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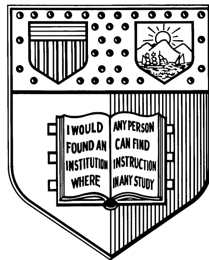

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Abstract

Law and public policy discussions about how best to improve public education invariably involve adequacy litigation. Adequacy lawsuits have come to reflect the most recent iteration of an enduring struggle for educational opportunity. The substitution of resources for race and the leveraging of educational policy goals into claims for legal entitlements transformed the equal educational opportunity doctrine and triggered intergovernmental jockeying to define the doctrine among the legislative, executive, and judicial branches. The resulting litigation generates important questions and consequences for both law and policy.

Educational Adequacy as Legal Theory:
Implications From Equal Educational Opportunity Doctrine

Michael Heise[*]

America's quest for greater equal educational opportunity—framed by the nation's historic drive for greater racial equality—presently involves a persistent quest for large sums of money. Incident to a successful adequacy lawsuit,[1] for example, New York state supreme court Justice DeGrasse recently ordered the State of New York to provide an additional $5.6 billion to the New York City public schools.[2] This award is on top of an additional $9.2 billion ordered for New York City school facilities.[3] How New York lawmakers will digest the court order and how school spending might change are far from clear. Nevertheless, New York's experience, while perhaps extreme in terms of the size of the judicial award, is a recent—albeit notable—product of a multi-decade nationwide litigation campaign designed to enlist the courts' assistance to extract additional resources for public schools.

Adequacy lawsuits do not exist in a vacuum. Moreover, they now occupy a central position in education policy and school reform discourse. Adequacy litigation represents the latest iteration of an enduring struggle for and over the meaning of equal educational opportunity, a struggle ignited by the *Brown v. Board of Education*[4] decision in 1954. Evolving school finance litigation theory reflects an evolving equal educational opportunity doctrine. Decades ago race and school desegregation litigation forged the initial modern understanding of equal opportunity. More recently, school finance litigation displaced desegregation litigation as the major instrument for enhancing equal educational opportunity. The substitution of resources for race in the legal quest for

greater equal educational opportunity necessitated an alternative theoretical approach. The substitution also stimulated a run of litigation that already spans more than three decades and traverses federal and state courts. Because judges and lawyers—prompted by litigants—second-guess lawmakers' and governors' decisions about public school spending with increased regularity, it is an appropriate moment to pause and reflect upon adequacy litigation and its consequences for education and public policy.

Framed by a quest for enhanced equal educational opportunity, school finance adequacy litigation raises four important issues considered in this chapter. First, adequacy lawsuits are structured in a manner that transforms failure in the classroom into success in the courtroom. The interaction of adequacy litigation and the No Child Left Behind Act (NCLB)—notably the student achievement data developed and disseminated by NCLB—helps fuel this ironic metamorphosis. Second, one unanticipated consequence of the interaction of adequacy litigation and NCLB is the growing pressure on states to reduce student proficiency standards so as to reduce adequacy litigation exposure. States are far less inclined to articulate bold student achievement policy goals now that litigants and courts transform education policy goals into legal minimums. Third, the efficacy of successful adequacy lawsuits and their remedies are clouded by the inevitable political backlash such litigation typically generates. Fourth, perhaps owing to political backlash, recent court decisions evidence an emerging hint of judicial humility. Courts in some states appear less willing for institutional, legal, or structural reasons to delve into the task of re-structuring school finance regimes. Whether the judicial push-back by a few state courts signals the start of a trend or, in the alternative, a slight detour

from a drive toward greater judicial engagement with school finance policy is far from clear.

Transforming Classroom Failure Into Litigation Success

The school finance adequacy litigation movement gained critical momentum once it joined with the standards and assessments movement. Since the mid-1980s, incident to The Nation At Risk report[5] and the legislative responses the report fueled,[6] many states began the task of reviewing and, in some instances, articulating for the first time goals for student education outcomes. The emergence of the standards and assessment movement signaled a fundamental shift in educational policymaking's focus from inputs (resources) to outcomes (student achievement).

