ENSURING AN “ADEQUATE” EDUCATION FOR OUR NATION’S YOUTH: HOW CAN WE OVERCOME THE BARRIERS?

SYMPOSIUM ARTICLES

A PROPHESY FOR EFFECTIVE SCHOOLING IN AN UNCARING WORLD

Derrick A. Bell, Jr.

[pages 1–12]

Abstract: In his Keynote Address, Professor Derrick A. Bell, Jr. recalled his prediction that the desegregation mandates of the *Brown v. Board of Education* decisions, though well-intended, would fail to provide black children with the equal education to which they were entitled. In similar fashion, he predicts in this article that, though the intentions of advocates for an adequate education for all students are commendable, such a goal does not appear feasible given the underlying racial barriers that continue to marginalize the black community. With this prediction, however, Bell acknowledges that the initiatives of those demanding an adequate education for all students will undoubtedly benefit some students, and that these initiatives must proceed regardless of the opposition they face.

ACHIEVING “ADEQUACY” IN THE CLASSROOM

William S. Koski

[pages 13–44]

Abstract: Though the last two decades have been marked by educational reform measures including standards-based reform, accountability policies, and “adequacy” litigation, there is one crucial element frequently absent from such schemes that is necessary to truly ensure that all children receive the educational resources and conditions necessary for an “adequate” education: meaningful reciprocal accountability. This article briefly discusses the recent history of education reform and its shortcomings to argue that a genuine reciprocal accountability system—one that provides effective monitoring and oversight mechanisms to local communities, parents, and students—is crucial to ensure the provision of an
adequate education for all students. To be effective, such monitoring systems may require simple complaint mechanisms as well as training to local communities and students to hold state policymakers and school officials accountable. Only when such a ground-level monitoring system is established can we hope to achieve true adequacy in America’s classrooms.

WHAT MATTERS EVEN MORE: CODIFYING THE PUBLIC PURPOSE OF EDUCATION TO MEET THE EDUCATION REFORM CHALLENGES OF THE NEW MILLENNIUM

Charles A. McCullough, II

Abstract: With the U.S. Constitution silent on the matter and local governments allowed to designate funds to fulfill various purposes of education, citizens and policymakers are left adrift in determining which educational reform initiatives will provide a quality education. Therefore a clear public purpose of education must be codified at the federal and state level through constitutional amendment and legislative enactments to avoid this current situation. This article explores philosophies, court opinions, and state constitutions to develop and propose a universal public purpose of education suitable for codification. The codification of a public purpose of education will assist the education community in promoting and funding educational reform initiatives, such as the National Board Certification of teachers offered by the National Board for Professional Teaching Standards, that have proven widely successful in increasing student achievement though, as of yet, have not garnered extensive federal and state government support.

ENSURING AN ADEQUATE EDUCATION: OPPORTUNITY TO LEARN, LAW, AND SOCIAL SCIENCE

Diana Pullin

Abstract: The Massachusetts Education Reform Act of 1993 and the decisions of the State’s highest court interpreting the state constitution’s education clause are benchmarks in efforts at law-based education reform. This article discusses the implications of legislative and judicial mandates concerning the provision of education and the extent to which these mandates fail to ensure a fair and meaningful opportunity to learn for all students. It contrasts the legal mandates with evidence from social science literature concerning the conditions that must exist in order to create
appropriate learning opportunities, particularly for the most at-risk student populations. It concludes that law can play a role in creating the conditions in local schools for implementing meaningful education reform, but that the present statutory requirements are insufficient and judicial deference to the legislative branch may result in ongoing achievement deficits for the State’s most vulnerable students.

**LAWYER, CLIENT, COMMUNITY: TO WHOM DOES THE EDUCATION REFORM LAWSUIT BELONG?**

*Amy M. Reichbach*

[pages 131–158]

**Abstract:** Important education reform litigation is often undertaken by lawyers with admirable intentions. It is too easy, however, particularly in the context of large, enduring, complex litigation where it is difficult to identify the class, much less name and pursue the class’s goals, to lose sight of the client-lawyer relationship and the significance of client autonomy. Several recent lawsuits concerning the enforceability of No Child Left Behind exemplify issues that arise in class representation. In devising legal strategies, lawyers must balance the need to address clients’ immediate problems with the pursuit of longer-term strategies for change, such as organization and mobilization. It is difficult work, but only through careful attention to relationships with and among clients and communities will lawyers participate effectively in achieving meaningful education reform.

**IS THERE ANY PARENT HERE?: FIXING THE FAILURES OF THE MASSACHUSETTS PUBLIC SCHOOL SYSTEM**

*Alan Jay Rom*

[pages 159–192]

**Abstract:** Research has shown that many students in Massachusetts’s public schools have yet to receive the adequate education required by the *McDuffy* decision. Most unsettling is the fact that it is the students most marginalized in the Commonwealth—racial minorities, those from the poorest school districts, and those for whom English is a second language—who are getting the least benefit, if any at all, out of various recent education reform measures. This article discusses the shortcomings of the public education system in Massachusetts to further illustrate the inequity and dismal results of the current system. It will then argue that the Commonwealth should adopt specific measures, such as increased wages for its
teachers and lengthened school hours, to finally provide all children in Massachusetts with the quality education they deserve.

NOTES

FEEBLE, CIRCULAR, AND UNPREDICTABLE: OSHA’S FAILURE TO PROTECT TEMPORARY WORKERS

César Cuauhtémoc García Hernández

[pages 193–226]

Abstract: Millions of people work in poorly paid jobs as temporary workers. These workers are hired by a temporary-help firm, but perform work for another company. As such, their status as “employees” of the company for which they actually perform work and on whose premises they generally labor is frequently challenged. This ambiguous employment status means that temporary workers fall outside the scope of federal workplace safety and health protections. This Note addresses the Occupational Safety and Health Act (OSHA), the nation’s principal federal legislation governing working conditions, as it pertains to temporary workers, as well as judicial interpretations that limit the safety and health protections OSHA extends to temporary workers. Rather than adhere to a formulaic interpretation of OSHA as the Supreme Court currently instructs, this Note urges courts to adopt Congress’s stated intent in enacting OSHA—the protection of all workers.

STRANDED AGAIN: THE INADEQUACY OF FEDERAL PLANS TO REBUILD AN AFFORDABLE NEW ORLEANS AFTER HURRICANE KATRINA

Larkin M. Moore

[pages 227–262]

Abstract: Hurricane Katrina was the most devastating hurricane to hit the United States in recorded history. The damage in New Orleans was most acutely felt by poor and African-American neighborhoods. One of the most pressing issues for poor residents of New Orleans in the future will be the availability of affordable housing. After the hurricane, Rep. Richard H. Baker (R-La.) proposed that the legislature create a government-run corporation with the mission of facilitating the rebuilding of Louisiana communities. His plan took into account community needs and prioritized affordable housing and well-planned development. Baker’s Bill has been rejected by the Bush Administration, which favors a free-market solution enhanced with federal tax incentives for developers and busi-
ness. During the last session of Congress, Baker’s Bill never became law.
Looking back at previous disasters and forward to new visions of the city,
this Note concludes that Baker’s proposal should be reintroduced and
the House and Senate should adopt the Baker Bill as soon as possible to
provide an innovative plan for rebuilding New Orleans.
A PROPHESY FOR EFFECTIVE SCHOOLING IN AN UNCARING WORLD

DERRICK A. BELL, JR.*

Abstract: In his Keynote Address, Professor Derrick A. Bell, Jr. recalled his prediction that the desegregation mandates of the Brown v. Board of Education decisions, though well-intended, would fail to provide black children with the equal education to which they were entitled. In similar fashion, he predicts in this article that, though the intentions of advocates for an adequate education for all students are commendable, such a goal does not appear feasible given the underlying racial barriers that continue to marginalize the black community. With this prediction, however, Bell acknowledges that the initiatives of those demanding an adequate education for all students will undoubtedly benefit some students, and that these initiatives must proceed regardless of the opposition they face.

No participant in a gathering entitled Ensuring an “Adequate” Education for Our Nation’s Youth: How Can We Overcome the Barriers? can expect that such a task will be accomplished easily. Most, though, would not be willing to concede that it will be impossible to achieve their worthy goal. And yet, that is my prediction. I offer it along with two admonitions. First, even educational initiatives that eventually fail will benefit some children’s schooling. Second, we must persevere in our efforts even as we recognize that the forces of opposition arrayed against us will prevail.

As the Biblical prophets learned, even Heavenly endowed truth is not welcome, nor even recognized, when it diverges from deeply held views and firmly fixed policy directions. Although I am not endowed with Heavenly insight and prophetic powers, I identify with the Biblical prophets. They told those in positions of authority what they had learned from God. They knew they were right. They were almost always ignored and not infrequently persecuted. From that day to this,

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there has been a suspicion regarding prophets. Indeed, according to Mark 6:4, Jesus observed that “a prophet is not without honor except in his own country, among his own relatives, and in his own house.”

During the heady period in the 1960s and 1970s, when the elimination of racial discrimination was a matter of “when” not “whether,” we refused even to consider that our hard-fought school desegregation policies might be well-intended, but far from realistic. Alas, President Bush is not the first leader who, facing disaster, insisted that we “stay the course” and maintain our resolve—repeating the word resolve as a substitute for analysis, reconsideration, or simple mother wit.

From 1960 to 1968, I believed desegregating public school systems was the best means to achieve effective schooling for black children. During that period I worked first as a litigator handling and supervising hundreds of cases and later as a government administrator working to implement Title VI of the Civil Rights Act of 1964. In the mid 1970’s, having gained the time for reflection that a law teaching position provides, I concluded reluctantly that our integrationist ideals no longer meshed with those of the parents we represented. Often at great risk, those parents sought better schooling for their children, whether in desegregated or racially separate schools.

In a law review article that gained me few friends and a substantial amount of enmity, I argued that civil rights lawyers were misguided in requiring racial balance of each school’s student population as the measure of compliance and the guarantee of effective schooling. Predicting that the quality of schooling for most black children would not be achieved by school desegregation strategies focused on racial balance, I urged that educational equity rather than integrated idealism was the appropriate goal. In short, while the rhetoric of integration promised much, court orders to ensure that black youngsters received the education they needed to progress would have achieved more.

That insight was hardly prophetic, given the willingness of so many white parents to move to the suburbs or private schools to avoid desegregation. The Supreme Court’s 1974 decision in Milliken v.

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2 See Peter Baker, Bush’s New Track Steers Clear of “Stay the Course,” Wash. Post, Oct. 24, 2006, at A1 (arguing that the term “stay the course” was originally “meant to connote steely resolve,” but has “instead . . . become a symbol for being out of touch and rigid in the face of a war that seems to grow worse by the week”).


4 See generally Derrick A. Bell, Jr., Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation, 85 Yale L.J. 470 (1976).

5 Even to this day, studies have shown that “the strongest predictor of white private school enrollment rates . . . [is] the percentage of students living in the district who are
Bradley allayed white middle-class fears that the school bus would become the Trojan Horse of their suburban Troys. Perhaps because school integration was experiencing setbacks, the Serving Two Masters article eased me out of the civil rights family. My status as the first black tenured on the Harvard Law School faculty, rather than strengthening my case, provided an explanation for my fall from grace. Critics viewed the article as further proof of the old saying that Harvard could mess up more black men than bad whiskey.

My article was prompted by personal experience enhanced by reading and knowledge of the history of racial policies in this country. Like the prophets of old, I was criticized and shunned by associates with whom I had worked for many years. They remained committed to a goal that seemed both worthy and attainable. For a brief time, I was courted by conservatives who hoped to recruit a black civil rights lawyer to their campaign against school desegregation. They backed off when they realized that my stance was not based on opposition to integrated schools, but on a tardy realization that society’s racism rendered meaningful school desegregation virtually impossible.

Unfortunately, my predictions have proven all too accurate. The enmity those predictions incurred is appropriate punishment for failing to heed those who made similar predictions much earlier. In the early 1930s, the National Association for the Advancement of Colored People (NAACP) initiated its strategy to end segregation by focusing its litigation efforts on the horrible disparities between black and white schools. In 1935, Dr. W.E.B. Du Bois, as close as we are likely to come to a Biblical prophet, commented on the separate school versus integrated school debate in a now-famous essay. Dr. Du Bois stated...
that “the Negro needs neither segregated schools nor mixed schools. What he needs is Education.”

Dr. Du Bois urged that the NAACP not commit itself to either separate or integrated schools. He lost that debate, but his views did not change. He saw a distinction between segregation, which reflected an unwillingness of blacks and whites to work, live, and cooperate with one another, and discrimination, which was inferior treatment based on race. But the NAACP and many blacks could see no distinction in the two terms. They rejected his contention that “oppression and insult [had] become so intense and unremitting that until the world’s attitude changes . . . volunteer union for self-expression and self-defense was essential.”

Dr. Du Bois did not hold views simply for the sake of ideology, as he had earlier fluctuated on the integration-separation issue. During his early years at the NAACP, which he helped found and where he served as editor of the organization’s official publication, The Crisis, from 1910 until 1934, Du Bois attacked Jim Crow laws and generally inveighed against the establishment of black schools. Later, discouraged by the federal government’s failure to aid blacks during the Depression, Du Bois concluded that survival would require black self-help. Thereafter, he de-emphasized integration, explaining, “[N]o idea is perfect and forever valid. Always to be living and apposite and timely, it must be modified and adapted to changing facts.” Dr. Du Bois was unswerving in his commitment to racial reform, but given the realities of racial hostility, he was flexible as to how that reform might be accomplished.

11 W.E. Burghardt Du Bois, Does the Negro Need Separate Schools? 4 J. NEGRO EDUC. 328, 335 (1935) (emphasis added). Dr. Du Bois warned that “[a] mixed school with poor and unsympathetic teachers, with hostile public opinion, and no teaching of truth concerning black folk, is bad.” Id. He added, “A segregated school with ignorant placeholders, inadequate equipment, poor salaries, and wretched housing, is equally bad.” Id. However, he conceded,

Other things being equal, the mixed school is the broader, more natural basis for the education of all youth. It gives wider contacts; it inspires greater self-confidence; and suppresses the inferiority complex. But other things seldom are equal, and in that case, Sympathy, Knowledge, and the Truth, outweigh all that the mixed school can offer.


While civil rights advocates were celebrating in the wake of the Supreme Court’s historic Brown decision in May 1954, Du Bois, then 86 years old, noted that “[n]o such decision would have been possible without the world pressure of communism,” which rendered it “simply impossible for the United States to continue to lead a ‘Free World’ with race segregation kept legal over a third of its territory.” He predicted accurately that the South would not comply with the decision for many years, or “long enough to ruin the education of millions of black and white children.”

Dr. Du Bois was not alone in predicting a less-than-glowing future for the precedent in Brown. In addition to those committed to maintaining segregated schools at all costs, noted liberal constitutional scholar and Yale Law Professor Alexander Bickel was willing to brave the criticism of civil rights advocates. In 1970, he questioned the long-term viability of the Brown decisions, explaining:

This is not to detract from the nobility of the Warren Court’s aspiration in Brown, nor from the contribution to American life of the rule that the state may not coerce or enforce the separation of the races. But it is to say that Brown v. Board of Education, with emphasis on the education part of the title, may be headed for—dread word—irrelevance.

Even after slogging through fifteen years of trench warfare with some promise but precious little actual school desegregation, civil rights lawyers like me were annoyed with Bickel. Few of us at that time had any doubts that we would eventually prevail in eradicating segregation “root and branch” from the public schools. More than three decades later, Professor Bickel’s heavily criticized prediction has become an unhappy but all-too-accurate reality.

My rehabilitation within the civil rights community took more than two decades. Then, I placed my civil rights credentials in jeopardy again by daring to suggest that black children would have been better served in education had the Court in Brown I rejected the petitioners’ argu-
ments to overrule *Plessy v. Ferguson*. In my version of *Brown I*, while acknowledging the deep injustice done black children in segregated schools, the Court would note the many segregated schools in which students performed well because of the tremendous efforts of their parents and teachers. Recognizing the potential of black students when given equal resources, the Court would enforce strictly the ignored “equal” part of *Plessy*’s “separate but equal” standard.

In *Silent Covenants*, I imagined an opinion in which the Court would mandate equalizing black and white schools with norms to be determined through study of successful school systems across the country. School boards would have to add members from the black community in numbers reflecting the population of black students in the schools. An interracial committee would be created to monitor the equalization process and report violators to the courts for swift sanctions. All of this, I felt, might have made it harder for local politicians to gain popularity by arousing white fears of integration. Instead of the “all deliberate speed” mandate of *Brown II*, financial pressures would soon force the now-integrated boards to begin on a far fairer process of school integration. In short, I was giving priority to educational substance rather than symbolic rhetoric enveloped in a swirl of white resistance that the Court would be powerless to contain.

Acknowledging this concern openly rather than in its private conferences, I had the Court in *Brown I* say:

> The racial reform-retrenchment pattern so evident in this Court’s racial decisions enables a prediction that, when the tides of white resentment rise and again swamp the expectations of Negroes in a flood of racial hostility, this Court, and probably the country, will vacillate; then, as with the Emancipation Proclamation and the Civil War amendments, it will rationalize its inability and—let us be honest—its unwillingness to give real meaning to the rights we declare so readily yet so willingly sacrifice when our interests turn to new issues and more pressing concerns.

> It is to avoid still another instance of this outcome that we reject the petitioners’ plea that the Court overturn *Plessy*

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forthwith. Doing so would systematically gloss over the extent to which Plessy’s simplistic “separate but equal” form served as a legal adhesive in the consolidation of white supremacy in America. Rather than critically engaging American racism’s complexities, this Court would substitute one mantra for another: where “separate” was once equal, “separate” would be now categorically unequal. Restructuring the rhetoric of equality (rather than laying bare Plessy’s whiteness underpinnings and consequences) constructs state-supported racial segregation as an eminently fixable aberration. And yet, by doing nothing more than reworking the rhetoric of equality, this Court would foreclose the possibility of recognizing racism as a broadly shared cultural condition.

Imagining racism as a fixable aberration, moreover, obfuscates the way in which racism functions as an ideological lens through which Americans perceive themselves, their nation, and their nation’s other. Second, the vision of racism as an unhappy accident of history immunizes “the law” (as a logical system) from antiracist critique. That is to say, the Court would position the law as that which fixes racism rather than that which participates in its consolidation. By dismissing Plessy without dismantling it, the Court might unintentionally predict if not underwrite eventual failure. Negroes, who, despite all, are perhaps the nation’s most faithful citizens, deserve better.21

I so enjoyed writing an opinion that no Supreme Court would likely even consider, much less ever issue, I overlooked the fact that like the actual Brown I decision, it was an opinion that much of white America would not accept or implement, or would not do so for very long. And, if issued, its harsh truth about the racial barrier even to adequate schooling for black children in racially separate schools would have increased the vehemence of its condemnation.

Vehement opposition does not alter truth. A serious, no-nonsense assessment of racial history with emphasis on decades-long experience in implementing the mandates of the Brown decisions and the multiple efforts to enforce state constitutional provisions guaranteeing the provision of equal, adequate, and effective schooling leads

21 Bell, supra note 19, at 26–27.
to a more honest conclusion. Seeking government and judicial support is a task doomed to great effort for modest success that slowly evaporates long before achieving real compliance.22

When policymakers do not perceive it is in their immediate economic and political self-interest to respond substantively to our demands for meaningful support for the children who need it most, they opt for programs of limited pedagogical value or promises they do not intend to keep. While the pressures we exert on them should continue, we who are concerned about preparing all children for the far-from-sanguine world we are bequeathing to them must recognize the daunting obstacles we face.

This country has been devising and implementing policies of neo-colonialism over the last several years. Enabling corporations to pursue overseas profit at the expense of domestic stability has led to devastating economic, political, and social ramifications.23 These policies are undermining the future in ways no terrorist can equal while at the same time increasing the danger of terrorism.

The damaging significance of these policies for black people is twofold. First, blacks, already excluded in many levels of the job market and marginalized in the rest, will find ever fewer jobs in competition with whites where employers, for any number of reasons, prefer whites.24 Second, as public concern and anger over the steadily worsening job situation finally gains more attention than the latest sports or celebrity story, politicians will quickly devise and disseminate arguments that adverse conditions are the result of affirmative action or other policies intended to remediate for past racial discrimination.

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22 Full disclosure requires that I acknowledge that as Director of the Western Center on Law and Poverty, I helped finance and otherwise support the litigation in Serrano I, in what is generally regarded as the first of the modern-era education finance litigation decisions. See generally Serrano v. Priest, 487 P.2d 1241 (1971). In 1971, the California Supreme Court ruled education a fundamental right under the state constitution and remanded for trial. See id. In Serrano II, the same court affirmed the lower court’s finding that the wealth-related disparities in per-pupil spending generated by the state’s education finance system violated the equal protection clause of the California Constitution. See generally Serrano v. Priest, 557 P.2d 929 (1976). Three decades of subsequent history and litigation of these cases are summarized by the National Access Network at http://www.schoolfunding.info/states/ca/lit_ca.php3 (last visited Oct. 28, 2006).


The already barely hidden hostility against blacks will then become more open and destructive.\textsuperscript{25}

The media has properly given attention to the massive protest marches urging a fair immigration policy, but there has been far less focus on the policies of NAFTA and other programs. These programs opened foreign markets in nations whose peoples, unable to compete, felt that survival depended on reaching this country in any way possible. And while this is a nation of immigrants, most immigrants have been granted a kind of whiteness that enables them and their grantors to further subordinate African Americans.\textsuperscript{26} Increasingly, it is an oddity to find a working-class African American employed in even a low-level, low-paying job.\textsuperscript{27}

\textsuperscript{25} See generally Willhelm, \textit{supra} note 24. Professor Willhelm, a sociologist who has studied and written about racial issues asserted more than three decades ago that slavery and segregation rested on the need to exploit black labor. But whites now produce wealth through the exploitation of technology, and I am sure today he would add continuing job bias, the importation of foreign labor, and the out-sourcing of manufacturing jobs that helped many blacks and whites gain middle-class status as sources of this white wealth.

Not needing black labor, Willhelm maintained the society felt free to offer them “equal opportunity.” But, he warned, the myth of equality within a context of oppression simply provides a veneer for more oppression. Blacks are increasingly being disgorged from the labor force as surplus in the modern, computerized economy. The redundancy of blacks in the marketplace, and the growing socioeconomic gap places the continued existence of black life in America at risk. Outcasts in the labor market, and poverty-stricken in the midst of plenty, predictable future ghetto uprisings, born of frustration, could provide the excuse for police and other officials to eliminate blacks who resist military rule over their communities. And, warns Willhelm, regardless of class, all blacks will be viewed as and treated like the enemy. For an overview of Professor Willhelm’s views, see Sidney Willhelm, \textit{The Supreme Court: A Citadel for White Supremacy}, 79 Mich. L. Rev. 847 (1981) (reviewing Derrick A. Bell, Jr., \textit{Race, Racism and American Law} (2d ed. 1980)); Derrick Bell, \textit{A Hurdle Too High: Class-Based Roadblocks to Racial Remediation}, 33 Buff. L. Rev. 1, 10–12, 22–34 (1984).


\textsuperscript{27} David Wessel, \textit{Racial Discrimination Is Still at Work}, Wall St. J., Sept. 4, 2003, at A2. In a controlled experiment involving 350 different employers, students posing as job applicants applied to low-wage, entry-level positions throughout the Milwaukee area. \textit{Id}. They found that “the disadvantage carried by a young black man applying for a job as a dishwasher or a driver is equivalent to forcing a white man to carry an 18-month prison record on his back.” \textit{Id}. Additionally, while acknowledging a criminal background cut white applicant chances by half, acknowledging a criminal background cut a black applicant’s chances by two-thirds. \textit{Id}. This result is particularly disturbing because of the increasing number of black males projected to carry criminal backgrounds in the coming generation. \textit{Id}. Wessel adds that “[s]tereotypes among young black men remain so prevalent and so strong that race continues to serve as a major signal of characteristics of which employers are wary.” \textit{Id}. (internal quotations omitted).
Well, you may ask, if the future for African Americans is as dire as I and other scholars suggest, why do most ignore the threat and continue in one way or another to pursue the American Dream? There is no easy answer to a question with so many dimensions. One component is the psychic damage done by unofficial long-term exclusion. None of us are immune, not even those who fight to end racism or try hard to describe it, understand it, and write it down. Boston College Law Professor Anthony Farley views the quest for racial equality as an almost romantic longing for acceptance. He writes:

Everybody, at some level believes in it. It’s a deeply seductive image. The image that we all want, as oppressed people, is an image of our masters finally loving us and recognizing our humanity. It is this image that keeps prostitutes with their pimps, the colonized with their colonizers and battered women with their batterers. Everybody dreams of one day being safe.28

In an analogy to F. Scott Fitzgerald’s novel, that is almost too revealing in its implications, Professor Farley writes about this phenomenon with great clarity. He suggests that

_The Great Gatsby_ is the Great American Novel for a reason. Gatsby believed in the green light and that was his undoing—rich girls don’t marry poor boys. And yet the compound where Daisy lived was across the bay. At night, it was marked by a green light on its pier—far away, but not Gatsby felt unattainable.29

Concluding the novel, Fitzgerald wrote:

Gatsby believed in the green light, the orgiastic future that year by year recedes before us. It eluded us then, but that’s no matter—tomorrow we will run faster, stretch out our arms farther . . . . And one fine morning—

So we beat on, boats against the current, borne back ceaselessly into the past.30

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28 **Bell, supra** note 19, at 199 (quoting Anthony Paul Farley, _Thirteen Stories_, 15 TOURO L. REV. 543, 621 (1999)).


30 **Bell, supra** note 19, at 199 (quoting Fitzgerald, _supra_ note 28, at 182).
“Well,” Farley suggests, “that’s what we do, we’re borne back ceaselessly into the past. Gatsby doesn’t get it . . . [and neither do] we, the intellectuals. We actually produce the seductive literature of the green light.”  

In our anxiety to identify, we are attracted to the obvious and the superficial, the least worthy characteristics of the dominant group. It is that unconscious component of quest that gives even hard-earned progress a mirage-like quality. The decision in Brown I and all the civil rights recognitions that came before—for they were far more mere acknowledgments of racial injustices than meaningful remedies—appeared more real than they could possibly be. We hardly noticed that any advances merely marked those periods when policymakers realized that remedies for racial injustice and the Nation’s needs coincided. Fortuity was more important than any national commitment to “freedom and justice for all.”

Fortuity is a fair-weather friend, but like the weather, it is capable of prediction. The lawyers for the University of Michigan Law School did just that by linking the values of diversity with interests of value to corporations and the armed services. Professor Robert Gordon offers encouragement in this likely life-long process when he reminds us that:

Things seem to change in history when people break out of their accustomed ways of responding to domination, by acting as if the constraints on their improving their lives were not real and that they could change things; and sometimes they can, though not always in the way they had hoped or intended; but they never knew they could change them at all until they tried.

Here is an explanation that transcends understanding and rises to the status of prophetic insight. It acknowledges the harsh truth that life seems to favor those in power, while it seldom rewards good works with triumphs. As James Russell Lowell put it: “Truth forever on the scaffold. Wrong forever on the throne.” Defeat, disgrace, and sometimes death are often the fate of the righteous who must rely on their faith that truth and justice were worth championing, even in a lost cause.

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31 Id. (quoting Farley, supra note 28, at 621).
33 See Bell, supra note 19, at 200 (quoting Robert W. Gordon, New Developments in Legal Theory, in The Politics of Law 413, 424 (David Kairys ed., 2d ed. 1990)).
It is both necessary and reassuring to question what we do as we continue doing something. We cannot know whether our actions are a help or a harm—and that, of course, is not the test. Our lives gain purpose and worth when we recognize and confront the evils we encounter—small as well as large—and meet them with a determination to take action even when we are all but certain that our efforts will fail.

Garry Wills notes that determination to take action in his review of *At Canaan’s Edge*, the third volume in Taylor Branch’s biography of Martin Luther King, Jr.\(^{35}\) Wills remembers what a farmer marching from Selma to Montgomery responded when one of the organizers asked whether he thought the marchers would be able to win in Montgomery. The farmer said, “We won when we started.”\(^{36}\) I doubt that the farmer had any advanced academic degrees, but his answer reflected an understanding of life, its risks, and the value of outcomes that cannot be measured in victories or defeats. For in rising to challenges that touch our souls, there is no failure. Rather, there is the salvation of spirit, of mind, of soul.


\(^{36}\) Id. at 26.
ACHIEVING “ADEQUACY” IN THE CLASSROOM

William S. Koski

Abstract: Though the last two decades have been marked by educational reform measures including standards-based reform, accountability policies, and “adequacy” litigation, there is one crucial element frequently absent from such schemes that is necessary to truly ensure that all children receive the educational resources and conditions necessary for an “adequate” education: meaningful reciprocal accountability. This article briefly discusses the recent history of education reform and its shortcomings to argue that a genuine reciprocal accountability system—one that provides effective monitoring and oversight mechanisms to local communities, parents, and students—is crucial to ensure the provision of an adequate education for all students. To be effective, such monitoring systems may require simple complaint mechanisms as well as training to local communities and students to hold state policymakers and school officials accountable. Only when such a ground-level monitoring system is established can we hope to achieve true adequacy in America’s classrooms.

Introduction

Educational finance reform litigation has reshaped the terrain of educational law and policy over the last three decades or more. Seizing upon arcane and often indeterminate state constitutional language, advocates and courts, in dialogue with legislatures and executive branches, have conferred educational “rights” upon children and communities in many states. At the same time, state policymakers are held responsible for honoring those rights. All told, school finance

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1 In this paper I use the term “rights” in a broad, though not the broadest, sense—not merely those rights conferred by constitution or even statute, but also those benefits that directly or indirectly flow from systemic policy reform.

2 For examinations of the judicial-political dialogue surrounding the implementation of adequacy decisions, see generally George D. Brown, Binding Advisory Opinions: A Federal Courts Perspective on the State School Finance Decisions, 35 B.C. L. Rev. 543 (1994); Mark Jaffe & Kenneth Kersch, Guaranteeing a State Right to a Quality Education: The Judicial-Political
lawsuits have been filed in forty-five of the fifty states with challengers prevailing in twenty-six of the forty-five cases that resulted in a judicial decision. Although early litigation focused on the development of the right to equal per-pupil funding or, at a minimum, a school finance scheme independent of local property wealth, more recent litigation has sought to define qualitatively the substantive education to which children are constitutionally entitled. Recent adequacy litigation has pushed legal doctrine toward specifying the state’s obligation to provide an education that ensures all children possess certain skills and capacities. It has also begun to reshape educational policy in some cases by ordering educational interventions (e.g., universal preschool, whole-school reform models) and “costing out” of what is a constitutionally adequate education. From the perspective of those bringing the lawsuits, what is perhaps most promising is the recent focus of some courts on ensuring that “at-risk” (read: poor, English Language Learner (ELL), disabled, and minority) children receive additional fiscal attention and educational support. As Michael Rebell argues, the new adequacy litigation is a path to educational equity for such children.

Parallel to recent adequacy litigation, state legislatures and executives have embraced the now inseparable policies of standards-based reform and accountability for student outcomes. Standards-based reform has sought, among other things, to combat low educational expectations for poor and minority children. By establishing

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5 See id. (manuscript at 19) (discussing the constitutional standards for “adequacy” being developed by courts).

6 For a discussion of specific remedies in adequacy lawsuits, including “costing-out” studies and methodologies, as well as specific educational interventions, see id. (manuscript at 25–27).


8 For an extended discussion of standards-based reform and the “new accountability” in educational policy reform, see Koski & Reich, supra note 4 (manuscript at 40).
challenging content standards for what children should know and be able to do, and assessing students to determine whether they have achieved those standards, standards-based reform attempts to raise individual achievement to what the state determines is proficient. Ideally, schools would possess or develop the capacity (including knowledge, skills, and resources; leadership; and structures and organization) to organize around and teach to high standards. In a sense, standards-based reform deregulates public schooling. It permits both top-down and bottom-up reform by moving away from dictating educational inputs and processes from state capitals, and moving toward outcomes-based expectations. Schools, in turn, are left to develop their own strategies to achieve high standards.

Beginning approximately a decade ago, standards-based reform has been supplemented by an additional policy lever—accountability of both schools and children for student performance on standards-based achievement tests. This “new accountability” in public education provides rewards for those schools, administrators, or schools who have succeeded—and sanctions for those who have not—in meeting student achievement targets. At a minimum, school- and district-wide performance on standards-based assessments are published and subjected to public scrutiny. Successful schools are provided with commendations and, sometimes, monetary rewards. At the other end, failing schools may be offered technical assistance and temporary grants to improve, while persistently failing schools may be subject to stiff measures such as state takeover or reconstitution. Students are now being tested for what they know and should be able to do through periodic, state-wide, criterion-based assessments and, in a growing number of states, high-stakes testing such as high school exit exams.9

Standards-based accountability regimes, like the No Child Left Behind Act, though promising to raise the performance of poor and minority children and close the achievement gap, are frequently criticized for failing to provide the necessary educational resources and conditions for all children to achieve at high levels. Indeed, one might ask whether it is acceptable to hold students accountable for failing to learn without providing them the necessary opportunities to learn.

This is where the modern adequacy litigation and the new accountability are beginning to embrace each other in the courtroom. Scholars and advocates have argued that it is appropriate and necessary for courts to hold states accountable under state constitutional education articles for providing the resources required for teachers to teach to, and children to learn at, the levels authorized by legislatures and often established by executive branches. Although no state court has gone so far as to constitutionalize state educational standards, many judges are citing the failure of students to reach proficiency on state-mandated tests as evidence of educational inadequacy. The result is a dialogue among courts, politicians, and education advocates: political branches establish expectations for local performance, schools and educators organize themselves to meet those standards, and courts oversee the political branches to ensure that they are providing the conditions necessary to achieve the desired results. As James Liebman and Charles Sabel have argued, courts in educational finance litigation are beginning to create public forums in which the political branches, educational insiders, and “new publics” can “discuss comprehensive reforms of American education that draw on

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linked innovations in school governance, performance measurement, and the reconceptualization of the teaching profession and pedagogy.”

