


Summer 3-1-2013

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### Recommended Citation

Aaron Lawson, *Educational Federalism: A New Case for Reduced Federal Involvement in K-12 Education*, 2013 BYU Educ. & L.J. 281 (2013)

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# EDUCATIONAL FEDERALISM: A NEW CASE FOR REDUCED FEDERAL INVOLVEMENT IN K-12 EDUCATION

*Aaron Lawson*\*

## I. INTRODUCTION: A LEGAL LENS FOR EDUCATION POLICYMAKING

A crucial part of the debate over education law and policy asks: Who should be creating education policy? When education policy is formulated, what is at stake is nothing less than success in life for our nation's young people. The twenty-first century has seen a pronounced shift in the way education policy decisions are made, as the educational policy making and regulatory epicenter has begun shifting from the state to the federal level, particularly with the passage of No Child Left Behind ("NCLB")<sup>1</sup> and Race to the Top ("RTTT").<sup>2</sup>

NCLB comprehensively reformed the Elementary and Secondary Education Act (ESEA), the primary federal education law.<sup>3</sup> Among the major changes were requirements (1) that states establish yearly testing of students in grades three through eight for reading and math and in three grades for science;<sup>4</sup> (2) that states establish standards for the adequate yearly progress of its students, incorporating a goal of total proficiency in all subjects by 2013-14;<sup>5</sup> (3) that students be allowed to transfer out of schools deemed in need of

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<sup>1</sup> No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2001).

<sup>2</sup> American Reinvestment and Recovery Act of 2009, Pub. L. No. 111-5, Title VIII, 123 Stat. 115 (2009); Race to the Top Fund, Final Rule, 74 Fed. Reg. 59,688 (Nov. 18, 2009) (to be codified at 34 C.F.R. subtit. B, ch. II).

<sup>3</sup> See WAYNE RIDDLE ET AL., CONG. RESEARCH SERV., RL31284, K-12 EDUCATION: HIGHLIGHTS OF THE NO CHILD LEFT BEHIND ACT OF 2001 (P.L. 107-110) 3 (2008), available at [www.crs.gov](http://www.crs.gov) (comparing the structure of ESEA pre- and post-NCLB).

<sup>4</sup> *Id.* at 4.

<sup>5</sup> *Id.* at 5.

improvement;<sup>6</sup> and (4) that states develop a number of new accountability measures to measure the progress of students with limited English language proficiency.<sup>7</sup> The focus on testing was meant to provide some accountability on the part of schools to parents and taxpayers and focus schools' efforts towards groups of students in need.<sup>8</sup>

RTTT, on the other hand, was less a legislative program and more a set of spending conditions.<sup>9</sup> In order to receive money from the RTTT fund, states must submit ambitious plans in four core areas: (1) adoption of standards geared to workplace preparedness, (2) building systems to measure student success, (3) increasing teacher effectiveness, and (4) improving the lowest achieving schools.<sup>10</sup> States were encouraged, as part of their funding applications, to develop budgets reflecting the changes they proposed, and the Department of Education provided guidance as to the size of these budgets.<sup>11</sup>

For the purpose of this Comment, what is important about these programs is not what they contain, but the fact that they represent a much larger role for the federal government in education. A growing body of legal scholarship argues that an increased role for the federal government in education is a normatively desirable development. One scholar, for instance, argues that limited state bureaucratic capabilities, which she asserts have developed compliance functions at the expense of true policy expertise, counsel in favor of an increased federal role.<sup>12</sup> Likewise, Professor Kimberly Jenkins Robinson, who served in the General Counsel's office at the U.S. Department

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<sup>6</sup> *Id.* at 5-6 (schools failing to show adequate yearly progress for two consecutive years are deemed to be in need of improvement).

<sup>7</sup> *Id.* at 14-15.

<sup>8</sup> *See* 34 C.F.R. § 200.13(b)(7)(ii) (stating that adequate yearly progress definitions developed by states must apply separately to students in the following subgroups: economically disadvantaged students, students from racial and ethnic minorities, students with disabilities, and students with limited English proficiency).

<sup>9</sup> *See* *Race to the Top Fund*, *supra* note 2, at 59,840-841. NCLB also conditioned receipt of federal education funds on acceptance of certain spending conditions, but was a comprehensive piece of legislation, as opposed to the *Race to the Top* fund, which was simply a part of the stimulus package passed under President Obama.

<sup>10</sup> *Id.* at 59,836 (describing RTTT as a "funding opportunity" and guaranteeing only a chance at receipt of federal money in exchange for adoption of these standards).

<sup>11</sup> *Id.* at 59,840.

<sup>12</sup> Shannon McGovern, Note, *A New Model for States as Laboratories for Reform: How Federalism Informs Education Policy*, 86 N.Y.U. L. REV. 1519, 1546-47 (2011).

of Education,<sup>13</sup> noting the persistence of interstate educational disparities since *Brown v. Board of Education*,<sup>14</sup> argues that an increased federal role in education is necessary because history teaches that states are incapable, on their own, of addressing disparities in educational opportunity.<sup>15</sup> Another scholar argues that the central role education has always held in our society necessitates recognition of education as a judicially-enforceable fundamental right.<sup>16</sup> Similarly, Goodwin Liu, recently appointed to the California Supreme Court, argues that the very text of the Fourteenth Amendment and the concept of national citizenship at least authorizes, if not compels, the creation of a “common set of educational expectations for meaningful national citizenship.”<sup>17</sup> However, increased federal involvement in education is worrisome for other reasons, explored below. This Comment pushes back on scholarship that supports federal solutions for the nation’s education issues and argues that countervailing considerations militate in favor of less federal involvement in education.

Every state constitution, in contrast with the Federal Constitution, contains some guarantee of education.<sup>18</sup> State

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<sup>13</sup> Richmond Sch. of Law, *Profile: Kimberly Jenkins Robinson, Professor of Law*, FACULTY, <http://law.richmond.edu/people/faculty/krobins2/> (last visited Oct. 8, 2012).

<sup>14</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

<sup>15</sup> Kimberly Jenkins Robinson, *The Case for a Collaborative Enforcement Model for a Federal Right to Education*, 40 U.C. DAVIS L. REV. 1653, 1689 (2007); McGovern, *supra* note 12, at 1545 (arguing that interstate resource disparities necessitate federal intervention).

<sup>16</sup> Michael Salerno, Note, *Reading is Fundamental: Why the No Child Left Behind Act Necessitates Recognition of a Fundamental Right to Education*, 5 CARDOZO PUB. L. POL’Y & ETHICS J. 509, 540 (2007).

<sup>17</sup> Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330, 401 (2006). Notably, Liu does not actually think NCLB accomplishes this, but he advocates for an even broader, though somewhat different, legislative response from Congress.

<sup>18</sup> Avidan Y. Cover, *Is “Adequacy” a More “Political Question” than “Equality?”: The Effect of Standards-Based Education on Judicial Standards for Education Finance*, 11 CORNELL J.L. & PUB. POL’Y 403, 404 (2002). Education Clauses vary widely in wording. For instance, the State of Montana declares, “It is the goal of the people to establish a system of education which will develop the full educational potential of each person. Equality of educational opportunity is guaranteed to each person of the state.” MONT. CONST. art. X, § 1(1). On the other hand, New York provides only that “[t]he legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated.” N.Y. CONST. art. 11, § 1.

courts split into two groups on how to give effect to these guarantees: (1) by evaluating education policy under Equal Protection by declaring education a fundamental right or by treating wealth as a suspect classification,<sup>19</sup> or (2) by evaluating education policies under a framework of educational adequacy.<sup>20</sup> In either case, these clauses establish substantive educational guarantees on the state level that do not exist at the federal level and provide the courts with a role in ensuring the fulfillment of these guarantees.<sup>21</sup> These clauses also help to create a valuable political dynamic, which has inured to the benefit of children. As part of this political dynamic, courts define the contours of these affirmative guarantees, and the legislature fulfills its own constitutional duty by legislating between those boundaries.<sup>22</sup>

However, when the federal government legislates or regulates in a given field, it necessarily constrains the ability of states to legislate in that same field.<sup>23</sup> In the field of education, the ability of courts to protect the rights of children is dependent on the ability of legislatures freely to react to courts. As such, anything that constrains state legislatures also constrains state courts and upsets this valuable political

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<sup>19</sup> See, e.g., *Rose v. Council for a Better Educ., Inc.*, 790 S.W.2d 186 (Ky. 1989); *Horton v. Meskill* 376 A.2d 359 (Conn. 1977); *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971).

<sup>20</sup> See, e.g., *Opinion of the Justices*, 765 A.2d 673 (N.H. 2000) (advisory opinion declaring that proposed school funding bill would violate state's duty to provide adequate education); *Abbeville Cnty. Sch. Dist. v. State*, 515 S.E.2d 535 (S.C. 1999); *DeRolph v. State*, 677 N.E.2d 733 (Ohio 1997).

<sup>21</sup> *But see, e.g., Neb. Coal. for Educ. Adequacy & Equity v. Heineman*, 731 N.W.2d 164 (Neb. 2007); *Okla. Educ. Ass'n v. State of Okla. ex rel. Okla. Legislature*, 158 P.3d 1058 (Okla. 2007). A small minority of state courts, like those in Nebraska and Oklahoma, have found educational rights to be nonjusticiable. This problem is dealt with at notes 161-167 and accompanying text.

<sup>22</sup> See discussion *infra* notes 79-105 and accompanying text.

<sup>23</sup> For a useful and succinct discussion of pre-emption doctrine, see Alexander K. Haas, *Chipping Away at State Tort Remedies through Pre-emption Jurisprudence: Geier v. American Honda Motor Co.*, 89 CALIF. L. REV. 1927, 1929-30 (2001) (discussing both field and conflict pre-emption). See also *Innes v. Tobin*, 240 U.S. 127, 134-35 (1916) (inferring that while it is true that where a federal statute does not cover an entire field, states are allowed to legislate in those areas omitted from federal regulation: “. . . when the situation with which the statute dealt is contemplated, the reasonable assumption is that by the omission to extend the statute to the full limits of constitutional power it must have been intended to leave the subjects unprovided for not beyond the pale of all law, but subject to the power which then controlled them -- state authority until it was deemed essential by further legislation to govern them exclusively by national authority.”). The contrapositive is where the rubber meets the road for the purposes of this Comment: state regulation cannot cover the very same ground as federal regulation.

dynamic created by the interaction of state legislatures and state courts. An expansive federal role in educational policymaking is normatively undesirable when it threatens to interfere with this political dynamic. This dynamic receives scant attention in the literature described above. However, mindfulness of this dynamic is crucial to the proper placement of the educational policymaking and regulatory epicenter.

Constraints on state legislatures would not be as problematic if the federal government had proven itself adept at guaranteeing adequate educational opportunity for all students. However, RTTT and NCLB have, in some cases, proven remarkably unhelpful for poor and minority students.<sup>24</sup> These negative outcomes, of course, are not guaranteed. However, the fact that federal involvement in education has produced undesirable outcomes for poor and minority students should cause policymakers to reexamine whether it is most desirable for the federal government to play such a significant role in education. This Comment argues that it is not.

