Finding a Coherent Federal Education Policy Where Adequacy Litigation and No Child Left Behind Meet

> *[T]he Lake View School District . . . has one uncertified mathematics teacher who teaches all high school mathematics courses. He is paid $10,000 a year as a substitute teacher and works a second job as a school bus driver where he earns $5,000 a year . . . . The college remediation rate for Lake View students is 100 percent.*[1]

> *[T]he American system . . . was designed in the 19th century to provide rigorous education for only about a fifth of the students, while channeling the rest into farm and factory jobs that no longer exist.*[2]

I. INTRODUCTION

Reminiscent of a grade school game of dodge ball, government bodies at all but the most local levels have attempted to evade responsibility for ensuring quality public education over the last three decades.[3] In 1973, the United States Supreme Court stymied discussion of meaningful federal involvement in public education by permitting states to manage intrastate educational systems in any "rational" manner.[4] In the thirty years since this decision, desperate students and parents have repeatedly petitioned their state governments for assistance in

1. Lake View Sch. Dist. No. 25 v. Huckabee, 91 S.W.3d 472, 489-90 (Ark. 2002) (highlighting lowest tier of Arkansas educational system).

2. Brent Staples, Editorial, *Why the United States Should Look To Japan for Better Schools*, N.Y. TIMES, Nov. 21, 2005, at A22 (noting current educational system out of date); *see also* NATIONAL CENTER FOR EDUCATION STATISTICS, DIGEST OF EDUCATION STATISTICS, 2004, TABLE 102, http://nces.ed.gov/programs/digest/d04/tables/dt04_102.asp (last visited Jan. 14, 2007) (showing graduates as percentage of seventeen-year-olds less than twenty percent before 1920). The percentage for 2004 is nearly seventy-five percent. NATIONAL CENTER FOR EDUCATION STATISTICS, *supra*.

3. *See infra* Part II.B (discussing frustration of citizens in pursuing remedy for poor school systems despite longstanding traditions); *see also* Chuck Williams, *Bell Says State Must Fix Education: Problems Start in Elementary School and Continue Throughout System*, COLUMBUS LEDGER-ENQUIRER (Ga.), Jan. 19, 2006, at A1 (discussing faulty logic of leaving all policy questions to lowest levels of education).

4. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 40 (1973) (stating legal justification for holding under existing jurisprudence); *see also* VICTORIA J. DODD, PRACTICAL EDUCATION FOR THE TWENTY-FIRST CENTURY 112 (2003) [hereinafter DODD, PRACTICAL EDUCATION LAW] (stating *Rodriguez* "death knell" for national reform movement); Brooke Wilkins, Note, *Should Public Education be a Fundamental Right?*, 2005 BYU EDUC. & L.J. 261, 272 (2005) (detailing historical focus of education funding and policy at local level).

the form of equal funding or equal opportunities.[5] Courts and legislatures have thrown the ball back and forth, finding education systems unconstitutionally funded, then unconstitutionally inadequate and, oftentimes, impossible to assess.[6] Meanwhile there exist schools that fail to prepare a single student for higher education operating within the same educational system as schools that rival the best in the world.[7] These schools are not only unequal in the eyes of any observer but, in the case of the lesser performing schools, they are often wholly inadequate as well.[8] There is a consensus that the existing system of public education must be fixed, but those with the power and resources to fix it continually shunt the responsibility to the least capable and most desperate.[9]

With due respect to the rights of the several states to govern themselves, as well as to the wisdom of local control, the federal government needs to fill this gap of responsibility with resources only it possesses.[10] Financial and

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5. *See* Quentin A. Palfrey, *The State Judiciary's Role in Fulfilling Brown's Promise*, 8 MICH. J. RACE & L. 1, 16-24 (2002) (detailing state-level litigation after *Rodriguez* decision). Plaintiffs in equity litigation brought suit under both state constitutional education and equal protection provisions. *Id.* at 17. The predominant theme in these cases, however, was to demand equal funding for all students. *Id.* Additionally, at least thirty states' courts have adjudicated adequacy in education cases. *See* Janet D. McDonald et al., *School Finance Litigation and Adequacy Studies*, 27 U. ARK. LITTLE ROCK L. REV. 69, 76-77 (2004) (outlining framework of various states' adequacy litigation). Twenty courts found at least part of their statewide educational systems to be unconstitutional and three settled before a decision. *Id.* The courts that upheld the existing systems typically relied on separation of powers or justiciability doctrines. *Id.*

6. *See* Palfrey, *supra* note 5, at 18-19 (discussing challenges to defining "equity" between school districts); *see also Lake View*, 91 S.W.3d at 486 (discussing defendant-state's argument of adequacy impossible to define); State v. Campbell County Sch. Dist., 19 P.3d 518, 539 (Wyo. 2001) (declaring adequacy study "of little probative value" due to deficiencies in methodology); Janice Francis-Smith, *Cost-out Studies May Cause More Questions in Education Lawsuit in OK*, J. REC. (Okla. City), Jan. 17, 2006, *available at* 2006 WLNR 10712434 (noting criticism of adequacy studies as "political documents"); *infra* Part II.B (discussing second and third waves of education litigation at state level). While the court in *Lake View* rejected the state's argument that defining adequacy is impossible, and provided some suggestions for measuring adequacy, it did not actually take the step of providing a definition. *Lake View*, 91 S.W.3d at 486, 511 (concluding court should not have role of defining remedy). *But see* Rose v. Council For Better Educ., Inc., 790 S.W.2d 186, 212 (Ky. 1989) (defining adequate education for Kentucky).

7. Lake View Sch. Dist. No. 25 v. Huckabee, 91 S.W.3d 472, 489-90 (Ark. 2002) (highlighting disparity between school districts in Arkansas); *Rose*, 790 S.W.3d at 198 (detailing discrepancies between poorer and more affluent districts in Kentucky). The court in *Lake View* highlighted the overall deficiencies in education in the state, citing its place near the bottom of all states in most measures, while also noting that border schools in Arkansas compared unfavorably to those in Texas. *Lake View*, 91 S.W.3d at 488-89. The named party, Lake View School District, had a 100 percent college remediation rate compared to forty-four percent for a larger school district. *Id.* at 488-90.

8. *See Lake View*, 91 S.W.3d at 489-90 (describing school system that produces zero students prepared for higher education). Both *Lake View* and *Rose* discussed the connections and distinctions between inequities and inadequacies in their respective systems. *Id.* at 488; *Rose*, 790 S.W.3d at 198.

9. *See* Editorial, *Trying To Leave Behind No Child*, COURIER NEWS (Bridgewater, N.J.), Aug. 25, 2005, at 7A (describing multiple states' fights against federal government for creating achievement demands but providing no resources); Williams, *supra* note 3 (quoting U.S. Attorney General stating education being improperly left to education establishment alone).

10. *See* Palfrey, *supra* note 5, at 48 (describing benefits of increased federal role in education policy); David Nash, Note, *Improving No Child Left Behind: Achieving Excellence and Equity in Partnership with the States*, 55 RUTGERS L. REV. 239, 269 (2002) (proposing expansion of federal authority and funding of No Child

organizational resources of the federal government have proven indispensable in other venues and need not infringe on the values enshrined in the law of federalism.[11] Moreover, the specific challenges of modern public education suggest the necessity of such a comprehensive solution.[12]

The current favored response to these challenges values accountability and measurable standards.[13] In this reform environment, there is a natural pressure to develop externally objective metrics and uniformity between districts.[14] For these standards to be meaningful, however, they must be rooted in something more than mere common sense or parochial wisdom; they must draw from the lessons of all fifty states and hundreds of localities in a coordinated effort that values the end result above all.[15]

In the next Part, this Note will begin by investigating the successes and shortcomings of thirty years of attempting to fix unequal and inadequate public education through private litigation.[16] This Part will continue by exploring the various attempts by state courts and legislatures to grapple with the concept of measuring and defining adequacy.[17] This discussion will also venture into the past and current federal involvement in public education standards and funding levels.[18] Part II will end by discussing the most recent federal legislation in education as it relates to the existing history of reform and litigation at the local

Left Behind Act); Williams, *supra* note 3 (advocating intrastate centralization of education policies); *see also infra* Part III.D (arguing for greater federal involvement).

11. *See* Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141, 1171-73 (1995) (establishing benefits of federal involvement in environmental law). The benefits generally cited are uniformity of standards and economies of scale. *Id.* at 1172; *see also* Palfrey, *supra* note 5, at 48 (introducing shared allocation of power between federal and state governments in education context); Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 288-93 (2005) (discussing "polyphonic federalism" as means of sharing accountability and authority between levels of government); *infra* Part III.D (evaluating positive role of federal government in some circumstances). Polyphonic federalism is presented by Schapiro as an alternative to "dualism" whereby the lines between state and federal authority are very clear. Schapiro, *supra*, at 250-53. Under this theory, aspects of governance most suited to each level of government are cooperatively allocated thereto. *Id.* at 285.

12. *See infra* text accompanying notes 138-142 (analyzing resulting pressure of test-based and standards reform movements).

13. *See infra* notes 77-79 and accompanying text (discussing testing and accountability reforms of recent years).

14. *See infra* Part III.C (discussing confluence of reform and litigation trends militates toward increased uniformity in education standards).