Although reasonable minds differ about the various consequences generated by the standards and assessment movement, one consequence is already clear: policymakers now understand how policy goals—educational standards—can be transformed into legal entitlements for increased resources by school finance litigants. In state after state, school finance litigants transformed failure in the classroom into success in the courtroom.[7] In 2002, for example, only 32 percent of New York City's public high school graduates earned Regents Diplomas, although 55 percent of New York's public school graduates statewide qualified for this academic distinction.[8] The plaintiffs in New York state's adequacy litigation successfully argued that New York City schoolchildren's dismal Regents Diploma record evidenced that the state was failing to provide a "sound

basic" education.[9] The court awarded New York City more than $14 billion to bring its schools up to state constitutional adequacy.[10]

The interaction between adequacy litigation and the standards and assessments movement took on even greater force with the passage of the federal No Child Left Behind Act (NCLB) in 2001.[11] Under NCLB, states (that have not already previously done so) must establish school accountability systems that annually assess student proficiency in math and reading.[12] Schools must achieve adequate yearly progress as construed by NCLB or face sanctions.[13] Although federal law says that the state standards must be "challenging,"[14] NCLB leaves states free to establish their own standards and to determine the score necessary to meet the "proficient" threshold. Thus, states possess virtually complete control over the mechanisms that determine whether their students and schools achieve adequate yearly progress. State autonomy in this regard frustrates comparisons between or among states.[15]

At its core, NCLB leverages state-created standards and assessments into litigation tools, increases transparency by disseminating data on progress, and imposes consequences for insufficient progress. NCLB currently requires that districts test students in grades 3 through 8 in reading and math.[16] Schools also must report and disseminate test results for all students as well as for various student subgroups that contain a minimum number of students.[17] A sliding scale of NCLB-specific consequences befalls any school that does not achieve adequate yearly progress.[18] Thus, a school's failure to achieve sufficient student achievement and progress generates liability under federal law. The full contour of NCLB liability was not fully appreciated, however, until school finance activists began to advance inadequate yearly progress

under NCLB as conclusive legal proof of inadequate education in school finance litigation.

The Kansas Experience

Recent adequacy litigation in Kansas illustrates how adequacy litigants synthesize state standards and NCLB consequences into a state constitutional entitlement for greater resources. The Kansas Constitution, as amended in 1966, requires the legislature to "make suitable provision for finance of the educational interests of the state."[19] To discharge its constitutional duty, and prompted by school finance lawsuits, in 1992 Kansas lawmakers passed the School District Finance and Quality Performance Act ("SDFQPA").[20] The SDFQPA created a statewide property tax and a statewide system for collecting and distributing property tax revenues. Although the SDFQPA begins from a presumption of equal per pupil spending, the presumption is modified by district-specific weighting factors. As well, the SDFQPA established a guaranteed state per pupil floor along with an accountability system tied to state minimum student performance standards in specific subjects.[21] Satisfied with Kansas lawmakers' development and implementation of SDFQPA, litigants agreed to dismiss pending school finance litigation.[22]

Satisfaction with the SDFQPA was relatively short-lived, however, and new school finance litigation ensued. In 2003 a Kansas judge struck down the SDFQPA.[23] Part of the court's reason for striking down the Kansas school finance scheme involved student academic performance.[24] In assessing whether student academic performance

evidenced "adequacy," the Kansas trial court assessed performance data generated in response to the recently-enacted No Child Left behind Act.[25] Notably, *both* parties pointed to NCLB data as support for their opposing positions.

The plaintiffs introduced into evidence 2002 and 2003 math and reading proficiency scores for 5th, 8th, and 11th grade students, by racial and ethnic cohort.[26] The court noted that the evidence was both "informative and disturbingly telling."[27] The student performance data uncovered substantial achievement gaps between and among student cohorts. The court then quickly ascribed the students' poor academic performance to inadequate funding.[28]

The defendant school districts also sought (albeit unsuccessfully) legal refuge from student academic performance as defined by NCLB. The defendant districts pointed to their schools' meeting the Adequate Yearly Progress (AYP) requirements articulated in the NCLB as evidence of adequate educational services.[29] The court dismissed the defendant's interpretation of the student achievement data, however, noting that the districts could still achieve AYP requirements even though, for the 2002 and 2003 school years, up to 56 percent of all K-8 graders, and 48 percent of high school students, could fail the reading standard.[30] For math performance, AYP standards permitted a 53 percent failure rate for K-8 and a 70 percent failure rate for high school students.[31]

The Threat of Adequacy Litigation Will Induce States to Dilute Student Proficiency Standards

Potential financial exposure from school finance adequacy lawsuits (as well as other adverse consequences to states and local school districts flowing from NCLB), fueled partly by a school's inability to achieve adequate yearly progress under NCLB, will prompt some states to dilute their student proficiency standards.[32] State lawmakers will be far more reluctant to establish bold student proficiency standards in an effort to stimulate improvement now that litigants can transform such standards into legal entitlements for additional education resources.