Using policies adopted in New York State in response to RTTT as an example, this Comment argues that the federal government should step aside to the extent necessary to allow state courts more flexibility to protect the substantive educational rights of poor and minority children. Specifically, where federal constitutional rights are not at issue, federal involvement in education should be minimized to the point that state courts have an unrestrained ability to protect the educational needs of, and ensure adequate educational opportunity for, each state's children.<sup>25</sup> This Comment does not argue for an end to all education policymaking at the

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<sup>24</sup> See discussion *infra* Part III.A.2.

<sup>25</sup> Generally, the term "federal constitutional rights" in the context of education will refer the right to attend a school not tainted by the vestiges of segregation. See *Missouri v. Jenkins*, 515 U.S. 70, 90 (1995) ("Thus, the proper response by the District Court should have been to eliminate to the extent practicable the vestiges of prior de jure segregation within the KCMSD . . ."). However, the term might also extend to bilingual education. See, e.g., *Meyer v. Nebraska*, 262 U.S. 390 (1923). *Meyer* held that a law prohibiting instruction in any language other than English violated Due Process. *Id.* at 400-03. In *Lau v. Nichols*, 414 U.S. 563 (1974), the Court was presented with a question about the substantive right to bilingual education, but ducked the Fourteenth Amendment question, and settled the case on statutory grounds, *id.* at 566.

federal level. Rather, it argues that the functioning of the state's court-legislature dynamic should act as a limitation on the policies enacted at the federal level. The educational rights of poor and minority children in particular may be more efficiently safeguarded by putting the power in the hands of state courts and legislatures, whereas recent federal programs have taken that ability from the states in a way that may be detrimental to the nation's youth.

In particular, the expansion of the federal presence in the education arena has changed policymaking dramatically. Federal policy will be off limits to the remedial powers of state courts and legislatures, limiting the array of options they have when seeking to enforce constitutional guarantees of education. Unless state courts prove themselves unwilling and unable to deal with the structural problems created by educational policies, the federal government should assume a role that leaves sufficient space for state courts to operate.

This Comment proceeds in three parts. Part II of this Comment briefly examines the history of education litigation and outlines the contours of the political dynamic that allows state-level government actors to efficiently protect educational rights. Part III looks at recent federal policies and some of their occasionally troubling side effects. In doing so, it also explains how these policies interfere with the political dynamic described in Part II and why that is problematic. Part IV answers some objections to this approach to educational reform.

## II. THE POLITICAL DYNAMIC

The key to the effectiveness of state-level educational policymaking is a political dynamic in which courts and legislatures work together, but in their own separate spheres to effectuate state-level constitutional guarantees of educational opportunity. This dynamic has been borne out on the judicial side within state-level education litigation. Although the education litigation in the federal courts that famously deals with segregation and equal access to public schools is more well-known, education litigation in state courts, dealing pertinently with a certain level of opportunity, is more relevant to the current policy debate.

Section A of this Part traces the historical development of education litigation, particularly state-level education litigation. Section B then examines the consistent framework

that courts across the nation have adopted for dealing with education litigation. Finally, Section C looks at how this framework translates into a judicially manageable role for the courts in education litigation, and the political dynamic that is so crucial to education reform.

### *A. The Historical Development of State Education Litigation*

Although only state constitutions, and not the Federal Constitution, contain language creating a substantive right to education in some form, education litigation began on the federal level.<sup>26</sup> The first wave of education litigation is the most well-known. Through the Fourteenth Amendment, this wave of litigation sought to remove the stain of de jure segregation from public schools.<sup>27</sup> Ultimately, of course, this wave of litigation achieved its principle purpose of legally desegregating public schools in the landmark 1954 *Brown v. Board of Education* case.<sup>28</sup> However, as one contemporary education reformer noted, “soon after the glow began to fade from *Brown’s* initial luster, education reformers saw the need to devise political and legal methods for ensuring the provision of adequate resources to the large numbers of poor and minority students who would continue to attend segregated schools.”<sup>29</sup> The Supreme Court held in the 1970s that *Brown* did not require integration where any de facto segregation was not the result of intentional state action, leaving students in

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<sup>26</sup> It is well settled at this point that education litigation occurred in three waves. See, e.g., Regina Umpstead, *Determining Adequacy: How Courts Are Redefining State Responsibility for Educational, Finance, Goals, and Accountability*, 2007 BYU EDUC. & L.J. 281, 285 (2007) (outlining the three-waves); Michael Heise, *State Constitutions, School Finance Litigation, and the “Third Wave”: From Equity to Adequacy*, 68 TEMP. L. REV. 1151, 1152 (1995) (same).

<sup>27</sup> See *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938); *Sipuel v. Bd. of Regents of Univ. of Okla.*, 332 U.S. 631 (1948); *Sweatt v. Painter*, 339 U.S. 629 (1950); *McLaurin v. Okla. State Regents*, 339 U.S. 637 (1950); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

<sup>28</sup> *Brown*, 347 U.S. at 495 (“We conclude that in the field of public education the doctrine of ‘separate but equal’ has no place.”).

<sup>29</sup> MICHAEL A. REBELL, *ACHIEVING HIGH EDUCATIONAL STANDARDS FOR ALL: CONFERENCE SUMMARY* 220 (Timothy Ready et al. eds., 2002). Indeed, the *Swann* Court seemed to recognize, despite the optimism of the era, that some schools would still be virtually one race, despite the efforts of the school district authorities, and the District Courts. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 25–28 (1971).



underperforming urban schools without any recourse to the Fourteenth Amendment.<sup>30</sup> Thus, advocates began to search for new legal tools with which to challenge subpar schools.<sup>31</sup>

As a result, a second wave of litigation commenced that focused on providing all students with an adequate educational opportunity. This second wave targeted “wealth-based inequities in the nation’s education system, which allegedly led to children from poorer school systems receiving worse educations than children from wealthier school systems . . . .”<sup>32</sup> Typically, these poorer school systems were also predominantly filled with minority students, for whom educational opportunity was already endangered, even putting to one side these wealth-based inequities.<sup>33</sup>

Noting that the inequity in educational opportunity came directly from the inequity of the funding system in many states, education reformers initially premised the second wave of litigation attacking these funding schemes on the Equal Protection Clause of the Fourteenth Amendment. In 1973, one of these cases quickly made its way to the Supreme Court. In *San Antonio Independent School District v. Rodriguez*, parents of schoolchildren in property-poor districts alleged that Texas’ school-funding system, premised on the levying of property taxes, violated the guarantee of equal protection.<sup>34</sup> The Texas school-funding system had been developed at a time when Texas had a predominantly rural, dispersed population.<sup>35</sup> However, the discovery of oil had changed Texas’ demographic landscape. Although the state had undertaken to remedy the funding problems caused by the population shift, its solution, particularly property taxes, was premised on the amount of assessable property within a given school district.<sup>36</sup> Because of huge disparities in the assessed value of property and size of the student population from one district to the next, major per-pupil funding disparities existed.<sup>37</sup> Still, the

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<sup>30</sup> See *Keyes v. Sch. Dist. No. 1, Denver, Colo.*, 413 U.S. 189 (1973).

<sup>31</sup> REBELL, *supra* note 29, at 221-26.

<sup>32</sup> Martha I. Morgan et al., *Establishing Education Program Inadequacy: The Alabama Example*, 28 U. MICH. J.L. REFORM 559, 560 (1995).

<sup>33</sup> See REBELL, *supra* note 29, at 220.

<sup>34</sup> *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 5 (1973).

<sup>35</sup> *Id.* at 8-9.

<sup>36</sup> *Id.* at 9-10.

<sup>37</sup> *Id.* at 11-15 (describing the differences in demographics and funding between two school districts).

Supreme Court held that Texas' school funding system did not violate the Equal Protection Clause, even though one dissenting Justice described the system that resulted as "chaotic and unjust."<sup>38</sup> Significantly, the Court also held that strict scrutiny was not required of state and local education finance decisions, indicating that education is neither a fundamental right guaranteed by the Constitution nor the impoverished a suspect class.<sup>39</sup>

State-level education litigation is largely a reaction to *Rodriguez* and the inability or unwillingness of federal courts to do what is needed to truly remedy the underlying problems in many of our educational systems.<sup>40</sup> State constitutional law provided two new opportunities for success following *Rodriguez*. First, state guarantees of equal protection are not necessarily co-extensive with their federal analogues, allowing for protection of education as a fundamental right within the state constitution, notwithstanding *Rodriguez*.<sup>41</sup> Second, every state constitution contains an additional textual hook: a guarantee of education in its constitution,<sup>42</sup> indicating that

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<sup>38</sup> *Id.* at 55 ("we cannot say that such disparities are the product of a system that is so irrational as to be invidiously discriminatory"); *id.* at 59 (Stewart, J., concurring).

<sup>39</sup> *Id.* at 44.

<sup>40</sup> REBELL, *supra* note 29, at 223-25 (outlining ways in which Supreme Court refused to engage financial equity debates because of the lack of "manageable standards"); Josh Kagan, *A Civics Action: Interpreting "Adequacy" in State Constitutions' Education Clauses*, 78 N.Y.U. L. REV. 2241, 2241-42 (2003) ("[Education Clauses] gained little attention until federal court doors were closed to education reformers."); Umpstead, *supra* note 26, at 285.

<sup>41</sup> The fact that some states analyze education claims under state Equal Protection clauses, while the federal Equal Protection clause contains no such guarantee, is demonstrative of this point. As well, Justice Brennan issued a call for state courts to expand protection beyond the scope found within the federal constitution, writing that:

[T]he very premise of the cases that foreclose federal remedies constitutes a clear call to state courts to step into the breach. With the federal locus of our double protections weakened, our liberties cannot survive if the states betray the trust the Court has put in them. And if that trust is, for the Court, strong enough to override the risk that some states may not live up to it, how much more strongly should we trust state courts whose manifest purpose is to expand constitutional protections. With federal scrutiny diminished, state courts must respond by increasing their own. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 503 (1977).

<sup>42</sup> Cover, *supra* note 18, at 404. See also Julius Chambers, *Adequate Education for All: A Right, An Achievable Goal*, 22 HARV. C.R.-C.L. L. REV. 55, 65-67 (1987).

education is afforded a higher status on the state level than on the federal level.

Litigators at the state level proceeded under two theories: first, Equal Protection and then educational adequacy. Some equal protection challenges to education-funding schemes initially met with success, even before the Supreme Court's *Rodriguez* decision.<sup>43</sup> Today, a handful of states review educational laws under an equal protection framework.<sup>44</sup> However, many state courts, following the Supreme Court's lead, have been reluctant to declare that their own state constitutions made education a fundamental constitutional right.<sup>45</sup> Courts have declared that "local control of schools served as the rational basis" for many funding schemes with a disparate impact, and some courts "criticized plaintiffs for failing to show that funding disparities had a negative impact on school children."<sup>46</sup> When state-level Equal Protection failed reformers, they turned to educational adequacy theories, inaugurating the third wave of educational reform litigation.