15. *See* James S. Liebman & Charles F. Sabel, *Changing Schools: A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform*, 28 N.Y.U. REV. L. & SOC. CHANGE 183, 184 (2003) (describing disparate local reform movements as laboratory for finding best national method). This Note argues that the existing model of federal education policy interferes with and thus further burdens local-based reform movements. *See infra* notes 87-89 and accompanying text (describing interrelationship of unenforceable federal standards and local reform movements).

16. *Infra* Part II.A (developing history of American education and recent shortfalls of historically-based system).

17. *Infra* Part II.B (evaluating progress of litigation in education); *infra* Part II.C (assessing attempts to define and measure adequacy as well as attendant problems).

18. *See infra* Part II.D (describing changing shape of federal involvement in local education norms).

level.[19]

Part III assesses the various shortcomings of these state and federal attempts to improve public education, looking for common threads from which to fashion policy recommendations.[20] This Part also investigates the logic, wisdom, and legal support for inviting the federal government to develop a comprehensive program of standards and assessment far beyond any previously undertaken.[21] The last section of Part III will develop a proposal modeled after concepts of cooperative federalism, with a more progressive federal-state relationship than is currently found in public education.[22]

II. BACKGROUND

A. Setting the Stage for Modern Education Reform

There is a history of strong support for public education in the United States dating to Colonial and State Constitutions as early as the 17th century.[23] Generations of Americans have identified the education of all citizens as a prerequisite for a functioning democracy.[24] Despite impressive rhetoric in support of education, comprehensive, compulsory public schools have taken time to develop.[25] Through the 18th and 19th centuries, movements to require

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19. *See infra* notes 90-96 and accompanying text (establishing relationship between federal legislation and local educational policies).

20. *See infra* Parts III.B-C (assessing value of litigation and legislation aimed at reforming public education).

21. *See infra* Part III (arguing for increased federal involvement as natural extension of existing movements in education law).

22. *See infra* Part III.D (discussing values of cooperative federalism in proposed model).

23. *See* DODD, PRACTICAL EDUCATION LAW, *supra* note 4, at 9-10 (detailing birth of local education mandates in Colonial America); Victoria J. Dodd, *American Public Education and Change: Not an Oxymoron*, 17 ST. LOUIS U. PUB. L. REV. 109, 111-12 (1997) [hereinafter Dodd, *American Public Education and Change*] (highlighting early American education law). *But see* Elisabeth Jaffe, *A Federally Mandated National School Curriculum: Can Congress Act?*, 24 SETON HALL LEGIS. J. 207, 222-24 (1999) (describing limited development of public education before 19th century).

24. *See* Plyler v. Doe, 457 U.S. 202, 221-23 (1982) (quoting from and listing cases identifying education's role in democracy and society). Thomas Jefferson is quoted as saying, "I know no safe depository of the ultimate powers of the society but the people themselves; and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them but to inform their discretion." THE NATIONAL COMM'N ON EXCELLENCE IN EDUC., A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM 7 (1983), *available at* http://www.ed.gov/pubs/NatAtRisk/risk.html [hereinafter A NATION AT RISK]. A NATION AT RISK is the source of the famous challenge to Americans, "the educational foundations of our society are presently being eroded by a rising tide of mediocrity that threatens our very future as a Nation . . . ." *Id.* at 5. The reform movement is commonly considered to have begun in response to this strongly-worded but well-received report detailing the deficiencies of American public education and threatening dire results if no action was taken. DODD, PRACTICAL EDUCATION LAW, *supra* note 4, at 13 (identifying beginnings of current reform movement).

25. *See* DODD, PRACTICAL EDUCATION LAW, *supra* note 4, at 10-11 (describing development of compulsory public education); Wilkins, *supra* note 4, at 271-72 (explaining relative "newness" of compulsory education in context of minimal federal involvement).

compulsory education moved across the nation.[26] In the 20th century, the scope of required public education increased to include more years of compulsory attendance as well as to cope with dramatically changing economic and racial landscapes.[27] The decline of the agrarian economy and growth of poor, urban areas, coupled with an increasing commitment to educate every child longer, created unprecedented demands on an existing education system developed under very different conditions.[28] In many ways, however, traditional approaches to education, most notably the emphasis on local control, have remained firmly in place.[29]

Despite this overt commitment, educational mandates at the state and national levels often remain vague in their implementation details and presume almost complete local control.[30] The nexus of the powerful interest in retaining strong state and local government, and the essential place of education in American society has left education policy firmly in the hands of local control.[31] Many Americans cherish this closeness to education and view the teaching of children as a community effort unsuited to the theories and policy-

26. Dodd, *American Public Education and Change*, *supra* note 23, at 112 (describing compulsory education movement of 19th century). Universal compulsory education was not in place until approximately the turn of the 20th century. Wilkins, *supra* note 4, at 271-72 (emphasizing compulsory attendance relatively recent development despite long tradition of public education).

27. DODD, PRACTICAL EDUCATION LAW, *supra* note 4, at 10 (describing changes in education laws across country); *see* Staples, *supra* note 2, at A22 (noting failure to update American school system from 19th century origins).

28. *See* A NATION AT RISK, *supra* note 24, at 6-7 (detailing economic shortfalls of American education system); Gershon M. Ratner, *A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills*, 63 TEX. L. REV. 777, 783-84 (1985) (explaining national economic changes after Industrial Revolution and impact on requirements of public education). Earlier education of many rural children did not extend into high school or even out of grade school in many cases. Staples, *supra* note 2, at A22 (using history of education as backdrop for present inadequacies).

29. *See* Michael Heise, *Goals 2000: Educate America Act: The Federalization and Legalization of Education Policy*, 63 FORDHAM L. REV. 345, 345 (1994) (citing A NATION AT RISK, identifying stagnation of approaches to education); Staples, *supra* note 2, at A22 (arguing today's school system not equipped to handle modern demands).

30. DODD, PRACTICAL EDUCATION LAW, *supra* note 4, at 9 (describing 1647 Colony of Massachusetts education requirement); Dodd, *American Public Education and Change*, *supra* note 23, at 111 (listing statutory requirements of early education laws). These statutes mandated that groups of households provide educational opportunities to their children but provided no guidelines for implementation. Dodd, *American Public Education and Change*, *supra* note 23, at 111.

31. *See* JOHN BOEHNER, FREQUENTLY ASKED QUESTIONS ABOUT NO CHILD LEFT BEHIND 7 (2004), *available at* http://edworkforce.house.gov/issues/109th/education/nclb/nclbfaq.pdf [hereinafter BOEHNER, NCLBA FAQ] (explaining retention of local control under recent federal education legislation); Robert J. Klee, *What's Good for School Finance Should Be Good for Environmental Justice: Addressing Disparate Environmental Impacts Using State Courts and Constitutions*, 30 COLUM. J. ENVTL. L. 135, 160-62 (2005) (tracing historically local control of education policy in parallel to environmental law); Wilkins, *supra* note 4, at 271 (explaining state competency throughout history of American education); *see also* Victoria J. Dodd, *A Critique of the Bush Education Proposal*, 53 ADMIN. L. REV. 851, 853 (2001) [hereinafter Dodd, *Critique*] (stating federal monetary contribution to public education very small). The NCLBA FAQ explains: "State flexibility is a key element within NCLB." BOEHNER, NCLBA FAQ, *supra*, at 7. The No Child Left Behind Act is discussed in greater detail in Part II.D.

making of a far-off government.[32] This interest further complicates the challenge of pursuing sweeping change to raise the quality of every child's education.[33] It is a system based on the notion that every parent, indeed every member of the community, wants what is best for the community's children.[34] The system assumes, however, that the community can and does grasp precisely what constitutes the best education.[35] Judicial and federal forays into education policy have taken pains to recognize this foundation and avoid interfering whenever possible.[36]

B. Attempts at Reform through Litigation

1. Federal Courts

Efforts to find a federal constitutional violation in the inequities and inadequacies of public school districts were relatively short-lived.[37] The decisive case was *San Antonio Independent School District v. Rodriguez*,[38] in which the Supreme Court delivered multiple blows to the burgeoning legal arguments proponents were proffering in an attempt to fundamentally change the framework of public education in the United States.[39] The Court first

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32. *See* John Ashcroft, *The President's National Testing Proposal Had To Be Stopped*, 17 ST. LOUIS U. PUB. L. REV. 1, 13-15 (1997) (enumerating benefits of parental involvement in education policy); Charles Benjamin, *Should There Be Home Rule For Kansas School Districts?*, 5 KAN. J.L. & PUB. POL'Y 175, 180 (1996) (listing arguments for greater autonomy for local school districts). Studies show that child success is closely tied to parental involvement in school and at home. *See* Ashcroft, *supra*, at 13-14. Ashcroft argues that local control is a prerequisite to proper parental involvement. *Id.* at 16-17. *But see* Jaffe, *supra* note 23, at 226 (detailing diffuse but extensive congressional role in education today).

33. *See* Ashcroft, *supra* note 32, at 17-18 (complaining creation of national curriculum would rob localities of important control); James Traub, *The Test Mess*, N.Y. TIMES, Apr. 7, 2002, § 6 (Magazine), at 46 (detailing frustration by consecutive presidents to promulgate national curricula or testing).

34. *See* Ashcroft, *supra* note 32, at 1, 12-15 (addressing traditional principles of localism in American education).

