Broadening the Scope of School Finance and Resource Comparability Litigation

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INTRODUCTION

Civil rights advocates face an uphill battle when they attempt to remedy problems in public education. American schools continue to be racially, ethnically, and economically segregated, and classrooms are re-segregating at a rapid pace.[1] Sixty-nine percent of African American children and seventy-five percent of Hispanic children now attend predominantly minority schools,[2] and most of the children in these segregated schools come from low-income families.[3] Because there is a strong correlation between concentrated poverty and most measures of academic success, stark education differences exist between segregated and integrated schools.[4] As Professor Gary Orfield points out, moreover, "[e]xisting patterns of income distribution and residential segregation make it almost impossible to disentangle the problems of race and poverty in American schools."[5]

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[1] GARY ORFIELD & JOHN T. YUN, RESEGREGATION IN AMERICAN SCHOOLS 15 (1999), *available at* http://www.law.harvard.edu/civilrights/publications/resegregation99.html; *see also* John Charles Boger, *Willful Colorblindness: The New Racial Piety and the Resegregation of Public Schools*, 78 N.C. L. REV. 1719, 1726–27 (2000); Elizabeth Jean Bower, *Answering the Call: Wake County's Commitment to Diversity in Education*, 78 N.C. L. REV. 2026, 2050–51 (2000); Wendy Parker, *The Future of School Desegregation*, 94 NW. U. L. REV. 1157, 1184–85 (2000).

[2] ORFIELD & YUN, *supra* note 1, at 14. Approximately thirty-five percent of African American and Hispanic students attend schools that are "extremely segregated," meaning ninety percent to one hundred percent minority. *Id.*

[3] *Id.* at 16–17. Children in most segregated African American and Latino schools are poor, but ninety-six percent of white schools have middle-class majorities. Gary Orfield, *The Growth of Segregation: African Americans, Latinos, and Unequal Education*, *in* DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF *BROWN V. BOARD OF EDUCATION* 53, 53 (Gary Orfield & Susan Eaton eds., 1996) [hereinafter Orfield, *Growth of Segregation*].

[4] *See* Orfield, *Growth of Segregation*, *supra* note 3, at 57, 67.

[5] *Id.* at 56.

Education reform is often a contentious issue because it involves the redistribution of resources, the retention of local control, and the effectiveness of increased spending.[6] In addition, the education debate recently has focused on school choice options that generate immense controversy, whether they allow students to attend a public school outside their neighborhood or a charter school, or provide a voucher for a private school.[7]

Reform efforts are further complicated by the willingness of many on both sides of the political aisle to abandon racial integration as an issue in education.[8] The Supreme Court has encouraged this trend through its recent decisions.[9] As a result, civil rights advocates have begun turning to school finance litigation.[10] This is a logical strategy in the current political climate because it is designed to appeal to a broad constituency.[11] A focus on school finance litigation also makes sense given the stark inequalities in resource distribution and educational opportunities in American schools. Pervasive resource disparities are reflected in expenditures per student, class size, teacher salaries, libraries, sports equipment, and guidance counseling.[12]

Although the Supreme Court has foreclosed federal equal protection claims in school finance cases,[13] plaintiffs can base school finance and

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[6] *See* James C. McKinley, Jr., *Officials Are Forced to Grab the Third Rail of Politics*, N.Y. TIMES, Jan. 11, 2001, at B4.

[7] Robert C. Bulman & David L. Kirp, *The Shifting Politics of School Choice, in* SCHOOL CHOICE AND SOCIAL CONTROVERSY: POLITICS, POLICY, AND LAW 36, 36 (Stephen D. Sugarman & Frank R. Kemerer eds., 1999). Though choice programs may provide students a needed escape from failing schools, "vouchers and charters also risk perpetuating inequality by excluding and segregating children with special needs, skimming from public schools those families motivated enough to take advantage of voucher and charter programs, and diverting resources from the project of improving the entire public school system." Martha Minow, *Reforming School Reform*, 68 FORDHAM L. REV. 257, 258 (1999).

[8] *See* James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 251 (1999); *see also* Parker, *supra* note 1, at 1158–59.

[9] Ryan, *supra* note 8, at 252; *see also* Missouri v. Jenkins, 515 U.S. 70 (1995); Freeman v. Pitts, 503 U.S. 467 (1992); Bd. of Educ. v. Dowell, 498 U.S. 237 (1991).

[10] Some believe this is because desegregation litigation is not feasible. For some minority children in cities like Washington, D.C., and New York, desegregation remedies are difficult to fashion because of the area's large size and high percentage of minority students. "Particularly if state borders are considered sacrosanct, there may not be enough white children subject to a remedy in such areas to permit effective desegregation." James S. Liebman, *Implementing* Brown *in the Nineties: Political Reconstruction, Liberal Recollection, and Litigatively Enforced Legislative Reform*, 76 VA. L. REV. 349, 371 (1990).

[11] Although there is often a "color-blind" strategy, studies in two states that have had protracted court battles over school finance indicate that "white citizens in both states inaccurately perceived school finance reform as primarily benefiting blacks." James E. Ryan, *The Influence of Race in School Finance Reform*, 98 MICH. L. REV. 432, 432–33 (1999) (citing Douglas S. Reed, *Twenty-Five Years After* Rodriguez*: School Finance Litigation and the Impact of the New Judicial Federalism*, 32 LAW & SOC'Y REV. 175, 209 (1998); Kent L. Tedin, *Self-Interest, Symbolic Values, and the Financial Equalization of the Public Schools*, 56 J. POL. 628 (1994)).

[12] Orfield, *Growth of Segregation*, *supra* note 3, at 68–69.

[13] *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973). The Supreme

resource claims on state constitutions, state statutes, and state regulations, and to a limited extent on federal statutes and regulations. Almost every state has faced school finance challenges based on state constitutional provisions,[14] and advocates have also been bringing cases based on federal regulations.[15]

Civil rights advocates have traditionally used school finance litigation to ensure greater fiscal equity among American schools.[16] Although this approach has proven useful, advocates can expand its scope to address broader concerns such as racial integration and enforceable, results-driven education reform. Through litigation and lobbying, advocates can use the gains made in school finance cases to further improve educational opportunities for minority students. Though many school finance cases have led to increased funding for majority-minority schools, a broader focus is necessary because these cases rarely address underlying educational problems and have often accompanied even greater racial isolation.

The resource comparability movement has emerged as one attempt to broaden the scope of school finance litigation. Though there is no exact definition of resource comparability, the Department of Education describes it as the "equitable distribution of educational resources."[17] In resource comparability cases, advocates base their claims on the resources students receive and on students' access to quality educational opportunities. Like school finance cases, the current resource comparability model focuses on inputs, but it does so by directly examining the actual resources that students receive, not just the budgetary allocations.

Supporters of the resource comparability approach must face the harsh reality of systematic inequality and segregation, and must determine how to integrate those issues into a broader movement.[18] As Richard Riley has explained:

Court held that Texas's system of financing its school system largely through property taxes, which resulted in large school funding disparities, did not fail the rational basis test of the Equal Protection Clause of the Fourteenth Amendment. *See id.* at 55. The Court refused to treat wealth as a "suspect" classification deserving strict scrutiny under the Equal Protection Clause. *Id.* at 18, 28.

[14] Molly S. McUsic, *The Law's Role in Distribution of Education: The Promises and Pitfalls of School Finance Litigation*, *in* LAW AND SCHOOL REFORM 88, 90 (Jay P. Heubert ed., 1999); *see infra* Part I.

[15] *See, e.g.*, Robinson v. Kansas, 117 F. Supp. 2d 1124 (D. Kan. 2000); Ceaser v. Pataki, No. 98 CIV. 8532 (LMM), 2000 WL 1154318 (S.D.N.Y. Aug. 14, 2000); Flores v. Arizona, 48 F. Supp. 2d 937 (D. Ariz. 1999); Campaign for Fiscal Equity, Inc. v. State, 655 N.E.2d 661 (N.Y. 1995). The Supreme Court recently foreclosed a private right of action under the implementing regulations of Title VI, which will severely limit plaintiffs' ability to bring these cases. *See* Alexander v. Sandoval, 121 S. Ct. 1511 (2001); *infra* notes 204–213 and accompanying text.

[16] *See* McUsic, *supra* note 14, at 89–90.

[17] OFFICE OF CIVIL RIGHTS, U.S. DEP'T OF EDUC., INTRADISTRICT RESOURCE COMPARABILITY: INVESTIGATIVE RESOURCES 3 (2000) [hereinafter INVESTIGATIVE RESOURCES].

[18] In *Schools, Race, and Money*, James Ryan outlines the ways in which a broader understanding of school finance and resource cases can help advocates effectively articulate additional remedies that address serious failures in education. Ryan, *supra* note 8. He dis-

> We can create a system that guarantees that every student has a quality education at high standards that is built on the strength of our diversity. But it will require us to put an end to the stark inequities that continue to exist in the quality and quantity of educational opportunities as a result of racial, ethnic, and economic status.[19]

While advocates understand that factors such as racial and ethnic isolation contribute significantly to the problem of school inequality, it is not clear how to integrate those issues with resource concerns. This Note will attempt to explore ways that advocates can move beyond the "equitable distribution of educational resources" to an expanded concept of resource comparability.

Resource comparability should become an effort to distribute educational resources so that all children have real opportunities to learn and to demonstrate success. This broader model of resource comparability has five main components.

First, advocates should argue that financial equity alone is insufficient. Because different children have different needs, equal funding will often fail to provide truly equal educational opportunities.[20] Furthermore, a sudden increase in funding cannot overcome the cumulative effects of years of inadequate education.

Second, both input and output measures should be used to determine if children are getting the resources they need and if schools are meeting acceptable standards. Input measures include state funding, facilities, teacher quality, and textbooks, while output measures consist of school performance and dropout rates. Schools, courts, and legislatures usually emphasize either inputs or outputs, but not both.

Third, advocates should focus on legislative remedies, not just on litigation. Too often civil rights advocates win finance or resource comparability cases in court, then lose ground when the issue of remedy is

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cusses the connections between school finance and desegregation litigation and asserts that "the effects of racial and socioeconomic isolation cannot be adequately addressed by school finance reform, because students in schools with high concentrations of poverty need more than increased funds to improve achievement." *Id.* at 256. Ryan argues that "racially isolated schools cannot replicate the social benefits of racially integrated schools," and believes it may be unwise to challenge resource adequacy instead of challenging the isolation. *Id.* Ryan also contends, however, that there is no reason for the rights recognized in school finance cases to be limited to funding. He advocates alternative approaches based on the concept that "the right to an adequate education or equal education is an affirmative right," and the remedy can include socioeconomic or racial integration. *Id.* at 307. Ryan's solutions involve refocusing school finance cases and encouraging school choice options. *Id.* at 257.

[19] Richard W. Riley, The Opportunity for a Quality Education: The Civil Right for the 21st Century, Remarks to Commemorate the 45th Anniversary of *Brown v. Board of Education* (May 17, 1999), *at* http://www.ed.gov/Speeches/05-1999/990517.html.

[20] Paul T. Hill, *The Federal Role in Education*, *in* BROOKINGS PAPERS ON EDUCATION POLICY 11, 28 (Diane Ravitch ed., 2000).

sent back to the state legislature.[21] School aid and education reform are explosive political issues that pit cities and counties against each other. As a result, legislative decisions are always far from certain, even after a favorable court ruling.[22] Civil rights advocates must exert more influence at this stage in order to affect any new educational programs and policies that may be implemented. Legislative lobbying should include efforts to set enforceable state standards with respect to concrete issues like class size and teacher training. In addition, advocates should encourage flexible and experimental solutions, including voluntary desegregation and public school choice.

Fourth, racial and ethnic disparities must remain a focus. Whenever possible, federal civil rights laws should be invoked and efforts should be made to address racial and ethnic isolation. This will ensure that race remains a primary concern and that inequities affecting children of color are given priority in the remedial stage.

Finally, a far-reaching conception of resource comparability should view students as individuals with unique needs and should not distribute resources or calculate expenditures based only on students' identities as potential workforce participants. The state should view students as citizens, as people, and as learners, and it should set priorities accordingly.

The broader approach to resource comparability outlined above is both politically and legally feasible, and this Note is an attempt to explore ways to build on the successes of school finance litigation. In Part I, I analyze some traditional state school finance cases in which courts have extended their review beyond financial inputs to address more sweeping educational concerns. These cases demonstrate the manner in which some courts have expanded the definition of adequate resources; they also illustrate the connection between traditional school finance cases and broader resource comparability concerns. In Part II, I examine the use of resource comparability strategies that rely on federal law—most often Title VI, Title I, and the Equal Educational Opportunities Act. In Part III, I explore ways to expand the scope of resource comparability so that advocates can move beyond equity, measure success using both input and output measures, lobby for legislative solutions, address racial and ethnic isolation, and change the terms of the debate in defining what constitutes a basic education.

I. STATE SCHOOL FINANCE CASES

The state school finance cases discussed below are part of an evolution in school finance law that can be divided into three phases.[23] The

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[21] *See infra* Part I.

[22] *See* McKinley, Jr., *supra* note 6.

