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Poverty, Educational Achievement, and the Role of the Courts

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The large and growing proportion of U.S. students who come from poverty backgrounds explains this country's relatively low performance on international achievement tests. These students need a broad range of comprehensive educational services if they are to have a meaningful opportunity to succeed in school. These opportunities include not only adequate resources for basic K–12 educational services but also parent engagement, health and other services, and additional early education, after-school, and summer programs. In most states, the schools attended by students with the greatest needs tend to receive the fewest resources because of the inequitable systems most states use for financing public education.

The United States' critical educational goals cannot be met unless the courts undertake a more active, sustained role in establishing a constitutional right to comprehensive educational opportunity and in pressing states to provide the schools sufficient resources to provide all students meaningful educational opportunities. The courts can effectively undertake this role, in a manner that is consistent with constitutional separation of powers requirements, by focusing on the comparative institutional strengths of each of the three branches of government.

The large and growing proportion of U.S. students who come from poverty backgrounds is a major explanation for this country's relatively low performance on international achievement tests.¹ The United States has a larger percentage of students from poverty backgrounds than virtually every other advanced European, Asian, or North American country.² The fact that so many U.S. students enter school with the large range of disadvantages that stem from poverty also explains the failure of most U.S. schools to even come close to reaching the proficiency targets established a dozen years ago by the federal No Child Left Behind Act.³ This substandard educational performance threatens this country's ability to compete in the global economy, as well as the continued viability of our democratic political system.

The impact of poverty on children's learning is profound and multidimensional. Children who grow up in poverty are much more likely than other children to experience conditions that make learning difficult and put them at risk for academic failure.⁴ Moreover, the longer a child is poor, the more extreme the poverty, the greater the concentration of poverty in the child's surroundings, and the younger the child, the more serious the effects on the child's potential to succeed academically

The federal government and virtually all of the states recognize this reality, and they proclaim that overcoming the achievement gaps related to poverty and race is the country's principal educational policy. But although they have established ambitious outcome goals and hold students and teachers accountable for reaching them, officials in Washington and in most of

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the states have failed to ensure that the schools have the resources they need to meet these goals. This malignant neglect has two separate dimensions: a failure to provide adequate resources for basic K–12 education to schools in low-income neighborhoods, and a failure to provide the additional early education, health, after-school summer, parent engagement, and other comprehensive services that students from poverty backgrounds need to have a meaningful opportunity to meet challenging state academic standards. This article discusses each of these deficiencies and then asserts that the United States’ critical educational goals cannot be met unless the courts have an active and sustained role in pressing policy makers to give the schools sufficient resources to provide meaningful educational opportunities to all U.S. students.

Funding Inequities

In 1991, Jonathan Kozol described in excruciating detail the deprivations that students in low-income areas in Illinois, New York, New Jersey, and Texas suffered because of the “savage inequalities” that existed in the education finance systems in those states and in most other parts of the country.⁵ Since that time numerous educational reforms have been implemented, but in most of the schools in which the children of the poor are enrolled resource deprivations remain unremedied and the conditions under which they attempt to learn remain bleak. The prime reason for this pattern of deprivation is the inherent inequity that stems from the fact that a majority of the funds that support public education historically have been raised through local property taxes. This means that children who live in districts with low wealth and low property values—as most low-income and most minority students do—will have substantially fewer resources available to meet their educational needs.

Last year, the National Commission on Equity and Excellence in Education found that “deep inequities in school funding . . . remain entrenched across our nation’s states and school districts at a time when more than 40% of all American school children are enrolled in districts of concentrated poverty.”⁶ The commission found that in most states, the highest-spending districts expend about twice as much per pupil as the lowest-spending districts; in some states, such as California, the ratio is more than 3-to-1. Even excluding the top 5 percent of districts, spending in California in 2009 ranged from \$6,032 to \$18,025 per pupil.⁷

To deal with these longstanding and increasingly consequential problems, the commission recommended “bold action by the states—and the federal government—to redesign and reform the funding of our nation’s public schools.”⁸ The report calls on all of the states to take the following steps:

- Identify and publicly report the teaching staff, programs and services needed to provide a meaningful educational opportunity to all students of every race and income level.
- Determine and report the actual cost of resources identified as needed to provide all students a meaningful educational opportunity based on the efficient and cost-effective use of resources.
- Adopt and implement a school finance system that will provide equitable and sufficient funding for all students to achieve state content and performance standards. “Equitable funding” includes the provision of additional resources to address the academic and other needs of low-income students, students with disabilities and English-language learners, and for districts and schools serving large concentrations of low-income students and those in remote areas.

