartial hearing and subsequent judicial appeals to contest any aspect of their child's diagnosis or educational opportunities).

134. 414 U.S. 563 (1974).

135. *Id.* at 566 (emphasis added). Having reversed the lower court's ruling on statutory grounds, the Court did not reach the constitutional issues.

136. *See, e.g.*, Michael A. Rebell & Robert L. Hughes, *Special Educational Inclusion and the Courts: A Proposal for a New Remedial Approach*, 25 J.L. & EDUC. 523, 524–25 (1996) (describing a substantial shift from separate educational settings to "inclusive" settings for students with disabilities in response to the IDEA).

137. This also coincided with President Richard Nixon replacing four of the Supreme Court Justices with more conservative jurists. CASS R. SUNSTEIN, THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER 153–54 (2004). This is not to say that Supreme Court jurisprudence directly changes with the election results. Constitutional jurisprudence is constrained by principle and precedent, whatever the philosophies of the particular Justices, but a major change in personnel, as occurred at this time, can move the direction of future development of precedent and principle in a different direction over time, or accelerate the pace of change. Sunstein's point, that election of a different President who appointed different Justices might have allowed a full flowering of social and economic welfare programs,

systems, the Court issued two critical rulings that substantially slowed progress toward desegregation. First, it declared that nonintentional, de facto desegregation resulting from segregated housing patterns was not unconstitutional.[138] And, second, it held that extensive urban segregation patterns could not be remedied by a mandatory metropolitan area desegregation scheme in the absence of evidence that the suburban districts had, in the past, intentionally discriminated against minority students.[139] In essence, in these cases, local control of education and countervailing "liberty" interests trumped the strong emphasis the Court had previously placed on ensuring effective desegregated schooling environments for black children.

The Supreme Court also declined to take a further necessary step toward providing meaningful educational opportunities for poor and minority children when it refused in *Rodriguez v. San Antonio Independent School District*[140] to invalidate the gross disparities in Texas's education finance system, which the Court acknowledged were highly inequitable.[141] Although the logic of *Brown* would seem to have implied that in order to provide meaningful educational opportunities for black children who had attended inherently

though probably true, overlooks the fact that in the education sector, the egalitarian seeds already planted by *Brown* and its progeny did continue to blossom in state courts and in state and federal standards-based reform initiatives, as will be discussed in the next subsection of this Article.

138. Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 200–03 (1973). Justices Douglas and Powell advocated abandoning the de jure/de facto distinction in their concurring opinion, *Id.* at 214–15, 217–19. The logic of *Brown*'s holding that separate schools were inherently unequal would seem to have called for remedying all segregated schooling patterns, whether these had originated because of "purposeful" state laws and actions (de jure segregation), or because of "natural" housing trends and other such developments (de facto segregation). *See, e.g.*, Paul R. Dimond, *School Segregation in the North: There Is but One Constitution*, 7 HARV. C.R.-C.L. L. REV. 1, 2 (1972) (proposing a national standard of equal protection). A number of lower federal courts had previously held that de facto segregation was unconstitutional under the *Brown* precedent. *See, e.g.*, Oliver v. Kalamazoo Bd. of Educ., 346 F. Supp. 766, 775–76, 779 (W.D. Mich. 1972), *aff'd*, 448 F.2d 635 (6th Cir. 1972) (finding segregation due to the placing of boundary lines to be unconstitutional); Johnson v. S.F. Unified Sch. Dist., 339 F. Supp. 1315, 1318–19 (N.D. Cal. 1971) (discussing true de facto segregation); Spangler v. Pasadena City Bd. of Educ., 311 F. Supp. 501, 504 (C.D. Cal. 1970) (holding a neighborhood school policy to be unconstitutional).

139. Milliken v. Bradley, 418 U.S. 717, 717–18 (1974). For a thoughtful analysis of the barriers imposed by the *Milliken* decision to effective implementation of desegregation remedies, see generally Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585 (1983).

140. 411 U.S. 1 (1973); *see supra* note 72.

141. *Id.* at 16–17, 58. Plaintiffs who attended school in the property-poor Edgewood school district had about half as much spent on their education on a per capita basis compared to white students in the affluent neighboring Alamo Heights, even though the tax rate in the poor district was 24% higher than in the affluent district. *Id.* at 12–13.

inadequate segregated schools, the schools they now attend must at least have adequate resources, the Supreme Court refused to invalidate Texas's highly inequitable state education finance system. Instead, it held that education was not "a fundamental interest" under the Federal Constitution, and that it was outside the domain of federal constitutional law to further scrutinize the significance of the educational opportunities being afforded to residents of property-poor school districts.[142]

In the mid-1980s, the Supreme Court began to focus on the question of when remedial decrees in longstanding desegregation cases should be terminated.[143] In a series of such decisions, the Court determined that the test for judging when a school board was entitled to be free of continuing judicial supervision would be whether the board has "complied in good faith with the desegregation decree since it was entered, and whether . . . vestiges of past de jure discrimination had been eliminated to the extent practicable."[144] Although for a time, the Court hinted that relative per pupil expenditures and "objective evidence of black achievement" might be appropriate factors to consider in determining whether the vestiges of past segregation had been eliminated,[145] the Supreme Court's

142. In declaring that education was not a fundamental interest under the Federal Constitution, the Supreme Court had to confront its own strong statement in *Brown* that "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954). After restating the full passage in which this phrase appears in *Brown*, the Court in *Rodriguez*, somewhat abashedly, stated, "Nothing this Court holds today in any way detracts from our historic dedication to public education." *Rodriguez*, 411 U.S. at 30. Ironically, the year after it issued its ruling in *Rodriguez*, the Supreme Court upheld the use of extra compensatory funding as a follow-up remedy for the Detroit students who were precluded by the Court's decision in *Milliken* from attending integrated schools in the suburbs. Milliken v. Bradley (*Milliken II*), 433 U.S. 267, 267–68 (1977); *see also* HALPERN, *supra* note 106, at 312–16 (arguing that thoroughgoing educational opportunity, not ratios of black to white students, was the true intent of *Brown*).

143. At this time, the Court also narrowly interpreted the rights of students with disabilities under the IDEA, holding that the law entitled a student only to some quantum of "educational benefits," but not to "an opportunity to achieve his full potential, commensurate with the opportunity provided to other children," the standard which had been adopted by the lower courts. Bd. of Educ. v. Rowley, 458 U.S. 176, 186 (1982). For a detailed analysis of the equal opportunity aspects of this decision, see Michael A. Rebell, *Structural Discrimination and the Rights of the Disabled*, 74 GEO. L.J. 1435 (1986).

144. Okla. City Pub. Sch. v. Dowell, 498 U.S. 237, 249–50 (1991).

145. *See* Freeman v. Pitts, 503 U.S. 467, 483, 496 (1992) (stating that courts could relinquish supervision of school districts in incremental stages and upholding district court order, requiring the school district to equalize per pupil expenditures in majority white and majority black schools because of differences in teaching quality in these schools). Some commentators viewed this emphasis on the actual achievement of minority students as a potential method for reinvigorating desegregation lawsuits and making them into

subsequent decision in *Missouri v. Jenkins*[146] dampened any such expectations. The Court there reversed a lower court ruling that would have required the State of Missouri to continue to fund quality educational programs because student achievement levels were below national norms at many grade levels.[147]

By emphasizing what is "practicable" for local school districts, rather than how to provide "meaningful" opportunities for black students, the federal courts after *Jenkins* were essentially abandoning any serious efforts to implement *Brown*'s vision of equal educational opportunity. As one commentator put it:

> Developments in federal school desegregation jurisprudence in the early 1990s . . . suggest that the litigation era reaching back to *Brown v. Board of Education* is now drawing to a close . . . curtailing continuing federal court jurisdiction over a district that had once acted illegally opens the way for the district also to abandon some of the special efforts that had been imposed on it—both programs aimed explicitly at achieving racially balanced student bodies and those aimed more at improving the educational opportunities offered in the often heavily minority schools.[148]

Not surprisingly, over the past decade, there has been a marked trend toward resegregation in the nation's public schools.[149]

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vehicles for assuring quality education. *See, e.g.*, Kevin Brown, *The Legal Rhetorical Structure for the Conversion of Desegregation Lawsuits to Quality Education Lawsuits*, 42 EMORY L.J. 791, 803 (1993) (discussing the effects of *Freeman*).

146. 515 U.S. 70 (1995).

147. *Id.* at 71–72.

148. Paul A. Minorini & Stephen D. Sugarman, *Educational Adequacy and the Courts: The Promise and Problems of Moving to a New Paradigm*, *in* EQUITY AND ADEQUACY IN EDUCATION FINANCE: ISSUES AND PERSPECTIVES 175, 187 (Helen F. Ladd et al. eds., 1999); *see also* Chris Hansen, *Are the Courts Giving Up? Current Issues in School Desegregation*, 42 EMORY L.J. 863, 864 (1993) (describing changes in the courts' attitudes toward desegregation litigation); Theodore M. Shaw, Missouri v. Jenkins*: Are We Really a Desegregated Society?*, 61 FORDHAM L. REV. 57, 60 (1992) (arguing that once a school district is relieved from court supervision, vestiges of segregation in areas like housing again become operative).

149. *See supra* notes 28–29 and accompanying text; *see also* Gary Orfield, *Conservative Activists and the Rush Toward Resegregation*, *in* LAW AND SCHOOL REFORM: SIX STRATEGIES FOR PROMOTING EDUCATION EQUITY 39, 56 (Jay P. Heubert ed., 1999) (arguing that these desegregation cases signal a "rush to resegregate" by conservative federal judges who have terminated desegregation plans without holding full evidentiary hearings, and without fairly assessing the educational ramifications of these terminations). The impact of Title VI has also been substantially diminished by the Supreme Court's decision in *Alexander v. Sandoval*, 532 U.S. 275 (2001), which eliminated the private right of action for discriminatory impact cases, which had been a major litigation tool of civil rights advocates. *Id.* at 293

At the dawn of the new century, almost fifty years after *Brown* had been decided, the contours of what was required to provide blacks and other historically disadvantaged groups equal educational opportunities had been sketched by the federal courts, but they were no longer actively engaged in completing the picture. The continuing power of the *Brown* vision was demonstrated, however, by the fact that as egalitarian initiatives waned in the federal courts, they took on renewed vigor in the state courts and in the Congress.

C. The State Court Decisions on Education Adequacy

At about the same time that the Supreme Court's active involvement with desegregation remedies was beginning to lag, successful legal challenges to the inequities in state education finance systems began to accelerate in the state courts.[150] Although the education finance and education adequacy cases could not ensure integrated school settings, they did respond to the reality that most poor and minority students attended school in property-poor urban or rural school districts that were substantially underfunded in comparison to schools in affluent, largely white suburban school districts.[151]

The results of these efforts have been extraordinary: challenges to inequities in state funding systems have been filed in more than forty states over the past thirty-five years, and plaintiffs have won major decisions in more than 60% of them.[152] Moreover, as the

150. *See supra* notes 72–73 and accompanying text.

151. Some have argued that to some degree, the state education finance cases can be said to be reasserting the "separate but equal" doctrine the Supreme Court overruled in *Brown*. *See, e.g.*, Ryan, *supra* note 30, at 258–60. Equity in funding can also be viewed, however, as an important prerequisite (although not a substitute) for effective integrated education. *See, e.g.*, REED, *supra* note 106, at 4–5 (arguing that state education finance cases arose from "a growing sense among civil rights lawyers that desegregation alone would not get to the heart of unequal educational opportunity"); *see also* Drew S. Days III, Brown *Blues: Rethinking the Integrative Ideal*, *in* REDEFINING EQUALITY, *supra* note 107, at 139, 141 (describing specific ways that growing numbers of blacks are turning away from the integrative ideal because of ineffective implementation of *Brown*).

152. For detailed information about these cases and ongoing updates regarding cases involving challenges to state education finance systems, see the website of the ACCESS Network, Teachers College, Columbia University, http://www.schoolfunding.info (last visited Apr. 15, 2007). The education finance and education adequacy litigations, in fact, constitute the most creative flowering of state court constitutionalism in the nation's history. The large-scale resort to the state courts, of course, was triggered by the U.S. Supreme Court's closing of the gates to the federal courts in *Rodriguez*. Although the Supreme Court held that education was not a "fundamental interest" under the federal constitution, education clearly is a "fundamental interest" under many state constitutions. For a detailed discussion of *Rodriguez* and the state court litigations, see generally Rebell, *supra* note 72; SCHRAG, *supra* note 72.

courts' emphasis in these cases has shifted in recent years from rectifying abstract fiscal inequities to ensuring that "adequate" educational opportunities are actually available for all students, plaintiffs have prevailed in three-quarters of the major decisions.[153]

The recent wave of state court cases challenging state education finance systems have been called "adequacy" cases because they are based on clauses in almost all state constitutions, which, although utilizing differing terms, like "thorough and efficient" education, "ample" education, or "sound basic education" guarantee all students some minimal level of "adequate education."[154] These provisions generally were incorporated into the state constitutions as part of the common school movement of the mid-nineteenth century.[155] Compulsory schooling, which became prevalent in most states by the

153. *See* ACCESS Network, Teachers College, Columbia University, http://www.schoolfunding.info/litigation/adequacydecisions.pdf (last visited Mar. 14, 2007).

154. For an overview of the education clauses in the state constitutions, discussed in terms of four basic categories related to the relative "strength" of the educational clauses, see generally William E. Thro, *The Role of Language of the State Education Clauses in School Finance Litigation*, 79 Educ. L. Rep. (West) 19 (Feb. 1993). Thro's categorization of the education clauses in the state constitutions in terms of the strength of their language and his predictions regarding the likely outcome of court cases based on his categorizations have been belied by the actual decisions. For example, based on Thro's categorization, plaintiffs should have won the cases in states like Maine, Rhode Island, and Illinois (which have "strong" constitutional language) and which they in fact lost, *see* Sch. Admin. Dist. No. 1 v. Comm'r, 659 A.2d 854, 858 (Me. 1995); City of Pawtucket v. Sundlun, 662 A.2d 40, 49, 57 (R.I. 1995); Comm. for Educ. Rights v. Edgar, 672 N.E.2d 1178, 1187, 1189 (Ill. 1996); Lewis E. v. Spagnolo, 710 N.E.2d 798, 805 (Ill. 1999), and lost the decisions in states having weak constitutional language like New York, North Carolina, and Vermont, which they in fact won, *see* Campaign for Fiscal Equity v. State (*CFE II*), 801 N.E.2d 326, 329 (N.Y. 2003); Leandro v. State, 346 N.C. 336, 347, 488 S.E.2d 249, 255 (1997); Brigham v. State, 692 A.2d 384, 390 (Vt. 1997).

155. *See supra* note 97 and accompanying text. Some state courts have in practice adopted contemporary terms to describe the requirements for adequate education in the state constitution in place of anachronistic nineteenth century terminology. For example, "[s]ound basic education" is a term utilized by the highest courts in New York and North Carolina to provide contemporary meaning to constitutional clauses adopted in the nineteenth century that require the legislature to establish a "system of free common schools, wherein all the children of this state may be educated," N.Y. CONST. art. XI, § 1 (amended 1938), and a "general and uniform system of free public schools," N.C. CONST. art. IX, § 2 cl. 1. *See Leandro*, 346 N.C. at 345, 488 S.E.2d at 254 (interpreting education clause in North Carolina's state constitution); Levittown v. Nyquist, 439 N.E.2d 359, 368 (N.Y. 1982) (interpreting education clause in New York's state constitution).