Although I agree that adequacy litigation holds the promise of leveraging from state policymakers the resources necessary for all children to reach proficiency, I am less sanguine than Liebman and Sabel that the “new publics,” especially those who are politically marginalized, will necessarily possess the tools required to ensure that policymakers and bureaucrats provide the requisite resources for sustained reform. This is where “reciprocal accountability” must enter the equation. While it is no longer vogue to speak of bureaucratic monitoring, and while I am aware of the potential difficulties in the proceduralization of educational rights, I nonetheless argue here that any educational adequacy campaign must include the demand for the tools and roles for local communities, parents, and students to hold the system accountable for educational resources at the classroom level. These tools must include monitoring and enforcement mechanisms.

Part I of this article explains how modern adequacy litigation and standards-based accountability policies can (and do) define and refine the substantive right to an education. Notwithstanding this abstract entitlement, local communities, particularly poor and minority communities, may still lack the technical expertise to participate in the day-to-day restructuring of schools; the political strength to enforce educational rights in state capitals; and the resources to challenge in court routine deprivations of a student, classroom, or school’s rights. For these reasons, and to ensure true reciprocal accountability, adequacy litigation must demand mechanisms for meaningful monitoring and oversight to ensure the provision of the necessary educational resources, as well as

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15 Id. at 266.

16 Modern standards-based reform and accountability schemes seek to leverage school improvement by holding schools, teachers, and students accountable for student outcomes. Those systems only rarely hold the educational system and institutions (read: policymakers and governing agencies) accountable for what they must contribute to the standards-based reform process, including the capacity, resources, and conditions for all children to succeed. The concept of “reciprocal accountability,” through which all education stakeholders hold each other accountable for inputs, processes, and outcomes, addresses this shortcoming of standards-based reform and accountability. Based loosely on the work of Richard Elmore, Agency, Reciprocity, and Accountability in Democratic Education, in THE PUBLIC SCHOOLS 277 (Susan Fuhrman & Marvin Lazerson eds., 2005), my definition of “reciprocal accountability” requires that a standards-based accountability system should include at least these key components: high standards, adequate resources, capacity for teaching and learning, fair assessments with even-handed consequences, and a strong reporting system.
the procedural rights for parents, children, and communities to redress educational deprivations through simple and inexpensive complaint mechanisms. Through monitoring and creating accountability schemes for not only outcomes but also resources, educational rights can be realized in the classroom.

Part II will then review the history of school finance litigation and standards-based reform in California through the recent *Williams v. California* litigation.\(^\text{17}\) The article will suggest that California suffers from a personality conflict: while it demands accountability to high standards and even recognizes to some extent that the State should be held accountable for providing educational resources at the classroom level, it nonetheless refuses to ensure that students are entitled to an adequate education. Though *Serrano v. Priest*\(^\text{18}\) and *Butt v. State*\(^\text{19}\) promise California’s children a right to an essentially equal education, and although the *Williams* settlement aims to ensure that children are all provided with basic educational necessities—textbooks, qualified teachers, and clean, safe facilities—through a bureaucratic monitoring system,\(^\text{20}\) the failure of the State to design a resource distribution and accountability system that addresses the needs of all children has still left children without adequate resources to reach the State’s demanding educational content standards. Despite these shortcomings of state policy, the article suggests that the *Williams* litigation provides a good start toward developing monitoring and reciprocal accountability schemes that promise local communities a meaningful voice in school reform.

### I. Educational Rights and Realities

The full recognition of a right to an education is still a work in progress. In the last twenty years, two strands of educational law and policy—adequacy litigation and standards-based reform and accountability—have worked separately and, in a few instances, together to develop and refine the educational resources and educational outcomes that we should expect from our school systems.\(^\text{21}\) This section discusses the

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\(^{19}\) See 842 P.2d 1240, 1248–51 (Cal. 1992).

\(^{20}\) See discussion *infra* Part II.C.

\(^{21}\) Here I do not intend to restate and reanalyze the already well-trod ground of the history of educational finance reform litigation. An enormous body of literature already examines this rich history. See generally *Equity and Adequacy in Education Finance: Issues and Perspectives* (Helen R. Ladd et al. eds., 1999); William H. Clune, *New Answers*
contours of the right to an education, focusing on how that right is increasingly tied to the needs of students and communities and how that right is not only defined by expected outcomes but also by the resources and conditions necessary to reach those outcomes in the classroom. Even if this nascent effort to define the inputs required for all children to achieve at high levels is sustained, one still should not assume complacently that those resources and conditions will actually be delivered. Policymakers and school systems must be held accountable to children, parents, and communities for providing those educational necessities. The section concludes by proposing a system of reciprocal accountability—one that incorporates monitoring and enforcement—that can ensure that rights are made real.

A. Educational Finance Reform Litigation and the Substantive Right to an Education

According to the standard narrative, school finance litigation has developed in three waves. The initial wave of school finance litigation, lasting from 1971 until 1973, was based on the argument that the U.S.
Constitution’s Equal Protection Clause guaranteed that school districts receive substantially equal funding or, at a minimum, that the resources available to a school district should not be dependent on the property wealth of the district.\textsuperscript{23} After enjoying initial success in at least two federal district courts and the California Supreme Court in \textit{Serrano v. Priest},\textsuperscript{24} the federal Equal Protection theory came to a screeching halt in \textit{San Antonio Independent School District v. Rodriguez}.\textsuperscript{25}

The New Jersey Supreme Court ushered in the second wave of school finance cases with its discovery of educational rights in state constitutions.\textsuperscript{26} Thereafter, most state high courts relied heavily on state education articles and, at times, employed these in conjunction with the state’s constitutional equality provision to find school spending schemes unconstitutional.\textsuperscript{27} Second-wave courts sought to achieve either horizontal equity among school districts, so that per-pupil revenues were roughly equalized, or fiscal neutrality, so that revenues available to a school district would not be solely dependent on the property wealth of the school district. But this so-called “equity litigation” met with limited success in the courts, so reformers abandoned the rhetoric of equality as a right and instead embraced adequacy in the 1990s.\textsuperscript{28}

The Kentucky Supreme Court launched the third wave in 1989 when it turned to the education article of its state constitution and con-

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\begin{itemize}
\item \textsuperscript{23} See Heise, \textit{supra} note 21, at 1153–57 (1995); \textit{John Coons et al., Private Wealth and Public Education} 2 (1970) (“The quality of public education may not be a function of wealth other than the wealth of the state as a whole”) (emphasis omitted).
\item \textsuperscript{24} 487 P.2d 1241 (Cal. 1971), aff’d after remand, 557 P.2d 929 (Cal. 1976).
\item \textsuperscript{25} 411 U.S. 1 (1973) (holding that Texas’s school financing plan met the requirements of the Equal Protection Clause of the Fourteenth Amendment); see Heise, \textit{supra} note 21, at 1157–58; see also \textit{Rodriguez v. San Antonio Indep. Sch. Dist.}, 337 F. Supp. 280 (W.D. Tex. 1971), rev’d, 411 U.S. 1 (1973) (holding that the Texas school financing plan violated students’ rights under the Equal Protection Clause of the Fourteenth Amendment); \textit{Van Dusartz v. Hatfield}, 334 F. Supp. 870 (D. Minn. 1971) (striking down the Minnesota school financing system as a violation of the Equal Protection Clause of the Fourteenth Amendment).
\item \textsuperscript{27} See, e.g., \textit{Washakie County Sch. Dist. No. 1 v. Herschler}, 606 P.2d 310, 332 (Wyo. 1980) (bolstering the state’s equality provision with the state’s education article to find the funding system unconstitutional); \textit{Dupree v. Alma Sch. Dist. No. 30}, 651 S.W.2d 90, 91 (Ark. 1983) (finding that an analysis of the education article reinforced the holding that the funding system was unconstitutional under the equality provision).
\item \textsuperscript{28} Heise, \textit{supra} note 21, at 1162.
\end{itemize}}
sidered the substantive education that article mandates. Third wave cases continue to rely on state education articles, but shift toward theories of educational adequacy, not equity, as the theory of educational rights. Notably, the same education articles that provided, for instance, for a “thorough and efficient” education that had been used to support equity claims in the second wave were now deployed in the third wave to establish the competencies and skills that all children should have an opportunity to acquire as a constitutional right.

The Kentucky Supreme Court, interpreting the thorough and efficient clause of its state constitution, held that its legislature must provide its students with such an adequate education. Under the Kentucky Constitution, an adequate education included the opportunity to develop seven capabilities, including sufficient oral and written communication skills to function in a complex and rapidly changing society and sufficient academic or vocational skills to enable students to compete favorably with their counterparts in surrounding states. Commentators and scholars quickly identified the importance of the 1989 Kentucky case as the bellwether for the shift from equity to adequacy.

More than fifteen years into the adequacy movement, there has been a maturation of both litigation strategies and the corresponding judicial responses to those strategies. For purposes of this discussion of educational rights, most striking are three aspects of modern adequacy litigation. First, advocates and courts have begun to embrace the idea that certain populations of disadvantaged students should be afforded additional resources in order to reach an adequate level of educational outcome. To some, such as Michael Rebell, this acceptance of educational rights based on educational need is an indication of how courts have begun to introduce the concept of vertical equity into adequacy litigation.

In modern adequacy cases, the most evident manifestation of needs-based rights comes in the methods used in costing-out an ade-

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29 Rose v. Council for Better Educ., 790 S.W.2d 186, 205 (Ky. 1989); Heise, supra note 21, at 1163; Underwood & Sparkman, supra note 21, at 543.
30 Heise, supra note 21, at 1162; Koski, Of Fuzzy Standards, supra note 21, at 1192.
31 See Levine, supra note 21, at 508.
32 Rose, 790 S.W.2d at 212.
33 Id.
34 See Heise, supra note 21, at 1163; Thro, The Third Wave, supra note 21, at 241.
35 Underwood & Sparkman, supra note 21, at 543.
36 See Koski & Reich, supra note 4 (manuscript at 21, 28).
37 See id. (manuscript at 21). See generally Rebell, supra note 7.
quate education, that is, attaching a price tag to the resources necessary for all children to reach specified educational outcomes. Naturally, difficult questions such as “adequacy for what?” and “what resources are necessary to produce such adequacy?” are central to such costing-out (or “adequacy”) studies. Currently, four overlapping methodologies for determining the cost of an adequate education have been employed in school finance litigation: the professional judgment (or market basket) model, the evidence-based professional judgment (or reliable research) model, the successful schools model, and the cost function model.\(^\text{38}\)

Both the professional judgment and evidence-based models look primarily to educational inputs to determine what comprises an adequate education.\(^\text{39}\) The professional judgment model identifies the student outcomes desired and employs focus groups of experienced educators and policymakers to develop the basket of goods necessary for all children to achieve those outcomes.\(^\text{40}\) These goods include facilities, administrative structures, teachers, and instructional materials.\(^\text{41}\) The professional judgment method also considers resources and programmatic interventions for special populations of children such as ELLs and children with disabilities.\(^\text{42}\) The evidence-based model determines resource needs by identifying research-based “best practices,” such as class-size reduction or comprehensive whole-school reform models, and by determining the costs of providing those interventions.\(^\text{43}\) The challenge with the evidence-based approach is that the extant evidence on “what works” is limited, inconsistent or unreliable in many areas.


\(^{39}\) See Guthrie & Rothstein, supra note 38, at 232–33; Smith, supra note 38, at 115.

\(^{40}\) Guthrie & Rothstein, supra note 38, at 233; Smith, supra note 38, at 116.

\(^{41}\) See Guthrie & Rothstein, supra note 38, at 245; Smith, supra note 38, at 116.

\(^{42}\) See Guthrie & Rothstein, supra note 38, at 245.

\(^{43}\) See Smith, supra note 38, at 117.
The successful schools and cost-function strategies focus instead on outcome data to estimate the cost of an adequate education.44 The successful schools model looks to school districts that are achieving state outcomes standards and uses statistical techniques to infer what an adequate amount of funding would be based on those districts’ expenditures.45 This model is less concerned with determining precise inputs because it assumes that, given a sufficient amount of overall dollars, districts would efficiently deploy those dollars to achieve the desired outcomes.46

Finally, the cost-function model employs regression techniques to estimate the effects of school spending, student demographics and local cost-of-living on student outcomes.47 The advantage of the cost-function approach is that it allows policymakers to make fine-tuned decisions regarding the cost of achieving adequate outcomes in districts with differing characteristics, such as the proportion of poor children or the regional cost of living.48 Like the successful schools model, however, its estimates are highly dependent on the assumptions made.

While all of these models possess advantages and disadvantages, the important point for this discussion is that while all four are designed to cost-out an adequate education, all four can—and sometimes do—infuse equity values into their calculations by targeting resources to underprivileged children. Costing-out studies help policymakers provide needs-based rights to certain populations of children. For instance, experts developing the market basket frequently provide additional resources for remedial reading programs and free breakfast and lunch for low-income children, English remediation for ELLs, and mandatory preschool and all-day kindergarten for children in low-income school districts. Similarly, the successful schools model frequently corrects for poverty levels within a poor school district or the number of ELL students in the district, much like the cost-function model does by design.

The second striking development in modern adequacy litigation is how judicial remedies are increasingly relying upon research-based educational interventions designed to raise educational achievement. The prototype for such a remedy is a recent order in the now epic Ab-

44 See Guthrie & Rothstein, supra note 38, at 244; Smith, supra note 38, at 115.
45 See Guthrie & Rothstein, supra note 38, at 224; Smith, supra note 38, at 117–18.
46 See Guthrie & Rothstein, supra note 38, at 225; Smith, supra note 38, at 118.
47 See Duncombe & Yinger, supra note 38, at 291; Guthrie & Rothstein, supra note 38, at 246-47; Smith, supra note 38, at 118.
48 See Guthrie & Rothstein, supra note 38, at 246; Smith, supra note 38, at 118.
bott v. Burke litigation. In Abbott II, twenty-nine of New Jersey’s poorest districts filed a lawsuit claiming that the State had failed to equalize funding among those districts and the richest districts and to provide for the educational needs of children in poor districts as was required by New Jersey’s Robinson v. Cahill decision. Since 1989, the New Jersey legislature and Supreme Court have debated what comprises an adequate education for the Abbott District children. Most recently, the court has become quite prescriptive, ordering that Abbott districts should be provided with specific educational resources, including half-day preschool for three- and four-year-olds and implementation of whole-school reform models that have been demonstrated successful in other school districts.

Third, courts in modern adequacy litigation are, in some cases, straying from their historic role in education litigation of mandating and superintending remedial schemes (for example, desegregation

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50 See Abbott II, 575 A.2d at 363; see also Robinson v. Cahill, 303 A.2d 273, 297–98 (N.J. 1973) (holding that where there is a disparity in the number of dollars spent per pupil based on district or residence, the state has an obligation to equalize the sums available per pupil).

51 See generally Abbott II, 575 A.2d 359; Abbott III, 643 A.2d 575; Abbott IV, 693 A.2d 417; Abbott V, 710 A.2d 450; Abbott VI, 748 A.2d 82; Abbott VII, 751 A.2d 1032.


53 I hasten to note that I do not want to over-state the extent to which courts are defining educational rights to consider the needs of at-risk children or to include specific educational programming. Indeed, I have argued elsewhere that the potential for such equity-minded reform is still mostly hopeful potential. I merely emphasize the extent to which adequacy litigations are beginning to reshape the educational rights terrain for at-risk students. See Koski & Reich, supra note 4 (manuscript at 31).
litigation and remedial decrees). Rather, as James Liebman and Charles Sabel argue, courts in adequacy litigation appear to be playing a coordinating role among reformers, policymakers, and educational insiders, as states work to develop an adequate education system. Rather than dictating command-and-control remedial schemes or providing a forum for traditional consent-decree bargaining, Liebman and Sabel argue that courts are overseeing the process by which schools, the interests affected by schooling, and civil society in general collaborate in devising school reform measures and are periodically correcting those measures based on empirical reality. Central to this formula is the disenfranchisement of established political interests by diverse “new publics” with connected interests (community groups, business leaders, civic and professional organizations) who coalesce around education reform.

The paradigmatic example of this new judicial role is Kentucky’s fabled Rose litigation. There, a tacit “collusion” among the policy elite, media, and public appears to have influenced the outcome of the case. Specifically, a former Governor represented the plaintiffs, the then-current Governor openly called for reform, and the legislature quickly responded to the judicial decision with a comprehensive reform package. As Kern Alexander, who was instrumental in developing the trial court’s definition of what comprises an “efficient” education, put it:

A most striking aspect of the Kentucky case was the breadth of the court’s ruling and the promptness of the legislative response. The court’s decision led directly to a complete revision of the scheme of school finance and substantial modification in the organization and administration of the public

55 See Liebman & Sabel, supra note 14, at 206–07, 278–79.
56 Id. at 278–79.
57 Id. at 266–67.
The court provided the legislature with both the nerve and the rationale to raise taxes, equalize school funding, and make other necessary changes.\textsuperscript{61}

In other states (Texas, for example), courts have hosted a continuous dialogue between the state legislature and the public to refine the meaning of educational adequacy.\textsuperscript{62} Liebman and Sabel “call this new form of judicial review ‘non-court-centric judicial review’ because it allows the court to participate in a process of building a constitutional order, rather than imposing one or abandoning its obligation to do so.”\textsuperscript{63}

As a matter of state constitutional principle, courts and legislatures are beginning to ascribe meaning to the right to an education through an iterative process of judicial decision and legislative response that focuses on providing the resources and conditions necessary for all children—particularly at-risk children—to obtain certain capacities and, perhaps, reach proficiency as measured by the state’s own educational content standards.

\textbf{B. Standards-Based Reform and the “New Accountability” in Education}

The area of standards-based reform and the “new accountability” in education is where state policy has been at work in defining the right to an education.\textsuperscript{64} The premise undergirding the standards movement is the idea that \textit{all} children can achieve at high levels; all we need to do is raise the bar and they will leap over it.\textsuperscript{65} Coupled with the development of standards and the push to measure performance, many states have also begun to hold schools and students accountable for such measured performance.\textsuperscript{66} The primary elements of the standards-based reform strategy as it has been enacted in most states are threefold: (1) the state sets broad and high minimum “con-


\textsuperscript{62} See Liebman & Sabel, \textit{supra} note 14, at 205–06. For a description of how the court and legislature have iteratively developed the meaning of a constitutional education in Texas, see \textit{id.} at 232–39.

\textsuperscript{63} \textit{Id.} at 281.

\textsuperscript{64} See Liebman & Sabel, \textit{supra} note 14, at 229–30.


\textsuperscript{66} See Koski & Reich, \textit{supra} note 4 (manuscript at 39); see also Milbrey W. McLaughlin & Lorrie Sheppard, \textit{Improving Education Through Standards-Based Reform} xviii–xix (1995).
tent standards” that describe the knowledge, skills, and abilities that schools are expected to teach and students are expected to learn in core academic content areas, such as math, science, reading, and social studies; (2) the state sets “performance standards” that provide explicit definitions of what students must know to demonstrate a mastery of the content standards; and (3) the state fairly and accurately assesses whether students have attained those standards. To date, virtually every state has approved standards in major curriculum areas.

In the latter half of the 1990s, the standards-based reform formula began to be supplemented by an additional policy lever: accountability of districts, schools, and students for student outcomes on standards-based assessments. Emblematic of the “new accountability” movement is the 2001 reauthorization of Title I of the Elementary and Secondary Education Act, the No Child Left Behind Act (NCLB). NCLB, like its predecessor, the Improving America’s Schools Act (IASA), has a threefold purpose: (1) to free school districts from burdensome and ineffective inputs monitoring under Title I, which frequently resulted in the discredited practice of pull-out compensatory education services; (2) to set high expectations for all students, especially poor and minority students who were not held to the same expectations as their wealthier and non-minority peers; and (3) to hold schools accountable for student outcomes.

Under NCLB, states must establish challenging “content standards” and “student academic achievement standards” in reading, math, and science that reflect an adequate educational outcome for all students in the state. Next, states must use assessments aligned with those standards to hold schools accountable for ensuring that their students make adequate yearly progress (AYP) toward proficiency with the goal of reaching proficiency by 2014. Significantly, such AYP must not only be achieved school-wide, it must also be achieved for all sig-

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67 See Koski & Reich, supra note 4 (manuscript at 39).
68 Leibman & Sabel, supra note 14, at 208; Skinner, supra note 9, at 77.
72 Id. §§ 6311(b) (2)–(3), 6316.
significant socioeconomic, racial, and ethnic subpopulations, encompassing many at-risk populations (e.g., migrant students, students with disabilities, ELLs, and major racial and ethnic groups). Schools failing to meet these goals are deemed “in need of improvement” and receive graduated interventions. After two years of failure, schools receive technical assistance and must develop improvement plans, while students in those schools may choose to go to another school in the district. If the school continues to fail for three years, students who have not left may receive tutoring services from an outside provider. After four years, school staff may be replaced, while after five years, the school must seek alternate governance by agreeing to be taken over by the state or to be directed by a qualified private management company.

Those who study educational accountability, however, are quick to point out that merely raising academic standards, assessing student achievement, and holding districts, schools, and teachers accountable for that achievement is not enough to ensure that all children—particularly low-performing children—attain proficiency. The success of external accountability schemes hinges in part on the school’s capacity to organize teaching and learning to achieve the goals of the state’s standards-based reform scheme. Significantly, such capacity must

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73 Id. § 6311(b)(2)-(3).
74 Id. §§ 6311(a), 6316(b).
75 Id. § 6316(b).
77 Id. § 6316(b)(7)(C)(iv)(I), (b)(8). The other significant aspect of the NCLB for purposes of this article is that it requires all Title I schools to hire only “highly qualified” teachers and that current teachers must demonstrate that they are “highly qualified” by 2005–2006. Id. § 6319(a)(2)-(3).
79 Richard Elmore, a leading scholar on educational accountability, has commented that external accountability systems work not by exerting direction and control over schools, but by mobilizing and focusing the capacity of schools in particular ways. The people who work in schools, and the systems that surround them, are not just active agents in determining the effects of accountability systems. Their knowledge, skill, values, and commitments, as well as the nature of the organizations in which they work, determine how their schools will respond. Id. at 196. The dimensions of capacity are: (1) internal accountability (“the shared norms, values, expectations, structures, and processes that determine the relationship between individual actions and collective results in schools”); (2) structure; (3) leadership; and (4) knowledge, skill, and resources. Id. at 197–98, 201, 203, 206. All these elements of capacity are effectively what the architects of standards-based reform would have called “opportunities to learn” or “service delivery standards.” See, e.g., Jeannie Oakes et al., Accountability for Adequate and Equitable Opportunities to Learn, in Holding Accountability Accountable: What Ought to Matter in Public Education 92–94 (Kenneth A. Sirotnik ed., 2004).
include the tangible resources—instructional materials, appropriate facilities, and highly-qualified teachers—to ensure that all schools have the opportunity to teach to their respective high standards and all students have the opportunity to reach those standards.

Yet most standards-based accountability systems have fallen short of ensuring that schools have the capacity to reform themselves. Granted, many accountability schemes provide to failing schools modest infusions of cash, some technical assistance, and even a period of time to design and implement school improvement plans. Equally common, however, are policies that do nothing to build the capacity of failing schools, but rather permit students in those schools to avoid the policies altogether. But, as Harvard educational researcher Richard Elmore and his colleagues found in a recent study of accountability in high schools, "there isn’t much evidence . . . of major external investments in new knowledge and skill in schools." So long as state accountability policies are based on the theory that external pressure for performance can mobilize existing capacity rather than create new capacity, “it is possible that the long-term effect of accountability policies . . . could be to increase the gap in performance between high and low capacity schools.” An educational policy that endeavors to ensure that schools produce proficient learners will not succeed without the capacity to produce those learners.

The marriage of standards-based accountability and adequacy litigation, however, provides the possibility that opportunities to learn can be achieved through litigation. Indeed, whether at the point of identifying the substantive elements of an adequate education or designing the appropriate remedial interventions, courts are beginning to compel policymakers to flesh-out the substantive entitlement to educational resources and conditions based on the state’s own expected educational outcomes.

While this sounds hopeful, two major caveats remain. First, even in those courts that have entered the school reform fracas, judges have just barely begun to look to standards-based accountability schemes as guidance for determining whether states have offered a constitutionally adequate education to their children. Even fewer have relied upon output standards in crafting or approving remedial finance schemes or

80 Examples of such policies are those that provide compensatory or remedial education, and those that permit students to transfer out of failing schools. See, e.g., 20 U.S.C.A. § 6301.
81 Elmore, supra note 78, at 206.
82 Id. at 206–08.
school reform remedies. Second, and the subject to which I now turn, is the difficulty of relying on the judicial system as the primary enforcement mechanism to ensure that necessary resources and conditions will be delivered at the classroom level. As a consequence, the future of adequacy litigation should seek to secure and implement meaningful, user-friendly monitoring and enforcement schemes.

C. Enforcing Educational Rights Through Monitoring and Reciprocal Accountability

Accountability in American public education is hardly a new concept. School board members who have failed to develop effective local policies or hire effective leaders are politically accountable to voters. Teachers and staff are bureaucratically accountable to their principals and superintendents. School districts were traditionally accountable to accreditation organizations and the federal government for certain inputs—library books, lab equipment, and certified teachers. What is strikingly new about the new accountability is the focus on student outcomes as the standard for performance. Any accountability system must answer the questions: Accountability of whom, to whom, for what, and how? Modern accountability policies generally answer those questions by holding teachers, schools, districts, and sometimes students accountable to the state for student achievement on standards-based assessments. The “how” in such systems is typically a system of rewards for successful schools and graduated punishments for those who do not meet proficiency standards.

While schools and districts are held accountable to the public for student performance through public reporting, the tools available to families and communities to pressure schools to improve are, in my view, ill-defined and not well-suited to the communities who need them most. For instance, requiring schools and districts to publish their students’ academic performance disaggregated by race and ethnicity, ELL

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83 There are other possible risks for this advocacy strategy. As James E. Ryan recently cautioned at the Rethinking Rodriguez: Education as a Fundamental Right Symposium at the Boalt Hall School of Law (Apr. 27-28, 2006), holding states accountable for providing resources to achieve at high standards may have the perverse effects of (1) encouraging states to lower their standards for proficiency; (2) encouraging schools and teachers to narrow their curriculum to only those items that will be tested; and (3) providing states with an opportunity to demonstrate that schools are doing “good enough” on standards-based tests so that courts will find them in compliance with state constitutions, despite dramatic inequality in educational resources among schools and districts. That said, each of these three criticisms could be equally directed at test-based accountability schemes, like the NCLB, even without court involvement.
status, and disability could provide a useful accountability tool to communities and families. But this assumes several conditions that are not necessarily present in low-income communities with low-performing schools. First, data must be published in a clear, accessible way so that all may understand its meaning. Yet a recent study in California suggests that the state’s mandated “school accountability report cards” (SARCs), which provide information on schools’ and districts’ student performance, facilities, and teacher qualifications, are too complex for most Californians to decipher. Next, disadvantaged communities must have the capacity to act meaningfully on this information. “Voting with their feet” is simply not an option for low-income families who cannot afford to move to higher performing school districts and schools.

This leaves only the “voice” option—political mobilization. Recall that Liebman and Sabel are optimistic that the new publics constituted by traditionally diverse interests (business and local community activists, for instance) will disentrench established political interests when it is “discovered” that local schools are failing. There is reason, however, to be less hopeful. For many families in low-income communities, group political mobilization is not a viable option. They may not possess the time and technical expertise to participate in sustained dialogue and school reform efforts. This leaves the very real possibility that

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85 There is some evidence that realtors and home-buyers are among the most avid consumers of school accountability data. David N. Figlio & Maurice E. Lucas, What's in a Grade? School Report Cards and House Prices 24 (Nat’l Ctr. for the Study of Privatization in Educ., Occasional Paper No. 29, 2001). Those who have the means will choose homes in higher-performing school attendance zones. Id. (finding significant evidence that arbitrary distinctions embedded in school report cards lead to major housing price effects). Additionally, anecdotal evidence of wealthy flight from underperforming schools has made headlines. See Carrie Sturrock, Families Flee School’s Sinking Scores, S.F. Chron., Feb. 1, 2005, at A1 (describing the rapid middle-class enrollment decline—leaving behind low-income families—in the Oak Grove Middle School in Concord, California after the school had been deemed a “Program Improvement” school under the NCLB).

86 See discussion supra notes 55–63 and accompanying text. Indeed some scholars, such as Jeannie Oakes and John Rogers, insist that traditional policy reform that is driven by technocrats without constituent “voice” will do little to further the cause of educational equality. See Jeannie Oakes & John Rogers, Learning Power: Organizing for Education and Justice 21–33 (2006). Rather, meaningful equity-minded reform can only occur through grassroots organizing and political mobilization aimed at changing the powerful norms or “logics” that work to maintain the inequitable status quo. See id. at 158–63, 171, 175.
disentrenched interests will re-trench as those who traditionally hold political clout (middle- and upper-middle-class whites and suburban communities) and educational technocrats will garner control over the new publics. Moreover, even if the right to an adequate education (whatever is necessary to ensure proficiency for at-risk children) were well-defined, the prospect of using litigation to enforce the right is dim given the costs and time associated with such an effort. Finally, the collective action problem plaguing efforts to secure a public good such as an adequate public education will hinder even the most resolute individuals and small groups. To overcome the collective action problem, disadvantaged communities and individuals must find a way to amplify their voices and secure the educational resources necessary to allow their children to enjoy their educational rights and receive an adequate education.

Virtually none of the modern accountability systems formally and systematically hold policymakers and states accountable for what they can provide—the conditions and resources (i.e., the capacity) necessary to reach proficiency targets. In other words, such systems lack meaningful reciprocal accountability. Such an accountability system would provide, in the words of Jeannie Oakes, Gary Blasi, and John Rogers, at least two missing components: (1) “[c]lear standards or benchmarks against which actors in the system can be measured . . . . [including] both learning outcomes students are expected to achieve and the resources and conditions necessary to support teachers and students to . . . produce those outcomes” and (2) “[l]egitimate roles for local communities, parents, and students in holding the system accountable.”

What would such a meaningful reciprocal accountability system look like on the ground level? Some flexibility for local conditions is warranted here, but I would identify two major components. First, in the same way that a state’s department of education is often charged with the monitoring of data from and periodic inspection of local school districts in areas such as the implementation of special education programs under the Individuals with Disabilities Education Act or federal programs like free and reduced lunch programs, state departments of education should supplement their obligation to monitor student performance data with the monitoring of data regarding

87 Oakes et al., supra note 79, at 93.
88 See id. at 93, 94 (emphasis added).
opportunities to learn, and follow up with on-the-ground inspections to verify those data. Since the meeting of the “Chicago Group” (a group of experts in state monitoring systems for special education convened to lay out a blueprint for a new system of special education monitoring in Texas), such a system of monitoring key performance or outcome indicators followed by heightened verification reviews and focused inspections that are tailored to local conditions has been the direction in which special education monitoring has been headed in a few states, including Texas and California. These monitoring and inspection mechanisms could easily be adapted to monitoring performance, inputs, and processes for all students.


The Texas work articulated five principles that provide the underpinnings for an effective state IDEA monitoring system. The system must (1) address all legal requirements and educational results for students, (2) include public involvement, (3) build on existing student data to increase system efficiency, (4) direct resources to areas of greatest need, and (5) result in timely verification or enforcement of compliance. Their approach is based on the notion of continuous improvement with a data-based accountability system . . . .

At the heart of this system is the performance review process . . . . The state agency conducts a performance review of each LEA [local education agency]. The outcome of the review is used by the SEA [State Education Agency], in part, to place LEAs into one of four categories: (1) Continuous Improvement District—no additional compliance activities required by the state agency; (2) Data Validation District—sixty LEAs randomly selected annually to verify reported data and examine procedural compliance; (3) At-Risk District—self-study supplement to district improvement plan required; or (4) Focused-monitoring district—on-site investigation of specific areas of noncompliance conducted by the state . . . .

The state creates an investigation plan that is tailored to the identified areas of noncompliance prior to the visit. The plan is individualized for each LEA and must incorporate several features including focusing on measurable data that indicate compliance or noncompliance with the identified issue, classroom observation, and input from parents and students. Districts that are designated as “at-risk” or “focused monitoring” must have plans for correcting areas of noncompliance. Technical assistance and personnel training are provided to the LEA by the SEA if needed. The SEA must develop written procedures that outline the progression from noncompliance findings to enforcement so that they are consistently applied for each noncompliant LEA. These procedures should be clear to LEAs so that there is no doubt about the consequences for ongoing noncompliance.

Back to School, supra note 89, at 198–99.
Second, an accessible and user-friendly system of complaints management should be available to students, parents, communities, and even teachers who believe that schools do not have the resources and conditions deemed necessary to reach proficiency targets. Whatever resources and conditions are deemed—through adequacy litigation, legislation, or otherwise—necessary for children to enjoy an adequate education must be widely publicized both in and outside of school. Schools must also publicize that individual students, parents, teachers, and, perhaps, site administrators may file a complaint with a state oversight agency when such resources and conditions are not provided at the desk level. Such a complaint must be promptly investigated, findings issued, and a corrective action ordered. Already, similar systems are commonplace in special education. The goal, of course, is that with an order of noncompliance and corrective action in hand, the relevant provider—the state or local school district—will ensure that the child receives the necessary educational resources.

Tying this discussion together, modern adequacy litigation and standards-based accountability policies are beginning to work in tandem to not only monitor and hold schools accountable for student performance, but also to specify the conditions and resources that provide the opportunity for all students, based on their needs, to reach proficiency. The final link in this chain of reciprocal accountability is a system of monitoring and complaints management that ensures meaningful opportunities for students, families, and communities, to hold policymakers, the state, and schools accountable for providing opportunities to learn.