Educational adequacy challenges were premised on persuading state courts to endorse a reading of state constitutions that required that each child be provided with an "adequate" education.<sup>47</sup> Adequacy litigation also met with success because the states themselves provided the remedy.<sup>48</sup> In response to new studies suggesting that declining educational performance was threatening America's position as the world superpower, states began creating academic requirements and testing standards in the mid-1980s.<sup>49</sup> These standards provided the vague concept of adequacy with substantive content,

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<sup>43</sup> See *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971).

<sup>44</sup> See, e.g., *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186 (Ky. 1989); *DuPree v. Alma Sch. Dist. No. 30 of Crawford Cnty.*, 651 S.W.2d 90 (Ark. 1983).

<sup>45</sup> See, e.g., *Thompson v. Engelking*, 537 P.2d 635, 642 (Idaho 1975); *Northshore Sch. Dist. No. 417 v. Kinnear*, 530 P.2d 178, 200 (Wash. 1974); *Robinson v. Cahill*, 303 A.2d 273, 279-88 (N.J. 1973).

<sup>46</sup> Janet D. McDonald et al., *School Finance Litigation and Adequacy Studies*, 27 U. ARK. LITTLE ROCK L. REV. 69, 75 (2004).

<sup>47</sup> MARTHA MCCARTHY & PAUL DEIGNAN, WHAT LEGALLY CONSTITUTES AN ADEQUATE PUBLIC EDUCATION? 7-8, 16-23 (1982) (writing that New York had premised its education litigation decisions on something other than the state constitution's Education Clause, which is no longer the case).

<sup>48</sup> *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 75 (1973) (Marshall, J., dissenting) ("Neither the majority nor appellants inform us how judicially manageable standards are to be derived for determining how much education is 'enough' to excuse constitutional discrimination.").

<sup>49</sup> REBELL, *supra* note 29, at 229.

instead of leaving it as an aspirational goal with no clear end point.<sup>50</sup> As one reformer put it, “standards-based reform also put into focus the fundamental goals and purposes of the nation’s system of public education” and gave “contemporary significance” to Founding-era educational provisions.<sup>51</sup>

The standards-based reform movement proved to be a significant boon to the reform movement, such that adequacy reform lawsuits succeeded in the vast majority of states where plaintiffs had not prevailed under equal protection theories.<sup>52</sup> Courts in some states cited specifically to the new state-level academic standards when declaring inadequacy.<sup>53</sup> Thus, by the end of these three waves of education litigation, reformers could use one of two legal theories and find success in just about any state.

### *B. How Courts Rule on Education Cases*

Under either legal theory—equal protection or adequacy—courts across the nation have followed a similar path when passing judgment on education finance schemes. Standards provide guideposts for courts ruling on educational adequacy, and while these guideposts are helpful for framing either the problem or the remedy, they do not substitute for legal analysis. Noted education policy reformer Michael Rebell identifies four consistent policy themes that dominate educational case law.<sup>54</sup> Although legislatively-adopted

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<sup>50</sup> *Id.* at 230.

<sup>51</sup> *Id.* Cf. Kagan, *supra* note 40, at 2249–50 (arguing that the use of standards in this manner is flawed and without solid constitutional grounding).

<sup>52</sup> See Daniel Greenspahn, *A Constitutional Right to Learn: The Uncertain Allure of Making a Federal Case out of Education*, 59 S.C. L. REV. 755, 780 (2008). According to the National Education Access Network, as of July 2012, Adequacy Plaintiffs have been successful in twenty-three of thirty-six cases. Nat’l Access Network, *Education Adequacy Liability Decisions Since 1989* (July 2012), <http://schoolfunding.info/wp-content/uploads/2011/07/School-Funding-%E2%80%98Adequacy%E2%80%99-Decisions-by-Outcome4.pdf>.

<sup>53</sup> Morgan et al., *supra* note 32, at 566–67 (citing *Alabama Coal. for Equity, Inc. v. Hunt*, Nos. CV-90-883-R, CV-91-0117 (Ala. Cir. Ct. Apr. 1, 1993), *reprinted in* Opinion of the Justices No. 338, 624 So. 2d 107, 154 (Ala. 1993)).

<sup>54</sup> REBELL, *supra* note 29, at 239 (“This constitutional core emphasizes that an adequate education must (1) prepare students to become citizens and economic participants in a democratic society; (2) relate to contemporary, not archaic educational needs; (3) be pegged to a ‘more than a minimal’ level; and (4) focus on opportunity,

standards provide a useful starting point, the analysis of this constitutionally-grounded guarantee traces these policies and is thus more fulsome.<sup>55</sup>

Rebell's first policy theme recognizes that educational policies should prepare students to be citizens and economic participants in an economic society.<sup>56</sup> This is a historic goal of education reform and policymaking. The idea of education being a fundamental part of American citizenship and success traces to the nation's founding. Thomas Jefferson, for instance, recognized that some degree of education was necessary to prepare citizens to participate effectively and intelligently in America's open political system.<sup>57</sup> Similarly, Benjamin Franklin expressed a belief that education was vital to the success of American society.<sup>58</sup> Such impulses have well outlasted the founding. The ideology behind mid-nineteenth-century education reforms at the state level was one that recognized education as "inextricably linked to America's continued growth and success."<sup>59</sup> Horace Mann, for instance, argued that a common school system was necessary "to train productive workers and loyal citizens."<sup>60</sup> As such, courts like New York's Court of Appeals asserted that "a sound basic education conveys not merely skills, but skills fashioned to meet a practical goal: meaningful civic participation in contemporary society."<sup>61</sup>

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rather than outcome.").

<sup>55</sup> As well, although courts are mindful of their policymaking limitations, to adopt learning standards as the meaning of "adequacy" would "be to cede to a state agency the power to define a constitutional right." Campaign for Fiscal Equity, Inc. v. State (CFE II), 801 N.E.2d 326, 332 (N.Y. 2003).

<sup>56</sup> REBELL, *supra* note 29, at 239.

<sup>57</sup> *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972) (accepting President Jefferson's proposition).

<sup>58</sup> Benjamin Franklin, *Proposals Relating to the Education of Youth in Pensilvania* (1749), available at [www.archives.upenn.edu/primdocs/1749proposals.html](http://www.archives.upenn.edu/primdocs/1749proposals.html). In his *Proposals Relating to the Education of Youth in Pensilvania*, available at [www.archives.upenn.edu/primdocs/1749proposals.html](http://www.archives.upenn.edu/primdocs/1749proposals.html). Benjamin Franklin declared in the first sentence, "The good Education of Youth has been esteemed by wise Men in all Ages, as the surest Foundation of the Happiness both of private Families and of Common-wealths. Almost all Governments have therefore made it a principal Object of their Attention, to establish and endow with proper Revenues, such Seminaries of Learning, as might supply the succeeding Age with Men qualified to serve the Publick with Honour to themselves, and to their Country."

<sup>59</sup> Kagan, *supra* note 40, at 2268.

<sup>60</sup> See Christopher E. Adams, *Is Economic Integration the Fourth Wave in School Finance Litigation?*, 56 EMORY L.J. 1613, 1636 (2007).

<sup>61</sup> Campaign for Fiscal Equity, Inc. v. State (CFE II), 801 N.E.2d 326, 330 (N.Y.

The second policy theme Rebell identifies is that educational policies need to relate to contemporary, rather than archaic, educational needs.<sup>62</sup> Case law establishes that courts and legislatures have a duty to be mindful of changes in educational scholarship, in pedagogy, and in educational needs.<sup>63</sup> For example, in Alabama, the state Supreme Court interpreted Alabama's constitutional education provision to "impl[y] a continuing obligation to ensure compliance with evolving educational standards."<sup>64</sup> An awareness of "evolving educational standards" was necessary because, ultimately, an "appropriate" education would prepare students "for the responsible duties of life."<sup>65</sup> Because those responsible duties change, so must the education provided by the state. Similarly, in Massachusetts, the state Supreme Court established that "[t]he content of the duty to educate which the [state] Constitution places on the Commonwealth necessarily will evolve together with our society."<sup>66</sup> In Washington, the state Supreme Court held that "the State's constitutional duty goes beyond mere reading, writing, and arithmetic" because state courts "must *interpret* the constitution in accordance with the demands of modern society or it will be in constant danger of being atrophied and, in fact, may even lose its original meaning."<sup>67</sup> This policy theme implies an affirmative duty for courts and legislatures to understand how the policies they enact affect a student's ability to participate in society.

The third overarching policy theme is that educational adequacy needs to be calibrated to "more than a minimal" level.<sup>68</sup> This policy has more relevance to adequacy suits than equity suits. The New York State Court of Appeals, for

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2003). *See also* Dupree v. Alma School Dist. No. 30 of Crawford Cnty., 651 S.W.2d 90, 93 (Ark. 1983) ("Education becomes the essential prerequisite that allows our citizens to be able to appreciate, claim and effectively realize their established rights.")

<sup>62</sup> REBELL, *supra* note 29, at 239.

<sup>63</sup> *See, e.g.*, Alabama Coal. for Equity, Inc. v. Hunt, Nos. CV-90-883-R, CV-91-0117 (Ala. Cir. Ct. Apr. 1, 1993), *reprinted in* Opinion of the Justices No. 338, 624 So. 2d 107 (Ala. 1993).

<sup>64</sup> *Id.* at 154.

<sup>65</sup> *Id.*

<sup>66</sup> McDuffy v. Sec'y of Exec. Office of Educ., 615 N.E.2d 516, 555 (Mass. 1993).

<sup>67</sup> Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71, 94 (Wash. 1978).

<sup>68</sup> REBELL, *supra* note 29, at 239.

instance, stated that “students require more than an eighth-grade education to function productively as citizens, and that the mandate of the Education Article for a sound basic education should not be pegged to the eighth or ninth grade . . . .”<sup>69</sup> This is an implicit recognition that educational adequacy must mean more than what is already guaranteed at the federal level, since adequacy litigation would be useless if it only duplicated federal, and sometimes state, equal protection outcomes.<sup>70</sup> In *Rodriguez*, the Court indicated that the denial of all education would violate equal protection.<sup>71</sup> Particularly in states where state guarantees of equal protection are broader than the federal analogue, holding that educational adequacy is satisfied by a bare minimum of education would render the various state constitutional education clauses entirely superfluous, because *Rodriguez* indicates that that work is done by equal protection.<sup>72</sup>

Finally, the fourth policy theme recognizes that education cases focus more on opportunity rather than outcome.<sup>73</sup> As the New York Court of Appeals put it, “plaintiffs have a right not to equal state funding but to schools that provide the opportunity for a sound basic education.”<sup>74</sup> Tennessee’s Supreme Court noted in perhaps stronger language that “the legislature’s constitutional mandate is to maintain and support a system of public education that affords substantially equal educational opportunities to all students.”<sup>75</sup> In Montana, the

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<sup>69</sup> Campaign for Fiscal Equity, Inc. v. State (CFE II), 801 N.E.2d 326, 331 (N.Y. 2003).