Notwithstanding the federal government's direct and significant involvement with K-12 education through NCLB, primary and secondary education endures as principally a state and local governmental concern. Indeed, NCLB generally respects state autonomy when it comes to student proficiency levels. States retain the ability to set their own student proficiency levels which interact with federal requirements for academic progress, so long as state proficiency levels receive formal U.S. Department of Education approval. Prior to 1989 many states engaged in something resembling a race-to-the-top in terms of developing and implementing rigorous student proficiency standards and goals. The emergence of adequacy litigation, however, now fueled by state standards and assessments and NCLB consequences, risks transforming a race-to-the-top into a race-to-the-bottom as states respond to the unanticipated consequences of establishing aggressive student proficiency standards.

When many states initiated efforts to articulate desired student academic proficiency in the early and mid-1980s they did so without the specter of federal liability under NCLB, or exposure to adequacy lawsuits. Today, such liability and exposure disquiet many policymakers and assuredly influence standards setting or tinkering and, if

nothing else, generate a dilemma. To be sure, some degree of state push-back from demanding student proficiency standards flows from other factors, including political resistance from under-performing districts. States with rigorous proficiency standards, however, are more likely to fail to achieve adequate yearly progress, trigger NCLB consequences, increase their respective adequacy litigation exposure, and consequently, generate potentially costly financial exposure. Conversely, states with comparatively weak proficiency standards stand a better chance of successfully navigating through NCLB requirements and thereby avoid NCLB sanctions and the associated stigma as well as potentially significant financial exposure.

Although NCLB affords states significant latitude in setting their own student performance standards, NCLB obligates states to participate in a national testing program. NCLB obligates states to submit a sample of their fourth and eighth graders to National Assessment of Educational Progress (NAEP) reading and math tests every other year.[33] Until NCLB, state participation in the NAEP, the nation's only true metric that facilitates comparisons of student achievement across states and, indeed, across nations, was voluntary. Mandating state participation in NAEP was designed, in part, to establish an external check on student achievement. NCLB proponents suggested that the threat of embarrassment flowing from a state's students performing exceptionally well on state test but poorly on NAEP would blunt a state's desire to dramatically lower its student performance standards.[34]

Perhaps more important than the specter of possible public humiliation, unsatisfactory student achievement results can increase legal liability for states. Many states now confront a stark dilemma: maintain high student proficiency standards at the

risk of increasing litigation (and financial) exposure. As state budgets tighten, and in a policymaking world of ever-increasing claimants on state resources, the policy path of least financial resistance becomes even more attractive to many lawmakers. Moreover, in states where suburban districts recoil at the prospect—however remote—of their students not achieving state proficiency standards, or in districts that resent standardized test's inevitable curricular pull, a decision to dilute academic standards becomes even easier to make.[35] How state student proficiency standards respond to NCLB exposure and whether NCLB will trigger a race to the bottom in terms of student proficiency standards is an empirical question. Early evidence, while far from definitive, is not encouraging.

New York State's Regents Standards

Recent changes in New York illustrate the complexities in assessing whether states are diluting academic standards in response to adequacy litigation. On the one hand, in 1996 the New York State Board of Regents voted to require that student achievement at the state's prestigious Regents Standards was necessary for any student desiring a diploma from a New York public high school.[36] In 2003, however, the Board of Regents voted to delay imposing the higher standard for two additional years.[37] As well, New York retreated on other fronts by lowering the passing score threshold and the required number of proficiency exams.[38] Indeed, it remains unclear whether, how, or when New York will fully implement its Regents Standards state-wide as well as whether the Regents Diploma will ever reflect the standards that existed prior to 1996.

The successful adequacy lawsuit in New York makes clear why some states revisit achievement standards. Before 1996 New York State's high Regents Standards were among the nation's most rigorous. The standards' rigor, however, guaranteed a steady stream of students who failed to achieve the coveted Regents Diploma. Districts that successfully sued New York State leveraged the pool of students who failed to earn Regents Diplomas. That is, school districts pushing adequacy litigation cited the pool of students failing to earn Regents Diplomas as evidence of the state's failure to provide an adequate education. Thus, in New York, high academic standards contributed to a legal judgment against the state in excess of $14 billion. In light of the immense financial exposure generated by a successful adequacy lawsuit, it is no surprise to find many states revisiting their commitment to high academic standards.