35. *See* Ashcroft, *supra* note 32, at 13-15 (emphasizing importance of both parental involvement and district-level curriculum control). Ashcroft warns that relinquishing control over curriculum definition to the national government will have dire consequences. *Id.* at 17.

36. *See* No Child Left Behind Act, 20 U.S.C. § 6301 (2005). The recent federal education reform bill, the No Child Left Behind Act, expressly provides for high levels of local control in its statement of purpose: "providing greater decision-making authority and flexibility to schools and teachers in exchange for greater responsibility for student performance . . . ." *Id.*; *see also* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 41, 49-50 (1973) (establishing Court's reticence in managing local affairs and highlighting benefits of local control in education); *infra* Part II.D (detailing political limitations of localism on increasing federal involvement in public education policy). The deficiencies of such local reliance are exemplified by state court cases examining the extreme disparities in quality of education between districts and states. *See* Lake View Sch. Dist. No. 25 v. Huckabee, 91 S.W.3d 472, 489-90 (Ark. 2002) (noting inter-district disparities when finding Arkansas' school funding system unconstitutional).

37. *See* DODD, PRACTICAL EDUCATION LAW, *supra* note 4, at 111-14 (discussing failed attempts at federal litigation in support of constitutional right to education); Palfrey, *supra* note 5, at 13-16 (summarizing history of federal equity in education litigation).

38. 411 U.S. 1 (1973).

39. *See id.* at 55 (summarizing holdings); Palfrey, *supra* note 5, at 15 (listing plaintiff's failed strategies);

declared that education was not a fundamental constitutional right worthy of strict judicial scrutiny.[40] The majority discussed the importance of education to American society and in previous judicial decisions, but declined to find a right to education anywhere in the Constitution.[41] Second, in applying a more deferential standard, the Court held the unequal school funding plan in Texas, founded upon property tax income, was a rational means to a legitimate state purpose.[42] In particular, the Court highlighted the importance of local control in education issues.[43] In addition to allowing Texas wide deference to determine its own funding scheme, the Court praised the stated goal of the plan to encourage and support local differences by allowing local participation in the funding plan.[44] The breadth of this decision, in particular the rejection of a fundamental right to education, essentially foreclosed future challenges to state educational systems in federal court.[45]

2. *Equity Litigation in State Courts–"Second Wave" Education Litigation*

Denied access to federal courts, education advocates pursued much the same argument in state courts: challenging funding regimes in light of state constitutional provisions.[46] In many cases, the state constitution explicitly

infra notes 40-42 and accompanying text (explaining details of *Rodriguez* holding).

40. *Rodriguez*, 411 U.S. at 37 (holding education is not a fundamental right); *see also id.* at 30-38 (discussing prior jurisprudence of fundamental rights). Prior to *Rodriguez*, other courts had invalidated state school funding systems on federal grounds. DODD, PRACTICAL EDUCATION LAW, *supra* note 4, at 112 (tracking fight for fundamental right to education); *see also* Van Dusartz v. Hatfield, 334 F. Supp. 870, 874 (D. Minn. 1971) (finding Minnesota educational system unconstitutional under Fourteenth Amendment Equal Protection Clause). The *Van Dusartz* court relied explicitly, and almost entirely, on an earlier California decision, *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971). *Van Dusartz*, 334 F. Supp. at 871-72 (declaring facts at hand indistinguishable from *Serrano*). *Serrano*, however, was decided on state constitutional grounds and helped to spawn state litigation efforts rather than the stunted effort in federal courts. DODD, PRACTICAL EDUCATION LAW, *supra* note 4, at 114-16 (discussing impact of *Serrano*). *See generally Serrano*, 487 P.2d 1241 (recognizing fundamental right to education).

41. *Rodriguez*, 411 U.S. at 29-30 (examining prior case law pertinent to importance of education). The Court cited strong language, primarily from *Brown v. Board of Education*, recognizing the supreme importance of providing education to all children. *Id.* The Court went on, however, to say that "the importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause." *Id.* at 30.

42. *Id.* at 50-51, 55 (summarizing holding with regard to deferential standard). The Court highlighted both the legislature's familiarity with local conditions, and the judiciary's lack of expertise in the field of education policy. *Id.* at 40-41.

43. *Id.* at 49-50 (detailing benefits of local flexibility in Texas plan).

44. *Id.* at 49-50. The Court rejected the appellees' arguments that the effect of the Texas plan, which allowed for part of school funding to come from local property taxes, was to essentially give fewer resources to poorer communities. *Id.* at 50-51. The Court, instead, highlighted the wisdom of the Texas authorities in trusting local communities with the responsibility of education. *Id.* at 49-50.

45. *See* DODD, PRACTICAL EDUCATION LAW, *supra* note 4, at 112 (stating effect of *Rodriguez* decision on state funding challenges); Palfrey, *supra* note 5, at 15-16 (discussing how *Rodriguez* bars future challenges).

46. *See* McDonald et al., *supra* note 5, at 74-75 (describing "second wave" litigation). The first wave of attempted education reform through litigation was in federal court. *See supra* notes 37-39 and accompanying text (detailing "first wave" litigation in federal courts).

identified the state's responsibility to provide public education, in contrast to the federal Constitution.[47] This line of cases continued utilizing the plaintiff's reasoning from *Rodriguez* that unequal funding violates equal protection.[48] Leveraging explicit education language found in respective state constitutions (but not in the federal Constitution), this approach met with some initial success.[49] In the end, however, the challenge of showing that unequal funding deprives students of the identified constitutional right proved too difficult.[50] Moreover, courts and legislatures found the prospect of providing truly equal funding profoundly impractical, which may have impacted some courts' reluctance to endorse this line of litigation.[51]

3. Adequacy Litigation in State Courts–"Third Wave" Education Litigation

After successive defeats seeking court-ordered equity in school funding, education activists have turned to a more subjective line of argument.[52] The objective of this current litigation trend, the so-called "third wave," is to convince a state's courts that the existing system of education is inadequate for at least some of the population.[53] Even absent an express requirement of an "adequate education" in state law, courts are generally more receptive to this

47. *See* Joseph S. Patt, Note, *School Finance Battles: Survey Says? It's All Just a Change in Attitudes*, 34 HARV. C.R.-C.L. L. REV. 547, 552-53 (1999) (categorizing education provisions in state constitutions). The exact contour of this line of litigation is, obviously, tied to the specific constitutional language in each state. *Id.* at 552-54 (noting differing strengths of clauses). Constitutional provisions range from simply mandating that the state provide public education to the use of increasingly stronger words such as "efficient," "uniform," and "fundamental." *Id.* at 553. Patt points out that there is no correlation between success in court and the strength of the constitutional language, indicating that policy preferences will necessarily become relevant. *Id.* at 555-56.

48. *See* DODD, PRACTICAL EDUCATION LAW, *supra* note 4, at 114-20 (enumerating various equal protection strategies in litigation at state level); Palfrey, *supra* note 5, at 17 (describing approach of litigants).

49. *See* McDonald et al., *supra* note 5, at 71-75 (detailing chronology of cases on school finance adequacy).

50. *See* Palfrey, *supra* note 5, at 17-18 (explaining difficulties confronted by line of argument); *see also supra* note 47 (elucidating policy judgments also inherent in constitutional challenges). Complete equity in school finance (on a per-student basis) ignores the difference of costs and challenges confronted by individual schools and districts. Palfrey, *supra* note 5, at 19-20. Once this fact is acknowledged, however, there becomes no clear way to determine *what* is equal and the result, again, becomes an expression of policy preference. *Id.* at 18-19.

51. *See* Palfrey, *supra* note 5, at 18-20 (describing practical problems of equity in funding). Critics and courts have noted that merely equalizing funding does not guarantee the intended results. *Id.* at 20, 51 (indicating potential problems of blindly equalizing funding and quoting decisions from education litigation).

52. Palfrey, *supra* note 5, at 21 (introducing adequacy actions as "third wave" of litigation). While occurring much earlier than most of this "third wave" of litigation, *Robinson v. Cahill* provided the original spark. DODD, PRACTICAL EDUCATION LAW, *supra* note 4, at 121. The *Robinson* court distinguished *Rodriguez* but reached the same conclusion regarding equal protection. Robinson v. Cahill, 303 A.3d 273, 283-85 (N.J. 1973). The court went on, however, to use the constitutional language—"thorough and efficient system of free public schools"—to find that the system of schools in New Jersey was constitutionally inadequate. *Id.* at 294 (internal citations omitted).

53. *See* Palfrey, *supra* note 5, at 21 (explaining framework of adequacy litigation).

approach for a variety of reasons.[54]

The adequacy argument more directly targets the measurable outputs of a school system—the performance of the students—rather than raising the burden of proving causation between funding and student performance.[55] Adequacy, unlike equal funding, however, is extremely difficult to measure and to rectify.[56] The result is that inadequate educations are relatively easy to identify, but practical legislative solutions are not. In contrast to mandating *equal* funding, this line of judicial intervention requires state legislatures to identify and provide *adequate* funding, a much more burdensome remedy.[57]

In 1989, the Kentucky Supreme Court provided a benchmark definition of adequacy from which the majority of subsequent similar cases have borrowed.[58] In *Rose v. Council for Better Education, Inc.*,[59] the court identified seven capacities that the Kentucky Constitution guaranteed to every student.[60] The seven capacities are:

> 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 or historical heritage; vi) sufficient training or preparation for advanced training in either academic or vocational

54. *See* McDonald et al., *supra* note 5, at 77 (stating two-thirds of adequacy litigation successful); Deborah A. Verstegen, *The Law of Financing Education: Towards a Theory of Adequacy: The Continuing Saga of Equal Educational Opportunity in the Context of State Constitutional Challenges to School Finance Systems*, 23 ST. LOUIS U. PUB. L. REV. 499, 508-10 (2004) (highlighting various successful approaches of adequacy litigants).