- Ensure that their respective finance systems are supported by stable and predictable sources of revenue.
- Develop systems to ensure districts and schools effectively and efficiently use all education funding to enable students to achieve state content and performance standards.⁹

In many parts of the country state courts have issued rulings that have pressed for these kinds of reforms. The state courts became the locus for these cases because in 1973, in a legal challenge to Texas's education finance system, the U.S. Supreme Court refused to invalidate that state's highly inequitable scheme. Although the high court agreed that Texas's system was inequitable, nevertheless, the justices refused to uphold the plaintiffs' claims, primarily because they determined that education is not a "fundamental interest" under the U.S. Constitution.¹⁰

Following this major setback in the federal courts, advocates turned to the state courts. Over the past forty years, constitutional challenges to state systems for funding public education have been litigated in the courts of forty-five of the fifty states. Shortly after the U.S. Supreme Court issued its decision in *Rodriguez*, the California Supreme Court held that even if education is not a fundamental right under the U.S. Constitution, it clearly is so under the California constitution.¹¹ Soon thereafter, courts in states such as New Jersey, Connecticut, and West Virginia also declared their state education finance systems unconstitutional. Plaintiffs' fortunes in these cases have waxed and waned, but overall they have prevailed in approximately 60 percent of the rulings of the highest state courts.¹²

The courts' intervention in education finance matters has resulted in significant increases in the adequacy of educational funding and the equity of resource distributions in many states. In Kentucky, for example, litigation resulted in dramatic reductions in spending disparities among school districts, the redesign and reform of the entire education system, and a significant increase in that state's student achievement scores.¹³ In Massachusetts, enactment of the Education Reform Act of 1993 in response to that state's adequacy litigation also sharply reduced the funding gaps between rich and poor school districts,¹⁴ and the percentage of students achieving proficiency on state tests has risen dramatically.¹⁵ Decades of litigation in New Jersey on behalf of the largely minority, low-income students in thirty-one urban districts has resulted in significant increases in their achievement test scores;¹⁶ one of these districts, Union City, a 92 percent Latino district that is the poorest in the state, has effectively closed the achievement gap between its students and non-urban students, and it may be the first urban district in the United States to sustain academic achievement into the middle grades.¹⁷

In other instances, though, strong resistance from the governor or the legislature or both has delayed or impeded mandated reforms. In Ohio, for example, the legislature had partially responded to a series of court orders by, among other things, reducing funding inequities and improving school facilities following the declaration of unconstitutionality. The legislature's failure to implement fully the judicial orders, however, and the judges' unwillingness to confront the legislature led the state supreme court to retreat from the fray and terminate the cases before an appropriate remedy had been effectuated.¹⁸ In West Virginia, the legislature virtually ignored the courts' extensive orders throughout the 1980s but then implemented some more limited reforms after another follow-up litigation was initiated in the mid-1990s.¹⁹ In Alabama, after a change in its membership following an election, the court *sua sponte* reopened *Alabama Coalition for Equity v. Spiegelman*,²⁰ a case it had decided for the plaintiffs in 1993, and after soliciting arguments from the two sides, dismissed the case, citing separation of powers and justiciability concerns.²¹

Overall, then, despite *Rodriguez's* closing of the federal courts to fiscal equity and educational adequacy litigations in 1973, progress has been made toward overcoming inequities in the funding of public education in the decades since because of the willingness of many state courts to pick up the mantle in this area. Twenty-seven state courts have issued rulings that have attempted to promote meaningful educational opportunities, especially for low-income and minority students. Courts in nineteen other states, however, have refused to accept jurisdiction or have otherwise found for the defendants, and in five other states no litigations have been initiated. And although the remedies issued by the states where the plaintiffs have prevailed have resulted in increased equity and improvements in educational opportunities and educational achievement, some of the state court remedies have not proven successful.