Several of the state constitutions' education clauses were enacted in the eighteenth century and contained phrases concerning the duty of the legislature to "cherish . . . public schools," *see, e.g.*, MASS. CONST. part 2, ch. 5, § II, which courts have interpreted to mandate "an adequate education." McDuffy v. Sec'y of Educ., 615 N.E.2d 516, 548 (Mass. 1993); *accord* Claremont Sch. Dist. v. Governor, 635 A.2d 1375, 1381 (N.H. 1993); *see also Brigham*, 692 A.2d at 392 (drafters of the Vermont Constitution sought to foster "republican values or public 'virtue' ").

beginning of the twentieth century, added an additional rationale for the emphasis on education in the state constitutions.[156]

Although the state defendants in many of these cases have argued that the adequacy clauses in the state constitutions should be interpreted to guarantee students only a "minimal" level of education, by and large, the state courts that have closely reviewed students' needs in contemporary society have called instead for an education system that is at substantially more than a minimum level.[157] This high minimum approach focuses on what would be needed to assure that all children have access to those educational opportunities that are necessary to gain a level of learning and skills that are now required to obtain a good job in our increasingly technologically complex society[158] and to participate effectively in our ever more complicated political process.[159]

156. In *Yoder v. Wisconsin*, 406 U.S. 205 (1972), the Supreme Court analyzed in detail the purposes of compulsory education before allowing the Amish plaintiffs a limited exemption from it. In doing so, the Court accepted the state's twofold justification for compulsory education, that is, preparation of citizens "to participate effectively and intelligently in our open political system," and preparation of individuals "to be self-reliant and self-sufficient participants in society." *Id.* at 221; *cf.* Serrano v. Priest, 487 P.2d 1241, 1259 (Cal. 1971) ("Education is so important that the state has made it compulsory.").

157. *See, e.g.*, William H. Clune, *The Shift from Equity to Adequacy in School Finance*, 8 EDUC. POL'Y 376, 376 (1994) (describing the thrust of the cases as calling for a high minimum level).

158. Minorini and Sugarman, *supra* note 148, at 188. The policy statement of the 1996 National Education Summit, endorsed by President Clinton, forty-one governors, and forty-eight CEOs of major American corporations, specifically described the type of cognitive skills students need for the contemporary job market: "In addition to basic skills, all individuals must be able to think their way through the workday, analyzing problems, proposing solutions, communicating, working collaboratively and managing resources such as time and materials." 1996 NATIONAL EDUCATION SUMMIT POLICY STATEMENT; *see also* ACHIEVE, INC., BENCHMARKING THE BEST 3 (1999) ("Almost two-thirds of today's workforce needs advanced reading, writing, mathematical and critical thinking skills, compared to only 15% of workers just twenty years ago."); DEBORAH WHETZEL, AM. INST. FOR RESEARCH, THE SECRETARY OF LABOR'S COMMISSION ON ACHIEVING NECESSARY SKILLS 3–4 (1991) (finding that students need much higher levels of technical skill and knowledge than in the past, including the ability to manage and comprehend complex texts and information); NAT'L CTR. ON EDUC. & THE ECON., AMERICA'S CHOICE: HIGH SKILLS OR LOW WAGES! 64–65 (1990) (comparing skill levels of students graduating from American schools with graduates of other industrial nations and concluding that American workers need higher level skills to be competitive); COMM. ON THE SKILLS OF THE AM. WORKFORCE, *supra* note 35, at xix ("This is a world in which a very high level of preparation in reading, writing, speaking, mathematics, science, literature, history, and the arts will be an indispensable foundation for everything that comes after for most members of the workforce.").

159. The kind of skills that students need to be "capable" voters and jurors have been described as "the intellectual tools to evaluate complex issues, such as campaign finance reform, tax policy, and global warning, to name only a few. . . . Jurors today must

Accordingly, many of the cases have specified that an adequate education must include, in addition to traditional reading and mathematical skills, knowledge of the physical sciences and "a fundamental knowledge of economic, social, and political systems, and of history and governmental processes; and academic and vocational skills."[160] Some cases have held that it also includes "the ability to appreciate music, art, and literature, and the ability to share all of that with friends."[161]

One of the clearest rejections of a minimalist interpretation of a state constitution adequacy clause was the 2003 decision of the New York Court of Appeals, the State's highest court. In invalidating the Appellate Division's holding that the constitution required an education that would provide students only eighth-grade level skills, the court held that New York's schoolchildren are constitutionally entitled to the "opportunity for a *meaningful* high school education, one which prepares them to function productively as civic participants."[162] In doing so, the court stressed that although in the nineteenth century, when the State's adequacy clause was adopted, a sound basic education may well have consisted of an eighth- or ninth-grade education, "[t]he definition of a sound basic education must serve the future as well as the case now before us."[163]

In focusing on the actual educational needs of students in the twenty-first century, some of the state courts have begun to take note of the fact that some students who come to school disadvantaged by the burdens of severe poverty need a more comprehensive set of services and resources in order to have a meaningful educational opportunity. Thus, in ordering that additional resources beyond the level currently enjoyed by students in affluent suburbs be provided to students in the state's poorest urban districts, the New Jersey Supreme Court held that:

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determine questions of fact concerning DNA evidence, statistical analyses, and convoluted financial fraud, to name only three topics." Campaign for Fiscal Equity v. State, 719 N.Y.S.2d 475, 485 (N.Y. Sup. Ct. 2001), *aff'd*, 801 N.E.2d 326 (N.Y. 2003).

160. Abbeville County Sch. Dist. v. State, 515 S.E.2d 535, 540 (S.C. 1999); *see also* Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 197 (Ky. 1989) (discussing the stark differences in achievement between districts); McDuffy v. Sec'y of Office of Educ., 615 N.E.2d 516, 554 (Mass. 1993) (noting areas that need significant improvement); Claremont Sch. Dist. v. Governor, 635 A.2d 1375, 1381 (N.H. 1993) (noting the State's duty to fund public education), *Leandro*, 346 N.C. at 347, 488 S.E.2d at 255 (defining a "sound basic education").

161. Abbott v. Burke, 575 A.2d 359, 397 (N.J. 1990).

162. *Campaign for Fiscal Equity*, 801 N.E.2d at 332 (emphasis added).

163. *Id.* at 349.

> This record shows that the educational needs of students in poorer urban districts vastly exceed those of others, especially those from richer districts. The difference is monumental, no matter how it is measured. Those needs go beyond educational needs, they include food, clothing and shelter, and extend to lack of close family and community ties and support, and lack of helpful role models. They include the needs that arise from a life led in an environment of violence, poverty, and despair . . . . The goal is to motivate them, to wipe out their disadvantages as much as a school district can, and to give them an educational opportunity that will enable them to use their innate ability.[164]

At least two state courts have also held that students from poverty backgrounds must be given access to early childhood services in order to receive the opportunity for a meaningful education. In October 2000, trial court Judge Howard Manning ruled in North Carolina's school funding case that many disadvantaged children were unprepared for school due to the absence of prekindergarten opportunities, and, accordingly, he ordered the State to provide prekindergarten programs for all "at-risk" four-year-olds.[165] When the case reached the Supreme Court of North Carolina in 2004, the court agreed with Judge Manning's holdings that the State was ultimately responsible "to meet the needs of 'at-risk' students in order for such students to avail themselves of their right to the opportunity to obtain a sound basic education"[166] and that the State must provide services to such children "prior to their entering the public schools."[167]

164. *Abbott*, 575 A.2d at 400. This holding is, in effect, a direct refutation of the reasoning of the Ninth Circuit in *Lau*, which had stated in the decision that was reversed by the U.S. Supreme Court, *see supra* note 135 and accompanying text, that

> However commendable and socially desirable it might be for the School District to provide special remedial educational programs to disadvantaged students . . . or to provide better clothing or food to enable them to more easily adjust themselves to their environment, we find no constitutional or statutory basis upon which we can mandate that these things be done.

Lau v. Nichols, 483 F.2d 791, 798 (9th Cir. 1973), *rev'd*, 414 U.S. 563 (1974).

165. Hoke County Bd. of Educ. v. State, No. 95CVS1158, 2000 WL 163986, at *36, 43–45 (N.C. Super. Ct. Oct. 12, 2000).

166. Hoke County Bd. of Educ. v. State, 358 N.C. 605, 640, 599 S.E.2d 365, 392 (2004).

167. *Id*. Although it upheld the constitutional right of children from poverty backgrounds to early childhood services, the Supreme Court of North Carolina rejected Judge Manning's specific order requiring prekindergarten classes for all "at-risk" students. Instead, the court deferred to the expertise of the legislative and executive branches in matters of education policy and authorized them to determine the specific types of services that should be provided to at-risk students to prepare them for school. *Id.* at 393–94. After this supreme court ruling, the State expanded "More at Four," a preschool

More recently, in December 2005, South Carolina state circuit court Judge Thomas W. Cooper, Jr. held that poverty directly causes lower student achievement and that the state constitution imposes an obligation on the State "to create an educational system that overcomes . . . the effects of poverty."[168] Because the state defendants have not provided early childhood intervention programs, the court declared that they "have failed in their constitutional responsibility to provide an opportunity" for a "minimally adequate" education.[169] The court then ordered "early childhood intervention at the pre-kindergarten level and continuing through at least grade three" to minimize "the impact and the effect of poverty on the educational abilities and achievements" of children from poverty backgrounds.[170]

IV. "MEANINGFUL" EDUCATIONAL OPPORTUNITY

A. The Conceptual Framework

Implementation of *Brown*'s vision of equal educational opportunity has been a major, sustained focus of governmental policy for the past half century; the discussion in the previous Part has demonstrated, however, that actual progress toward this goal has been inconsistent and incomplete. Many have despaired that more than half a century after the historic *Brown* decision, increasing numbers of black and white children attend segregated schools, and

program geared to low-income students, which the legislature had initiated in 2001 in response to Judge Manning's original order. This pre-K program, which had been serving about one thousand students in its first year, was serving over sixteen thousand by the 2005–06 school year. OFFICE OF SCH. READINESS, N.C. DEP'T OF HEALTH & HUMAN SERVS., MORE AT FOUR PRE-KINDERGARTEN PROGRAM: PROGRESS REPORT TO THE NORTH CAROLINA GENERAL ASSEMBLY 1 (2006), *available at* http://www.governor.state.nc.us/Office/Education/_pdf/MAFFeb2006LegislativeReport.pdf.

168. Abbeville County Sch. Dist. v. State, No. 31-0169, slip op. at 157 (S.C. Ct. Com. Pl. Dec. 29, 2005), *available at* http://www.schoolfunding.info/states/sc/Abbeville%20Trial%20Court%20Order%2012-29-05.pdf.

169. *Id.*

170. *Id*. at 161. In *Abbott v. Burke*, 693 A.2d 417 (N.J. 1997), at the remedy stage of the litigation, the New Jersey Supreme Court "identified early childhood education as an essential educational program for children in the [low-wealth urban districts]" and found that "[i]ntensive pre-school and all-day kindergarten enrichment program[s are necessary] to reverse the educational disadvantage these children start out with." *Id.* at 436. Concluding that the legislature had made inadequate provision for preschool services, the court later directed the State's education commissioner to require the thirty urban "Abbott" districts to provide half-day preschool for their three- and four-year-olds and ordered the State to provide adequate funding to support these preschool programs. *Id.* at 463–64.

the gap between achievement levels of white students and black and Latino students seems to be narrowing only slightly, if at all.[171]

Although *Brown*'s vision has been imperfectly implemented at best, this momentous decision has led to the most serious and sustained commitment to equal educational opportunity in America's political and legal history.[172] The clearest reflection of this ongoing egalitarian dynamic is the fact that, as the federal courts' commitment to active implementation of educational equity began to wane, Congress, the state legislatures, and the state courts picked up the baton and developed important new egalitarian initiatives. The state legislatures, in adopting standards-based reforms, and Congress, in enacting NCLB, have now established as the core of state and federal educational policy throughout the United States the stunning proposition that *all* children can learn and *all* children must become proficient in meeting challenging state academic standards by a date certain.

A key question that immediately must be asked in regard to this extraordinary egalitarian commitment that has been adopted as mandatory national policy is whether it can, in fact, be achieved. Proficiency for all by 2014 is a radical call for equality of result that breaches the normal boundaries of America's political culture, and is a goal that is, in any event, unattainable at least within the unreasonably brief time period that Congress has established.[173] No

171. *See supra* notes 17–32 and accompanying text. For perspectives on "*Brown* at 50," see generally Special Issue, Brown *Plus Fifty*, 107 TCHRS. C. REC. 343 (2005); Special Issue, Brown *Plus Fifty* (2), 107 TCHRS. C. REC. 1905 (2005); Symposium, Brown@50, 47 HOW. L. REV. 1 (2003–2004); Special Issue, Brown v. Board of Education, 8 AM. L. & ECON. REV. 141 (2006); Arthur Chaskalson, Brown v. Board of Education*: 50 Years Later*, 36 COLUM. HUM. RTS. L. REV. 503 (2005); Michael Heise, Brown v. Board of Education, *Footnote 11 and Multidisciplinarity*, 90 CORNELL L. REV. 297 (2005); Symposium, *50 Years of* Brown v. Board of Education, 90 VA. L. REV. 1537 (2005).

172. *See, e.g.*, Charles Vert Willie & Sarah Susannah Willie, *Black, White and Brown: The Transformation of Public Education in America*, 107 TCHRS. C. REC. 475, 490–91 (2005) (specifying dramatic educational and economic advances of African-Americans since *Brown*). Note also, the major changes in public attitudes on egalitarian issues during this *Brown* era. "In 1942 only 2 percent of southern whites (and 40 percent of northern whites) believed blacks and whites should attend the same schools. By the mid-1990s, 87 percent of Americans approved of the *Brown* decision." Richard D. Kahlenberg, *The Fall and Rise of School Segregation*, AM. PROSPECT, May 21, 2001, at 41, 41, *available at* http://www.prospect.org/print/V12/9/kahlenberg-r.html.

173. *See, e.g.*, Robert Linn, Improving the Accountability Provisions of NCLB 2–3 (Nov. 1, 2006), http://devweb.tc.columbia.edu/manager/symposium/Files/97_Linn_11[1].1.06.pdf (stating that the demand for adequate yearly progress leading to full proficiency by 2014 asks all schools to do what no school has ever done); Richard Rothstein et al., 'Proficiency for All'—An Oxymoron 2 (Nov. 2006), http://devweb.tc.columbia.edu/manager/symposium/Files/101_Rothstein%20-%20Prof%20for%20All%20-%20TC%20

one seriously expects that in the next seven years the legacies of poverty and racism will be totally overcome and all students in the United States will be achieving at high academic levels. Senator Edward M. Kennedy, one of the architects of the law, recently acknowledged that "the idea of 100 percent is, in any legislation, not achievable."[174] But, as Senator Lamar Alexander noted, Americans don't want politicians to lower standards,[175] so no one in Washington is pressing now to modify the 2014 mandatory compliance date.