II. Educational Rights and Realities in California

This section explores California’s experience with education reform litigation and standards-based accountability policies with a particular eye toward opportunities for the kind of bottom-up accountability described in the previous section.
A. Serrano, Butt, and the Entitlement to “Basic Educational Equality” in California

It therefore appears well settled that the California Constitution makes public education uniquely a fundamental concern of the State and prohibits maintenance and operation of the common public school system in a way which denies basic educational equality to the students of particular districts. The State itself bears the ultimate authority and responsibility to ensure that its district-based system of common schools provides basic equality of educational opportunity.91

Having ruled in Serrano I that education was a “fundamental interest” in California and that district wealth constituted a “suspect classification,”92 the California Supreme Court made it clear in Butt v. California that it would apply strict scrutiny to any public policy or practice that denied the State’s children the fundamental right to basic educational equality.93 From a doctrinal perspective, one could hardly find judicial text more demanding of equality in educational policymaking than the Serrano and Butt decisions. Yet the Serrano I decision has been criticized for failing to achieve its goal of creating equality of educational opportunity and failing to target educational resources to poor and minority children.94 Some have even blamed Serrano I for

91 See Butt v. California, 842 P.2d 1240, 1251 (Cal. 1992). In Butt, the court approved a trial court’s order that the State had a duty to step in and prevent the Richmond Unified School District from closing its doors six weeks before the school year ended due to fiscal mismanagement because doing so would deny Richmond’s children their fundamental right to basic educational equality. Id. at 1264.
92 487 P.2d 1241, 1244, 1250 (Cal. 1971).
93 842 P.2d at 1256.
94 As one author argued:

[M]any reformers had wrongly assumed that the revenue disparities targeted by Serrano were systematically related to race and income. In fact, a high proportion of poor and minority students attended schools in high-revenue urban districts. Consequently, reducing revenue inequality at the district level did little to help disadvantaged students as a whole. Although California managed to achieve and maintain broad equity in school district funding, it ultimately did so in large part through relative declines in per pupil spending. For these and other reasons, many of the benefits envisioned by reformers in California failed to materialize.

lowering overall educational spending in California relative to other states and “leveling down” the State’s once enviable K-12 educational system to the basement of the nation.95 Here I briefly examine the California Supreme Court’s two leading cases on the right to an education—Serrano and Butt—as context for how that right has been refined (or at least affected) by California’s experience with standards-based accountability and the recent Williams v. California settlement.96

In 1971, prior to the U.S. Supreme Court’s decision in Rodriguez, the Serrano I court effectively struck down a property-tax-based educational finance system that created glaring inter-district revenue inequities in the State.97 In finding that education was a fundamental interest, the court relied on language from Brown v. Board of Education regarding the indispensable role of education in the modern industrial state, and the influence of education in the development of a civic-minded citizenry.98 Moreover, the California court concluded that classifications based on an individual’s wealth required exacting scrutiny.99 Because of the unjust reality that poor people almost invariably lived in low property wealth school districts, the court required any funding scheme that made a child’s educational funding dependent upon the wealth of the district to be mandatorily subject to strict judicial scrutiny.100 The Serrano I court thereby adopted the fiscal neutrality principle and allowed the plaintiffs’ case to go forward.101

The California Supreme Court would not issue a decision on the merits in the Serrano litigation until December 30, 1976, more than five years after the Serrano I decision.102 Much happened in the interim. Most importantly, the U.S. Supreme Court handed down Rodriguez.103

in assessed property values and per-pupil school revenues in California were not systematically related to race, ethnicity, or family income prior to the Serrano decisions).

95 See Bradley W. Joondeph, The Good, the Bad, and the Ugly: An Empirical Analysis of Litigation-Prompted School Finance Reform, 35 SANTA CLARA L. REV. 763, 792–93, 797 (1995); see also SONSTELIE ET AL., supra note 94, at 90 (demonstrating California’s drop in school spending relative to other states since the 1970s).

96 For two excellent and extensive discussions of the Serrano I decision and the politics and policymaking in its aftermath, see SONSTELIE ET AL., supra note 94; RICHARD F. ELMORE & MILBREY WALLIN McLAUGHLIN, REFORM AND RETRENCHMENT: THE POLITICS OF CALIFORNIA SCHOOL FINANCE REFORM (1982).


100 See id. at 1263.

101 Id.


Also, the California legislature revamped the State’s school funding scheme, though the *Serrano* plaintiffs were not pleased with the reform effort.\(^{104}\)

After a sixty-day trial on whether the legislature’s reform efforts complied with *Serrano I*, a Los Angeles Superior Court Judge agreed with the plaintiffs and invalidated the State’s educational finance system under the constitutional principles set forth in that decision.\(^{105}\) The trial court ordered a new system which would produce per-pupil expenditure differences among districts of no more than one hundred dollars.\(^{106}\) In light of the U.S. Supreme Court’s *Rodriguez* decision, the California Supreme Court on appeal applied the California Constitution’s equal protection provision, rather than the federal Equal Protection Clause, to uphold the trial court’s conclusion.\(^{107}\) But the *Serrano II* court did little to clarify whether the constitutional concern was fiscal neutrality or horizontal equity.\(^{108}\) Nor did it reconcile the concept of fiscal neutrality with concerns about revenue-raising ability in those districts facing the challenges of children in poverty, ELLs, and the like, i.e., vertical equity.\(^{109}\)

After the *Serrano* decisions, the broad and fuzzy outlines of the right to education in California were in place: education was a fundamental interest worthy of strict scrutiny protection when infringed and, accordingly, the California school finance system was now required to at least provide basic equality in funding. In *Butt v. California*, the court revisited the constitutional standard set forth in *Serrano* and seemed to suggest that equality of educational opportunity under the State’s equal protection provision went beyond fiscal neutrality to “basic equality of educational opportunity.”\(^{110}\) The case addressed whether students’ fundamental right to an education had been infringed when the Richmond Unified School District declared it would close six weeks early because it had run out of money.\(^{111}\) The California Supreme Court swiftly intervened and declared that this was a denial of Richmond students’ right to basic educational equity, and ordered the State and the district to ensure that school remained in

\(^{104}\) See *Serrano II*, 557 P.2d at 935–36.
\(^{105}\) Id. at 931, 939.
\(^{106}\) Id. at 940 n.21.
\(^{107}\) Id. at 957–58.
\(^{108}\) See id. at 939–47.
\(^{109}\) See *Serrano II*, 557 P.2d at 939–47.
\(^{110}\) See *Butt v. California*, 842 P.2d 1240, 1251 (Cal. 1992); *Serrano I*, 487 P.2d at 1244 (Cal. 1971).
\(^{111}\) *Butt*, 842 P.2d at 1243.
session for the prescribed period of time.\textsuperscript{112} Still, basic educational equity remains elusive. It remains unclear whether this basic equity means equality of basic educational inputs, basic equality in educational outcomes, basic equality of educational inputs, basic equality to achieve a certain educational outcome, or some other standard not yet enunciated.

California’s \textit{Serrano} decisions and the later gloss applied to them in \textit{Butt v. California}, provide California students with a constitutional right to basic educational equality across school districts.\textsuperscript{113} In implementing this right, the state legislature has chosen to focus on creating operating revenue equity by establishing revenue limits for school districts and narrowing the difference among such revenue limits over time.\textsuperscript{114} Moreover, due to the centralization of property tax allocations at the state level in the wake of the property tax limitation measure, Proposition 13,\textsuperscript{115} nearly all current noncategorical operating revenues are distributed through this revenue limit formula. Thus, we should see substantial equity in noncategorical state aid. Yet, neither horizontal nor vertical resource equity exist because districts are still free to raise discretionary funds through parcel taxes and private contributions, and to raise facilities funding through general obligation bonds and developer fees.\textsuperscript{116} Moreover, significant state aid is still distributed through categorical programs, many of which are not targeted to needy students.\textsuperscript{117} Finally, the State has done little to ensure that educational resources are sufficient in poor and minority schools so that all students reach the educational standards prescribed by standards-based reform efforts.

\textbf{B. The “New Accountability” in California}

California, like most other states, has adopted an ambitious standards-based reform and accountability scheme that ties state interventions, sanctions, and rewards to student performance on state-wide,

\begin{itemize}
  \item \textsuperscript{112} Id. at 1264.
  \item \textsuperscript{113} \textit{Serrano I}, 487 P.2d. at 1244; \textit{Butt}, 842 P.2d at 1243.
  \item \textsuperscript{115} \textsc{Cal. Const.} art. XIIIA.
  \item \textsuperscript{117} For a sampling of categorical state educational aid programs in California, see Cal. Dep’t of Educ., Categorical Programs (2006), http://www.cde.ca.gov/fg/aa/ca.
Achieving "Adequacy" in the Classroom

standards-based assessments. Pursuant to the Public Schools Accountability Act of 1999 (PSAA), all California public schools are held accountable for progress toward annual growth targets in each school’s academic performance index (API). API is primarily based on student performance on the California Standards Test, a state-wide assessment tied to the State’s educational content standards in the areas of English-language arts, mathematics, science, and history/social science. Each year, each school’s API score, the school’s growth toward its targets, and the school’s rank in comparison to all state and demographically similar schools are reported publicly. Schools that meet certain performance targets may be eligible for rewards, while schools that fail to meet targets will initially receive a $50,000 planning grant and technical assistance followed by a $200 per-pupil implementation grant as part of the Immediate Intervention/Under-performing Schools Program (II/USP). Should schools fail to improve over a period of two years, they may be subject to a menu of sanctions, including state takeover, reconstitution, or administration by an outside agency or organization—a step that has yet to be taken in any meaningful way in any California school district. In some sense, one could argue that vertical equity is enhanced with the infusion of grant monies and technical assistance through the II/USP program. That said, while it is far too early to determine the effects of the PSAA, an early study demonstrates that it has done little to close the achievement gap between low- and high-performing schools nor has it stemmed the widening gap in teacher quality between such schools.

For a detailed description of California’s standards-based accountability system, see William S. Koski & Hillary Anne Weis, What Educational Resources Do Students Need to Meet California’s Educational Content Standards? A Textual Analysis of California’s Educational Content Standards and Their Implications for Basic Educational Conditions and Resources, 106 TCHR. C. REC. 1907 (2004).


See id. §§ 52053, 52053.5, 52054.

See id. §§ 52053, 52053.5, 52054. It is also worth noting that California students, beginning in 2006, will not be permitted to graduate unless they pass the standards-based High School Exit Examination. See id. §§ 60850–60851.

Julian R. Betts & Anne Danenberg, The Effects of Accountability in California, in No Child Left Behind? The Politics and Practice of School Accountability 197, 199, 209 (Paul E. Peterson & Martin R. West eds., 2003). The authors preliminarily concluded, however, that those schools that chose to participate in and were selected for the II/USP experienced significant one-year achievement gains. Id. at 209.
educational equity, and did not stave off a state-wide lawsuit that sought to ensure that all students received basic educational necessities.

C. Williams v. California and the State’s Obligation to Prevent, Detect, and Correct

On the forty-sixth anniversary of Brown v. Board of Education, hundreds of California students in dozens of schools in low-income communities sued the State for its failure to provide equality in even the basic educational necessities.\(^{125}\) That case, the most significant educational rights litigation in California since Serrano, was settled before trial.\(^{126}\) The settlement agreement did not focus on revamping California’s educational finance system.\(^{127}\) Instead, it provided for significant reforms of the State’s system for monitoring and ensuring the provision of educational resources, including adequate instructional materials, clean and safe facilities, and qualified teachers, to all children in the State.\(^{128}\) This section will not describe the heart-wrenching educational conditions suffered by poor and minority students in California that gave rise to the lawsuit,\(^{129}\) nor will it examine the doctrinal basis or legal strategy in the lawsuit. Rather, this section will summarize the settlement agreement and its implementing legislation to highlight the evolving right to an education in California. Specifically, it focuses on the important procedural rights won by children in schools that “shock the conscience”\(^{130}\) to complain to lo-

\(^{125}\) See generally First Amended Complaint for Injunctive and Declaratory Relief, Williams v. California, No. 312236 (Cal. Sup. Ct. Aug. 14, 2000), available at http://www.decentschools.org/courtdocs/01FirstAmendedComplaint.pdf [hereinafter First Amended Complaint]. The plaintiffs sought basic necessities such as quality teachers, adequate facilities, and appropriate instructional materials and curricula. See id.


\(^{127}\) See id. at 6–8.

\(^{128}\) Id. at 6–7.


\(^{130}\) First Amended Complaint, supra note 125, at 6.
cal and state officials and secure certain basic educational necessities. The section will conclude by describing a project undertaken by the Stanford Youth and Education Law Project aimed at making the Williams rights real at the desk level, and the conclusions the clinic drew from examining the monitoring and complaints mechanisms established by the Williams litigation.

1. The Williams Settlement and Reciprocal Accountability

After four years of intense and sometimes bitter litigation, settlement was reached between representatives of the plaintiffs and Governor Arnold Schwarzenegger, who had just months earlier succeeded Grey Davis in a gubernatorial recall election. The major terms of the deal included over $800 million in funding for facilities in the lowest performing schools; $138 million in aid for instructional materials; timetables for ensuring that “highly qualified” teachers as defined by the NCLB are available to all students; enhanced capacity and responsibility of county superintendents to monitor local school districts’ provision of quality teachers, facilities, and instructional materials; and a uniform complaint process regarding inadequate instructional materials, teacher vacancies and misassignments, and emergency facilities problems.\textsuperscript{131} Five emergency bills to implement the settlement agreement were passed by the legislature and signed by the Governor in September 2004.\textsuperscript{132}

Although it remains to be seen how far the additional funding for textbooks and facilities will go and whether school districts will fulfill their NCLB and Williams obligation to provide a “highly qualified” teacher for every classroom, two significant observations about the settlement can already be made. First, few disagree that the settlement is merely a good first step toward substantive adequacy or equality of educational opportunity in California. According to the Williams attorneys, the suit was designed only to secure those basic

\textsuperscript{131} Notice of Proposed Settlement, \textit{supra} note 126.
educational necessities that many California children were denied.\textsuperscript{133} It was not aimed at ensuring that children enjoy all of the complex resources and conditions that would enable them to reach California’s high standards. In this regard, and unlike current adequacy litigation, Williams was not intended to be the happy marriage between constitutional principle and educational policy.

Second, the Williams deal clarified the State’s obligation to prevent, detect, and correct the denial of basic educational necessities, and provided children and their communities both a monitoring system and procedural rights to hold the State accountable for that obligation.\textsuperscript{134} There are three primary aspects to this monitoring and reciprocal accountability system. First, the county superintendents are obligated to conduct inspections and report to the public and State on school districts’ provision of clean, safe facilities; qualified teachers; and sufficient, appropriate textbooks.\textsuperscript{135} Second, school districts are required to conduct public hearings on the availability of textbooks, to generate SARCs that provide information on, among other things, student demographics, teacher qualifications, and performance on the state standards test.\textsuperscript{136} Third, the Williams deal created a uniform complaints system that requires schools to post in every classroom the right to qualified teachers, sufficient textbooks, and clean, safe facilities as well as the right to file a compliance complaint with local and state officials.\textsuperscript{137} The Williams litigation is, in a rough sense, out-of-step with modern adequacy litigations as it did not aim to establish the right to educational resources that would enable children to obtain certain skills and proficiencies.\textsuperscript{138} However, unlike other lawsuits, it recognizes the central importance of reciprocal accountability of the State to those in classrooms and communities.\textsuperscript{139}

2. Monitoring the Williams Settlement

During the Winter Semester of 2006, students in the Youth and Education Law Project (YELP),\textsuperscript{140} in collaboration with the private

\textsuperscript{133} See Notice of Proposed Settlement, supra note 126, at 1.
\textsuperscript{134} See id., at 7.
\textsuperscript{135} See id.
\textsuperscript{136} See id.
\textsuperscript{137} See id.
\textsuperscript{138} See Notice of Proposed Settlement, supra note 126, at 1.
\textsuperscript{139} See id.
\textsuperscript{140} YELP is an in-house legal clinic at the Stanford Law School that provides free legal services to disadvantaged children and their communities in education-related matters.
civil rights firm and Williams plaintiffs’ attorneys, Public Advocates, Inc., launched a pilot project through which public interest and private attorneys would “monitor the monitors” by examining the monitoring and compliance activities of county superintendents and a targeted local school district. Specifically, YELP monitored the Williams implementation work of the San Mateo County Office of Education and the Ravenswood City School District in East Palo Alto, a very low-performing and virtually one hundred percent “minority” kindergarten through eighth grade district of approximately 4500 students.141 The pilot project demonstrated both the excellent potential of reciprocal monitoring and complaints systems, as well as their distinct weakness.

Both the district (in large part) and the County Superintendent (nearly to the letter) complied with inspection and public disclosure obligations during the first full year of Williams implementation. Their own inspection and monitoring uncovered deficiencies in teacher assignments and the condition of facilities, as well as a handful of other material shortfalls. But even this inspection and monitoring will not be sufficient if local and state officials do not take the necessary steps to come into compliance. This observation, coupled with the alarming finding that not one Williams compliance complaint was filed in Ravenswood during the first year of implementation, demonstrates a potentially debilitating gap in reciprocal accountability schemes: local stakeholders must be apprised and aware of their rights, must be trained to identify denials of those rights, and must exercise their procedural rights and voice so they may not only complain to remedy the deficient conditions but also follow-up with state and local officials to hold them to account. While the reasons for the lack of use of the complaints system in Ravenswood remain unknown, other California school districts in which community groups and organizers reached out to parents and students received multiple complaints regarding

Through litigation and policy advocacy, YELP aims to ensure that all children enjoy excellent and equal educational opportunities. The author is YELP’s director. The Williams project was overseen by Molly Dunn, the Clinic’s Youth Advocacy Fellow, managed by Stanford law student Christine Sebourn, and conducted by Christine and her fellow students Marc Tafolla Young, Carolyn Jacobs Chachkin, Tara Heuman, and Tim Sanders. My thanks to the team for a job well done.

141 For more information on the Ravenswood City School District, see Ed-Data, District Reports, Ravenswood City Elementary District (2005-2006), available at http://www.ed-data.k12.ca.us/welcome.asp (follow “Reports - District” hyperlink; then click “San Mateo” under county and click “Ravenswood City Elementary District” under district).
deficient conditions. Reciprocal accountability works, but training and outreach are necessary to ensure that communities long marginalized in the education reform debate can begin to make rights real in the classroom.

Conclusion

Adequacy litigation and standards-based, educational accountability policies are reshaping the educational landscape, and hold the potential to establish rights to resources, conditions, and, ultimately, outcomes that would benefit the most disadvantaged students. But rights are abstract. Quality teachers, challenging curricula, functioning science labs, school guidance counselors, safe and clean facilities, and preschool programming are real. How can the state know that any of these resources are missing from the classroom? How can students, parents, and teachers hold the district and state accountable to provide for these rights? As unfashionable as it may be to speak of monitoring and procedural safeguards, such methods of reciprocal accountability may be necessary, though hardly sufficient, to achieve adequacy in the classroom.

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WHAT MATTERS EVEN MORE: CODIFYING THE PUBLIC PURPOSE OF EDUCATION TO MEET THE EDUCATION REFORM CHALLENGES OF THE NEW MILLENNIUM

CHARLES A. MCCULLOUGH, II*

Abstract: With the U.S. Constitution silent on the matter and local governments allowed to designate funds to fulfill various purposes of education, citizens and policymakers are left adrift in determining which educational reform initiatives will provide a quality education. Therefore a clear public purpose of education must be codified at the federal and state level through constitutional amendment and legislative enactments to avoid this current situation. This article explores philosophies, court opinions, and state constitutions to develop and propose a universal public purpose of education suitable for codification. The codification of a public purpose of education will assist the education community in promoting and funding educational reform initiatives, such as the National Board Certification of teachers offered by the National Board for Professional Teaching Standards, that have proven widely successful in increasing student achievement though, as of yet, have not garnered extensive federal and state government support.

I. THE NEED FOR A PUBLIC PURPOSE OF EDUCATION

The education reform attendance list: increased funding, new facilities, more technology, challenging curricula, accountability through testing, quality teachers, and parental involvement. Yes, they are all equally important. No, alone, no single one is the silver bullet. More

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important than discussing these great concepts for reform, however, is defining a common ground upon which the nation can base its education reform dialogue. Plainly stated, it is imperative that the federal government and the state legislatures codify a single and uniform public purpose of education. With a codified purpose to reference, the courts and legislatures could play a more effective role in ensuring education adequacy under state constitutions and in the current context of education reform requirements. A clearly defined public purpose of education would also provide one more tool that would allow state and federal legislatures to move more rapidly beyond partisan entrenchments to find not just a middle ground, but a solid ground for identifying and funding effective educational reform initiatives. Furthermore, a federally codified public purpose may be used nationally by parents to determine the proper expectations and rights of a child sent to public school.

Some may argue that national standards or a national curriculum are better tools than codification to bring focus to the education reform movement. However, the problem is not an absence of good reform ideas or national standards. There are federal provisions that provide national standards for education.\(^1\) A national curriculum has existed since the first day that Advanced Placement classes and exams were available to high school students. A national standard for receiving a high school diploma has been available since the inception of the International Baccalaureate Program. As the president of the National Commission on Teaching and America’s Future (NCTAF) observed, “We do have national standards, they are just not applied to all kids.”\(^2\)

In this manner, education becomes a mirror to society, simply reflecting societal outputs.\(^3\) Additional studies are not needed to demonstrate the fact that children of minority groups or of low socio-economic status are more likely to receive a lower quality of public education than other children. Unfortunately, a broken public education system is often cited for being the cause of this fact. Ironically, it is not the system that is broken; the problem is that the system was


\(^2\) Thomas Carroll, President, Nat’l Comm’n on Teaching & America’s Future, Address at the National Commission on Teaching and America’s Future Partners’ Symposium (July 9, 2006).

\(^3\) Kurt Landgraf, President & Chief Executive Officer, Educ. Testing Serv., Address at the National Forum on Education Policy (July 12, 2006).
never organized to serve everyone. Codifying a public purpose is part of a larger effort to get the educational system to do something that it was never designed to do—serve every student equitably.

Yes, there is a cultural divide as to how the nation views and receives education. Concepts of teaching, and therefore learning, are as varied as our schoolhouses. The nation needs a codified public purpose that is federally uniform. More importantly, with a set purpose by which to view the viability of education reform initiatives, any person vested in the educational debate—student, teacher, parent, or policy-maker—could transcend the bureaucratic and traditional approach to determining educational reform. Armed with the codified public purpose, they will be better equipped to achieve an equitable and quality system of public education.

One must first address the question what is the purpose of education before one can fully understand the dimensions of an adequate education and, in turn, create a competent plan of reform. To this end, Neil Postman observed that “[w]ithout a purpose, schools are houses of detention, not attention.” This prophetic statement was perhaps not far-reaching enough in its honesty. What one observes throughout the country is that, without a defined purpose of education, the childhood schoolhouse becomes a mere holding cell for the adulthood detention house. For those lucky enough to avoid this fate, the alternative may consist of an even greater penance—arriving at adulthood unprepared to contribute the full capacity of one’s innate abilities.

A. The Federal Government and a Public Purpose of Education

1. The Call to Codification

As the importance of defining the purpose of education appears to be self evident, one would suppose that the chorus of philosophers, legislative enactments, and judicial pronouncements on education would have long ago led to a codified definition of a public educational purpose. However, this is not the case, most fundamentally because the American tradition of public education is deeply rooted in the notion of

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4 Carroll, supra note 2.
local control. This is underscored by the fact that each of the seven articles and twenty-seven amendments of the U.S. Constitution is silent as to any aspect of education.

The silence of the founding fathers on the education issue has led some to conclude that the consequent intent was for all matters of public instruction to be legislated locally. However, just as the present-day Congress has increasingly crept into the area of local educational policy through the No Child Left Behind Act (NCLB), so too did the early Congress begin the process of shaping the look of public education with the passage of the Northwest Ordinance of 1785. Unfortunately, this zeal for education policy did not result in a specific provision in the U.S. Constitution, which was ratified only four years later. Nevertheless, the passage of the Ordinance suggests that the federal legislature contemplated by our founding fathers was properly empowered and obligated to guide matters of public instruction when the need for appropriate direction and uniformity arose.

If it is proper for the federal government to act more decisively in matters of public instruction—and if it chooses to do so—it becomes that much more necessary for the federal government to codify a public purpose of education. Without codification, education will remain subject to political whimsy. Even the President of the Educational Testing Service, discussing current investment in public education, has asserted that “[w]e must de-politicize the political discussion in education, because it is about the future of our society and we are failing large cohorts of our children.”

The idea of establishing a joint federal and state public purpose of education is not entirely new either. As recently as 1989, at the directive of President George H.W. Bush, the governors of several states, led by then Arkansas Governor Bill Clinton, convened to address the manner in which the nation could set goals and quantifiable standards to improve the quality of education in the United States. The following six National Education Goals were created:

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8 See id.
9 William O. Swan, The Northwest Ordinances, So-Called, and Confusion, 5 Hist. of Educ. Q. 235, 235 (1965). In the Ordinance, the early federal government provided for the survey and reservation in each township of a lot at coordinate N16° to be used for the purpose of a public school. Id.
10 Landgraf, supra note 3.
• All children in America will start school ready to learn
• The high school graduation rate will increase to at least ninety percent
• American students will leave grades four, eight, and twelve having demonstrated competency in challenging subject matter
• U.S. students will be first in the world in science and mathematics achievement
• Every adult American will be literate and will possess the knowledge and skills necessary to compete in a global economy
• Every school in America will be free of drugs and violence\textsuperscript{12}

Unfortunately, though the completion deadline for these six goals was the year 2000,\textsuperscript{13} none have yet to be satisfied. Yet these goals remain just as applicable today as they were nearly two decades ago. To avoid watching the hope for a clear and uniform public purpose of education fade, that public purpose must be codified into law to survive beyond the promising words of press conferences and television coverage. That defined purpose of education should be beyond a simple statement, and it should have the strength of legal accountability and the force of law through the interpretation of the courts. If such a public purpose of education were codified, it would remain the constant sifter used in policy discussions, board of education meetings, and classrooms when evaluating the course and speed of education reform.

2. The Legislative Challenge

A remarkable challenge exists when trying to pass a bill at the federal or state level, especially when the bill simply states a definition. As indicated by long-time federal government relations official, Anna Davis, most bills are composed of programmatic, finding, and definition sections.\textsuperscript{14} With no associated program to authorize or appropriate and no findings to detail, a bill for codification would simply state a feeling of Congress. This type of measure is usually the province of a non-binding resolution.\textsuperscript{15} Such resolutions are often passed by general consent, without comment from the other house of Congress or legally binding significance other than the persuasive power of being recorded.

\textsuperscript{12} Id.
\textsuperscript{13} Id.
\textsuperscript{14} Interview with Anna Davis, Executive Dir. for Fed. Gov’t Relations, Nat’l Bd. for Prof’l Teaching Standards, in Arlington, Va. (July 7, 2006) [hereinafter Davis Interview].
\textsuperscript{15} Id.
in the annals of the federal legislature.\textsuperscript{16} The weak character of this form of legislation would leave it to the same fate as the six National Education Goals championed nearly two decades ago.

Davis feels the most effective legislation has some means of quantification.\textsuperscript{17} Yet, a bill codifying the public purpose of education would not have any readily quantifiable elements, as the public purpose surpasses the scope of common education quantification tools. Furthermore, there is no simple funding formula that can be implemented to ensure the public purpose is met for every child. As a consequence, a united audience on this measure may begin to fracture. Also, though many legislators could agree in principal with such an organic act, they may be inclined to vote against it because of its potential to later limit the viability of their own proposed educational reform programs.\textsuperscript{18} In the end, a bill codifying a public purpose of education in Congress stands the same chances of succeeding as any other bill and would be subject to the same political winds. Yet, perhaps the strongest protection against these political winds is the growing national sentiment to better focus the education reform movement. In addition, the great strength of a public purpose codification bill is that it would illustrate the inspirational purpose for education shared by a vocal majority of citizens.

However, the matter of codifying a public purpose of education is also a matter for the states. In many ways, if the public purpose of education is codified solely as an act of the federal government, it may only have the effect of the widely criticized NCLB.\textsuperscript{19}

\textsuperscript{16} Id.
\textsuperscript{17} Id. However, Davis concedes that numerous factors often play a role in speeding the passage of a bill into law. Id. Having served with the Federal Trade Commission, Davis readily recalled that other than the authorization to enter World War II, the fastest bill ever passed by Congress was the establishment of the Do Not Call Registry. Id. Other than the impending 2004 election, the bill was able to pass swiftly with minimal dissent because the majority of Congress had personal knowledge of the matter. See id.; see also Press Release, Office of the Press Sec’y, President Signs Do Not Call Registry (Sept. 29, 2003), available at http://www.whitehouse.gov/news/releases/2003/09/20030929-10.html [hereinafter Do Not Call Registry]. As evidenced by the 50 million telephone numbers entered in the registry within the first three months of its existence, the bill also enjoyed the support of many Americans. See Do Not Call Registry, supra.

\textsuperscript{18} See Davis Interview, supra note 14.

\textsuperscript{19} Paul E. Robertson & Martin R. West, Is Your Child’s School Effective? Don’t Rely on NCLB to Tell You, 4 Educ. Next 76, 77 (2006), available at http://media.hoover.org/documents/ednext20064_76.pdf. A recent study conducted by Paul E. Peterson of Harvard University and Martin R. West of Brown University cites the major problem of NCLB as being the manner in which it characterizes schools by simply dividing them into two categories: those that are making adequate yearly progress (AYP) and those that are not.
B. State Governments and a Public Purpose of Education

1. The Interplay of State Constitutions and Courts

Codifying a public purpose of education is not a foreign concept for all states. Illinois and Louisiana have each created a state goal of education in enumerated articles of their respective constitutions. Much like the public purpose proposed later in this article, Louisiana’s goal of education is to establish educational learning environments that provide equal access to all children wherein the opportunity is present for each child to develop to their fullest potential. Illinois’s constitution takes this concept a step further, and declares that the public purpose of education is for all the state’s children to learn to the fullest capacity and that the right to such an education is fundamental to the state’s citizenry. Such a strong statement of purpose could easily be construed to create a right for all children to receive a superior education.

Unfortunately, Illinois courts have yet to go that far, but instead have found that “education [is] not a fundamental right for equal protection purposes under the United States Constitution, and . . .
[is] not subject to strict scrutiny.” Rather, the court concluded that the appropriate standard of review was the rational basis test. Nevertheless, the court’s current interpretation should not discourage any codification efforts. Indeed, the fact that the court would even consider the argument of education to be a fundamental right indicates the power of enshrining the public purpose in a state constitution.

Until the Illinois court’s relatively recent decision, the state constitution’s stated goal provided a clear and reasonable expectation for all Illinois residents as to the goal of the state in educating their school-aged children. Thus, it is necessary to codify the purpose in such a manner so that its positive effects would not be undone by subsequent statutes or court rulings as was the case in Illinois. Without question, this will be a difficult task.

In West Virginia, where the state legislature tepidly addressed the matter of public education in its constitution, the court held that the constitutionally required provision of a “thorough and efficient system of free schools” was enough to vest education as a fundamental right for all West Virginians. This decision required that any denial of the right to such an education system be subjected to strict scrutiny. Therefore, the language used to codify the public purpose of education need not be full of legal jargon to have far-reaching effects. Indeed, it may only take the right set of judges to have the public purpose of education reach into the courtroom where it can properly calibrate the scales of justice to assist in the proper adjudication of education reform debates.

Beyond specific language to be codified, another question regarding the codification of the public purpose of education may be where in the state constitution should the public purpose be added. The importance of location was illustrated in North Carolina, where education was declared a fundamental government function by the Supreme

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23 Id.
24 See id.
26 Some would argue that the actions of the Illinois court could easily be remedied if the public purpose of education stopped being merely a “goal” and instead presented clearer and quantifiable directives to the state. This approach would, in theory, stymie any avenue for the court to limit the creation of a state educational right vesting from a public educational purpose codified in a state constitution. Unfortunately, theories like these do not always bare-out.
28 Phillip Leon M., 484 S.E.2d at 913.
Court of North Carolina.\textsuperscript{29} The justices recognized the significance of education in the state and ruled as they did in part because education received its own specifically enumerated article in the state’s constitution.\textsuperscript{30}

2. State Legislatures and Codification

If citizens do not wish to try their luck at waiting for a sympathetic bench of judges, state legislatures must be urged to codify the public purpose of education in the declaration of rights articles common to all state constitutions. Similar in nature to our federal bill of rights, all fifty states have a section echoing federal rights and detailing additional state rights for their citizens. The Declaration or Bill of Rights sections range from the seventeen rights outlined in the Minnesota Constitution to the fifty-seven rights written in the Constitution of Maryland.\textsuperscript{31}

The rights articulated are, in large part, similar across the states. Freedom of speech, religion, and the press are universal. Many states have used their declaration of rights sections to grant rights not included in the U.S. Constitution.\textsuperscript{32} In fact, a recent and frequent spate of states passing similar constitutional amendments to declare rights that are important to them indicates that it is not improbable to have a national movement to codify the public purpose of education as a state right. Codifying the public purpose as a state constitutional right


\textsuperscript{30} \textit{See id.}

\textsuperscript{31} \textit{See infra} Appendix. The chart located in the appendix is one compiled from my own independent research on the state constitutions. I will refer to this chart periodically throughout the rest of the article.

\textsuperscript{32} Florida, New Jersey, and North Dakota have granted additional rights on matters of employment. \textit{See Fla. Const.} art. I, § 6.; \textit{N.J. Const.} art. I, § 19; \textit{N.D. Const.} art XI, § 24. Other states, such as Louisiana and Wisconsin, have added rights dealing with inherently local concerns including a right to fish, trap, and hunt. \textit{See}, e.g., \textit{La. Const.} art. I, § 27; \textit{Wis. Const.} art I, § 26. Triumphantly, states have also added rights for their citizens which seek to better society through individual empowerment. This has been the impetus behind the adoption of the various Victim Rights Amendments passed by thirty-four states throughout the Midwest, Northeast, and South. \textit{See National Victims’ Constitutional Amendment Passage, State Victims Rights Amendments, http://www.nvcap.org/stvras.htm} (last visited Nov. 18, 2006) (providing a color-coded map indicating which states have enacted victims’ rights amendments and allowing users to link to the text of their respective amendments). Sadly, state declarations of rights also have been used to divest the rights of citizens. Such was the probable motive for the eighteen states that have passed the Marriage Protection Amendments barring marriage or civil unions for countless citizens. \textit{See Eric Ervin, Arizona Rejects Anti-gay Marriage Amendment, WASH. BLADE.COM, Nov. 8, 2006, http://www.washblade.com/2006/11-8/news/national/amendments.cfm.}
would more efficiently prevent state courts from interpreting the public purpose of education as being an esoteric goal. Instead, the purpose will be interpreted as a directive and mandatory course of action by which all education reform efforts should be conducted or face strict scrutiny from the court. In addition, this would reaffirm the state’s commitment to defining a purpose by which education reform should be measured. It would also provide an additional level of civic engagement closer to education policymakers responsible for individual schools and school districts.

C. Effectiveness of Codification

The question remains whether a public purpose of education codified at either the federal or state level would be clear enough to guide subsequent reform implementation. Nancy Schwartz, a long-time education advocate, believed that many legislators still base decisions about education reform on their own personal experiences. Unless a public purpose bill provides a readily quantifiable means to review proposals for reform, such a bill would still run the risk of being interpreted subjectively. Yet, one benefit Schwartz saw in adopting a broad public purpose of education into a state constitution is that its inspirational nature would likely meet little opposition while providing parents, teachers, community groups, and other educational activists another tool to lobby for more thorough education reform.