Need for Comprehensive Services

Efforts to overcome the achievement gaps that largely stem from students' poverty backgrounds are not succeeding at an acceptable pace because the reform efforts do not match the enormity of the problem. The escalating proportion of students from low-income households in our schools and the abundant evidence of the impact of poverty on their readiness for school success require a much more extensive and comprehensive approach to educational equity than the United States has mounted to date.

The impact of poverty on children's readiness to learn is profound. Children from low-income households are more likely to be exposed to lead dust and poisoning, vision and hearing problems, untreated cavities, and asthma, all of which directly relate to capacity for learning. For example, lead exposure is connected with lowered IQ scores.²² Children spend, on average, a thousand hours a year in school but five thousand hours in the neighborhood and with their families.²³ This means that if we seek to deal effectively with the impediments to learning that surround children from poverty backgrounds, we must provide them a broad range of "supplementary educational interventions" during their nonschool hours.²⁴ Such services should include early childhood education programs, after-school and summer programs, family and community support, health, and nutrition.²⁵ Unless we attend to these broad needs, we will never overcome the significant achievement gaps between low-income and minority students and their more advantaged peers.

Because out-of-school factors directly impede academic achievement, they can no longer be relegated to the sidelines of the education policy dialogue; they must be tackled head on. The potential benefits of providing such comprehensive supports and services have long been recognized. In the nineteenth century, the settlement houses were an early model for providing a variety of services to children and their families. The 1960s' War on Poverty expanded programs for children, although it left them largely uncoordinated. Spurred by research in the social sciences in the 1970s and 1980s, a widespread understanding emerged of the benefits of the coordinated delivery of a wide range of health, mental health, family, and educational services to children.

In recent years, we have seen a burgeoning of initiatives, programs, projects, and activities that seek to integrate education and supports. The delivery models employed include full-service community schools, promising neighborhood initiatives modeled on the Harlem Children's Zone, citywide or county-wide collective impact projects such as Say Yes Syracuse and Strive Cincinnati, and a variety of other collective impact initiatives.

Although the importance of taking a comprehensive approach to the well-being of children has, therefore, been widely recognized, efforts to date have not been effectively

coordinated or extended on the systematic, statewide basis that is necessary to provide meaningful educational opportunities for all children. The successful models of coordinated comprehensive services have not been sufficiently publicized, replicated, funded, and brought to scale. If we are to meet the nation's stated goals for educational opportunity and educational achievement, we need to vastly expand our understanding of, and advocacy for, effective mechanisms for providing comprehensive educational equity.

Ironically, however, despite the enormity of the deprivations suffered by children from poverty backgrounds and the magnitude of their learning needs, in the United States today the children with the greatest needs by and large have the fewest resources provided to them. Although the legal challenges to this pattern of inequity triggered a vigorous debate over the past few decades about whether "money matters" in education, the overwhelming consensus of the research and of the many judicial decisions that have considered this question is that money does matter—if it is spent well.²⁶ The real issue, then, is not whether additional funding for comprehensive services is necessary but what steps need to be taken to ensure that funds appropriated for this purpose are used in an efficient and cost-effective manner.

Funding for public education, however, is not and cannot be unlimited. Therefore, money that is appropriated for school-based services and for critical supplementary services must be spent in ways that are strategic and accountable. The provision of services in each of the comprehensive educational opportunity areas needs to be approached through careful cost-benefit analyses of likely gains and with continuing oversight of the effectiveness of the methods of delivering the particular services. The critical concerns should be (a) how do we get better results for present investments and (b) what new investments are most likely to yield the greatest long-range educational gains. The kinds of cost-benefit studies undertaken by Levin and Belfield need to be replicated and expanded, and future-cost studies for determining legislative appropriations for in-school and out-of school educational services need to be correlated with analyses of best practices and most promising practices in particular areas of education.²⁷

Some may ask, why take this comprehensive approach when a number of studies point to high-poverty, high-minority schools that are "beating the odds" and distinguishing themselves with good outcomes thanks to high-quality teaching and great leadership? The goal, however, must go beyond helping some schools to beat the odds against success; we must aim to lower those odds for all schools. We need to study the broad range of factors that have contributed to success in particular initiatives and determine the extent to which these practices are replicable and can be implemented on a larger scale and for sustained periods.