Successful Adequacy Lawsuits, Political Backlash, and Legal Implementation

Successful adequacy lawsuits generate political opposition and resistance that impede implementation of court orders. Sources of political opposition and resistance include the obvious: state lawmakers and policymakers. Many lawmakers and policymakers resent outside (that is, judicial) intrusion into their budgeting processes. State budgeting is invariably a high-wire act during the best of fiscal times. When budgets tighten or contract, the political tradeoffs incident to the budgeting process can be especially unpleasant. A court order with potentially dramatic budgetary implications can bother even lawmakers otherwise partial to school finance reform. In the world of public

budget-making where delicacy and nuance often rein, a court order raising serious budgetary issues can be an especially blunt instrument.

To be sure, a few lawmakers and policymakers may welcome judicial intrusions into school finance policymaking. In particular, lawmakers who prefer increased education funding but remain unwilling to support the necessary tax increases for political reasons might seek opportunities to deflect political responsibility onto less politically accountable judges. Lawmakers motivated to externalize political accountability—however prevalent—strain the traditional allocation of powers. Moreover, such political motivations generate their own set of risks.

A second source of political opposition and resistance to adequacy lawsuits is less obvious: suburbanites. At a general level, suburbanites will assuredly resist efforts designed to challenge their ability to control the fiscal destiny of their public schools. Unlike the threat posed by judicially-mandated busing during the school desegregation era that implicated suburbs' control over who attended their schools, the principle threat posed by adequacy litigation is financial. Suburbanites care a great deal about preserving the ability to control their schools as well as how their property tax revenues are spent. As adequacy litigation continues and judgments mount, suburban and taxpayer resistance will continue to stiffen.

Policymakers will need to account for suburban resistance for one simple reason: raw political power. In most state legislatures, which almost always participate in the development of new school funding policies after courts have ruled existing policies unconstitutional, suburban lawmakers hold the balance of power.[39] Influence over the legislative response to an adverse court ruling flows from such political power.

Illustrations of suburban influence occurred in such states as New Jersey and Texas when lawmakers sought to redistribute existing funds from comparatively wealthier suburban districts to lower-spending districts. The well-documented suburban opposition in those states generated considerable additional complexity to the school finance challenge.[40]

Institutional Stress and Recent Hints of Judicial Humility

The institutional stresses imposed by adequacy lawsuits on courts as well as the sometimes vigorous opposition to judicial mandates involving education spending may help explain emerging hints of increasing judicial humility. Judicial humility in the school finance context comes in three main flavors. First, some state courts simply refuse to participate. For example, state courts in Illinois and Rhode Island, when confronted with school finance challenges (either based in equity or adequacy theory) to their respective state constitutional requirements, declined jurisdiction and found refuge in the political question doctrine.[41]

The political question doctrine supplies at least two safe harbors for courts disinclined to resolve school finance disputes. First, a court can "decide not to decide" by concluding that the state constitution possesses a "textually demonstrable constitutional commitment of the issue to a coordinate political department."[42] Such a commitment flows from state constitutional text and either expressly, implicitly, or structurally directs school finance matters to the legislative branch.

When confronted with a school finance challenge the Illinois Supreme Court pointed to concerns about trenching into legislative terrain as one reason to decline

plaintiff's invitation to strike down the state's school finance system. The Illinois Constitution's education clause guarantees to its citizens an "efficient system of high quality public educational institutions and services."[43] In *Committee for Educational Rights v. Edgar*,[44] although the court cited numerous grounds for upholding a lower court dismissal of plaintiff's challenge, the court remarked: "Nor is education a subject within the judiciary's field of expertise, such that a judicial role in giving content to the education guarantee might be warranted. Rather, the question of educational quality is inherently one of policy involving philosophical and practical considerations that call for the exercise of legislative and administrative discretion."[45] To hold otherwise, the court warned, "would largely deprive the members of the general public of a voice in a matter which is close to the hearts of all individuals in Illinois."[46]