<sup>70</sup> If the various Education Articles and Equal Protection Clauses produced identical substantive guarantees, this would render the education clauses essentially superfluous, in violation of a well-settled canon of construction. See Stephen M. Durden, *Textualist Canons: Cabining Rules or Predilective Tools*, 33 CAMPBELL L. REV. 115, 121–30 (2010) (discussing what the author refers to as the “superfluity canon”).

<sup>71</sup> San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 37 (1973) (“Whatever merit appellees’ argument might have if a State’s financing system occasioned an absolute denial of educational opportunities to any of its children, that argument provides no basis for finding an interference with fundamental rights where only relative differences in spending levels are involved and where—as is true in the present case—no charge fairly could be made that the system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.”).

<sup>72</sup> *But see* Charlet v. Legislature of State, 713 So. 2d 1199, 1206 (La. Ct. App. 1998) (“If some funding is being provided by the State to every school district, the State has met whatever quantification may be implied by the word ‘minimum’ in the constitutional provision.”).

<sup>73</sup> REBELL, *supra* note 29, at 239.

<sup>74</sup> CFE II, 801 N.E.2d at 346.

<sup>75</sup> Tenn. Small Sch. Sys. v. McWhorter, 91 S.W.3d 232, 241 (Tenn. 2002).

state Supreme Court “conclude[d] that the guarantee of equality of educational opportunity applies to each person of the State of Montana, and is binding upon all branches of government whether at the state, local, or school district level.”<sup>76</sup> One commentator has found it “surprising” how many cases decided within the “adequacy” framework focused on “equality of educational opportunity” or “comparability.”<sup>77</sup> There is no similar focus on outcome.

As courts have applied this policy framework, a remarkably consistent cause of action has developed. In many states, courts consciously look at state inputs and outputs within the educational system, determining whether the resources invested in an education system are sufficient to provide students with an adequate opportunity to receive a quality education.<sup>78</sup> These policies form the basis of the political dynamic that is key to educational reform on the state level because they are not policies that relate to specific educational programs, but rather to constitutional text. These policies are the tools that state courts use to ensure legislative fidelity to their constitutional duties.

### *C. The Interplay Between Courts and Legislatures*

After a court declares that an educational system is constitutionally inadequate, there is a need to define a remedy. It is the remedial phase,<sup>79</sup> rather than the demonstration of

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<sup>76</sup> *Helena Elementary Sch. Dist. No. 1 v. State*, 769 P.2d 684, 690 (Mont. 1989).

<sup>77</sup> James Ryan, *Standards, Testing, and School Finance Litigation*, 86 TEX. L. REV. 1223, 1232–33 (2008).

<sup>78</sup> *Compare* Campaign for Fiscal Equity, Inc. v. State (CFE I), 655 N.E.2d 661, 666 (N.Y. 1995) (“If the physical facilities and pedagogical services and resources made available under the present system are adequate to provide children with the opportunity to obtain these essential skills, the State will have satisfied its constitutional obligation.”) *with* Morgan et al., *supra* note 30 (the authors, the lead litigators in the Alabama educational adequacy case *Harper v. Hunt*, discuss the various ways in which they used inputs and outputs to establish constitutional inadequacy in Alabama’s educational system.).

<sup>79</sup> By “remedial phase,” the author means that part of a given education lawsuit in which the court determines at least the outlines of a remedy to the identified constitutional violation. In many lawsuits, the declaration of inadequacy and the development of the remedy will not be separate phases of the trial, although they may be, particularly where the state legislature completely ignores or is insufficiently attentive to the dictates of the state courts.



inadequacy, that is the difficult part of education litigation.<sup>80</sup> Courts' own institutional concerns are at their apex in the context of education funding, where allocation of state monies is a quintessentially legislative function, as is the weighing of competing policy choices.<sup>81</sup> As such, courts have exhibited a "propensity . . . to defer to the legislature for a remedy [as] a workable compromise between the judiciary and political branches . . ." <sup>82</sup> Moreover, courts are more likely to meet political resistance when they attempt to override legislative choices.<sup>83</sup>

State courts, therefore, have, for the most part, followed a consistent pattern in the remedial phase: after declaring that inadequacy exists, and detailing the reasons why, the courts remand to the legislature to fashion a remedy.<sup>84</sup> In Alabama, for example, the state Supreme Court declared that "it is the legislature that bears the 'primary responsibility' for devising a constitutionally valid public school system."<sup>85</sup> Although it acknowledged that a trial court might have a role in fashioning a remedy, it also recognized that "the judiciary *should* exercise this power *only in the event* the legislature

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<sup>80</sup> See Aaron Y. Tang, *Broken Systems, Broken Duties: A New Theory for School Finance Litigation*, 94 MARQ. L. REV. 1195, 1210 (2011) ("persuading a court that a state has violated its constitutional duty to provide an adequate or equitable education is only the beginning of the battle").

<sup>81</sup> See, e.g., *Bd. of Educ., Levittown Union Free Sch. Dist. v. Nyquist*, 439 N.E.2d 359, 363 (N.Y. 1982); Cora True-Frost, Note, *Beyond Levittown Towards a Quality Education for All: Litigating High Minimum Standards for Public Education—The CFE Case*, 51 SYRACUSE L. REV. 1015, 1041-42 (2001).

<sup>82</sup> William Koski, *Of Fuzzy Standards and Institutional Constraints: A Re-Examination of the Jurisprudential History of Educational Finance Reform Litigation*, 43 SANTA CLARA L. REV. 1185, 1297 (2003).

<sup>83</sup> See James E. Ryan, *The Influence of Race in School Finance Reform*, 98 MICH. L. REV. 432, 457-71 (1999) (describing the struggles to remedy school finance systems ruled unconstitutional in eleven states, and concluding that in about half of these cases the relevant judicial decree was met with a significant amount of legislative recalcitrance and public opposition).

<sup>84</sup> See Koski, *supra* note 82, at 1259 ("Although the separation of powers doctrine has proven flexible in describing the role of the court at the liability stage of the litigation, all courts that have overturned their educational finance scheme invoke the doctrine at the remedial phase.").

<sup>85</sup> *Ex parte James*, 713 So. 2d 869, 882 (Ala. 1997), *vacated in part sub nom. Siegelman v. Ala. Ass'n of Sch. Bds.*, 819 So. 2d 568 (Ala. 2001). In Alabama, the public school system was declared unconstitutional in part because "Alabama's poorer school systems are among the lowest spending systems in the nation, and include some of the worst schools in the country," and also because Alabama schools failed to meet regional accreditation standards. See Opinion of the Justices, 624 So. 2d 107, 126-27 (Ala. 1993).

fails or refuses to take appropriate action.”<sup>86</sup> In Texas, the state Supreme Court was quite explicit that its role went no further than declaration of a constitutional violation.<sup>87</sup> In New Hampshire, the state Supreme Court declared that the state constitution conferred a substantive right to education on the state’s students, and then subsequently expressed confidence “that the legislature and the Governor will fulfill their responsibility with respect to defining the specifics of, and the appropriate means to provide through public education, the knowledge and learning essential to the preservation of a free government.”<sup>88</sup> In Washington, while fending off a separation of powers argument, the state Supreme Court asserted that it could declare a constitutional violation and that it was “firmly convinced the other branches of government also will carry out their defined constitutional duties in good faith and in a completely responsible manner.”<sup>89</sup>

However, despite their reticence to fully define a remedy to a constitutionally inadequate educational system, courts do not merely declare inadequacy and then remove themselves from the picture, as this would likely do little to actually improve the situation. Instead, courts give some measure of guidance to legislatures in order for their decrees to have any effect. Some scholars see the positive nature of the educational right, as contrasted with the negative nature of most federally guaranteed rights,<sup>90</sup> as counseling an active judicial role.<sup>91</sup> For

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<sup>86</sup> *Ex parte James*, 713 So. 2d at 882.

<sup>87</sup> *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 399 (Tex. 1989) (“[W]e do not now instruct the legislature as to the specifics of the legislation it should enact; nor do we order it to raise taxes. The legislature has primary responsibility to decide how best to achieve an efficient system. We decide only the nature of the constitutional mandate and whether that mandate has been met.”). The Texas system violated the state constitution because “spending per student varie[d] widely [from district to district], ranging from \$2,112 to \$19,333.” *Id.* at 392. The court found that this was not an “efficient” system as required by the Texas Constitution. *Id.* at 393–94.

<sup>88</sup> *Claremont Sch. Dist. v. Governor*, 635 A.2d 1375, 1381 (N.H. 1993).

<sup>89</sup> *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71, 89 (Wash. 1978) (en banc).

<sup>90</sup> See Frank B. Cross, *The Error of Positive Rights*, 48 UCLA L. REV. 857, 864–74 (2001) (discussing negative and positive rights at the federal level and concluding that the Bill of Rights is “essentially negative in nature”). Cross distinguishes between negative and positive rights as follows: “One category [negative] is a right to be free from government, while the other [positive] is a right to command government action.” *Id.* at 864.

instance, Professor Jonathon Feldman has argued that abdicating from enforcement of positive rights on separation of powers grounds “represents a serious misinterpretation of the negative separation of powers doctrine.”<sup>92</sup> This scholar also asserts that “[a] court’s articulation of a legislature’s duty does not represent judicial tyranny.”<sup>93</sup> Recognizing that governmental inertia represents the greatest threat to positive rights, he concludes that “[a]s long as the legislature retains its core function as policymaker and allocator of public funds, the courts may establish the parameters within which legislative action must proceed.”<sup>94</sup> Similarly, Helen Hershkoff has argued for state justiciability doctrines that “respond more closely to state and local concerns” and which are not subject to the same constraints as Article III courts, in part because of the positive rights contained within state constitutions.<sup>95</sup> Both Feldman and Hershkoff recognize that a right’s character as “positive” does not preclude judicial enforcement. Indeed, a paradigm within which state courts actively participate in a dialogue with the political branches about vindication of those rights is likely to produce more fruitful outcomes.<sup>96</sup> Professor Rebell has noted that judicial involvement in other areas of public law, particularly administrative law, has proven beneficial to the development of public policy and has not been characterized by judicial ineptitude.<sup>97</sup>

Courts have taken up this charge to define the scope of positive rights and do provide guidance to legislatures.<sup>98</sup> Following a declaration of inadequacy, courts often provide certain guidelines consistent with the positive character of the

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<sup>91</sup> See, e.g., Helen Hershkoff, *State Courts and the “Passive Virtues”*: Rethinking the Judicial Function, 114 HARV. L. REV. 1833 (2001); Jonathan Feldman, *Separation of Powers and Judicial Review of Positive Rights Claims: The Role of State Courts in an Era of Positive Government*, 24 RUTGERS L.J. 1057 (1993).

<sup>92</sup> Feldman, *supra* note 91, at 1060. For Professor Feldman, the term “negative separation of powers” refers to a system in which power is strictly divided between three branches of government, as it is in all U.S. jurisdictions. See *id.* at 1060.

<sup>93</sup> *Id.* at 1060–61.

<sup>94</sup> *Id.* at 1091.

<sup>95</sup> See Hershkoff, *supra* note 91, at 1885–90, 1929.