55. Palfrey, *supra* note 5, at 22 (defining contours of adequacy litigation). The question of causation is actually turned on its head in most adequacy litigation. *Id.* Most solutions to the adequacy requirement have attempted to measure what amount of funding inputs would create the adequate outputs defined by the court. Verstegen, *supra* note 54, at 503 (describing states' approaches to adequacy solutions using funding solutions); *see also infra* note 68 and accompanying text (explaining challenge of defining adequacy in practical terms).

56. *See* Verstegen, *supra* note 54, at 502-03 (comparing equity to adequacy litigation). A major difference between the two courses of litigation is that a finding of inadequacy will usually elicit a system-wide remedy instead of merely providing for less-wealthy districts. *Id.* at 502.

57. *See* Patricia F. First & Barbara M. DeLuca, *The Meaning of Educational Adequacy: The Confusion of DeRolph*, 32 J.L. & EDUC. 185, 190-96 (2003) (detailing four successive cases assessing remedial legislative action in Ohio).

58. *See* McDonald et al., *supra* note 5, at 77 (indicating reliance on Kentucky decision by other state courts); *see also* Lake View Sch. Dist. No. 25 v. Huckabee, 91 S.W.3d 472, 487-88 (Ark. 2002) (quoting directly from *Rose* decision and noting Arkansas legislature adopted some of its findings); Opinion of the Justices No. 338, 624 So. 2d 107, 134-35, 166-67 (Ala. 1993) (citing *Rose* language while holding Alabama school system inadequate).

59. 790 S.W.2d 186 (Ky. 1989).

60. *Id.* at 212 (stating minimum goals for constitutionally adequate education). The court also defined the requirements of an "'efficient' system of common schools," using the term "efficient" from the Kentucky state constitution. *Id.* at 212-13.

> 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.[61]

The *Rose* court held that the state failed to provide adequate resources to instill these capacities in every student and, as a result, the entire framework for public education violated the state constitution.[62]

Other courts have left to lawmakers the job of actually defining adequacy.[63] In either case, there is a pervasive notion in both courts and legislatures that there must be a logical relationship between the inputs and outputs of an educational system.[64] Two difficult questions then arise: 1) How does one measure adequacy and 2) How much money does adequacy cost?[65]

Despite various courts' coalescence around the *Rose* standards, measuring adequacy still varies from state to state.[66] Additionally, in order to be effective, some measurable standards must be affixed to the more abstract *Rose* capacities.[67] More problematic is the challenge of identifying a per-pupil price tag that will assure the realization of these adequacy goals.[68] This presumes, however, that it is even possible to identify an actual dollar figure that will guarantee results.[69] Courts have rejected state governments' vigorous

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61. *Id.* at 212 (listing capacities). This is the portion of *Rose* that is most often quoted. *See supra* note 58 (detailing reliance on *Rose* in other states).

62. *Id.* at 215 (emphasizing breadth of holding). The court made the effort to list, explicitly, every "part and parcel" of the Kentucky education system to which the decision applied, including the statutes that created each piece of the system. *Id.*

63. *See* First & DeLuca, *supra* note 57, at 192-96 (discussing various approaches taken by legislature and rejected by court); *see also* Lake View Sch. Dist. No. 25 v. Huckabee, 91 S.W.3d 472, 516 (Ark. 2002) (chastising General Assembly for failure to perform adequacy study).

64. *See* Lake View Sch. Dist. No. 25 v. Huckabee, 91 S.W.3d 472, 486-87 (Ark. 2002) (searching for per-student cost of adequate education); Campaign for Fiscal Equity, Inc. v. New York, 801 N.E.2d 326, 328 (N.Y. 2003) (discussing need for state to meet trial court's requirements for educational inputs and outputs); First & DeLuca, *supra* note 57, at 192 (analyzing Ohio decision's reliance on logical connection between funding and adequacy); McDonald et al., *supra* note 5, at 89 (categorizing approaches to adequacy studies and identifying goal of connecting funding to adequacy). The *Campaign for Fiscal Equity, Inc.* court gives a detailed examination of inputs and outputs. *Campaign for Fiscal Equity, Inc.*, 801 N.E.2d at 333-40. *But see* Verstegen, *supra* note 54, at 516 (noting broad holding of *Rose* not limited to finance system).

65. McDonald et al., *supra* note 5, at 89 (assessing problems of adequacy studies).

66. *See* Verstegen, *supra* note 54, at 524-25 (contrasting various states' approaches to adequacy standards).

67. David R. Matthews, *Lessons from* Lake View*: Some Questions and Answers from* Lake View School District v. Huckabee, 56 ARK. L. REV. 519, 528 (2003) (discussing requirement of accountability system to measure expectations of adequacy).

68. McDonald et al., *supra* note 5, at 89-92 (addressing problem of setting funding goals to meet adequacy standards). There are four common approaches for making this jump from adequacy to per-pupil costs: historical spending, econometric, professional judgment, and successful schools. *See id.* at 89-92 (explaining various approaches).

69. *See Lake View*, 91 S.W.3d at 486 (presuming study of per-student costs would have ameliorated legal problems for Arkansas state government); First & DeLuca, *supra* note 57, at 192 (mandating that state identify actual cost of educating students in Ohio).

arguments that per-pupil expenditure is not correlated with adequacy.[70] As such, this "third wave" of litigation serves often as a proxy for "second wave"-style funding equity litigation.[71]

C. Standards-Based Reform

In response to growing concerns over student performance in education, many school districts and state education departments settled on standards-based testing as the appropriate spur to success.[72] States implemented testing as a means of accountability for identifying failing schools and, later, failing students, in order to appropriately focus remedial resources.[73] The promulgation of standards developed in this environment in response to a rising need for uniformity in testing.[74] Standards-based testing initially focused on measuring the outputs of schools (i.e., the students' performance) to identify which schools and systems were not meeting expectations.[75] Later, many states also prescribed testing as a metric for students' grade-advancement or graduation, shifting the burden of failure closer to the students and away from the system at large.[76] Usually, as with most aspects of education, individual states performed the bulk of the testing with little sharing of methodologies or metrics between states.[77]

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70. Lake View Sch. Dist. No. 25 v. Huckabee, 91 S.W.3d 472, 498 (Ark. 2002) (rejecting argument that funding does not correlate to performance).

71. *See* First & DeLuca, *supra* note 57, at 189 (showing similar results in pursuit of equity or adequacy); Palfrey, *supra* note 5, at 21-22 (discussing evolution from adequacy to equity litigation and practical similarities).

72. *See* Liebman & Sabel, *supra* note 15, at 207-10 (detailing emergence of standards movements in response to nationwide concern over state of education); *see also* A NATION AT RISK, *supra* note 24, at 8-9 (listing deficiencies of public education in America). Liebman and Sabel attach the label "New Accountability" to the nexus of the standards-based reforms and their attendant testing regimes. *See* Liebman & Sabel, *supra* note 15, at 229-31 (synthesizing authors' definition of "New Accountability").

73. *See* DODD, PRACTICAL EDUCATION LAW, *supra* note 4, at 15-16 (noting advent of student competency testing); Traub, *supra* note 33, at 46 (noting use of tests to measure accountability efforts of early, disparate, standards-based reform movements).

74. *See* Maurice R. Dyson, *Leave No Child Behind: Normative Proposals to Link Educational Adequacy Claims and High Stakes Assessment Due Process Challenges*, 7 TEX. F. ON C.L. & C.R. 1, 3-4 (2002) (explaining connection between standards and accountability through testing). Dyson also argues that while many view the standards and testing movements as inextricably linked, they are in fact "twin movements" with differing validity. *Id.* at 4-5.

75. *See* Ashcroft, *supra* note 32, at 9-10 (describing state efforts at testing, including assessment of schools and methods). These expectations are often but not always labeled "adequacy." *See* Dyson, *supra* note 74, at 3-4.

76. *See* DODD, PRACTICAL EDUCATION LAW, *supra* note 4, at 14-16 (noting transition to teacher and student competency testing). *But see* Liebman & Sabel, *supra* note 15, at 208-20 (indicating standards movement always focuses on teacher and student competency). Liebman and Sabel acknowledge, however, that the "New Accountability" movement enhances the focus on performance outputs rather than so-called opportunity to learn standards which dictate resource and methodology inputs. *Id.* at 230.