Second, even where a court is persuaded that school finance disputes are not committed to other branches of government, a court can nonetheless still decline jurisdiction by concluding that it lacks "judicially discoverable and manageable standards" to resolve the conflict.[47] More specifically, some courts have concluded that judicially operationalizing such notions as "equal" and "adequacy" in the school finance context resist easy consensus. As the Supreme Court noted, what constitutes an equal or adequate education "is not likely to be divined for all time even by the scholars who now so earnestly debate the issues."[48] In addition, whether the courts are the best institution to undertake an effort to define what an equal or adequate education means is another critical question. Too many discussions about the judiciary's involvement with school finance disputes focus on what courts *should* do independent of discussion about what courts effectively *can* do.[49]

The Rhode Island Supreme Court noted such concerns in *City of Pawtucket v. Sundlum*[50] when it resisted the plaintiff's desire to engage the court in an effort to re-craft Rhode Island's school finance system. The court concluded that it could discern no standards that would assist it in the task of discerning whether "equal" or "adequate" education was provided to the plaintiffs. Moreover, the court declined to undertake the task of judicially crafting such standards as such an endeavor risked injecting the court into a "morass comparable to the decades-long struggle of the Supreme Court of New Jersey."[51] Indeed, the Rhode Island justices, hinting at comparative institutional disadvantages, characterized the multi-decade New Jersey school finance saga as a "chilling example of the thickets that can entrap a court that takes on the duties of a Legislature."[52]

A second form of judicial humility emerges in states where courts recognize jurisdiction, accept the invitation to decide school finance challenges but, after reviewing the evidence presented in light of the relevant constitutional text, conclude that no violation exists. The Nebraska Supreme Court's decision in *Gould v. Orr*[53] illustrates this version of judicial humility. Unlike its counterparts in Illinois and Rhode Island, the Nebraska court did not flinch from granting jurisdiction. The court noted that while the plaintiffs—pushing an equity theory—successfully demonstrated funding inequality, the plaintiffs did not successfully demonstrate how such unequal per pupil funding led to constitutionally inadequate educational services. While the *Gould* decision effectively foreclosed an equity challenge to Nebraska's school finance system, it conspicuously left open a question about the efficaciousness of an adequacy challenge. Indeed, such a challenge was launched in subsequent litigation in 2003.[54]

Judicial Push-Back

Recent judicial push-back by a few state courts evidences a third genre of judicial humility. This version involves states where courts accept jurisdiction, conclude that school finance systems violate state constitutional requirements, and demand either legislative or executive action consistent with the judicial opinion. Once state lawmakers and executives act, however, follow-up litigation invariably ensues and typically asserts that constitutional violations persist. This follow-up litigation invites the judicial branch not only to re-engage but to also assume even broader and deeper roles in re-shaping school finance systems.

It is at this precise point where school finance litigation enters a critical stage. On the one hand, such litigation can follow the "New Jersey" path and risk a multi-decade struggle among the executive, legislative, and judicial branches over school finance turf. New Jersey's saga—still, ongoing after more than three decades—is well chronicled. The situation unfolding in New York appears destined to follow its neighbor's path.

Experiences in others states differ, however, and hint at a potential trend. During the 1990s state supreme courts in Alabama, Ohio, and Massachusetts were cited by school finance reform activists as evidence of the dominance and efficaciousness of adequacy theory.[55] Subsequent decisions in all three states, however, suggest something of a judicial retreat. In 1993 an Alabama court boldly announced that the state was obligated to provide an adequate education to its citizens.[56] The court order was especially particular in what it meant by an adequate education.[57] More recently,

however, and incident to follow-up litigation, the Alabama Supreme Court dismissed further proceedings, pointing to separation of powers concerns.[58] Likewise, after protracted litigation in Ohio, the Ohio Supreme Court granted a writ of prohibition in 2003 forbidding the trial court from exercising further jurisdiction over the school finance case.[59]

The Massachusetts Saga

As recent court decisions in Alabama and Ohio illustrate, judicial hesitation emerges even in states where courts had previously found inadequate education. A dramatic turn of events in Massachusetts embodies many of these common themes and warrants close attention.[60] In 1993, Massachusetts' Supreme Judicial Court ruled in *McDuffy v. Secretary of the Executive Office of Education*[61] that the state failed to fulfill its constitutional obligation and noted in particular the deleterious consequences of the state's overwhelming reliance on local property tax revenues.[62] The Massachusetts court directed the state's governor and legislature to correct the constitutional defects.[63] Three days after the *McDuffy* opinion was announced Massachusetts lawmakers passed the Education Reform Act of 1993.[64] The Act radically restructured education in Massachusetts, especially as it relates to school funding, student goals and performance, and school and school district accountability provisions.[65]

Notwithstanding the *McDuffy* opinion and the Act, in 1999 litigants sued anew claiming that data from four specific Massachusetts school districts[66] showed that education—at least for those four districts[67]—had not improved since 1993 and, more

important, still violated constitutional obligations, including those articulated in the *McDuffy* decision.[68] The trial court judge found that the state's education department lacked adequate resources to meet the requirements of Massachusetts' education clause.[69] Soon thereafter, once again, Massachusetts' highest court was called upon by litigants to help restructure the state's education system.