Proficiency for all does, however, serve an important inspirational purpose in expressing a serious national commitment to substantially furthering the education of all students, and especially of blacks, Latinos, students with disabilities, and low-income students whose needs have been neglected in the past. It is a rallying cry that says we must overcome the impediments of poverty and racism and seriously pursue equity in education. Stated in these terms, the inspirational impetus of "proficiency for all by 2014" can be retained and actually realized if the commitment to achieve unprecedented educational results for low-income, disabled, and minority students is converted to a serious commitment to actually implement *Brown*'s vision of equal educational opportunity within the next few years.

This rare opportunity created by strong bipartisan support at both the state and national levels for pursuing thoroughgoing equity in education must be seized. To do so, the proficiency for all by 2014 goal should be modified before it is undermined by a cynical aura of impossibility. If "proficiency for all" is recast as actual achievement of *Brown*'s vision of equal educational opportunity by 2014, then the focus can be on determining what that vision truly means and how it can actually be realized. The history of the implementation of the *Brown* vision as discussed in the previous Part of this Article indicates that substantial progress can be made and has been made when concrete steps are taken to provide "meaningful" opportunities to all students. What is needed to fully realize the *Brown* vision at this point, then, is to identify and emphasize the strands of meaningful educational opportunity that have been developed by the courts, Congress, and other national and state institutions in the past, and to mold them into a concept of "meaningful educational opportunity"

Symposium%2011-14-06.pdf ("No goal can simultaneously be challenging to and achievable by all students across the entire achievement distribution . . . but this is what NCLB requires.").

174. Amit R. Paley, *'No Child' Target Is Called Out of Reach*, WASH. POST, Mar. 14, 2007, at A1.

175. *Id.*

that can give focus, direction, and coherence to egalitarian policies in education for the future.

The importance of the concept of "meaningful" educational opportunity stems from the fact that "equal educational opportunity" is, if left undefined, an inspiring, yet ultimately elusive, term. Equality of educational opportunity has often been analogized to providing all individuals an equal start for the competitive race that is life. As President Lyndon Johnson graphically put it:

> You do not take a person who, for years has been hobbled by chains and liberate him, bring him to the starting line of a race, and then say you are free to compete with all the others, and still just believe that you have been completely fair. Thus, it is not enough just to open the gates of opportunity. All our citizens must have the ability to walk through those gates.[176]

But attempts to ensure that all of our citizens have an ability "to walk through those gates" involve complex decisions regarding what compensatory measures we should take, who will be the beneficiaries of these measures, and how we should assess the degree of equity achieved.[177] Furthermore, equalizing rights in one area may have a negative effect on rights in other areas, and an equal distribution of a particular resource may have widely different utility impacts for different individuals.[178]

In short, then, for "equal educational opportunity" to have practical significance it must be given an explicit definition and concrete content.[179] This is why the courts, the Congress, and the

176. LYNDON JOHNSON, THE VANTAGE POINT: PERSPECTIVES OF THE PRESIDENCY 1963–1969, at 166 (1971); *see also* JOHN ROEMER, EQUALITY OF OPPORTUNITY 2 (1998) ("[T]here is, in the notion of equality of opportunity, a 'before' and an 'after': before the competition starts, opportunities must be equalized, by social intervention if need be, but after it begins, individuals are on their own.").

177. *See, e.g.*, ROBERT BERNE & LEANNA STIEFEL, THE MEASUREMENT OF EQUITY IN SCHOOL FINANCE: CONCEPTUAL, METHODOLOGICAL, AND EMPIRICAL DIMENSIONS 4–5 (1984) (describing the myriad forms that concepts of equity in the field of education finance can take); ROEMER, *supra* note 176, at 6 (discussing the complexities of distinguishing levels of effort among individuals coming from differing backgrounds and circumstances); James Coleman, *The Concept of Equality of Educational Opportunity*, *in* EQUALITY OF EDUCATIONAL OPPORTUNITY: A HANDBOOK FOR RESEARCH 3, 3–16 (LaMar P. Miller & Edmund W. Gordon eds., 1974) (setting forth five different definitions of equal educational opportunity).

178. AMARTYA SEN, INEQUALITY REEXAMINED 12–30 (1996).

179. Looking at the "elusiveness" of equality from another perspective, it has been said that "equality" basically consists of treating "like things alike," but determining what things are "alike" is the critical question since categories of morally alike objects do not exist in nature; moral likeness exists only when people define categories. Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 345–46

state legislatures have made their greatest strides toward implementing the *Brown* vision when they have defined exactly what it means in particular contexts. The Supreme Court was most effective in implementing equal educational opportunity when it adopted as a clear goal the dismantling of de jure segregation in Southern schools and insisted on concrete desegregation plans that "promise[] realistically to work *now*."[180] Similarly, equal educational opportunity for English language learners got its greatest boost when the Supreme Court insisted that educational services provided to them be "meaningful," and Congress, the lower federal courts, and the Department of Education then articulated in very precise terms the types of services that would meet that requirement.[181] The long history of neglect of children with disabilities ended when Congress specified in clear terms the types of special education and related services that would be provided to meet the individual needs of each of these children.

Despite the vagueness of the overarching term "education adequacy" that has come to describe the state court litigations that seek basic quality educational services for all children, these cases have been able to substantially equalize education financing in many states[182] and to promote educational reforms that have raised student

(1949); *see also* Peter Westin, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 547 (1982) (arguing that the notion of equality is tautological because "it tells us to treat like people alike; but when we ask who 'like people' are, we are told they are 'people who should be treated alike' "). The most effective way to approach issues of equality is, therefore, to specify precisely what equality means and what it requires in particular contexts. This is the essence of the concept of "meaningful" educational opportunity being espoused in the main text.

180. Green v. County Sch. Bd., 391 U.S. 430, 439 (1968).

181. Specifically, in response to *Lau v. Nichols*, 414 U.S. 563 (1974), Congress increased by tenfold the funding available under the Bilingual Education Act, Pub. L. No. 93-380, § 105, 88 Stat. 484, 503–04 (1974), and expanded its definitions to emphasize bilingual, bicultural programs. *See also* Rachel Moran, *The Politics of Discretion: Federal Intervention in Bilingual Education*, 76 CAL. L. REV. 1249, 1257–68 (1988) (providing a history of federal intervention on bilingual educational issues). Also, in response to *Lau*, the federal Department of Health, Education, and Welfare enacted a set of regulations which came to be known as "the *Lau* remedies," which required a school district to provide a remedial plan whenever it had twenty or more students of the same language group identified as having a primary or home language other than English. *See* BILINGUAL EDUCATION: A REAPPRAISAL OF FEDERAL POLICY xii–xiii, 213–21 (Keith A. Baker & Adriana A. de Kanter eds., 1983).

182. *See, e.g.*, William N. Evans et al., *The Impact of Court-Mandated Finance Reform*, *in* EQUITY AND ADEQUACY, *supra* note 148, at 72, 77 (study of 10,000 school districts over twenty-year period found that court-ordered reform reduces disparities by "leveling up" and increases overall spending on education); Douglas S. Reed, *Twenty-Five Years After* Rodriguez*: School Finance Litigation and the Impact of the New Judicial Federalism*, 32 LAW & SOC'Y REV. 175, 190 (1998) (finding that changes in the level of inequality

achievement[183] because they focus on the specific resources that are needed for a basic quality education. The New York Court of Appeals understood this point when it specifically held in *Campaign for Fiscal Equity v. State* that the state constitution required that each child be provided the opportunity for a "meaningful" high school education that included certain "essential" resources such as qualified teachers, small class sizes, and books and other instrumentalities of learning,[184] and that children must be taught the specific skills that will prepare them to function productively as civic participants capable of voting and serving on juries.[185]

B. Relationship to NCLB

In order to realize *Brown*'s vision of equal educational opportunity, what is needed at this point is the formulation of a clear concept of what constitutes a "meaningful" education opportunity, that is, the educational essentials, the particular resources, practices, programs, and services that are required to provide real opportunities, especially for children from poverty backgrounds. We have learned a great deal in the past fifty years about the necessary and feasible elements of educational opportunity, and it is now time to assemble those elements into a coherent legal concept of "meaningful educational opportunity." This concept might then be incorporated into a legal argument in an education adequacy or equal protection case or into an appropriate state or federal statutory context.

Since NCLB is the focal point of current national policy on educational opportunity, an exploration of the relationship between

among school districts resulting from fiscal equity litigations were sustained and relatively robust).

183. *See infra* notes 196–203 and accompanying text.

184. Campaign for Fiscal Equity v. State (*CFE II*), 801 N.E.2d 326, 333–36 (N.Y. 2003); *see also* Neeley v. W. Orange-Cove, 176 S.W.3d 746, 787 (Tex. 2005) ("Districts satisfy this constitutional obligation when they provide all of their students with a *meaningful opportunity* to acquire the essential knowledge and skills reflected in . . . curriculum requirements."); Abbott v. Burke, 710 A.2d 450, 481 (N.J. 1998) ("The use of content and performance standards embodied the accepted definition of a thorough and efficient education, i.e., to prepare all students with a *meaningful opportunity* to participate in their community." (emphasis added)).

185. *CFE II*, 801 N.E.2d at 331; *see also* DeRolph v. State, 677 N.E.2d 733, 744–47 (Ohio 1997) (requiring legislature to ensure an appropriate "student-teacher ratio . . . and sufficient computers" as well as "facilities in good repair and the supplies, materials, and funds necessary to maintain these facilities in a safe manner"); Campbell County Sch. Dist. v. State, 907 P.2d 1238, 1279 (Wyo. 1995) (stating that a "quality education" includes "small schools, small class size, low student/teacher ratios, textbooks, low student/personal computer ratios" and more).

the concept of meaningful educational opportunity and the purposes and requirements of that federal statute will provide an appropriate context for developing, applying, and illustrating the argument being advanced here. The legislative history of the NCLB provides a good starting point for this exploration.

In various statutes it enacted regarding funding for students from economically disadvantaged backgrounds since the early 1990s, Congress has increasingly articulated clear goals and expectations concerning the broad needs of these children for in-school and out-of-school services. For example, the national goals for the year 2000 endorsed by Congress as part of the Goals 2000: Educate America Act[186] included such specific "school readiness" goals as ensuring that "all children will have access to high-quality and developmentally appropriate preschool programs that help prepare children for school";[187] and that

> children will receive the nutrition, physical activity experiences, and health care needed to arrive at school with healthy minds and bodies, and to maintain the mental alertness necessary to be prepared to learn, and the number of low-birthweight babies will be significantly reduced through enhanced prenatal health systems.[188]

Further, it included student achievement goals such as:

> all students will leave grades 4, 8, and 12 having demonstrated competency over challenging subject matter including English, mathematics, science, foreign languages, civics and government, economics, arts, history, and geography, and every school in America will ensure that all students learn to use their minds well, so that they may be prepared for responsible citizenship, further learning, and productive employment in our Nation's modern economy.[189]

Although these goals clearly have not been achieved, the "Statement of Purpose" in the 2001 No Child Left Behind Act drew on this history in expanding the definition of equal educational opportunity

186. Goals 2000: Educate America Act of 1994, Pub. L. No. 103-227, 108 Stat. 129 (codified as amended at 20 U.S.C. §§ 5801–6804 (2000)).

187. 20 U.S.C. § 5812(1)(B)(i). The bipartisan drafting committee that produced the original version of Goals 2000 had agreed that school readiness had to be the number one goal and that this goal could not be achieved without the extensive inputs listed in the text. CHRISTOPHER T. CROSS, POLITICAL EDUCATION: NATIONAL POLICY COMES OF AGE 95–96 (2004).

188. 20 U.S.C. § 5812(1)(B)(iii).

189. *Id.* § 5812(3)(A).

to specify that "[t]he purpose of this title is to ensure that all children have a fair, equal, and *significant* opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging state academic achievement standards and state academic assessments."[190] The predecessor statute, the Improving America's Schools Act of 1994,[191] had utilized the phrase "fair and equal" educational opportunity,[192] and this phrase was repeated in the original House and Senate versions of the NCLB.[193] The Senate version also had a list of specific programs, strategies, conditions, and educational essentials that expanded on the specifications of the predecessor statutes. These included, inter alia,

> (8) providing children an enriched and accelerated educational program, including the use of schoolwide programs or additional services that increase the amount and quality of instructional time;
> (9) promoting schoolwide reform and ensuring access of children to effective instructional strategies and challenging, scientifically-based academic content;
> (10) significantly elevating the quality of instruction by providing staff in participating schools with substantial opportunities for professional development;
> (11) coordinating services under all parts of this title with each other, with other educational services, and to the extent feasible, with other agencies providing services to youth, children, and families;
> (12) affording parents substantial and meaningful opportunities to participate in the education of their children.[194]

This detailed delineation was omitted from the final version of the NCLB, but importantly, the term "significant" modifying "opportunity to obtain a high quality education" was substituted in its place.[195] "Significant" educational opportunity under the Act can therefore be taken to mean the type of concrete and comprehensive

190. 20 U.S.C. § 6301 (Supp. II 2002) (emphasis added).
191. Pub. L. No. 103-382, § 1001(a)(1), 108 Stat. 3519, 3519 (1994) (amended by 20 U.S.C. § 6301 (Supp. II 2002)).
192. *Id.*
193. *See* H.R. REP. NO. 107-334, at 691–92 n.10 (2001) (Conf. Rep.).
194. *Id.* at 692.
195. *See supra* note 190 and accompanying text.

educational opportunities that had been listed in the original Senate version.[196]

The addition of the word "significant" to the purposes clause of the Act focuses attention on the need to approach equal educational opportunity in a concrete manner. "Significant" is a synonym for "meaningful."[197] Although reference to "significant" or "meaningful" educational opportunity in an introductory purposes clause does not constitute a statutory mandate, it does provide guidance for interpreting the Act, and, in a more general analytic sense, for approaching the reauthorization of the Act, which is due in 2007. Many commentators and educators have pointed out that although the Act's goals are exceptional and many of its innovations, like the disaggregation of output data by ethnic, racial, and income groups, are highly constructive, a number of its major aspects require serious reconsideration.[198] As discussed above, it is also clear that its core mandate and expectation, i.e., that all children will be proficient in challenging state standards by 2014, cannot actually be met.[199]

This being the case, in order to maximize student proficiency and minimize achievement gaps, Congress should emphasize the first part of the NCLB purposes clause for the near future and revise the Act to

196. *Cf.* 82 C.J.S. *Statutes* § 340 (1999 & Supp. 2006) ("A court may consider the history of a statute, in an attempt to determine the intention of the legislature in enacting it . . . [including] the history of the proceedings attending its actual passage . . . .").

197. The prime dictionary definition of "significant" is "[h]aving or expressing a meaning; meaningful." THE AMERICAN HERITAGE COLLEGE DICTIONARY 1268 (3d ed. 1997).