77. *See* Ashcroft, *supra* note 32, at 9-10 (approving existing variety of state-level assessment programs); Traub, *supra* note 33, at 46 (describing early disparate attempts at testing and development of standards); *see also* Annette Lamb & Larry Johnson, *Education Standards*, http://eduscapes.com/tap/topic28.htm (last visited

On the national and regional levels, there are a growing number of private standardized tests that schools use to compare in-state performance against external standards.[78] Additionally, the federal government has made a significant foray into this reform movement with the National Assessment of Educational Progress (NAEP).[79] NAEP provides standards and testing to sample sets of students all over the country in an attempt to measure student performance in a more uniform fashion.[80] The results of the tests have no immediate effect on schools; they simply serve as a national metric.[81] NAEP has aided states in assessing their own standards regimes against a sample set outside of and larger than their own.[82] States have begun voluntarily using these testing regimes to broaden their assessment capabilities as they strive to improve their educational systems.[83]

D. Increased Federal Involvement

In addition to NAEP, the federal government has been increasingly expanding its role in the assessing and shaping of public education.[84] The origin of this increased role as a movement began with the groundbreaking 1983 report, *A Nation At Risk*, which detailed the far-reaching and fundamental problems of American schools.[85] The effort to partly nationalize education standards began in earnest, however, in the 1990s.[86] While federal involvement has increased significantly, any imposition of standards for curricula or student performance has remained voluntary.[87] Thus, federal involvement has created a pool of intellectual resources upon which states can draw, but imposed no

Jan. 10, 2006) (collecting over two dozen websites of state, regional and national curriculum standards).

78. *See* Ashcroft, *supra* note 32, at 10-11 (listing private assessment efforts).

79. *See* DODD, PRACTICAL EDUCATION LAW, *supra* note 4, at 13-14 (describing NAEP). NAEP is funded by Congress but is used merely as an assessment program, with no relation to accountability at present. *Id.*

80. National Center for Education Statistics, *NAEP Overview* (2006), http://nces.ed.gov/nationsreportcard/about (providing overview of NAEP testing goals and programs).

81. *Id.* "NAEP does not provide scores for individual students or schools; instead, it offers results regarding subject-matter achievement, instructional experiences, and school environment for populations of students . . . ." *Id.*

82. *See* Liebman & Sabel, *supra* note 15, at 209-11 (detailing expansion of accountability and testing but with continued emphasis on local control).

83. *See* Ashcroft, *supra* note 32, at 10-11 (detailing adoption of regional testing programs); First & DeLuca, *supra* note 57, at 201-03 (addressing deficiencies in defining "adequacy" on state-by-state basis).

84. *See* Heise, *supra* note 29, at 353-60 (summarizing increased federal role after A NATION AT RISK report through mid-1990s).

85. *See* DODD, PRACTICAL EDUCATION LAW, *supra* note 4, at 13-14 (asserting "bull market" on current reforms environment result of report). *See generally* A NATION AT RISK, *supra* note 24 (reporting on state of public education).

86. *See* Heise, *supra* note 29, at 354-60 (detailing Congressional legislation of educational reform under Presidents Bush and Clinton).

87. Heise, *supra* note 29, at 355, 358 (emphasizing voluntary nature of national standards under reforms of Presidents Bush and Clinton); *see also* Traub, *supra* note 33, at 46 (describing resistance to mandatory testing under NCLBA from both conservatives and liberals).

binding obligations to develop uniform success between states.[88] In turn, there is also no external pressure for education levels within a state to be particularly uniform from region to region.[89]

In many respects, the culmination of this movement to increase federal involvement in public education was the No Child Left Behind Act (NCLBA) of 2001.[90] Drawing on the legacy of accountability and testing, the Bush Administration attempted to address the many disparities in education between states, between districts, and between groups of students.[91] One hallmark of the NCLBA is the federal requirement that states show progress in the performance outputs of their students.[92] Conceptually, the NCLBA draws a hard line, but in practice the ongoing dedication to localism in education convinced legislators to leave out any strong enforcement provisions for the federal Department of Education.[93] Most notably, the standards against which a state is measured are ultimately determined by the state itself.[94] The effect is that it encourages movement toward uniform standards, and in fact mandates non-binding NAEP testing, but does nothing to ensure anything more than voluntary participation.[95] Critics also note that allowing states to create their own standards will only encourage states to lower their testing standards, in contrast to the burgeoning individual standards movements.[96]

A more cooperative model of state and local implementation of federal standards has a precedent in other areas of governmental regulation.[97] The

88. *See* Dodd, *Critique*, *supra* note 31, at 856 (describing NCLBA incentive for states to continue standards movement).

89. *See* Lake View Sch. Dist. No. 25 v. Huckabee, 91 S.W.3d 472, 489-90 (Ark. 2002) (demonstrating wide disparities between school districts in Arkansas); *see also* Rose v. Council For Better Educ., Inc., 790 S.W.2d 186, 198 (Ky. 1989) (defining part of efficient system of public education as uniformity between districts).

90. *See* Liebman & Sabel, *supra* note 15, at 283 (discussing NCLBA as extension of "New Accountability" movement); Nash, *supra* note 10, at 253-55 (describing restructuring of federal involvement under NCLBA).

91. Liebman & Sabel, *supra* note 15, at 283-86 (discussing provisions of NCLBA).

92. Liebman & Sabel, *supra* note 15, at 283-86 (discussing state reporting requirements of the NCLBA); BOEHNER, NCLBA FAQ, *supra* note 31, at 7-13 (explaining major components of bill).

93. Traub, *supra* note 33, at 46 (analyzing political pressure surrounding passage of act).

94. BOEHNER, NCLBA FAQ, *supra* note 31, at 7-12 (explaining extreme flexibility defining yearly progress and designing assessment tests by state and local authorities).

95. Liebman & Sabel, *supra* note 15, at 284-91 (assessing provisions of act). This is referred to by some as the "race to the bottom." James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 944-47 (2004) (arguing NCLBA is "[d]riving a race to the bottom").

96. Traub, *supra* note 33, at 46 (describing incentives of NCLBA); *see* Dodd, *Critique*, *supra* note 31 at 856-57 (noting lack of nationalized testing precludes ability to make interstate comparisons under NCLBA); Ryan, *supra* note 95, at 945-47 (describing incentives). A more indirect, but troubling, incentive is to encourage schools to forego education in untested subjects for certain student populations. Sam Dillon, *Schools Cut Back Subjects to Push Reading and Math*, N.Y. TIMES, Mar. 26, 2006, at A1 (revealing schools nationwide withdrawing students from science and history classes to protect test scores).

97. *See* Percival, *supra* note 11, at 1174 (enumerating aspects of cooperative federalism in context of recent environmental regulation); Schapiro, *supra* note 11, at 283-85 (describing movement toward cooperative federalism).

statutory framework for environmental regulation provides such a model.[98] Under the Clean Air Act (CAA), for example, individual states may elect to design their own implementation plans, which must be approved by the federal government's Environmental Protection Agency (EPA) and designed to meet regulations outlined by the agency.[99] The CAA recognizes that the solution framework for the problem of air pollution cannot effectively be left to individual states, but its execution benefits from local participation and locally-designed implementation plans.[100] It has been suggested that this framework for federal-state cooperation may be a politically viable answer to the problem of declining public school performance.[101] This model may balance the tension between aspirational federal standards and the firmly-rooted traditions of local control and variation.[102]

III. ANALYSIS

The aforementioned trends in judicial and legislative responses to the changing needs of education have had an overlapping and cumulative effect on local education authorities.[103] Pressure from judicial intervention upsets the status quo of an educational system built on a different set of societal needs.[104] The legislative response effectively puts the burden on local authorities, plus

98. Percival, *supra* note 11, at 1161 (describing "environmental federalism"). In particular, the Clean Air Act (CAA) is presented as a model for cooperation in the making of and meeting standards. Palfrey, *supra* note 5, at 48-49 (describing federal-state structure of CAA in context of federal education policy); *see also* THE CLEAN AIR ACT HANDBOOK 4-7 (Robert J. Martineau, Jr. & David P. Novello, eds., 2nd ed. 2004) (giving brief history of Clean Air Act); Percival, *supra* note 11, at 1161 (enumerating requirements of CAA). Indeed, some commentators assert that the NCLBA is in the mold of this model as well. Note, *No Child Left Behind and the Political Safeguards of Federalism*, 119 HARV. L. REV. 885, 888-89 (2006) [hereinafter *NCLB and the Political Safeguards of Federalism*] (noting advocates of NCLBA believe Act is example of cooperative federalism).

99. THE CLEAN AIR ACT HANDBOOK, *supra* note 98, at 13, 44-46 (describing federal standards and process of state implementation plans); Percival, *supra* note 11, at 1161 (couching requirements of CAA in discussion of federalist principles).

100. THE CLEAN AIR ACT HANDBOOK, *supra* note 98, at 3-7 (describing changing relationship between state and federal action during early years of federal pollution regulation); Percival, *supra* note 11, at 1171-74 (highlighting objective of federal separation in modern environmental legislation).

101. *See* Palfrey, *supra* note 5, at 48-49 (proposing CAA as model for future federal education policy). *But see* Joshua D. Sarnoff, *Cooperative Federalism, the Delegation of Federal Power, and the Constitution*, 39 ARIZ. L. REV. 205, 217-21 (1997) (arguing Constitution does not support engaging in cooperative federalism). *See generally* Jaffe, *supra* note 23 (analyzing possible constitutional bars to increased federal education legislation). Jaffe finds multiple bases for Congressional action including the Commerce Clause, Equal Protection, and even the Weights and Measurements Clause. *Id.* at 228-46.

102. Diane Ravitch, *Every State Left Behind*, N.Y. TIMES, Nov. 7, 2005, at A23 (lamenting resulting incentives of NCLBA in absence of careful balance of local and federal action); *see also* Sam Dillon, *Students Ace State Tests, but Earn Ds from U.S.*, N.Y. TIMES, Nov. 26, 2005, at A1 (describing falling state standards under the NCLBA, as compared to nationally administered test).