<sup>96</sup> A typical objection to judicial entrance into policy arenas centers on the political insulation enjoyed by judges. While this is certainly true of federal judges, who are unelected, this argument carries much less force at the state level, where many judges must stand before the populace at regular intervals.

<sup>97</sup> See Michael Rebell, *Poverty, “Meaningful” Educational Opportunity, and the Necessary Role of the Courts*, 85 N.C. L. REV. 1467, 1531–35 (2007).

<sup>98</sup> See, e.g., *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 212–13 (Ky. 1989).

substantive educational entitlement.<sup>99</sup> In the seminal case *Rose v. Council for Better Education, Inc.*,<sup>100</sup> the Kentucky Supreme Court outlined what it termed “the essential, and minimal, characteristics of an ‘efficient’ system of common schools.”<sup>101</sup> The Kentucky court also held that education was a fundamental right in that state,<sup>102</sup> arguably justifying an even broader judicial role than that otherwise required for the enforcement of positive rights. Courts operating within an adequacy framework have also followed Kentucky’s lead explicitly.<sup>103</sup> Such guidance does not violate the very real separation of powers concerns that play a large role in education lawsuits. This interplay between the judicial and legislative branches forms a political dynamic that creates the conditions necessary for educational reform.<sup>104</sup> Professor

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<sup>99</sup> Koski, *supra* note 82, at 1245-52 (describing the early attempts by courts to outline the adequacy standard). Professor Koski refers to the “fuzzy standards” that courts place on the legislature’s action following a finding of inadequacy as “the ideal combination of restraint and activism.” *Id.* at 1240.

<sup>100</sup> *Rose*, 790 S.W.2d at 186.

<sup>101</sup> *Id.* at 212-13 (“We concur with the trial court that an efficient system of education must have as its goal to provide each and every child with at least the seven following capacities: (i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization; (ii) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices; (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation; (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness; (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage; (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and (vii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.”).

<sup>102</sup> *Id.* at 206.

<sup>103</sup> *See, e.g.,* *Claremont Sch. Dist. v. Governor*, 703 A.2d 1353, 1359 (N.H. 1997) (“We look to the seven criteria articulated by the Supreme Court of Kentucky as establishing general, aspirational guidelines for defining educational adequacy.”); *McDuffy v. Sec’y of Exec. Office of Educ.*, 615 N.E.2d 516, 554 (Mass. 1993) (“The guidelines set forth by the Supreme Court of Kentucky fairly reflect our view of the matter and are consistent with the judicial pronouncements found in other decisions.”).

<sup>104</sup> Professor Greenspahn recounts some encouraging evidence to this effect:

Elected officials, following state court orders, have increased spending by 11% on schools in the poorest districts and by 7% in median districts. Increased funding for the neediest districts has increased student proficiency in states such as Kentucky and Massachusetts and improved school facilities in others, such as Arizona. Furthermore,

William Koski, a noted education scholar and litigator, has described the dynamic at play in education adequacy jurisprudence:

A fuzzy standard allows plaintiffs to bring novel actions and permits the judiciary to invalidate what it views as an unjust educational finance scheme, while those same fuzzy standards permit legislatures to respond to the law in the face of competing political demands. Law, under this analysis, does little to shape legislative or executive behavior on the books. It is not self-executing. Litigation and judicial intervention, however, can influence legislative behavior, but only to a certain extent. Litigation and a court's decision to strike down an educational finance system can serve as the catalyst for legislative reform, as they can provide the political cover for reform-minded policy-makers to act. And if the political branches do not respond appropriately, the judicial "veto power" can again be invoked.<sup>105</sup>

As such, it remains true that in the mine run of cases it will be the legislature who is responsible in the first instance for fashioning the remedy for a constitutionally deficient educational system. It is for this reason that extensive and growing federal involvement in education is troubling.

Both NCLB and RTTT attach significant strings to state acceptance and receipt of federal funds,<sup>106</sup> which are vitally important if a state is to create a constitutionally adequate education system. Although a state theoretically has a choice as to whether or not to accept the proffered federal funds,<sup>107</sup> there is no other actor that can replace the funds that a state might otherwise receive from the federal government.<sup>108</sup> Given

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studies prompted by litigation in more than thirty states have resulted in revisions to school funding formulas so that educational resources are delivered based on actual student need. Greenspahn, *supra* note 52, at 780 (citations omitted).

<sup>105</sup> Koski, *supra* note 82, at 1297-98.

<sup>106</sup> For instance, NCLB required states to develop a plan, to be approved by the Secretary of Education, to implement "challenging academic standards" (a term which is narrowly defined), and to develop a way meaningfully to ensure that students were making "adequate yearly progress" (a term also narrowly defined). *See generally* 20 U.S.C. § 6311 (2012) ("State Plans"). RTTT has, in its two rounds, required states to adopt certain legislative priorities, required that a State's Fiscal Stabilization Fund program (itself required to receive a Race to the Top grant) be approved by the Secretary of Education, and that there be no legal barrier within a state to linking data on student achievement (a term defined by the federal government) to teacher evaluation, in order effectuate further RTTT goals. *See generally* U.S. DEP'T OF EDUC., EXECUTIVE SUMMARY: RACE TO THE TOP (Nov. 2009), available at <http://www2.ed.gov/programs/racetothetop/executive-summary.pdf>. The limitations outlined here are simply examples of the strings attached to federal funding in both instances.

<sup>107</sup> *See* South Dakota v. Dole, 483 U.S. 203, 207 (1987).

<sup>108</sup> Lynn A. Baker, *The Spending Power and the Federalist Revival*, 4 CHAP. L.

these budgetary realities, as well as the constitutional imperative of educating children, state legislatures are significantly limited in their ability to reject these federal funds. Despite some initial resistance to NCLB,<sup>109</sup> every state eventually chose to accept the federal money and the attached conditions, at least initially.

Recently, however, due to a provision in the law that would have cut off federal funding if states failed to meet almost impossible goals,<sup>110</sup> most states were granted waivers from some of the program's more onerous requirements.<sup>111</sup> However, these waivers themselves came with conditions attached, as the Obama Administration used the waivers to force states to adopt favored reforms.<sup>112</sup> Thus, these waivers simply represent the shift from one federal policy to another. On the one hand, attaching such limitations on the use of federal money is affirmatively good because it protects federal legislative priorities; federalism is a two-way street and "[c]oncern for protecting the states should not obscure the need to vindicate the authority of Congress to choose whether and how to spend its money."<sup>113</sup>

But there is another side to this coin, which is that "[a] state's freedom from federal interference . . . is a freedom to

REV. 195, 212 (2001) ("states in the second group are severely constrained in their decision-making by the lack of equivalent, alternative sources of revenue. There is no competitor to the federal government to which these states might turn for substitute financial assistance."). Professor Baker also points out that this money might otherwise be raised by the states through their own direct taxing authority, except that state taxes already compete with federal taxes, and she asserts that "the states implicitly have been able to tax only the income and property remaining to their residents and property owners after the federal government has taken its yearly share." *Id.* at 213.

<sup>109</sup> See Sam Dillion, *Utah Vote Rejects Part of Education Law*, N.Y. TIMES (Apr. 20, 2005), [http://www.nytimes.com/2005/04/20/national/20child.html?\\_r=1&pagewanted=print&position=&](http://www.nytimes.com/2005/04/20/national/20child.html?_r=1&pagewanted=print&position=&)

<sup>110</sup> NCLB would have required states to achieve 100 percent proficiency in math and English by 2014 without an update. 20 U.S.C. § 6311(b)(2)(F) (2012).

<sup>111</sup> See Joy Resmovits, *No Child Left Behind Waivers Granted to More Than Half of U.S. States*, HUFFINGTON POST (July 6, 2012), [http://www.huffingtonpost.com/2012/07/06/no-child-left-behind-waivers\\_n\\_1652574.html](http://www.huffingtonpost.com/2012/07/06/no-child-left-behind-waivers_n_1652574.html).

<sup>112</sup> See *id.*

<sup>113</sup> Erwin Chemerinsky, *Protecting the Spending Power*, 4 CHAP. L. REV. 89, 89 (2001).

make choices, not just a freedom to choose wisely.”<sup>114</sup> As such, although “Congress may use its spending power to create incentives for states to act in accordance with federal policies[,] . . . when pressure turns into compulsion, the legislation runs contrary to our system of federalism.”<sup>115</sup> This is particularly important in the context of education. Where conditions on federal money are too restrictive, they limit the array of choices available to state legislatures in any given area of policy. In the context of education, where a court will establish limits on the exercise of legislative discretion but call upon the legislature to formulate a remedy in the first instance, a state court’s action will be less effective since the legislature is already constrained by conditions attached to the receipt of federal funds. Indeed, where the effect of the federal policy is as harmful as some policies may be,<sup>116</sup> the court’s ability to vindicate the rights of students might be entirely ineffective. This possibility becomes more plausible as federal intervention grows.

### III. THE PROBLEM WITH FEDERAL INVOLVEMENT

Restrictions on the ability of state legislatures and courts to remedy constitutionally deficient education systems are problematic, in large part because the federal government has proven inept at formulating education policy that is responsive to the needs of states. Nothing about the federal government suggests that it should be unskilled at formulating education policy. However, there are times in which federal education policy is ineffective. These instances should force us to ask whether and when it is normatively desirable for the federal government to be formulating educational policy, particularly when a substantive guarantee of some level of educational opportunity exists in the vast majority of states but not at the federal level. Accordingly, this Part describes instances in which federal involvement in education has proven to be less-than-successful.

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<sup>114</sup> Lynn A. Baker & Mitchell N. Berman, *Getting Off the Dole: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It to Do So*, 78 IND. L.J. 459, 479 (2003).

<sup>115</sup> Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S.Ct. 2566, 2602 (2012) (quoting Steward Machine Co. v. Davis, 301 U.S. 548, 590 (1937)).

<sup>116</sup> See Part III.A *infra*.

### *A. The Example of New York State*

New York, a state that recently adopted a policy developed pursuant to RTTT, provides a useful case study for the issues raised by federal involvement. New York is useful as a case study because of its relatively well-developed adequacy jurisprudence, its recent fight over RTTT-inspired policy, and the availability of relevant social science evidence. New York's policy was enjoined and then modified, but that result developed apart from the state's educational adequacy jurisprudence. However, the very adoption of the policy raised the specter of the issues considered in this Comment, making this case apt for consideration.

Subsection 1 briefly covers New York's adequacy case law. Subsection 2 examines the policy that was proposed and which would have been enacted absent action by the teachers. Subsection 3 applies New York's adequacy jurisprudence to the policy at hand and considers the situation in which the legislature might have found itself had the policy been enacted and/or litigated in a different setting.

#### *1. New York's adequacy framework*

New York's Constitution requires that the state provide for all children "a system of free common schools, wherein all the children of [New York] may be educated."<sup>117</sup> New York's courts interpret this to require that the state provide a "sound basic education."<sup>118</sup> Consistent with other adequacy cases, New York's Court of Appeals has written that "[s]uch an education should consist of basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury."<sup>119</sup> The State's constitutional obligation is satisfied "if the physical facilities and pedagogical services and resources made available . . . are adequate to provide children with an

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<sup>117</sup> N.Y. CONST. art. XI, § 1.