198. *See, e.g.*, MELISSA LAZARIN, NAT'L COUNCIL OF LA RAZA, IMPROVING ASSESSMENT AND ACCOUNTABILITY FOR ENGLISH LANGUAGE LEARNERS IN THE NO CHILD LEFT BEHIND ACT 3 (2006) (urging the need to reconsider provisions regarding English language learners and offering proposals); MICHAEL A. REBELL & JESSICA WOLFF, CAMPAIGN FOR EDUC. EQUITY, OPPORTUNITY KNOCKS: APPLYING LESSONS FROM THE EDUCATION ADEQUACY MOVEMENT TO REFORM THE NO CHILD LEFT BEHIND ACT 2 (2006), *available at* http://www.schoolfunding.info/resource_center/OpportunityKnocks.pdf (stating that NCLB lacks requirements for sufficient federal or state funding to accomplish its purposes); James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 934 (2004) (arguing that permitting states to set their own proficiency standards will lead to a "race to the bottom" and undermine basic purposes of the Act); Barnett Berry et al., Ctr. for Teacher Quality, No Child Left Behind and the 'Highly Qualified' Teacher: The Promise and the Possibilities 1 (2006), *available at* http://devweb.tc.columbia.edu/manager/symposium/Files/103_Berry_NCLB_HQT_CEP_Oct2_2006.pdf (concluding that NCLB's current requirements will not actually lead to "high-quality teachers" in poverty schools); Richard C. Elmore, The Problem of Capacity in the (Re)Design of Educational Accountability Systems 3 (Oct. 2006), *available at* http://devweb.tc.columbia.edu/manager/symposium/Files/95_ElmoreCapacityPaper_10-5.pdf (stating that NCLB's sanction provisions undermine school-based capacity-building).

199. *See supra* notes 174–75 and accompanying text.

ensure an achievable goal, i.e., 100% *meaningful opportunity* for all children by 2014, rather than the impossible goal of 100% *proficiency* by that time. Drawing upon the legislative history of the Act, as well as the experiences of the state courts in the education adequacy litigations, Congress should define specific 100% meaningful opportunity expectations. These should require the states to have in place by 2014 certain programs and services that are critically necessary for children's educational progress such as early childhood and health programs for all children from poverty backgrounds, as well as truly qualified teachers and sufficient books, computers, laboratories, and other instrumentalities of learning. The NCLB should require states to ensure the availability of additional programs and services as needed to provide meaningful opportunities to all of their children in accordance with local needs,[200] since federal regulations cannot properly or effectively dictate all aspects of local educational programs.[201]

The suggestion here is not to eliminate the prominence of outcome accountability measures in NCLB, but to moderate them and achieve a reasonable balance with appropriate input measures. As "meaningful opportunity" is realized over the next seven years, Congress can then assess the achievement gains actually made in light of these opportunity gains and with those data determine challenging, but realistic, targets for achieving full proficiency thereafter.[202]

C. Specific Elements

In addition to guiding future directions for NCLB, the concept of "meaningful" educational opportunity should be the main interpretative mechanism that Congress, the courts, and the state legislatures use in approaching educational equity issues. What an emphasis on "meaningful" educational opportunity adds to the equity equation is the understanding that to achieve, or even approach, equity, children must be provided a range of programs and services that respond directly to their educational needs and that will reasonably allow them to develop their educational potential. This is

200. States would be expected to provide a combination of particular in-school and out-of-school services that are most relevant for their students' needs. *See supra* notes 177–85 and accompanying text.

201. *See* ELMORE, *supra* note 198, at 3–4 (noting that the federal government lacks the necessary resources to independently enact its policy goals).

202. *See* MICHAEL A. REBELL ET AL., MOVING EVERY CHILD AHEAD: ENSURING "MEANINGFUL" EDUCATIONAL OPPORTUNITY FOR ALL CHILDREN (forthcoming 2007) (offering detailed suggestions for reorienting specific provisions of the NCLB to promote meaningful educational opportunity and reasonable outcome measures in this manner).

especially true for children in high-poverty schools who have the greatest need for meaningful opportunities.[203]

Specifically, to formulate coherent concepts of meaningful educational opportunity, Congress, the courts, and the state legislatures need to concentrate on policies in three areas. The first is establishing clear goals and expectations that can reasonably be met. Second is adopting a "comprehensive" approach to educational opportunity that confronts the realities of concentrated poverty and provides the range of in-school and out-of-school services that will allow all students to actually meet the goals and expectations. Third is the need to ensure that all necessary resources are actually provided, but to do so in a feasible, cost-effective way.

1. Goals and Expectations

The many state courts that have considered in depth what students need to obtain a constitutionally adequate education have, in fact, arrived at a general consensus regarding the definition of a basic quality education. This state court consensus indicates that a basic quality education is one that provides students with the essential skills they need to function productively as capable voters, jurors, and civic participants in a democratic society and to compete effectively in the twenty-first century global economy.[204]

The types of knowledge and skills that students need to be effective citizens and workers, as articulated in the state court adequacy cases, are:

- sufficient ability to read, write and speak the English language and sufficient knowledge of fundamental mathematics and physical science to enable them to function in a complex and rapidly changing society;

203. This concept of "meaningful" educational opportunity is somewhat comparable to the theory of "minimum welfare" articulated by Professor Frank Michelman in *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 9 (1969). Michelman sought to explain the Warren Court's equal protection jurisprudence through this paradigm, which held that government has an obligation to provide certain specific basic services and treatments to the poor, rather than abstract equal treatment. Michelman's theory was articulated in terms of "minimums." If we are to take seriously the national commitment to proficiency for all students in the foreseeable future, however, more than minimum levels of services must be provided.

204. For a more detailed discussion of the consensus state court definition of a basic quality education, see generally MICHAEL A. REBELL & JESSICA R. WOLFF, CAMPAIGN FOR EDUC. EQUITY, LITIGATION AND EDUCATION REFORM: THE HISTORY AND THE PROMISE OF THE EDUCATION ADEQUACY MOVEMENT 10–11 (2006), *available at* http://www.schoolfunding.info/resource_center/adequacy-history.pdf; REBELL & WOLFF, *supra* note 198.

- sufficient fundamental knowledge of social studies, that is, geography, history, and basic economic and political systems, to enable them to make informed choices with regard to issues that affect them personally or affect their communities, states and nation;
- sufficient intellectual tools to evaluate complex issues and sufficient social and communication skills to work well with others and communicate ideas to a group; and sufficient academic and vocational skills to enable them to compete on an equal basis with others in further formal education or gainful employment in contemporary society.[205]

If the true goals and expectations for a quality basic education are defined in these broad terms, then students should be assessed in terms of this range of expectations (and not just in core reading and math skills), proficiency should be defined in accordance with this full range of knowledge and skills, and resources need to be provided in amounts that will allow students to successfully meet expectations in all of these areas.

2. Comprehensive Services

As discussed in Part II, the state court adequacy litigations have clearly established that "money matters" and that providing appropriate resources substantially improves student achievement.[206] The consensus definition emerging from the state adequacy cases also identified the following as the essential school-based resources students need to acquire the basic knowledge and skills described above:

- effective teachers, principals, and other personnel;
- appropriate class sizes;
- adequate school facilities;
- a full platform of services including guidance services and necessary tutoring and additional time on task for students from poverty backgrounds;
- appropriate programs and services for English language learners and students with disabilities;
- instrumentalities of learning, including, but not limited to, up-to-date textbooks, libraries, laboratories, and computers; and

205. REBELL & WOLFF, *supra* note 198, at 8–9.
206. *See supra* Part II.B.

- a safe, orderly learning environment.[207]

As part of the Goals 2000: Educate America Act[208] enacted in 1994, Congress articulated the concept of "opportunity to learn standards" ("OTL"), voluntary national school delivery standards that states could choose to adopt, or state OTL standards that states could develop in conjunction with their own content and student performance standards.[209] The statute defined the OTL concept as "the criteria for, and the basis of, assessing the sufficiency or quality of the resources, practices, and conditions necessary at each level of the education system . . . to provide all students with the opportunity to learn the material in voluntary national content standards or State content standards."[210] For a short period of time, intense controversy developed concerning the meaning of the vaguely defined OTL concept and the extent to which it would be a precursor of overbearing federal control of education.[211] Whether or not feasible OTL standards could have been developed remains unknown since the OTL requirements were promptly revoked by Congress after the Republicans took control later that year, and these requirements never took effect.[212]

The concept of meaningful educational opportunity being advanced in this Article differs from the OTL standards in that it relies on a concrete list of essential resources based on extensive educational research and practice that has been subject to grueling analysis in a wide variety of separate state cases. As such, this concept has emerged from actual empirical experience in the states,

207. *Id.*; *cf.* S. 2828, 109th Cong. (2006); H.R. 2178, 109th Cong. (2006) ("Student Bill of Rights" Act introduced by Senators Dodd, Kennedy, and others which defines the "fundamentals of educational opportunity" in terms of highly qualified teachers, principals, and academic support personnel, rigorous academic standards, small class sizes, textbooks, instructional materials and supplies, school facilities and computer technology, and quality guidance counseling).

208. Goals 2000: Educate America Act of 1994, Pub. L. No. 103-227, 108 Stat. 125 (codified as amended at 20 U.S.C. §§ 5801–6084 (1994)); *see supra* notes 184–87 and accompanying text.

209. 20 U.S.C. §§ 5801–02 (1994), *repealed by* Pub. L. No. 104-134, 110 Stat. 1321 (1996).

210. 20 U.S.C. § 5802 (1994).

211. *See, e.g.*, Gretchen Guiton & Jeannie Oakes, *Opportunity To Learn and Conceptions of Educational Equality*, 17 EDUC. EVAL. & POL'Y ANALYSIS 323, 323 (1995) (discussing various theories of equality that might be reflected in OTL standards); Andrew C. Porter, *The Uses and Misuses of Opportunity-To-Learn Standards*, EDUC. RESEARCHER, Jan./Feb. 1995, at 21, 22 (describing difficulties of using OTL standards for accountability purposes).

212. *See* PATRICK J. MCGUINN, NO CHILD LEFT BEHIND AND THE TRANSFORMATION OF FEDERAL EDUCATION POLICY, 1965–2005, at 109 (2006).

rather than as abstract federal mandates developed by regulators or advisory panels. Moreover, "meaningful educational opportunity" calls for categories of specific resources but omits the difficult to define "conditions and practices" that created most of the controversy around OTL standards.[213]

If the states are to implement earnestly the policy of providing meaningful educational opportunity to all that is basic to NCLB and most state standard-based reform initiatives, the need for essential resources is virtually incontrovertible. The federal law should require states to provide adequate resources in each of the essential areas, but determining specifically what are "effective" teachers, "appropriate" class sizes, "adequate" facilities, and so on should be left to the states. Such a federal requirement would likely lead to extensive and beneficial debates and discussions within each state as to the level and combination of services that are needed to provide a "meaningful educational opportunity." Moreover, if, over time, student progress toward proficiency is not sufficient, further consideration of the types and level of resources and of states' practices in providing those that need to be provided would likely ensue.

The "money matters" debate and the continuing analysis of the impact of socioeconomic disadvantages on student achievement first raised by the Coleman report, have clearly established that in addition to providing necessary in-school resources, states and localities need to ameliorate a variety of out-of-school conditions if students from poverty backgrounds are to reach proficient levels of academic achievement. A revised NCLB should, therefore, also include a requirement that school districts with high concentrations of students from poverty backgrounds who are not meeting annual progress requirements should work with public agencies and local community-based organizations to identify and provide an appropriate range of out-of-school services to counter the detrimental effects of poverty. In addition to high-quality early childhood education programs, such services are likely to include health and nutrition services, a range of after-school and summer academic enrichment programs, family and community support for academic achievement, access to the arts, and cultural and civic expression.

213. *See, e.g.*, Lorraine M. McDonnell, *Opportunity To Learn as a Research Concept and a Policy Instrument*, 17 EDUC. EVAL. & POL'Y ANALYSIS 305, 307–311 (1995) (describing technical difficulties of using opportunity to learn as a policy tool, such as the need for enormous amounts of data to document what is actually being taught in classrooms).

Examples of promising school/community collaborations to provide such comprehensive services already exist. In Portland, Oregon, for instance, the Schools Uniting Neighborhoods ("SUN") Initiative,[214] joins a range of public and private entities in an extensive collaboration with over fifty schools in six districts to develop community schools that extend the school day and serve as "community hubs" in their neighborhoods.[215] SUN community schools link with other community institutions, such as the libraries, neighborhood health clinics, community organizations, and area churches and businesses to pool and coordinate resources.[216]

The SUN Initiative has a unique methodology: the community school selects a nonprofit lead agency to act as managing partner for the effort.[217] "Jointly they hire SUN Site Managers to help build and bring networks of services, classes and volunteers together to benefit youth and the community."[218] A major goal is to provide enrichment and recreational opportunities that will connect the curriculum of the school and after-school activities for the students.[219] The "managers coordinate these services and make sure they link to the academic school day."[220] They also provide programs for parents and other adults in the community. Through the use of an advisory committee, the schools tailor their events, classes, services, and activities to the needs of the local community.[221]

Similarly, school officials, community agencies, and political leaders in Rochester, New York, recently came together to develop a

214. Schools Uniting Neighborhoods Mission and Goals, http://www.sunschools.org/mission.shtml (last visited May 3, 2007); *see also* Martin J. Blank, *How Community Schools Make a Difference*, EDUC. LEADERSHIP, May 2004, at 62, 64.

215. SUN EVALUATION WORKGROUP, SCHOOLS UNITING NEIGHBORHOODS: BASELINE REPORT 4, http://www.sunschools.org/pdf/baseline_eval_rep.pdf; Sun Community School Contacts 2006–07, http://www.sunschools.org/pdf/sunschools_contacts.pdf.

216. Schools Uniting Neighborhoods Mission and Goals, *supra* note 214.

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. SUN EVALUATION WORKGROUP, *supra* note 215. Initial evaluations of the project have indicated a range of positive results including improved academic performance in reading and math both at the elementary and middle school levels, *see* Dianne Iverson, *Schools Uniting Neighborhoods: The SUN Initiative in Portland, Oregon*, *in* COMMUNITY SCHOOLS: A STRATEGY FOR INTEGRATING YOUTH DEVELOPMENT AND SCHOOL REFORM, 81, 86 (Joy Dryfoos & Jane Quinn eds., 2005), and teacher surveys indicate improvement in attendance, classroom behavior, homework completion, and class participation, *see* GARY NAVE ET AL., NW. REG'L EDUC. LAB., MULTNOMAH COUNTY DEPARTMENT OF SCHOOLS AND COMMUNITY PARTNERSHIPS SUN SERVICE SYSTEM 2004–05 EVALUATION REPORT (2006).

plan for a Rochester Children's Zone encompassing a large section of the school district that would provide extensive, coordinated education, health, and youth services, as well as job training and housing assistance to their parents.[222] New York State Governor Eliot Spitzer has included a $4 million allocation in his current budget proposal to support the Rochester plan as a pilot model that may then be replicated in other parts of the state.[223]

The Rochester plan was modeled on the Harlem Children's Zone ("HCZ") Project,[224] an established program that works to enhance the quality of life for children and families in one of New York City's neighborhoods most devastated by poverty, unemployment, and a paucity of public resources. The HCZ Project takes a comprehensive approach to empowering and providing necessary support to parents, residents, teachers, and community members in order to create significant, positive opportunities for their children to become healthy, productive adults.[225] Through an interrelated program of education, health, nutrition, parent education, and early childhood support, HCZ runs fifteen community centers that provide a comprehensive range of services to more than 13,000 children and adults, including over 8,600 at-risk children in a sixty-block area in central Harlem.[226]

The services provided to the children and families within the zone include programs to:

- provide expectant and new parents with necessary skills and information relating to health, safety, and child development, and support to address the needs of children from birth to the age of three;
- stimulate four-year-old, prekindergarten children's mental growth and learning through reading and talking;

222. IT TAKES VISION TO RAISE A CHILD, ROCHESTER CHILDREN'S ZONE: IMPROVING THE LIVES OF CHILDREN IN NORTHEAST ROCHESTER 5–6 (2007) http://www.rcsdk12.org/rcz/DOCS/RC2%20Community%20Plan.pdf.