If these comprehensive services are to be provided on the scale and in the sustained manner that is needed to truly meet the needs of the growing number of children from poverty backgrounds in our schools, disadvantaged students' access to the necessary comprehensive services needs to be seen as a basic right rather than as a discretionary benefit that policymakers may bestow or deny. A strong case can be made on both statutory and constitutional grounds for establishing such a right.²⁸ Doing so will focus attention on the critical link between poverty and achievement gaps and will require the government to provide the full range of resources necessary to meet the urgent needs of children from backgrounds of poverty.

The Necessary Role of the Courts

If meaningful educational opportunity for all children is to be achieved, the courts must not only articulate a right to comprehensive educational opportunity, but they must also effectively enforce that right. After all, contemporary understandings of equal educational opportunity were

largely created by *Brown v. Board of Education* and shaped by the series of federal desegregation and related education cases that followed in its wake.²⁹ The state court fiscal equity and education adequacy litigations have maintained and magnified the egalitarian momentum, even as the federal courts' active pursuit of school desegregation has abated, and they have begun to define in concrete terms the elements of meaningful educational opportunity, including the comprehensive services discussed in the previous section.

But as the federal courts' retrenchment in enforcing school desegregation and the state courts' inconsistent follow-through in the remedial stage of many of the state court education finance cases demonstrate, the courts' involvement in education policy litigations has not consistently realized its potential for promoting positive educational reform. One of the major reasons for delay and resistance to constitutional mandates in these cases is that many policymakers and many judges are reluctant to understand and acknowledge the importance of the courts' role in educational reform. Opponents attack the legitimacy of the court's involvement, claiming that it is a usurpation of legislative and executive authority, and they claim that the courts lack institutional capacity to effectively promote necessary reforms.³⁰ These charges of judicial usurpation and institutional incapacity, which originated with political opposition to the desegregation decrees of the federal courts in the 1960s and 1970s and have been repeated as a mantra ever since, have little doctrinal or empirical substance.

Abram Chayes confronted these objections in a major article he wrote in 1976 that describes in detail the "new model" of public law litigation and relates the growth of the judicial involvement in the reform of public institutions since *Brown* to the broader expansion of governmental activities in the welfare state era.³¹ Malcolm Feeley and Edwin Rubin, agreeing with this perspective, put it this way:

[Judges] are part of the modern administrative state. . . . And they fulfill their role within that context. Under certain circumstances that role involves public policy makings; as our state has become increasingly administrative and managerial, judicial policy-making has become both more necessary for judges to produce effects and more legitimate as a general model of governmental action.³²

That the courts' expanded role is a fundamental judicial reaction to deep-rooted social and political trends seems to be borne out by the fact that the activist stance initiated during the Warren Court era has persisted to a large extent through the Burger, Rehnquist, and Roberts years, and that conservatives no less than liberals now tend to look to the courts routinely to remedy legislative or executive actions of which they disapprove.

In the 1980s, my colleague Arthur R. Block and I undertook two major empirical studies to test the validity of the competing arguments in the judicial activism debate in actual instances of educational policymaking by courts, legislatures, and a major administrative agency, the Office of Civil Rights in the U.S. Department of Health, Education and Welfare.³³ We concluded, among other things, that the evidentiary records accumulated in the court cases were more complete and had more influence on the actual decision-making process than did the factual data obtained through legislative hearings. The latter tended to be "window dressing" occasions organized to justify political decisions that had already been made.³⁴ Our study also found that judicial remedial involvement in school district affairs was less intrusive and more competent than is generally assumed, largely because school districts and a variety of experts generally participated in the formulation of reform decrees, with the courts serving as catalysts and mediators. The courts' "staying power" and their ability to respond flexibly to changed

circumstances was also markedly more effective than that of the legislatures and the administrative agency.³⁵