[23] For a summary of the different waves of school finance litigation, see William E.

first phase focused on the Federal Constitution's Equal Protection Clause and ended in 1973 with the U.S. Supreme Court's decision in *San Antonio Independent School District v. Rodriguez*.[24] Cases in the second phase relied on equal protection clauses in state constitutions and, to a lesser extent, on state education clauses.[25] The third phase began in 1989 as courts moved beyond equal funding to a focus on educational quality and "adequacy."[26] Court decisions in this third phase are primarily based on the education clauses of state constitutions.[27] The third-phase cases provide a foundation on which advocates can build a broader conception of resource comparability.

In most successful school finance cases, state courts do not address the quality of education, but focus instead on equitable financing schemes. These courts are often reluctant to mandate a remedy and defer to state legislatures to create solutions. Many also leave the definition of educational standards to state legislatures by limiting the scope of judicial review to include only an examination of financial inputs.[28] In some cases, however, either the court or the state legislature defines the inequalities at issue to include more than just financial inputs.

The cases described below are examples of this broader approach to inequality. They involve more than equal funding, and some even reach beyond a simple notion of educational adequacy. These cases demonstrate the possibility of extending the reach of school finance cases, and show that an expanded conception of resource comparability is an attainable goal. These cases also illustrate the importance of state legislatures in the remedial stage. To be truly effective, advocates must play an active role in framing and policing education legislation.

Thro, *Judicial Analysis During the Third Wave of School Finance Litigation: The Massachusetts Decision as a Model*, 35 B.C. L. REV. 597, 600–04 (1994); and Michael Heise, *State Constitutions, School Finance Litigation, and the "Third Wave": From Equity to Adequacy*, 68 TEMP. L. REV. 1151, 1152 (1995).

[24] 411 U.S. 1 (1973). In *Rodriguez*, the parents of Mexican American children in an urban San Antonio school district challenged Texas's system of financing its public schools. The Supreme Court determined that Texas's system was constitutional. *Id.* at 55. The Court explained that "[i]t has simply never been within the constitutional prerogative of this Court to nullify statewide measures for financing public services merely because the burdens or benefits thereof fall unevenly depending upon the relative wealth of the political subdivisions in which citizens live." *Id.* at 54.

[25] Thro, *supra* note 23, at 601–02.

[26] *Id.* at 603–04.

[27] *Id.*

[28] *See* McUsic, *supra* note 14, at 108; *see also, e.g.*, Roosevelt Elementary Sch. Dist. No. 66 v. Bishop, 877 P.2d 806 (Ariz. 1994) (holding that because Arizona's school funding scheme causes "gross disparities in school facilities," it violates the "general and uniform" clause of the Arizona Constitution).

A. State Courts Take Action

Education clauses in individual state constitutions[29] include requirements that the state provide a "basic education,"[30] a "general and uniform system of free public schools,"[31] or a "thorough and efficient" system of education.[32] Plaintiffs who rely on these clauses must prove that schools have not met the constitutional standard and that this failure is caused by a lack of resources.[33] Judges often feel more free to issue broader decisions when they can rely on state education clauses rather than on less-focused statutes or constitutional clauses that affect other areas of the law.[34]

1. Defining a Basic Education in Kentucky and Massachusetts

The Kentucky Supreme Court is one of the few courts that has articulated the specific components of a basic education. In *Rose v. Council for Better Education, Inc.*,[35] after hearing testimony about the inadequacy of public education in poor and even relatively affluent areas, the court relied on Kentucky's constitution to invalidate the state's entire system of funding public education and ordered the Kentucky legislature to formulate a new system in compliance with the standards described in the decision.[36] The *Rose* court identified specific and extensive goals necessary to any efficient system of education.[37] These goals included providing every child with the ability to communicate, to compete in academics and the job market, to understand and participate in the political system, to

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[29] Recent school finance cases based on state constitutions have focused on individual state education clauses. Thro, *supra* note 23, at 603.

[30] For example, the New York Constitution requires that students receive a "sound basic education." N.Y. CONST. art. XI, § 1; *see also* Campaign for Fiscal Equity, Inc. v. State, 655 N.E.2d 661, 666 (N.Y. 1995); *infra* notes 58–61 and accompanying text.

[31] The North Carolina Constitution states: "The people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right." N.C. CONST. art. I, § 15. The North Carolina Constitution also provides that "[t]he General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools, which shall be maintained at least nine months in every year, and wherein equal opportunities shall be provided for all students." N.C. CONST. art. IX, § 2(1).

[32] *E.g.*, OHIO CONST. art. VI, § 2.

[33] Thro, *supra* note 23, at 603–04.

[34] *See id.*

[35] 790 S.W.2d 186 (Ky. 1989).

[36] *Id.* at 209, 211–13. Education reform efforts in Kentucky began in "a statewide citizens committee that excluded the educational bureaucracy and other entrenched educational interests." James S. Liebman & Charles F. Sabel, *The Emerging Model of Public School Governance and Legal Reform: Beyond Redistribution and Privatization*, *at* http://www.law.columbia.edu/sabel/papers/school.htm (last visited Apr. 28, 2001). By the late 1980s, committee participants and education insiders "came to support the legal challenge to the state's school system [in *Rose*]." *Id.*

[37] The Kentucky Constitution requires that the State General Assembly "provide for an efficient system of common schools throughout the State." KY. CONST. § 183.

maintain a healthy lifestyle, and to appreciate his or her cultural heritage.[38]

In response to *Rose*, the Kentucky legislature passed the Kentucky Education Reform Act of 1990 ("KERA"),[39] but the legislation may have failed to accomplish the goals of the *Rose* plaintiffs. KERA required a more equitable distribution of funds among school districts and mandated ungraded primary schools,[40] school-based decisionmaking, preschool programs, extended school services, and a reorganization of the Kentucky Department of Education.[41] KERA also introduced a testing system known as the Kentucky Instructional Results Information System ("KIRIS").[42] The standards-based KIRIS system assumed that student achievement can be improved by raising expectations for school performance.[43]

The KIRIS exam illustrates the danger of improper reliance on outcome measures like standardized tests. KIRIS was immediately controversial, and many education experts argued that the test was incapable of determining school quality and was not statistically useful.[44] Fraud has been suspected in some districts, possibly as a result of the sanctions imposed on schools and teachers that perform poorly.[45] In 1998 the legislature suspended sanctions,[46] and it is unclear whether they will be rein-

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[38] *Rose*, 790 S.W.2d at 212. The court noted specifically that state education goals should include:

> (i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization; (ii) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices; (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation; (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness; (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage; (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and (vii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.

Id.

[39] 1990 Ky. Acts 476 (codified as amended in scattered sections of KY. REV. STAT. ANN. tit. XIII).

[40] In an ungraded primary school no distinctions are made among the early grades.

[41] *See generally* 1990 Ky. Acts 476.

[42] Triplett v. Livingston County Bd. of Educ., 967 S.W.2d 25, 27 (Ky. Ct. App. 1997).

[43] *Cf. id.*

[44] William H. Hoyt, *An Evaluation of the Kentucky Education Reform Act*, *at* http://gatton.gws.uky.edu/CBER/html/kentucky_education_reform_act.htm (last visited Apr. 25, 2001).

[45] *See* Steve Stecklow, *Apple Polishing: Kentucky's Teachers Get Bonuses, but Some Are Caught Cheating*, WALL ST. J., Sept. 2, 1997, at A1.

[46] *Compare* KY. REV. STAT. ANN. § 158.6455(3)–(7) (Michie 1996), *with* KY. REV. STAT. ANN. § 158.6455 (Michie 2001).

stated. Poorly performing schools are now subject to audits and assistance, but not sanctions.[47]

Kentucky's experience with litigation and legislation is important for two reasons. First, even after the court identified specific features of a meaningful education, the state legislature's reforms were less than effective. Advocates must do their best to play a role in shaping the remedies and legislation that follow litigation, even after a favorable court decision. Second, the end result of reform in Kentucky shows that any reliance on outcome measures, like exams, must be carefully structured and monitored. Outcome measures used inappropriately can harm the very students and schools they are intended to help.

In *McDuffy v. Secretary of Executive Office of Education*, the Massachusetts Supreme Judicial Court joined Kentucky in specifically defining the state's educational obligations.[48] The Massachusetts court articulated guidelines for the legislature to follow and actually adopted much of the *Rose* approach.[49] Just three days after the Supreme Judicial Court issued its decision, the Massachusetts state legislature passed the Education Reform Act of 1993.[50] The Reform Act increased state funding for public schools, created stricter teacher certification standards, mandated curriculum frameworks, and required that students show competency in various areas of the curriculum before receiving their diplomas.[51] The State Department of Education ("DOE") has chosen to rely on a series of high-stakes tests[52] called the Massachusetts Comprehensive Assessment System ("MCAS") to review and evaluate its education reforms.[53]

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[47] Hoyt, *supra* note 44. In 1998, the test's name and structure were also both changed. As part of the new Commonwealth Accountability Test System ("CATS"), students are tested more often, results are available more quickly, and the data is easier to read. Lonnie Harp, *KERA: Where Our Schools Stand*, COURIER-J. (Louisville, Ky.), Dec. 4, 1998, at A17.

[48] McDuffy v. Sec'y of Executive Office of Educ., 615 N.E.2d 516 (Mass. 1993). The plaintiffs claimed that the state's school financing system "denie[d] them the opportunity to receive an adequate education," in violation of the state constitution. *Id.* at 517. The court held that the "Commonwealth is in violation of its constitutional duty to educate our children." *Id.* at 554 n.91. The plaintiffs cited problems including "crowded classes, reductions in staff, inadequate teaching of basic subjects . . . neglected libraries, the inability to attract and retain high quality teachers . . . the lack of predictable funding . . . and inadequate guidance counseling." *Id.* at 521. The court held there was a violation of part II, chapter 5, section 2, and articles 1 and 10 of the Declaration of Rights of the Massachusetts Constitution. *Id.* at 517–18.

[49] *Id.* at 554; *see also* Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 212 (Ky. 1989).

[50] 1993 Mass. Acts 71 (codified as amended in scattered sections of MASS. GEN. LAWS ch. 71).

[51] *See id.*

[52] High-stakes examinations require students to pass certain tests before they can graduate or be promoted to the next grade level. MASS. DEP'T OF EDUC., NEW YEAR BRINGS NEW TESTS TO MASS. SCHOOLS, *at* http://www.doe.mass.edu/mcas/archives/98/womag2a.html (last visited Apr. 25, 2001).

[53] *Id.*

Since the first round of MCAS testing, the Massachusetts DOE has revised curriculum frameworks, reduced the length of the fourth grade tests, and added provisions to help students with disabilities or limited English proficiency improve their test scores.[54] New provisions also allow students who fail the MCAS exam to take it at least five more times in an attempt to pass.[55] Test results from 1998 and 1999 show a high failure rate, particularly among minority students,[56] and there is still a large gap between minority and white performance.[57] As in Kentucky, Massachusetts is trying to measure outcome, but it is doing so in a way that often harms the students it intends to help. This experience shows not only that legislative remedies must be monitored, but also that outcome measures can do more harm than good unless they are carefully structured and implemented.

2. *Reform with No Definition of Basic Education: New York, Ohio, Tennessee, and Alabama*

Many courts issue sweeping decisions about states' educational responsibilities without specifying what constitutes a basic education. *Campaign for Fiscal Equity, Inc. v. State*[58] illustrates this trend toward rulings that reach beyond funding formulas but do not delineate the features of an adequate or basic education. In a case that originally reached the New York Court of Appeals in 1995, the plaintiffs, including New York City students and parents, claimed that the state's school financing system was unconstitutional, and they sought a declaratory judgment against the state defendants.[59] At that time, the court of appeals allowed the plaintiffs to sue the state, holding that the education article of the state constitution imposes a duty on the state legislature to ensure the availability of a "sound basic education."[60] The court's decision directed the lower court to evaluate whether New York City public school students

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[54] Scott S. Greenberger & Corey Dulling, *MCAS Retest Plan Approved*, BOSTON GLOBE, Jan. 24, 2001, at B4.

[55] *Id.*

[56] *See* Eye on Education, *at* http://www.wgbh.org/wgbh/eyeoned/index.html (last visited Mar. 13, 2001).

[57] *See* MCAS Tests, Boston Globe, *at* http://www.boston.com/mcas (last visited Mar. 13, 2001).

[58] 719 N.Y.S.2d 475 (Sup. Ct. 2001).