223. N.Y. STATE DIV. OF THE BUDGET, DESCRIPTION OF 2007–08 NEW YORK STATE EXECUTIVE BUDGET RECOMMENDATION FOR ELEMENTARY AND SECONDARY EDUCATION 16 (2007), http://www.budget.state.ny.us/localities/schoolaid/0708Schlaid_exec.pdf.

224. *See* Children's Zone, HCZ Project & Programs; The Mission, http://www.hcz.org/project/mission.html (last visited Apr. 12, 2007).

225. *Id.*

226. *See id.*; HCZ Project & Programs: The Boundaries of the Zone, http://www.hcz.org/project/boundaries.html (last visited Apr. 12, 2007).

- provide families and children with access to immediate social services, including foster care prevention, domestic violence workshops, and parenting skill classes;
- help students and parents of students with severe academic and attendance problems;
- train young people ages eighteen to twenty-four who are interested in making their neighborhoods safer for children and families;
- teach youth and adult residents the necessary skills to compete in today's increasingly competitive job market;
- promote local revitalization projects and support neighborhood tenant and block associations;
- screen all children within the HCZ Project for asthma and offer a holistic response including home visits and medical support to families.[227]

As with essential in-school services, a general federal requirement to implement a coordinated program of important out-of-school services would allow for extensive state and school district discretion in determining which out-of-school and community-based services are most critical for meeting students' educational needs and which methods for providing these services would be feasible and most cost-effective.[228] The anticipated public dialogue on the specific components of a "meaningful educational opportunity" and how they can best be provided by schools in collaboration with other agencies would be particularly useful and advantageous in this newly developing but critical area. As with in-school services, if over time student progress toward proficiency is not sufficient, further consideration of the types, amounts, and mechanisms for providing services that are needed to meet students' needs would likely ensue.[229]

If educational opportunities for low-income and minority students are to be truly meaningful, the issue of school integration must be put back on the table. Although providing all children a comprehensive range of services in an effective manner will significantly advance national educational progress, decades of

227. *See* Harlem Children's Zone, HCZ Project & Programs, http://www.hcz.org/project/mission.html (last visited May 3, 2007).

228. *Cf.* PETER H. SCHUCK & RICHARD J. ZECKHAUSER, TARGETING IN SOCIAL PROGRAMS: AVOIDING BAD BETS, REMOVING BAD APPLES 116 (2006) (proposing an analytic framework for determining "best bets" for increased social investments).

229. Extensive state-based discussion and debate of these issues may also motivate policymakers to implement other social and economic policies that might mitigate the effects of poverty on children in areas like housing, health insurance, and income maintenance.

experience have now proved that all children, minority and majority, are better prepared for work and civic life when they have experienced integrated education.[230] In order to prepare our students to compete effectively in the global marketplace and to function productively as civic participants in a democratic society, ultimately, the wisdom of *Brown* will have to be respected and serious pursuit of racial integration of the schools will have to again become national and state policy.

At some point, the manner in which the competing values of "local control" and school desegregation were balanced by the Supreme Court in *Milliken*[231] more than three decades ago will have to be revisited. Such a contemporary reconsideration would recognize that, on the one hand, state standards-based reforms and increased federal intervention into local educational affairs under the NCLB have dramatically reduced the actual influence of local school officials on educational policy, and that, on the other hand, a focus on "meaningful" educational opportunity reinforces the truth of *Brown*'s core holding that segregation in the schools is inherently unequal.[232]

230. "[M]uch of the social science research on school desegregation has been optimistic, showing mixed test score results but a positive trend toward higher African-American student achievement during the peak years of desegregation, as well as long-term academic and professional gains for African-American adults who had attended racially mixed schools." Amy Stuart Wells et al., *Tackling Racial Segregation One Policy at a Time: Why School Desegregation Only Went So Far*, 107 TCHRS. C. REC. 2141, 2142 (2005). *See generally* Janet Ward Schofield, *Review of Research on School Desegregation's Impact on Elementary and Secondary School Students*, *in* HANDBOOK OF RESEARCH ON MULTICULTURAL EDUCATION 597 (James A. Banks ed., 2001) (reviewing a wide array of research on the impact of school desegregation); Amy Stuart Wells & Robert L. Crain, *Perpetuation Theory and the Long-Term Effects of School Desegregation*, 64 REV. EDUC. RES. 531 (1994) (drawing together twenty-one studies on the long-term effects of school desegregation).

231. Milliken v. Bradley, 418 U.S. 717 (1974); *see supra* note 139 and accompanying text.

232. If resource inadequacies in predominantly minority schools are corrected, and students from poverty backgrounds receive the comprehensive range of services they need to be ready to learn, thoroughgoing desegregation efforts in the twenty-first century may meet less political resistance than they have in the past. *See* TAMAR JACOBY, SOMEONE ELSE'S HOUSE: AMERICA'S UNFINISHED STRUGGLE FOR INTEGRATION 539 (1998) ("[I]ntegration will not work without acculturation."). Effective integration may also be cost-effective, since serious efforts to overcome the impediments to learning in schools with concentrated poverty (whose students currently are 80% black and Latino, *see supra* text accompanying note 28) are substantially more expensive than similar educational initiatives in schools with lesser rates of poverty.

3. Resources

If all children are to actually obtain a basic quality education, then once a determination has been made regarding the constellation of services particular children need to obtain a meaningful educational opportunity, those essential resources must actually be provided. This may seem to be an elementary proposition, but the fact is that many state education finance systems are not based on allocating money in accordance with need, but instead subordinate need to the availability of funding or to politically determined funding decisions. As virtually all of the state court education finance and education adequacy decisions have found,[233] money does matter. Therefore, the types of remedies that have been implemented in the state fiscal equity and educational adequacy cases, and the types of cost studies that have been generated by them, need to become standard operating procedures in all states. Actual provision of essential resources also means that the type of hyperbole that permeates the NCLB, which labels teachers with minimum competency skills as "highly qualified"[234] and accepts minimal content or assessment standards as constituting "proficiency," must be rejected.[235] If it is agreed that students, and especially students from poverty backgrounds, need effective teachers who are truly "highly qualified" and academic standards and assessments that are truly rigorous, full measures, not half measures, must be taken to provide these.[236]

233. *See supra* Part II; *see also* text accompanying notes 20–26 (describing the educational difficulties faced by low-income children).

234. *See, e.g.*, BERRY ET AL., *supra* note 198, at 2 (noting that federal rules allow states to label a teacher as highly qualified before finishing preparation).

235. LINN, *supra* note 173, at 3, 14–15 (stating that under NCLB, the notion of proficient student achievement "is so poorly defined and varies so much from state to state that it has become a meaningless concept"); Robert B. Schwartz, Standards, Tests and NCLB; What Might Come Next (Nov. 13–14, 2006), *available at* http://devweb.tc.columbia.edu/manager/symposium/Files/102_Schwartz_STANDARDS%20AND%20EQUITY1.pdf (arguing that the wide variations in proficiency standards across the states compels revisiting the question of national standards or national benchmarking of standards).

236. The kind of efforts that must be made and that can result in recruiting and retaining effective teachers in "hard-to-staff" schools include

a) providing adequate salaries for all teachers,
b) ensuring a critical mass of competent, dedicated peers at hard to staff schools,
c) providing substantial ongoing bonuses for highly qualified teachers willing to make long-term commitments to teach in "hard to staff" schools,
d) assuring adequate resources, reasonable class sizes, and appropriate working conditions in all schools,
e) ensuring effective principals and administrators,

Clearly, if "meaningful" educational opportunity is seriously pursued, substantial additional revenues will be needed, but the benefits will reduce other social costs, improve productivity, and generate economic growth. Indeed, a recent set of papers that examined the broad range of social costs of inadequate education concluded that the impact on the American economy in terms of lost income, lost taxes, extra health costs, and increased crime amounts to over $250 billion per year.[237] The public has also repeatedly indicated that it is willing to accept higher costs for public education—if the money is spent well and truly leads to higher achievement for all students.[238]

This, of course, means that accountability issues must move to the forefront of equity discussions. A thoroughgoing focus on accountability is precisely the direction that the state standards-based reforms and adequacy litigations are going. Costing-out studies[239] are

f) providing high-quality mentoring and professional development,
g) providing opportunities for collaboration and exercise of professional judgment,
h) eliminating rights of senior teachers to transfer in and "bump" qualified junior teachers,
i) redefining tenure to ensure reasonable job security so long as instructional effectiveness is maintained.

237. *See* THE PRICE WE PAY: THE SOCIAL AND ECONOMIC COSTS OF INADEQUATE EDUCATION, *supra* note 31 (calculations of economists and subject area experts of annual dollar loss to society based on numbers of high school dropouts per year).

238. State and national polls have revealed a consistent willingness of overwhelming majorities of the American public (59% to 75%) to pay higher taxes for education, especially if there is a reasonable expectation that the money will be spent well. *See, e.g.*, *Americans Willing To Pay for Improving Schools*, NPR ONLINE (1999), http://www.npr.org/programs/specials/poll/education/education.front.html (interpreting the data from the 1999 National Public Radio poll and stating that "[t]hree out of four Americans say they would be willing to have their taxes raised by at least $200 a year to pay for specific measures to improve community public schools"); *Majority of Voters Indicate They Will Vote for Candidates Who Make Education a Top Priority; Report to Reveal Mixed Support for No Child Left Behind*, EDUC. WK., Apr. 1, 2004, http://www.publiceducation.org/doc/2004_Poll_Press_Release.doc (interpreting the results from Public Education Network/Education Week Poll 2004 and stating that "[a] majority of voters (59 percent) say they are willing to pay higher taxes to improve public education"); Lowell C. Rose & Alec M. Gallup, *38th Annual Phi Delta Kappa/Gallup Poll of the Public's Attitudes Toward the Public Schools*, 88 PHI DELTA KAPPAN 41, 47 (2006), *available at* http://www.pdkintl.org/kappan/k0609pol.htm (finding that 66% of Americans responded affirmatively to the question, "Would you be willing to pay more taxes for funding preschool programs for children from low-income or poverty-level households?").

239. "Costing-out" studies are analyses undertaken by education finance analysts or economists that aim to determine objectively the amount of funding that is needed to provide all students with a meaningful opportunity for an adequate education. For a detailed discussion of the current state of the art regarding these studies, see generally Michael A. Rebell, *Professional Rigor, Public Engagement and Judicial Review: A Proposal for Enhancing the Validity of Education Adequacy Studies*, 109 TCHRS. C. REC. 1303 (2007), *available at* http://www.tc.columbia.edu/i/a/3949_profrigor.pdf.

beginning to move from discussions of how much money is needed to educate students from diverse backgrounds under present practices to how much money would be needed in an environment that emphasized best practices.[240] Better coordination of services already being provided by a range of governmental and private agencies can also result in both significant cost savings and more effective support programs.[241]

"Meaningful" educational opportunity may also necessitate confronting the accelerating trends toward widening of the income gaps between haves and have-nots. Although a comprehensive range of effective in-school and out-of-school programs can substantially mitigate the detrimental impacts of poverty, if job insecurity, housing conditions, mobility, and other poverty conditions that schools cannot affect deteriorate, the cost of providing meaningful educational opportunities will escalate, and the possibilities of actually achieving the *Brown* vision will diminish. In other words, there is a limit to the degree that America can reasonably expect equal educational opportunities to compensate for the neglect of employment, housing, and other social welfare policies.[242] Accordingly, some reduction in

240. *See* Rebell, *supra* note 239 (discussing "Quality Education Model" mechanisms for determining both the amount of money and the educational practices that will lead to high student performance in accordance with established state standards which are being implemented in Oregon, California, and other states). Consideration also should be given to cost-effectiveness in the utilization of existing allocations. For example, huge and growing amounts of money are now earmarked for teacher pension programs. These have relatively small value in terms of attracting and retaining qualified young teachers. A recent survey of teacher pension costs in seven states by the Commission on the Skills of the American Workforce concluded that the average total contribution by employers and employees was approximately 18%. Assuming this to be the average contribution nationwide, the Commission concluded that a 6% reduction in pension contributions would free up approximately $6.6 billion that could be used to bolster salaries of starting and mid-level teachers. COMM. ON THE SKILLS OF THE AM. WORKFORCE, *supra* note 35, at 107.

241. Some state courts have also included accountability requirements, as well as mandates for more resources, in their orders. *See, e.g.*, Rose v. Council for Better Educ., 790 S.W.2d 186, 213 (Ky. 1989) ("[The] schools shall be monitored by the General Assembly to assure that they are operated with no waste, no duplication, no mismanagement, and no political influence"); *see also infra* text accompanying notes 303–08 (discussing accountability issues in the *CFE* litigation).

242. *See* WELLS, *supra* note 36, at 30 (arguing the need for different supplementary programs to equal the lives of our children outside of school). Although the present Article is not the proper place for a full discussion of the moral dimensions of this issue, some recognition must be given to the fact that huge gaps between the haves and the have-nots undermine the social contract and sense of community necessary for a democracy to function. Furthermore, there can be little doubt that those who succeed economically are benefiting to a large degree from the "social capital" that the society has provided them, and they therefore have a concomitant obligation to extend the benefits of that social

the gap between haves and have-nots in American society[243] may be a sine qua non for substantially reducing or eliminating achievement gaps.

In sum, adoption of a "meaningful" educational opportunity paradigm will bring together the manifold strands of equal educational opportunity that have been developed over the past fifty years in a coherent and effective manner. It will allow us finally and truly to implement the vision of *Brown v. Board of Education*. However, in order to actually accomplish this visionary but achievable goal, active involvement by the courts, working in concert with the other branches of government, must be not merely tolerated, but welcomed. The next Part explains why.

V. THE NECESSARY ROLE OF THE COURTS

Meaningful educational opportunity for all children, as defined in the preceding Part, can be achieved—but not without the continued and expanded involvement of the courts in educational reform cases. Contemporary understandings of equal educational opportunity were largely created by *Brown v. Board of Education* and shaped by the series of federal desegregation and related education cases that followed in its wake. The state court fiscal equity and education adequacy litigations have maintained and magnified this egalitarian momentum as the federal courts' active pursuit of school desegregation has abated, and they have begun to define in concrete terms the elements of meaningful educational opportunity.

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capital to those who have been less advantaged. *See generally* JOHN RAWLS, A THEORY OF JUSTICE (1971) (arguing that differentials in economic rewards are morally justified only when the economic incentives ultimately result in benefits to the most disadvantaged in the society).

243. The growing gap between haves and have-nots in America is illustrated by the fact that from 1973 to 2000, the average real income of the bottom 90% of American taxpayers declined by 7%, while the income of the top 1% rose by 148%. Heather Boushey & Christian E. Weller, *What the Numbers Tell Us*, *in* INEQUALITY MATTERS: THE GROWING ECONOMIC DIVIDE IN AMERICA AND ITS POISONOUS CONSEQUENCES 27, 31 (James Lardner & David A. Smith eds., 2005). Another ominous reflection of these trends is the fact that whereas in 1965, a corporate CEO's income was twenty-six times the average wage, in 2003 it was 185 times the average wage. LAWRENCE MISHEL ET AL., THE STATE OF WORKING AMERICA 2004/2005, at 7. The American dream of rapid upward mobility may be more myth than reality. Income inequality is more extreme today in America than in most other developed countries, and the chances of someone from a family in the bottom quarter rising to the top quarter, which was 23% in 1973, was only 10% in 1998. Boushey & Weller, *supra*, at 34.