The irony of the fact that some political commentators and academics continue to invoke anachronistic “judicial activism” phrases is that, while these pundits persist in arguing that the courts’ new role is usurping legislative powers, Congress and the state legislatures have themselves asked the courts to take on more of these policymaking activities by passing regulatory statutes that directly or implicitly call for expanded judicial review. A prime example is the Individuals with Disabilities in Education Act, in which Congress set forth a detailed set of substantive and procedural rights and established a new area of court jurisdiction for individual suits, regardless of the amount in controversy.³⁶ Under these circumstances, as Chayes aptly puts it, we should “concentrate not on turning the clock back (or off), but on improving the performance of public law litigation.”³⁷

One of the major fallacies of those who argue that courts lack the institutional capacity to deal with complex social policy issues is that they focus on the limitations of the judicial branch, while ignoring the comparable institutional shortcomings of the legislative and the executive branches. For example, Donald Horowitz, one of the foremost critics of the courts’ new role, catalogued a bevy of examples of alleged judicial incompetence, ranging from receiving information in a skewed and halting fashion to failing to understand the social context and potential unintended consequences of the cases before them.³⁸ As Neil Komesar has forcefully pointed out, however, Horowitz’s critique, like that of many of his current disciples, was unreasonably one-sided:

Horowitz’s study can do no more than force us to accept the reality of judicial imperfection. By its own terms it is not comparative, and that is far more damning than Horowitz supposes. All societal decision makers are highly imperfect. Were Horowitz to turn his critical eye to administrative agencies or legislatures he would no doubt find problems with expertise, access to information, characterization of issues, and follow-up. Careful studies would undoubtedly reveal important instances of awkwardness, error and deleterious effect.³⁹

In the state-court educational equity and adequacy cases, among the main criticisms of judicial intervention are that the courts have failed to “require[e] the efficient or cost-effective use of funds,”⁴⁰ that they assumed that “school districts are organized in a way that ensures that they are making productive use of the money they now receive from taxpayers or of the additional money they would receive if adequacy campaigns prevailed.”⁴¹ As Komesar points out, however, none of these critics has even claimed that the other branches of government have been more effective than the courts in ensuring the productive use of educational funding.

The fact is that providing meaningful educational opportunities to eliminate or substantially narrow achievement gaps is a daunting task that no governmental entity has been able to solve. If *Brown*’s vision of equal educational opportunity is actually to be realized, it will require the sustained commitment of all three branches of government, at the federal and state levels, working collaboratively in dramatic new ways. In the complex administrative environment in which we now live, no single institution, whether a legislature, an administrative agency, or a court, can successfully resolve major social problems. Effective policymaking in a complex regulatory environment requires continuing interchanges and often continuing involvement of all three branches of government. Successful implementation of meaningful educational opportunity has generally occurred in the past when the judicial, legislative, and

executive branches worked collaboratively together, as in Congress's advancing the desegregation remedies formulated by the courts through the Elementary and Secondary Education Act and Title VI statutes,⁴² and in Congress's enactment of the Individuals with Disabilities Education Act.⁴³

In considering the role of the courts in promoting meaningful educational opportunities, the approach should be, not repetition of abstract rhetoric about judicial "usurpation," but consideration from a comparative institutional perspective of what functions courts can best undertake, in collaboration with the other branches, to promote effective school reform practices. What is needed, therefore, is not a competition but a "colloquy"⁴⁴ among the branches to get this demanding job done. Such a colloquy should build on the realization that each of the three branches has specific institutional strengths and weaknesses in regard to social policy making and remedial problem solving. The focus therefore should be on how the strengths of each of the branches can best be jointly brought to bear on solving critical social problems.