[59] Campaign for Fiscal Equity, Inc. v. State, 655 N.E.2d 661, 663–64 (N.Y. 1995). The plaintiffs based their claim on the Equal Protection Clause; the education article, equal protection clause, and antidiscrimination clause of the state constitution; Title VI of the Civil Rights Act of 1964; and the Title VI implementing regulations. *Id.*

[60] *Id.* at 666. The court allowed the claim based on the precedent established in *Board of Education, Levittown Union Free School District v. Nyquist*, 439 N.E.2d 359 (N.Y. 1982). In *Levittown*, the New York Court of Appeals rejected the plaintiffs' claim that the education article was intended to ensure equality of educational offerings throughout the state. *Id.* at 368. The court held that although equality was not necessary, the system in place must at least make available "a sound basic education." *Id.* at 369.

were receiving a sound basic education as required by the state constitution.[61] The court of appeals ordered the trial court to examine "both 'inputs,' the resources available in public schools, and 'outputs,' measures of student achievement, primarily test results and graduation rates" to determine if the schools were meeting their constitutional obligations.[62]

On remand, the trial court in *Campaign for Fiscal Equity* looked beyond test scores to a broader definition of outputs, examining "the percentage of students who actually graduate and the bundle of knowledge and skills that they possess on the day that they graduate."[63] The court considered "1) how many students graduate on time, 2) how many drop out, 3) the nature of the degrees graduates receive, and 4) the performance of those who pursue higher education" in the New York City system.[64] Although the defendants argued that they should not be blamed for student dropout rates, the court found that "when 30% of students drop out of school without obtaining even a [General Equivalency Degree] serious questions arise about system breakdown."[65]

The trial court also emphasized that money alone does not determine the adequacy of an education. Responding to the defendants' claims that "New York State is the third highest-spending State on education, and that New York City spends more per pupil than most large urban school systems," the court held that "[a] sound basic education is gauged by the resources afforded students and by their performance, not by the amount of funds provided to schools."[66]

Although this most recent decision in the *Campaign for Fiscal Equity* line of cases was very specific about the state's violations, it did not outline a detailed remedy. It found instead that determining specific remedial measures should be left to the legislature.[67] The court did reserve some power for itself by requiring "effective and timely action to address the problems" it identified.[68] The court also reserved the power to intervene if the legislative or executive branches failed to implement the required reform measures.[69] Since the court was so specific in naming problems, it may be more likely to intervene at a later date if the state fails to address its concerns.

The Ohio Supreme Court issued a similarly far-reaching education decision in *DeRolph v. State*.[70] The court ruled that the state's system of

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[61] *Campaign for Fiscal Equity*, 719 N.Y.S.2d at 480, 482.
[62] *Id.* at 491.
[63] *Id.* at 515.
[64] *Id.*
[65] *Id.* at 517.
[66] *Id.* at 534.
[67] *Id.* at 549.
[68] *Id.* at 550.
[69] *Id.*
[70] 677 N.E.2d 733 (Ohio 1997).

funding education was unconstitutional,[71] but deferred to the legislature to determine an appropriate remedy.[72] The remedial stage has been contentious, and the case has been bouncing back and forth between the legislature and courts regarding an appropriate remedy. On the first remand, the trial court determined that the state had failed both to implement a "systematic overhaul" of Ohio's school funding system and to show compliance with the requirements of the Ohio Constitution.[73]

In 2000, the Ohio Supreme Court again heard the case, this time assessing the Ohio Legislature's remedy.[74] The legislature's response to the original *DeRolph* decision included increased academic accountability. The new laws raised the requirements for high school graduation[75] and set standards for school performance.[76] The court welcomed the legislature's broad focus, but was concerned about a system that "increases academic requirements and accountability, yet fails to provide adequate funding."[77] The court also emphasized that "funding is only one aspect of a thorough and efficient system of schools,"[78] explaining that

> Even if the system were very generously funded, if other factors are ignored, it might still not be thorough and efficient. If teachers are ill prepared and students are unaware of what is expected of them, then our state has failed them. If students have access to the latest technology but cannot take advantage of it, then our state has failed them. If students have the most up-to-date textbooks but cannot comprehend the material in those books, then our state has failed them.[79]

Despite these criticisms, the court held that the state should be given additional time to comply with the constitutional requirement of a thorough and efficient system of public education.[80]

DeRolph is important because the several court decisions moved beyond school finance or equalizing resources to focus on the effective use of those resources in educating students. The courts determined school quality by examining both inputs and outputs, including proper resources and school achievement. The Ohio Supreme Court also emphasized the

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[71] *Id.* at 737. The *DeRolph* court based its decision on the state constitution and concluded that "the current legislation fails to provide for a thorough and efficient system of common schools, in violation of Section 2, Article VI of the Ohio Constitution." *Id.*

[72] *See id.* at 747.

[73] DeRolph v. State, 712 N.E.2d 125, 178, 297 (Ohio Ct. Com. Pl. 1999).

[74] DeRolph v. State, 728 N.E.2d 993 (Ohio 2000).

[75] OHIO REV. CODE ANN. § 3313.603(B) (Anderson 1999).

[76] *Id.* §§ 3302.02 to .03.

[77] *DeRolph*, 728 N.E.2d at 1018.

[78] *Id.* at 1001.

[79] *Id.*

[80] *Id.* at 1021.

importance of teacher quality, fairness for students, and the illogic of requiring accountability without providing sufficient resources to meet those goals.[81] The supreme court itself pointed out the pitfalls of the Ohio plan, explaining that it is unfair to require a higher level of student achievement without providing students the resources they need to meet the new standards.[82]

In *Tennessee Small School Systems v. McWherter*,[83] the Tennessee Supreme Court also moved beyond funding to look more substantively at the quality of education that students receive. The court found that Tennessee's constitution requires educational opportunities provided by the public school system to be "substantially equal" throughout the state,[84] and it rejected local control of public schools as a justification for the disparate educational opportunities provided under the existing funding scheme.[85]

In reaching its decision, the court analyzed evidence that the state's "funding scheme ha[d] produced a great disparity in the revenues available to [ ] different school districts" and found a "direct correlation between dollars expended and the quality of education a student receives."[86] The court also emphasized, however, that the record showed that many factors other than funding affected the quality of education, and it held that "all relevant factors may be considered by the General Assembly in the design, implementation, and maintenance of a public school system that meets constitutional standards."[87] The court left the details to the legislature,[88] but its broad ruling opened the door for consideration of issues such as racial, ethnic, and socioeconomic isolation.

In response to *McWherter*, the Tennessee legislature created the Basic Education Program ("BEP"), a promising remedy that distributes funds to school districts based on the costs of forty-two specifically identified "components" found to be necessary in all schools.[89] The components include provisions for "basic, vocational, and special education; guidance counseling; textbooks; art, music, and physical education; services of librarians, social workers, and psychologists; computer tech-

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[81] *Id.* at 1001, 1018–20.

[82] *Id.* at 1018–20.

[83] 851 S.W.2d 139 (Tenn. 1993).

[84] *Id.* at 140.

[85] *Id.* at 156. The court based its decision on the Tennessee Constitution, which mandates that the General Assembly provide for "a system of free public schools [that] guarantees to all children of school age in the state the opportunity to obtain an education." *Id.* at 140.

[86] *Id.* at 141 (quoting Tenn. Small Sch. Sys. v. McWherter, No. 01-A-01911CH00433, 1992 WL 119824, at *3 (Tenn. Ct. App. June 5, 1992)).

[87] *Id.*

[88] *Id.* at 156.

[89] Tenn. Small Sch. Sys. v. McWherter, 894 S.W.2d 734, 736 (Tenn. 1995). For additional information about Tennessee's Basic Education Program, see TENN. CODE ANN. §§ 49-1-104, -1-602, -3-351(a), -3-354 (1996).

nology; supervisory and administrative staffs; transportation; and capital expenditures for physical facilities."[90] The Tennessee remedy is noteworthy in that it includes art, music, physical education, libraries, and psychologists.

The second time that *McWherter* came before the Tennessee Supreme Court, the plaintiffs claimed that the BEP did not meet state constitutional standards because it failed to achieve immediate equalization and because the plan did not provide for the equalization of teachers' salaries.[91] As to the plaintiffs' first claim, the court held that "substantial improvement in educational opportunities can best be accomplished incrementally," but implicitly left open the possibility that students and parents may bring subsequent litigation to enforce the new educational components.[92] The court found for the plaintiffs as to their second claim, however, and held that "exclusion of teachers' salary increases from the equalization formula . . . would substantially impair the objectives of the plan."[93] This decision indicates the importance of equalizing teachers' pay and teaching quality generally by acknowledging that the unequal distribution of high-salaried teachers is the source of much of the inequality in local education spending.[94]

The Alabama courts have also developed broad concepts of adequacy and equity in public schools. In *Alabama Coalition for Equity, Inc. v. Hunt*,[95] the court found that Alabama schoolchildren were not receiving substantially equal educational opportunities in the state's public schools. The court defined the term "'educational opportunities' to mean, in the broadest sense, the educational facilities, programs and services provided for students in Alabama's public schools, grades K–12, and the opportunity to benefit from those facilities, programs and services."[96] The court explained that "schoolchildren who have different educational circumstances, needs and aptitudes may require different school resources and facilities which, in turn, may entail different costs. This may be most obvious in the case of children with disabilities and children otherwise disadvantaged."[97]

The court then examined the equality of educational opportunity in the state through the lens of school financing. The court found substantial funding disparities in Alabama's public schools and held that the state was responsible for the inequities.[98] More importantly, the court recog-

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[90] *McWherter*, 894 S.W.2d at 736.
[91] *Id.* at 735.
[92] *Id.* at 738–39.
[93] *Id.* at 738.
[94] Hill, *supra* note 20, at 30.
[95] No. CV-90-883-R, 1993 WL 204083 (Ala. Cir. Ct. Apr. 1, 1993).
[96] *Id.* at *5.
[97] *Id.*
[98] *Id.* at *12. The court cited the example of the disparity between the Mountain Brook city school system, which had $4,820 available in state and local revenues to spend per

nized that such disparities result in "differential treatment of schoolchildren"[99] through the provision of "educational facilities, programs and services."[100] In a thorough analysis of the educational opportunities afforded to students, the court considered the percentage of students enrolled in college preparatory classes and examined the disparities in educational resources and opportunities that exist within school systems.[101] The court also heard evidence that "Alabama's high drop-out rate is directly related to the inadequacy of the school system."[102] At the time of trial, Alabama ranked forty-ninth of the fifty states in its ability to graduate students.[103] The court also credited the testimony of an expert who stated that "additional counseling, assistance with academics, and drop-out prevention programs could help reduce Alabama's drop-out rate, and that the absence of such services [was] the result of inadequate funding."[104] This important component of the court's decision implies that school systems must take affirmative steps to intervene in order to help students succeed, and could be expanded to require intervention when children are failing to learn.[105]

The plaintiffs in *Alabama Coalition for Equity* directly addressed the issue of racial inequality as it relates to educational opportunity. One school funding expert testified that the "haves" and "have-nots" in Alabama public schools experience vastly different educational systems, a dividing line that often tracks "the difference between black and white."[106] Another expert suggested that "the boundaries of the separate school tax districts . . . ha[d] been used to gerrymander taxable wealth into the predominantly white districts at the expense of black citizens."[107]

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student, and the Roanoke city schools, with only $2,371 to spend per student. *Id.* at *6. "This disparity of $2,449 (more than two to one) per pupil represented a difference in revenues of $61,225 per classroom of 25 students in a single year." *Id.*

[99] *Id.* at *12.

[100] *Id.*

[101] *Id.* at *14. Evidence at trial showed that some Alabama schools are not able to offer the most basic courses. The court found that

> at Monroe Senior High School . . . the highest level courses in the math and science curriculum are algebra I and general science . . . . In Dallas County, one high school alternates offering chemistry and physics because of a lack of resources. No school in the Dallas County or Roanoke City school systems offers calculus.

Id. at *25.

[102] *Id.* at *31.

[103] *Id.*

[104] *Id.*

[105] *See, e.g.*, George Farkas & L. Shane Hall, *Can Title I Attain Its Goal?*, *in* BROOKINGS PAPERS ON EDUCATION POLICY, *supra* note 20, at 59, 66.

[106] *Alabama Coalition for Equity*, 1993 WL 204083, at *15. There was not, however, a cause of action that specifically mentioned race.

[107] *Id.*

The court cited these experts but did not articulate exactly how the racial aspects of the case influenced its decision.[108]

3. Moving Favorably Toward Reform: North Carolina and California

Even state courts reluctant to issue mandates as sweeping as those in *Campaign for Fiscal Equity*, *McWherter*, or *Alabama Coalition for Equity* have been the source of favorably broad rulings in the area of education. In *Leandro v. State*, the North Carolina Supreme Court rejected a plea for straightforward school finance reform and declined to end local supplemental funding.[109] At the same time, the court identified substantial educational responsibilities borne by the state and implied that individual parents may be able to demand, in court, that the state meet those responsibilities.[110]

In *Leandro*, the court held that "[a]n education that does not serve the purpose of preparing students to participate and compete in the society in which they live and work is devoid of substance and is constitutionally inadequate."[111] The court, however, also expressed concern about judicial decisionmaking and about the danger of triggering a "steady stream of litigation" that would interfere with school management and "deplete [schools'] human and fiscal resources as well as the resources of the courts."[112] While emphasizing that the executive and legislative branches are better positioned to make education policy, the North Carolina Supreme Court held that the trial court, on remand, could consider educational goals and legislative standards to determine the components of a "sound basic education."[113]

The *Leandro* court also required lower courts to look at more than just funding levels in assessing the complex question of the constitutionality of North Carolina's public school system.[114] The court agreed with the proposition that "substantial increases in funding produce only modest gains in most schools"[115] and instructed lower courts "not [to] rely upon the single factor of school funding levels in determining whether a

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[108] *See id.*

[109] Leandro v. State, 488 S.E.2d 249, 256 (N.C. 1997).

[110] *See* John Charles Boger, Leandro v. State—*A New Era in Educational Reform?*, POPULAR GOV'T, Spring 1998, at 2, 2.

[111] *Leandro*, 488 S.E.2d at 254. The court also specifically equated the right to education guaranteed by the state constitution with "a right to a sound basic education." *Id.*

[112] *Id.* at 257. The court cited cases like *Edgewood Independent School District v. Meno*, 917 S.W.2d 717 (Tex. 1995), that have been moving in and out of the courtroom and legislature for many years. *Leandro*, 488 S.E.2d at 257.