While the legislative process may not be largely affected by codifying a public purpose of education, at the state level it is still a particularly important step as this is where implementation of education reform occurs. Effective education reform must happen beyond courtroom edicts and government regulations; rather, the hearts and minds of citizens must be changed. The public must become willing to change inherently inequitable funding structures, classroom pedagogy of a bygone time, and invest in educational reform programs that will deliver the public purpose of education. The first step toward motivating the public to invest in true educational reform is to codify the public purpose of education in a manner understood and accessi-

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33 Interview with Nancy Schwartz, Dir. of State & Local Outreach Programs, Nat’l Bd. for Prof’l Teaching Standards, in Arlington, Va. (July 7, 2006).
34 Id. An example of a quantifiable method for determining educational reform is establishing a financial rubric by which one can measure the equity of funding for a student’s education. Id.
35 Id.
ble to the administrators and educators that work in schools implementing reform programs.

Because the U.S. Constitution is silent on the issue and because of the frenetic nature of local governments, citizens and policymakers are left adrift on matters of education. This paradigm is clearly not functioning. There must be a codified public purpose of education by which all may design, benchmark, and critique educational initiatives to ensure that “success” and “achievement” and “preparation” hold the same weight in every schoolhouse. Such a public purpose of education must be codified so all may easily understand when a government, policy, school, or teacher is failing to provide a proper education and how to cure that failure.

II. Understanding the Public Purpose of Education

A. Defining the Public Purpose of Education

Defining a public purpose of education must occur through a meticulous process—one that takes note of philosophers, courts, and earlier legislative enactments. Through this process, one arrives at a definition that avoids the pitfalls that would otherwise limit universal applicability.

To begin to define the purpose of education one must first have a common understanding of “education” and “purpose.” The word “education,” originating in the Latin *educere* meaning “to lead out,” led Socrates to define education as the process by which one draws out the innate abilities of a student. Many centuries later, the father of modern day experiential education, John Dewey, championed the importance of the subjective experience of the individual absent the presence of a teacher’s recitation. This leaves today’s common definition for education: “The act or process of educating or of being educated,” and “[t]he knowledge or skill obtained or developed by such a process.”

So too, “purpose” finds a readily understood meaning: “The object toward which one strives or for which something exists.” When applied to defining the public purpose of education, however, many have

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39 Id. at 900 (defining “purpose”).
confused “purpose” with “function.” Judith Lloyd Yero differentiated the two in defining the latter as “other outcomes that may occur as a natural result of the process.”\textsuperscript{40} Using this logic, a naturally occurring consequence of schooling, such as acquiring factual knowledge, cannot in itself be a purpose of education due to the fact that this result is not a goal for which there is some extra effort, but simply a natural result of being recited facts.\textsuperscript{41}

Based on historical and current core definitions of education and its purpose, I propose that the codified purpose of education should read as follows: \textit{it is the public purpose of education to vest in the student the ability to investigate, locate, and develop the full complement of one’s abilities so as they may be refined in exercise for the benefit of the human condition.}\textsuperscript{42}

This definition is most appropriate because in those school systems that have failed to adopt this view, one may witness the “miseducation” of the masses. Failure to comply with the purpose of education as herein defined leaves us with governments, policies, schools, and teachers that champion a lesser purpose. They call for recitation instead of investigation, location, and development. Their faulty lesson plans have an educational baseline of adequacy of the masses instead of excellence of an individual’s abilities. More troubling is that the schools that lack this public purpose unintentionally establish a goal of keeping the status quo as opposed to bettering the human condition, which is the goal of the educational philosophies most apt to American classrooms and society.

**B. Philosophies of the Public Purpose of Education**

It is necessary to develop a proper philosophical understanding of education to better understand where the public purpose of education I have proposed above stands in regard to the other purposes of education expressed by courts and policymakers. The voices of philosophers, legislative enactments, and judicial pronouncements tend to break into two major universities of thought, utilitarianism and humanism, though I will argue that the latter is the most preferable.

\textsuperscript{40} Yero, \textit{supra} note 36, at 2.

\textsuperscript{41} See id.

\textsuperscript{42} The “human condition” referenced in the definition of the public purpose of education refers to humanity collectively and the civility of global society.
1. Utilitarian Philosophies of Education

The first university of thought is utilitarianism, which encompasses two of the educational philosophies with which one is accustomed: essentialism and behaviorism. The shared philosophical attribute between these two philosophies is the focus on how education can be used to efficiently and most effectively benefit the state.

In the school of essentialism, the philosophy of education is to produce useful individuals to become productive adult citizens. Thus, teachers should present only essential information that is practical to obtaining gainful employment. From this understanding come philosophies that emphasize an education that develops citizenship, preserves government, and provides essential skills needed for employment.

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45 The notion of education being used to develop citizenship is highly regarded throughout the Western world. In a famous oration by the Archbishop of York to a group of headmasters, it was stated that “the true purpose of education is to produce citizens.” See Eleanor Roosevelt, Good Citizenship: The Purpose of Education (originally published in Pictorial Rev., Apr. 1930, at 94, 97), available at http://newdeal.feri.org/er/er19.htm [hereinafter Selected Writings of Eleanor Roosevelt] (quoting the Archbishop of York). The United States embraced this same philosophy because large-scale immigration at the turn of the century fostered the idea that “American” society would disappear if a national consciousness was not developed through the sound preparation of its new immigrants for citizenship. See generally Kenneth L. Karst, Essay, Paths to Belonging: The Constitution and Cultural Identity, 64 N.C. L. REV. 303, 333–35 (1986) (discussing the role of education in assimilation). Even after such baseless fears have disappeared, one state constitution still speaks of the need for education to instill a “high degree of . . . patriotism . . . on the part of every voter in a government,” and the need for school instruction to “impress upon the mind the vital importance of . . . public spirit.” N.D. Const. art VIII, §§ 1, 3.

A logical corollary to using education to build good citizens is the notion that an educational system ought to sustain the very government-society that provides the education. In the newly formed United States, the citizens of the Commonwealth of Massachusetts drafted in their constitution the understanding that the chief goal of educating students in arts and sciences was to qualify them for public office and preserve not only the Commonwealth, but the nation as a whole.46

Many decades later this same sentiment is echoed in nearly identical language of the North Carolina and Michigan Constitutions, which both encourage education as being “necessary to good government.”47 The use of education to sustain the government was even echoed by the court in Fogg v. Board of Education of Union School District of Littleton, as a manner by which New Hampshire achieved protection “from the consequences of an ignorant and incompetent citizenship.”48

Though seemingly un-American, this coarse philosophy is at the cornerstone of our American capitalist system. In the Wealth of Nations, Adam Smith posited that national wealth was very much determined by the quality of its workforce. Without a literate, skilled, healthy, and motivated labor force, capital and technology cannot create a productive environment.49 Professor James Schouler, in his work A Treatise on the Law of the Domestic Relations, used the same philosophy from the educated citizen’s point of view, concluding that an intelligent population is the barometer that determines the strength of the state.50

The unyielding coil of government and business ties a state’s global dominance more directly to its economic prowess. Thus, a capitalist society must have a highly skilled workforce to fuel the machinery of the capitalist system and ensure economic prosperity of the country.51 With an educational focus narrowed to producing a citizenry for economic productivity, the government has provided a pub-

47 Mich. Const. art. VIII, § 1; N.C. Const. art. IX, § 1.
48 82 A. 173, 175 (N.H. 1912).
50 See Ex parte Bayliss, 550 So.2d 986, 990 (Ala. 1989) (referring to a citation of Domestic Relations by J. Askren in Esteb v. Esteb, 244 P. 264, 266–67 (Wash. 1926)).
lic education that can produce little more than industrial age factory workers and managers.\textsuperscript{52}

Currently, the education articles of six states set some sort of job skill training as a goal of education.\textsuperscript{53} This type of education has the effect of diverting students away from their individual abilities toward the future needs of an outside economic source. This is far too shortsighted; the job skills necessary or evident in a student today may not yield a job in the future. Even if job demand could be predicted accurately, there exists no guarantee in our country that success in school will provide college admission or a job.

In the somewhat different school of behaviorism, the chief pronouncement is strict compliance and obedience.\textsuperscript{54} The student, negatively influenced by the outside environment, must be manipulated by the teacher to master the basic skills that have been pre-determined by local education authorities.\textsuperscript{55}

The behaviorist notion that curricula must be determined by state authorities and local boards of education is a notion that has long held firm in the American understanding of educational governance.\textsuperscript{56} Equally instilled in the American psyche is the idea that a purpose for education is also to inculcate proper behavior and morals. The concept of education for the purpose of instilling morals and good character is echoed in the same constitutions that espouse the essentialist viewpoint of using education for preservation.\textsuperscript{57}

\textsuperscript{52} See Reinventing Our Schools: A Conversation with Ted Sizer (1994), available at http://www.ed.psu.edu/insys/esd/sizer/purpose.html. As late as the 1980s this was the aim of education for Lee Iacocca, who, as the chief executive officer of Chrysler automotive factories, delivered numerous speeches championing labor force production as the aim of education. See id.

\textsuperscript{53} See infra Appendix.


\textsuperscript{55} See Peterson, supra note 54; Bourbon, supra note 54.


\textsuperscript{57} See Mich. Const. art. VIII, § 1; N.C. Const. art. IX, § 1. Although his viewpoint was not sustained by the court in Dawson v. Hillsborough County, Superintendent Shelton advocated for the educational philosophy of his generation, testifying that the learning process was best served by a “businesslike, pleasant, non-distractive atmosphere,” and that being ostracized was the just reward for deviating from this behavioral norm. See 322 F. Supp. 286, 291 (M.D. Fla. 1971). Justice Jackson would echo this same need for cohesion
This university of thought fails in establishing a universal purpose because it inherently presumes a static common end without regard to individual needs. Worse yet, the apodictic nature of this system does not foster in the student a proper understanding of why one performs or refrains from performing certain tasks. Without this understanding, one creates a doer, not a thinker. It is this ability to think and improve upon the knowledge attained that is a hallmark of the public purpose of education proposed herein and the characteristic of the second main university of thought concerning education.

2. Humanistic Philosophies of Education

With a common focus on how education benefits the student’s ability to contribute their inherent skill set, the second university of thought regarding education is humanism. Humanism is rooted in educational philosophies such as pragmatism and reconstructionism. These philosophies have grown in use by educational theorists because of their widespread applicability.

In the school of pragmatism, the teacher serves as an advisor who is charged with guiding the student in the development of problem-solving skills to effectively navigate a world filled with ever-changing views and expanding knowledge. A characteristic of pragmatism is using the progress of the student to determine the purpose of education. This philosophy is annunciated in the Code of Massachusetts Regulations, which requires teachers to assure the existence of “educational programs in their classrooms that address the needs, interests, and abilities of all students.” By making this a condition of licensure for its teachers, the Commonwealth, in theory, moves away and discipline as being a fundamental educational aim of Catholic parochial schools. See Everson v. Bd. of Educ. of Ewing Twp., 330 U.S. 1, 24 (1947) (Jackson, J., dissenting).

Superintendent Shelton was not alone in his call for limited disruption through conformity. During this same period, Richard Nixon’s successful presidential campaign had a central theme of “law and order.” See Book Rags, America 1960–1969: Government and Politics, http://www.bookrags.com/history/america-1960sfederal-republic (last visited Nov. 27, 2006). At this time the social climate in the United States was marked by upheaval and disillusionment. The late 1960s saw the assassination of Dr. Martin Luther King Jr. and Sen. Robert F. Kennedy. Id. The civil rights movement had begun to evolve and its more vocal demands were being challenged by the large support garnered by segregationist icon and presidential candidate George Wallace. See id. As the federal government focused less on constructing the Great Society and more on building a stronger response to the Vietnam War, a significant antiwar movement had begun to divide the country. See id.

58 Travers & Rebore, supra note 44.
59 See id. at 72–73.
from a behaviorist pronunciation of a single curriculum set to the lowest common denominator. The statute encourages curricula that can adequately reflect and adapt to the needs and capabilities of the individual student. As termed by Howard Gardner, this "individually-configured excellence" has the benefit of developing the strengths of the whole person.\textsuperscript{61}

The public purpose of education proposed in this article addresses the need for education to be more individualized by calling for a learning environment where the pedagogy is to assist students in exploring and developing their inherent individual abilities. This produces students who can achieve beyond the skill set needed for the current job market. Similarly, a fundamental goal for providing knowledge in Illinois is to develop "all persons to the limits of their capacities."\textsuperscript{62} In Louisiana, the goal of the public educational system is to provide learning experiences that afford every individual the opportunity to develop to their full potential.\textsuperscript{63} In adopting these educational philosophies, these states embark on the path of producing learning societies. Such societies produce not learned but learning people.\textsuperscript{64}

In the school of reconstructionism, as in pragmatism, there is the understanding that everyone can attain their full potential.\textsuperscript{65} However, reconstructionism is unique for the idea that despite the ills of society,

\textsuperscript{61} Excerpt from Reinventing Our Schools: A Conversation with Linda Darling-Hammond (1994), http://www.ed.psu.edu/insys/esd/darling/purpose.html. In a recent speech before the Education Commission of the States, Arkansas Governor Mike Huckabee championed the call for more individualized education by stating that one of the best results of NCLB is that children and the problems they may face will be worked through on an individual level. Mike Huckabee, Governor of Ark., Address at The Nat’l Forum on Educ. Policy (July 13, 2006). However, to date, only Alabama, Illinois, Louisiana, and Montana have recognized individualized education within their respective constitutions. See infra Appendix.

\textsuperscript{62} Ill. Const. art. X, § 1.

\textsuperscript{63} La. Const. art. VIII, pmbl.

\textsuperscript{64} See Yero, supra note 36, at 2. Learning people are a natural result of an educational system vested in identifying the abilities of an individual. This type of system guides a student to view the whole range of abilities possessed and understand the many ways those abilities may be applied. In this manner, the student, as an informed thinker, becomes his or her own teacher.

Ironically, this same sort of critical thinking formed the basis for the Alabama Academic Freedom Act. The Act’s stated purpose for education was in part to teach students to seek and acquire all information necessary for critical thinking. However, the catalyst was a desire to preserve the teaching of divine creation as tantamount to theories of evolution. See H.B. 391, 2004 Leg., 2004 Reg. Sess. ( Ala. 2004). This example demonstrates how perennialist notions and utilitarian pedagogy must seek the cloak of pragmatism to survive. See id.

\textsuperscript{65} Peterson, supra note 54.
students, who are all deemed inherently good, should be taught that they can use their individual skill set to find a practical means to remake society into its ideal form. The Constitution of New Hampshire encourages the reconstructionist philosophy that knowledge ought to be used to remake the larger society. The state’s constitution calls upon the educated citizen to spread the advantages of learning throughout the various parts of the country to “inculcate the principals of humanity and general benevolence.” This purpose clearly contemplates the duty of the educated to spread good charity and improve society.

Even though the humanistic philosophies of education seek to establish a more complete and individualized result for students, a public purpose of education adopting such ideals still faces a major setback. In a review of state constitutions, it is evident that the notion of educating “all children” equitably was lost by their framers. Only twenty states explicitly indicate that classrooms are to be made available to all school-aged citizens. Eight others stop just short of this by indicating the need for education to be “generally diffused” throughout the public.

The varying manner in which the states have addressed this matter has left courts the final arbiter of defining equal schooling. If the public purpose of education were codified among state constitutions, how many more children would have received their rightful education without the years and toil of court cases? Even now, with varying judicial interpretations as to how a state is to arrive at schooling equality, a codified public purpose of education would provide a universal guide by which dialogue could be directed towards a more rapid solution.

The matter of equal educational access was consequently left to the federal courts in cases such as Brown v. Board of Education. Reconstructionism necessarily goes beyond educational equality because it

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66 Id.
68 Id.
69 See id. However, the sentiment of most states is more generally expressed in the Constitution of Texas. See Tex. Const. art. VII, § 1. This document gives citizens the responsibility of preserving the liberties and rights of the people. Id. On its face this is the same societal improvement notion that was stated in the New Hampshire Constitution. See N.H. Const. pt. 2, art. 83; Tex. Const. art. VII, § 1. However, the use of the word “preserve” actually calls upon the citizenry to maintain the status quo of liberties without regard to its effect on society. See Tex. Const. art. VII, § 1.
70 See infra Appendix.
71 See id.
72 See id.
requires all students to attain full potential. Due to the fact that some students may need more resources to fully experience their capabilities, the philosophy of education in this paradigm must be rooted in the equity of programs. The public purpose of education I proposed for codification understands that reform programs must be designed to offer students an equitable education process to achieve equal results. Undoubtedly, this was the understanding of noted philosopher Jean-Jacques Rousseau who concluded that “it is precisely because the force of things tends always to destroy equality, that the force of legislation ought always to tend to maintain it.”

By exploring the utilitarian and humanistic schools of thought surrounding educational purpose, it is clear that the public purpose I have proposed herein has the most universal application. Borrowing from legislatures and court opinions, the public purpose of education proposed seeks to engage all students individually to the height of their abilities and for the good of humankind. However, the review of these philosophies also exposes the fact that numerous other meritorious purposes do exist for education. Can the public purpose of education have multiple definitions? Is one better than another?

In the same way a book, originally purchased for the purpose of diffusing information to the reader, may later be used to level a table or teach a debutant to loose her slouch, it is conceivable that education may also have many defined purposes. For example, some hypothesize that in industrial nations, education commonly has goals that are directed towards empowering the individual and goals preserving government. However, no matter how many purposes a thing has, there remains a better or more universal purpose for everything. As such, the multifaceted nature of education does not grant it an exemption. Moreover, Linda Darling-Hammond, a noted education philosopher, took this idea further by suggesting that it may not so much be a matter of a better or worse definition of the purpose of education; instead, it may be a matter of a single public purpose and many private purposes of education. However, this all may be a matter of semantics.

Regardless of the chosen definition, the public purpose necessitates educational equity so that all students may equally exercise the

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74 See Roberts v. City of Boston, 59 Mass. 198, 204 (5 Cush. 198) (1849) (quoting Rousseau and his discussion of the theory of the social contract).
75 See Baig, supra note 51; Reilly Jones, Purpose of Education (2003), http://home.comcast.net/~reillyjones/education.html.
76 Interview with Linda Darling-Hammond, Professor Stanford Univ., in St. Paul, Minn. (July 10, 2006).
capacity of their knowledge and abilities in a manner beneficial to their global surroundings.

III. THE CURRENT STATUS OF EDUCATION REFORM AND HOW THE PUBLIC PURPOSE OF EDUCATION INFORMS PROFESSIONAL DEVELOPMENT

The United States already has organizations, businesses, and financial backers contributing to education reform efforts. There are teachers ready, administrators being prepared better than before, and a rise of new unionism casting away the management conflicts of yesterday. There are a thousand ideas and new ones produced every day. Codifying the public purpose of education arrives at a time when the education reform movement is teeming with solutions of varying scope, cost, and achievement,\textsuperscript{77} though very few initiatives have produced more than the catchphrase featured on their latest media kit. These reform programs take many forms. Reform initiatives have sought to hurriedly certify new teachers without classroom observation.\textsuperscript{78} Others promise new funding by robbing Peter’s public school to pay Paul’s charter school.\textsuperscript{79} The most recent trend is quantifying educational quality through a battery of standardized testing shrouded in proprietary secrecy.\textsuperscript{80} The litany of education reform organizations seeking to find the most effective program reads like an alphabet soup—NCTAF, ECS, NCATE, ABCTE, CPSF, NCTQ, CCCSO, NEA, AFT, AACTE, ACE, NCEE, TEAC, INTASC, etc.


\textsuperscript{78} See The Am. Bd. for Certification of Teacher Excellence, Frequently Asked Questions, http://www.abcte.org/passport/faq (last visited Nov. 27, 2006) (indicating that classroom observation is not required as a condition of receiving the Passport to Teaching Certification).

\textsuperscript{79} See Assoc. of Tex. Prof’l Educators, Vouchers/Charter Sch., http://www.atpe.org/Advocacy/Issues/vouchersCharters.asp (last visited Nov. 18, 2006) (indicating the organization’s opposition to voucher programs and charter schools that enrich for-profit companies during a time period when the state has limited funds for public schools and charter school students are evidencing little academic progress compared to their public school counterparts).

\textsuperscript{80} See Barnett Berry, Building the Teaching Profession: Do NBCTs Still Make a Difference? Yes (May 15, 2006), http://teachingquality.typepad.com/building_the_profession/2006/05/in_the_may_9th_.html (indicating that certain Value-Added researchers opt to use “methodology [that] is proprietary and held in secret, and thus not available for other researchers so that they can conduct the typical peer review of statistical procedures and models used”).
These valiant efforts and progressive organizations have only brought us to a place where far more needs to be done. Asian and European counterparts are still outperforming U.S. high school students in mathematics and science.\(^81\) A factor contributing to this and similar statistics is that, unlike other countries, the United States offers no universal professional development program for high school teachers.\(^82\)

A 2006 report by Education Trust indicated that teachers lacking experience and education were more likely to be located in low-income and minority-rich schools.\(^83\) The effect of these low-quality teachers is apparent in their students’ relative lack of college preparedness.\(^84\) Assuredly, this is one of the many factors that contributed to the barely seventy percent national high school graduation rate for the 2002–2003 school year.\(^85\)

In codifying a public purpose of education, federal, state, and local legislatures, in concert with judges, will have a legally binding description of what education reform is to produce. This directive will assist in purging the loaded phrases that often polarize intelligent discourse on education reform.\(^86\) With this universally applicable and easily understood definition, the public will enjoy an open conversation with education policymakers. These groups may more readily reach consensus on educational reform initiatives that have heretofore been extremely divisive.

An example of a reform effort that may be assisted by codifying the public purpose of education is the movement to determine the appropriate manner by which to develop and sustain highly qualified and


\(^{82}\) Barnett Berry & John Norton, \textit{Learn from the Masters}, 2 \textit{Edutopia} 46, 45 (2006). In Japan, first-year teachers may expect a full year of close supervision with an accomplished teacher. \textit{Id.} In Germany, teachers are required to embark on a two-year teaching internship that is closely monitored and evaluated prior to assuming full instructional duties. \textit{Id.}


\(^{84}\) \textit{Id.}

\(^{85}\) The graduation rate varied by state, ranging from New Jersey and North Dakota, with average graduation rates of 84.5\% and 83.1\% respectively, to South Carolina, which has a graduation rate of 52.5\%. EPE Research Ctr., \textit{Diplomas Count: An Essential Guide to Graduation Policy and Rates}, \textit{Educ. Week}, June 22, 2006, at 14.

\(^{86}\) Scott Widmeyer, \textit{Communicating for Change: What Educators Must Know and Be Able to Do}, \textit{Educ. Week}, June 7, 2006, at 34–35 (“It’s not enough to make people aware, to provide accurate information, or to disseminate or debate research—especially if questions are misguided. Purge jargon and open up conversation with the public—defining terms as you go, reaching consensus on the course of action.”).
accomplished teachers through a system of professional development. Adopting the public purpose of education facilitates the growth of highly qualified and accomplished teachers by providing a clearer picture as to which professional development practices will best provide students an education that achieves the public purpose—vesting in students the ability to investigate, locate, and develop the full complement of their abilities so they may be refined in exercise for the benefit of the human condition.

In this manner, educational excellence is defined by a course of instruction properly fulfilling the public purpose of education. Consequently, one may define the highly qualified and accomplished teacher as one that implements a pedagogy fulfilling that codified public purpose. Therefore, to ensure excellence in education, citizens, businesses, and government must implement a system that will develop and sustain this definition of a highly qualified and accomplished teacher.

A. The History of Professional Development

For a long time now, the education reform movement has focused on the role of the teacher. Eleanor Roosevelt observed that the nation’s highest aspirations for teaching its children required a “high grade of teaching” that would “inspir[e] youth and send[] them on to great heights.”\(^87\) Roosevelt knew that few teachers could meet these lofty goals, and that, to meet them would necessitate professional development opportunities, or as she characterized, “leisure to prepare, to study, to journey in new fields, and to open new sources of knowledge” to develop the accomplished teacher.\(^88\)

The education reform debate tackled the question of how to design and implement a system of professional development a little over twenty years ago. Had the public purpose of education been codified as a legislative norm at that time, this debate may have concluded shortly after it began. Policymakers would have readily understood and provided earlier support for professional development initiatives that were grounded in the public purpose. This hypothesis is apparent in exploring the history and current status of one of the country’s most distinguished professional development organizations, the National Board for Professional Teaching Standards (NBPTS).

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\(^87\) See Selected Writings of Eleanor Roosevelt, supra note 45.

\(^88\) See id.
1. The National Commission on Excellence in Education

In the early 1980s, studies demonstrated concerns about the declining abilities of the nation’s youth.\textsuperscript{89} Science achievement scores were in a steady decline nearly every year since 1969.\textsuperscript{90} Remedial math courses increased at four year colleges by seventy-two percent between 1975 and 1980.\textsuperscript{91} The Department of the Navy reported that one-quarter of recent recruits could not read at the ninth grade level.\textsuperscript{92}

Due to the end of the baby-boom, teacher hiring had been at a sluggish pace for many years.\textsuperscript{93} Between the school years ending 1977 and 1984, many of the baby-boom teachers started to retire.\textsuperscript{94} The feared result was an impending teacher shortage.\textsuperscript{95} Licensing standards were thought to be weak, and few states involved teachers in state standard review procedures.\textsuperscript{96} A lack of mobility in teacher licensure meant that no national market existed for teachers.\textsuperscript{97}

To provide a unified direction from which government, citizen, and business could address the growing need for education reform, President Reagan, through his Secretary of Education, established the National Commission on Excellence in Education (“the Commission”).\textsuperscript{98} In April of 1983, the Commission issued a report stressing that “the educational foundations of our society are presently being eroded by a rising tide of mediocrity that threatens our very future as a nation and a people.”\textsuperscript{99}

The Commission suggested that new teachers should demonstrate academic and pedagogic competence, and a method should be devised to recruit stronger candidates through salary incentive programs.\textsuperscript{100} The Commission went on to suggest that input from all fac-


\textsuperscript{90} Id.

\textsuperscript{91} Id.

\textsuperscript{92} Id.

\textsuperscript{93} CARNEGIE FORUM, supra note 49, at 31.

\textsuperscript{94} Id.

\textsuperscript{95} See id.

\textsuperscript{96} See id. at 35, 64.

\textsuperscript{97} See id. at 102.

\textsuperscript{98} NCEE, A NATION AT RISK, supra note 89.

\textsuperscript{99} Id. In true cold-war fashion, the Commission supposed that if this level of educational mediocrity had been cast upon the American people by a foreign power it would be considered “an act of war.” Id.

\textsuperscript{100} Id.
ets of American society were needed to generate the fundamental reform necessary to improve the educational system.\textsuperscript{101}

This idea of inclusiveness was a result of the preamble to the Commission’s charter.\textsuperscript{102} Articulated with a humanistic ideal, the preamble asserted that “[a]ll, regardless of race or class or economic status, are entitled to a fair chance and to the tools for developing their individual powers of mind and spirit to the utmost.”\textsuperscript{103} It is evident from the Commission’s recommendations that when a humanistic purpose is applied to conversations on education reform, the focus is directed towards how all students can be involved and equitably benefit from the suggested reform.\textsuperscript{104}

Why then did the work of the National Commission on Excellence in Education end with the Nation at Risk report? Why did the preamble, held in esteem by a presidential commission, fail to finally define a singular purpose to education providing targeted and effective reforms twenty years ago?

Chester Finn hypothesized that the Commission lacked the vision and resources that could take its notions beyond theory.\textsuperscript{105} Furthermore, the Commission was stymied by the decentralized and inherently local structure of the system it wished to reform.\textsuperscript{106} This left the Commission’s recommendations free to be picked apart by legislatures and boards of education consumed by the lesser purposes of education.\textsuperscript{107}

Despite these shortcomings, the Commission did create a spark. Governors, more driven by the utilitarian economic aspects of education reform, began to fan the spark into a small flame. Governor Lamar Alexander of Tennessee asserted the need to prepare for better schools was the major domestic issue of the day.\textsuperscript{108} Missouri’s Governor, John Ashcroft, espousing the humanistic notion of the Commission, would state that it was the primary goal of his constituency to “create an environment of opportunity, development, and growth for

\textsuperscript{101} Id.
\textsuperscript{102} Id.
\textsuperscript{103} NCEE, A Nation at Risk, supra note 89. The preamble is strikingly similar to the public purpose of education espoused in this text. See id.
\textsuperscript{104} Id.
\textsuperscript{105} See Chester E. Finn, Jr., Teacher Reform Gone Astray, in Our Schools & Our Future. Are We Still at Risk? 216–17 (Paul E. Peterson ed., 2003).
\textsuperscript{106} See id.
\textsuperscript{107} See id.
\textsuperscript{108} Id.
all of [the State’s] citizens.”109 Finally, the little known Governor of Arkansas, Bill Clinton, weighed in that education reform was necessary to properly develop the minds of all the nation’s citizens.110 By raising interest in the need for education reform, the Commission also created an awareness for the need to improve America’s teachers.

2. The Rise of Professional Development as a Means for Purposeful Education Reform

In January of 1985 the small spark was ablaze. The modern conversation on teacher professional development began when the Carnegie Forum on Education and the Economy was established for the purpose of developing education reform initiatives that would address the economic challenges expressed in the report authored by the National Commission on Excellence in Education.111

Within two months the Advisory Council chairing the Carnegie Forum established the fourteen-member Task Force on Teaching as a Profession (“the Task Force”). The Task Force was composed of a variety of education leaders, policymakers, and business executives reflecting the vast diversity of opinions on education reform.112 The group started with two essential tenets. First, educational standards would have to be more demanding to assure that students would achieve far more.113 Second, the teaching profession would have to rise to the standards required to meet the challenge of the first tenet.114 Both tenets were to be executed with the intention of educating the individual for the benefit of all.115

109 Id.
110 Finn, supra note 105, at 216–17.
111 Id.
112 Id.
113 Id.
114 Id.
115 Despite the underlying utilitarian mission of the Carnegie Forum—to propose reforms for national economic security and development—the Task Force set foundations of understanding that were similar to those articulated in humanistic purposes of education. It espoused the view that job-skill preparation should not be the sole focus or even most important focus of education. Finn, supra note 105, at 15. The Task Force superseded the utilitarian notion of using education as a means to establish a citizenry loyal to existing government design. Id. at 14–15. Instead, the Task Force focused on the idea that education must enable one to “make informed judgments about the complex issues and events that characterize life.” Id. at 14. This parallels the notion of developing the natural abilities of a student for use in the betterment of the human condition. To vest a student with the ability to make such personalized decisions, the Task Force understood teachers would have to concentrate on individual students’ abilities.
To meet its two goals and remain true to the humanistic approach to education reform, the Task Force issued the following eight recommendations in its report, *A Nation Prepared*:

- Make teachers’ salaries and career opportunities competitive with those in other professions.
- Relate incentives for teachers to school wide student performance, and provide schools with the technology, services and staff essential to teacher productivity.
- Mobilize the nation’s resources to prepare minority youngsters for teaching careers.
- Develop a new professional curriculum in graduate schools of education leading to a Master in Teaching degree based on systemic knowledge of teaching and including internships and residences in the schools.
- Require a bachelor’s degree in the arts and sciences as a prerequisite for the professional study of teaching.
- Restructure the teaching force, and introduce a new category of Lead teachers with the proven ability to provide active leadership in the redesign of the schools and in helping their colleagues to uphold high standards of learning and teaching.
- Restructure schools to provide a professional environment for teaching, freeing them to decide how best to meet state and local goals for children while holding them accountable for student progress.
- Create a National Board for Professional Teaching Standards, organized with a regional and state membership structure, to establish high standards for what teachers need to know and be able to do and to certify teachers who meet that standard.\(^{116}\)

Of the eight enumerated proposals, the establishment of the National Board for Professional Teaching Standards (NBPTS) is the most noteworthy and sustained education reform initiative presented by the Task Force.\(^{117}\) To date there are various other professional develop-

\(^{116}\) *Id.* at 3.

\(^{117}\) *See id.*
ment initiatives and organizations. However, it is worthwhile to further explore NBPTS because research surrounding that organization and governmental support of its practices demonstrate that it is an effective model of the professional development of teachers that is able to serve the public purpose of education. A review of NBPTS also demonstrates how embracing a reform initiative grounded in the public purpose of education can produce effective and long lasting educational reform.

3. The History of NBPTS’s Professional Development Initiatives

The Task Force envisioned that the professionalization of teaching would have much of the same impact for teachers as the professionalization of medicine had for doctors at the turn of the twentieth century. For true professional development to take place, teachers themselves would have to exhibit the specific knowledge and demonstrable abilities needed to be considered highly qualified and accomplished. The states would be left to determine standards for entry level teachers, and determine who would meet standards for certification. NBPTS, as envisioned by the Task Force, would issue two certificates. The Teacher’s Certificate would establish a high entry level standard, and the Advanced Teacher’s Certificate would identify those that had reached a high level of teaching and had the acumen worthy of school leadership. The high standards for these certificates would represent a consensus of educators well versed in the specific field of certification. Assessments for certification would reach far beyond the mastery of subject knowledge. In a true humanistic fashion, teachers would also have to demonstrate their contribution to the school wide learning community. Assessment would focus on a teacher’s capacity to encourage learning in students of various learning styles, cultural

119 See id. at 7 (noting the impact of Abraham Flexner, who at the beginning of the twentieth century issued the report Medical Education in the United States and Canada. The document examined the state of American medical education and called for reforms to the manner in which students were selected for and trained in North American medical schools).
120 See id.
121 See id.
122 See id. at 66.
124 Id.
125 See id.
126 See id. at 67.
experiences, and economic realities. This voluntary certification process would be decentralized, allowing for easy access for teachers throughout the country. With the hope of providing a large number of professional teachers to communities most in need, a heavy emphasis would be placed on recruiting and preparing minority candidates.\textsuperscript{127}

The conceived design of NBPTS and its premier professional development tool, National Board Certification, are in concert with the public purpose of education. Teachers attaining the certification issued by NBPTS would advance the public purpose of education because their selection would espouse the same theme. In the design of NBPTS, one finds the humanistic notion of a chorus of different voices coming together to articulate a central theme. The process of certification emphasizes major components of the public purpose of education by championing individualized instruction for the ability of the student, emphasizing the equity of all students, and setting a high bar for service to the community. If a codified public purpose of education had existed at the conception of this organization, policymakers could have easily discerned the need to provide immediate and sustained investment in this reform initiative.