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

Second, because state legislatures and executive agencies overseeing school districts have at times failed to ensure the effective use of education funds, courts need to become more, not less, active at the remedy stage of equal opportunity and adequacy litigations. As noted earlier, virtually all the economists and fiscal policy analysts agree that money matters in education—if the money is spent well. Ensuring accountability and the effective use of funds is a function for which the courts are particularly well suited. State courts have proved to be highly adept at promoting and reviewing cost studies that provide proper parameters for adequate funding. This does not mean that courts should undertake cost studies or devise the econometric methodologies that should be used in such studies. These functions are better undertaken by the other branches. Rather, judicial review is important in the costing-out process in providing a neutral forum for reviewing the validity of legislative or executive actions when allegations of manipulation or misuse of the cost study data arises.⁴⁵

Courts similarly are well equipped to review and enforce effective accountability measures to ensure that the manner in which education funds stemming from adequacy cases are used is cost-efficient, productive, and targeted. Ironically, opponents of judicial involvement in education adequacy cases rebuke the courts for mandating sizeable increases in education funding without taking any steps to ensure that the money is actually spent effectively. But, at the same time, they argue that the courts must terminate their involvement in these litigations as soon as possible. The fact is that courts have a unique capacity to ensure that effective

accountability measures are put into effect, not by micromanaging the day-to-day operations of a school system, but in making sure that state education departments and school districts do their jobs well.

Because the challenge of meeting the needs of students from poverty backgrounds requires a broad, comprehensive range of meaningful educational opportunities, the courts must play a central role in articulating the constitutional principles involved and in overseeing the remedies to make sure that the solutions the legislatures and state education agencies devise are appropriate, and that they are fully and fairly implemented.

Notes

¹ See, e.g., Martin Conroy and Richard Rothstein, “What Do International Tests Really Show about U.S. Student Performance?,” *Education Policy Institute Report*, January 28, 2013 (U.S. average performance appears to be relatively low partly because we have so many more test takers from the bottom of the social class distribution); Christopher H. Tienken, “Conclusions from PISA and TIMSS Testing,” *Kappa Delta Pi Record* 49, no. 2 (2013): 56–58, http://christienken.com/wp-content/uploads/2013/01/Conclusions_From_PISA_2013.pdf (poverty is a major factor in America’s relatively low ranking on international tests).

² The United States ranked 27 out of 30 OECD nations for proportion of children living in poverty in 2008, and in the bottom half for overall well-being. See “Comparative Child Well-Being across the OECD,” chap. 2 of *Doing Better for Children* (Paris: OECD Publishing, 2009), <http://www.oecd.org/els/family/43570328.pdf>.

³ The No Child Left Behind Act, 20 U.S. C. § 6301 et seq. (2002), established as a goal that 100 percent of U.S. students be proficient in meeting “challenging state standards” by 2014 and mandated actual achievement of that outcome. The degree of “challenge” in state achievement tests (as well as their validity) varies widely, but now that we are in the 2014 target year, no state has achieved 100 percent proficiency. Looking at the National Assessment of Educational Progress (NAEP), generally considered the most accurate national indicator of student proficiency, in 2013, nationally, only 26 percent of twelfth graders scored proficient or higher in mathematics and 38 percent scored proficient or higher in reading (2013 NAEP results). Mathematics scores have increased since the first assessment in 2005, while reading scores have decreased since 1992. Among eighth graders, 36 percent scored proficient or higher in reading and mathematics; among fourth graders, 42 percent scored proficient or higher in mathematics, while 35 percent did so in reading. “The Nation’s Report Card: A First Look; 2013 Mathematics and Reading,” National Center for Education Statistics, Institute of Education Sciences, U.S. Department of Education, Washington, DC, <http://nces.ed.gov/nationsreportcard/subject/publications/main2013/pdf/2014451.pdf>.

⁴ These issues are discussed at length in Richard Rothstein, *Class and Schools: Using Social, Economic and Educational Reform to Close the Black-White Achievement Gap* (Washington, DC: Economic Policy Institute and Teachers College Press, 2004). See also, e.g., David C. Berliner, “Our Impoverished View of Educational Research,” *Teachers College Record* 108 (2006): 949; James E. Ryan, “Schools, Race and Money,” *Yale Law Journal*, 109 (1999): 249, 284–96.

⁵ Jonathan Kozol, *Savage Inequalities: Children in America’s Schools* (New York: Broadway Books, 1991).

⁶ National Commission on Equity and Excellence in Education, *For Each and Every Child: A Strategy for Education Equity and Excellence* (Washington, DC: Author, 2013), 17. The author of this article was a member of the commission.

⁷ *Ibid.*, 18.

⁸ *Ibid.*, 17.