<sup>118</sup> Bd. of Educ., Levittown Union Free Sch. Dist. v. Nyquist, 439 N.E.2d 359, 369 (N.Y. 1982); see also Campaign for Fiscal Equity, Inc. v. State (CFE I), 655 N.E.2d 661, 665 (N.Y. 1995).

<sup>119</sup> CFE I, 655 N.E.2d at 666.



opportunity to obtain these essential skills.”<sup>120</sup>

In interpreting whether or not this obligation is met, like most courts, New York courts look at inputs and outputs: that is, whether the resources used to educate students provide students with adequate educational opportunity.<sup>121</sup> The “teaching” input has been described as “surely [the] most important.”<sup>122</sup> In *Campaign for Fiscal Equity, Inc. v. State*, the New York Court of Appeals rejected an approach that would have evaluated teacher quality using only one metric (principal evaluation) and instead held that “teacher certification, test performance, experience and other factors measure quality of teaching.”<sup>123</sup> And even where those factors may demonstrate adequate teacher quality in some areas of the state,

the constitutional history of the Education Article shows that the objective was to make it imperative on the State to provide adequate free common schools for the education of all of the children of the State and that the new provision would have an impact upon places in the State of New York where the common schools are not adequate.<sup>124</sup>

Thus, when a policy provides insufficient educational opportunity in one area of the state, its sufficiency in other parts of the state does not preclude New York courts from declaring inadequacy.

New York courts further require a causal link between state action and inadequate educational opportunity.<sup>125</sup> Thus, “allegations of academic failure alone, without allegations that the State somehow fails in its obligation to provide minimally acceptable educational services, are insufficient to state a cause of action under the Education Article.”<sup>126</sup> On the other hand, “quality of teaching correlates with student performance.”<sup>127</sup> Where it is state policy that has an identifiable and quantifiable effect on the quality of teaching that schools are able to provide and there is a causal link to poor student

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<sup>120</sup> *Id.*

<sup>121</sup> See *Campaign for Fiscal Equity, Inc. v. State* (CFE II), 801 N.E.2d 326, 332 (N.Y. 2003). See also *supra* text accompanying note 61; *Alabama Coal. for Equity, Inc. v. Hunt*, Nos. CV-90-883-R, CV-91-0117 (Ala. Cir. Ct. Apr. 1, 1993), *reprinted in* *Opinion of the Justices* No. 338, 624 So. 2d 107 (Ala. 1993).

<sup>122</sup> *CFE II*, 801 N.E.2d at 333.

<sup>123</sup> *Id.* at 333-34.

<sup>124</sup> *Id.* at 333 (quoting *CFE I*, 665 N.E.2d at 672 (Levine, J., concurring)).

<sup>125</sup> *CFE I*, 655 N.E.2d at 667.

<sup>126</sup> *Paynter v. State*, 797 N.E.2d 1225, 1229 (N.Y. 2003).

<sup>127</sup> *CFE II*, 801 N.E.2d at 334.

performance, plaintiffs—generally school boards, school districts, parents, and students—have a viable cause of action in New York.

## 2. *New York's response to RTTT*

Like many other states, New York participated in Phase II of the Obama Administration's RTTT Program, eventually receiving \$696,646,000 for their application.<sup>128</sup> Pursuant to this application, New York State adopted a policy that essentially made student performance on high-stakes testing—testing that carries with it incredibly high consequences, such as student eligibility for promotion from one grade to the next<sup>129</sup>—dispositive of teacher evaluations.<sup>130</sup> Under the policy, student scores on yearly high-stakes tests would have comprised 40% of a teacher's yearly evaluation.<sup>131</sup> Fortunately, the program was enjoined by court order because the implementing regulations went beyond the scope of their enabling statutes.<sup>132</sup> However, the regulation, had it been enacted, would have weighed heavily on the educational rights of New York's racially and socioeconomically disadvantaged children.

For instance, under this policy as it would have been implemented in New York City, the measures adopted by the Board of Regents would have rated 18% of teachers "ineffective"—a number that would have been the highest in the nation.<sup>133</sup> Such a rating can get a teacher fired after two

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<sup>128</sup> N.Y. State United Teachers *ex rel.* Iannuzzi v. Bd. of Regents of Univ. of State of N.Y., 929 N.Y.S.2d 699, 701 (N.Y. Sup. Ct. 2011).

<sup>129</sup> For a general discussion of high-stakes testing, see Rachel F. Moran, *Sorting and Reforming: High-Stakes Testing in the Public Schools*, 34 AKRON L. REV. 107 (2000).

<sup>130</sup> Scott Waldman, *Regents Move Bar on Teacher Ratings*, ALBANY TIMES-UNION (May 17, 2011), <http://www.timesunion.com/local/article/Regents-move-bar-on-teacher-ratings-1382073.php>.

<sup>131</sup> *Id.*

<sup>132</sup> N.Y. State United Teachers, 929 N.Y.S.2d at 703-704.

<sup>133</sup> Yoav Gonen, "18%" of Teachers Get an F, N.Y. POST (July 22, 2011), [http://www.nypost.com/p/news/local/of\\_teachers\\_get\\_an\\_bud6BqFiyJmlrg9Oji4SO](http://www.nypost.com/p/news/local/of_teachers_get_an_bud6BqFiyJmlrg9Oji4SO). The evaluation system would also have permitted districts to use test scores from math and English tests only, meaning that social studies and science teachers could have been held responsible for test scores in other subjects. This provision of the Regents' guidelines would also collapse under the analysis of this Note.

years, tenure provisions notwithstanding. While such a number would likely not have been replicated elsewhere in the state,<sup>134</sup> the over-seven-fold increase in “ineffective” ratings that New York City would have experienced would be a likely candidate for repetition in other parts of the state, especially in urban school districts. While the previous system for rating teachers served the interests of neither students nor teachers (because its subjective factors were subject to potentially harmful manipulation by administrators),<sup>135</sup> the new system the Board of Regents attempted to institute may have been worse.

To begin with, the method used for evaluating student performance—high-stakes testing—is generally flawed. Racially disparate performance on standardized and high-stakes testing is a well-documented phenomenon.<sup>136</sup> This factor alone would suggest that minority students who tend to be concentrated in urban school districts<sup>137</sup> will score lower than their white peers—concentration in certain school districts logically should have a heavier impact on those teachers, accelerating turnover in those areas. Further, students attending school districts without adequate facilities or without enough books to go around will be disadvantaged relative to their counterparts in more affluent districts even before the school year begins—without regard for intelligence. In many cases, those students living in these poor districts are minorities.<sup>138</sup> In New York State, these resource disparities still threaten to and often do produce huge gaps in scores between affluent suburban and

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<sup>134</sup> See *id.*

<sup>135</sup> See, e.g., *Q&A on Teacher Improvement Plan*, UNITED FEDERATION OF TEACHERS (May 12, 2010), <http://www.uft.org/q-issues/qa-teacher-evaluation-and-improvement-plan>.

<sup>136</sup> See, e.g., Roy O. Freedle, *Correcting the SAT's Ethnic and Social Class Bias: A Method for Reestimating SAT Scores*, 73 HARV. EDUC. REV. 1 (2003). The problem is not confined to the SAT. See Yasmin Tara Rammohan, *Advocates Say Standardized Tests Often Flunk Cultural Bias Scrutiny*, MEDILL REPORTS CHICAGO (May 9, 2007), <http://news.medill.northwestern.edu/chicago/news.aspx?id=35935>.

<sup>137</sup> Linda Darling-Hammond, *Unequal Opportunity: Race and Education*, BROOKINGS REVIEW 29 (1998).

<sup>138</sup> See, e.g., Teachers Coll., Columbia Univ., *Why Boundaries Matter: A Summary of Five Separate and Unequal Long Island School Districts*, CENTER FOR UNDERSTANDING RACE AND EDUCATION 7 (2009), available at <http://www.policyarchive.org/handle/10207/bitstreams/95995.pdf> (last accessed Nov. 5, 2012) (“racial segregation in public schools appears to persist across urban and suburban contexts, and the distribution of ‘tangible’ educational resources—e.g. public funding, qualified teachers, supplies and good facilities, etc.—roughly correlates with the race, affluence and privilege of the students served”).

poorer districts where the majority of students are of non-white backgrounds.<sup>139</sup>

But even apart from the ways in which race and poverty serve as proxies for each other within public schools, one study that “examined the relationship between a student’s location and his or her achievement” found that “for the country as a whole, the correlation [between the proportion of a school’s pupils in poverty and its average achievement level] is about .5 or .6. No other single social measure is consistently more strongly related than poverty to school achievement.”<sup>140</sup> As such, students in racially or socioeconomically disadvantaged schools are already behind the eight ball with respect to student achievement. The use of high-stakes tests to measure student achievement gives already vulnerable students yet another hill to climb. By making such performance dispositive of teacher evaluation, another obstacle develops. As one study noting the connection between race, poverty, and performance, along with the raw numbers already available from New York City, demonstrates, making student performance dispositive of teacher evaluations in this way will likely have the effect of increasing teacher turnover.

High rates of teacher turnover provide yet an additional disadvantage for minority students, as teacher turnover depresses student achievement and disproportionately harms minority student achievement.<sup>141</sup> This study documented

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<sup>139</sup> Data collected by the New York Times brings this contrast out in sharp relief. See *New York School Test Scores*, N.Y. TIMES, <http://projects.nytimes.com/new-york-schools-test-scores> (last visited Nov. 5, 2012). To take one example, the Syracuse City School District, the fifth-largest in the state, is 54% black and 66% poor (however those terms are defined). For every grade between third and eighth, SCSD’s pass rate was 30–40% below the state’s median. By contrast, the Fayetteville-Manlius School District, which is 4% poor and 2% Black, and which is in suburban Syracuse, boasts pass rates among the same age populations which are at least 20% better than the state median.

<sup>140</sup> John Charles Boger, *Education’s “Perfect Storm”?: Racial Resegregation, High-Stakes Testing, School Resource Inequities: The Case of North Carolina*, 81 N.C. L. REV. 1375, 1416 (2003) (quoting ALISON WOLF, NAT’L INST. OF EDUC., COMPENSATORY EDUC. STUDY GROUP, THE RELATIONSHIP BETWEEN POVERTY AND ACHIEVEMENT I–II (1977)). A correlation coefficient of .5 or .6 means that roughly one-third of the variation is related to the proportion of the school’s pupils in poverty.