Two years after its 1987 creation, NBPTS took the first step in implementing a system of National Board Certification by issuing the policy statement \textit{What Teachers Should Know and Be Able to Do}, which served as the foundation on which all standards would be based and all assessments developed.\textsuperscript{128} The statement articulated the fundamental requirements for proficient teaching\textsuperscript{129} along with the following Five Core Propositions:\textsuperscript{130}

\begin{itemize}
  \item Teachers are committed to students and their learning.
  \item Teachers know the subjects they teach and how to teach those subjects to students.
  \item Teachers are responsible for managing and monitoring student learning.
\end{itemize}

\textsuperscript{127} \textit{See id.}


\textsuperscript{129} \textit{Id.} at 2–3.

\textsuperscript{130} \textit{Id.} at 3–4. The Five Core Propositions expressed the sentiment of the public purpose of education. \textit{Id.} at 2–6. They preserved the Task Force’s focus on producing teachers to advance the public purpose of education. \textit{Id.} The Propositions affirm the need to have a solid knowledge base and emphasize the ability to convey that knowledge and cultivate the desire to learn in the fluid atmosphere of our nation’s schools. \textit{See id.}
• Teachers think systemically about their practice and learn from experience.
• Teachers are members of learning communities.

At present, the certification issued by the NBPTS remains voluntary and is open to anyone with a bachelor’s degree and three years of classroom experience.\(^{131}\) NBPTS’s certification-area repertoire includes nearly every educational field and development-level taught from early-childhood through young-adulthood.\(^{132}\) With a 2003–2004 national pass rate average of forty-seven percent, the performance-based assessments developed by teams of teachers and educational experts undoubtedly reflect high and rigorous standards.\(^{133}\) Thus, nearly twenty years after its creation, the NBPTS has grown into a sound facsimile of its artists’ rendering.

Yet, despite all the tremendous efforts made by NBPTS, the current level of government support and public knowledge of this initiative will only yield an estimated 50,000 National Board Certified Teachers (NBCTs) by the end of 2006.\(^{134}\) That is about 1.3% of the nation’s teachers.\(^{135}\) This percentage would no doubt be larger and reform efforts further progressed if at inception, policymakers had a codified public purpose of education by which to judge this organization as one deserving of more generous amounts of public support.

Some may argue that one reason for moderate government support is the existence of a few research studies questioning the effectiveness of NBCTs to deliver standardized test scores.\(^{136}\) This does not explain moderate government support, as a larger body of research exists demonstr-


strating the effectiveness of NBCTs. A 2001 national survey found that NBCTs were, on average, more desirous of leadership positions and received more awards than their counterparts. A 2005 study indicated that NBCTs were better equipped to work collaboratively with the diversity of parents and guardians of their students. A 2004 study conducted by the University of Arizona found that the students of NBCTs received the equivalent of one additional month of schooling. A much larger study conducted in Florida indicated that students of NBCTs performed at a significantly higher level.

B. Federal Government Support for NBPTS Professional Development Initiatives

Despite the design of NBPTS, which mirrors the public purpose of education proposed above, and the myriad of research demonstrating the program’s effectiveness, the federal and state governments have so far not taken the opportunity to invest more generously in NBPTS. Also, federal programs instituted in 1997 only provide limited financial assistance to individuals seeking certification in target areas. Some of these subsidies have covered up to half of the $2500 certification fee. However, with a national teacher salary average of only $46,597 in recent years, much more can be done by the federal government. Teachers should be able to pursue National Board Certification without

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having to decide between professional development and household needs.144

At the federal level, the decision to forego a larger investment in professional development initiatives is not due to a lack of understanding of the need for such programs. Recognizing the positive effects of identifying and developing accomplished teachers, President George W. Bush has stated that his “administration is committed to a goal that we’ll have a quality teacher in every classroom in America.”145 The Department of Education continually trumpets state-level findings that “students with ‘highly-qualified’ teachers for three years in a row scored 50 percentage points higher on a test of math skills than those who had ineffective teachers.”146

Yet, instead of embracing programs like National Board Certification, the Bush Administration has left a vague set of disjointed standards to be implemented by the states. For example, through NCLB, an elementary school teacher is considered highly qualified if he or she has obtained full state certification or licensure, completed a bachelor’s degree, and demonstrated subject knowledge and teaching skills in reading, writing, mathematics, and other areas of basic elementary curriculum by passing a “rigorous” state test such as the state certification exam.147 Unfortunately, this definition fails the public purpose of education standard I propose, primarily because it is focused on the teacher’s basic content knowledge instead of the teacher’s ability to teach students. The public purpose of education requires a student-centered focus so that the individual’s abilities may be cultivated and because the skill-set the student possesses for the betterment of the human condition may exceed the scope of basic reading, writing, and math curriculum. By adopting the NCLB approach, the Bush Administration has lost the opportunity to ensure that teachers meet requirements as suggested by the public purpose of education. Through federal government support of the NBPTS and its humanistic vision of professional development, more students could have access to accomplished teachers that would encourage them to achieve

their fullest individual potential for the good of themselves and the betterment of society.

C. State Government Support for NBPTS Professional Development Initiatives

States have embraced professional development initiatives with as much variation as exists in their respective constitutions. The encouraging fact is that some states do recognize a need to pursue professional development through National Board Certification. Incentives can range from allowing an NBCT interstate license portability to a bevy of financial pay-incentives and certification process support.

North Carolina, the state with the largest number of NBCTs, observes a large state commitment to this professional development initiative. That state’s board of education has adopted the NBPTS’s Five Core Propositions into state educational policy. It allows for immediate licensure of NBCTs relocating to North Carolina, and incorporates the public purpose pedagogy of NBPTS into staff development and training programs. In addition, the state house has also approved legislation that provides for a twelve percent salary increase to NBCTs. These programs exemplify the support for education reform that can easily arise after codifying a strong commitment to the public purpose of education.

Despite these encouraging facts, it is also apparent that a great deal remains to be done in North Carolina. Of the state’s 115 school districts, only thirty-three offer assistance to those seeking professional development through NBPTS. Generally, these are the poorer rural

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150 See id.
151 See id.
152 See id.
153 See id.
154 See NBPTS, North Carolina, supra note 148.
counties that could benefit from an influx of accomplished teachers. Though the state articulates a right to education, without a specifically delineated public purpose of education, less affluent counties lack the incentive and authority to break from their standard funding formulas to support these programs.

The situation in North Carolina is similar in more affluent states like California. There, the state implemented an NBPTS Incentive Program that provides to NBCTs teaching in high priority schools for four consecutive years a $20,000 pay incentive, paid in four annual installments. However, of 1056 separate school districts in California, only seventy-one offer some form of additional salary incentives to teachers in non-priority schools or assistance with certification fees.

D. How the Public Purpose of Education Should Be Applied to Support Effective Professional Development Initiatives

This review of the history and current status of one of the country’s most distinguished professional development organizations indicates the ways that codifying a public purpose of education in federal and state legislative enactments can have positive effects on educational reform. First, codification will lend more credence to the need to professionalize the teaching practice. The public purpose requires higher teaching standards necessary for orchestrating individualized student learning communities. Professionalization becomes necessary to identify highly qualified and accomplished teachers and to service the codified public purpose of education. Second, professional development initiatives, such as National Board Certification, will receive greater support. These initiatives will act as the conduit for attaining a critical mass of professional teachers. Finally, the codification of a public purpose will set a clear standard of government commitment and parent expectations. If commitment is compromised, a lobbyist would have the benefit of reminding legislators of their codified legal obligation, and parents could more effectively petition the courts for remedy. This will give smaller and less affluent school systems more leverage in state legislatures when requesting funding for professional development initiatives.

Effective education reform will occur by embracing the codified public purpose that calls upon all children to be granted an equitable opportunity to investigate, locate, and develop the full compliment of their abilities so that they may be refined in exercise for the benefit of the human condition. The codified public purpose will focus judicial, legislative, and executive dialogue in support of reform initiatives, such as National Board Certification, causing the enthroned pedagogy of least common denominator education to fall.

With purposeful resolve, our schools will develop the character articulated by Prakash Nair:

\[\text{Student centered, not teacher centered; } \ldots \text{ personalized, not mass produced; } \ldots \text{ connected to real-world experiences, not classroom simulations; its communications technologies should cut across local, state, and national boundaries in real time; it should be a testing ground for new ideas and technologies; it should model and then build new social, economic, and democratic structures.}\]^{158}

These ideals are the fulfillment of the codified public purpose of education and the educational promised land to which the nation’s most humble reform efforts wished to deliver us.

**Conclusion: A Call for Codification**

In the 1980s, after years of waiting and wanting, the country’s eyes were opened to focus upon a mediocre education system. The nation was at risk and unsure of what to do. Many plans were put forth in the following twenty years. With so many theories hypothesized and tested, the United States truly became a nation prepared for what was ahead. Today, national policies, local programs, educational organizations, business collaborations, university support networks, learning communities, studies, standard measures, philanthropic billionaires, and even daytime television hosts dedicating shows for the benefit of education reform are everywhere. Yet the country is missing the catalyst to move from the event horizon and engage the future through a unified body of education reform initiatives. The catalyst missing is a unifying pronouncement by which we may together move all of our energies.

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^{158} Prakash Nair, *Getting Beyond the School as Temple*, Edutopia, July/Aug. 2006, at 28.
Herein lies the glory of codifying the public purpose of education. It will spawn collaboration by giving a common point of reference by which to resolve the most heated reform debates. It will present a common and clear expectation for all classrooms. American society is subconsciously embracing the definition already. In a piecemeal manner, one can observe the purpose contemplated in certain state constitutions, whispered in the dicta of lower court opinions, and hypothesized in the mission statements of reform organizations. The idea of a public purpose is heard faintly in the much maligned NCLB and its attempt to set a uniform standard for all of the nation’s children.

It will be incredibly difficult to codify the public purpose of education. Yet, now that the nation is truly prepared, it must move forward. The only way is by adopting a set definition for the public purpose of education while respecting that private purposes also exist. The public purpose of education is to be adopted not just in discussions, seminars, or whitepapers. It is to be drafted and adopted in policies and statutes. It is to be chiseled into state constitutions, argued in courthouses, and known in the nation’s collective heart. More than this, the public purpose of education must be applied now, to current education reform programs, so that we better understand which programs will more fervently lead us to the educational system desired throughout the country.

Despite the diminutive number of words comprising it, the proposed purpose has the power to transform public education and our known society simply because of where it is to be enshrined. The U.S. Constitution was born with ten amendments and Congress has given birth to seventeen more since 1789. The several states have a long history of amending their respective constitutions when the public demands that a state’s consciousness be preserved. One cannot avoid codifying a public purpose for education simply because the task was not done in the time of George Washington. Via the federal government or among the several state legislatures, by resolution or bill, the nation is ready to codify a public purpose of education. We are a nation ready. We must act now. We can no longer be guardians of the status quo.
## Appendix: Education as Specifically Enumerated in the Several State Constitutions' Declaration of Rights and Education Article Preamble and Establishment Clauses

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<th>State</th>
<th>Number of Enumerated Rights/Number of Articles</th>
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<th>Education is a Stand-Alone Article</th>
<th>Education is Specifically Mandated for All School-Age Citizens</th>
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<th>Vocational or Scientific Job Skill Development is an Education Goal</th>
<th>Development of a Student’s own Abilities is an Education Goal</th>
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’y’—Indicates the presence of a particular provision in a state constitution.

”*”—State constitutions consisting of two distinct parts—a declaration of the rights of the state’s citizenry and the plan or frame of government. For counting purposes the first part is counted as one article and the divisions of the second part are counted as separate articles.
ENSURING AN ADEQUATE EDUCATION: OPPORTUNITY TO LEARN, LAW, AND SOCIAL SCIENCE

DIANA PULLIN*

Abstract: The Massachusetts Education Reform Act of 1993 and the decisions of the State’s highest court interpreting the state constitution’s education clause are benchmarks in efforts at law-based education reform. This article discusses the implications of legislative and judicial mandates concerning the provision of education and the extent to which these mandates fail to ensure a fair and meaningful opportunity to learn for all students. It contrasts the legal mandates with evidence from social science literature concerning the conditions that must exist in order to create appropriate learning opportunities, particularly for the most at-risk student populations. It concludes that law can play a role in creating the conditions in local schools for implementing meaningful education reform, but that the present statutory requirements are insufficient and judicial deference to the legislative branch may result in ongoing achievement deficits for the State’s most vulnerable students.

Introduction

Since the middle of the twentieth century, advocates have turned to federal and state courts in efforts to provide full and fair educational opportunities for all the nation’s students. During the same period, state legislatures and the U.S. Congress adopted a voluminous number of statutory incentives and prescriptions concerning the provision of educational services. All these efforts were marked by an ongoing and still unresolved series of public policy disputes over the role

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of education in our society; the relationships between local communities, states, and the federal government; and the balance of powers between the legislative and judicial branches of governments.²

The efforts at law-based education reform have also been continuously marked by a failure to adequately marry legal claims, judicial decisions, and statutory provisions with the best available education and social science evidence and theory concerning the provision of educational opportunity.³ Law-based education reform initiatives designed to promote equitable and adequate education fail to sufficiently address the factors necessary to provide meaningful opportunities to learn at the classroom level.⁴ As a result, the utilization of law as a tool for education reform has to date failed to achieve meaningful educational attainment by all students.

One set of public policy commentators has suggested that the fundamental and enduring public policy disputes in education can be summarized as:

- Who should go to school?
- What are the purposes of education?
- What should be taught?
- Who should decide issues of educational policy?
- Who should pay for education?⁵

However, one question missing from efforts to resolve education policy controversies through law is: How do we ensure every student receives a fair and effective opportunity to learn? Social science research has made recent strides in identifying the models of teaching and characteristics of learning that provide the conditions necessary for effective learning opportunities at the school level. In addition, recent empirical studies have demonstrated the role that law can play

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² See Pullin, supra note 1, at 3–4.
³ See Mary Kennedy, Infusing Educational Decision Making with Research, in HANDBOOK OF EDUCATIONAL POLICY, supra note 1, at 53, 55 (noting that evidence from systematic research and evaluation has not contributed to education policy); see also Pullin, supra note 1, at 5–6, 20 (describing the proliferation of legal claims and judicial decisions in the past fifty years as representative of society’s ongoing struggle to define access to educational opportunity).
⁴ See Pullin, supra note 1, at 20–22 (noting that courts have struggled to define the adequacy and sufficiency of educational opportunities).
in promoting educational reform and attaining educational opportunity. Legal attempts at education reform will succeed only to the extent that legal requirements and remedies effectively address the critical social science factors associated with improving educational opportunities for all students.

Since the landmark decision Brown v. Board of Education (Brown I), education policy disputes and education law initiatives have often focused on students most at risk of failure in our schools: racial and ethnic minority children, children from low-income families and low-wealth communities, children with disabilities, and children with limited English proficiency. Our system of judge-made and legislated education law has struggled with issues of educational governance, targeted funding, specialized programs, educator quality, the components of instructional programs, and institutional and individual accountability for educational attainment. Yet, after over fifty years of law-based education reform, we entered a new century facing continued failure to educate all our children successfully. The role of law in promoting education reform and the provision of adequate educational opportunity has had mixed success. Past lawsuits and legislation addressing the provision of educational opportunity have missed opportunities to address significantly the fundamental and highly complex issues associated with providing fair and meaningful opportunities to learn for all students, particularly those most at risk of educational failure.

I. The Courts and an Opportunity to Learn

The first significant elementary and secondary school education case in federal court was also the first case to address the issue of an opportunity to learn. In Brown I, the U.S. Supreme Court declared:

[E]ducation is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate

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6 See discussion infra Part IV.
8 See, e.g., Hochschild & Scovronick, supra note 5, at ix–x (“[T]he great flaw in the American public school system is its systematic and pervasive denial to poor (and disproportionately non-white) children of the chance to get a good education.”).
9 See Pullin, supra note 1, at 3–7.
10 Id. at 25–26.
our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.\footnote{Id. at 493.}

In determining that racially separate schools were inherently unequal, the Court engaged in one of the judiciary’s earliest forays into the use of social science evidence to evaluate educational legal arguments.\footnote{Id. at 494 n.11. Footnote eleven in Brown I refers to the works of various social scientists including Effect of Prejudice and Discrimination on Personality Development, by Kenneth B. Clark, and The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion, by Max Deutscher and Isidor Chein.} Psychological studies demonstrating pervasive perceptions of inferiority among African-American students provided social science evidence to support the Court’s determination that separate schools were inherently unequal.\footnote{Id. at 493–95.}

In Brown v. Board of Education (Brown II),\footnote{Brown v. Bd. of Educ. (Brown II), 349 U.S. 294 (1955).} decided a year after Brown I, the Court mandated that segregated schools be dismantled “with all deliberate speed.”\footnote{Id. at 301.} In these early cases, the Supreme Court’s concept of an opportunity to learn was based on a fairly simple theory: schools that educated African-American children with white children provided sufficient opportunities to learn.\footnote{See id. at 298; Brown I, 347 U.S. at 493–94 (1954). In Brown I, the Court stated: “Does segregation of children in public schools solely on the basis of race . . . deprive the children of the minority group of equal educational opportunities? We believe that it does.” 347 U.S. at 493.} Fifty years of political and legal struggle followed.\footnote{See generally Yudof et al., supra note 1, at 469–672 (examining extensively the law of equal educational opportunity from Brown I forward).} Strategies for creating equal educational opportunities for minority children grew more sophisticated and varied, from busing to building and program enhancement to affirmative ac-
tion in teacher hiring. After over fifty years of desegregation litigation, courts have mostly ended their jurisdiction over school desegregation cases, even though commentators argue that the nation’s schools are becoming more segregated than ever and that the achievement gap between white and minority students persists.

In addition to the more traditional types of school desegregation cases designed to end dual school systems, enrollment patterns, and staffing issues that have isolated racial minorities, civil rights advocates have also utilized the courts to challenge education practices that have a disparate impact on minority students as well as an unfair impact on all students. These legal challenges have addressed not only traditional practices, such as the provision of special education or school disciplinary sanctions, but also education reform initiatives.

One popular approach to education reform, adopted by both Massachusetts and the federal government, is the use of high-stakes tests to drive education reform. Litigation has successfully challenged the use of some standardized achievement tests as a requirement for high school graduation. In the leading case in this area, federal appellate courts ruled that state legislatures and public education officials may use tests to determine graduation status but must provide an opportunity to learn the content covered on the test, a requirement particularly important for African-American students previously forced to attend

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19 See id. at 311, 496.
22 See, e.g., Debra P. v. Turlington (Debra I), 644 F.2d 397 (5th Cir. 1981) (reviewing a challenge to a Florida school reform plan), remanded to 564 F. Supp. 177 (M.D. Fla. 1983), aff’d sub nom. Debra P. ex rel Irene P. v. Turlington (Debra II), 730 F.2d.1405 (11th Cir. 1984).
23 See Mass. Gen. Laws ch. 69, § 1D (2004); High Stakes Testing, supra note 21, at 13–14; see also text infra accompanying notes 34–37.
24 See, e.g., Debra I, 644 F.2d 397; Debra II, 730 F.2d 1405.
segregated schools. The courts based their decisions on the Equal Protection and Due Process clauses of the Fourteenth Amendment. Eventually, schools were allowed to proceed with testing as a high school graduation requirement on the condition that in the time after the high-stakes testing requirements were announced and desegregation was implemented, there was evidence that the test covered curricular materials students were exposed to in high school and that remediation was provided to prepare students for taking or retaking the test.

II. LEGISLATING LEARNING OPPORTUNITIES

Courts have recognized obligations under the Equal Protection and Due Process Clauses of the U.S. Constitution to ensure that students have an opportunity to learn. However, courts have not fully articulated what kinds of actions schools must take in order to provide that opportunity. Legislation at both the federal and state levels has articulated additional requirements for providing learning opportunities. Examining this legislation provides insight into what legislative policymakers believe is required to afford our children opportunities to learn.

25 Debra I, 644 F.2d at 404; Debra II, 730 F.2d at 1407, 1414–17; see John R. Munich, High-Stakes Testing: The Next Round of Finance Litigation, 18 ME. BAR J. 202, 204 (2003) (noting that the Debra I decision “set the standards that still govern suits over such high-stakes exams”); see also High Stakes Testing, supra note 21, at 21 (stating that the Debra holdings offer “an especially clear illustration of a crucial distinction between appropriate and inappropriate test use”).

26 Debra I, 644 F.2d at 402; Debra II, 730 F.2d at 1406–07.

27 See Debra II, 730 F.2d at 1409, 1415 n.15. Similar decisions on behalf of students with limited English proficiency have been based on the federal Equal Educational Opportunities Act (EEOA). 20 U.S.C. §§ 1701–1758 (2000); see Flores v. Arizona, 405 F. Supp. 2d 1112, 1120 (D. Ariz. 2005) (holding that state failure to provide sufficient funding and programs to English language learners denied these students an equal educational opportunity to pass the state graduation test in violation of EEOA), vacated on other grounds sub nom. Flores v. Rzeslawski, No. 06–15378, 2006 WL 2460741 (9th Cir. Aug. 23, 2006).

28 See, e.g., Debra I, 644 F.2d at 402.

29 See id.

A. The No Child Left Behind Act of 2001

The new century began with a remarkable bipartisan agreement to implement the No Child Left Behind Act of 2001 (NCLB). NCLB is the largest piece of federal education legislation ever implemented, and it sought to increase federal funding to state and local educational efforts. Additionally, NCLB imposes substantial conditions on receipt of federal aid by elementary and secondary schools. NCLB marks a major change in the federal role in education and a widespread commitment to test-driven, standards-based education reform. States must comply with NCLB mandates or lose support from the largest source of federal funding for elementary and secondary education. NCLB requires that states define performance standards for districts and hold them accountable for compliance. Local districts and schools must participate in annual student testing and demonstrate “adequate yearly progress” (AYP) in improving student test performance. Parents are given the choice to send their child to another school if their current school is unable to meet AYP requirements. NCLB also requires states to ensure that all teachers are “highly qualified,” which is often determined by teacher competency testing. Accountability, parental choice intended to create free-market competition, and teacher quality provisions of the statute represent an effort to improve student performance nationwide.

Among the conditions placed on NCLB funding are requirements that educational programs and activities endorsed in the statute be just-

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33 Andrew Rudalevige, No Child Left Behind: Forging a Congressional Compromise, in No Child Left Behind? 23, 26 (Paul E. Peterson & Martin R. West eds., 2003).
36 Id. § 6311(b).
37 Id. § 6311(b) (2), (b) (3).
38 Id. § 6316(b)(1) (A), (E).
39 Id. § 6319(a); see Thomas & Brady, supra note 34, at 56.
ified by scientific evidence. These requirements that programs and activities funded under NCLB be evidence-based represent a heightened understanding of the meaning of an opportunity to learn and the role of social science research in informing law-based educational approaches.

It remains to be seen whether recent legislative and judicial initiatives will narrow the achievement gap, ensure meaningful learning opportunities, incorporate ongoing opportunities to improve the qualities and capabilities of the education professions for continuous improvement, and utilize policy tools that maximize high quality responses by educators, students, families at the ground level.

B. Massachusetts Education Reform Act of 1993

Prior to the enactment of NCLB, many states, on their own initiative, legislated education reforms that focused on content standards and performance benchmarks to drive local educational accountability and improvement. Massachusetts offers one useful illustration of the impact of judicial and legislative activity on the provision of educational opportunity. Eight years prior to the passage of NCLB, Massachusetts began allocating billions of dollars in new funding for education pur-

\[\textit{See id.} \S 6316(b) (3)(A)(i) \text{ (requiring low-performing local districts that receive federal funds to develop plans for school improvement that incorporate “strategies based on scientifically based research that will strengthen the core academic subjects in the school and address the specific academic issues that caused the school [to be low-performing]”); id.} \S 6316(b) (7)(C)(iv)(I)–(II) \text{ (requiring any school failing to make AYP to take, inter alia, corrective action, including replacing “school staff who are relevant to the failure to make adequate yearly progress” and “providing appropriate professional development . . . that is based on scientifically based research and offers substantial promise of improving educational achievement for low-achieving students”); id.} \S 6511 \text{ (providing “financial incentives for schools to develop comprehensive school reforms, based upon scientifically based research”). The statute sets forth a definition for the term “scientifically based research” at section 7801(37). In many respects, these statutory standards parallel rules of evidence adopted by the federal courts. See Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 587 (1993) (creating new standard that scientific evidence, to be admissible, must be relevant and reliable as determined according to a multi-part test); Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 141 (1999) (expanding application of } Daubert \text{ standard to all expert testimony). Courts in many states have now adopted similar standards. See, e.g., Canavan’s Case, 733 N.E.2d 1042, 1049–50 (Mass. 2000); Commonwealth v. Lanigan, 641 N.E.2d 1342, 1349 (Mass. 1994).} \]

\[\textit{See Thomas & Brady, } \textit{supra note 34, at 56–57.} \]

\[\textit{MERA, Mass. Gen. Laws chs. 69–71 (2004); High Stakes Testing, } \textit{supra note 21, at 15; Susan H. Fuhrman, \textit{Introduction to From the Capitol to the Classroom: Standards-Based Reform in the States} 1, 1 (Susan H. Fuhrman ed., 2001); Munich, } \textit{supra note 25, at 202.} \]
suant to the Massachusetts Education Reform Act of 1993 (MERA). At the same time, the legislature set forth a massive set of requirements that restructured school finance, redefined the provision of education at the local level, established new rules for educator qualification and employment, and set up a standards-driven, test-based system of individual and institutional accountability. This standards-driven system required, among other things, that state education officials establish curriculum frameworks for schools and institute testing to assess progress in achieving those curriculum standards. Schools were required to reach benchmarks of student performance or they would be labeled underperforming and possibly reconstituted. In many respects, this state legislation foreshadowed the requirements enacted later in NCLB. The State’s years of implementation of MERA also highlight some of the problems that will arise across the country in NCLB implementation.

Implementation of MERA and increased state funding for schools had an impact on the opportunity to learn provided to the State’s students. The extent and depth of the impact became a source of public policy, educational, and legal disputes. After over ten years of education reform implementation in Massachusetts, one source of evidence on the condition of the State’s schools is data from the State’s Massachusetts Comprehensive Assessment System (MCAS) exams. While test scores have improved over time, in the spring of 2005, eleven per-

46 See High Stakes Testing, supra note 21, at 36, 37.
47 See Mass. Gen. Laws ch. 69, § 1J.
48 Compare 20 U.S.C.A. § 6316(b)(7)–(8) (West 2003) (providing for school “restructuring” in the case of a school that fails to make AYP for a year after being identified as needing “corrective action”), with Mass. Gen. Laws ch. 69, §§ 1J–1K (providing that underperforming schools failing to demonstrate “significant improvement” be deemed “chronically under-performing” and reorganized or placed into receivership).
50 Caution should be exercised in relying entirely on standardized test scores as evidence of educational improvement. There are many considerations that should be taken into account, including the validity and reliability of the tests themselves, statistical anomalies concerning test scores, instructional practices, and the nature of school-level responses to external legal and policy requirements. See generally USES AND MISUSES OF DATA FOR EDUCATIONAL ACCOUNTABILITY AND IMPROVEMENT (Joan L. Herman & Edward H. Haertel eds., 2005).
percent of tenth graders performed at the failing level on the English Language Arts test, while fifteen percent of those students performed at the failing level on the Mathematics test, though both tests are required for high school graduation.\textsuperscript{51} The MCAS results also indicated ongoing significant achievement gaps.\textsuperscript{52} Limited English Proficiency (LEP) students, students with disabilities and racial and ethnic minority students continue to fall behind, while white students improve at faster rates than African-American and Hispanic students.\textsuperscript{53}

Test performance on the MCAS continues to be low for large numbers of disadvantaged students.\textsuperscript{54} In Boston public schools, while overall performance on the MCAS has improved, the gap in achievement between African-American and Hispanic students and other elementary students has not narrowed since the MCAS exams were first given in 1998.\textsuperscript{55} The most recent state-wide MCAS results show that, among third graders, overall performance among all students on the reading test has remained flat for the past two years.\textsuperscript{56}

What the Massachusetts Commissioner of Education referred to as “the usual achievement gap” persists.\textsuperscript{57} Overall, ninety-seven percent of white students and ninety-three percent of Asian students passed the reading exam.\textsuperscript{58} However, only seventy-four percent of LEP students, eighty-three percent of Hispanic students, eighty-five percent of students with disabilities, and eighty-seven percent of African-American students passed the test.\textsuperscript{59} The Massachusetts Department of Education further reported:

The performance gap was especially evident when looking at the percentage of students who scored Proficient, the top category: 39 percent of African American students scored Proficient, as did 63 percent of Asians, 32 percent of Hispanic students, 57 percent of Native Americans, 71 percent of white students.


\textsuperscript{52} Id. at 2.

\textsuperscript{53} Id. LEP students are students for whom English is not their first language. Id. at 10.

\textsuperscript{54} Id. at 1–2.

\textsuperscript{55} Tracy Jan, Latinos, Blacks Lag on MCAS, BOSTON GLOBE, Jan. 19, 2006, at B1.


\textsuperscript{57} Id.

\textsuperscript{58} Id.

\textsuperscript{59} Id.
students, 37 percent of students with disabilities and 24 percent of limited English proficient students.\textsuperscript{60}

In the mandatory report on progress that the State provided to the federal government in response to NCLB requirements, Massachusetts reported that forty-nine percent of the Commonwealth’s schools have not improved test scores of black students and forty-six percent of schools did not make gains in the scores of their low-income students.\textsuperscript{61}

In addition to MCAS scores, other sources of evidence provide information about the Commonwealth’s schools following over ten years of MERA implementation.\textsuperscript{62} For instance, performance on the Scholastic Aptitude Test (SAT), used for college admissions and financial aid determinations, reflects disparities in performance between students from low property wealth districts as opposed to those from high property wealth districts.\textsuperscript{63} In many low-wealth districts, SAT scores have actually gone down since the implementation of MERA.\textsuperscript{64}

The U.S. Bureau of the Census reports an ongoing gap between whites and blacks over the age of twenty-five in Massachusetts who have attained a high school diploma.\textsuperscript{65} That gap shrank, but just barely, between 1990 and 2000.\textsuperscript{66} In 2000, almost a quarter of the State’s black population over the age of twenty-five had not even attained a high school diploma.\textsuperscript{67} In the post-MERA environment of high-stakes testing and accountability, reports of increased dropouts from Massachusetts’s schools suggest that further data regarding these gaps may look even more discouraging.\textsuperscript{68} Clearly, the State still confronts many difficulties in its quest to provide sufficient opportunities for all students to learn.

\textsuperscript{60} Id.
\textsuperscript{63} Id. at *122.
\textsuperscript{64} See id. at *123–24.
\textsuperscript{66} Id.
\textsuperscript{67} Id.
III. Adequacy Litigation in Massachusetts

A. The McDuffy Case

The passage of MERA in 1993 was in part a response to a decision by the State’s highest court asserting that the Commonwealth had failed to meet its state constitutional obligations to educate its citizens. In a clause commonly known as the Education Clause, the Massachusetts Constitution declares:

Wisdom, and knowledge, as well as virtue, diffused generally among the body of the people, being necessary for the preservation of their rights and liberties; and as these depend on spreading the opportunities and advantages of education in the various parts of the country, and among the different orders of the people, it shall be the duty of legislatures and magistrates, in all future periods of this commonwealth, to cherish the interests of literature and the sciences, and all . . . public schools and grammar schools in the towns . . . .

Massachusetts is one of many states in which state constitutional provisions regarding elementary and secondary education have been used to challenge the inequities in the system of allocating state aid to local school districts. Plaintiffs in many states have argued that these inequities in funding make it difficult for low property wealth districts to provide an opportunity to learn. The use of state constitutional provisions to challenge the quality of educational opportunities was a reaction to the U.S. Supreme Court’s 1973 decision San Antonio Independent School District v. Rodriguez, which held that there is no right to education protected under the Equal Protection Clause of the U.S. Constitution. The resulting wave of state court cases asserted denials of state

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72 See Minorini & Sugarman, School Finance Litigation, supra note 71, at 35.
73 See 411 U.S. 1, 55 (1973).
equal protection guarantees in the provision of education as required by their respective state constitutions; though plaintiffs had mixed success in challenging these decisions.\textsuperscript{74} The next wave of state cases asserted that state constitutional provisions on education entitled students to a particular level or quality of educational opportunity, deemed “suitable,” “thorough and efficient,” or “adequate” depending upon the particular language in a state’s constitution.\textsuperscript{75} Plaintiffs across the country had greater success once they turned to this type of legal claim and focused on providing an adequate education and determining how to calculate and efficiently allocate funds in support of public education.\textsuperscript{76} In Massachusetts, the unique post-Colonial constitutional terminology established the duty to “cherish” education.\textsuperscript{77} The first issue in the Massachusetts litigation was to determine the meaning of the term “cherish” and how that terminology related to the provision of education.\textsuperscript{78}

In \textit{McDuffy v. Secretary of the Executive Office of Education}, plaintiffs from low property wealth school districts argued that the state constitutional provision on education required the Commonwealth to provide every young person in the Commonwealth with equal access to an adequate education regardless of the wealth of their district.\textsuperscript{79} Following a remarkable set of stipulations in which the State’s highest educational officials and local school superintendents agreed they were not providing adequate education due to financial constraints, the Massachusetts Supreme Judicial Court determined in 1993 that there was a constitutional duty to provide education.\textsuperscript{80} Furthermore, the court declared that the State’s elected officials had failed to meet their obligations under the Massachusetts Constitution to fund and operate schools capable of providing an adequate education in order to prepare students to function successfully in society.\textsuperscript{81}

In \textit{McDuffy}, the court described the constitutional obligation as the duty to provide funding sufficient to prepare educated citizens.\textsuperscript{82} The

\begin{itemize}
\item \textsuperscript{74} See Saiger, \textit{supra} note 71, at 1709.
\item \textsuperscript{75} See id.
\item \textsuperscript{76} Allan Odden et al., \textit{Rethinking the Finance System for Improved Student Achievement}, in \textit{American Educational Governance on Trial}, 82, 83–84 (William Lowe Boyd & Debra Miretzky eds., 2003).
\item \textsuperscript{77} See Mass. Const. pt. 2, ch. V, § II.
\item \textsuperscript{78} See \textit{McDuffy v. Sec’y of Exec. Office of Educ.}, 615 N.E.2d 516, 523–24 (Mass. 1993).
\item \textsuperscript{79} Id. at 523, 524.
\item \textsuperscript{80} Id. at 553–55.
\item \textsuperscript{81} Id. at 553–54.
\item \textsuperscript{82} Id. at 555.
\end{itemize}
court did not establish criteria for providing an opportunity to learn, but instead described the outcomes of an adequate education:

An educated child must possess “at least the seven following capabilities: (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 students 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 level 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.”