[113] *Leandro*, 488 S.E.2d at 259.

[114] *Id.* at 260.

[115] *Id.* (quoting with approval William H. Clune, *New Answers to Hard Questions Posed by* Rodriguez*: Ending the Separation of School Finance and Educational Policy by Bridging the Gap Between Finance and Remedy*, 24 CONN. L. REV. 721, 726 (1992)).

state is failing in its constitutional obligation to provide a sound basic education to its children."[116] Some civil rights advocates might disagree with the conclusion that increased funding produces only modest gains in schools.[117] The court's requirement that lower courts look at factors besides financial inputs, however, can benefit minority children by allowing them to sue for the enforcement of state education statutes.[118]

The promise of the *Leandro* decision has begun to materialize in recent North Carolina cases. In *Hoke County Board of Education v. State*,[119] the court held that the right to a sound, basic education can extend to pre-kindergarten children. In a previous order, Judge Manning had explained that

> This ruling does not require the legislature to provide every 4 year old child, or for that matter every 3 year old child with a free pre-kindergarten education. To the contrary, the ruling merely clarifies the right to certain children to pre-kindergarten and early childhood intervention so as to permit them to take advantage of, and have an equal opportunity to receive, the sound basic education to which they are entitled in North Carolina under its Constitution.[120]

The *Hoke County Board of Education* decision shows that an emphasis on sound basic education may result in a requirement that states move past the simple distribution of money to more affirmative steps.

Even in states where there have been no sweeping resource comparability or school finance cases, some courts have put the burden of providing a fundamentally sound education directly on the state. This mandate could provide an opening for broader decisions in the future. In the California case *Butt v. State*,[121] plaintiffs sought to prevent the early closing of schools in the Richmond Unified School District, whose schools were to close six weeks early because of financial difficulties.[122] The court's ruling, though very limited in some areas, did identify a state constitutional duty to prevent a school district's budgetary problems from

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[116] *Id.*

[117] *See, e.g.*, JONATHAN KOZOL, ORDINARY RESURRECTIONS 44 (2000). Kozol argues that questions about whether money "really makes much difference" are rarely asked when people send their children to expensive private schools or when they move to affluent suburbs to take advantage of public schools that spend more money on each student.

[118] *See* Boger, *supra* note 110, at 2.

[119] No. 95-CVS-1158, 2000 WL 1639686, at *7 (N.C. Super. Ct. Oct. 12, 2000). On remand in *Leandro*, the trial court decided to split the case into two—one dealing with large school districts and one with small school districts. *Hoke County Board of Education* addresses the complaints of plaintiffs from small school districts.

[120] *Id.*

[121] 842 P.2d 1240 (Cal. 1992).

[122] *Id.* at 1243.

"depriving its students of 'basic' educational equality."[123] The California Supreme Court held that it is the state's role to provide sound and basic education and that the state cannot discharge its duty simply by being a "fair funder."[124]

4. Addressing Racial Isolation and Resource Inequalities

In 1996, the Connecticut Supreme Court broadened the scope of state constitutional education cases by placing special emphasis on the corrosive impact of racial and ethnic isolation in public schools. In *Sheff v. O'Neill*,[125] students in Hartford, Connecticut, alleged that they were racially, ethnically, and economically isolated in their schools.[126] Plaintiffs based much of their argument on Connecticut's unique and racially progressive state constitution.[127] In its decision, the court held that the state has "an affirmative constitutional obligation . . . to provide a substantially equal educational opportunity" for all students.[128] Importantly, the court held that this obligation does not depend on a finding that any inequities in the system are the result of intentional discrimination.[129] Noting the strong causal relationship between racial isolation and lower achievement, the court further proclaimed that a significant part of equal

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[123] *Id.*; *see also id.* at 1251–54.

[124] *Id.* at 1253. Plaintiffs in a newly filed case, *Williams v. State*, use the *Butt* case as authority for their claim that the state has ultimate responsibility for its public elementary and secondary school systems, explaining that "California has assumed specific responsibility for a statewide public education system open on equal terms to all." Complaint for Injunctive and Declaratory Relief at 9, Williams v. State (Cal. Super. Ct.) (No. 312236), *at* http://www.aclu-sc.org/docs/complainteducation.pdf (quoting *Butt*, 842 P.2d at 1247). Plaintiffs make a variety of claims based on the California Constitution, insisting that the state has failed in its education obligations by providing them with unsafe and unsanitary conditions and failing to supply the basic textbooks, teachers, and facilities they need to obtain an education. *See id.* at 16. The *Williams* plaintiffs emphasize the great role the state plays in education by explaining that

> Students who lack textbooks to take home as well as functioning toilets for their use at school and who attend schools infested with vermin and lacking heat learn from their time in school that their State is not concerned about their education and that their learning opportunities are less valuable than those of more privileged children in better-equipped schools.

Id. at 43.

[125] 678 A.2d 1267 (Conn. 1996).

[126] For instance, during the 1991–1992 school year, children from minority groups made up just a quarter of the public school population in Connecticut; in the Hartford districts, they made up over ninety-two percent of the student population. *Id.* at 1272.

[127] *Id.* at 1270. Article I, section 20 of the Connecticut Constitution provides as follows: "No person shall be denied the equal protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment of his or her civil or political rights because of religion, race, color, ancestry, national origin, sex or physical or mental disability." CONN. CONST. art. I, § 20.

[128] *Sheff*, 678 A.2d at 1280.

[129] *Id.*

educational opportunity is access to a public school education that is not segregated.[130] The majority, however, left open the issue of whether racial and ethnic isolation necessarily lead to an inadequate education.[131] The concurrence was less reserved, concluding that permitting "racially and ethnically segregated educational environment[s] ... deprives schoolchildren of an adequate education as required by the state constitution."[132]

Connecticut distributes school aid so that resources are linked to districts' needs.[133] The legislature has enacted various civil rights initiatives, and it reorganized the state board of education during the 1980s to improve urban schools and to promote school diversity.[134] While these policies would seem to foreclose concerns about discrimination, the court in *Sheff* nonetheless held that the state played a significant, though unintentional, role in the segregation of the state's schools.[135] The court found that the state's 1909 districting statute, which defined school district lines by town boundaries, was the "*single most important factor* contributing to the present concentration of racial and ethnic minorities in the Hartford public school system."[136] The court sent the issue of the Hartford schools back to the legislature, giving it the first opportunity to formulate a remedy that would respond to the constitutional violations.[137]

In response to *Sheff*, the Connecticut legislature passed a law entitled "An Act Enhancing Educational Choices and Opportunities."[138] The legislature's aim, as later summarized by the state supreme court, was to reduce "racial, ethnic and economic isolation, as well as improv[e] the quality of education throughout the state."[139] The first section of the Act defined "the 'educational interests of the state[ ]' to include the reduction of 'racial, ethnic and economic isolation,' and to impose a duty on each school district to 'provide educational opportunities for its students to interact with students and teachers from other racial, ethnic and economic backgrounds.'"[140] If local districts fail to achieve these objectives, they can lose state funding.[141]

The Connecticut legislation provided that school boards could reduce racial, ethnic, and economic isolation by using the following programs or methods:

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[130] *Id.* at 1281.
[131] *Id.*
[132] *Id.* at 1292.
[133] *Id.* at 1273.
[134] *Id.* at 1274.
[135] *Id.*
[136] *Id.*
[137] *See id.* at 1290.
[138] 1997 Conn. Acts 97-290 (Reg. Sess.).
[139] Sheff v. O'Neill, 733 A.2d 925, 927 (Conn. 1999).
[140] *Id.* at 927 (quoting 1997 Conn. Acts 97-290, § 1).
[141] *Id.*

> (1) Interdistrict magnet school programs; (2) charter schools; (3) interdistrict after-school, Saturday and summer programs and sister-school projects; (4) intradistrict and interdistrict public school choice programs; (5) interdistrict school building projects; (6) interdistrict program collaboratives for students and staff; (7) minority staff recruitment; (8) distance learning through the use of technology; and (9) any other experience that increases awareness of the diversity of individuals and cultures.[142]

The Act also requires the state board of education to develop a five-year implementation plan,[143] and allows the state to sue school districts to enforce the law.[144]

Three years after *Sheff* first reached the Connecticut Supreme Court, Hartford students went back to court. In 1999, the plaintiffs claimed that the state had not met its obligation to remedy racial and ethnic isolation. The plaintiffs emphasized that the Hartford schools were more segregated than they had been at the time of the first decision—during the 1998-1999 school year, 95.6% of students in the public schools in Hartford were minorities. The court held, however, that the plaintiffs had "failed to wait a reasonable time and that their return to court was premature."[145]

All told, both *Sheff* decisions at the state supreme court provide many essential lessons for advocates in future resource comparability cases. First, they show the importance of including outcome measures in legislation, such as measures of racial isolation or the number of students who drop out from certain schools. The legislation passed by the Connecticut legislature only mentions programs, not outcomes. These programs may be "bad proxies" for tangible reform because they do not address the underlying structural problems of the Hartford schools with regard to racial, ethnic, and economic segregation.[146] In any subsequent litigation the state can claim that it is trying to resolve the education problems, and it will not be held to any specific standards.

The first *Sheff* decision also demonstrates that a sweeping victory in litigation will not always translate into broad education reform. Despite the supreme court's strong statement about the impropriety of severe racial and ethnic isolation in the Hartford public schools, the state legislature did not respond with a strong agenda for change. Finally, the second *Sheff* case should remind advocates of the limits of courts' remedial powers.

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[142] *Id.* at 927–28 (quoting 1997 Conn. Acts 97-290, § 2).
[143] *Id.* at 934 (citing 1997 Conn. Acts 97-290, § 4).
[144] *Id.* at 927.
[145] *Id.* at 938.
[146] *See* Hill, *supra* note 20, at 29.

B. State Legislatures and the Importance of Remedies

Occasionally when courts make very narrow school finance decisions, the subsequent legislative remedy provides more sweeping reform. After a limited ruling, advocates may be able to lobby the state legislature to read the court's mandate broadly and enact legislation that goes beyond funding. This type of specific legislation can benefit minority students when the state law provides mechanisms for enforcement.

In *Tucker v. Lake View School District No. 25*, students in certain districts alleged that the education funding system in Arkansas violated the state constitutional guarantees of equal protection and of a "general, suitable, and efficient system of education."[147] Though the Chancery Court for Pulaski County held that Arkansas's system of education was unconstitutional, it denied the plaintiffs' request for specific remedies and would not set aside the funding system. Rather, the court stayed the decision for two years to give the state legislature time to respond to its decision.[148] In response to *Tucker*, the Arkansas General Assembly passed Acts 916 and 917, which repealed the old funding system and required the State Board of Education to review minimum standards of accreditation and develop a definition of an adequate education.[149] The Assembly also passed Act 1194, providing funding for special programs and vocational technical education.[150] The *Tucker* case is an example of a traditional finance case that has broader implications at the remedy stage. In addition, it illustrates a way in which outcome measures can be used without punishing children who attend failing schools.

In a recent school finance case in Texas, the court limited its analysis to financial inputs, but the state legislature nevertheless decided to impose extensive reforms.[151] In *Edgewood Independent School District v. Kirby*, the Texas Supreme Court held that the Texas constitution "imposes on the legislature an affirmative duty to establish and provide for the public free schools."[152] Focusing exclusively on inputs, the court explained that "an efficient system . . . requires only that the funds available

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[147] Tucker v. Lake View Sch. Dist. No. 25, 917 S.W.2d 530, 531 (Ark. 1996). Thirteen years before *Tucker* there was a similar successful school finance challenge in Arkansas. In *DuPree v. Alma School District*, 651 S.W.2d 90 (Ark. 1983), the plaintiffs alleged that the school financing system violated the state constitution's guarantee of equal protection and its requirement that the state provide a general, suitable, and efficient system of education. *Id.* at 91.

[148] *Tucker*, 917 S.W.2d at 532. The Arkansas Supreme Court concluded that the question of whether the lower court could stay its decision was not before the court and declined to rule on the issue. *Id.*

[149] 1995 Ark. Acts 916; 1995 Ark. Acts 917, §§ 3, 6.

[150] 1995 Ark. Acts 1194, § 16.

[151] Texas has a long history of school finance reform litigation, starting with *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973). *See supra* note 24.

[152] Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 394 (Tex. 1989).

for education be distributed equitably and evenly."[153] After *Kirby*, the Texas legislature made a variety of attempts to comply with the decision and fought with the courts about remedies.[154]

The Texas Supreme Court rejected three of the state legislature's plans for funding public education before it finally approved the legislature's plan in *Edgewood Independent School District v. Meno*.[155] The court held, however, that if "Texas school children were denied access to that education needed to participate fully in the social, economic, and educational opportunities available in Texas, the 'suitable provision' clause [of the state constitution] would be violated."[156] Notably, however, the court found that the plaintiffs did not prove that a constitutional violation had occurred in this case.[157]

The Texas plan shows the positive and negative aspects of school finance litigation and subsequent legislation. Though the court was not willing to delineate its own educational standards and deferred to the legislature to create a remedy, the standards adopted by the legislature have the potential to aid children by providing specific criteria with which to hold the state accountable.