<sup>141</sup> Matthew Ronfeldt et al., *How Teacher Turnover Harms Student Achievement* (Nat’l Bureau of Econ. Research, Working Paper No. 17176), available at [www.nber.org/papers/w17176](http://www.nber.org/papers/w17176).

student performance and teacher turnover (whether a move within the same school or a move to a different school entirely) in New York City over a five-year period.<sup>142</sup> What these researchers found, importantly, was that the presence of inexperienced teachers by itself could not entirely explain variations or drops in student performance.<sup>143</sup> Instead, the data demonstrated that student performance dropped across the board in schools that experienced higher turnover rates, even among students who were assigned to teachers who retained the same job from year to year.<sup>144</sup> The authors posited a number of reasons for this, including decreased institutional memory and stability and the need to expend institutional resources on the hiring process.<sup>145</sup> Whatever the reasons, another inescapable conclusion was that the effects of teacher turnover were felt most heavily by minority students.<sup>146</sup>

This research suggests, incredibly, that had the New York state teacher evaluation policy been allowed to go forward, it might have had the perverse effect of actually harming minority student performance over the long term, even though it was ostensibly designed to improve that performance.<sup>147</sup> By tying high-stakes testing performance to teacher effectiveness, there is a strong chance that the policy would have accelerated teacher turnover, robbing minority students, especially those in districts with a high proportion of minority students, of a very valuable resource: a stable learning environment.

### *3. New York's policy within the adequacy framework*

New York's policy was adopted in response to RTTT. New York is not the only state to move in such a direction.<sup>148</sup>

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<sup>142</sup> *Id.* at 3-4.

<sup>143</sup> *Id.* at 14.

<sup>144</sup> *Id.* at 16.

<sup>145</sup> *Id.* at 18.

<sup>146</sup> *Id.* at 19.

<sup>147</sup> Other researchers have found similar effects elsewhere. *See, e.g.*, Boger, *supra* note 140, at 1450. Professor Boger noticed that school resegregation in North Carolina had coincided with NCLB's Accountability Tests. Because some funding was attached to these tests, and minority students did poorly, many of these schools and students became more and more isolated.

<sup>148</sup> *See Promoting Innovation, Reform, and Excellence in America's Public Schools*, THE WHITE HOUSE (Nov. 4, 2009), <http://www.whitehouse.gov/the-press-office/fact-sheet-race-top> (detailing some efforts made in pursuit of the goals of Race to the Top, a competitive block grant program in which certain states are awarded

Although New York's courts managed to turn back a potentially disastrous policy, the New York decision was grounded in statutory interpretation: the trial court found that the policy exceeded the power granted by the enabling statute. A simple change in the statute changes the outcome, allowing implementation of the policy outlined above. At that point, what might aggrieved students have done to protect their educational rights?

Posit for a moment that the New York policy just described was to have all of the effects that appear, for the moment, only to be frightening possibilities. Imagine that the effect on teacher turnover was as great as was feared and that minority student achievement suffered or, at best, stagnated while the achievement gap grew. If education reformers brought suit seeking to have this policy enjoined, they could present a persuasive argument that the policy was unconstitutional under New York's current educational adequacy jurisprudence. There is strong potential for an identifiable link between the policy itself and its impact on educational inputs, particularly the teaching input,<sup>149</sup> and harm to poor and minority student performance,<sup>150</sup> and New York law allows for a finding of inadequacy even if the deleterious effects are not felt uniformly throughout the state.<sup>151</sup>

Thus, even if the governor were allowed to implement it, this policy might be ruled constitutionally inadequate in New York. But the policy was mandated by federal spending conditions. Although the vast majority of education clause lawsuits to date have been funding lawsuits, some commentators now note the possibility of a third wave of education litigation beyond the funding context.<sup>152</sup> When

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money in order to implement proposed reforms, including one reforming teacher and student evaluation to student performance).

<sup>149</sup> See Campaign for Fiscal Equity, Inc. v. State (CFE II), 801 N.E.2d 326, 333-34 (N.Y. 2003).

<sup>150</sup> Cf. Campaign for Fiscal Equity, Inc. v. State (CFE I), 655 N.E.2d 661, 667 (N.Y. 1995).

<sup>151</sup> See CFE II, 801 N.E.2d at 333.

<sup>152</sup> See Bran C. Noonan, *The Fate of New York Public Education is a Matter of Interpretation: A Story of Competing Methods of Constitutional Interpretation, the Nature of Law, and a Functional Approach to the New York Educational Article*, 70 ALB. L. REV. 625, 628 (2007) ("What set Paynter and NYCLU apart from CFE II and its

should a state court declare that a federally mandated policy violates the state constitution? The system of teacher evaluation in New York was struck down, but there was still room in the applicable enabling legislation for a modified policy that comported with the dictates of RTTT. Constitutional infirmity, on the other hand, may not be so flexible. Would the state legislature follow the state court and reject the federal money? Or would it spurn the state court, arguing perhaps that it is also entitled to interpret the state constitution? That the federal government might place state courts and legislatures in such an uncertain position is problem enough to counsel against such extensive federal involvement in education.

Many of the potential effects of New York's policy have been observed in policies adopted in North Carolina pursuant to the Bush Administration's NCLB.<sup>153</sup> Although recognizing that accountability measures like those created by NCLB shine an important light on previously unexplored issues within public education, Professor Boger nevertheless concluded that NCLB's accountability measures were a major part of a perfect storm that was threatening educational opportunity for North Carolina's poor and minority students.<sup>154</sup> Boger found that "the convergence of racial segregation and high-stakes accountability testing all but dooms racially segregated, economically isolated public schools and their students to failure on state accountability tests, entrenching broad patterns of grade retention, student demoralization and dropout, and parental and teacher flight."<sup>155</sup> Therefore, accountability measures "threaten to exacerbate the isolation of African-American, Hispanic, Native-American, and low-income children, with negative consequences both for their access to highly performing classmates and for any prospect of attracting better, more highly qualified classroom teachers to

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predecessors is that the former two cases potentially prefigure the next wave of Education Article cases, where the funding system is not the sole source of academic failure, or, alternatively, where academic failure continues despite and adequately funded school system.").

<sup>153</sup> Boger, *supra* note 140, at 1440-41.

<sup>154</sup> See *id.* at 1448-49. The other parts of the perfect storm were the end of the area's *Brown* era desegregation decrees, and a prohibition on the use of race conscious student assignment plans. *Id.* at 1378-84.

<sup>155</sup> *Id.* at 1450.

their schools.”<sup>156</sup> The effects of NCLB Boger described in North Carolina are exactly the kinds of effects threatened by RTTT in New York.

Instances like these described in New York and North Carolina call into question the wisdom of allowing the federal government to set education policy on any kind of significant basis. On the one hand, reforms like those undertaken in New York, North Carolina, and elsewhere can prove and have proven successful.<sup>157</sup> However, given the importance of education to our success as a nation, the fact that education is explicitly provided for at the state level but not at the federal level, and existing state-level policymaking levers, that such reforms may prove and have proven counterproductive in some instances calls into question the whole policymaking endeavor.

For these reasons, policymaking on the federal level is undesirable when resulting policies prevent state courts from doing their part to ensure meaningful educational opportunity and, in doing so, threaten the educational opportunities available to poor and minority students. When the federal government creates disastrous policy, there is no judicial backstop, as exists at the state level. As such, the system of education reform that exists at the state level should be allowed full freedom to operate, facilitating the interplay between state legislatures and courts, thereby providing the fullest protection available for poor and minority students.

#### IV. SOME METHODOLOGICAL OBJECTIONS

As with any argument, this Comment’s argument that the federal government needs to provide a larger space for state courts and state legislatures to formulate educational policy contains a number of contestable premises. This Part examines a number of the more salient objections that might arise in relation to the line of arguments advanced by this Comment.

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<sup>156</sup> *Id.*

<sup>157</sup> *See, e.g.*, Mark Schneider, *The Accountability Plateau*, FORDHAM INSTITUTE 6-15 (Dec. 15, 2011), available at <http://edexcellencemedia.net/publications/2011/20111215-The-Accountability-Plateau/20111215-The-Accountability-Plateau.pdf> (analyzing the success of Texas in implementing NCLB reforms).



The objections examined relate to the judicial involvement in educational policy formulation that is part and parcel of the state court-state legislature dynamic outlined above. This dynamic assumes that courts can and should play a useful role in education reform, but not all agree with this premise.<sup>158</sup> For those who see no role for the courts in education, there is no need for the interaction between state courts and legislatures to provide a limitation on the education policies that are enacted at the federal level. However, even those who see a role for courts in education reform might still raise significant objections to a diminished federal role in setting education policy. Although these objections raise important points, ultimately none is a sufficient response to the contention that state courts and state legislatures should be given ample space in order to effectively create constitutionally adequate educational policy.

In the first place, states have not always been very good at providing children with even a minimally adequate education, suggesting that national educational programs like NCLB and RTTT might be necessary. For example, prior to the 1950s, many states deprived students of equal educational opportunity by segregating their schools. In 1983, the National Commission on Excellence in Education published “an open letter to the American people” titled *A Nation at Risk*, which found that American students were falling behind their international counterparts and that “the educational foundations of our society are presently being eroded by a rising tide of mediocrity that threatens our very future as a Nation and a people.”<sup>159</sup> However, if states are to be “laboratories of democracy,” then the federal government should not be in the business of ossifying certain educational trends. The state courts have not had their final say on this matter, and until they do, federal intervention on the level

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<sup>158</sup> See, e.g., William S. Koski, *Courthouses vs. Statehouses?*, 109 MICH. L. REV. 923 (2011) (Book Review). Professor Koski’s book review examines the debate over the proper role of courts in education policy. Arguing that courts should play no role in education is Eric Hanushek, who has written a number of books and articles making this argument, such as the book reviewed by Koski. See ERIC HANUSHEK ET AL., *SCHOOLHOUSES, COURTHOUSES, AND STATEHOUSES: SOLVING THE FUNDING-ACHIEVEMENT PUZZLE IN AMERICA’S PUBLIC SCHOOLS* (2009).

<sup>159</sup> Nat’l Comm’n on Excellence in Educ., *A Nation at Risk: The Imperative for Educational Reform*, available at <http://reagan.procon.org/sourcefiles/a-nation-at-risk-reagan-april-1983.pdf> (last visited Nov. 5, 2012).

found in NCLB and RTTT is premature.<sup>160</sup>

Some state courts, however, may never have their say, as a number of state constitutions have clauses that require a strict separation of powers, such that education is potentially the province only of the legislature and no room is left for judicial involvement.<sup>161</sup> These clauses have provided the basis for a number of state court decisions that have rejected attempts to have state funding schemes declared unconstitutional despite the existence of textual guarantees of education.<sup>162</sup> However, one study by Professor Scott Bauries has found that such constitutional text is in no way dispositive of claims of educational inadequacy.<sup>163</sup> This is consistent with the recent experience in Colorado, where the state's highest court self-consciously created a standard of review that tolerated local

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<sup>160</sup> See, e.g., *Paynter v. State of New York*, 797 N.E.2d 1225 (N.Y. 2003). In *Paynter*, *id.* at 1229, plaintiffs brought a class action alleging that New York's school assignment policies had led to increased segregation in the public schools, and thus poorer performance by minority students, who alleged a violation of New York's education clause. The New York Court of Appeals rejected that contention because plaintiffs alleged no causal link to state action, but at the same time recognized "that [plaintiffs] cite research correlating concentrated poverty and racial isolation with poor educational performance, and that evidence founded on such research might enhance an otherwise sufficient Education Article claim. . . . Finally, as a logical and jurisprudential matter, we recognize that in CFE I we addressed the sufficiency of the pleadings then before us and had no occasion to delineate the contours of all possible Education Article claims."