The court deferred to the legislature to determine how to proceed. The same week, the legislature passed MERA and public officials and state and local educators began implementation of the statute.

B. The Hancock Case

Following six years of implementation of MERA, plaintiffs re-opened the original McDuffy litigation. The case, recaptioned Hancock v. Driscoll, examined four low property wealth “focus districts,” contrasting them with three high property wealth “comparison districts.” Plaintiffs argued that the Commonwealth was still failing to meet its state constitutional obligation to provide adequate elementary and secondary education. The Hancock case was referred to a trial court

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83 McDuffy, 615 N.E.2d at 554 (quoting Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 212 (Ky. 1989)).
84 Id. at 554 n.92.
86 Hancock Report, supra note 62, at *4. The four focus districts were Brockton, Lowell, Springfield, and Winchendon. Id. The comparison districts were Brookline, Concord/Carlisle, and Wellesley. Id.
87 Id. at *1.
judge to report proposed findings and conclusions to the Supreme Judicial Court.\textsuperscript{88}

1. The Proposed Findings in \textit{Hancock}

Few would argue that judges and lawmakers in Massachusetts were not well-intending or that the MERA requirements have not had a widespread impact on schools. Yet Judge Botsford of the state trial court reported to the Supreme Judicial Court in 2004 that she found a deep and widespread failure to educate many disadvantaged students in low-wealth school districts.\textsuperscript{89} She indicated that this failure to meet the constitutional obligations to educate was based on several factors: state funding of education, curriculum, educator quality, test scores and other indicators of educational success, and the nature of the constitutional duty to educate.\textsuperscript{90}

a. \textit{Funding of Education}

In 1993, the \textit{McDuffy} court determined that inadequacies in state funding for low property wealth school districts unconstitutionally impaired access to educational opportunity for students in those districts.\textsuperscript{91} However, the court explicitly refused to define or mandate a particular level of state funding for education, leaving the determination to the legislature.\textsuperscript{92} When the legislature adopted MERA after the \textit{McDuffy} decision, it adopted a new formula for allocating state educational aid.\textsuperscript{93} Along with other educational requirements, MERA increased appropriations, which resulted in an infusion of billions of dollars in new funding for Massachusetts public elementary and secondary schools in low property wealth districts.\textsuperscript{94} These changes were substantial and the impact on low-wealth districts was considerable.\textsuperscript{95}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{88} \textit{Id.}; Hancock v. Comm’r of Educ., 822 N.E.2d 1134, 1145 (Mass. 2005).
\item \textsuperscript{89} Hancock Report, \textit{supra} note 62, at *143. At the time of Judge Botsford’s findings, MERA had been in effect for over ten years. \textit{Id.} at *8.
\item \textsuperscript{90} \textit{Id.} at *143, *145.
\item \textsuperscript{91} See \textit{McDuffy} v. Sec’y of Exec. Office of Educ., 615 N.E.2d 516, 552 (Mass. 1993).
\item \textsuperscript{92} \textit{Id.} at 519.
\item \textsuperscript{93} See MASS. GEN. LAWS ch. 70 (2004); Hancock Report, \textit{supra} note 62, at *5.
\item \textsuperscript{94} See Hancock Report, \textit{supra} note 62, at *8, *143.
\item \textsuperscript{95} See \textit{id.} at *143. For example, Judge Botsford noted that, as a result of MERA, “Winchendon’s actual net school spending . . . almost tripled [between 1993 and 2003], from approximately $5.78 million to almost $14 million, while its enrollment over this period of time increased but certainly did not triple.” \textit{Id.} at *95.
\end{itemize}
\end{footnotesize}
However, even with the infusion of substantial new state resources into low-wealth districts as a result of MERA, Judge Botsford found that high-performing districts spend, on average, 130% of the state-mandated foundation, or minimum budget, and almost 200% of the foundation budget for teacher salaries after MERA’s funding increases.\(^96\) In contrast, between 2001 and 2003, the four focus districts were found to have spent just slightly more than 100% of the state-mandated foundation budget, and “teaching salary expenditures were generally much closer to the amount . . . allocated . . . in the formula.”\(^97\) Since the passage of MERA, pressures on the state budget due to the economic climate and a state tax cut actually resulted in overall reductions in state aid to education.\(^98\) Some of those programs that experienced funding reductions were particularly critical to education reform efforts: class size reduction grants, support for remedial education for students failing the MCAS, and early intervention and early childhood services.\(^99\) After MERA passed, there were no legislative adjustments of the school finance formula, which determined the minimum costs of educating students, to take into account the cost increases associated with the new curriculum, testing, and other programs added as a result of MERA.\(^100\)

\(^{96}\) Id. at *123 & n.156, *127 & n.164.
\(^{97}\) See id. at *122–23, *127 n.164.
\(^{99}\) See Hancock Report, supra note 62, at *127–28. Judge Botsford reported: “The high water mark of State funding for public school education programs was in FY02. The next two fiscal years saw reductions, and those in FY04 were substantial.” Id. at *128. In addition to the reductions in state aid through the state’s foundation formula for funding local schools,

several significant grant programs were drastically cut in FY04:

- Class size reduction grants . . . were eliminated entirely . . . ;
- MCAS remediation grants were reduced from $50 million in both FY03 and FY02 to $10 million for FY04 . . . ;
- Grants for public school preschool and other early childhood education programs were also greatly cut, for the third year in a row. Thus these grant funds went from a high of $114.5 million in FY01 to $103.4 million in FY02, to $94.6 million in FY03, and finally, down to $74.6 million in FY04;
- Early literacy grants for early reading programs were also cut by two-thirds, from $18.3 million in FY03 to $3.8 million in FY04.

\(^{100}\) See id. at *126.
b. School Curriculum

One of the primary components of the MERA reform in 1993 was the requirement that the State Board of Education, in consultation with educators and the public, write a series of curriculum frameworks to define the essential knowledge necessary for elementary and secondary students. These frameworks were to address each of the content areas of mathematics, English and language arts, science, and social studies. Additionally, these frameworks were to define the coverage of the MCAS examinations, though to date, only the mathematics and English/language arts tests have been fully implemented. Judge Botsford found that the MCAS and its accompanying curriculum framework standards were regarded by many national education commentators as among the most ambitious in the country, and she recognized that the frameworks corresponded to the seven McDuffy standards.

The MERA framers hoped that the formulation of curriculum frameworks, coupled with testing requirements, would cause local schools and educators to behave differently to achieve educational reform. However, Judge Botsford’s proposed findings in the Hancock case indicate that the legislature’s model of reform did not necessarily work because several low-wealth districts had great difficulty implementing the curriculum frameworks. For example, one low-wealth district was cited for using an outdated elementary school reading series that neither met NCLB requirements for “scientifically-based curricula” nor matched the district’s curriculum goals. In another example from the low property wealth district of Springfield, the local mathematics curriculum was aligned with the state curriculum frameworks, but Judge Botsford found that many math teachers in the district did not have the experience and skills to teach the inquiry and problem solving approaches mandated by those frameworks.

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102 Id.
103 Id.; see Hancock Report, supra note 62, at *8.
104 See Hancock Report, supra note 62, at *17 n.37, *18–20 (citing testimony of expert witnesses at trial).
105 See Mass. Gen. Laws ch. 69, §§ 1D, 1E.
107 Id. at *61; see discussion supra Part III.B.1.b.
c. Educator Quality

Both NCLB and MERA recognize that improving educator quality is an essential component of education reform. The Commonwealth’s Commissioner of Education likewise described teacher quality as the critical variable in improving student achievement. While both statutes set out new conditions for ensuring teacher quality, researchers have also described the characteristics of teachers sufficiently prepared to educate students. For example, one of the nation’s preeminent researchers on teacher quality, Dr. Linda Darling-Hammond, described the criteria for judging teacher quality as the “teacher’s verbal ability, level of substantive knowledge in the field he or she teaches, capacity to make content available to students at different levels, and knowledge of teaching methods.”

Judge Botsford also discussed the importance of teacher quality, particularly for the most high risk students. She found that hiring and retaining qualified educators in low property wealth districts is especially challenging. In the four low property wealth districts profiled in the Hancock case, a significant proportion of both teachers and administrators were not certified or licensed by the State. In Winchendon, for example, one-third of the district’s administrators (three of nine) were not licensed, and approximately 11% of its teachers were not licensed or were teaching out of field in the fall of 2002. Also, 75% of seventh and eighth grade math teachers and approximately 20% of ninth through twelfth grade math teachers in Winchendon lacked appropriate certification in 2001. In Brockton, around 10%

109 Id. at *134 (citing testimony of Dr. David Driscoll).
111 Hancock Report, supra note 62, at *134.
112 Id. (citing testimony of Dr. Linda Darling-Hammond).
113 Id. at *135.
114 Id.
115 Id. at *134. Note that educators are not technically licensed by states, but are instead certified. Certification does not consist of the exclusive ability to provide the service of educating, since states like Massachusetts do not require state credentials of any sort for individuals to teach in private schools or to engage in homeschooling. See Linda Darling-Hammond, Standard Setting in Teaching: Changes in Licensing, Certification, and Assessment, in HANDBOOK OF RESEARCH ON TEACHING 751, 751–52 (Virginia Richardson ed., 4th ed. 2001) (reviewing changing standards for teacher education, licensing, and certification); Diana Pullin, Key Questions in Implementing Teacher Testing and Licensing, 30 J.L. & EDUC. 383, 395–97 (2001) (distinguishing teacher certification from teacher licensing).
116 Hancock Report, supra note 62, at *134 n.184.
117 Id. at *108.
of teachers and 12% of administrators were not licensed at all.\textsuperscript{118} At the junior high school level, 50% of the junior high school math teachers were not appropriately certified in 2001.\textsuperscript{119} By 2002 to 2003, 35% of the math teachers were still not appropriately certified in mathematics.\textsuperscript{120} Only 32% of Lowell’s middle school math teachers and only 47% of its middle school social studies teachers were certified in their respective fields.\textsuperscript{121} In 2002, Springfield employed 2639 teachers, 12% of whom were not licensed at all.\textsuperscript{122}

Judge Botsford highlighted the essential role qualified administrators (particularly school principals) can play in providing fair and meaningful opportunities to learn.\textsuperscript{123} She discussed the considerable variability in school quality that can occur within a school district.\textsuperscript{124} For example, she noted that the Springfield school district had so many low-performing schools that it was, overall, a low-performing district.\textsuperscript{125} However, Springfield also had some of the highest-performing individual urban schools in Massachusetts.\textsuperscript{126} She found that “[s]chool leadership and the capacity of the principal and faculty to instill a culture of student achievement were important reasons cited by the superintendent for the stark performance differences seen among these two groups of schools.”\textsuperscript{127} Clearly, Judge Botsford understood the importance of educator quality in ensuring access to meaningful educational opportunity.\textsuperscript{128}

d. Outcomes Measures for Education Reform

While Judge Botsford’s discussion of curriculum and educator qualifications demonstrated a more nuanced understanding of the complexities associated with providing a fair and meaningful opportunity to learn, she seemed to accept at face value the use of MCAS scores as evidence of the success of MERA’s education reforms.\textsuperscript{129} In her report, Judge Botsford determined that MCAS test score results repre-

\textsuperscript{118} Id. at *134 n.184.
\textsuperscript{119} Id. at *42.
\textsuperscript{120} Id.
\textsuperscript{121} Hancock Report, supra note 62, at *62, *64.
\textsuperscript{122} Id. at *90.
\textsuperscript{123} See id. at *27.
\textsuperscript{124} See id. (noting “enormous variation” in school quality within a particular district).
\textsuperscript{125} Id. at *32.
\textsuperscript{126} Hancock Report, supra note 62, at *27.
\textsuperscript{127} Id.
\textsuperscript{128} See id. at *134–35.
\textsuperscript{129} See id. at *113.
sented an acceptable means for determining school and district performance, a basis for determining whether education programs were minimally adequate. Overall, Judge Botsford reported that MCAS scores in the focus low-wealth districts improved from 2002 to 2003. But at the same time, she used MCAS scores to demonstrate problems with the provision of adequate education in the low-wealth districts.

As one example of the use of MCAS scores to assess problems in the provision of an adequate education in the Winchendon district, Judge Botsford noted that the district’s MCAS scores were among the lowest in the state. Another method for assessing the results of test-based education reform is to review the rates at which students drop out of school. Judge Botsford found that the dropout rates for low-wealth districts were higher than rates for the state as a whole.

130 Id. Since the only MCAS tests being given at the time were in mathematics and English/language arts, there was no test score data on the other subjects covered by the curriculum frameworks. See id. Judge Botsford also noted that the determination of a “passing” score on MCAS was actually based upon a student attaining a score at the level of “needs improvement” rather than “proficient.” Id.

131 Hancock Report, supra note 62, at *113.

132 Id. at *37. Judge Botsford stated:

[T]he MCAS scores for Winchendon are very low, particularly for a non-urban system with a population that includes almost no minority or LEP students. The [English language arts] scores show very little improvement over the years. In 2003, 64% of grade 10 students scored in the Needs Improvement or Failing categories on the MCAS English language arts test, and 62% of grade 4 students did so. In math, the actual failure rate went down significantly between 1998 and 2003, but in 2003, 73% of tenth graders still scored in the combined Needs Improvement or Failing category, and the same was true of fourth graders. In 2003, 83% of the grade 8 students were in the Needs Improvement or Warning/Failing category on the science MCAS test, and 56% of fifth graders were in the same predicament. In history for eighth grade students in 2002, 95% scored in the Needs Improvement or Warning/Failing categories. As is true in the other three focus districts, there are substantial gaps between the MCAS performance of special education or low income students and that of regular education students.

Id. The Judge noted that in the previous year:

52.5% of Winchendon’s students on the [English language arts] test and 79.8% of the students on the math test, scored in the Needs Improvement and Warning/Failing categories. These scores were 12.3 percentage points in [English language arts] and 19.4 percentage points in math more than the State average percentages for Needs Improvement and Warning/Failing.

Id. at *111.

133 Id. at *113, *115–16.

134 Id. at *116. Judge Botsford cited the State’s own data for each district and concluded:
Though Judge Botsford recognized that some improvements could be identified, she focused on the key issue framed by the state defendants in the case. State defendants asked, “Do the instructional programs provided by the district’s schools in each core subject area, at each grade level, meet the educational needs of all students and result in steadily improving student achievement?” Her response:

[N]o. While it is certainly true that MCAS scores in the focus districts have improved, these four districts’ scores are still much lower than the State average, not to speak of the comparison districts. As for the other criteria discussed—dropout data, retention rates, graduation rates, SAT scores, post-secondary school plans—with few exceptions, the four focus districts have not improved at all, and if one concentrates particularly on the last five years, when one would expect at least to begin seeing the impact of [M]ERA investments, there are almost no exceptions.

Judge Botsford’s report noted the gains in MCAS scores in low-wealth districts, yet looked at the larger picture, including state MCAS averages and graduation rates, to conclude that those students were not yet receiving an adequate education.

e. The Duty to Educate

The report to the Supreme Judicial Court provided by Judge Botsford was extremely detailed, thoughtful, and thorough. After hearing

The department’s projected four-year dropout rates for the four focus districts are substantially higher than the annual dropout rates in the [state]. For the class of 2003, for example, the department projected a four year dropout rate (that is, ninth through twelfth grades for that class) as follows: Brockton–20%; Lowell–37%; Springfield–21%; Winchendon–17%. For the class of 2004, the four year projections are as follows: Brockton–20%; Lowell–33%; Springfield–28%; Winchendon–21%. The projections for the comparison [high-wealth] districts are much lower: for Brookline, Concord-Carlisle and Wellesley, the four year dropout rates for both 2003 and 2004 were 1% with one exception (Wellesley’s projected rate for 2004 was 2%).

Id. at *116 n.143 (citations omitted).

135 Id. at *117–18.
136 Hancock Report, supra note 62, at *117.
137 Id. at *118.
138 See id. at *113, *118.
114 witnesses and reviewing more than 1000 exhibits, the final report she submitted spanned 318 pages. The report, powerful in both its analysis and conclusions, covered indicators of both the inputs into the State’s school districts and the outputs from that system. Judge Botsford focused her report on the seven capabilities identified in *McDuffy* as the benchmark against which to measure the sufficiency of the State’s efforts. She concluded,

The Commonwealth, and the department, have accomplished much over the past ten years in terms of investing enormous amounts of new money in local educational programs, ensuring a far greater degree of equitable spending between rich and poor school districts, and redesigning in some fundamental ways the entire public school educational program. When one looks at the State as a whole, there have been some impressive results in terms of improvement in overall student performance. Nevertheless, the factual record establishes that the schools attended by the plaintiff children are not currently implementing the Massachusetts curriculum frameworks for all students, and are not currently equipping all students with the *McDuffy* capabilities.

While MCAS scores were a primary focus, the judge reported that the problem was broader and deeper than what could be represented by test scores, extending across all the subject areas and severely impacting students from low-income families, racial and ethnic minority children, students with learning disabilities, and those with limited English proficiency. The remedy Judge Botsford proposed was an order requiring the Commonwealth to follow the model set forth in the New York adequacy litigation where a public commission determines, and then the legislature provides, the costs required to permit every student the opportunity to acquire the *McDuffy* capabilities.

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140 Id. at 1146.  
142 *Hancock Report*, *supra* note 62, at *143.  
143 Id.  
144 See *id.* at *145 (citing Campaign for Fiscal Equity, Inc. v. New York, 801 N.E.2d 326, 344–50 (N.Y. 2003)). Subsequently, New York’s highest state court reaffirmed its holding that the state constitution required the State to provide a sound basic education, but held that determination of these costs rested exclusively with the legislative and executive branches unless they act unreasonably or irrationally. Campaign for Fiscal Equity, Inc. v. State, 2006 N.Y. Slip Op. 08630, 2006 WL 3344731 (N.Y. Nov. 20, 2006).
2. The Judgment in the *Hancock* Case

Upon its completion, Judge Botsford submitted her report to the Massachusetts Supreme Judicial Court for review. The court accepted the report, expressing great deference to Judge Botsford’s findings.\(^{145}\) A plurality of the court, however, completely rejected both her conclusions concerning the widespread failures to educate students in low-wealth districts and her recommendations.\(^{146}\) The court concluded that the State’s educational system had improved markedly since MERA was implemented and that, while shortcomings still existed, they did not amount to the “egregious . . . abandonment” of state responsibility found in *McDuffy*.\(^{147}\) Instead, the court determined that while “serious inadequacies in public education remain . . . the Commonwealth is moving systemically to address those deficiencies and continues to make education reform a fiscal priority.”\(^{148}\)

The court reaffirmed the holding in *McDuffy* and ruled that the elected officials of the Commonwealth were not required to take any further steps to meet their obligations under the Massachusetts Constitution to provide an adequate education to the State’s children.\(^{149}\) However, in a concurring opinion, two justices indicated that they were inclined to either overturn or limit the original *McDuffy* holding.\(^{150}\) Furthermore, two dissenting justices asserted that the consequence of the plurality opinion was a repudiation of the *McDuffy* holding.\(^{151}\)

While the justices found that there are still significant educational problems in Massachusetts, their decision in *Hancock* relied on several critical determinations.\(^{152}\) The plurality opinion embraced the enactment of MERA:

The act . . . radically restructured the funding of public education across the Commonwealth based on uniform criteria of need, and dramatically increased the Commonwealth’s man-

\(^{145}\) *Hancock* v. Comm’r of Educ., 822 N.E.2d 1134, 1138 (Mass. 2005). The court stated that “[Judge Botsford’s] findings will stand as a compelling, instructive account of the current state of public education in Massachusetts.” *Id.* at 1147.

\(^{146}\) *Id.* at 1155–58.

\(^{147}\) *Id.* at 1138.

\(^{148}\) *Id.* at 1139.

\(^{149}\) *Id.* at 1136–37.

\(^{150}\) *Hancock* v. Comm’r of Educ., 822 N.E.2d 1134, 1159–60 (Mass. 2005) (Cowin, J., concurring) (joined by Sosman, J.). Justice Cowin described *McDuffy* as “a display of stunning judicial imagination” that should be overruled. *Id.* at 1160 (Cowin, J., concurring).

\(^{151}\) See *id.* at 1171 (Greaney, J., dissenting); *id.* at 1175 (Ireland, J., dissenting).

\(^{152}\) See discussion *infra* Part III.B.2.a–e.
Condolatory financial assistance to public schools. The act also established, for the first time in Massachusetts, uniform, objective performance and accountability measures for every public school student, teacher, administrator, school, and district in Massachusetts.\(^{153}\)

MERA’s “sweeping reach,” as the court described it, and the infusion, at least in previous economic good times, of billions of new dollars of state aid to local education sufficiently indicated to the Supreme Judicial Court that the State’s constitutional requirement to “cherish” education was being met.\(^{154}\) MERA’s system of using objective, data-driven performance assessment and accountability was persuasive evidence to the court that the State was not “acting in an arbitrary, nonresponsive, or irrational way” in meeting the constitutional obligation.\(^{155}\)

Just as Judge Botsford had done, the Supreme Judicial Court’s consideration of issues related to an opportunity to learn took into account issues of funding, curriculum, educator quality, and outcomes measures.\(^{156}\) However, the conclusions the justices reached, and the bases for drawing these conclusions, were notably different.

a. Funding of Education

The Supreme Judicial Court’s discussion in \(Hancock\) hinged on deference to the Governor and legislature to determine the allocation of financial resources.\(^{157}\) This deference, coupled with the weak standard of judicial review of legislative and executive branch activities adopted by the court, help to explain the outcome in \(Hancock\).\(^{158}\) Justice Marshall’s plurality opinion indicates that many of the justices viewed the case as primarily a debate about funding.\(^{159}\) This placed the matter in the hands of the legislature because of the court’s view that the legislature holds ultimate authority regarding resource allocation.\(^{160}\) In the face of generally increased levels of school funding de-
signed to minimize differences attributable to local property wealth and in the absence of any other constitutional violations, the court found that the Commonwealth was not violating the state Education Clause.\textsuperscript{161} The magnitude of new funding allocated to local schools, as noted by Judge Botsford, was very persuasive to the court.\textsuperscript{162} Though the court also noted drastic cuts in state funding in the two most recent budget years, the justices did not find them troubling when determining the outcome of the case.\textsuperscript{163}

b. \textit{School Curriculum}

The Supreme Judicial Court’s determinations about funding and the standards to employ when assessing the constitutional duty to provide education allowed the court to avoid a detailed consideration of issues concerning curriculum in the schools as Judge Botsford had done.\textsuperscript{164} However, the plurality opinion addressed curriculum and the outcomes of schooling in some detail.\textsuperscript{165}

The court noted that the State’s curriculum frameworks are of excellent quality and a reasonable representation of what students needed if they were to achieve the seven \textit{McDuffy} capabilities.\textsuperscript{166} Justice Marshall’s plurality opinion also went so far as to endorse the curriculum frameworks as providing appropriate pedagogical approaches.\textsuperscript{167}

c. \textit{Educator Quality}

The Supreme Judicial Court was also very supportive of the State’s efforts to enhance educator quality.\textsuperscript{168} In particular, the court endorsed those initiatives associated with eliminating teacher tenure

\textsuperscript{161} \textit{Id.} at 1152–53.
\textsuperscript{162} \textit{See Hancock}, 822 N.E.2d at 1147. Indeed, the court almost sarcastically noted that “[n]o one reading the judge’s report can be left with any doubt that the question is not ‘if’ more money is needed, but how much.” \textit{Id.} at 1157.
\textsuperscript{163} \textit{Id.} at 1148. \textit{But see id.} at 1174 (Ireland, J., dissenting) (expressing concern that “\textit{McDuffy} did not envision that this constitutional duty would be subject to the vagaries of budget issues”).
\textsuperscript{164} \textit{See discussion supra} Part III.B.1.b.
\textsuperscript{165} \textit{See Hancock}, 822 N.E.2d at 1142–43 (plurality opinion).
\textsuperscript{166} \textit{Id.} at 1151.
\textsuperscript{167} \textit{See id.} at 1142 n.10. Many educators and education researchers might contest whether the State’s curriculum frameworks actually include sufficient representation of how to teach the content covered in the frameworks.
\textsuperscript{168} \textit{See id.} at 1144 & n.13.
and improving teacher certification requirements.¹⁶⁹ Consistent with the court’s superlative ratings for the State’s various MERA implementation efforts, the _Hancock_ decision also applauded the State’s teacher competency tests and credentialing regulations as “among the most rigorous teacher qualification programs in the United States.”¹⁷⁰

d. **Outcomes Measures for Education Reform**

The use of outcomes measures to determine whether the Commonwealth’s constitutional duty regarding education is being met was first outlined in the _McDuffy_ decision through that decision’s description of the characteristics of an educated citizen.¹⁷¹ However, in the subsequent _Hancock_ decision, the Supreme Judicial Court seemed to suggest that the _McDuffy_ capabilities imposed goals that were too lofty given the constitutional requirement.¹⁷² Instead, the _Hancock_ decision noted with approval the general improvement over time in MCAS examination scores.¹⁷³ The plurality opinion also firmly rejected the conclusion by two of the dissenting justices that the results of the State’s efforts to improve achievement were insufficient.¹⁷⁴ In fact, Justice Marshall’s plurality opinion seemed to assume that it is not surprising, and perhaps even inevitable, that some school districts would continue to be low performing.¹⁷⁵

The metric for determining success is also worth considering. Commentators have noted elsewhere that there is an incentive for states to set the performance bar low under NCLB and state systems in order to appear to be making progress.¹⁷⁶ It has even been suggested that

¹⁶⁹ *Id.* at 1144. Note, however, that commentators have described how the MERA requirements, as implemented, did little to change approaches concerning low-performing teachers and may, in fact, have had the reverse effect. *See e.g.* Henry G. Stewart & Sally L. Adams, _Arbitration of Teacher Dismissals and Other Discipline Under the Education Reform Act_, 83 Mass. L. Rev. 18, 32 (1998).

¹⁷⁰ *Hancock*, 822 N.E.2d at 1151 (internal quotations omitted).

¹⁷¹ *See supra* text accompanying note 83.

¹⁷² The court stated: “One scholar notes of these ‘capabilities’ that, ‘[i]f this standard is taken literally, there is not a public school system in America that meets it.’” *Hancock*, 822 N.E.2d at 1153 n.29 (quoting William E. Thro, _A New Approach to State Constitutional Analysis in School Finance Litigation_, 14 J.L. & Pol. 525, 548 (1998)).

¹⁷³ *Id.* at 1150.

¹⁷⁴ *Id.* at 1151–52.

¹⁷⁵ *See id.* at 1139, 1154–56.

¹⁷⁶ *See Ryan*, *supra* note 32, at 934, 953–54 (arguing that NCLB creates “shaming sanctions” through the use of the label “low performing” for schools and utilizes incentives that actually work against their achievement by unintentionally encouraging states to lower their academic standards, promoting school segregation and the pushing out of poor and minority students, and discouraging good teachers from taking jobs in challenging class-
states may further lower the bar over time as NCLB’s requirement for 100% proficiency for all students by 2014 nears.\textsuperscript{177} In fact, in Massachusetts, successful completion of the MCAS test required not “proficiency,” but instead only a score falling in the “needs improvement” range.\textsuperscript{178}

e. The Duty to Educate

To the plurality of the court in \textit{Hancock}, the constitutional duty to educate imposed upon the legislature and elected officials seems to consist of the duty to make a concerted effort to provide funding to local districts, coupled with directives and accountability obligations for the operation of local schools.\textsuperscript{179} The court found that the legislature and public officials in Massachusetts engaged in a “responsive, sustained, intense legislative commitment to public education.”\textsuperscript{180} Given the court’s statement of deference to the legislature and elected officials in providing education, this accolade seems to capture the court’s perception of the nature of the duty imposed.\textsuperscript{181} The plurality opinion further praises the State’s efforts as revolutionary in wisdom and quality.\textsuperscript{182}

The concurrence by Justice Cowin, joined by Justice Sosman, argued that the \textit{McDuffy} holding read too much into the Education Clause and viewed the constitutional duty as very limited in scope, creating only broad directives with great discretion for the legislative and executive branches.\textsuperscript{183} These justices clearly believed courts should not become involved in education policy, as they noted the importance of separation of powers and judicial restraint in these matters.\textsuperscript{184}
Yet two justices dissented strongly from the plurality and concurring opinions in Hancock, characterizing the constitutional duty to cherish education more broadly and claiming that the majority of the justices, in effect, overruled McDuffy. These two justices asserted that the plurality recast the duty to cherish education as a mere “aspiration.” To the dissenters, results were the key to assessing whether the duty was being met. However, the dissenters also suggested that while equal outcomes on such measures as MCAS or graduation rates are not guaranteed, the constitutional obligation required that students be afforded “a reasonable opportunity to acquire an adequate education, within the meaning of McDuffy, in the public schools of their communities.” The dissenting opinions took a stance similar to that taken by Judge Botsford. As Justice Greaney stated in his dissent:

We have then between the focus districts and the comparison districts a tale of two worlds: the focus districts beset with problems, and lacking anything that can reasonably be called an adequate education for many of their children, the comparison districts maintaining proper and adequate educational standards and moving their students toward graduation and employment with learned skills necessary to achieve in postgraduate education and function in the modern workplace.

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In contrast, according to the plurality of the court, good progress was being made in Massachusetts schools. These justices applauded what might be termed the legislature’s early adopter approach to education reform in MERA. The increased state appropriations for education, a revised system for funding local schools and the test-driven, standards-based reform and accountability requirements serve as the cornerstones for the Hancock adequacy determination.

The Hancock decision marked the intersection of legislative and judge-based education reform. This combination of standards-based reform and the adequacy litigation movement, described by some commentators as the “perfect storm,” ended in Massachusetts with a judicial whimper. The meaning and long-term ramifications of the Hancock decision, particularly given the current condition of education in Massachusetts, requires that education reformers assess the future direction of efforts to use litigation or legislation to improve educational opportunities. Do MERA and the Hancock decision set forth the standards for the operation of an educational system that will lead to the provision of fair and meaningful opportunity to learn while ameliorating the current troubling condition of education in Massachusetts? Or does social science evidence suggest that there are more potentially successful alternatives that would improve access to meaningful educational opportunities while alleviating achievement deficits for the most at-risk student populations?

IV. Social Science Research on Adequate Educational Opportunities

Two prominent education researchers, Richard Elmore and Milbrey McLaughlin, asserted in 1988 that education reform has been a continuous process in this nation. They stated:

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190 See Hancock, 822 N.E.2d at 1138 (plurality opinion).
191 See id. In a previous decision contesting MERA implementation, the court stated that “[a]ccording to the department, the school and district accountability system it has developed is one of the first in the United States.” Hancock, 822 N.E.2d at 1144 (quoting Hancock Report, supra note 62, at *14).
192 Id. at 1138–39.
193 See id. at 1157–58.
Reform can originate in any of three ways: (1) changes in professionals’ view of effective practice, (2) changes in administrators’ perceptions of how to manage competing demands and how to translate these demands into structure and process, and (3) changes in policymakers’ views of what citizens demand that result in authoritative decisions.196

Looking at the outcome in Hancock with regards to Elmore and McLaughlin’s factors, and with particular consideration of recent social science research on effective educational practice, offers insight on the conditions required to provide a fair and meaningful opportunity to learn for all students. While there is still much research to be done, social scientists know more than they did even in 1993 about how to educate students successfully.197 There is also a growing body of evidence about how educators respond to external mandates like MERA and NCLB.198 However, as Professor Elmore has noted more recently:

[P]olicymakers have shown a willingness to ignore expert advice [in their contemporary efforts to implement education reform]. All of the problems that are present in NCLB were accurately predicted and fully defined by a series of studies commissioned by the National Research Council specifically to inform the reauthorization of [NCLB]. Sometimes the political logic of reforms undermines their essential purposes.199

So what does the social research say about the provision of opportunity to learn and efforts to promote education reform through the use of accountability? To what extent has the use of law-based education reform significantly changed practices in schools and enhanced opportunity to learn, particularly for the most educationally at-risk students? Have legislation and judicial decisions addressed the fundamental issues identified by social science researchers about whether our schools have the fundamental capacity to serve all stu-


196 Elmore & McLaughlin, supra note 195, at v.


198 See generally social science literature cited throughout Part IV.

students’ educational needs and to provide a full and meaningful opportunity to learn?

Social science evidence has advanced since the U.S. Supreme Court’s *Brown* decisions in the 1950s and has advanced even more dramatically in the past two decades.\(^\text{200}\) We now know more about the impact of funding on the provision of educational opportunity.\(^\text{201}\) We know more about the impact of external mandates concerning curriculum and standards.\(^\text{202}\) We know more about how people learn.\(^\text{203}\) We know more about how to assess what students have learned.\(^\text{204}\)

There is now substantial evidence that an opportunity to learn is based on both a “theory of learning” and “models of teaching and schooling.”\(^\text{205}\) In addition, appropriate “instructional leadership” from administrators and teacher leaders is critical.\(^\text{206}\) We know more about what educators need to know and be able to do.\(^\text{207}\) Furthermore, the evidence establishes that appropriate educational opportunity for students only exists when there are appropriate and ongoing opportunities to learn for educators themselves.\(^\text{208}\) Finally, we know more about

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\(^{200}\) See generally, e.g., *How People Learn*, supra note 197.

\(^{201}\) See generally, e.g., *Equity and Adequacy in Education Finance*, supra note 71.

\(^{202}\) See, e.g., discussion infra Part IV.B–C.

\(^{203}\) See generally, e.g., *How People Learn*, supra note 197.

\(^{204}\) See generally, e.g., *Comm. on Founds. of Assessment, Nat’l Research Council, Knowing What Students Know: The Science and Design of Educational Assessment* (James W. Pellegrino et al. eds., 2001) [hereinafter *Knowing What Students Know*]. This attempt by the National Research Council to synthesize the literature on learning and assessment concluded that current forms of large-scale assessment, such as state testing systems, fail to take into account developments in cognitive science and measurement and to provide adequate information on how to improve learning opportunities through useful models of cognition and learning. See id. at 2–3.