The legislation finally approved in *Meno* also has a potentially negative effect resulting from use of high-stakes testing to measure student achievement. Under Texas law, a score of 70 on the Texas Assessment of Academic Skills Test ("TAAS") is required for high school graduation.[158] Beginning in 2003, third grade students will not be promoted to the fourth grade unless they receive a passing score to be determined by the Texas Education Agency on the third-grade TAAS.[159] Beginning in 2005, fifth graders must pass the TAAS to be promoted to the sixth grade, and in 2008, eighth graders will have to pass the TAAS to enter ninth grade.[160] There are widespread concerns that the TAAS will have a disparate impact on minority students, and that it violates their due process rights.[161] The Intercultural Development Research Center discovered that although fifty percent of the state's students were members of minority

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[153] *Id.* at 398.

[154] *See, e.g.*, Edgewood Indep. Sch. Dist. v. Kirby, 804 S.W.2d 491 (Tex. 1991); Edgewood Indep. Sch. Dist. v. Meno, 917 S.W.2d 717 (Tex. 1995).

[155] *Meno*, 917 S.W.2d at 717. See also TEX. CONST. art. 7, § 1, which states that "it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools."

[156] *Meno*, 917 S.W.2d at 736 (quoting TEX. CONST. art. 7, § 1).

[157] *Id.* at 737.

[158] TEX. EDUC. CODE ANN. §§ 39.023, .025 (Vernon Supp. 2000). The only exemptions are for some students with disabilities and limited English proficiency. *Id.* §§ 39.023(c), .023(*l*), .027.

[159] *Id.* § 28.0211(n)(1).

[160] *Id.* § 28.0211(n)(2)–(3).

[161] The TAAS exam was challenged unsuccessfully in *GI Forum v. Texas Education Agency*, 87 F. Supp. 2d 667 (W.D. Tex. 2000).

groups, seventy percent of the 147,000 students who failed the tests in 1996–97 were minorities.[162]

II. The Federal Law of Resource Comparability

Since the Supreme Court effectively foreclosed a federal equal protection claim in school finance cases in *San Antonio Independent School District v. Rodriguez*,[163] many advocates have understandably focused on state constitutional and statutory claims. There are, however, federal statutes on which advocates can base resource comparability claims, such as the Equal Educational Opportunities Act of 1974 ("EEOA")[164] and Title I of the Improving America's Schools Act of 1994.[165] Advocates can also rely on Title VI of the Civil Rights Act of 1964,[166] though the Court, in *Alexander v. Sandoval*,[167] recently declined to interpret the Title VI implementing regulations[168] as establishing a private right of action. The effective use of federal statutes is a crucial part of expanding the scope of resource comparability and school finance litigation.

Perhaps most importantly, federal statutes such as Title VI require that states use federal resources in a nondiscriminatory manner. This is critical because some states have weaker oversight systems than the federal government, especially with regard to their education programs.[169] Federal statutes may also bring the resources of the federal government into the case through enforcement, prosecutorial resources, or monitoring.

Federal claims can also broaden cases beyond fiscal equity and sustain resource comparability cases when state constitutional claims are foreclosed. For example, in *Flores v. Arizona*,[170] a resource comparability case, the court permitted federal claims based on the EEOA and the im-

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[162] *The Texas "Miracle," at* http://www.educationnews.org/thetexasmiracle.htm (last visited Apr. 29, 2001).

[163] 411 U.S. 1 (1973). See *supra* notes 13 and 24 for further discussion of *Rodriguez*.

[164] 20 U.S.C. §§ 1701–1758 (1994).

[165] 20 U.S.C. §§ 6301–8962 (1994). Between 1981 and 1994, the program was called Chapter I.

[166] 42 U.S.C. §§ 2000d to 2000d-4a (1994).

[167] Alexander v. Sandoval, 121 S. Ct. 1511 (2001). See *infra* notes 204–213 and accompanying text for further discussion of *Sandoval*.

[168] 34 C.F.R. § 100.3(b)(2) (1999) states that

> A recipient, in determining the types of services, financial aid, or other benefits, or facilities which will be provided . . . may not . . . utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin.

[169] Gary Orfield, *Strengthening Title I: Designing a Policy Based on Evidence*, *in* Hard Work for Good Schools: Facts Not Fads in Title I Reform 1, 9 (1999).

[170] 48 F. Supp. 2d 937 (D. Ariz. 1999).

plementing regulations of Title VI because a previous school finance case, *Roosevelt Elementary School District No. 66 v. Bishop*,[171] "did not address the quality of education being provided in Arizona."[172] Rather, that case addressed only uniformity in funding.[173]

A. EEOA

Students with limited English proficiency can base resource comparability claims on the EEOA. The EEOA includes a requirement that state and local educational agencies take "appropriate action" to overcome language barriers that impede limited English proficiency ("LEP") students' educational opportunities.[174] The Department of Justice has argued that intentional discrimination is not required for an EEOA violation.[175] Moreover, it has been the position of the Department of Justice that "the EEOA requires state and local agencies to do more than simply make a good faith effort to overcome the language barriers faced by LEP students."[176]

Plaintiffs have successfully used the EEOA to challenge the inadequacy of school programs. For example, in *Flores*, the plaintiffs challenged, under the EEOA, the state's system of distributing educational resources and monitoring the quality of schools that serve predominantly low-income minority children.[177] Pointing to a lack of trained LEP teachers, textbooks, and other resources, the plaintiffs claimed that "districts enrolling predominantly low-income minority children . . . allow [their] schools to provide less educational benefits and opportunities than those available to students who attend predominantly anglo-schools."[178] The *Flores* court held that there was an express private right of action under the EEOA.[179]

The court outlined its responsibility under the Act. First, the court must determine if a school system is pursuing a sound, recognized educational theory (or a legitimate experimental strategy).[180] Second, the

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[171] 877 P.2d 806 (Ariz. 1994).

[172] *Flores*, 48 F. Supp. 2d at 947.

[173] *Id.* For further discussion of *Flores*, see *infra* notes 177–182.

[174] 20 U.S.C. § 1703(f) (1994).

[175] Memorandum of the United States as Proposed Amicus Curiae, Haitian Ctrs. Council v. Bd. of Educ. (E.D.N.Y.) (No. 96-6202 (EHN)), *available at* http://www.usdoj.gov/crt/edo/documents/haitianbr.htm (last visited Apr. 30, 2001).

[176] *Id.*

[177] *Flores*, 48 F. Supp. 2d at 937. The plaintiffs also based their claim on Title VI. *See supra* notes 170–173.

[178] *Flores*, 48 F. Supp. 2d at 939, 955–56.

[179] *Id.* at 956. The EEOA provides that "[an] individual denied an equal educational opportunity, as defined by this subchapter, [may] institute a civil action in an appropriate district court of the United States against such parties, and for such relief as may be appropriate." 20 U.S.C. § 1706 (1994).

[180] *Flores*, 48 F. Supp. 2d at 948 (citing Castaneda v. Pickard, 648 F.2d 989, 1009–10 (5th Cir. 1981)). The *Flores* court noted that it did not believe Congress intended that un-

court must inquire whether "the programs and practices actually used by a school system are reasonably calculated to implement effectively the educational theory."[181] Finally, "[i]f a school's program, although premised on a legitimate educational theory and implemented through the use of adequate techniques, fails . . . to produce results indicating that the language barriers confronting students are actually being overcome, that program may . . . no longer constitute appropriate action."[182]

B. Title I

Title I of the Improving America's Schools Act is the largest federal aid program for elementary, middle, and high schools.[183] Through Title I, the federal government gives money to school districts based on the number of low-income children in each district. The statute is a mechanism for targeting funds to schools with high concentrations of low-income students. It does not mandate that schools implement any specific educational approach or program. Each district uses its Title I money for "supplemental services" for students in poverty and has discretion in the way the funds are used.[184] Last year the federal government spent eight billion dollars on Title I.[185] Although there are numerous regulations regarding application of Title I, there has been little oversight to ensure that schools receiving money actually improve. This is partly because Title I has always been considered a prime source of "legislative pork," "with funds for every congressional district."[186]

Under Title I's "supplement not supplant" ethic, schools cannot use Title I funds to replace local funding that otherwise would have been provided to a school.[187] However, districts often consider Title I funds as

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der § 1703(f) "a school would be free to persist in a policy which, although it may have been 'appropriate' when adopted, in the sense that there were sound expectations for success and bona fide efforts to make the program work, has, in practice, proved a failure." *Id.*

[181] *Id.*

[182] *Id.*

[183] 20 U.S.C. §§ 6301–8962 (1994). Title I was first a part of the Elementary and Secondary Education Act ("ESEA"), passed in 1965 "in response to public concern about the schooling of disadvantaged children." Diane Ravitch, *Introduction*, *in* BROOKINGS PAPERS ON EDUCATION POLICY, *supra* note 20, at 1, 2. ESEA was reauthorized as the Improving America's Schools Act ("IASA") in 1994. U.S. DEP'T OF EDUC., THE IMPROVING AMERICA'S SCHOOLS ACT OF 1994 (1995), *at* http://www.ed.gov/legislation/ESEA/brochure/iasabro.html.

[184] Although the federal government spends billions of dollars per year on Title I, the funds make up less than ten percent of expenditures of local school districts' budgets. Farkas & Hall, *supra* note 105, at 75.

[185] Jacques Steinberg, *Adding a Financial Threat to Familiar Promises on Education*, N.Y. TIMES, Jan. 26, 2001, at A17 (discussing *Quality Counts 2001: A Better Balance*, EDUC. WEEK, Jan. 11, 2001, at 9, *available at* http://www.edweek.org/sreports/qc01).

[186] McUsic, *supra* note 14, at 94. Efforts were made in 1994 to focus Title I resources on the neediest schools, but these changes have not been substantial enough to impact the structure of education funding. *Id.*

[187] See Elementary and Secondary Education Amendments of 1969, Pub. L. No. 91-

"little more than a small add-on to whatever they were doing already."[188] This is especially true in "school districts under constant financial pressure where fungibility is the first instinct of many central administrators."[189]

Congress's original goal was to use Title I to support extra services for needy students.[190] Under a recent amendment to Title I, however, schools with high poverty rates can now use their money for "school-wide" programs, allowing greater flexibility in spending.[191] High-poverty schools can integrate resources obtained under Title I with other federal support to address school-wide concerns.[192]

The downside to this newly acquired ability to use funds to benefit the school as a whole is that it raises the possibility that the funds will be dispersed too widely and will not be used to provide services to the neediest children.[193] Some experts believe that such displacement has "significantly reduced the beneficial impact of the program on low-income children."[194] Advocates should conduct a thorough examination of the effectiveness of the "whole-school" program and, if necessary, lobby for a renewed emphasis on targeting the money and resources to the children most in need of special services.[195]

Title I may be useful to advocates because of the number of ways that school districts can violate federal laws that govern the aid.[196] This is significant because, as stated earlier, some states have weaker civil rights enforcement than the federal government, especially in terms of education programs.[197] The manner in which school districts use Title I funds may violate the implementing regulations of Title VI if districts misallocate funds in a way that results in resource comparability disparities.[198] Moreover, a school may violate Title VI if Title I funds are used in a way that has a disparate, adverse effect on minority students.[199]

230, 84 Stat. 121, which prohibited supplanting state and local funds with federal Title I money.

[188] Farkas & Hall, *supra* note 105, at 75.

[189] *Id.* at 85.

[190] Hill, *supra* note 20, at 15.

[191] *Id.*; *see also* U.S. DEP'T OF EDUC., *supra* note 183.

[192] U.S. DEP'T OF EDUC., *supra* note 183.

[193] Farkas & Hall, *supra* note 105, at 76.

[194] *Id.* at 85.

[195] *See id.* at 89–90.

[196] *See* INVESTIGATIVE RESOURCES, *supra* note 17, at 12–13. For example, Diane Ravitch notes, "Soon after [the] passage [of the Elementary and Secondary Education Act in 1965], federal officials threatened to withhold ESEA funds from southern school districts until they dismantled the dual system of racially segregated schools." Ravitch, *supra* note 183, at 3.

[197] Orfield, *supra* note 169, at 9.

[198] INVESTIGATIVE RESOURCES, *supra* note 17, at 13. For further discussion of Title VI, see *infra* Part II.C.

[199] For example, the practice of supplanting funds may have a racially disparate impact. INVESTIGATIVE RESOURCES, *supra* note 17, at 13.

Title I regulations also require recipients to ensure that schools within a district are comparable.[200] To assess comparability, districts must compare the quality of teachers, administrators, materials, and supplies.[201] Advocates should be mindful of these factors and insist that schools are in fact comparable. On the outcome side, advocates can also use Title I to ensure that testing procedures are fair and appropriate.[202]

President George W. Bush recently introduced his plan for "Transforming the Federal Role in Education," which could include the ability to withhold federal aid to public schools and to provide vouchers for students in these schools.[203] Leaving the voucher debate for another forum, it is worth noting that advocates can take advantage of Bush's desire to enforce Title I requirements and a political climate favoring education reform.

C. Title VI

Until the recent Supreme Court decision in *Alexander v. Sandoval*,[204] public-school children and their parents could bring resource comparability cases based on the implementing regulations[205] of Title VI of the Civil Rights Act of 1964.[206] The Title VI regulations use the "effects test," which prohibits the use of "criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program."[207] The implementing regulations were a powerful tool for plaintiffs because proof of intentional discrimination was not required—plaintiffs had to prove only that there was a discriminatory disparate impact.[208] In many resource comparability cases, children and their parents used Title VI regulations to show that the state's system of funding or maintaining the

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[200] *Id.* at 12–13.