This time, however, the Massachusetts high court pulled back. Specifically, the court rejected the lower court report's conclusion that the "Commonwealth [State of Massachusetts] is presently neglecting or is likely to neglect its constitutional duties, thus requiring judicial intervention."[70] Pivotal to the supreme court's analysis was the selection of the appropriate constitutional standard. The Massachusetts' high court rejected the assertion that adequacy required that all Massachusetts' school districts achieve proficiency in the seven different areas outlined in the 1993 *McDuffy* decision.[71] Rather, in *Hancock v. Commissioner of Education*,[72] the court concluded that the state had taken reasonable and appropriate steps in a timely manner to address school funding and student achievement disparities.[73] The decision brought to a close 27 years of litigation and 12 years of state court supervision over school finance matters in Massachusetts.

Notably the Massachusetts justices also feared replicating the experiences of other states. The *Hancock* decision explicitly references parallel adequacy litigation in both New Jersey and New York. The Massachusetts jurists noted that courts in New York and New Jersey stepped in (repeatedly) "after many years of legislative failure or inability to enact education reforms and to commit resources to implement those reforms."[74]

Certainly the experiences of lengthy and nasty state supreme court entanglements with their legislative and executive counterparts in New York, New Jersey, and elsewhere provided Massachusetts' justices ample reason to pause and reflect. The damage to the state judicial branch owing to legislative and gubernatorial resistance or outright rejection of state judicial decrees is considerable. Moreover, even in states that do not outright resist state school finance decisions, the empirical evidence on the efficacy of court decisions to actually achieve the goals sought by the prevailing plaintiffs is mixed, at best.

The likelihood of courts ceding jurisdiction over school finance litigation due to institutional capacity concerns, however, is far from certain. Existing evidence is decidedly split; discernable trends elude. The *Hancock* decision in Massachusetts could just as easily signal a potential judicial reluctance to trench too deeply into educational policymaking. At the same time, *Hancock* might simply be a brief diversion of a trend toward increased judicial engagement with school finance issues.

Adequacy Litigation Into the Twenty-First Century

School finance adequacy litigation's centrality in education reform and policy discourse is unlikely to recede anytime soon. If anything, for the immediate future adequacy litigation is likely to strengthen due to its interactions with NCLB. That NCLB—a federal law—reinforces the salience of school finance adequacy litigation for states, of course, abounds with irony. To be sure, NCLB was not enacted for the benefit of adequacy litigation activists. Unable to forestall any longer an important shift at the

policy level from a focus on education resources to school and student performance—embodied in NCLB—adequacy litigants turned their collective attention to executing a reversal at the legal level: leveraging disparities in school and student performance into state constitutional claims for increased education resources.

Adequacy litigation's future efficacy pivots on the endurance of two key elements. First, that litigants, judges, and juries collapse educational policy goals and aspirations into legally enforceable minimums. Second, that judges and courts willingly engage—deeply—in complicated, politically perilous, and contentious school finance policy terrain. The long-term stability of both key elements, however, is far from clear. The first element risks conflating policy and law; the second places increasingly enormous stress on traditional understandings of separation of power.

Although society's unending quest for greater equal educational opportunity implies a robust role for state (and federal) courts, the role imposed upon the courts in the service of adequacy litigation is not without limits. Judges disinclined to venture too far into legislative terrain due to separation of powers concerns impose one internal limit on judicial power's reach. The courts' limited institutional capacity to achieve desired policy changes imposes an external limit on judicial activity even where separation of powers concerns might not deter judges.