\(^{205}\) See generally id. at 178–79; Lee S. Shulman & Judith H. Shulman, *How and What Teachers Learn: A Shifting Perspective*, 36 J. Curriculum Stud. 257 (2004). By the phrase “theory of learning,” I am referring to frameworks for understanding how people learn, and by “models of teaching and schools,” I am referring to devices that provide exemplars for how effective educational opportunities are provided.


capacity building to promote the enhancement of opportunity to learn for all students.209 How do these theories and models shed light on areas upon which the Massachusetts courts focused in the Hancock case? Finally, do law-based education reform initiatives sufficiently take the social science findings into account?

A. Money Matters, but . . .

There is little dispute that, at least temporarily, significant amounts of additional state money were provided to low-performing schools in Massachusetts as a result of the McDuffy decision and MERA.210 There is debate in the social science literature on the extent to which increases in funding can improve educational opportunity, though most researchers conclude that funding does make a difference.211 What is not in dispute is that how increased funding is utilized is as important as the presence of new financial resources for students.212

B. Curriculum and Standards

For the Massachusetts legislature and a plurality of the Supreme Judicial Court, one of the essential conditions for schools to receive increased funding was the articulation of curriculum frameworks and performance standards for students and schools.213 The MERA provisions reflect legislative assumptions (implicitly shared by NCLB) that the declaration of state content standards and testing requirements would drive changes in curriculum and instruction at the local school level.214 However, these provisions and the assumptions behind them are not entirely consistent with the current research literature on how

210 Federal appropriations under NCLB also increased federal funding for Massachusett's, although that funding declined somewhat after 2003 due to general decreases in the federal education budget. U.S. Dep't of Educ., Funds for State Formula-Allocated and Selected Student Aid Programs 51 (2006), available at http://www.ed.gov/about/overview/budget/statetables/07stbystate.pdf.
213 See discussion supra Parts II.B, III.B.2.
214 See discussion supra Part II.B.
education reform occurs. A growing line of policy research on responses to external state or federal mandates for school reform has demonstrated that these mandates do have an impact to some extent, but they often do not provoke widespread change, particularly for at-risk students. Some recent efforts to assess directly the impact of external mandates for standards-based reforms demonstrate that simply articulating standards and then holding schools accountable will not work. External mandates fail to work because standards-based reform presumes rationality in schools and classrooms and in the way they respond to external mandates about either curriculum or instruction. The failure of these mandates has been described in various ways. Sometimes external mandates do not succeed because autonomous local educators fail to attend to external mandates that are inconsistent with their own interests and agendas. Some external mandates fail because educators do not know what to do to address the mandates successfully.

However, more recent implementation research, such as the work of Professor James Spillane and others, suggests a “cognitive account.” Based on the premise that local officials’ responses to policy will depend on how they make sense of that policy, these methods of implementation may not match the responses that policymakers desire because of these policymakers’ perspective and tendency to select the


216 See Fuhrman, supra note 43, at 5–8. See generally Susan M. Wilson, California Dreaming: Reforming Mathematics Education (2003). Much of this research has been financed by the U.S. Department of Education and major foundations such as the Consortium for Policy Research in Education (CPRE). For more information on the CPRE, visit http://www.cpre.org.

217 See, e.g., Wilson, supra note 216; Margaret E. Goertz, Standards-Based Accountability: Horse Trade or Horse Whip?, in From the Capitol to the Classroom, supra note 43, at 39, 54–55.

218 See, e.g., James P. Spillane, Challenging Instruction for “All Students”: Policy, Practitioners, and Practice, in From the Capitol to the Classroom, supra note 43, at 217, 220–21, 235–38.

219 See Elmore & McLaughlin, supra note 195, at 48–50; James P. Spillane, Standards Deviation: How Schools Misunderstand Education Policy 5 (2004); see also Arthur E. Wise, Legislated Learning 47–87 (1979) (arguing that education reform policies fail because the goals of various policymaking entities conflict and because their mandates are divorced from the realities of the classroom).

220 Elmore, supra note 209.

221 E.g., Spillane, supra note 219, at 7.
cues and signals that make sense to them. Policy implementation is like the “telephone game,” with opportunities for the message to become garbled each time it is passed down from one level to the next. What results is honest misunderstanding rather than willful attempts to adapt policy to local needs.

What happens at the local school is the key to success in education reform and to determining whether or not a constitutional duty to provide meaningful learning opportunities is being met. When state policy or new ideas about teaching and learning are presented, what matters most in implementation is what local educators come to understand about their practice from the standards they are given. Quite often, what state-level policymakers seek is not the same as what local educators understand as their duty under state legislation, a situation resulting in only partial implementation of state policies.

Researchers have demonstrated that local educators do pay attention to what state policies mandate. However, Spillane’s work shows that state standards have had only limited success in implementation at the local level. Some teachers will fundamentally change their practice, which is “proof that policy, under the right conditions, can enable teachers to make fundamental changes to their practice.” To Professor Spillane, the key challenge then becomes how to design policies that allow local educators to understand what should be implemented.

But even the best combination of policy tools will not be sufficient in helping local educators know what or how to do what needs to be done unless they have the knowledge, skills, and dispositions to do what needs to be done and curriculum standards are appropriately defined. In her study of efforts to implement curriculum reform in mathematics in California, Professor Susan Wilson writes that mathematics curricula are so insufficient and so widely diffused that they will not bring students to a high level of achievement.

\[\text{See } \text{id.}\]

\[\text{Id. at } 8.\]

\[\text{See } \text{Cohen & Hill, supra note } 208, \text{ at } 71. \text{ See generally Spillane, supra note } 219.\]

\[\text{See } \text{Cohen & Hill, supra note } 208; \text{ Spillane, supra note } 219, \text{ at } 7–8.\]

\[\text{See generally Cohen & Hill, supra note } 208; \text{ Spillane, supra note } 219.\]

\[\text{See } \text{Spillane, supra note } 219 \text{ at } 173–74.\]

\[\text{Id. at } 174.\]

\[\text{See } \text{id. at } 179–82.\]

\[\text{See discussion infra Part IV.E (discussing educator qualities).}\]
As a result, mathematics continues to be taught conventionally and traditionally and students are not exposed to the content knowledge or pedagogy they need for meaningful mathematics attainment. She concludes that the weakness of curriculum standards causes the most harm to at-risk students from minority and low-income families, and that this debility results in student socioeconomic status becoming the critical factor in whether or not students learn mathematics.

Other researchers have concluded that the curriculum and learning goals fostered by systems like the MCAS result in limiting the scope and depth of the overall curriculum. Essentially, educators narrow their instruction to teach only to the content of items covered on the state examinations because they struggle to cope in the face of high-stakes sanctions for themselves, their schools, and their students.

C. Theories of Learning and Models of Teaching

The emerging consensus among many social scientists about efforts to improve educational opportunity also relies heavily upon recent developments in the cognitive and sociocultural sciences and research on the impact of the implementation of more recent education reform initiatives concerning classroom practices. A series of projects at the National Research Council of the National Academy of Sciences has synthesized the research on teaching, learning, and testing in the context of standards-based, high-stakes education reform initiatives. These projects have compiled research and offered caution for policymaking and practice, as well as suggestions for additional research to more fully understand the impact of policy and practice on the provision of opportunities to learn. The studies point out the failure of current educational practices to incorporate recent developments in

232 See Wilson, supra note 216.
233 See id.
234 See id.
235 See W. James Popham, The Truth About Testing 19–21 (2001); see also infra Part IV.D (discussing outcomes measures).
236 See generally, e.g., High Stakes Testing, supra note 21; How People Learn, supra note 197; Knowing What Students Know, supra note 204. The National Academy of Sciences is the congressionally chartered independent entity created to provide expert scientific advice to the government on issues of public concern. See 36 U.S.C. §§ 150301–150303 (2000).
237 See, e.g., High Stakes Testing, supra note 21, at 1–9; How People Learn, supra note 197, at 52–57; Knowing What Students Know, supra note 204, at 1–3.
cognitive science regarding how students learn as well as the failure of current large-scale standardized testing programs to take into account recent scientific developments in measurement, teaching, and learning.\(^{238}\)

There are other efforts to synthesize social science evidence to promote educational opportunities. A research project sponsored by the Spencer Foundation, one of the nation’s largest private sources of funding for education research, sought to advance understanding of the relationship between testing practices and the provision of a meaningful opportunity to learn for all students.\(^{239}\) The project was a cross-disciplinary dialogue among some of the nation’s most prominent educational researchers and theorists.\(^{240}\) Participants in the project agreed that, historically, assessment practices have played a significant role in the amplification of inequality.\(^{241}\) They concluded that breaking the cycle of inequality in the contemporary educational context requires a new way of thinking about both assessment practices and instructional approaches.\(^{242}\) These researchers synthesized their individual research findings and agreed that the provision of a meaningful opportunity to learn requires a different perspective on the relationship between tests and learning and the better utilization of existing knowledge demonstrating that the unacceptable relationship between social class and educational performance can be mitigated.\(^{243}\)

D. Outcomes Measures for Education Reform

Despite the evidence from social scientists about the conditions required to provide fair and meaningful opportunity to learn, policymakers at both the state and federal levels have invested heavily in the use of test-driven accountability systems like MCAS to improve educa-

\(^{238}\) See generally How People Learn, supra note 197, at 10–15; Knowing What Students Know, supra note 204, at 3–9.


\(^{240}\) See “Idea of Testing” Project, supra note 239.

\(^{241}\) See Assessment, Equity, and Opportunity to Learn, supra note 239 (manuscript at 21–22).

\(^{242}\) See id. (manuscript at 28–30) (outlining possible approaches to conceptualizing the link between assessment and opportunity to learn).

\(^{243}\) See id.
This investment arises in part because of a deeply ingrained belief on the part of policymakers that quantification is a useful policy tool, and that testing is a powerful and positive social policy tool for changing schools. Policymakers and the public also increasingly rely on test scores as evidence of the impact of education reform initiatives. Judge Botsford and the justices on the *Hancock* court certainly relied on test scores to judge the effectiveness of education reforms. Yet there is a heated debate among education researchers about the value of test-driven education reform approaches. Similarly, there is a discussion among traditional civil rights advocates about the same issues. However, while some civil rights advocates view test-based education reform as the best hope for improving educational opportunities for minority children, some social science commentators have stated that “beliefs and practices informed by [the use of standardized testing] have become so deeply ingrained in the American educational system that it has become difficult to see them as choices arising in particular sociocultural circumstances or to imagine that things could be otherwise.” Thus, some social scientists assert that the use of high-stakes testing should be reconsidered because testing designed to motivate accountability can have a negative impact on reform.

One negative impact of the reliance on testing to drive education reform is that testing has diverted attention that would otherwise be paid to developing curriculum standards and building the capacity of local schools to engage in meaningful improvements. Elmore believes this shift in focus occurs because,

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244 See Diana Pullin, *When One Size Does Not Fit All—The Special Challenges of Accountability Testing for Students with Disabilities*, in *Uses and Misuses of Data for Educational Accountability and Improvement*, supra note 50, at 199.


246 See generally *Uses and Misuses of Data for Educational Accountability and Improvement*, supra note 50.

247 See discussion supra Part III.B.1, B.2.d.

248 See, e.g., *High Stakes Testing*, supra note 21, at 15–16.


251 See generally *The Ambiguity of Teaching to the Test*, supra note 249, at 159–60.

252 See Elmore, supra note 199, at 316.
when left to their own devices, . . . [accountability policies] drift toward emphasis on testing as the primary instrument, and to de-emphasize standards and capacity-building. The reasons for this are clear: testing is relatively cheap; the less sophisticated the test, the cheaper it is. . . .

. . . [NCLB] rewards schools and school systems essentially for gaming the test, rather than for setting high and challenging standards and using testing and human investment together as strategies for improving quality and performance.253

The testing industry’s own standards of professional practice caution against overreliance on test scores when making significant determinations in education.254 These standards require evidence that when test scores are used, they provide a valid and reliable measure of performance.255 Robert Linn, one of the nation’s preeminent experts on educational testing, concluded:

[I]n most cases the instruments and technology have not been up to the demands that have been placed on them by high-stakes accountability. Assessment systems that are useful monitors lose much of their dependability and credibility for that purpose when high stakes are attached to them. The unintended negative effects of the high-stakes accountability uses often outweigh the intended positive effects.256

By shifting resources away from curriculum reform and other effective changes, high-stakes testing may do more harm that good.257

253 Id.
257 In addition, there is mounting evidence that there are considerable limitations on the utility of test scores for students with disabilities or limited English proficiency. E.g., Jamal Abedi, Issues and Consequences for English Language Learners, in Uses and Misuses of Data for Educational Accountability and Improvement, supra note 50, at 175, 193–
High-stakes testing may also have an impact on dropout rates, and those rates may then be used to punish low-performing schools. While school dropouts have long been a problem, researchers have found evidence that the pressures associated with high-stakes testing can result in more students leaving school than might otherwise be expected. Yet, Both NCLB and MERA endorse sanctions for schools with low test scores or high dropout rates. Commentators have referred to this process as “naming and shaming.” While these sanctions have been characterized as making “intuitive sense,” there is little available research to support the approach. The research found that sanctions have relatively limited success in promoting meaningful opportunity to learn. In part, educators who regard the approach

95; Pullin, supra note 244, at 199–222. Other researchers have concluded that failures to implement the types of changes real reform requires causes particular harms for at-risk students. See Wayne E. Wright & Daniel Choi, The Impact of Language and High-Stakes Testing Policies on Elementary School English Language Learners in Arizona, Educ. Pol’y Analysis Archives, May 22, 2006, at 1, 4, http://epaa.asu.edu/epaa/v14n13. For example, one survey of third grade teachers revealed that a state ballot proposition limiting bilingual education, coupled with state high-stakes accountability requirements and NCLB mandates, resulted in confusion throughout the schools given the minimal guidance from state or local officials about how to provide adequate instruction to these students. See id. at 39–45. The result was education reform mandates that did little to improve educational opportunities for these students. See id. at 45–46.


259 One of the stated purposes of NCLB is “holding schools, local educational agencies, and States accountable for improving the academic achievement of all students, and identifying and turning around low-performing schools that have failed to provide a high-quality education to their students.” 20 U.S.C.A. § 6301(4) (West 2003). Massachusetts law allows various sanctions for chronically under-performing schools, including removal of the principal. Mass. Gen. Laws ch. 69, § 1J (2004).


261 See id.

262 See Spillane, supra note 219 at 173–74 (noting that many teachers fail to adjust their teaching methods to align with standards-based reforms); Mintrop, supra note 260.
as unfair, invalid, and unrealistic are not motivated by the imposition of sanctions.\textsuperscript{263}

\textbf{E. Educator Qualities}

Efforts to change educational opportunity by defining state-wide curriculum frameworks depend in part on the capabilities of local educators to implement the new curriculum.\textsuperscript{264} Judge Botsford’s report to the Massachusetts Supreme Judicial Court in \textit{Hancock} noted that the Massachusetts Commissioner of Education regarded educator quality as the critical variable in education reform.\textsuperscript{265} This perspective is supported by a growing consensus in both social science and public policy literature.\textsuperscript{266} For many education researchers, particularly those who have studied recent attempts to implement state-mandated standards-based reforms, educator quality and the provision of an opportunity to learn for educators themselves is the factor most critical to the success of current education reform.\textsuperscript{267}

Most of MERA’s educator quality provisions focus on the credentials awarded to teachers and requirements that local districts provide professional development activities for teachers.\textsuperscript{268} These provisions relate to what NCLB and MERA describe as criteria for determining

\begin{footnotesize}
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\item \textsuperscript{263} See Mintrop, \textit{supra} note 260.
\item \textsuperscript{264} See, e.g., Darling-Hammond, \textit{supra} note 207, at 229–32; Elmore, \textit{supra} note 209.
\item \textsuperscript{265} See \textit{supra} text accompanying note 109.
\item \textsuperscript{267} See Cohen & Hill, \textit{supra} note 208, at 185; see also Elmore, \textit{supra} note 209, at 130 (“Professional development is at the center of the practice of improvement.”).
\item \textsuperscript{268} In order to be certified as a “provisional educator,” Massachusetts law requires the following of its teachers:

\begin{itemize}
\item \textsuperscript{T}he candidate shall (1) hold a bachelor’s degree in arts or sciences from an accredited college or university with a major course in the arts or sciences appropriate to the instructional field; (2) pass a test established by the board which shall consist of two parts: (A) a writing section which shall demonstrate the communication and literacy skills necessary for effective instruction and improved communication between school and parents; and (B) the subject matter knowledge for the certificate; and (3) be of sound moral character.
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\textsuperscript{264} See \textit{supra} text accompanying note 109.


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\textsuperscript{265} See \textit{supra} note 260.

\textsuperscript{264} See, e.g., Darling-Hammond, \textit{supra} note 207, at 229–32; Elmore, \textit{supra} note 209.

\textsuperscript{266} See \textit{supra} text accompanying note 109.

\textsuperscript{267} See Cohen & Hill, \textit{supra} note 208, at 185; see also Elmore, \textit{supra} note 209, at 130 (“Professional development is at the center of the practice of improvement.”).

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\end{itemize}

Mass. Gen. Laws ch. 71, § 38G (2004). Massachusetts also requires that school districts develop plans for professional development activities for teachers. See \textit{id.} ch. 69, § 11; \textit{id.} ch. 71, § 38Q.
whether an individual is a “highly qualified teacher.” The credentialing process relies heavily upon testing and subject matter knowledge to define educator quality.

However, recent social science research stresses the importance of focusing on the qualities effective educators possess rather than the paper qualifications they hold. Consistent with the intent (although not necessarily the adopted provisions) of some education reforms, cognitive scientists and researchers on policy implementation agree that good teachers possess a deep and complex level of subject matter expertise. These scientists have found that expertise cannot necessarily be measured by successful passage of teacher competency tests used under MERA or NCLB. Instead, social science studies describe successful educators as having certain qualities such as deep, structural understanding of subject matter content accompanied by pedagogic skills and dispositions that enable students to understand the subject matter. Furthermore, research indicates that well-qualified teachers must be “ready, willing, and able to teach and to learn from [their own] teaching experiences.”

The Massachusetts Supreme Judicial Court’s endorsement of teacher competency testing is consistent with widely embraced reform efforts, such as those articulated in NCLB. However, many education researchers have soundly criticized teacher competency tests currently in use and presented questions about the defensibility of teacher certification requirements.

Research indicates that state policy can change teaching practices to some extent, but the key to meaningful reform is linking clearly

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269 See 20 U.S.C.A. § 7801(23) (West 2003) (defining a “highly qualified” teacher for purposes of NCLB); see also id. §§ 6819(a), 6613(c) (imposing responsibility on states for ensuring that local schools employ highly qualified teachers).

270 See supra note 268.

271 See, e.g., How People Learn, supra note 197, at 2, 16; see also Lee S. Shulman, Knowledge and Teaching: Foundations of the New Reform, 57 HARV. EDUC. REV. 1, 20 (1987) (stressing the importance of “pedagogic content knowledge,” described as the capacity to exercise teaching pedagogies specifically appropriate to a particular content area).

272 See sources cited supra note 271.

273 See, e.g., How People Learn, supra note 197, at 2, 16; Shulman & Shulman, supra note 205, at 259.

274 Shulman & Shulman, supra note 205, at 259 (emphasis partially omitted).

275 See supra text accompanying notes 31–42.

defined curriculum and instructional content to long-term, ongoing, and in-depth professional development.277 States must provide opportunities for educators to learn in order to be prepared in both subject content and pedagogy.278 Only then will schools provide their students with meaningful educational opportunities.279 When the State calls for substantial changes in local school practices, the real key to reform is a consistent approach that provides meaningful opportunities to learn for educators themselves.280

The use of curriculum frameworks can be helpful to educators, but only if they are accompanied by a broad range of suggested educational practices, textbook content, and thoughtful teacher analysis of students’ needs.281 State efforts to augment teaching and learning in a high-stakes testing program only work when teachers are provided with significant professional development opportunities such that they can learn how improve their teaching abilities within their respective subject areas.282 The more learning opportunities teachers have, the more their students learn, at least as measured by state test scores.283 One commentator concludes that it takes about ten years of sustained professional development to turn even a knowledgeable and well-qualified novice teacher into the type of seasoned professional who can attend to the individual educational needs of all students.284 Furthermore, social science research has demonstrated the importance of leadership in schools, particularly on the part of school principals, to create a culture of reform.285 Perhaps most important, according to the literature, is the role of the school principal in leading the improvement of instruction and learning.286

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277 See Elmore, supra note 209, at 89–132.
278 See id.
279 See id.
280 See id.
281 See id.; see also How People Learn, supra note 197, at 10, 15, 19 (providing examples of how to teach based on evidence of how people learn); Comm. on Sci. Learning, Nat’l Research Council, Taking Science to School (Richard A. Duschl et al. eds., forthcoming 2007) (describing suggested practices in science education).
282 See Elmore, supra note 209, at 89–132.
283 See id.
285 See, e.g., James P. Spillane et al., Policy Implementation and Cognition: Reframing and Refocusing Implementation Research, 72 Rev. Educ. Res. 387 (2002); see also sources cited supra note 206 (discussing the importance of “instructional leadership”).
286 See Blase & Blase, supra note 206; Nelson & Sassi, supra note 206, at 7, 150.
F. It’s Capacity that Really Counts

One legal commentator has noted that the “unaccountable school district” has long been a feature of American public education. But the real locus of education reform is at the local school level; therefore, state efforts to provide education can only be meaningful if the focus is on local schools and districts. Many local-level educators in schools have worked diligently to implement the new systems and meet accountability standards. However, Professor Elmore has suggested that many educators simply do not know what to do for their students since, if they did know what to do, they would do it. Simply setting an external standard does not guarantee improved student performance.

Researchers studying schools operating under standards-based reform mandates found the following:

[If] state accountability policies are based on the working theory that external pressure for performance is designed to mobilize existing capacity, rather than to create new capacity, then it is possible that the long-term effect of accountability policies, other things being equal, could be to increase the gap in performance between high and low capacity schools. The relative absence in our case studies of evidence of deliberate, systematic efforts to influence capacity by states and localities makes this a troubling issue.

These researchers concluded that policymakers suffer from a misconception if they believe that external mandates determine how schools and districts will act. Schools respond differently to external accountability, depending on their initial capabilities and circumstances.

Based on significant studies on the implementation of externally mandated, standards-based accountability systems, researchers have concluded that meaningful education reform requires capacity.

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287 Saiger, supra note 71, at 1662 (“[F]or a variety of historical, legal, bureaucratic, and political reasons, districts have enjoyed a long tradition of near-total autonomy.”).
289 Id. at 216–17.
290 Id. at 220–21.
292 Id. at 195.
293 Id. at 196.
294 See id. at 207–09.
Capacity is defined by a combination of several factors and their complex relationship, such as:

- How much teachers know about their subject area as well as their pedagogic skill in bringing students to an appropriate level of understanding (the key element of capacity).  

- Internal accountability of “shared norms, values, expectations, structures, and processes” working coherently to achieve ambitious goals for student learning (particularly difficult to achieve in high schools).

- Leadership, not only by administrators, but throughout the school and school system.

- Resources (time, money, information, materials, external support).

If schools “try to respond to external pressure by doing what they are already doing at a higher level of efficiency and effectiveness[, they] typically don’t produce substantial improvements in either practice or performance.” At present, capacities to provide full and meaningful opportunity to learn vary widely in existing schools. Most frequently, according to this research, it is the low-performing schools that are the most cautious about change, the most intimidated, and the most risk-averse because of their low performance in the past.

The considerable variation in capacity among schools, particularly in schools serving poor and minority children, is due in part to teacher beliefs. Many teachers in low-performing schools simply reject or ignore reforms, do not know what to do, or do not believe that they can do anything that will cause change. Teachers’ low expectations for at-risk students can be overcome by implementing appropriate pedagogical methods and allowing teachers to receive the feedback that they can in fact make a difference in achievement for these students. Otherwise, teachers often narrow teaching to cover only the content of state assessment tests. As one researcher concluded, “Ensuring that all students have comparable learning opportunities is

295 Id. at 197.
296 Elmore, supra note 291, at 197–201.
297 Id. at 203–06.
298 Id. at 197.
299 Id. at 208.
300 See id. at 208–09.
301 See Elmore, supra note 291, at 256.
302 See, e.g., Popham, supra note 235, at 19-21.
perhaps the most politically challenging issue that states face.”\textsuperscript{303} A focus on equalizing capacity would be a step toward providing meaningful learning opportunities.

Every student, including the most vulnerable, should have a fair and meaningful opportunity to learn an important and challenging curriculum, such as the curriculum that would lead to the 

McDuffy

\textsuperscript{304} outcomes.\ The most fundamental educational issue for state policymakers and judges considering a state constitution’s education clause should be how to provide this opportunity to \textit{all} students. Unfortunately, in the face of almost overwhelming evidence of continued low performance among the most at-risk students in the most resource-poor schools, the Massachusetts Supreme Judicial Court determined that the State was meeting its constitutional duty to educate.\textsuperscript{305}

\section*{V. The Role of Law in Ensuring the Provision of a Fair and Meaningful Opportunity to Learn}

Research literature confirms that, as Justice Marshall put it, the problem with the progress of education reform is that it is “painfully slow.”\textsuperscript{306} But the speed of implementation may be only part of the challenge of improving schools. Social science evidence demonstrates that the reform mandates of MERA will not thoroughly and effectively reform the delivery of educational opportunities to students most at risk of failure anytime soon, or perhaps at all. The achievement gap between white and minority children and between affluent and poor children persists.\textsuperscript{307} Many educators have reformed their practices, but current legislative mandates for reform and inadequate financial support limit the chances to achieve the changes required. What does this say about our constitutional premise that the State has a duty to “cherish” education?


\textsuperscript{304} See \textit{supra} text accompanying notes 79–83 (describing the seven McDuffy capabilities).


\textsuperscript{306} Id. at 1154; \textit{see also} id. at 1174 (Ireland, J., dissenting) (analogizing the slow speed of education reform to the slow speed of school desegregation).

The MERA mandates were not based on educational theories much more sophisticated than the assumption that if you test certain content, educators will teach it and sanctions will motivate recalcitrant educators and students to improve their performance. The MERA framers seemed to assume that educators and students needed to be told what to learn and to try harder. The Massachusetts legislature showed zeal for imposing standards-driven, high-stakes accountability, and the Supreme Judicial Court later accepted that approach in Hancock. As a result, the Commonwealth has foregone the opportunity to implement deeply meaningful and effective approaches that would have a greater likelihood of ensuring a fair and meaningful opportunity to learn for all students.

Judge Botsford’s comments on educator quality and the importance of the role of the school principal come closer than most court decisions, or legislation for that matter, in articulating an understanding of the characteristics needed to provide this opportunity to learn. She did not have before her most of the research evidence discussed here, so many of Judge Botsford’s proposed findings and conclusions fail to incorporate recent social science evidence. The plurality opinion in Hancock paid little attention to the conditions necessary for effective education services, instead favoring the right of the legislature to make all decisions regarding implementation of the constitutional duty to educate. Judge Botsford clearly saw a role for legislators in designing education reforms and for judges in overseeing the creation and enactment of improvements by education experts and public officials. On the other hand, Chief Justice Marshall, writing for a plurality of the Supreme Judicial Court, saw only controversy among education experts about how to conduct education as well as a set of value judgments about schooling in which courts should not be involved.

**Conclusion**

The low performance of poor and minority students in Massachusetts was predictable or perhaps even inevitable, given that the reforms endorsed by social science research have not been adopted by

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308 See supra note 45 and accompanying text.
309 See supra notes 145–156 and accompanying text.
310 See supra Part III.B.1.c.
311 See supra text accompanying notes 157–160.
312 See supra text accompanying notes 141–144.
the state legislature in favor of standards-driven, high-stakes testing. As a result, the achievement gap will likely continue and may, in fact, worsen. Most efforts to use law to improve educational opportunities for at-risk students fail to consider, or constructively influence, the local-level conditions necessary for effective teaching and learning. Thus far, state legal and legislative action has neglected to implement strategies demonstrated by social science literature to provide meaningful opportunity to learn.

As more and more schools fall into the underperforming category, might the Supreme Judicial Court be persuaded that the duty to cherish education is no longer being met? Early in her plurality opinion, Chief Justice Marshall reiterated language from *McDuffy* that it is the ongoing responsibility of state officials to meet the duty to cherish education. She stated:

> Nothing I say today would insulate the Commonwealth from a successful challenge under the education clause in different circumstances. The framers recognized that “the content of the duty to educate . . . will evolve together with our society,” and that the education clause must be interpreted “in accordance with the demands of modern society or it will be in constant danger of becoming atrophied and, in fact, may even lose its meaning.”

Perhaps in the face of ongoing performance problems, the most recent social science research will eventually persuade a future court to reconsider these matters in a new wave of school finance litigation. If it happens at all, will the next phase of adequacy lawsuits or the next revision of state or federal legislation successfully address conditions required for effective teaching and learning as described by recent social science research?

Massachusetts has foregone the opportunity to adequately address the conditions for providing a fair and meaningful opportunity to learn for students, particularly those most at risk of failure. Thus, some of the answers to the key questions of education policy enumerated at the start of this article remain unchanged, at least for the moment, in Massachusetts. The watershed year of 1993 did result in new declarations of the desired outcomes of education, the content of the curriculum, and, at least for a time, commitments to increase state

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314 *Id.* at 1140 (quoting McDuffy v. Sec’y of Exec. Office of Educ., 615 N.E.2d 516, 555 (Mass. 1993)).
funding to low-wealth local schools. However, as to the question of who decides issues of education policy, the Massachusetts Supreme Judicial Court has clearly decided that issue now rests exclusively in the hands of the legislature. Yet in the face of substantial developments in the research evidence about how to provide meaningful opportunities to learn, the state falls far short of meeting the goal of providing the conditions and resources, or capacities, needed to educate all our future citizens effectively. Failure to remedy these severe educational shortcomings in light of available advances in knowledge about how to do so will surely have a detrimental impact on the social, economic, and civic future of Massachusetts. We have either reached the limits of law-based education reform or we have reached the beginning of the next phase of law-based education reform. Perhaps we will soon enter an era in which elected officials will reconsider how to structure learning conditions or where courts will determine that our collective understanding of the duty to educate has, as Chief Justice Marshall put it, indeed evolved, such that new obligations will arise that impart new meaning to our duty to cherish education.

Even if legislatures or judges can agree on a course correction in efforts to reform schools and craft approaches fully informed by what educators need to help all students achieve at high levels, some key questions of education policy remain. Educating students to high standards of achievement in meaningful content knowledge is complex, highly technical, and expensive. If we attain some level of consensus concerning the key issues of educational policy, who should pay for these endeavors? Are we all, collectively, willing to pay to educate other people’s children and to educate them well? What role will law, either legislated or judge-made, play in responding to recent scientific developments and in determining the educational success of all our children?
LAWYER, CLIENT, COMMUNITY: TO WHOM DOES THE EDUCATION REFORM LAWSUIT BELONG?

AMY M. REICHBACK*

Abstract: Important education reform litigation is often undertaken by lawyers with admirable intentions. It is too easy, however, particularly in the context of large, enduring, complex litigation where it is difficult to identify the class, much less name and pursue the class’s goals, to lose sight of the client-lawyer relationship and the significance of client autonomy. Several recent lawsuits concerning the enforceability of No Child Left Behind exemplify issues that arise in class representation. In devising legal strategies, lawyers must balance the need to address clients’ immediate problems with the pursuit of longer-term strategies for change, such as organization and mobilization. It is difficult work, but only through careful attention to relationships with and among clients and communities will lawyers participate effectively in achieving meaningful education reform.

INTRODUCTION: DEFINING THE ISSUES

By definition, the public interest law firm begins with a concept of the public interest and fashions its clients around that. This reverses the traditional process where attorneys begin with clients and then fashion a concept of the public interest to correspond to the interests of their clients.

—Kenney Hegland1

Important education reform litigation is often undertaken by lawyers with admirable intentions.2 It is too easy, however, particularly

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in the context of large, enduring, complex litigation where it is
difficult to identify the class, much less name and pursue its goals, to
lose sight of the client-lawyer relationship and the significance of cli-
ent autonomy.\textsuperscript{3} In devising legal strategies, lawyers must balance the
need to address clients’ immediate problems with the pursuit of
longer-term strategies for change, such as organization and mobiliza-
tion.\textsuperscript{4} Representing a class is further complicated by the fact that
plaintiffs are frequently disempowered by the very system they are
challenging, by race and class differences between lawyers and their
clients, and by the limited preparation lawyers receive for working
effectively with communities.\textsuperscript{5} The disconnect between public interest
lawyers and their clients in education and other structural reform lit-
gigation is further exacerbated by time constraints, making meaningful
client-lawyer communication difficult, and by potentially divergent
interests among a group of clients and between the lawyer and the
client.\textsuperscript{6} Lawsuits concerning the enforceability of the No Child Left
Behind Act (NCLB)\textsuperscript{7} exemplify many of these issues.

This article begins in Part I with a brief description of several re-
cent lawsuits involving NCLB. Part II highlights concerns that arise in
the context of lawyering for social justice, particularly through com-
plex litigation, and examines the manifestation of these issues in the
lawsuits described above. Part III discusses strategies courts and law-
yers may employ to alleviate these concerns, and the article concludes
by applying these recommendations in the context of education re-
form.

\begin{thebibliography}{9}
\bibitem{3} See Mary Kay Kane, \textit{Of Carrots and Sticks: Evaluating the Role of the Class Action Lawyer}, 66 \textit{Tex. L. Rev.} 385, 389 (1987) (asserting that class actions are unique because of the
degree of management required and the inherent problems of client control and conflicts
of interest).
\bibitem{4} See Paul R. Tremblay, \textit{Rebellious Lawyering, Regnant Lawyering, and Street-Level Bureauc-
\bibitem{5} See Edgar S. Cahn & Jean Camper Cahn, \textit{Power to the People or the Profession?—The Pub-
\bibitem{6} See Kane, \textit{supra} note 3, at 386.
\bibitem{7} Pub. L. No. 107-110, 115 Stat. 1425 (2002) (to be codified as amended primarily in
\end{thebibliography}
To Whom Does the Education Reform Lawsuit Belong? 133

I. LAWSUITS CONCERNING THE ENFORCEABILITY OF NCLB

It was all white people on this side [of the courtroom], and all white people on [that] side—and the argument is about our children.