103. *See* Traub, *supra* note 33, at 46 (describing efforts of local education authorities to respond to shortcomings); *infra* notes 104-108 and accompanying text (analyzing overlapping effect of trends).

104. *See* Rose v. Council For Better Education, Inc., 790 S.W.2d 186, 215 (Ky. 1989) (explaining each part of existing state educational system contravenes constitution); Staples, *supra* note 2 (noting today's society different than during creation of existing education systems).

students and teachers, to perform and produce outputs at high, but often difficult to quantify, levels.[105] Often in contravention of a judicial mandate, legislative and executive bodies leave these authorities without the necessary resources, motivating local authorities to be narrowly output driven, with the outputs measured by someone else.[106]

In conjunction with these developments, a grassroots standards movement has grown up to provide support and intellectual resources to local education providers.[107] Without coordination between these movements, however, they work together to heighten the disparities between districts and between states.[108] The net result is a mosaic of standards and proposed solutions that are not cross-comparable and that exacerbate existing inequities.[109] Furthermore, where these disparate local efforts to improve meet the top-down demands for success, a storm brews.[110] Without cooperation, these competing approaches will continue to frustrate each other and the common goal of elevating American education to the height of modern standards will be frustrated with it.[111]

A. Downward Pressure

From one point of view, leaving the implementation of public education to educators, school boards, and local governments simply maintains a centuries-long tradition of localism in education.[112] The *Rodriguez* Court tied its rejection of education as a fundamental right to this tradition.[113] The facts of

105. *See* First & Deluca, *supra* note 57, at 202 (discussing outcome-based solutions of legislative responses); Liebman & Sabel, *supra* note 15, at 207-09 (detailing burdens on schools and teachers in response to legislative pressure).

106. First & Deluca, *supra* note 57, at 202 (revealing attempts by state legislatures to avoid coming to terms with adequacy decrees); Palfrey, *supra* note 5, at 42-43 (detailing tension between courts and legislatures in aftermath of adequacy litigation).

107. *See* Ashcroft, *supra* note 32, at 9-11 (detailing state efforts at assessment and testing). *But see* Nash, *supra* note 10, at 246-47 (noting federal role in standards movement). The standards movements began in response to A NATION AT RISK and was quickly supported, to varying degrees, by the federal government. *See id.*; DODD, PRACTICAL EDUCATION LAW, *supra* note 4, at 13-14 (explaining federal role in standards movement).

108. *See supra* note 89 and accompanying text (demonstrating inconsistencies between educational systems).

109. *See* Lake View Sch. Dist. No. 25 v. Huckabee, 91 S.W.3d 472, 489 (Ark. 2002) (demonstrating discrepancies between neighboring districts in Arkansas and Texas).

110. *See supra* notes 95-96 and accompanying text (explaining incentives created by competing pressures of inadequate education and federal legislation).

111. *See* Dodd, *Critique*, *supra* note 31, at 856-57 (detailing effect of pressure on state assessment exams). State responses to federal accountability vary from focusing all teaching on the assessment exams to rewriting exams to ensure higher passing rates. *Id.*

112. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 47 (1973) (noting Texas system of reliance on local resources similar to most other states); Wilkins, *supra* note 4, at 271-72 (highlighting importance of local control over education policy); *supra* notes 30-36 (describing growth of education law under constraint of maintaining local control).

113. *Rodriguez*, 411 U.S. at 39-40 (discussing motivation of local control to extend public education to

Rodriguez, however, displayed the stark realities of an education system no longer able to cope adequately with the needs of educating more children for more years than when it was designed.[114] By basing its decision on the importance of localism in education, the *Rodriguez* Court reasoned past this reality and gave the federal government a continuing pass to ignore the growing problems of public education.[115] Consequently, local education authorities and activists are compelled to search for ad hoc solutions that are likely to fail due to the same lack of monetary and intellectual resources.[116]

B. Shortcomings of Litigation-Based Solutions

1. "Second-Wave" Equity Litigation

The problems encountered by the litigational strategies in state courts exemplify the challenge of fitting yesterday's systems into today's world.[117] While state constitutional provisions forced many states to own up to unequal systems of education, the severe lack of funding made the only solution untenable.[118] Equalizing funding across intrastate school districts would have required decreasing funding for some of the richest schools, absent a major new infusion of money.[119] While these victories for plaintiffs advanced the cause of discrediting unequal funding schemes, the mammoth task of revamping entire educational systems proved too difficult to achieve by judicially-mandated remedy.[120] This result, in addition to being ineffective, again highlights the need to reconsider the entire approach to public education in the United States.[121]

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all).

114. *Id.* at 11-15 (reciting facts of case). The Court primarily detailed financial comparisons between the least and most wealthy schools in the San Antonio School District. *Id.* at 12-13. While the per-pupil cost in each school was rising at the same rate and the percentage of property tax input was adjusted for local income, the total cost for each student in the poorer school was about twenty-five percent less than that of the wealthier school. *Id.* at 14.

115. *See id.* at 39-40 (discussing importance of local control); *supra* notes 43-45 and accompanying text (detailing loss of federal avenue for reform after *Rodriguez*).

116. *See* Palfrey, *supra* note 5, at 24 (describing Kentucky's failure to fix educational system). *Rose* is considered the most progressive example of adequacy victories, but the disparities were so great that even after this success, positive change was frustratingly difficult. *Id.* at 23-24.

117. *See* Staples, *supra* note 2 (castigating discontinuity between origins of educational system and modern challenges). The fundamental premise of equity litigation remedies was that funding needed to be leveled off. *See* Palfrey, *supra* note 5, at 20-21 (describing trend as "leveling down"). This sort of balancing was already attempted in the past. *See Rodriguez*, 411 U.S. at 45 (describing Texas funding system whereby local funds balanced with state funds).

118. *See* Palfrey, *supra* note 5, at 19-20 (revealing problems equity litigation successes faced).

119. *See* Palfrey, *supra* note 5, at 20 (explicating practical difficulties of equity litigation).

120. *See* McDonald et al., *supra* note 5, at 74-75 (discussing courts' reticence to invalidate systems based on equity challenges).

121. *See* McDonald et al., *supra* note 5, at 75 (explaining transition to adequacy litigation). Adequacy asks a more challenging question than merely whether spending is equal (and if that even matters). *See* Verstegen,

2. *"Third-Wave" Adequacy Litigation*

Adequacy litigation signals an evolutionary step in education activism.[122] This strategy strikes close to the heart of the problems of public education.[123] It is the simplest indictment of a system: inadequate. Consequently, successful adequacy litigation poses the most difficult questions for judges and lawmakers.[124] Many courts take this opportunity to sweepingly condemn state education systems.[125] The challenge of defining adequacy forces policymakers to look hard at the actual faces in their school systems and to answer the question of why the schools and students are not succeeding.[126] Shortcomings of these systems that lie deeper than merely unequal funding become readily apparent under this scrutiny.[127] Unfortunately, the tangible results of this wave of litigation continues to make it evident that local, ad hoc solutions to public education will fail on a large scale for multiple reasons.[128]

The problem lies in fashioning a remedy. The abstract, expansive language of adequacy definitions ("sufficient," "thorough and efficient," etc.) is well-suited to a finding of inadequacy, but unwieldy when it comes to designing a practical remedial plan.[129] Unlike the blunt instrument of equitable funding, adequacy does not lend itself to a tidy price tag.[130] While courts proclaim that

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supra note 54, at 508-10 (describing framework of adequacy litigation).

122. *See supra* note 121 (outlining progressive aspect of adequacy).

123. *See* Verstegen, *supra* note 54, at 512 (highlighting pressure to evaluate more than financial input during adequacy litigation). Verstegen cites "teachers, class sizes, technology, materials, curriculum, facilities, [and] budget flexibility" as examples of factors to be considered. *Id.*

124. *See supra* notes 56-57 and accompanying text (outlining adequacy litigation framework and attendant challenges).

125. *See* Lake View Sch. Dist. No. 25 v. Huckabee, 91 S.W.3d 472, 511 (Ark. 2002) (stating "every dollar spent on public education in Arkansas would be constitutionally suspect"); Rose v. Council For Better Education, Inc., 790 S.W.2d 186, 215 (Ky. 1989) (noting broad extent of unconstitutional educational apparatus). The court's strong language is worth quoting at length:

> Lest there be any doubt, the result of our decision is that Kentucky's *entire system* of common schools is unconstitutional. There is no allegation that only part of the common school system is invalid, and we find no such circumstance. This decision applies to the entire sweep of the system—all its parts and parcels. This decision applies to the statutes creating, implementing and financing the *system* and to all regulations, etc., pertaining thereto. This decision covers the creation of local school districts, school boards, and the Kentucky Department of Education to the Minimum Foundation Program and Power Equalization Program. It covers school construction and maintenance, teacher certification—the whole gamut of the common school system in Kentucky.

Id.

126. *See* Verstegen, *supra* note 54, at 512-22 (listing examples of states grappling with questions of educational adequacy).

127. *See* Verstegen, *supra* note 54, at 512-22 (listing state examples of adequacy testing).

128. *See* Palfrey, *supra* note 5, at 24 (describing failure of post-*Rose* Kentucky remedies).