[201] *Id.*

[202] *See* NAT'L RESEARCH COUNCIL, HIGH STAKES: TESTING FOR TRACKING, PROMOTION, AND GRADUATION 264–66 (Jay P. Heubert & Robert M. Hauser eds., 1999) [hereinafter HIGH STAKES].

[203] George W. Bush Education Proposal, *at* http://www.whitehouse.gov/news/reports/no-child-left-behind.html (last visited Mar. 13, 2001) [hereinafter Bush Education Proposal]; *see also* Steinberg, *supra* note 185.

[204] 121 S. Ct. 1511 (2001).

[205] 34 C.F.R. § 100.3(b)(1)–(2) (1999).

[206] 42 U.S.C. §§ 2000d to 2000d-4a (1994).

[207] 34 C.F.R. § 100.3(b)(2).

[208] Though not required, evidence of intentional discrimination would enhance a plaintiff's disparate impact claim. *See, e.g.*, Powell v. Ridge, 189 F.3d 387 (3d Cir. 1999). For further discussion of Title VI as a tool in education lawsuits, see generally Daniel J. Losen & Kevin G. Welner, *Disabling Discrimination in Our Public Schools: Comprehensive Legal Challenges to Inappropriate and Inadequate Special Education Services for Minority Children*, 36 HARV. C.R.-C.L. REV. 407 (2001).

public schools had a disparate impact on minority students.[209] For example, in *Campaign for Fiscal Equity, Inc. v. State*, the New York Court of Appeals held that plaintiffs stated a valid disparate impact claim under the Title VI implementing regulations.[210] On remand, the plaintiffs showed that New York City, which educated a majority of the state's minority children, received twelve percent less state aid per pupil ($3,000) than the statewide average ($3,400).[211]

The *Sandoval* decision, which held that there is no private right of action under the implementing regulations of Title VI,[212] thwarts the efforts to broaden the scope of resource comparability cases. The Title VI cause of action was crucial to the expansion of resource comparability claims because plaintiffs could demonstrate the racially disparate impact of purportedly "neutral" education policies. In addition, basing a claim on Title VI ensured that race was a major issue both in the case and the remedy.[213]

While the Department of Justice can still bring cases based on the implementing regulations of Title VI, the scope of enforcement will be significantly diminished because the agency will not have the institutional capacity to bring cases against all of the states that violate the regulations. Nonetheless, advocates should make every effort to engage the Department of Justice in resource comparability cases and to urge the agency to sue school districts under the Title VI regulations. In addition, advocates must lobby Congress to amend Title VI to allow for the promulgation of regulations that expressly confer a private right of action.

III. Expanding the Scope of Resource Comparability

I will now outline a multi-part approach that advocates can use to take advantage of court precedents from current school finance and resource comparability cases. This five-part approach uses the current models and builds on them with the hope of making them even more effective. First, advocates should abandon the call for strict fiscal equity, allowing them to argue, as does Paul T. Hill, that "different children need different instructional experiences," and that "identical treatment, or

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[209] For example, in *Powell*, the plaintiffs complained that Pennsylvania's funding policies and practices disadvantaged students in underfunded districts, citing the Philadelphia city schools as an example. The court allowed a cause of action based on the implementing regulations of Title VI, and remanded the case. *Powell*, 189 F.3d at 395, 405. In *Robinson v. Kansas*, 117 F. Supp. 2d 1124 (D. Kan. 2000), plaintiffs survived a summary judgment motion in a Title VI case where they claimed that state education laws disproportionately harmed minority children.

[210] Campaign for Fiscal Equity, Inc. v. State, 655 N.E.2d 661 (N.Y. 1995).

[211] Campaign for Fiscal Equity, Inc. v. State, 719 N.Y.S.2d 475 (Sup. Ct. 2001).

[212] In *Sandoval*, the plaintiff challenged Alabama's English-only license driver's license exam based on the implementing regulations of Title VI. Alexander v. Sandoval, 121 S. Ct. 1511, 1515 (2001).

[213] *See generally* Losen & Welner, *supra* note 208.

identical levels of expenditure, is not always equitable."[214] Second, a new approach should use both input and output measurements to ensure that children receive the resources they need, and to guarantee that schools are meeting their obligations to their students and the community.

Moving away from litigation-specific strategies, the third aspect of the approach is that there must be a concerted effort to influence any remedial actions taken by the state legislature. Too often, civil rights advocates win cases in court only to find their victories undercut when an issue is sent to the state legislature. Many of the nuts and bolts of education reform are crafted by the state legislature—an aspect of reform not likely to change. Therefore, civil rights advocates should work to influence those decisions.

Fourth, racial and ethnic disparities should remain a focal point for advocacy. Whenever possible, federal civil rights laws should be used to address racial and ethnic isolation. Programs should be developed in the states to tackle racial and ethnic isolation in schools. Finally, civil rights leaders should set the tone of the debate by conceptualizing students as unique and cherished members of the community. They should be wary of characterizing students only as potential workforce participants. Those involved in school reform litigation and legislation must envision students as citizens, people, and learners—and set priorities accordingly.

A. Affirmative Steps Beyond Equity

One of the most important aspects of a broader approach to resource comparability cases is that equal or adequate financing should no longer be the end goal. States must be required to be more than a "fair funder."[215] The benefits of education are cumulative, and states and schools should acknowledge this by funding programs that can address a wide range of needs.

California's highest court emphasized this point in *Butt v. State*, ruling that the state must do more than provide funding for schools.[216] The court additionally held that, absent a compelling reason, the state must take action to prevent failures, such as the premature closing of the Richmond Unified School District due to financial difficulties.[217] In *Alabama Coalition for Equity, Inc. v. Hunt*, an Alabama court cited with approval the findings of the Governor's Education Reform Commission that "additional counseling, assistance with academics, and drop-out prevention programs could help reduce Alabama's drop-out rate, and that the absence of such services [was] the result of inadequate funding."[218] Al-

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[214] Hill, *supra* note 20, at 28.
[215] Butt v. State, 842 P.2d 1240, 1253 (Cal. 1992).
[216] *Id.*
[217] *Id.* at 1256.
[218] Alabama Coalition for Equity, Inc. v. Hunt, No. CV-90-883-R, 1993 WL 204083, at

though the court focused on the necessary financing, it also emphasized that the state and the public schools may be required to take *affirmative* steps to ensure that students receive a proper education. States must be required to act affirmatively when the successful operation of the public schools is at stake.

By insisting that strict fiscal equity cannot solve educational crises, advocates can remain credible and persuasive, given the increasingly uniform patterns in school funding. As Paul Zielbauer pointed out in a recent editorial, "Over the past thirty years . . . , funding disparities between districts have narrowed in many places."[219] But, he continues, funding parity is not a panacea.[220] If the debate focuses on the overall level of funding, failing schools may not be held accountable for their actions because there is parity in funding across a school district, signaling that a "sufficient" level of funding exists.

A focus beyond strict fiscal equity has been especially important in both Connecticut and New York, where courts held school systems to be inadequate even though both states spend above the national average on education.[221] As discussed in Part I, Connecticut distributes state financial aid "so that the neediest districts receive the most aid."[222] Nonetheless, the state was held to have an affirmative responsibility to remedy the extensive racial and ethnic isolation in its public schools.[223] Fiscal equity cannot be relied upon to adequately address all of the problems of failing schools—states must ensure that their money is effecting change.

Currently, equalizing funding is less important than making sure that low-performing schools provide children the resources they need. The trial court in *Campaign for Fiscal Equity* articulated this point: "A sound basic education is gauged by the resources afforded students and by their performance, not by the amount of funds provided to schools."[224] This focus ensures that states maintain responsibility for schools beyond funding and requires a more holistic approach to education reform.

An advocate's strategy should also emphasize that education is cumulative.[225] If students have been underserved for most or all of their time in public schools, a sudden increase in funds will not give them the tools they need to succeed. Schools may need to take affirmative steps to ensure that students are not penalized for the past failures of their schools. Furthermore, equal funding fails to account for different education costs. Some schools may pay more for basic services, and children

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*31 (Ala. Cir. Ct. Apr. 1, 1993).

[219] Paul Zielbauer, *The Courts Try to Get City Schools Their Fair Share*, N.Y. TIMES, Jan. 14, 2001, § 4, at 3.

[220] *Id.*

[221] *See supra* notes 58–69, 125–146 and accompanying text.

[222] Sheff v. O'Neill, 678 A.2d 1267, 1273 (Conn. 1996).

[223] *See id.* at 1282–85.

[224] Campaign for Fiscal Equity, Inc. v. State, 719 N.Y.S.2d 475, 534 (Sup. Ct. 2001).

[225] *See id.* at 492.

with differing educational needs may require different resources and facilities. As Gary Orfield notes, "Segregated minority high-poverty schools have to spend much larger shares of their resources on remedial courses, special education, dealing with out-of-school problems and crimes, [and] managing violence."[226] Orfield also notes that children of poor families are more likely to move frequently for lack of rent money, and that children of jobless parents are more likely to confront "violence, alcoholism, abuse, and divorce, and desertion related to joblessness and poverty."[227]

In a Massachusetts case, a school superintendent explained that he could not meet the special needs of the many children in his system who are in foster care, who are wards of the state, and who are homeless.[228] A system of equal funding would not address fully the needs of those students who require special services, nor would it recognize that students enter school at different levels of preparedness and that some may need early childhood intervention services.[229] As one Massachusetts school superintendent explained, "Families from the top scoring communities in this state have libraries in their homes. We have to take our children on a field trip to the library. That's the difference."[230]

Focusing on resource development, and not just funding, also serves to refute the charge that increasing funds to failing schools is like "throwing good money after bad."[231] For many civil rights advocates, this claim is counterintuitive: as one observer asked, "If money does not matter, why do wealthy suburbs tax themselves so highly for expensive schools?"[232] Even though there is evidence that "increased funding can improve the quality of public education,"[233] advocates must be prepared to counter popular misconceptions about this claim. Advocates should emphasize that they want to see tangible results regardless of whether there is an increase in funding. This may involve targeting money toward specific goals like desegregation and smaller class size,[234] and focusing the debate on quantifiable educational outcomes.

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[226] Orfield, *Growth of Segregation*, *supra* note 3, at 68.

[227] *Id.* at 54.

[228] McDuffy v. Sec'y of Executive Office of Educ., 615 N.E.2d 516, 520 n.13 (Mass. 1993).

[229] *See, e.g.*, Hoke County Bd. of Educ. v. State, No. 95-CVS-1158, 2000 WL 1639686 (N.C. Super. Ct. Oct. 12, 2000).

[230] Heidi B. Perlman, *Study Shows Education Reform Not Helping Poorer Districts*, http://www.s-t.com/daily/02-01/02-08-01/a08sr029.htm (last visited Apr. 29, 2001).

[231] Skeptics of reform often stress that funding increases "produce only modest gains" in many schools. *See, e.g.*, Leandro v. State, 488 S.E.2d 249, 260 (N.C. 1997) (quoting with approval William H. Clune, *New Answers to Hard Questions Posed by* Rodriguez*: Ending the Separation of School Finance and Educational Policy by Bridging the Gap Between Wrong and Remedy*, 24 CONN. L. REV. 721, 726 (1992)).

[232] Richard Rothstein, *Does Money Not Matter? The Data Suggest It Does*, N.Y. TIMES, Jan. 17, 2001, at B9.

[233] Ronald F. Ferguson, *Paying for Public Education: New Evidence on How and Why Money Matters*, 28 HARV. J. ON LEGIS. 465, 488 (1991).

[234] *See, e.g.*, Zielbauer, *supra* note 219.

B. Focusing on Both Inputs and Outputs

Advocates must insist that officials consider both inputs and outputs when measuring school progress. Educational inputs include funding, resources, and quality of teaching.[235] Output measures look to the number of students who graduate, the dropout rate, the skill level of students who enter state higher education systems, and students' test results. A focus only on inputs or only on outputs does not adequately measure educational quality.

Tracking inputs alone is insufficient because the money schools receive often is not used to improve the educational resources provided to students. In many areas, an increase in funding has not led to increased student achievement,[236] and schools must be held accountable for this failure. By also measuring outputs, advocates can ensure that reform continues until discernible progress is made. Without specific output measures, school officials can claim improvements without showing any concrete results.[237] Output measures alone, however, fail to take account of whether schools are providing sufficient resources for students to succeed. Examining both input and output measures ensures that students are receiving the resources they need and that they have access to meaningful learning opportunities.

Advocates should insist that schools focus on inputs that have been shown to improve graduation rates and to provide students with a more effective education. Although researchers do not agree on all of the components for school reform and dropout prevention, most tend to emphasize two general inputs.[238] First, teachers, administrators, and staff must be "committ[ed] and competen[t]."[239] Second, the organizational structure must be sound.[240] To be effective, schools must guarantee both. For instance, adopting "progressive" structural changes may provide few tangible results if teachers are not qualified.[241]

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[235] In *Campaign for Fiscal Equity*, the New York Court of Appeals held that the state must guarantee certain inputs including minimally adequate physical facilities and classrooms, materials, teaching, and curricula. Campaign for Fiscal Equity, Inc. v. State, 655 N.E.2d 661, 666 (N.Y. 1995).

[236] *See* Perlman, *supra* note 230.