As noted above, constitutional challenges to the inequitable and inadequate funding of public education have been litigated in the state courts of forty-five of the fifty states, and the courts have been upholding plaintiffs' claims at an accelerating rate, with plaintiffs prevailing in almost 75% of education adequacy cases decided since 1989.[244] The court decrees in these cases have led to notable successes. In Kentucky, the courts' intervention has resulted in dramatic reductions in spending disparities among school districts,[245] the redesign and reform of the entire education system, and a significant increase in that State's student achievement scores.[246] In Massachusetts, enactment of the Education Reform Act of 1993 in response to that State's adequacy litigation has also sharply reduced the funding gaps between rich and poor school districts,[247] and the percentage of students achieving proficiency on state tests has risen dramatically.[248] As a result of litigation in Arizona, facilities standards have been aligned with the State's learning standards, and all school buildings are being brought up to the new code.[249]

In some states, the mere filing of a complaint has led to significant reforms.[250] Even where plaintiffs have not prevailed, the

244. *See supra* note 73 and accompanying text.

245. Molly A. Hunter, *All Eyes Forward: Public Engagement and Educational Reform in Kentucky*, 28 J.L. & EDUC. 485, 485 (1999) (noting that immediate legislative response to the *Rose* decision resulted in greater income distribution to low-wealth districts).

246. KY. DEP'T OF EDUC., RESULTS MATTER: A DECADE OF DIFFERENCE IN KENTUCKY'S PUBLIC SCHOOLS 1990–2000, at 72–87 (2000), *available at* http://www.kde.state.ky.us/NR/rdonlyres/EF0A1C1D-F709-44D3-8CC2-74E113172B51/0/10thAnniversaryReport.pdf.

247. Hancock v. Driscoll, No. 02-2978, 2004 WL 877984, at * 5 (Mass. Super. Ct. Apr. 26, 2004) (expounding on the key changes of the Education Reform Act), *rev'd on other grounds*, 822 N.E.2d 1134 (Mass. 2005); Hancock v. Comm'r of Educ., 822 N.E.2d 1134, 1141–44 (Mass. 2005) (summarizing the background and effect of the Education Reform Act).

248. For example, on the fourth-grade English language arts examinations the percentage of students meeting proficiency rose from 20% in 1998, to 55% in 2003; on the tenth-grade math examination the percentage meeting proficiency over that five-year period rose from 25% to 50%. RENNIE CTR. FOR EDUC. RESEARCH & POLICY, REACHING CAPACITY: A BLUEPRINT FOR THE STATE ROLE IN IMPROVING LOW PERFORMING SCHOOLS AND DISTRICTS 9 (2005), http://www.renniecenter.org/research_docs/0504_ReachingCapacity.pdf.

249. Molly A. Hunter, *Building on Judicial Intervention: The Redesign of School Facilities Funding in Arizona*, 34 J.L. & EDUC. 173, 173 (2005) (stating that lawsuits regarding state funding methods resulted in a new capital funding system).

250. In Iowa, within a year after a coalition of 160 school districts and individuals filed suit challenging the school funding system, the legislature passed a bill replacing the current local-option sales tax for schools with a pool of sales-tax money that would be distributed on a per pupil basis, and the suit was withdrawn. Lynn Okamoto, *House OKs Bill on School Tax Pool*, DES MOINES REG., Apr. 24, 2003, at 4B; Dale Wetzel, *School*

very fact that there has been litigation often puts the issue of finance reform at the top of the legislative agenda, in some cases prompting significant legislative changes.[251] The courts' involvement in this area has also spurred the widespread use in over thirty states of costing-out studies, which have substantially improved the methodologies used to determine objectively the amount of resources needed to provide an adequate education.[252]

Despite the dramatic impact of their interventions and a record of notable successes, the state courts' widespread involvement in educational adequacy litigations has not consistently realized its potential for promoting positive educational reform. Although legislatures and governors in some states have responded promptly and positively to judicial decrees,[253] in other states there has been excessive delay and resistance to court orders,[254] sometimes combined

Lawsuit Ends, BISMARCK TRIB., Jan. 11, 2006, *available at* http://www.bismarcktribune.com/articles/2006/01/11/news/topnews/108347.txt; Molly A. Hunter, Access Network, Iowa Suit Seeks Equitable and Adequate School Funding (Dec. 5, 2002), http://www.schoolfunding.info/states/ia/12-5-02litigation.php3.

251. G. Alan Hickrod et al., *The Effect of Constitutional Litigation on Education Finance: A Preliminary Analysis*, 18 J. EDUC. FIN. 180, 207–08 (1992) (concluding that reductions in inequity occur in states experiencing education finance litigations, whether plaintiffs prevail or not, compared to states in which there has been no litigation); *see also* William S. Koski & Henry M. Levin, *Twenty-Five Years After* Rodriguez*: What Have We Learned?*, 102 TCHRS. C. REC. 480, 506 (2000) ("Surely every state legislature is aware of the possibility of educational finance litigation and many have likely taken prophylactic measures.").

252. For a history, overview, and analysis of the use of costing-out studies, see generally Rebell, *supra* note 239 (providing a detailed analysis of costing-out studies).

253. In Vermont, for example, within months of the court's decision the legislature enacted a dramatic set of sweeping education finance reforms. *See* Michael A. Rebell & Jeffrey Metzler, *Rapid Response, Radical Reform: The Story of School Finance Litigation in Vermont*, 31 J.L. & EDUC. 167, 167 (2002) (providing a description of the enacting of the Equal Educational Opportunity Act of 1997 in Vermont). In Wyoming, the Joint Appropriations Committee of the legislature promptly commissioned and implemented a cost study according to the court's order in *Campbell County School District v. State*, 907 P.2d 1238 (Wyo. 1995). As noted above, the Kentucky legislature promptly responded to the court's decision in *Rose v. Council for Better Education*, 790 S.W.2d 186 (Ky. 1989), by enacting a thoroughgoing reform scheme that dramatically exceeded the court's requirements. *See* Hunter, *supra* note 245, at 485 (discussing the state's response to the *Rose* decision).

254. In New York, for example, the legislature failed to act by the July 30, 2004, deadline established by the New York State Court of Appeals in *Campaign for Fiscal Equity v. State* (*CFE II*), 801 N.E.2d 326 (N.Y. 2003), causing plaintiffs to seek and obtain a further remedial order from the trial court, which was upheld in modified form by the Court of Appeals. *See* Campaign for Fiscal Equity v. State (*CFE III*), 861 N.E.2d 50, 61 (N.Y. 2006) (modifying the order and affirming the lower court, as modified). In New Hampshire, the state legislature and governor reacted to the court's ruling in *Claremont School District v. Governor*, 703 A.2d 1353 (N.H. 1997), by proposing a number of constitutional amendments limiting the court's power and affirming the state's

with threats to revoke the courts' authority to hear these cases.[255] In two instances, state supreme courts, after initially confronting opposition to their orders, retreated from the fray and terminated the cases before an appropriate remedy had been fully effectuated.[256]

A. The Outdated Charges of "Judicial Activism"

One of the major reasons for delay and resistance to constitutional mandates in these cases is that there is an "absence of a legitimate legal discourse"[257] that straightforwardly supports the judicial interventions. Opponents attack the legitimacy of the courts' involvement, as well as judicial competence to undertake these tasks,

unconstitutional school funding system. After the amendments failed to pass, the legislature created a funding system that did not address many of the tax issues raised by the lawsuit, and which was based upon the results of a cost study that had been substantially manipulated to lower costs. Their reaction led to further legal challenges. *See generally* DREW DUNPHY, MOVING MOUNTAINS IN THE GRANITE STATE: REFORMING SCHOOL FINANCE AND DEFINING ADEQUACY IN NEW HAMPSHIRE (on file with the North Carolina Law Review) (describing the effects of the ruling).

255. In Kansas, for example, after the state supreme court responded to the legislature's failure to comply fully with its initial order with a definitive requirement for a substantial funding increase by a date certain, leaders of the state senate informed the governor that they would comply only if the education finance reform bill was accompanied by a constitutional amendment revoking the court's jurisdiction over education finance issues in the future. *See* John Hanna, *Showdown Looms as Republicans Plan Amendment*, LAWRENCE J.-WORLD, June 17, 2005, *available at* http://www2.ljworld.com/news/2005/jun/17/showdownlooms/?politics; John Milburn, *Senate Pushes for Constitutional Amendment*, LAWRENCE J.-WORLD, June 29, 2005, *available at* http://www2.ljworld.com/news/2005/jun/29/senate_pushes/. Within weeks, this resistance was overcome and a bill enacted in accordance with the court's order. Montoy v. State, 120 P.3d 306, 308 (Kan. 2005) (holding the State's funding system to be unconstitutional, resulting in quick legislative action).

256. In both Alabama and Ohio, state supreme court judges are elected, and the education adequacy case became a major issue in the judicial elections. New judges who were critical of the court's adequacy ruling replaced members of the majority who had voted for the education finance reforms. In Alabama, the result was a sua sponte move by the state supreme court in 2002 to reopen *Alabama Coalition for Equity v. Spiegelman*, 713 So. 2d 937 (Ala. 1997), a case it had decided for the plaintiffs in 1997. After soliciting arguments from the two sides, the court dismissed the case, citing a violation of separation of powers. Access Network, Alabama Supreme Court Dismisses Funding Case It Previously Affirmed (May 31, 2002), http://www.schoolfunding.info/states/al/5-31-02ACE dismissed.php3. In Ohio, despite repeated rulings by the state supreme court that the state's school funding system was unconstitutional in *DeRolph v. State* (*DeRolph I*), 677 N.E.2d 733 (Ohio 1997), *DeRolph v. State* (*DeRolph II*), 728 N.E.2d 993 (Ohio 2000), and *DeRolph v. State* (*DeRolph III*), 754 N.E.2d 1184 (Ohio 2001), the legislature failed to enact sufficient reforms. Once the majority on the supreme court shifted, the court agreed to a request by the state to end the compliance process, effectively putting an end to the case. Access Network, Ohio (May 31, 2002), http://www.schoolfunding.info/states/oh/lit_oh.php3.

257. FEELEY & RUBIN, *supra* note 115, at 338.

claiming that courts are usurping legislative and executive authority.[258] These charges of judicial usurpation, which originated with political opposition to the desegregation decrees of the federal courts in the 1960s and 1970s and have been repeated as a mantra ever since, have little doctrinal or empirical substance.

In the initial days of judicial enforcement of desegregation decrees, there was a wide-ranging academic debate regarding the phenomenon of "judicial activism." The courts' forays into policymaking in areas that traditionally were considered in the legislative or executive domain were repeatedly attacked as violating traditional separation of powers precepts.[259] Defenders of the courts' new role argued that the courts were merely adapting traditional concepts of judicial review and their obligation to enforce constitutional rights to the needs of a complex administrative state[260] and that "no branch could correctly claim to be the sole representative of the people. Representation was to be by each of them, according to the functions they performed."[261] One of the most influential perspectives on judicial activism during this period was that of Harvard Law Professor Abram Chayes who related the

258. *See, e.g.*, Alfred A. Lindseth, *The Legal Backdrop to Adequacy*, *in* COURTING FAILURE, *supra* note 9, at 33, 36 ("Ignoring separation of powers considerations, [some state courts] have approached adequacy lawsuits in such a way as to substantially usurp the power of the legislature"); *see also* Michael Heise, *Litigated Learning and the Limits of the Law*, 57 VAND. L. REV. 2417, 2446–50 (2004) (discussing the courts' encroachment on traditional notions of separation of powers); Kenneth W. Starr, *The Uncertain Future of Adequacy Remedies*, *in* SCHOOL MONEY TRIALS: THE LEGAL PURSUIT OF EDUCATIONAL ADEQUACY 307, 310 (Martin R. West & Paul E. Peterson eds., 2007) (advocating "judicial humility" in cases involving educational policy issues); Joshua Dunn & Martha Derthick, *Adequacy Litigation and the Separation of Powers*, *in* SCHOOL MONEY TRIALS: THE LEGAL PURSUIT OF EDUCATIONAL ADEQUACY, *supra*, at 322, 334–39 (expressing skepticism regarding judicial competence to fashion remedies in educational adequacy litigations).

259. *See, e.g.*, RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 390 (1997) (discussing judicial takeover of policymaking); Nathan Glazer, *Toward an Imperial Judiciary*, *in* THE AMERICAN COMMONWEALTH—1976, at 104, 114 (Nathan Glazer & Irving Kristol eds., 1975) (predicting a "continued and powerfully intrusive role for the courts that they cannot avoid"); *see also* PHILIP B. KURLAND, POLITICS, THE CONSTITUTION AND THE WARREN COURT 21–50 (1970) (discussing the interaction of the three branches of government).

260. *See, e.g.*, Frank M. Johnson, Jr., *The Role of the Federal Courts in Institutional Litigation*, 32 ALA. L. REV. 271, 271–75 (1981); Owen M. Fiss, *Forward: The Forms of Justice*, 93 HARV. L. REV. 1, 5–17 (1979).

261. Edward Levi, *Some Aspects of Separation of Powers*, 76 COLUM. L. REV. 371, 376 (1976); *see also* RICHARD NEELY, HOW COURTS GOVERN AMERICA, at xi (1981) (stating that "American courts . . . are the central institution in the United States which makes American democracy work").

growth of judicial involvement in the reform of public institutions since *Brown* to the broader expansion of governmental activities in the welfare state era.[262]

The courts' institutional capacity to carry out successfully these broad new remedial tasks was also widely questioned. Critics claimed that courts are incapable of obtaining sufficient social science data and that judges generally are unable fully to understand and digest the data that are obtained.[263] They also contended that judges lack coherent guidelines for resolving policy conflicts and that, therefore, they fail to undertake a comprehensive policy review or to consider the overall implications and consequences of their orders.[264] Defenders of this new remedial role retorted that the courts' lack of established organizational mechanisms is a virtue, not a vice, because it permits a flexible response that can be tailored to the needs of the particular situation.[265] They emphasized that the courts have always delved into complex social and economic facts[266] and that processes of judicial appointment or election assure that judges are "likely to have some experience of the political process and acquaintance with a fairly broad range of public policy problems."[267]

In the 1980s, my colleague Arthur R. Block and I undertook two major empirical studies to test the validity of the competing arguments in the judicial activism debate in actual instances of educational policymaking by courts, legislatures, and a major administrative agency, the Office of Civil Rights in the U.S. Department of Health, Education, and Welfare ("OCR").[268] In regard to the separation of powers issues, we concluded that judicial deliberations tended to be based on principled constitutional values,

262. *See, e.g.*, Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1288 (1976).

263. *See, e.g.*, DONALD L. HOROWITZ, THE COURTS AND SOCIAL POLICY 47–51 (1977); Eleanor P. Wolf, *Social Science and the Courts: The Detroit Schools Case*, 42 PUB. INT. 102, 113–15 (1976).