⁹ *Ibid.*, 18–19. The commission also called for commensurate bold action by the federal government to “direct states, with appropriate incentives, to adopt and implement school finance systems that will provide a meaningful educational opportunity for all students, along with appropriate budgetary and other frameworks to ensure the effective and efficient use of all funds” and to “enact ‘equity and excellence’ legislation that targets significant new federal funding to schools with high concentrations of low income students, particularly where achievement gaps exist.”

¹⁰ *Rodriguez v. San Antonio Independent School District*, 411 U.S. 1 (1973).

¹¹ *Serrano v. Priest*, 5557 P. 2d 929 (Cal. 1976).

¹² For a detailed discussion of the history and specifics of these cases, see Michael A. Rebell, *Courts and Kids: Pursuing Educational Equity through the State Courts* (Chicago: University of Chicago Press, 2009).

¹³ Kentucky Department of Education, *Results Matter: A Decade of Difference in Kentucky's Public Schools 1990–2000*, Report on the Tenth Anniversary of Education Reform in Kentucky (Frankfort, KY: Author, 2000): 72–87. See, e.g., Molly A. Hunter, “All Eyes Forward: Public Engagement and Educational Reform in Kentucky,” *Journal of Law and Education* 28 (1999): 485 (noting that immediate legislative response to a court order led to substantial increases in funding for low wealth districts).

¹⁴ *Hancock v. Driscoll*, 2004 WL 877984, at * 5 (Mass. Super. Ct. Apr. 26, 2004) (expounding on the key changes of the Education Reform Act); *rev'd. on other grounds*, 822 N.E.2d 1134 (Mass. 2005) (summarizing the background and effect of the Education Reform Act).

¹⁵ E.g., on the fourth grade English language arts examinations, the percentage of students meeting proficiency rose from 20 percent in 1998 to 57 percent in 2003; on the tenth grade math examination, the percentage meeting proficiency over that five-year period rose from 25 percent to 50 percent. Rennie Center for Education Research and Policy, *Reaching Capacity: A Blueprint for the State Role in Improving Low Performing Schools and Districts* (Boston: Author, 2005), 9,

http://www.massinc.org/~media/Files/Mass%20Inc/Research/Full%20Report%20PDF%20files/reaching_capacity.a.shx.

¹⁶ Margaret Goertz and Michael Weiss, “Assessing Success in School Finance Litigation: The Case of New Jersey,” *Education, Equity, and the Law*, November 2009, 23.

¹⁷ Gordon MacInnes, *In Plain Sight: Simple, Difficult Lessons from New Jersey's Expensive Effort to Close the Achievement Gap* (New York: Century Foundation Press, 2009), 35–37.

¹⁸ See Larry J. Obhof, “*DeRolph v. State* and Ohio's Long Road to an Adequate Education,” *Brigham Young University Education & Law Journal*, 2005, 83.

¹⁹ See *Pauley v. Bailey*, 324 S.E.2d 128, 135 (1984); *Tomblin v. West Va. State Bd. of Educ.*, Civ. No. 75–1268 (Cir. Ct, Kanawha Co., January 3, 2003).

²⁰ *Alabama Coalition for Equity v. Spiegelman*, 713 So. 2d 937 (Ala. 1997).

²¹ *Ex parte James*, 836 So. 2d 813 (Ala. 2002).

²² Rothstein, *Class and Schools*, 37–42.

²³ Berliner, “Our Impoverished View,” 953.

²⁴ Edmund W. Gordon, Beatrice L. Bridglall, and Aundra Saa Meroe, *Supplementary Education: The Hidden Curriculum of High Academic Achievement* (Latham, MD: Rowman & Littlefield, 2005).

²⁵ See *For Each and Every Child*, 28–33.

²⁶ For a discussion of the scholarly literature and judicial findings on this point, see Michael A. Rebell, “Poverty, ‘Meaningful Educational Opportunity,’ and the Necessary Role of the Courts,” *North Carolina Law Review* 85 (2007): 1467, 1476–87.