[237] *See, e.g.*, Sheff v. O'Neill, 678 A.2d 1267 (Conn. 1996) (requiring school reform to end racial and ethnic isolation in the schools). Both the *Sheff* court and the subsequent reform legislation failed to use outcome measures. As a result, the court had no power to enforce its decision because the school district was making an effort to solve the problem. *See* Sheff v. O'Neill, 733 A.2d 925 (Conn. Super. Ct. 1999).

[238] *See* Russell W. Rumberger, *Why Students Drop out of School and What Can Be Done*, *at* http://www.law.harvard.edu/groups/civilrights/publications/dropout/rumberger.html (May 2001).

[239] *Id.*

[240] *Id.*

[241] *Id.*

Output measures are most useful if they are varied. The output measure most favored by state education reform efforts is high-stakes testing.[242] Advocates must remain committed to ensuring that high-stakes testing methods do not punish students for their schools' failures. As James Liebman argues, "absent contrary proof by school officials, it is not the students' misfortune but the officials' derogation of duty that accounts for the students' failure to progress."[243]

High-stakes testing can have particularly severe consequences and it is a measure that some have argued may violate students' due process rights.[244] The National Research Council's Committee on Appropriate Test Use has determined that "[a]lthough the causal connections are unclear, much of the existing research shows that the use of high-stakes tests is associated with higher dropout rates."[245] The Committee cites statistics showing that "9 of the 10 states with the highest dropout rates [have] high-stakes graduation tests, [while] none of the states with low dropout rates use[ ] tests for high-stakes purposes."[246] A new report on the increase in the dropout rate in New York City suggests that many students drop out because they become discouraged after failing a grade, or because they are intimidated by the required standardized tests.[247] The report's authors predict that the dropout rate will "skyrocket" as all students are required to take the high-stakes math exam: "Whenever standards are raised without the necessary academic and social supports, graduation rates tend to decline and dropout rates increase."[248] Many education researchers also believe that high-stakes testing is particularly likely to increase the dropout rate of minority students.[249] Further, a recent study found that when students fail high-stakes tests, only a few states provide extra assistance to the students or their teachers.[250]

Testing can be a useful tool, but it should be used for limited purposes with limited ramifications for individual children. The trial court in *Campaign for Fiscal Equity* adopted this approach when it examined stu-

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[242] *See supra* note 52.

[243] Liebman, *supra* note 10, at 390.

[244] For an overview of legal challenges to high-stakes testing, see HIGH STAKES, *supra* note 202, at 50–70. *See also supra* notes 52–57, 158–162 and accompanying text.

[245] HIGH STAKES, *supra* note 202, at 174. There is no clear evidence of causality between high-stakes tests and dropouts, but some believe graduation tests can give at-risk students "an extra push out the school door." *Id.* (quoting A.E. Kreitzer et al., *Competency Testing and Dropouts*, *in* DROPOUTS FROM SCHOOL: ISSUES, DILEMMAS, AND SOLUTIONS 129, 146 (Lois Weis et al. eds., 1989)).

[246] *Id.*

[247] Anemona Hartocollis, *Pace of Dropouts Persists in City Schools*, N.Y. TIMES, Feb. 28, 2001, at A21.

[248] *Id.*

[249] *See* HIGH STAKES, *supra* note 202, at 174.

[250] *See* Jacques Steinberg, *Survey Finds Teacher Support for Standards but Skepticism on Tests*, N.Y. TIMES, Jan. 11, 2001, at A18 (discussing *Quality Counts 2001: A Better Balance*, EDUC. WEEK, Jan. 11, 2001, at 9, *available at* http://www.edweek.org/sreports/qc01).

dents' results on standardized tests, but gave them limited weight.[251] The court of appeals had instructed the lower court to consider the results "cautiously[,] as there are a myriad of factors which have a causal bearing on test results."[252]

If high-stakes exams must be used, they should not be imposed until a state has implemented reforms to ensure that all students have a fair opportunity to learn the necessary information. In states like Massachusetts, Kentucky, and Texas, high-stakes tests were used before system-wide reform was completed.[253] In response to high-stakes tests in Ohio, the state supreme court welcomed the broad focus of education reform, but cautioned that it was problematic to have a system that "increases academic requirements and accountability, yet fails to provide adequate funding."[254]

Despite these potential dangers, advocates can take advantage of the current focus on education standards by embracing output measures when they are appropriate. There seems to be broad consensus about the usefulness of standards-based reform, which has been called "America's de facto national education policy."[255] President Bush has already shown his enthusiasm for standards, and his new education proposal depends heavily on testing.[256] Given this political climate, focusing on output measures is a politically attainable lobbying objective. To effect real educational reform, however, advocates must be careful not to lose sight of inputs. Though courts and legislators tend to focus exclusively on either outputs or inputs, advocates must carefully monitor the reform process and insist that they consider both.

C. The Importance of Legislative Strategies

Advocates should focus on both litigation and lobbying. As with input and output measures, using one to the exclusion of the other will not adequately address the difficult work of school reform. Some academics have analyzed the failure of school finance litigation and subsequent remedies and have argued that courts should be more aggressive in mandating and monitoring legislative remedies.[257] While this may be true, it is an unrealistic goal. Even courts that have made sweeping decisions in favor of plaintiffs have been unwilling to meddle heavily in the remedial

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[251] Campaign for Fiscal Equity, Inc. v. State, 719 N.Y.S.2d 475, 517 (Sup. Ct. 2001).

[252] *See* Campaign for Fiscal Equity, Inc. v. State, 655 N.E.2d 661, 666 (N.Y. 1995).

[253] *See supra* Part I.

[254] DeRolph v. State, 728 N.E.2d 993, 1018 (Ohio 2000).

[255] Robert B. Schwartz & Marian A. Robinson, *Goals 2000 and the Standards Movement*, *in* BROOKINGS PAPERS ON EDUCATION POLICY, *supra* note 20, at 173, 173.

[256] *See* Bush Education Proposal, *supra* note 203; *see also* Steinberg, *supra* note 185.

[257] *See* Note, *Unfulfilled Promises: School Finance Remedies and State Courts*, 104 HARV. L. REV. 1072, 1085 (1991).

stage.[258] Although many commentators argue that the courts should be more involved,[259] even the reform-minded court in *Campaign for Fiscal Equity* felt compelled to defer to the legislature in implementing policy objectives.[260]

Litigation, however, should not be abandoned altogether. Some academics argue that "nonadjudicative approaches" should be used, especially when school finance litigation has failed.[261] While nonlitigation approaches may work in some situations, litigation options are often necessary when the "political process has come to an impasse."[262] School aid often becomes an explosive issue that has severe consequences for state politicians,[263] and litigation is a way to force them to the table. Furthermore, low-income school districts often lack political clout and may need to rely on litigation to enhance their legitimacy.[264]

Maintaining the ability to sue while lobbying forcefully is a more well-rounded and realistic strategy. Advocates in Kentucky used this two-track method by first building support for reform through a statewide citizens' committee and then later including education insiders in a legal challenge to the state's school system.[265] Advocates should follow this example by focusing on legislative as well as litigation strategies.

Too often, serious educational policy proposals are enacted without the input of civil rights advocates. In Massachusetts, for example, the debate over the Education Reform Act of 1993 focused on funding formulas rather than on issues that would later become contentious, like the MCAS exams.[266] "Until 1993, the public had hardly any knowledge of [the Act's] sweeping changes in school policy and regulation."[267] Civil rights advocates must therefore act defensively and track the status of

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[258] *See, e.g.*, Sheff v. O'Neill, 678 A.2d 1267 (Conn. 1996); Campaign for Fiscal Equity, Inc. v. State, 719 N.Y.S.2d 475 (Sup. Ct. 2001); *see also supra* notes 67–69, 145–146 and accompanying text.

[259] *See, e.g.*, Michael A. Rebell & Robert L. Hughes, *Efficacy and Engagement: The Remedies Problem Posed by* Sheff v. O'Neill*—and a Proposed Solution*, 29 CONN. L. REV. 1115, 1119 (1997).

[260] *See Campaign for Fiscal Equity*, 719 N.Y.S.2d at 549. Notably, however, the court gave the defendants a deadline of September 15, 2001—approximately eight months later—to implement the ordered reforms. *Id.* at 551.

[261] *E.g.*, Tomiko Brown-Nagin, *"Broad Ownership" of the Public Schools: An Analysis of the "T-Formation" Process Model for Achieving Educational Adequacy and its Implications for Contemporary School Reform Efforts*, 27 J.L. & EDUC. 343, 346 (1998). Brown-Nagin argues that nonlitigation strategies should be especially considered in states like South Carolina, where belief in local control of public schools and hostility to court-mandated change is strong. *Id.*

[262] Rebell & Hughes, *supra* note 259, at 1118.

[263] *See* McKinley, *supra* note 6.

[264] *See* McUsic, *supra* note 14, at 89.

[265] *See* Liebman & Sabel, *supra* note 36. For a discussion of the *Rose* case in Kentucky, see *supra* notes 35–47 and accompanying text.

[266] Craig Bolon, *Education Reform in Massachusetts, at* http://www.massparents.org/easternmass/brookline/ed_reform_bolon.htm (August 30, 2000).

[267] *Id.*

any educational proposals, even those that seem favorable, to ensure they will not have a disparate impact on minority students.

In addition, advocates should lobby state legislators to encourage the enactment of state educational standards. Advocate-supported standards should recommend goals for such essential educational components as class size, teacher training, teacher salaries, proper facilities, and curricula. This lobbying effort would not only encourage school reform on specific, targeted issues, but would also help develop enforceable standards. If courts are hesitant to interpret vague clauses in state constitutions broadly, they may be more receptive to claims attempting to enforce more specific state statutes or regulations.[268]

In *Lewis E. v. Spagnolo*, students in East St. Louis, Illinois, claimed that the state was using funds and administering schools in violation of state regulations.[269] The plaintiffs' complaint charged that the district's neglect and mismanagement led to "meager instructional equipment, unsupervised, disengaged, and uncertified teachers, and systemic staffing deficiencies."[270] The plaintiffs sought to force the state officials responsible for implementing various sections of the school code to "do what the law requires."[271] Although the Illinois Supreme Court rejected most of the plaintiffs' causes of action in *Lewis E.*, it held that plaintiffs may be entitled to pursue a mandamus action against the defendants to enforce the state's education codes.[272]

The plaintiffs in *Alabama Coalition for Equity, Inc. v. Hunt* similarly used their state's education statutes to challenge the existing educational opportunities available to children.[273] The *Alabama Coalition for Equity* plaintiffs sought to prove the inadequacy of the educational system by showing that the state failed to follow through with its own mandates, such as the Alabama Department of Education's "Plan for Excellence,"[274] the Alabama Education Improvement Act,[275] and a performance-based accreditation system.[276] The court noted that although the state department of education and the legislature adopted all three of these plans,

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[268] *See* Liebman, *supra* note 10, at 403.

[269] Lewis E. v. Spagnolo, 710 N.E.2d 798 (Ill. 1999).

[270] *Id.* at 801.

[271] *Id.* at 813.

[272] *Id.* at 813–15.

[273] *See* Alabama Coalition for Equity, Inc. v. Hunt, No. CV-90-883-R, 1993 WL 204083 (Ala. Cir. Ct. Apr. 1, 1993).

[274] *Id.* at *20. The "Plan for Excellence" is a blueprint for improving Alabama's schools developed by the state department of education in 1984. The state legislature commended it when it passed. *Id.*

[275] The court cited the Act's claim that "[a]ttainment of these goals will require a serious reexamination of every aspect of Alabama's education system and some profound changes in our public schools." *Id.* (quoting 1991 Ala. Acts 323, 607 (codified at ALA. CODE § 16-23-3 (2001))).

[276] *Id.*

there was no funding to implement them.[277] By focusing on the state's own standards, the court avoided concerns about judicial activism.

The success of plaintiffs in Alabama and Illinois provides insight into how to use the legislature to implement more thorough reform and ensure that the state fulfills its educational duties. If state legislatures set specific, enforceable guidelines for schools, students may have greater opportunity to benefit from meaningful change. State legislatures may even be compelled to implement more progressive solutions, such as voluntary desegregation programs, if other solutions fail.