264. *See, e.g.*, HOROWITZ, *supra* note 263, at 51–56; JEREMY RABKIN, JUDICIAL COMPULSIONS: HOW PUBLIC LAW DISTORTS PUBLIC POLICY 113–14 (1989).

265. *See* Chayes, *supra* note 262, at 1309; *see also* Robert D. Goldstein, *A* Swann *Song for Remedies: Equitable Relief in the Burger Court*, 13 HARV. C.R.-C.L. L. REV. 1, 48 (1978).

266. ROSEN, *supra* note 121, at 6–7; *see* Chayes, *supra* note 262, at 1284.

267. Chayes, *supra* note 262, at 1308.

268. MICHAEL A. REBELL & ARTHUR R. BLOCK, EDUCATIONAL POLICY MAKING AND THE COURTS: AN EMPIRICAL STUDY OF JUDICIAL ACTIVISM, at xi (1982); REBELL & BLOCK, *supra* note 112, at 53–202. Although the core case study here involved OCR's enforcement activities in New York City, detailed comparative perspectives were also obtained of comparable OCR activities at the time in Chicago, Los Angeles, and Philadelphia.

rather than instrumental policy considerations, although in many circumstances distinctions between "principle" and "policy" were difficult to draw. Significantly, however, judges tended to approach principle/policy issues in a distinctly different way: their decisions tended to reflect a "rational-analytic" decisionmaking mode, in contrast to the mutual adjustment processes that tend to predominate in legislative decisionmaking, and the "pragmatic/analytic" policymaking mode of the administrative agency.

One of the other major conclusions of our comparative empirical studies was that the evidentiary records accumulated in the court cases were more complete and had more influence on the actual decisionmaking process than did the factual data obtained through legislative hearings. The latter tended to be "window dressing" occasions organized to justify political decisions that had already been made.[269] Fact gathering through the administrative process proved to be more comprehensive and more sophisticated than that of either the courts or the legislatures, at least in this massive OCR special investigation context, but questions arose concerning the objectivity of the agency's use of the data since OCR tended to adopt a "prosecutorial" stance in its approach to the evidence.[270]

In regard to remedies, our studies concluded that judicial remedial involvement in school district affairs was both less intrusive and more competent than is generally assumed, largely because school districts and a variety of experts generally participated in the formulation of reform decrees, with the courts serving as catalysts and mediators. OCR proved effective in administering remedial agreements that call for immediate, statistically measurable implementation, but in regard to the major New York City faculty

269. A comparative analysis of the factfinding capabilities of Congress and the courts reached similar conclusions. *See* Neal Devins, *Congressional Fact Finding and the Scope of Judicial Review: Preliminary Analysis*, 50 DUKE L.J. 1169, 1177–87 (2001); *see also* Sheila Jasanoff, *Judicial Fictions: The Supreme Court's Quest for Good Science*, 38 SOC'Y 27, 28 (2001) ("Adversarial questioning of experts in legal proceedings has frequently exposed hidden interests and tacit normative assumptions that are embedded in supposedly value-neutral facts. The confrontation of lay and expert viewpoints that the law affords has emerged as a powerful instrument for probing some of the untested epistemological foundations of expert claims.").

270. *See also* JAMES O. FREEDMAN, CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT 24 (1978) (discussing the implications of "authorizing administrative agencies to combine investigative, prosecutorial and adjudicatory functions"); William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 308 (1988) ("[A]n agency tends to be 'captured' over time, as interest group demands grow increasingly asymmetrical and the agency loses outside political support and institutional momentum.").

desegregation agreement that called for phased-in implementation over a number of years, the agency's "staying power" and its ability to respond flexibly to changed circumstances was markedly less effective than that of the courts.[271]

Although criticisms of particular instances of active judicial involvement in social policymaking still resound in political debates and in the popular press, serious academic discussion of the "legitimacy" of the courts' enhanced role has been muted in recent years. Chayes's contention that the courts' expanded role is a fundamental judicial reaction to deep-rooted social and political trends seems to be borne out by the fact that the activist stance initiated during the Warren Court era has persisted to a large extent through the Burger and Rehnquist[272] years and that conservatives no less than liberals now tend to look to the courts routinely to remedy legislative or executive actions of which they disapprove.[273] As Feeley and Rubin have noted,

271. Gary Orfield, after completing a number of case studies of judicial involvement in lengthy desegregation cases, similarly concluded that "courts have some special strengths—removal from politics and the ability to stay with a complex issue long enough to implement change." GARY ORFIELD & SUSAN E. EATON, DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF *BROWN V. BOARD OF EDUCATION* 350 (1996). Legislatures do not purport to engage in remedial oversight of the reform processes they initiate, although oversight hearings and modification of statutory provisions in light of events could be said to constitute analogous functions. We did not, therefore, attempt to extend our comparative analysis of remedial oversight capabilities to the legislative domain.

272. Indeed, if "judicial activism" is defined in terms of declaring an act of the legislature unconstitutional, the Rehnquist Court was the most activist in American history. Until 1991, the United States Supreme Court struck down an average of about one congressional statute every two years. Since 1994, the Court has struck down sixty-four congressional provisions, or about six per year. This invalidated legislation has involved social security, church and state, campaign finance, and a host of other major social policy issues. Paul Gewirtz & Chad Goldner, Op-Ed., *So Who Are the Activists?*, N.Y. TIMES, July 6, 2005, at A19. Gewirtz and Goldner also point out that the Court's most conservative members tended to be the most "activist": Justice Thomas voted to strike down 65.63% of these congressional provisions, Justice Scalia 56.25%, in contrast to only 39.06% for Justice Ginsberg and 28.13% for Justice Breyer. *Id.*; *see also* Barry Friedman, *The Importance of Being Positive: The Nature and Function of Judicial Review*, 72 U. CIN. L. REV. 1257, 1261–63 (2004) (arguing that the Rehnquist Court is one of the "most activist in history").

273. *See, e.g.*, Gratz v. Bollinger, 539 U.S. 244, 255 (2003) (declaring unconstitutional a college's policy of granting racial preferences in its admissions policy); United States v. Morrison, 529 U.S. 598, 602 (2000) (declaring unconstitutional the Violence Against Women Act); United States v. Lopez, 514 U.S. 549, 552 (1995) (invalidating the Gun Free School Zones Act); Roslyn Union Free Sch. Dist. No. 3 v. Hsu, 85 F.3d 839, 872–73 (2d Cir. 1996) (allowing a school religious club to require its officers to be Christians); *see also* Frew v. Hawkins, 540 U.S. 431, 440 (2004) (reiterating the power of federal courts to enforce broad-ranging consent decrees in institutional reform litigations). *But see* Grutter

> [Judges] are part of the modern administrative state . . . and they fulfill their role within that context. Under certain circumstances that role involves public policy making; as our state has become increasingly administrative and managerial, judicial policy making has become both more necessary for judges to produce effects and more legitimate as a general model of governmental action.[274]

The irony of the fact that some political commentators and academics continue to invoke anachronistic "judicial activism" phrases is that, while these pundits persist in arguing that the courts' new role is usurping legislative powers, Congress and the state legislatures have themselves asked the courts to take on more of these policymaking activities by passing regulatory statutes that directly or implicitly call for expanded judicial review. A prime example is the Individuals with Disabilities in Education Act, in which Congress set forth a detailed set of substantive and procedural rights and explicitly established a new area of court jurisdiction for individual suits, regardless of the amount in controversy.[275] The significance of this trend of the creation of new statutory rights that explicitly or implicitly expand the enforcement responsibilities of the courts has been recognized even by critics of judicial involvement in social policymaking.[276] Under these circumstances, as Chayes aptly

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v. Bollinger, 539 U.S. 306, 343 (2003) (upholding a policy of considering race as a valid factor in promoting diversity in law school admissions).

274. FEELEY & RUBIN, *supra* note 115, at 344.

275. *See* 20 U.S.C. § 1415(e)(2) (2000); *see also* Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (codified as amended in scattered sections of 42 U.S.C.) (requiring states to adopt federal standards to obtain federal funds). The Adoption Assistance and Child Welfare Act has reportedly spawned foster care litigation in at least thirty-four states. *See* NAT'L CTR. FOR YOUTH LAW, FOSTER CARE REFORM LITIGATION DOCKET (2006), http://www.youthlaw.org/fileadmin/ncyl/youthlaw/publications/fcrldocket06.pdf. Additionally, the Clean Air Act of 1970 establishes a right to healthy air and explicitly authorizes citizen suits. *See* Clean Air Act § 304(a), 42 U.S.C. § 7604(a) (2000).

276. *See, e.g.*, ROSS SANDLER & DAVID SCHOENBROD, DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT 17–18 (2003). Although recognizing the significance of this trend, Sandler and Schoenbrod are highly critical of its implications:

> By extrapolating [the *Brown* precedent] to a whole host of newly minted rights, [Congress has] created a new governmental lineup in which one set of officials at the federal level largely escapes accountability for the costs of the laws they pass and another set of officials at the state and local levels lacks the power to balance the costs of implementing the federal statutory rights against other competing priorities.

put it, we should "concentrate not on turning the clock back (or off), but on improving the performance of public law litigation."[277]

The public also has come to look to the courts for an assessment and resolution of highly controverted issues involving the intersection between science and public policy.[278] For example, the volatile issue of whether "intelligent design" is a valid scientific theory that should be taught to high school biology students has apparently been resolved by the recent decision of a federal district court judge in Pennsylvania.[279] The judge's declaration that "after a six week trial that spanned twenty-one days and included countless hours of detailed expert witness presentations, the Court is confident that no other tribunal in the United States is in a better position than are we

Id. at 33. *But cf*. Mark Tushnet, *Sir, Yes, Sir: The Courts, Congress and Structural Injunctions*, 20 CONST. COMMENT. 189, 190 (2003) (arguing that Sandler and Schoenbrod's criticism of the courts is misguided since the political branches, through clear democratic processes, authorized and required them to enforce the affirmative rights at issue).

277. Chayes, *supra* note 262, at 1313. In one area, that of prison litigations, Congress has acted affirmatively to limit judicial involvement. Thus, the Prison Litigation Reform Act of 1995 ("PLRA"), among other things, limits the type of relief that courts can provide, makes any relief granted subject to termination after two years, and abridges the courts' authority to appoint a special master. Pub. L. No. 104-134, 110 Stat. 1321 (codified as amended at scattered sections of 18 U.S.C.). Although the PLRA has not totally eliminated prison reform litigation, *see, e.g.*, Wilson v. Vannatta, 291 F. Supp. 2d 811 (N.D. Ind. 2003) (holding that inmate's complaint was sufficient to state a claim that deprivation of food, exercise, and medication violated his constitutional rights), it has substantially decreased their incidence and impact, *see* William C. Collins, *Bumps in the Road to the Courthouse: The Supreme Court and the Prison Litigation Reform Act*, 24 PACE L. REV. 651, 669–70 (2004) (illustrating that the rate of prison civil rights filings declined from 29.3 per 1,000 prisoners in 1981 to 11.4 in 2001).

278. Researchers also appear to be looking to the courts as a source for effective resolution of major social science issues because the courts' discovery processes are sometimes more comprehensive than data gathering techniques available to professionals in the field. *See* Clive R. Belfield & Henry M. Levin, *The Economics of Education on Judgment Day*, 28 J. EDUC. FIN. 183 (2002) ("Both in terms of resources and access to documents, data, and personnel, the Court's investigation far exceeded that typically made by researchers."). Belfield and Levin also opined that:

> Courts can navigate well through (disputed) social science arguments regarding educational outcomes, educational inputs (the education production function), and the deployment of teacher inputs. Moreover, rulings themselves can offer useful guidance to researchers on what fields of inquiry are important for resolving key public policy concerns, on what empirical evidence and which methodologies are deemed most valid, as well as indicate new areas for academic interest.

Id. at 24–25.

279. Kitzmiller v. Dover Area Sch. Dist., 400 F. Supp. 2d 707, 745 (M.D. Pa. 2005).

to traipse into this controversial area,"[280] was widely accepted by national commentators[281] and local public officials[282] alike.

Concerns regarding the courts' capacity to engage in sophisticated fact gathering and remedial processes have also been muted by the findings of empirical investigations into what courts actually do in these cases. One of the major shortcomings of the judicial activism debate was its focus on the limitations of the judicial branch, while ignoring the comparable institutional shortcomings of the legislative and the executive branches. For example, Donald Horowitz, one of the foremost critics of the courts' new role, catalogued a bevy of examples of alleged judicial incompetence, ranging from receiving information in a skewed and halting fashion to failing to understand the social context and potential unintended consequences of the cases before them.[283] As Professor Neil Komesar has forcefully pointed out, however, Horowitz's critique, like that of many of his current disciples, was unreasonably one-sided:

> Horowitz's study can do no more than force us to accept the reality of judicial imperfection. By its own terms it is not comparative, and that is far more damning than Horowitz supposes. All societal decision makers are highly imperfect. Were Horowitz to turn his critical eye to administrative agencies or legislatures he would no doubt find problems with expertise, access to information, characterization of issues, and follow-up. Careful studies would undoubtedly reveal important instances of awkwardness, error and deleterious effect.[284]

280. *Id.* at 735. The judge also remarked that "[t]hose who disagree with our holding will likely mark it as the product of an activist judge. If so, they will have erred as this is manifestly not an activist court." *Id.* at 765.

281. "In this case [the courtroom] proved to be an ideal forum. . . . The trial also allowed the lawyers to act as proxies for the rest of us, and ask of scientists questions that we'd probably be too embarrassed to ask ourselves. In a courtroom, you must lay an intellectual foundation in order to earn a line of questioning—and so the lawyers stripped matters neatly back to the first principles of science." Margaret Talbot, *Darwin in the Dock: Intelligent Design Has Its Day in Court*, NEW YORKER, Dec. 5, 2005, at 66, 68.

282. One of the Dover school board members remarked that,

> This is a judge making a ruling on a case where both sides got to present their side, fully. This should bring some closure at least for our community. I'm sure there are many other communities throughout the United States that will be waiting for this verdict with great interest.

James Anthony Whitson, *The Dover (PA) Evolution Case: A True Win for Education?*, TCHRS. C. REC., Jan. 4, 2006 (on file with the North Carolina Law Review).

283. HOROWITZ, *supra* note 263, at 255–74.

284. Neil K. Komesar, *A Job for the Judges: The Judiciary and the Constitution in a Massive and Complex Society*, 86 MICH. L. REV. 657, 698 (1988) [hereinafter Komesar, *A*

In light of the reality that the courts have proved highly effective in comprehending and applying social science information and in formulating and monitoring remedies in complex institutional reform litigations, Michael Heise's contention that litigation focused on student academic achievement is beyond the reach of law, litigation, and court opinion[285] has no factual basis. Precisely because the challenge of meeting the needs of students in schools with high concentrations of poverty and substantially narrowing or eliminating the achievement gaps, involves "[c]hallenges such as household stability, poverty, and adverse peer-cohort effects,"[286] a comprehensive range of "meaningful" educational opportunities must be made available to these students, and meaningful educational opportunity will in many circumstances only be effectuated if it is established and enforced as a principled priority by the courts.

Interestingly, although charges of "judicial usurpation" of legislative and executive prerogatives still abound, the claim from the 1970s that judges were not capable of understanding social science facts or overseeing reform processes has largely abated, presumably because of the overwhelming evidence of comparative judicial competence in these areas. The main concerns with judicial interventions into educational affairs in the state adequacy cases today seem focused on the fact that courts tend not to follow up on their orders to ensure that the funds are, in fact, being allocated in ways that will benefit the poor and minority children in whose names most of these cases had been brought.