²⁷ See, e.g., Henry M. Levin and Clive R. Belfield, “The Promise of Early Childhood Interventions” in *The Price We Pay: Economic and Social Consequences of Inadequate Education*, ed. Clive R. Belfield and Henry M. Levin, (Washington, DC: Brookings Institution Press, 2007); Michael A. Rebell, “Professional Rigor, Public Engagement and Judicial Review: A Proposal For Enhancing The Validity of Education Adequacy Studies,” *Teachers College Record*, 109, no. 6 (2007): 1303–73.

²⁸ I try to make that case in Michael A. Rebell, “The Right to Comprehensive Educational Opportunity,” *Harvard Civil Rights–Civil Liberties Law Review* 47 (2012).

²⁹ *Brown v. Board of Education*, 347 U.S. 483 (1954).

³⁰ See, e.g., Alfred A. Lindseth, “The Legal Backdrop to Adequacy,” in *Courting Failure: How School Finance Lawsuits Exploit Judges' Good Intentions and Harm Our Children*, ed. Eric A. Hanushek (Stanford, CA: Education Next Books, 2006), 36 (“ignoring separation of powers considerations, [some state courts] have approached adequacy lawsuits in such a way as to substantially usurp the power of the legislature”); and Joshua Dunn and Martha Derthick, “Adequacy Litigation and the Separation of Powers, in School Money Trials” in *The Legal Pursuit of Education Adequacy*, ed. Martin R. West and Paul E. Peterson (Washington, DC: Brookings Institution Press, 2007), 322, 334–39 (expressing skepticism regarding judicial competence to fashion remedies in educational adequacy litigations).

³¹ Abram Chayes, “The Role of the Judge in Public Law Litigation,” *Harvard Law Review* 89, no. 7 (1976): 1281.

³² Malcolm M. Feeley and Edwin L. Rubin, *Judicial Policy Making and the Modern State* (New York: Cambridge University Press, 1998), 344.

³³ Michael A. Rebell and Arthur R. Block, *Educational Policy Making and the Courts: An Empirical Study of Judicial Activism* (Chicago, 1982); Michael A. Rebell and Arthur R. Block, *Equality and Education: Federal Civil Rights Enforcement in the New York City School System* (Princeton: Princeton University Press, 1985).

³⁴ For a comparative analysis of the fact-finding capabilities of Congress and of the courts that reached similar conclusions, see Neal Devons, "Congressional Fact Finding," *Duke Law Journal* 50 (2001): 1169.

³⁵ The executive and legislative branches do, however, have significant strengths in regard to policy making that the courts lack. Our studies found, for example, that the legislatures' mutual adjustment decision-making processes more effectively foster political compromises and that the administrative pragmatic-analytic decision-making approach was most effective for grassroots implementation processes.

³⁶ Individuals with Disabilities in Education Act 20 USC §1415(e)(2) (1994).

³⁷ Chayes, "Role of the Judge," 1313.

³⁸ Donald Horowitz, *The Courts and Social Policy* (Washington, DC: Brookings Institution, 1977).

³⁹ Neil K. Komesar, "A Job for the Judges: The Judiciary and the Constitution in a Massive and Complex Society," *Michigan Law Review* 86 (1988): 657, 698.

⁴⁰ Lindseth, "Legal Backdrop to Adequacy," 65.

⁴¹ Williamson M. Evers and Paul Clopton, "High-Spending, Low-Performing School Districts," in Hanushek, *Courting Failure*, 104.

⁴² This history is discussed in Rebell, *Courts and Kids*, 51–52.

⁴³ Congress's enactment of the Education of All Handicapped Children's Act, the predecessor to the Individuals with Disabilities Education Act, was a direct response to the decisions in two federal district court cases that had applied the *Brown* precedent of equal educational opportunity to students with disabilities: *Mills v. Board of Educ.*, 348 F. Supp. 866 (D.D.C., 1972), and *Pennsylvania Assn. for Retarded Children v. Commonwealth*, 334 F. Supp. 1257 (ED Pa., 1971) and 343 F. Supp. 279 (1972). See H.R. Rep No. 332, 94th Cong., 1st sess., 3–4 (1975).

⁴⁴ Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Indianapolis: Bobbs Merrill, 1962).

⁴⁵ See Rebell, "Professional Rigor," n28.