<sup>161</sup> See Scott R. Bauries, *Is There an Elephant in the Room?: Judicial Review of Educational Adequacy and the Separation of Powers in State Constitutions*, 61 ALA. L. REV. 701 (2010) (examining the impact of explicit textual separation of powers in state constitutions). For instance, the New Jersey Constitution provides that "The powers of the government shall be divided among three distinct branches, the legislative, executive, and judicial. No person or persons belonging to or constituting one branch shall exercise any of the powers properly belonging to either of the others, except as expressly provided in this Constitution." N.J. CONST. art. III, § 1. Professor Bauries identifies constitutional provisions in nineteen other states in which adequacy lawsuits were brought that contain similarly explicit provisions separating legislative, executive, and judicial power. See Bauries, *supra* at 762-72.

<sup>162</sup> See, e.g., *Neb. Coal. for Educ. Adequacy & Equity v. Heineman*, 731 N.W.2d 164 (Neb. 2007).

<sup>163</sup> Bauries, *supra* note 161, at 746. Concerns over justiciability may be overblown, anyway, as only a small minority of states that have been confronted with adequacy challenges have declared state funding schemes nonjusticiable. See Tang, *supra* note 76, at 1208. When Mr. Tang's article went to print, only eight of thirty-two courts that had been presented with the question had ruled on justiciability grounds. Since then, Nebraska and Oklahoma have followed suit. See *supra* note 21.

differences even though the state constitution explicitly required the establishment of a “thorough and uniform” system of schools.<sup>164</sup> Indeed, instead of finding that constitutional text governing the separation of powers has any kind of consistent impact on the outcome of education finance cases, Bauries concludes that “if a litigant in an education finance adequacy suit were to succeed at convincing the court that the education clause guarantees individual rights, rather than simply spelling out discretionary legislative duties, the litigant would be virtually guaranteed to win the case” and have a court declare inadequacy.<sup>165</sup> The existence of certain constitutional text has virtually no bearing on whether this argument can be successful. That a court would need to reach such a conclusion about individual rights goes directly to the issue of whether any justiciable remedy exists.

On the other hand, despite the fact that courts have demonstrated that they are not bound by separation of powers clauses, some state courts have found that their state constitutions do not contain any substantive guarantee of some level of educational opportunity.<sup>166</sup> In these states, there are few, if any, opportunities for litigants to convince courts to prod state legislatures to give meaningful content to positive educational rights, and there is no court-legislature dynamic with which federal policies like NCLB and RTTT can interfere. However, this does not mean that resort to the courts in other states is misguided or unhelpful, even for those students in states without constitutional guarantees of a certain level of educational opportunity. Indeed, “trends in education show a remarkable tendency to follow a national pattern.”<sup>167</sup> Even in those states in which the courts have a very limited role, legislatures should pick up on trends from outside of their borders, where the interplay between the legislature and the courts is working. This would be problematic where

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<sup>164</sup> *Lobato v. State*, 218 P.3d 358, 374 (Colo. 2009) (reviewing education clause claims for a rational basis); COLO. CONST. art IX, § 2. Bauries, *supra* note 161, also demonstrates rather forcefully that separation of powers clauses do not preclude justiciability.

<sup>165</sup> Bauries, *supra* note 161, at 750.

<sup>166</sup> *See, e.g., Marrero v. Commonwealth*, 739 A.2d 110 (Pa. 1999) (declaring state funding scheme a nonjusticiable political question); *Charlet v. Legislature of State of La.*, 713 So.2d 1199 (La. Ct. App. 1998) (Louisiana constitution requires only that State provide a “minimum education” which was met because state funding levels amounted to more than a “mere pittance.”).

<sup>167</sup> Kagan, *supra* note 40, at 2265.

educational systems in the neighboring states themselves are doing poorly. A system that is doing poorly, however, also sends a signal to try something else, and that something else may yet yield positive results. But where reforms are mandated, as through NCLB and RTTT, the ability of states to innovate or pick up on trends is stunted.

If, however, reformers and advocates are uncomfortable waiting for educational reform to trickle across state borders, then the proper solution is to create a substantive right to education, enforceable at the federal level through suits under Section 1983 or otherwise through the courts.<sup>168</sup> This solution, though, is anathema to our traditional ideas about local control of education, an idea engrained in decisions at both the state and federal levels and an idea substantiated by the need for educational policy to respond to local concerns.<sup>169</sup> Further, a federal right that is not lodged at the constitutional level could, rather problematically, easily be repealed.<sup>170</sup>

A second problem with giving the courts a major role in formulating education policy—and a concern that would also

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<sup>168</sup> Although the remedial scheme is somewhat complicated, this is generally the approach taken with respect to students with learning disabilities. See 20 U.S.C. § 1403 (2012) (abrogating state sovereign immunity for violations of Individuals with Disabilities Education Act (IDEA) and allowing for remedies both at law and equity for violations of IDEA). The IDEA requires states to establish administrative procedures for handling disputes as to the implementation of procedures required by the IDEA, with different requirements established for the subchapters dealing with children to age two, 20 U.S.C. § 1439 (2012), and those aged three to twenty-one, 20 U.S.C. § 1415 (2012). The circuits are currently split over whether a Section 1983 claim may be brought for violations of the IDEA. See Candace Chun, Comment, *The Use of § 1983 as a Remedy for Violations of the Individuals with Disabilities Education Act: Why It Is Necessary and What It Really Means*, 72 ALB. L. REV. 461, 482–90 (2009) (five circuits disallowing such claims, two circuits allowing, two circuits with some decisions recognizing such claims and others barring, and three circuits yet to rule on the issue). Regardless of the availability of Section 1983 claims, the remedial scheme for violations of the IDEA affecting those aged three to twenty-one provides for the ability to appeal the administrative decision to “any State court of competent jurisdiction or any district court of the United States, without regard to the amount in controversy.” 20 U.S.C. § 1415(i)(2)(A) (2012). In any case, the IDEA creates, for students with disabilities, a substantive, enforceable entitlement to a “free appropriate public education.” 20 U.S.C. § 1411 (2012).

<sup>169</sup> See McGovern, *supra* note 12, at 1529–32.

<sup>170</sup> Of course, a constitutional amendment could solve this problem, as well. However, because it is so difficult to amend the Constitution, this Comment does not consider this option seriously.

exist by giving the federal courts a say in this arena—is the inherently slow-moving nature of the court system. It takes a significant amount of time for a case to work its way through multiple levels of the court system. This delay would seem to negate the flexibility required by an adequacy framework. However, state courts, particularly in this context, do not speak only through the final judgments of their highest benches. In a system in which the courts are responsible for prodding the legislature and fighting inertia, the elected branches can also respond to filed suits, trial court orders, or evidentiary studies commissioned specifically for education litigation.<sup>171</sup> That a court's docket might be clogged does not counsel against using the judiciary for these purposes. Even filing a suit can have an effect, although it may take years for any case to reach a state's highest court.

None of these objections to judicial involvement in the formulation of education policy is a sufficient response to the claim that state courts should be given ample room to effectuate state-level constitutional guarantees. These objections do serve as correctives to any impulse to rely too heavily on litigation as the medium of change in the realm of educational policy, and it is no mistake that the political dynamic outlined above envisions a significant role for the political branches even given active judicial involvement. Ultimately, however, the importance of education, its constitutional stature on the state level, and the positive nature of existing substantive educational guarantees are compelling reasons to preserve a meaningful judicial role in educational policymaking.

## V. CONCLUSION

When we, as a nation, consider how best to provide adequate educational opportunity to as many students as possible, one critical question that must be answered is at what level these decisions are best made. This means developing an awareness of both where students may most effectively vindicate their own interests and where these decisions may be made most efficiently. NCLB and RTTT represent a belief that education policy may be usefully directed, if not dictated, at the federal level. As this Comment argues, these decisions

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<sup>171</sup> See Greenspahn, *supra* note 52, at 1380.

are best made on the state level. Substantive constitutional guarantees of education can be found in every state, entitling students to an adequate level of educational opportunity. These guarantees provide a role for both state courts and state legislatures in vindicating the national educational interest in ensuring educational opportunity for all.

The very nature of the educational right—positive in character—requires active government involvement. As Feldman recognizes, legislative inertia and not judicial overreach is the primary barrier to adequate vindication of positive rights.<sup>172</sup> Part of this active government involvement must come from the judicial branches, which are in a position to prod the legislature to act where educational quality falls below some minimally adequate level.

The judiciary is the ultimate defense against the legislative inertia that threatens the ability of poor and minority students to obtain an adequate education. Educational adequacy litigation began to open new doors and expand beyond funding precisely at the moment that federal involvement, through NCLB and RTTT, began to grow to such a level as to threaten to interfere with judicial intervention in education.<sup>173</sup> This potential pitfall is precisely the reason why the federal government should not take such an active role in education.

Courts are important players in education reform not by articulating the content of educational policy but by setting the rules governing how education reform can proceed. Educational reform involves an important give and take as interested parties advance their own solutions, but there are constitutional limits on this give and take that should be defined by state courts. The experience of educational adequacy lawsuits indicates that there is an important political dynamic at play here, which involves courts and ultimately inures to the benefit of students, as all education reform should.

To the extent that the federal government is involved, through programs like NCLB and RTTT, that involvement has the potential to diminish the effectiveness of state legislative

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<sup>172</sup> Feldman, *supra* note 91, at 1089.

<sup>173</sup> *See, e.g.*, Paynter v. State, 797 N.E.2d 1225 (N.Y. 2003).

response to state courts by binding the legislature to the requirements of federal funding programs. Thus, through NCLB and RTTT, the federal government threatens this valuable political dynamic in which courts play an important role in vindicating the substantive educational entitlements enjoyed by students. Although state legislatures may be able to respond to both the federal government and to state courts simultaneously, the very real possibility that state legislatures may, in some instances, be placed in an untenable position between federal requirements and state court dictates should counsel against extensive federal involvement in education.

An adequacy framework for educational policy requires more than that a state legislature commit to a certain level of education funding. It requires also that a legislature be sensitive to the ways in which educational policies, especially those that go beyond the funding context, affect student performance and achievement. NCLB and RTTT focus legislatures in ways that may not actually be helpful. These policies may have any number of constitutionally relevant consequences, particularly for poor and minority students.

There is a role for courts to play in educational policy, and that role is to make sure that legislatures remain sensitive to the ways educational policies affect students and especially that they remain sensitive to the unique challenges posed to racially and socioeconomically isolated students within our educational systems and society. State constitutional text demands that closing the achievement gap cannot merely be a legislative priority. State courts cannot effectively play that role in a system riddled with federal commands. There are reasons for federal involvement in local educational policy, but protection of student interests counsels in favor of more restrained involvement, rather than the ever-expanding role the federal government has given itself in the last decade.