Public policy discussions about how best to improve public education invariably involve adequacy litigation. Adequacy lawsuits have come to reflect the most recent iteration of an enduring struggle for educational opportunity. The substitution of resources for race and the leveraging of educational policy goals into claims for legal entitlements transformed the equal educational opportunity doctrine and triggered

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[*] Professor, Cornell Law School. Thanks to participants in the Adequacy Lawsuits: Their Growing Impact on American Education conference at Harvard University for comments on an earlier draft. Thanks as well to Andrew C. Compton and the librarians at Cornell Law School for outstanding research assistance.

[1] Campaign for Fiscal Equity, Inc. v. State of New York, 100 N.Y.2d 893 (2003). For a review of the somewhat tortured—though rich—litigation history surrounding New York school finance issues, see Brian J. Nickerson & Gerard M. Deenihan, "From Equity to Adequacy: The Legal Battle for Increased State Funding of Poor School Districts in New York," *Fordham Urban Law Journal*, vol. 30 (2003), p. 1341.

[2] Sam Roberts, "Judicial Enforcement: Rare Ruling on New York City Schools Sets Amount for Other Branches to Pay," *New York Times*, February 22, 2005, p. B3 (Nat'l ed.).

[3] Roberts, "Judicial Enforcement," p. B3.

[4] 347 U.S. 483 (1954).

[5] For a discussion of the report, see Karen MacPherson, "A Nation Still at Educational Risk: Two Decades Later Reports Still Focusing on the Mediocrity of U.S. Education," *Pittsburgh Post Gazette*, August 31, 2003, available at (www.post-gazette.com/pg/03243/216956.stm [Nov. 2005]).

[6] Macpherson, "A National Still at Educational Risk," available at (www.post-gazette.com/pg/03243/216956.stm [Nov. 2005]).

[7] For cynics, the moral hazard implications to education reform for rewarding inefficacy are obvious.

[8] Regents Diplomas: More than Circumstance and Pomp, (www.nysut.org/excellence/evidence_regents.html [Nov. 2005]) (while noting progress in the number of Regents Diplomas being awarded each year, the article also shows New York City as lagging behind the rest of New York State).

[9] Campaign for Fiscal Equity, Inc. v. State of New York, 100 N.Y.2d 893 (2003).

[10] 100 N.Y.2d at 893.

[11] No Child Left Behind Act of 2001 (NCLB), 20 U.S.C. § 6301 (2002).

[12] NCLB § 1111(b)(1)(A)-(C), 20 U.S.C. § 6301 (2002).

[13] NCLB at § 1111(b)(3), § 1116.

[14] NCLB at § 1111(b)(1)(A)-(C).

[15] Paul E. Peterson & Frederick M. Hess, "Johnny Can Read… in Some States: Assessing the Rigor of State Assessment Systems," *Education Next* (Summer 2005), pp. 52-53.

[16] NCLB § 1111(b)(3), 20 U.S.C. § 6301 (2002).

[17] NCLB § 1111(b)(3)(C)(xiii).

[18] NCLB § 1111(b)(3), § 1116.

[19] Kansas Constitution, article VI, § 6.

[20] School District Finance and Quality Performance Act, 1992 Kansas Session Laws § 280.

[21] Charles Berger, "Equity Without Adjudication: Kansas School Finance Reform and the 1992 School District and Quality Performance Act," *Journal of Law & Education*, vol. 27 (1998), p. 28.

[22] Berger, "Equity Without Adjudication," p. 28.

[23] Montoy v. State, No. 99-C-1738, 2003 WL 22902963, at *49 (Kan. Dist. Ct. Dec. 2, 2003).

[24] 2003 WL 22902963, at *45.

[25] 2003 WL 22902963, at *45.

[26] 2003 WL 22902963, at *47.

[27] 2003 WL 22902963, at *47.

[28] 2003 WL 22902963, at *49.

[29] 2003 WL 22902963, at *41.

[30] 2003 WL 22902963, at *41.

[31] 2003 WL 22902963, at *41.

[32] See, for example, James E. Ryan, "The Perverse Incentives of the No Child Left Behind Act," *New York University Law Review*, vol. 79 (2004), pp. 946-48. To be sure, other political reasons exist that might contribute to a state's decision to dilute student proficiency standards. For example, political pressure generated from districts, parents, and homeowners uncomfortable with less-than-desired results might influence lawmakers.

[33] NCLB § 1111(c)(2).

[34] Compare Lynn Olsen, "Want To Confirm State Test Scores? It's Complex, But NAEP Can Do It," *Education Week* (Mar. 13, 2002), p. A1 (arguing that states will respond to NAEP pressure), with Diane Ravitch, Every State Left Behind," *New York Times* (Nov. 7, 2005), p.A23 (arguing that national testing is necessary).