Michael Rebell and Robert Hughes argue that the mixed results in both federal and state education reform cases are caused by courts' reluctance to play a broad role in the process.[278] As a solution, they believe courts should adopt a policy of "efficacy and engagement."[279] Rebell and Hughes' solution is unrealistic because it does not address judges' concerns about violating separation of powers principles. As James Liebman explains, relying on state codes ensures that courts will not shy away from cases because they are concerned about judicial lawmaking and enforcing substantive values through constitutional interpretation.[280] If decisions are based on school codes enacted by the state legislature, they will be less vulnerable to conservative objections that the judiciary is redistributing wealth or relying on ambiguous constitutional norms.[281]

In North Carolina, the state supreme court cited concerns about ongoing litigation and emphasized that the executive and legislative branches were better positioned to make education policy.[282] Even though the court was not enthusiastic about education litigation, it held that "educational goals and standards adopted by the legislature" could be used to determine whether students were "being denied their right to a sound basic education."[283]

Lobbying for school codes should involve a deliberate campaign to achieve specific educational policy objectives. These objectives should include factors proven to increase student achievement. Possible standards include teacher certification, teacher salary, class size, up-to-date curricula and textbooks, and adequate and safe physical facilities. Recently, equalization in teacher pay has become a salient issue. In *Campaign for Fiscal Equity*, the court found that New York City's lack of qualified teachers is largely the result of an inability to compete in the New York metropolitan labor market.[284] In the New York area, there is an

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[277] *Id.* at *21.
[278] Rebell & Hughes, *supra* note 259, at 1144.
[279] *Id.* at 1145.
[280] Liebman, *supra* note 10, at 378.
[281] *See id.* at 379.
[282] Leandro v. State, 488 S.E.2d 249, 259 (N.C. 1997).
[283] *Id.*
[284] Campaign for Fiscal Equity, Inc. v. State, 719 N.Y.S.2d 475, 498 (Sup. Ct. 2001).

estimated difference of as much as thirty-six percent between teacher salaries in the city and teacher salaries in the surrounding suburban areas.[285]

State codes might also require special programs for at-risk students, such as pre-kindergarten programs, summer programs, and after-school activities.[286] Advocates should also work for inclusion of an innovative curriculum that includes the arts and physical education. In Massachusetts, the Education Reform Act of 1993 included art as part of the core curriculum. This helped advocates insure that creative outlets for children were not eliminated in budget cuts.[287]

In addition to specific state codes regarding quantifiable resources such as class size and teacher certification, advocates should encourage state legislatures to pass education standards that allow flexibility, while also requiring effective reform. This broader, more flexible element is necessary because there are no easy solutions to serious school problems like racial and ethnic isolation. The EEOA can be used as a model for this type of malleable standard.[288]

The EEOA allows various approaches, but it always requires more than a good-faith effort.[289] A state code similar to the EEOA would require the state to address school failures such as racial isolation, unqualified teachers, and crumbling buildings. Using the EEOA as a model would allow states to experiment with education problems that have proven intractable, such as racial and ethnic isolation, but would also require the states to show results.

Title VI may provide additional support for advocates trying to enforce state educational codes.[290] In *Ceaser v. Pataki*,[291] the plaintiffs claimed that the state of New York, the governor, and the state education department are legally obligated to "monitor the provision of educational services" in the state and to assure that those services are provided in a manner that complies with state laws and regulations.[292] Specifically, plaintiffs alleged that the state had no adequate system to monitor proper teacher certification, remedial education, school facilities, school libraries, and the availability of Regents courses.[293] The *Ceaser* plaintiffs ar-

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[285] *Id.*

[286] The court in *Campaign for Fiscal Equity* noted that these resources can improve student achievement. *Id.* at 525.

[287] *See* Sandy Coleman, *Task Force Aims to Get Arts Back in Schools*, BOSTON GLOBE, Aug. 22, 1993, (City Weekly), at 1.

[288] See *supra* Part II.A for further discussion of the EEOA.

[289] 20 U.S.C. § 1703 (1994).

[290] Although the ability to utilize Title VI is greatly diminished by *Sandoval*, Title VI implementing regulations can still be enforced by governmental agencies. *See supra* notes 204–213 and accompanying text.

[291] Ceaser v. Pataki, No. 98 CIV. 8532 (LMM), 2000 WL 1154318 (S.D.N.Y. Aug. 14, 2000).

[292] *Id.* at *1.

[293] *Id.*

gued that students in high-minority schools are significantly more likely to be harmed by the defendants' failure to monitor the implementation of state educational standards. They claimed that the defendants' "failures to enforce and assure compliance with [the legal requirements] ... is having a [discriminatory,] disparate impact on high minority schools."[294] This is an example of how state legislation can provide advocates a "hook" for a variety of enforcement mechanisms.

D. Maintaining Racial and Ethnic Integration as a Top Priority

Lurking in the background of most resource comparability cases is the fear that even if resources are equalized, education in the United States will remain racially, ethnically, and economically segregated. In *Brown v. Board of Education*, Chief Justice Warren emphasized that the Court's decision "cannot turn on merely a comparison of ... tangible factors .... We must look instead to the effect of segregation itself on public education."[295] Even successful resource comparability efforts cannot provide the benefits of integration.[296]

Unfortunately, national political leaders in the 1990s did not view recent increases in segregation as an important issue.[297] While the Bush Education Proposal rightly notes that "too many children in America are segregated by low expectations, illiteracy, and self-doubt,"[298] it fails to mention the most important ways students are segregated—by race, ethnicity, and economic status. Efforts to decrease racial and ethnic isolation can and should be incorporated into resource comparability cases and education reform. Advocates should not have to choose between desegregation and resource comparability, and they should lobby for legislation that addresses both issues. This type of legislation would emphasize flexible solutions, including voluntary desegregation or public school choice.

Advocates may be able to achieve voluntary desegregation or public school choice if other efforts to improve outputs like dropout rates and student achievement are not successful. An advocate's legislative agenda should include encouraging states to experiment with remedies that sat-

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[294] *Id.* at *5. A disparate impact claim based on failure to enforce a state regulation could also have been used in *Campaign for Fiscal Equity*. In New York City, "13.7% of ... public school teachers were not certified in any subject they taught, as compared with only 3.3% in the rest of the State." Campaign for Fiscal Equity, Inc. v. State, 719 N.Y.S.2d 475, 493 (Sup. Ct. 2001). The state's failure to enforce its teacher certification standards has an adverse effect on minorities because, as plaintiffs asserted, New York City's minority public school students "comprise 73% of the State's minority students and approximately 84% of the City's public school enrollment." *Id.* at 478.

[295] Brown v. Bd. of Educ., 347 U.S. 483, 492 (1954).

[296] *See* Ryan, *supra* note 8, at 256.

[297] *Id.*

[298] Bush Education Proposal, *supra* note 203.

isfy the requirements of a state code. Voluntary desegregation is one option that may be useful as an intervention for failing schools.[299] If a state department of education fails to meet the requirements of the school codes, advocates should insist on a more extensive remedy. A state department of education probably would have the ability to reorganize district boundaries,[300] to allow a more meaningful opportunity for desegregation.

Advocates can also keep the issue of race on the table by using federal antidiscrimination law in resource comparability cases. This may be even more important if race is not considered when state education legislation is passed. A South Carolina coalition successfully lobbied for significant school reform litigation by emphasizing the "broad ownership" of the public schools.[301] Tomiko Brown-Nagin explains that in South Carolina, "[w]ithout the 'taint' of civil rights and the politics of race, the concept of broad ownership of the schools could find widespread public acceptance among those whites who dominated politics and the economy, and who, in the final analysis, would decide the fate of the school reform bill."[302] Brown-Nagin argues that the campaign's deemphasizing race was important to its success.[303] Although issues of race may be purposefully excluded or overlooked when legislation is passed, civil rights advocates can try to use federal civil rights protections to ensure that the new laws are successfully and carefully implemented.

E. Holistic View of Educating a Student as a Person and a Citizen

Civil rights advocates must take special care when framing the standards they use to define a meaningful education. When addressing school finance and resource comparability concerns, courts and legislatures often try to quantify what a student should know and why he or she should know it. Although such efforts to delineate educational standards are important, the results can demean students by treating them only as future laborers, jurors, or voters, instead of as creative and unique young people. Jonathan Kozol explains that using "mercantile criteria" to assess the needs of low-income children is problematic because "[childhood] ceases to hold value for its own sake but is valued only as a 'necessary prologue' to utilitarian adulthood."[304]

The trial court in *Campaign for Fiscal Equity* rejected the defendant's assertion that a sound basic education is any education that provides high school graduates with the skills necessary to serve as jurors

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[299] Liebman, *supra* note 10, at 394.
[300] *Id.* at 395.
[301] Brown-Nagin, *supra* note 261, at 379.
[302] *Id.*
[303] *Id.*
[304] KOZOL, *supra* note 117, at 139.

and voters.[305] The court emphasized that these standards are low,[306] and articulated a broader definition when it explained that "[p]roductive citizenship means more than just being *qualified* to serve as a juror, but to do so capably and knowledgeably. It connotes civic engagement."[307] The court found that a sound basic education must include "the foundational skills that students need to become productive citizens capable of civic engagement and sustaining competitive employment."[308]

In its articulation of important educational standards, the Kentucky Supreme Court used functional terms.[309] The court stated that students should have "sufficient grounding in the arts to enable each child to appreciate his or her cultural and historical heritage."[310] Although knowledge of the arts contributes to students' understanding of other subject areas, artistic endeavors are also important for a child's own development. Nurturing talent is important as more than just a potential "public good"[311]—all children deserve to explore creative outlets in school.

Increased reliance on standardized testing and high-stakes exams has further dehumanized the education system. Although states may claim they have a variety of educational goals, basing school promotion or high school graduation on a single examination sends a signal to students that education is not about personal development or learning, but merely about passing an exam. Teachers and principals are also stripped of their decisionmaking power when students' fates are determined by a single test. In a survey that asked about statewide exams, "nearly seven in ten teachers said [that] instruction stresses state tests 'far' or 'somewhat' too much."[312] This problem is compounded by the most common test structure, multiple-choice questions, which require little creative thinking.[313] Students in such a system may be deprived of the ability to develop subject-area expertise and critical thinking skills, which require more than memorization and the successful completion of a single test.[314]

Educational goals that seek to do more than create efficient workers are also important because they allow for aspirations such as integration and an engaged citizenry. If advocates resist definitions that limit education to workforce training, they can more forcefully and coherently argue that racial and ethnic isolation is unacceptable, not only because it affects

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[305] Campaign for Fiscal Equity, Inc. v. State, 719 N.Y.S.2d 475, 484 (Sup. Ct. 2001).

[306] *Id.* at 484–85.

[307] *Id.* at 485.

[308] *Id.* at 487.

[309] Rose v. Council for Better Educ., Inc., 790 S.W.2d 186 (Ky. 1989).

[310] *Id.* at 212.

[311] *See Campaign for Fiscal Equity*, 719 N.Y.S.2d at 501.

[312] *Quality Counts 2001: A Better Balance*, EDUC. WEEK, Jan. 11, 2001, at 9, *available at* http://www.edweek.org/sreports/qc01.

[313] Forty-nine states include multiple-choice questions on their exams. *Id.*

[314] *Cf.* NAT'L RESEARCH COUNCIL, HOW PEOPLE LEARN: BRAIN, MIND, EXPERIENCE, AND SCHOOL 228 (John D. Bransford et al. eds., 1999).

how much students learn, but also because isolation negatively affects students' personal development. A broader conception of basic education communicates to children that they are important, meaningful members of the community. In *Brown*, Chief Justice Warren explained that state educational policies sanctioned by law can "affect [children's] hearts and minds in a way unlikely ever to be undone."[315] When students receive a substandard education or are forced to take a test unrelated to the skills they have learned, they may be less able to conceive of themselves as problem-solvers and creative individuals.

CONCLUSION

Although the American public seems interested in education reform, many citizens are skeptical of remedies that include racial components.[316] Civil rights advocates must carefully navigate this complex political environment. This task has been made somewhat easier by the current push for bold change, as all levels of government are addressing education reform.[317] In 1995, the "Contract with America" called for the elimination of the U.S. Department of Education,[318] and Bob Dole supported that proposal during his presidential campaign.[319] In contrast, George W. Bush has signaled that he is deeply committed to education reform, that he envisions a role for the federal government in the effort, and that he is willing to compromise to reach solutions.[320] At the same time, however, advocates face challenges to issues such as desegregation and affirmative action.[321]

This political atmosphere may well lead to education reform without racial remedies. Furthermore, state legislatures and the federal government might respond to the call for change by enacting high-stakes testing, zero-tolerance discipline,[322] and other measures that tend to punish children of color instead of protecting them. These policies are often identified as "reform," but they conceal underlying problems in American

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[315] Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954).

[316] Jay P. Heubert, *Six Law-Driven School Reforms: Developments, Lessons, and Prospects*, *in* LAW AND SCHOOL REFORM 1, 26–27 (Jay P. Heubert ed., 1999).

[317] Minow, *supra* note 7, at 257.

[318] David Warsh, *First 100 Days: A Restoration, Not a Revolution*, BOSTON GLOBE, Apr. 9, 1995, at 81.

[319] Dan Morgan, *A Revolution Derailed; How Three Ideas of Big Government from the '60s Helped Put the GOP's Juggernaut in the Shop*, WASH. POST, Oct. 20, 1996, at C01.

[320] *See* Bush Education Proposal, *supra* note 203; Frank Bruni, *Words Versus Deeds*, N.Y. TIMES, Feb. 7, 2001, at A1. Bruni states that "Republicans note that on education Mr. Bush has sent signals that he is plenty willing to find common ground, and Democrats by and large agree with that assessment." *Id.*

[321] Heubert, *supra* note 316, at 26–27.

[322] The Bush Education Proposal includes school safety provisions and a call to provide federal money to schools for enforcing strict discipline. Richard Rothstein, *Schools, Crime, and Gross Exaggeration*, N.Y. TIMES, Feb. 7, 2001, at A16.

schools: the racial, ethnic, and economic segregation of students and the unfair distribution of school resources.

Given this complicated atmosphere, civil rights advocates must rely on a mix of strategies to advance their education goals. These strategies should include concrete proposals, like specific state education statutes regarding classroom size, and flexible proposals to address the more intractable and politically divisive issues of racial and ethnic isolation. Although clear battle lines have been drawn in the arena of education policy, adept advocates can use the current interest in school change to negotiate solutions that broaden the scope of reform and address the core inequalities that exist in American classrooms.