129. *See* First & DeLuca, *supra* note 57, at 197-203 (outlaying difficulties of defining adequacy even in presence of constitutional language).

130. *See* McDonald et al., *supra* note 5, at 89-94 (defining variety of methods of adequacy studies); *supra* notes 65-68 and accompanying text (describing challenge of defining adequacy in terms of dollars).

money is not the only ingredient of an adequate education, the legislature is nevertheless directed to assess how much money, per pupil, it would require to provide the prescribed educational goals to every child.[131] Indeed, it is an onerous burden to demonstrate compliance to a court without this monetary figure.[132] Unsurprisingly, this price tag is often disputed, varying wildly from study to study.[133] Further, while this approach is politically logical, it fails to recognize that a true remedy must measure the substantive inputs to every child's education, not just the financial cost.[134]

Apart from this problem, adequacy definitions create an inherent need to compare internal systems to the world outside of that in which they are defined.[135] Likewise, the studies and court decisions recognize that an adequate education in the 21st century prepares graduates to be viable citizens outside of simply the communities in which they are raised.[136] Thus, the adequacy studies essentially mandate greater cooperation and integration, but are conducted individually at state and local levels.[137]

3. Adequacy and Standards Movements

The combined effect of the difficulty in measuring educational inputs and the need to compare educational outputs with external standards dovetails with the accountability movement.[138] This movement focuses on the measurable outputs of education—increasingly testing students and holding both schools and students accountable for the results.[139] The progression towards accountability at the lowest level seems natural given the constraints of the system, but places too high a burden on teachers and students.[140] Without

131. *See Lake View*, 91 S.W.3d at 485-88 (chastising state for failure to generate sufficient adequacy study after trial court decree).

132. *See* Campaign for Fiscal Equity, Inc. v. New York, 801 N.E.2d 326, 328 (N.Y. 2003) (scrutinizing state action with regard to educational inputs and outputs).

133. *See* McDonald et al., *supra* note 5, at 89-94 (defining various approaches to adequacy assessment); Francis-Smith, *supra* note 6 (complaining results of adequacy studies vary based on underlying motivations).

134. *See Campaign for Fiscal Equity, Inc.*, 801 N.E.2d at 328 (explaining adequacy must consider variety of inputs); Dyson, *supra* note 74, at 44-45 (describing role of "opportunity to learn" standards in adequacy assessment).

135. *See supra* text accompanying note 61 (listing adequacy factors from landmark *Rose* decision). In particular, note the standard, "compete favorably with their counterparts in surrounding states, in academics or in the job market." *Id.*

136. *See supra* text accompanying note 61.

137. *See supra* text accompanying note 61; *see also* First & DeLuca, *supra* note 57, at 201 (lamenting lack of national uniformity in adequacy standards).

138. *See* Dyson, *supra* note 74, at 34-39 (discussing relationship between high-stakes testing and adequacy litigation). The pressures of high-stakes testing burden efforts to identify and aspire to adequate educational opportunities. *Id.* at 37-38.

139. *See* DODD, PRACTICAL EDUCATION LAW, *supra* note 4, at 14-16 (noting growth of competency testing for students and teachers).

140. *See* Traub, *supra* note 33, at 46 (discussing efforts by teachers and students to prepare for high-stakes tests).

focusing on the substantive inputs of schools, lawmakers are essentially testing the outputs of a black box, applying a method of trial and error to the results.[141] Refocusing the standards movement on educational inputs would be more in line with the spirit of adequacy definitions and would remove the negative pressures of high-stakes testing.[142]

C. Shortcomings of Existing Federal Legislation

The federal government's involvement in public education is limited to discretionary legislative and executive action since the *Rodriguez* decision.[143] Nevertheless, these branches have responded with increasing fervor to the dire warnings of a faltering American education system.[144] Unfortunately, one hallmark of such involvement has been ensuring that any action is not perceived as an intrusion upon the cherished localism of public education.[145]

The most concrete example of this careful treading is the NCLBA. Like education initiatives before it, the federal role defined by the NCLBA steadfastly refrains from interfering in local implementation, but the strong bipartisan support of the Act allowed it to go further than ever in terms of holding schools accountable for poor results.[146] The primary reason, however, for this strong congressional support is that the purported accountability is, in fact, illusory.[147] The accountability standards by which a state must measure itself in order to continue receiving federal money are set by the state itself.[148] This pecuniary pressure, when coupled with the tempting opportunity to create more easily attainable benchmarks, is having a measurable downward effect on the stringency of the self-made accountability standards.[149]

Directly contradictory to the purported objectives of NCLBA, this incoherent regime of accountability leaves states in a worse position than before. Through the standards and reform movements of the 1990s, many

141. *See supra* note 61 and accompanying text (listing *Rose* standards, focusing on outputs of educational system). *But see Campaign for Fiscal Equity, Inc.*, 801 N.E.2d at 344-45 (advocating actual cost of adequate education in New York must tie to both inputs and outputs).

142. *See* Dyson, *supra* note 74, at 34-39 (arguing for better integration of accountability and adequacy); *see also* Dillon *supra* note 96, at 1 (discussing pressure under high-stakes testing regime to teach directly to tests).

143. *See* DODD, PRACTICAL EDUCATION LAW, *supra* note 4, at 112 (noting effect of *Rodriguez*).

144. *See supra* notes 84-87 and accompanying text (detailing increased federal role in last two decades).

145. *See supra* note 36 and accompanying text (evaluating effect of localism in education on federal legislative role).

146. *See supra* notes 90-94 and accompanying text (describing incorporation of principles of localism into NCLBA).

147. *See* Ryan, *supra* note 95, at 944-46 (describing failure of accountability in NCLBA); Ravitch, *supra* note 102, at A23 (discussing unintended effects of testing regime in which states create own standards).

148. *See* Ryan, *supra* note 95, at 940-41 (defining key aspects of NCLBA, including self-defined Adequate Yearly Progress requirements). In addition to writing their own tests, states define assessment goals for aggregate groups of students and schools, known as Adequate Yearly Progress. *Id.*

149. *See* Dillon, *supra* note 96 (lamenting plummeting testing standards for Adequate Yearly Progress).

states began to employ testing and accountability standards to measure and identify shortcomings of their own systems.[150] While states struggled through the problems of defining, measuring, and funding adequate educations, the federal government has undercut their efforts by decoupling the incentives of creating and meeting standards in blind devotion to the "New Accountability" movement.[151]

D. Proposals

A paradigm shift is needed in public education to respond to an economy and society that is vastly different from that under which the system was initially conceived.[152] The major trends of the last thirty years in this area, and their attendant flaws, counsel reinventing the federal-state relationship in the arena of education.[153] There are examples in the area of environmental regulation that envision such a restructured relationship, drawing upon the strengths and traditions of both partners.[154] In this relationship, often referred to as cooperative federalism, the federal government creates specific goals and limits, but leaves the process of implementation to state and local governments.[155] The relevant federal administrative agency works *with* states to develop the implementation plan, however, not simply as a purely regulatory agency.[156]

The Clean Air Act is a model of this type of federal-state relationship.[157]

150. *See* Dodd, *Critique*, *supra* note 31, at 856 (describing state efforts to create tests and accountability prior to NCLBA).

151. *See* Ravitch, *supra* note 102, at A23 (displaying evidence fears of lowering standards are coming to fruition); *supra* notes 144-150 and accompanying text (describing adverse pressure on state reform efforts by NCLBA).

152. *See* Campaign for Fiscal Equity, Inc. v. New York, 801 N.E.2d 326, 351-52 (N.Y. 2003) (Smith, J., concurring) (noting changing requirements of public education); *see also supra* notes 27-29 and accompanying text (detailing changes in American economy and society in context of public education). Judge Smith says, "a high school education is today as indispensable as a primary education was in 1894. Children in the 21st century need the opportunity for more than a ninth grade education." *Campaign for Fiscal Equity, Inc.*, 801 N.E.2d at 351-52.

153. *See supra* notes 103-111 and accompanying text (establishing argument foregoing trends of education militate for dramatic change).

154. *See* Palfrey, *supra* note 5, at 48 (outlining beneficial aspects of Clean Air Act as applicable to educational context); Percival, *supra* note 11, at 1174-75 (describing federal environmental regulation as exercise in cooperative federalism).

155. *See* Schapiro, *supra* note 11, at 283-85 (discussing benefits of cooperative federalism). Schapiro highlights the distinction between "dualist" notions of federalism, in which federal and state roles are at odds, and "polyphonic" federalism, in which there is integration and cooperation. *Id.* at 250-54. He also uses the NCLBA as an example of federal regulation that should be assessed in terms of its commitment to polyphonic federalism. *Id.* at 254-57. *But see* Sarnoff, *supra* note 101, at 214-19 (arguing dubious logic of and lack of constitutional support for cooperative federalism).

156. *See* Palfrey, *supra* note 5, at 48-50 (outlining relationship between states and federal agency under Clean Air Act).

157. *See* THE CLEAN AIR ACT HANDBOOK, *supra* note 98, at 41, 44-46 (detailing procedural aspects of Clean Air Act); Palfrey, *supra* note 5, at 48 (giving details of Clean Air Act in context of education reform).