[35] Paul T. O'Neill, "High Stakes Testing Law and Litigation," *Brigham Young University Education and Law Journal* (2003), pp. 657-60 (discussing suburban backlashes against standardized testing).

[36] Karen W. Arenson, "Scaling Back Changes On Regents Standards," *New York Times*, October 14, 2003, p. B5.

[37] Arenson, "Scaling Back," p. B5.

[38] Arenson, "Scaling Back," p. B5.

[39] Marilyn Gittell, "Conclusion: Creating a School Reform Agenda for the Twenty-First Century," in Marilyn J. Gittell, ed., *Strategies for School Equity* (Yale University Press, 1998), p. 238 (noting suburbs' power in state legislatures and state education bureaucracies); William Schneider, "The Suburban Century Begins," *Atlantic Monthly*, July 1992, p. 33 (arguing that suburban voters now drive national policy).

[40] Mark G. Yudof, "School Finance Reform in Texas: The Edgewood Saga," *Harvard Journal on Legislation*, vol. 28 (1991), p. 499 (describing the Texas school finance debacle).

[41] Committee for Educational Rights v. Edgar, 174 Ill.2d 1 (1996) (Illinois); City of Pawtucket v. Sundlum, 662 A.2d 40 (R.I. 1995) (Rhode Island).

[42] Baker v. Carr, 369 U.S. 186, 217 (1962).

[43] Illinois Constitution, article X, § 1.

[44] 174 Ill.2d 1,1 (1996).

[45] 174 Ill.2d. at 29.

[46] 174 Ill.2d. at 29.

[47] 174 Ill.2d. at 28.

[48] *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 43 (1973).

[49] Jonathan Cohen, "Judicial Control of the Purse—School Finance Litigation in State Courts," *Wayne State Law Review,* vol. 28 (1982), pp. 1415-16.

[50] 662 A.2d 40 (R.I. 1995).

[51] 662 A.2d at 59.

[52] 662 A.2d at 59.

[53] 506 N.W.2d 349 (1993).

[54] Douglas County School District 0001 v. Johanns Nebraska District Court, (No. 1028-017)(June 30, 2003). See http://www.nebraskaschoolstrust.org/images/complaint.pdf. See also David Hoff, "States on Ropes in Finance Suits," *Education Week.*, December 8, 2004, p. 23.

[55] Opinion of the Justices, 624 So.2d 107 (Ala. 1993); McDuffy v. Secretary of the Executive Office of Education, 615 N.E.2d 516 (Mass. 1993); DeRolph v. State (DeRolph I), 677 N.E.2d 733 (Ohio 1997).

[56] Opinion of the Justices, 624 So.2d 107 (Ala. 1993).

[57] 624 So.2d at 165-66 (noting the essential principles of a "liberal system of public schools").

[58] Ex Parte James, 836 So.2d 813, 815 (Ala. 2002) ("It is the Legislature, not the courts, from which any further redress should be sought.").

[59] State v. Lewis, 789 N.E.2d 195 (Ohio 2003), cert denied, 540 U.S. 966 (2003).

[60] For a fuller explication of school finance litigation in Massachusetts, please see Robert Costrell, "***XXX***," in ***XXX***, edited by **XXX**, pp. **xx-xx**.

[61] 615 N.E.2d 516 (Mass 1993).

[62] 615 N.E.2d at 552.

[63] 615 N.E.2d at 555-56.

[64] Massachusetts General Laws chapter 71 (1993).

[65] Hancock v. Commissioner of Education, 822 N.E.2d 1134 (2005).

[66] Through the litigation these four districts were referred to as the "focus districts." See Hancock v. Driscoll, No. 02-2978, 2004 WL 877984, at *4 (Mass. Super. Apr. 26, 2004).

[67] 2004 WL 877984, at *4 (the four districts include Brockton, Lowell, Springfield, and Winchendon).

[68] 2004 WL 877984 at *1.

[69] 2004 WL 877984 at *119.

[70] Hancock v. Commissioner of Education, 822 N.E.2d 1134, 1155 (2005).

[71] 822 N.E.2d at 1153.

[72] 822 N.E.2d 1134 (2005).

[73] 822 N.E.2d at 1154.

[74] 822 N.E.2d at 1153.