Thus, the courts are criticized for failing to "requir[e] the efficient or cost-effective use of funds,"[287] for assuming that "school districts [are] organized in a way that ensures that they are making

Job for the Judges]. Komesar elaborates on his comparative analytic approach in Neil K. Komesar, *Taking Institutions Seriously: Introduction to a Strategy for Constitutional Analysis*, 51 U. CHI. L. REV. 366 (1984). For more background on comparative institutional analysis, see generally NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS AND PUBLIC POLICY (1994); Edwin L. Rubin, *The New Legal Process: The Synthesis of Discourse and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393, 1427–28 (1996) (calling for a new synthesis of process, law and economics, and critical legal theories into a "new realm of comparative legal analysis" that explores institutional capacities under particular circumstances).

285. Michael Heise, *Litigated Learning, the Limits of Law, and the Urban School Challenge*, 85 N.C. L. REV. 1419, 1420 (2007). Heise's general position regarding the courts' inability to deal effectively with "teaching and learning activities," *id.*, is belied by the state courts' substantial success in bolstering state standards-based reform efforts and inducing legislatures, executive agencies, and school boards to fairly and effectively implement these reforms.

286. *Id.* at 1421.

287. Lindseth, *supra* note 258, at 65.

productive use of the money they now receive from taxpayers or of the additional money they would receive if adequacy campaigns prevailed,"[288] and for not requiring that the extra resources they mandate "be targeted at the students in need of it most, such as low income children."[289]

A significant aspect of these criticisms is that, as Komesar pointed out,[290] none of these critics have even claimed that the other branches of government have been more effective than the courts in ensuring the productive use of educational funding, or in targeting the funds in a manner that would benefit students most in need. On the contrary, it is precisely because the legislative and executive branches have failed to target funds in an equitable and effective manner[291] that constitutional rights have been violated and courts have felt compelled to take jurisdiction of these cases. Legislatures in most states are heavily dominated by suburban majorities,[292] and therefore the legislative process, left to its own natural political propensities, will tend to create education finance systems that strongly disfavor poor urban and rural school systems.[293]

288. Evers & Clopton, *supra* note 9, at 104.

289. David Hinojosa, How Adequacy Litigation Shortchanges High-Poverty Children and Schools, Address at the North Carolina Law Review Symposium, High-Poverty Schooling in America: Lessons in Second-Class Citizenship (Oct. 13, 2006); *accord* Marguerite Roza & Paul T. Hill, *How Can Anyone Say What's Adequate if Nobody Knows How Money Is Spent Now?*, *in* COURTING FAILURE, *supra* note 9, at 235, 252 ("The lawsuits leave the districts' decision-making processes intact, making it likely that new funds will follow the same patterns as current funds do.").

290. *See supra* note 284 and accompanying text.

291. The critics of judicial intervention themselves readily admit that "the dissatisfaction with the current performance of schools relates directly to decisions the political branches have made in the past." Koret Task Force on K–12 Education, *Funding for Performance*, *in* COURTING FAILURE, *supra* note 9, at 329, 346. Often courts are blamed for mismanagement or waste that occurs with funds flowing from their orders, even though the executive or legislative branch had total control of the activities at issue. For example, after the New Jersey Supreme Court had ordered substantial funding for school construction in *Abbott ex rel. Abbott v. Burke*, 710 A.2d 450, 473–74 (N.J. 1998), a school construction oversight authority, set up by the governor in 2000, caused major delays and was then replaced by the New Jersey School Construction Corporation, set up by another governor in 2002. The chairman of that corporation then resigned in 2005 amid accusations of mismanagement, conflicts of interest, and abuse of taxpayer dollars. Tom Hester, *Legislators Back School Plan but Worry over the Red Tape*, STAR-LEDGER (N.J.), July 31, 2002, at 17; David Kocieniewski, *Head of New Jersey's School Construction Agency Resigns*, N.Y. TIMES, May 11, 2005, at B8.

292. Marilyn Gittell, *The Politics of Equity in Urban School Reform*, *in* BRINGING EQUITY BACK: RESEARCH FOR A NEW ERA IN AMERICAN EDUCATIONAL POLICY 16, 16 (Janice Petrovich & Amy Stuart Wells eds., 2005).

293. *See id.* at 16–17; *see also* Clayton P. Gillette, *Reconstructing Local Control of School Finance: A Cautionary Note*, 25 CAP. U. L. REV. 37, 43 (1996) ("[I]f the representatives from wealthier school districts can form a majority without the inclusion of

B. The Need for a "Colloquy" Among the Branches

The fact is that providing meaningful educational opportunities to eliminate or substantially narrow achievement gaps is, as indicated in the previous sections of this Article, a daunting task that no governmental entity has been able to solve. Clearly, if *Brown*'s vision of equal educational opportunity is actually to be realized, it will require the sustained commitment of all three branches of government, at both the federal and state levels, working collaboratively in dramatic new ways. In the complex administrative environment in which we now live, neither courts, legislatures, nor administrative agencies operating alone can successfully resolve major social problems. Successful policymaking in a complex regulatory environment requires continuing interchanges and often continuing involvement of all three branches of government. Effective implementation of meaningful educational opportunity has, in fact, generally occurred in the past when the judicial, legislative, and executive branches worked collaboratively, as in Congress's advancing the desegregation remedies formulated by the courts through the ESEA and Title VI statutes, and in Congress's enactment of the IDEA[294] and the executive branch's issuance of the *Lau* remedies in response to the declaration of egalitarian values by the courts.[295]

In considering the role of the courts in education finance and education adequacy cases, the approach should be, not repetition of abstract rhetoric about judicial "usurpation," but consideration from a comparative institutional perspective of what functions courts can best undertake, in collaboration with the other branches, to promote effective school reform practices.[296] What is needed, therefore, is not

representatives from poorer school districts, the latter will be unable to logroll for their agenda.").

294. Congress's enactment of the Education of All Handicapped Children Act, the predecessor to the IDEA, was a direct response to the decisions in two federal district court cases which had applied the *Brown* precedent of equal educational opportunity to students with disabilities: *Pennsylvania Association for Retarded Children v. Commonwealth*, 343 F. Supp. 279, 297 (E.D. Pa. 1972), and *Mills v. Board of Education*, 348 F. Supp. 866, 874–75 (D.D.C. 1972). *See* Bd. of Educ. v. Rowley, 458 U.S. 176, 180 n.2, 192–94, 194 n.18 (1982). Congress enacted the sweeping handicapped rights statute before the Supreme Court had considered the issue of constitutional rights in this area.

295. *See supra* notes 134–35, 181 and accompanying text.

296. Komesar has stated this proposition in more skeptical terms: "The judicial role is defined by asking when a constrained and fragile judiciary should substitute its decisions for a sometimes badly malfunctioning political process." Komesar, *A Job for the Judges*, *supra* note 284, at 659.

a competition but a "colloquy"[297] among the branches to get this demanding job done. Such a colloquy should build on the realization that each of the three branches has specific institutional strengths and weaknesses in regard to social policymaking and remedial problem-solving. The focus, therefore, should be on how the strengths of each of the branches can best be jointly brought to bear on solving critical social problems.

Although a full consideration of precisely which functions can best be undertaken by the courts, by legislatures, and by executive agencies will require substantially more dialogue and consideration than can be dealt with in this Article, a few preliminary illustrative points about the courts' comparative institutional strengths are apparent. First, declaring and insisting on the vindication of constitutional rights is the courts' prime constitutional responsibility. The courts' role in articulating constitutional principles and affirming the right of all children to an adequate and meaningful educational opportunity is of paramount importance. The dynamic advance of values of equal educational opportunity that has been at the core of political and legal activity for the past fifty years would not have occurred without the Supreme Court's landmark decision in *Brown*, nor would education finance reform or the insistence that poor and minority children be provided the resources needed for a meaningful educational opportunity have occurred without the intervention of the state courts. Full realization of these values also will not come about without the continued active involvement of the courts.

Second, precisely because state legislatures and executive agencies overseeing school districts have at times failed to ensure the effective use of education funds, and the targeting of resources to the students with greatest needs, courts need to become more—not less—active at the remedy stage of equal opportunity and adequacy litigations. Virtually all economists and fiscal policy analysts agree that money matters in education—if the money is spent well.[298] The public has expressed a willingness to pay higher taxes to support education reform—if the money is used well.[299] Ensuring accountability and the effective use of funds is a function for which the courts are particularly well suited. State courts have, in fact,

297. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 70–71, 206, 240 (2d ed. 1986). *See generally* Shirley S. Abrahamson & Robert L. Hughes, *Shall We Dance? Steps for Legislators and Judges in Statutory Interpretation*, 75 MINN. L. REV. 1045 (1991) (discussing "colloquy" between state courts and state legislatures on statutory issues).

298. *See supra* Part II.

299. *See supra* note 238 and accompanying text.

proved to be highly adept at promoting and reviewing cost studies that provide proper parameters for adequate funding.[300]

This does not mean that courts should undertake cost studies or devise the econometric methodologies that should be used in such studies. These functions obviously are better undertaken by the other branches. Rather, judicial review has become important in the costing-out process, by (a) inducing legislatures to utilize transparent, professional methodologies for determining education funding levels in place of the secret back-room political deals that have dominated education finance decisionmaking in the past, and (b) providing a neutral forum for reviewing the validity of legislative or executive actions when allegations of manipulation or misuse of cost study data arise.[301] Courts also can have an important role in encouraging states and school districts to develop and adopt promising new methodologies for linking cost studies with analyses of best practices through "quality education models" and other such mechanisms.[302]

Courts similarly are well equipped to review and enforce effective accountability measures in order to ensure that education funds stemming from adequacy cases are used in a cost-efficient, productive, and targeted manner. Developments in the compliance stage of the *CFE* litigation illustrate why. Both the plaintiffs and the defendant governor had asked the courts to insist that the New York City Department of Education, which is expected to receive at least $2 billion of court-ordered funds, develop a comprehensive plan detailing how these funds would be spent, and that the Department issue annual reports that would specify how the funds had in fact been disbursed and what results had been achieved.[303] Although a panel of referees and the lower court had endorsed this request,[304] it was ultimately denied by the Court of Appeals based on an abstract separation of powers concern that the courts' involvement in this case must be terminated as soon as possible.[305] The court took this stance, even though the assistant solicitor general at oral argument had informed the court that the state had joined the plaintiffs in

300. *See* Rebell, *supra* note 239.

301. *Id.*

302. *Id.*

303. Report and Recommendations of the Judicial Referees 47–48, Campaign for Fiscal Equity v. State (*CFE III*), 861 N.E.2d 50 (N.Y. 2004) ("The parties have agreed on several enhancements to the current system of accountability that we believe are appropriate").

304. *CFE III*, 861 N.E.2d at 57.

305. *Id.* at 58 ("[I]n fashioning specific remedies for constitutional violations, we must avoid intrusion on the primary domain of another branch of government.").

requesting a judicial accountability order because political realities had precluded the legislature from taking effective action of this type.[306]

Ironically, opponents of judicial involvement in education adequacy cases rebuke the courts for mandating sizeable increases in education funding without taking any steps to ensure that the money is actually spent effectively[307] but at the same time argue that the courts must terminate their involvement in these litigations as soon as possible.[308] The fact is that courts have a unique capacity for ensuring that effective accountability measures are put into effect, not by micromanaging the day-to-day operations of a school system, but by making sure that legislatures, state education departments, and school districts do their jobs well.

CONCLUSION

Our nation has embarked on an unprecedented undertaking in committing as a matter of firm national policy to ensure that all children are educated to high levels. This goal—which is critical to the nation's economic competitiveness and to the effective functioning of our democratic political system—can only be accomplished by focusing not on abstract concepts, but on specific understandings of which programs, activities, or services are "meaningful" with regard to getting the job done.

The history of the federal courts' implementation of *Brown*'s desegregation mandate; Congress's enactment of Title I of the

306. Denise A. Hartman, Assistant Solicitor Gen. for the State of N.Y., Oral Argument at the New York Court of Appeals (Oct. 10, 2006). The Court of Appeals' refusal to insist on a workable accountability mechanism in *CFE III* was especially puzzling since the court had in *CFE II* included a specific requirement to "ensure a system of accountability to measure whether the reforms actually provide the opportunity for a sound basic education." Campaign for Fiscal Equity v. State (*CFE II*), 801 N.E.2d 326, 348 (N.Y. 2003). The parties' insistence on open effective planning and reporting by the school district was an attempt to enforce this judicial requirement which the *CFE III* court inexplicably then abandoned. In *Hancock v. Driscoll*, No. 02-2978, 2004 WL 877984, at *145 (Mass. Super. Ct. Apr. 26, 2004), *motion for further relief denied sub nom.* Hancock v. Comm'r of Educ., 822 N.E.2d 1134 (Mass. 2005), the trial judge, citing *CFE II* as precedent, issued an even more specific recommendation regarding accountability strictures when she ruled that the State must "determine the costs associated with measures, to be carried out by the department working with the local school district administrations, that will provide meaningful improvement in the capacity of these local districts to carry out an effective implementation of the necessary educational program."

307. *See, e.g.*, Koret Task Force on K–12 Education, *supra* note 291, at 340 (accusing courts of "almost always turn[ing] to calls for increased spending on schools" without providing strong accountability systems).

308. *See* SANDLER & SCHOENBROD, *supra* note 276, at 223–25.

Elementary and Secondary Education Act, Title VI of the 1964 Civil Rights Act, the Bilingual Education Act and the Individuals with Disabilities Act; as well as the state courts' involvement in the fiscal equity and education adequacy litigations has shown that progress toward equal educational opportunity occurs when concrete steps are taken to provide "meaningful" opportunities to all students. This Article has attempted, therefore, to identify and emphasize the strands of meaningful educational opportunity that have been developed by the courts, Congress, and other national and state institutions in the past and to mold them into a concept of "meaningful educational opportunity" that can give focus, direction, and coherence to egalitarian policies in education for the future.

To formulate coherent concepts of meaningful educational opportunity, Congress, the courts, and the state legislatures need to concentrate on policies in three areas. The first is establishing clear goals and expectations that can be met—and taking every feasible step to actually meet them. Second is adopting a "comprehensive" approach to educational opportunity that confronts the realities of concentrated poverty and provides the range of in-school and out-of-school services that will allow all students to actually meet those goals and expectations. Third is the need to ensure that all necessary resources are actually provided, but to do so in a feasible cost-effective way.

Although NCLB's mandate that 100% proficiency be achieved by 2014 is unrealistic and unattainable, the provision of 100% meaningful educational opportunity—a goal that would finally realize the fifty-year-old vision of *Brown v. Board of Education*—is attainable by 2014. This challenge can only be met, however, if all branches of government at both the federal and state levels are committed to the task. Each branch of government has a significant, complementary role to play. The courts have a critical role in ensuring and enforcing the rights of the most vulnerable and powerless, and in overseeing long-range remedial processes to make sure that promised reforms are implemented and that they are implemented well. The role of the courts, therefore, is critical if *all* children are indeed to receive the meaningful educational opportunities that are at the heart of the vision of *Brown* and at the core of the American dream.