Under this model, the federal Environmental Protection Agency (EPA) sets air pollution goals for various pollutants referred to as National Ambient Air Quality Standards.[158] The states, in turn, create implementation plans for reaching the national goals that the EPA must approve.[159] The EPA does not dictate the details or best methods of a state's implementation plan but merely verifies that it *actually* attains the national pollution goals the EPA outlined.[160]

The regulation needs of education nicely parallel those of the environment.[161] Both have strong histories of local control and regulation.[162] Both have deeply rooted long-term effects on society at-large.[163] Perhaps most important to this proposed model, the outputs of both systems migrate far and wide from their sources.[164] The NCLBA attempts to address these issues, but without rocking the boat of local politics.[165] Unfortunately, by codifying the existing weaknesses of the public education system in a misguided attempt to maintain local control, the act bullies local authorities into acting against their own interests.[166] By refocusing the accountability efforts of No Child Left Behind and re-envisioning the federal-state relationship in education, the federal government could provide exactly the right incentives to local authorities.[167] The next section assesses the strengths of such a proposal.[168]

1. Maintains Localism

The resulting incentives of the NCLBA demonstrate the weighty political

158. *See* THE CLEAN AIR ACT HANDBOOK, *supra* note 98, at 44-46 (explaining state role in EPA regulation).

159. *See* Palfrey, *supra* note 5, at 48-49 (explaining federal role in state implementation plans).

160. *See id.*

161. *See* Klee, *supra* note 31, at 160-62 (outlining parallels between environment and education). Klee asserts that these parallels argue that the two areas should be regulated similarly. *Id.* He takes the opposite view of this Note, however, arguing that environmental law should go down the path of state-by-state litigational strategies instead of federal oversight. *Compare id.* at 158-59 (advocating state-level litigation of environmental justice), *with* Parts II.B.2-3 (examining failure of state-level education litigation to fully effect desired change).

162. *See* Klee, *supra* note 31, at 160-62 (appealing to history of education and environmental regulation to argue parallel reform).

163. *See* Plyler v. Doe, 457 U.S. 202, 221 (1982) (noting long-term impact of deprivation of education); Percival, *supra* note 11, at 1156-57 (emphasizing far reach of pollution and effects of environmental regulation).

164. *See* Percival, *supra* note 11, at 1156-57 (noting "interstate character of pollution problems" spurred increased federal regulation); *supra* text accompanying notes 135-137 (discussing interstate aspect of adequacy standards in education).

165. *See NCLB and the Political Safeguards of Federalism*, *supra* note 98, at 893 (noting lack of debate over maintenance of state control in NCLBA).

166. *See* Ravitch, *supra* note 102, at A23 (discussing lowering of state standards merely to maintain federal monetary support).

167. *See* Palfrey, *supra* note 5, at 47-49 (proposing accountability model which does not encourage lowering state standards).

168. *See infra* Parts III.D.1-3 (detailing benefits of proposed cooperative federalism model).

power of the tradition of localism in education policy.[169] There are merits to local control, however, beyond tradition. The United States continues to support regional differences in culture and economy that require flexibility of teaching methods and educational organization.[170] Legislation in the model of cooperative federalism would continue to emphasize local control but the focus would be on implementation rather than standards and curricula.[171] Additionally, the creation of meaningful national standards could easily be an aggregation and accumulation of lessons learned from implementing local standards, in the model of the existing NAEP testing.[172] The most personal aspects of education are the schools and the actual teaching of children. Future federal legislation needs to embrace these local resources as partners in a new education initiative, but without ceding all power to local authority.[173]

2. *Provides Clearer Political Accountability*

As a result of the *Rodriguez* decision in 1973, advocates' efforts to reform education are necessarily disconnected and idiosyncratic.[174] Additionally, accountability is limited to state and local authorities despite the fact that in today's mobile society the educational viability of any citizen potentially affects any part of the country.[175] Political accountability is also deceptively misguided under current federal legislation as the attempted hard line of regulation is undercut by the illusory testing requirements.[176] States evade owning up to lowering standards by claiming that they are only attempting to avoid losing federal money.[177] The federal government, in turn, disclaims any

169. *See NCLB and the Political Safeguards of Federalism*, *supra* note 98, at 893 (noting lack of debate over maintenance of state control in NCLBA); Traub, *supra* note 33, at 46 (discussing toothless nature of NCLBA due to local control).

170. *See supra* note 32 (discussing cherished aspects of parental and local involvement in public education).

171. *See* Palfrey, *supra* note 5, at 49 (discussing state role in hypothetical education regulation based on Clean Air Act); Schapiro, *supra* note 11, at 253 (highlighting polyphonic federalism aspects of NCLBA). Aspects of existing federal law certainly bring some of the flexibility advocated by this Note, but the balance between control and authority has not been carefully calibrated. *See supra* notes 149-151 and accompanying text (outlining failings of NCLBA with regard to state-federal relationship).

172. *See* DODD, PRACTICAL EDUCATION LAW, *supra* note 4, at 13-14 (describing NAEP); Palfrey, *supra* note 5, at 43-44 (advocating involvement of all interested parties in re-envisioning school reform); *see also* Ryan, *supra* note 95, at 959-60 (demonstrating how failure to tie accountability to NAEP in existing legislation pushes standards down). The governing board that creates the NAEP tests is "a bipartisan group whose members include governors, state legislators, local and state school officials, educators, business representatives, and members of the general public." *NAEP Overview*, *supra* note 80.

173. *See* Palfrey, *supra* note 5, at 51-52 (proposing "holistic" approach to future federal education regulation).

174. *See supra* notes 103-106 and accompanying text (discussing negative effect of downward pressure on states after removal of federal recourse).

175. *See* Nash, *supra* note 10, at 256 (addressing complications of localized accountability); *supra* note 164 and accompanying text (discussing effects of modern mobile society).

176. Ryan, *supra* note 95, at 944-46 (defining "perverse incentives" of NCLBA structure).

177. *See* Dillon, *supra* note 96 (arguing "chasm" between NAEP standards and state standards result of

responsibility with its weak testing requirements and hands-off approach to creating standards.[178] If the federal government adopted universal standards of education, students and families would know where to turn for answers and could do so with a coherent national voice.[179]

3. Freedom to Reevaluate Methods

Remodeling the relationship between state and federal governments does nothing in an automatic way for failing educational standards. The foregoing presentation, however, demonstrates that the competing and disconnected movements that currently exist in educational reform are doing a disservice to American public education everywhere.[180] By centralizing educational standards, the educational infrastructure can provide a comprehensive evaluation of their quality and effectiveness.[181] Such an evaluation would benefit from input from every affected locality and from the ability to assess the state of education in every variation of American community.[182] From this point, the methods and standards can be reevaluated, unencumbered by court decrees or the out-of-touch downward pressure that burdens state systems under the current framework.[183] More ethereally, but perhaps just as important, there can grow a common sense of purpose when every American is held to the same educational standard. Perhaps, in time, this reevaluation can become the foundation of a national conversation powerful enough to reverse the demoralizing *Rodriguez* decision and recognize a fundamental right to education.[184]

IV. CONCLUSION

There is near unanimity that the existing public school systems in the United States must improve if its citizens are to remain competitive in a global economy. If a chance is created to fashion a new system of education, free

political and pecuniary pressure).

178. *See* BOEHNER, NCLBA FAQ, *supra* note 31, at 7 (disclaiming federal accountability for state school performance). "Each individual state is given the flexibility to determine a variety of factors, including the definition of proficiency . . . ." *Id.*

179. *See NCLB and the Political Safeguards of Federalism*, *supra* note 98, at 903 (criticizing NCLBA for blurring accountability).

180. *See supra* Parts II.B.2-3, III.B (demonstrating confluence of pressures on public educational standards).

181. *See* Williams, *supra* note 3 (advocating centralization of educational system to take burden off lowest rung).

182. *See supra* note 172 and accompanying text (discussing NAEP as model for local involvement in national standards).

183. *See* Schapiro, *supra* note 11, at 288 (discussing value in polyphonic federalism of flexibility due to intergovernmental dialogue).

184. DODD, PRACTICAL EDUCATION LAW, *supra* note 4, at 132 (advocating future acceptance of *Rodriguez* dissent, finding right to education).

from the constraints of history, culture, and politics, a multitude of imaginative reforms might spring up. Presently, however, education reformers contend with hundreds of years of policy development, the limits of stare decisis, and the competing personal values of nearly every American.

In this context, successful reform must account for and leverage the successes and setbacks in the litigational forum. There are good arguments for overturning *Rodriguez*, but counting on that would be impractical. The existing state-level litigation, however, has defined the boundaries of state obligations to public education. More helpfully, however, these cases provide substantial rhetorical ammunition to reformers wishing to put the deficiencies and disparities of education on display.

Likewise, the increased fervor on the national level for accountability and improvements in performance output paints a quantitative picture for the American public, importantly raising the profile of education reform. In this light, the NCLBA serves two beneficial roles, despite its flaws. As a step toward increased federal involvement, it sets the stage for a national discussion of the merits of continuing down this road by giving real strength to its provisions. Also, as an arm of the accountability movement, the NCLBA promotes further evaluation of the tensions created by the focus on performance outputs. At the least, then, the NCLBA has helped bring the question of education policy into the open, and on a more national scale.

In the end, it will surely take vision and dedication to become unanchored from the inertia of history and adequately address the problems of public education in the United States. By drawing the existing threads of education trends toward a holistic re-imagining of the place of public education in greater American culture, a politically viable solution might be crafted before it is too late.

Kurtis D. Behn