—Connecticut NAACP President Scot X. Esdaile

Lawsuits addressing inequities in school funding have enjoyed only limited success in terms of impact on the quality of education that children attending high-poverty schools receive. As a result, education reformers have examined other rights that may be enforceable in courts, including those provided in NCLB. At the same time, one State and a group of school districts from several states, joined by a national teachers’ union and a number of its local affiliates, have separately challenged NCLB in court as an unenforceable unfunded mandate. A brief recounting of some of these lawsuits, and their conflicts with each other, will provide context for the remainder of

8 Robert A. Frahm, NAACP Details Opposition to "No Child" Lawsuit, Hartford Courant, Mar. 23, 2006, at B1 (describing Esdaile’s comment to a mostly black audience about why the State NAACP opposes a lawsuit filed by the Connecticut Attorney General challenging NCLB).


the discussion. These particular lawsuits are highlighted because, although the lawyers involved in them were doing good work, in combination they reveal some of the tensions faced by those who represent communities. Awareness of these tensions may further inform effective class action practice.

A. Attempts to Enforce Various Provisions of NCLB

In 2003, in Association of Community Organizations for Reform Now v. New York City Department of Education (ACORN), a group of parents and community associations filed a lawsuit against the New York City Board of Education and the Albany School District and their respective Chancellor and Superintendent alleging, *inter alia*, that the defendants had violated several provisions of NCLB.\(^\text{12}\) Specifically, the plaintiffs claimed that the defendants had failed to provide students attending schools in need of improvement, corrective action, or restructuring, with the rights to transfer to different schools and obtain supplemental educational services (SES).\(^\text{13}\) Also, the defendants allegedly had failed to inform parents of the schools’ inclusion in these categories and the corresponding right to request a transfer or SES.\(^\text{14}\)

A judge in the U.S. District Court for the Southern District of New York held that the plaintiffs could not maintain their action pursuant to 42 U.S.C. § 1983, because NCLB “does not reflect the clear and unambiguous intent of Congress to create individually enforceable rights.”\(^\text{15}\)

The following year, in National Law Center on Homelessness and Poverty, Rhode Island v. New York (NLC), a judge in the U.S. District Court for the Eastern District of New York denied the State’s motion to dismiss a lawsuit alleging, *inter alia*, that the plaintiffs, parents of homeless children residing in Suffolk County, New York, had been deprived of their rights secured by the McKinney-Vento Act, a pre-existing law

\(^{12}\) *ACORN*, 269 F. Supp. 2d at 339. The plaintiffs focused on the provisions of NCLB appearing at 20 U.S.C.A. § 6316 (b)(1)(E), (b)(5)(A), (b)(7)(C), and (b)(8)(A)(i) (transfer provisions); § 6316 (b)(5)(B), (b)(7)(C)(iii), (b)(8)(A)(ii), and (e) (provisions governing SES); and § 6316(b)(6) (parental notification). See *id.* at 339–46. Nearly two years later, relying on *ACORN*, a federal district court judge in Ohio similarly concluded that NCLB did not confer rights upon private providers of tutoring services to bring an action enforceable under 42 U.S.C. § 1983 or by an implied private right of action. See *Fresh Start Acad. v. Toledo Bd. of Educ.*, 363 F. Supp. 2d 910, 916 (N.D. Ohio 2005).

\(^{13}\) *ACORN*, 269 F. Supp. 2d at 339.

\(^{14}\) *Id.*

\(^{15}\) *Id.* at 347.
reauthorized as part of NCLB in 2002. The judge also allowed the plaintiffs’ motion for class certification. In concluding that the plaintiffs’ rights were enforceable under § 1983, the judge explained that Congress clearly intended that the McKinney-Vento Act confer individually enforceable rights. He distinguished McKinney-Vento from the provisions of NCLB that the judge in ACORN had determined did not confer such enforceable rights. In documents submitted to the court, the NLC plaintiffs’ counsel drew the same distinction, adopting the ACORN court’s analysis of NCLB and describing the earlier lawsuit as addressing an “entirely different statutory regime.” In so doing, they strengthened some of their clients’ educational rights (those secured specifically for homeless children by the McKinney-Vento Act), while adopting arguments that weakened any claim their clients might make in the future to other rights held by homeless and non-homeless children alike, specifically rights to the parental notice, SES, and transfer provisions of NCLB.

B. Challenges to NCLB

Although children and their parents have not challenged NCLB as a class, other plaintiffs have done so. Their actions have colored the landscape for those seeking to pursue education reform through the courts. School districts in several states, joined by a national teachers’ union and ten of its local affiliates, filed a thus far unsuccessful lawsuit against the Secretary of the U.S. Department of Education in her

16 224 F.R.D. 314, 314, 318, 321 (E.D.N.Y. 2004). The purpose of the McKinney-Vento Act, 42 U.S.C. §§ 11431–11435, is to “ensure that each child of a homeless individual and each homeless youth has equal access to the same free, appropriate public education . . . as provided to other children and youths.” 42 U.S.C. § 11431 (2002); see NLC, 224 F.R.D. at 318.

17 NLC, 224 F.R.D. at 326.

18 Id. at 319–20.

19 Id. at 320–21. The judge specifically noted several distinctions between McKinney-Vento and NCLB. Id. NCLB seeks aggregate education reform by holding states and educational agencies (LEAs) accountable, focuses on whether LEAs are making adequate yearly progress, and provides for federal enforcement. Id. McKinney-Vento, in contrast, imposes on the State a mandatory requirement to provide for each homeless child the “same opportunity and access to education as a nonhomeless child,” provides for specific entitlements for specific individuals “by directing [LEAs] to carry out specific activities,” and lacks any mechanism for administrative enforcement. Id. at 320.


official capacity, alleging that NCLB is an unenforceable, unfunded mandate. The Attorney General of Connecticut, claiming to be fighting in the public interest to close the achievement gap, obtain adequate federal funding for all classrooms, and “vindicate the rights of our children,” filed a separate lawsuit on similar grounds. Highlighting conflicts among those who claim to speak for children attending persistently failing schools, the NAACP in Connecticut, accompanied by several minority schoolchildren, filed a motion to intervene in the Connecticut case on the side of the defendant federal government. The NAACP and other opponents of Connecticut’s action fear that the Attorney General’s lawsuit could set dangerous precedent for other civil rights laws, hurt minority and poor children by allowing a state to

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24 See Plaintiff’s Complaint for Declaratory and Injunctive Relief, Connecticut v. Spellings, No. 3:05-CV-01330 (D. Conn. Aug. 22, 2005), available at http://www.lawyerscomm.org/2005website/projects/education/educationpics/nclb%20original%20complaint.pdf. Three of four counts were dismissed recently on jurisdictional grounds; the judge held that state officials cannot maintain a pre-enforcement challenge to NCLB. Spellings, 453 F. Supp. 2d at 489, 491 (dismissing Count I); id. at 494 (dismissing Count II); id. at 501 (dismissing Count III); id. at 503 (granting in part and denying in part defendant’s motion to dismiss as to Count IV).

avoid its obligations to them under NCLB, and squander state resources that could otherwise be used to improve schools.  

II. TENSIONS IN STRUCTURAL REFORM LAWSUITS

_Idealism, though perhaps rarer than greed, is harder to control._

—Derrick A. Bell, Jr.  

Several tensions manifested in the lawsuits discussed above arise frequently in the context of lawyering for education and other structural reform, and can limit the efficacy of both process and results. These tensions include the strength of lawyers’ ideological commitments, attenuated relationships between class counsel and their clients, and the role of client autonomy in group representation.

A. Lawyers’ Ideological Commitments

The Attorney General of Connecticut’s choice to challenge NCLB indicates that he views such an action as consistent with his obligation “to represent the interests of the people of the State of Connecticut in all civil legal matters involving the state to protect the public interest.”  

The NLC plaintiffs’ attorneys aimed to secure education for homeless children. Yet both of their approaches have potentially negative ramifications for the very populations they seek to protect.

This is not an unusual situation, though it is not an unproblematic one. Legal actions based on attorneys’ ideological commitments

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29 See supra text accompanying notes 16–20.

30 Although this paper criticizes lawsuits for structural reform that appear to neglect meaningful client and community input or compromise class members’ rights without their informed consent, the author in no way means to suggest that it is easy or convenient to engage clients and communities in crafting lawsuits and other responses to problems such as inadequate educational opportunity. As the circumstances of these cases reveal, there are significant trade-offs involved. Had the lawyers in the NLC case not distinguished the McKinney-Vento Act from other provisions of NCLB, for example, they may well have lost their case. See NLC, 224 F.R.D. 314, 320–21 (E.D.N.Y. 2004).

31 See Robert L. Rabin, Lawyers for Social Change: Perspectives on Public Interest Law, 28 STAN. L. REV. 207, 231 (1976) (asserting that public interest practitioners, including estab-
may be simply the manifestation of what lawyers think is important, rather than an expression of the concerns of clients, class, or community. Their concerns about the potentially broad impact of NCLB drove the actions of the Attorney General, school districts, teachers’ unions, the Connecticut NAACP, and the plaintiffs’ lawyers in NLC. This typifies the focus of “cause lawyers” on the “broad stakes involved in representing their client community.”

The Attorney General decided to challenge NCLB in court because he believed children are “ultimately the victims of unkept federal promises and inadequate resources resulting from unfunded federal mandates.” He viewed the endorsement of the lawsuit by a large number of school boards across the state as a “groundswell of grassroots support—crossing all geographic, political and socio-economic borders.” Yet he filed the lawsuit before ascertaining whether a large number of students and their parents, whose lives would be affected directly by the lawsuit, wished to pursue it. The moral implications of such decisions by lawyers raise the “critical question of accountability in a democratic society,” because in choosing which claims to bring, lawyers serve as gatekeepers to the legal system.

Many education reform plaintiffs’ lawyers may believe they have adequate information upon which to base their strategic decision-making, even without client input, because they have spent decades published law reform organizations, have been historically “selective in defining litigation priorities within a broad range of . . . grievances”).

32 See William B. Rubenstein, Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns, 106 Yale L.J. 1623, 1637–38 (1997) (discussing the fact that while lawyers were debating about when to bring forward a case to press the issue of gay marriage, lesbians and gay men started filing their own legal actions without support from legal experts).


36 See Frahm, supra note 8. The NAACP’s intervention on behalf of minority plaintiff children reveals the lack of unified community support. See id. (“The NAACP’s decision to back [NCLB] is an effort to guarantee that poor and minority children are represented in the courtroom argument over how it will be applied in Connecticut.”).

37 Cahn & Cahn, supra note 5, at 1008 (asserting that because a group of independent lawyers remains “free to choose [its] own version of the public interest . . . [w]hether public interest law will develop new methods of ensuring democratic control of the nation’s resources and programs or whether it will be a further entrenchment of the most elitist tendencies in the law remains to be seen”).
pursuing educational equity. The disparity in expertise possessed by lawyers and their clients, however, raises additional concerns, as it may increase client dependence and permit lawyers to manipulate clients in the guise of providing assistance. In addition, many idealistic lawyers may choose the class action as a litigation strategy because it advances broad idealistic goals and affects large numbers of people while potentially providing the self-reinforcement of winning a big case. Given the level of their investment, it may be difficult for lawyers to step back from their own strategies to consult with clients who may disagree with them. This problem is exacerbated by a lack of clarity as to the precise identity of the client. The Connecticut Attorney General, for example, represents the state and the “public,” entities difficult to define. Although they represent specific clients, the Connecticut NAACP and the NLC plaintiffs’ attorneys, like many public interest lawyers, may “see themselves as advocates for a much more loosely defined constituency or community.” Furthermore, many education reform lawsuits are filed on behalf of young people under the age of eighteen, which raises a plethora of additional issues, detailed discussion of which is beyond the scope of this article.

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38 See Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 714 (1941) (observing that the individuals making up a group in a class action are usually in no position to act for themselves because they lack knowledge and because the expense of seeking redress is much greater than their individual stake in a controversy); see also Bell, *supra* note 27, at 491 & n.63 (noting that the willingness of many attorneys to assume that they know best may lead to a lack of accountability to clients). In *Serving Two Masters*, Professor Derrick Bell discusses the consequences of the NAACP’s pursuit of integration as the only acceptable remedy for the poor quality of education that black students were receiving. See Bell, *supra* note 27, at 476 & n.21. Many of Bell’s critiques of the NAACP’s legal strategy in school desegregation cases, written thirty years ago, apply with equal force to lawsuits concerning the enforceability of NCLB today.

39 Cahn & Cahn, *supra* note 5, at 1040 (“We have seen this take place in the legal service programs—where lawyers ‘for’ the poor decide what in their professional collective wisdom is in the best interests of the poor.”).

40 Bell, *supra* note 27, at 493.

41 See id. (asserting that psychological motivations may underlie lawyers’ tendency to direct a class action lawsuit toward their own goals rather than those of their clients).

42 See id. at 491 & n.63 (citing Comment, *The New Public Interest Lawyers*, 79 YALE L.J. 1069, 1124–25 (1970)).

43 In addition to the difficulties many public lawyers have in defining their clients, the context of education further complicates the issue. Named plaintiffs may include students under the age of eighteen, though their parents hold many of their educational rights, such as those provided in the Individuals with Disabilities in Education Act, and may be included as “next friends” or plaintiffs in their own right. See, e.g., NLC, 224 F.R.D. 314, 316 (E.D.N.Y. 2004) (concerning action commenced by parents of homeless children); ACORN, 269 F. Supp. 2d 338, 339 (S.D.N.Y. 2003) (concerning claim initiated by parents of schoolchildren). Where students’ goals diverge from those of their parents, additional
B. Attenuated Relationships with Clients

It is difficult in the context of complex litigation for lawyers to fulfill their ethical obligations to consult with clients regularly and fully inform them of relevant considerations. Typically, parties in a class action exercise little control over their lawyers; the usual employer-employee relationship is absent, as class action lawyers must represent the interests of an amorphous group of clients. The distance between class action lawyers and their clients may lead lawyers to underestimate their clients’ stake in the matter or to fail to recognize potential conflicts that require their attention.

Members of the plaintiff classes in \textit{ACORN} and \textit{NLC} and the intervener class in Connecticut are numerous and potentially divided, making it difficult for lawyers to figure out whom to consult for guidance in strategic decision-making. Even if class members are easily identifiable, should the class action lawyer’s obligation run to the representative party, someone who is typically not chosen by class members but either comes forward as a volunteer or is sought out by the lawyers, or to the class as a whole? Counsel may limit interaction conflicts are raised for lawyers who represent children. A more detailed discussion of these issues, which raise important considerations for lawyers representing young people, is beyond the scope of this article. Interested readers may consult Kristin Henning, \textit{Loyalty, Paternalism and Rights: Client Counseling Theory and the Role of Child Counsel in Delinquency Cases}, 81 \textit{Notre Dame L. Rev.} 245, 266 (2005) and Martha Matthews, \textit{Ten Thousand Tiny Clients: The Ethical Duty of Representation in Children’s Class-Action Cases}, 64 \textit{Fordham L. Rev.} 1435, 1439 (1996).

\begin{itemize}
  \item \textsuperscript{44} Bell, \textit{supra} note 27, at 504.
  \item \textsuperscript{45} Kane, \textit{supra} note 3, at 389; see Bell, \textit{supra} note 27, at 491 (noting that civil rights attorneys frequently are isolated from their clients).
  \item \textsuperscript{46} An example of such an underestimation is provided in Rabin’s assertion that “[t]he classical tension that the poverty or criminal lawyer sometimes confronts between establishing broad precedent and safeguarding the rights of his client is hardly ever an issue because public interest advocates simply do not have discrete clients whose personal liberty or property is at stake.” Rabin, \textit{supra} note 31, at 234.
  \item \textsuperscript{47} See Bell, \textit{supra} note 27, at 504 (discussing these concerns in the context of school desegregation litigation); \textit{see also supra} note 43, and accompanying text (describing special issues that arise in representing underage clients). In \textit{NLC}, for example, one of the plaintiffs was no longer homeless by the time the case reached resolution and, as a result, that plaintiff’s priorities may have shifted during the course of the litigation. See \textit{224 F.R.D.} at 325.
  \item \textsuperscript{48} See Bell, \textit{supra} note 27, at 511. Bell suggests, further, that lawyers’ obligations to their clients may be compromised because of how their work is funded or because some groups are more effective than others in getting their attention. \textit{See id.} at 489 (noting that because established civil rights groups fighting school segregation were funded by middle class blacks and whites who believed in integration, civil rights attorneys favored this strategy over others); \textit{id.} at 491 (suggesting that civil rights attorneys may feel as though they must
\end{itemize}
with named plaintiffs because fiduciary obligations run to the class as a whole, such that named plaintiffs’ directives are not of controlling significance. Yet this obligation to represent the interests of all members of a class frequently results in numerous potential conflicts between the interests of lawyers, named class representatives, and unnamed class members. Especially where such conflicts exist, it may be difficult for a lawyer with “strong prudential or ideological preferences” herself to decide who should be heard.

C. The Role of Client Autonomy

The difficulties discussed above may lead lawyers pursuing structural reform to underestimate the importance of ascertaining the interests of their clients or community. Even if they are aware of clients’ concerns, lawyers may choose not to pursue narrower client interests that conflict with the larger cause as they perceive it. The strength of their passions and commitments may lead lawyers to prioritize their own ideologies or strategic concerns over individual autonomy, a problematic notion for an adjudicative system that holds that clients, not their lawyers, are responsible for defining the objectives of litigation. The issue of client autonomy is further complicated within class actions by the concept of group autonomy and the question whether it is more appropriate to emphasize individual autonomy, some form of group consensus, or more abstract notions of collective justice.

1. Individual Autonomy as a Guiding Principle for Client-Lawyer Relationships

The foundation of client-centered lawyering is the premise that an individual should make her own legal decisions. The lawyer is an employee of the client whose professional duty is to advocate for her answer only to those whom they consult in defining the goals of the litigation; concerns of those who do not have access to the lawyers may go unaddressed.

49 Deborah L. Rhode, Class Conflicts in Class Actions, 34 Stan. L. Rev. 1183, 1203 & n.82 (1982) (citing Parker v. Anderson, 667 F.2d 1204, 1211 (5th Cir. 1982)).

50 Kane, supra note 3, at 394–95.

51 Rhode, supra note 49, at 1212.

52 See Calmore, supra note 33, at 1932–36.

53 See Rhode, supra note 49, at 1183.


employer’s best interest.\textsuperscript{56} It is the client, not the lawyer, who determines what is in the client’s best interest.\textsuperscript{57} This paradigm requires that lawyers gain their clients’ trust and cooperation in order to facilitate communication.\textsuperscript{58} By making an effort to understand their clients’ situations; engaging clients in identifying their own objectives, alternatives, and concerns; and offering empathy, client-centered lawyers assist clients in making their own decisions and thereby protect individual autonomy.\textsuperscript{59}

It is unclear to what extent the lawyers involved in the lawsuits concerning the enforceability of NCLB have considered client autonomy. In \textit{ACORN}, plaintiffs included parents of children attending schools in two very different districts.\textsuperscript{60} Had the litigation not been dismissed at such an early stage, some plaintiffs’ schools may have achieved sufficient progress to be removed from the list of schools identified for school improvement, corrective action, or restructuring, such that those students would no longer be entitled, under NCLB, to receive SES or tutoring.\textsuperscript{61} At that point, their lawyers (or the court) may have considered separate representation or sub-classes for distinct factions of the plaintiff class.\textsuperscript{62} In \textit{NLC}, at least one of the initial plaintiffs was no longer homeless at the time the class was certified.\textsuperscript{63} A legal strategy that emphasized the rights of homeless students to the detriment of the rights of all students attending failing schools may no longer have been that plaintiff’s individual choice.\textsuperscript{64}

\textsuperscript{56} Cahn \& Cahn, \textit{supra} note 5, at 1041.

\textsuperscript{57} Id.

\textsuperscript{58} See Ellman, \textit{supra} note 55, at 1128. An in-depth review of the principles of client-centered lawyering is beyond the scope of this article, but for more information the reader may consult \textsc{David A. Binder et al., Lawyers as Counselors: A Client-Centered Approach} (2d ed. 2004). Prevailing client-centered models have, however, been critiqued for their failure to fully account for issues of race and class. See \textit{generally} Michelle S. Jacobs, \textit{People from the Footnotes: The Missing Element in Client-Centered Counseling}, 27 \textsc{Golden Gate U. L. Rev.} 345 (1997).

\textsuperscript{59} See Ellman, \textit{supra} note 55, at 1128–29.


\textsuperscript{61} Cf. 20 U.S.C.A. \S 6316(b)(5)(B), (b)(7)(C)(iii), (b)(8)(A)(ii), (e) (West 2003) (setting forth provisions governing SES available to students attending schools failing to make adequate yearly progress).

\textsuperscript{62} See \textit{infra} notes 93–94, 97 and accompanying text.

\textsuperscript{63} \textit{NLC}, 224 F.R.D. 314, 325, 326 (E.D.N.Y. 2004).

\textsuperscript{64} See \textit{supra} notes 16–20 and accompanying text. Although it may have been sound legal strategy, the \textit{NLC} plaintiffs’ lawyers’ choices not to challenge the \textit{ACORN} court’s determination that many rights provided by NCLB are unenforceable and to distinguish, instead, those rights provided by the McKinney-Vento Act, would make it more difficult for
2. Autonomy in the Context of Group Representation

The trust and cooperation that a lawyer must build with her clients becomes more difficult in the context of community lawyering, which requires lawyers to take into account both individual autonomy and their clients’ choices to make connections. The group lawyer’s responsibility runs to the group and its interests, not solely to individual clients. Maintaining the autonomy of group clients requires that lawyers help group members to clarify their goals, identify and evaluate their options, and ultimately choose a course of action. This model promotes group-based decision-making by placing responsibility for litigation decisions concerning a group in the hands of the group as a whole, rather than an individual within the group. Unfortunately, the group that convenes to participate in a democratic decision-making process may not actually reflect the interests and concerns of the group it purports to represent. Furthermore, where disagreements among group members manifest themselves, the lawyer for that group must develop an understanding of the nature of any such conflicts, maintain her loyalty to the group as an entity, and refrain from abandoning her duties to all members. As she seeks their clients, whether they remained homeless or not, to enforce their rights to, for example, SES.

65 See Ellman, supra note 55, at 1107 (indicating that lawyers representing communities must understand and respect community norms and monitor empathic responses, choices, and values).

66 See Rubenstein, supra note 32, at 1679; see also Rhode, supra note 49, at 1203.

67 See Ellman, supra note 55, at 1132; see also Rubenstein, supra note 32, at 1634 (asserting that client-centered lawyering for groups requires the development of democratic means of group member involvement).

68 Rubenstein, supra note 32, at 1655. Under this model, the decision to go to court belongs to the group collectively, and decisions regarding litigation require the input and assent of those whose rights are at issue. Id. This model increases litigation’s claim to legitimacy and individuals’ confidence in their community. Id. at 1655–56. As a result of democratic decision-making, the community becomes more involved with decisions that affect it, and community members become more actively engaged with each other, with the law, and with their “advocate-experts.” Id. at 1656.

69 See id. at 1658; Rhode, supra note 49, at 1233–37 (observing that few class members attend meetings convened by attorneys in civil rights cases, and those who do respond or attend are often neither knowledgeable nor unbiased).

70 See Ellman, supra note 55, at 1159–60. Ellman emphasizes that the lawyer’s ethical duty is to represent the position endorsed by the organization, rather than withdraw. Id. at 1160. If disagreements persist, the group’s lawyer should ask those who dissent from the organization’s position whether they want to pursue the issue themselves and, if so, advise them to obtain separate counsel. Id. at 1161.
consensus within the group, the lawyer must prevent herself from taking over the process.\footnote{See id. at 1141, 1154; Rubenstein, supra note 32, at 1679. Ellman also emphasizes that the lawyer must be careful to remain balanced and avoid making promises of confidentiality or seeming partial to some subset of the group. See Ellman, supra note 55, at 1137–38. He further cautions that although a lawyer can empower groups by facilitating access to court, she must be aware that the class is not empowered against the lawyer herself. Id. at 1118.}

If the attorneys for the Connecticut NAACP and the plaintiffs’ lawyers in \textit{NLC} view not individuals, but a group or groups as their client, it might be difficult for them to ascertain the group’s autonomous wishes. For example, the Connecticut NAACP may view itself as representing the individual plaintiffs on whose behalf it intervened, all poor and minority children in Connecticut, or the broader civil rights community, groups whose interests may or may not overlap. Depending upon which group or groups the plaintiffs’ lawyers viewed as their client, the principles discussed above would drive a different process of nurturing and maintaining group autonomy. This feat becomes even more challenging in the absence of an established group that can be said to represent all students subject to both the requirements and the benefits of NCLB.\footnote{See Ellman, supra note 55, at 1119.} In the event that one or more groups claim to represent these students, tensions might emerge between the groups and communities across the nation.

\section{3. Autonomy in Class Actions}

The Model Rules do not address adequately how to establish a community’s legal goals and determine the best ways to achieve them.\footnote{Rubenstein, supra note 32, at 1676.} Because an individualist model drives rules of civil procedure and professional ethics in the American adjudicative system, an individual group member may claim to represent and bind those similarly situated, and her attorney may determine how the case will be pursued.\footnote{Id. at 1624.} Because the class action lawyer owes a duty to the class, rather than to individuals, she must approach client autonomy with a particular sensitivity to her professional and ethical responsibilities.\footnote{See Parker v. Anderson, 667 F.2d 1204, 1211 (5th Cir. 1982); see also Ellman, supra note 55, at 1119 (noting that under Fed. R. Civ. P. 23(e), with court approval, lawyers may settle a case even where a majority of named class representatives object). As Ellman indicates, the absence of a decision-making structure for a class as a whole frequently means that the class lacks the power to direct a lawyer’s actions. Ellman, supra note 55, at 1119. As}
must make decisions about how to resolve disputes that arise among community members in order to represent the community effectively. Within a class action, the issue of client autonomy is further complicated by the popular view that the lawyer’s responsibility runs to the class as a whole, including unnamed representatives. Regarding the class as client enables the attorney to protect the interests of unnamed (and unidentified) class members unable to protect their own interests. Furthermore, considering the class as client while fostering autonomy encourages attorneys to be mindful of the balance between the needs of current and future class members. This balance is especially important in the context of settlement negotiations, as class attorneys often pursue an institutional action to further certain public improvements rather than the interests of any particular client. Recognizing the tensions between the immediate interests of named plaintiffs and broader concerns animating lawyers’ or groups’ involvement in a structural reform lawsuit does not resolve these tensions, but may lead to increased disclosure and improved communication between class action plaintiffs and their lawyers.

Many of these conflicts have not yet manifested themselves in litigation concerning the enforceability of NCLB, and for this reason, a result, the lawyer has a profound responsibility for gauging what is in the class’s best interests. 

76 See Rubenstein, supra note 32, at 1626. Rubenstein recommends that where there are disputes among community members, decision-making regarding goals of litigation should be more democratic, whereas more reliance on experts is appropriate for resolution of technical disputes about methods of litigation.

77 See Kane, supra note 3, at 394; Rhode, supra note 49, at 1204–05, 1214–15.

78 See Rhode, supra note 49, at 1215 (indicating that these groups frequently will not know the likely consequences of litigation nor the extent of their stake in the outcome, and will therefore be unable to gauge whether or not they need their own representative to protect their interests); see also Kane, supra note 3, at 394 & n.56 (noting that because absent class members may be bound and their decisions might not accord with those of the self-appointed named representative, the class action lawyer’s role is more dominant than that of a lawyer in the traditional adversarial model).

79 See Kane, supra note 3, at 396 (asserting that institutional litigation class attorneys often urge settlements favoring prospective relief and policy changes rather than relief for past harmful practices).

80 See id.; Rhode, supra note 49, at 1186.

81 See Bell, supra note 27, at 501–02 (discussing implications of Justice Harlan’s dissent in Nat’l Ass’n for the Advancement of Colored People v. Button, 371 U.S. 415 (1963)). Bell observes that, particularly in school cases where an individual plaintiff might prefer a compromise that would frustrate attainment of the larger group’s goals, the choice between an immediate small gain and possible later achievement of a larger aim should belong to the named plaintiff, not to her attorneys.

Id. (quoting Robert H. Birkby & Walter F. Murphy, Interest Group Conflict in the Judicial Arena: The First Amendment and Group Access to the Courts, 42 Tex. L. Rev. 1018, 1036–37 (1964)).
this article aims not to suggest how the lawyers in these particular cases could have acted differently, but to raise awareness of potential pitfalls to avoid in the future. The NLC lawsuit was filed in February of 2004, and the plaintiffs reached a court-approved settlement with the defendants in October of 2004, four days after the judge denied the defendants’ motion to dismiss and certified the plaintiff class. This left little time for intra-group conflict to develop prior to settlement. An assessment of the role of client autonomy in the NAACP’s intervention in the Connecticut lawsuit would be premature, as the motion was filed in January of 2006 and denied without prejudice in August of 2006. The court has recently invited a motion to intervene as to the remaining count of the complaint, and whether the NAACP will accept that invitation remains to be seen. The case is far from the remedy stage, where potential conflict among clients is likely to materialize. The strategies discussed in Part III may assist courts and lawyers as this action develops, and in future complex education reform litigation.

III. ADDRESSING THESE CONFLICTS: RECOMMENDATIONS FOR COURTS AND LAWYERS ENGAGED IN STRUCTURAL REFORM LITIGATION

[Structural reform litigation is an interest group strategy to change policy outcomes . . . . This kind of litigation reflects “an understanding by organized interests that a class action suit could call governmental attention to problems that were not being addressed . . . .” —Anthony M. Bertelli & Sven E. Feldmann]

The decision to file a lawsuit as a class action, or to intervene on behalf of an existing class in a lawsuit, indicates that a particular issue has implications beyond the named plaintiffs, and the litigation is, to

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84 Id. at 68.
85 See Rhode, supra note 49, at 1188–89 (noting that conflicts among clients in structural reform litigation frequently do not emerge until the settlement or remedial deliberation phase because a loosely defined consensus that rights have been infringed or needs ignored unites a group during the liability phase).
some extent, conceived of as a community-wide venture.\textsuperscript{87} Because a 23(b)(2) class action final judgment binds all class members,\textsuperscript{88} even when unnamed class members would have prioritized different remedies—or preferred not to bring the lawsuit at all—it is essential that lawyers pursuing structural reform lawsuits, and the courts hearing these claims, consider the tensions outlined above in determining their respective courses of action.\textsuperscript{89} Although it may not be possible to resolve the numerous potential conflicts attendant to class actions that arise in public interest lawyering, awareness of the role of lawyers’ ideological commitments in determining the course of litigation, the implications of attenuated relationships between lawyers and their clients, and the role of client autonomy in class actions may lead to improved practices. The suggestions outlined below aim to mitigate the effects of these tensions.\textsuperscript{90}

### A. The Role of the Court

Guided by ethical responsibilities and the Federal Rules of Civil Procedure, particularly Rule 23, the court plays an important role in class action litigation, but it is handicapped to some extent by the limited information it receives.\textsuperscript{91} Measures that increase and improve the amount and quality of information that a judge is able to consider would allow the judge to take account of the existence of conflicts between lawyers and clients or among clients, and take action to protect unrepresented or inadequately represented interests.\textsuperscript{92} Furthermore, given the volume of judicial resources consumed by class actions, closer

\textsuperscript{87} See Schlozman & Tierney, supra note 86, at 368 (stating that judicial decisions in class actions apply not just to the plaintiff but to a whole class of persons).

\textsuperscript{88} See Fed. R. Civ. P. 23(b).

\textsuperscript{89} See Bell, supra note 27, at 505–06; Bryant G. Garth, Conflict and Dissent in Class Actions: A Suggested Perspective, 77 Nw. U. L. Rev. 492, 502–03 (1982) (“Rule 23(b)(2) class members generally are unable to opt out of the lawsuit and may be bound even if they receive no notice of the action. [The Rule thus permits a class action] to proceed without the active support of class members.”).

\textsuperscript{90} These solutions address the roles and responsibilities of courts and lawyers; operating separately or in concert, they may provide guidance for those seeking to improve structural reform litigation. See Kane, supra note 3, at 408 (discussing the importance of collaboration between lawyers and judges in this context).

\textsuperscript{91} See, e.g., Model Code of Jud. Conduct Canon 3(B)(7) (amended 1991), available at http://www.abanet.org/cpr/mcjc/canon_3.html (directing judges to “accord to every person who has a legal interest in a proceeding, or that person’s lawyer, the right to be heard”); Fed. R. Civ. P. 23 (outlining the procedure and requirements for bringing class action lawsuits); see also Rhode, supra note 49, at 1218 (emphasizing that courts often lack information regarding the need to invoke Rule 23’s procedural devices).

\textsuperscript{92} See Kane, supra note 3, at 405.
judicial oversight from the beginning might avert retrospective formal reviews and proceedings that consume time and resources and that may occur too late to protect those most vulnerable.\(^93\)

In determining whether to allow a class action to proceed and whether to certify a particular class, courts apply the multiple requirements of Rule 23 of the *Federal Rules of Civil Procedure*.\(^94\) A central requirement of the Rule for the purposes of this analysis is courts’ responsibility to ensure adequate representation.\(^95\) In the more than fifty years that the *Federal Rules of Civil Procedure* have been in existence, several commentators have proposed that Rule 23 be revised to focus more on this issue.\(^96\) Others recommend that rather than modify the Rule itself, courts should scrutinize carefully whether all of its requirements have been met.\(^97\) Recognizing that conflicts among classes are not revealed and addressed until the settlement stage in

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\(^93\) *See id.* at 406.

\(^94\) FED. R. CIV. P. 23(a) (denoting prerequisites for class actions); *id.* 23(b) (outlining additional requirements for maintenance of class actions); *id.* 23(c) (setting forth processes, procedures, and requirements for determining by order whether to certify a class action, appointing class counsel, establishing membership in a class, reaching judgments, and representing multiple classes and subclasses); *id.* 23(e) (indicating the procedures for settlement, voluntary dismissal, and compromise); *id.* 23(f) (establishing rules for appeals); *id.* 23(g) (noting procedure for appointment of class counsel); *id.* 23(h) (stating procedure for obtaining an attorney fees award).

\(^95\) *Id.* 23(a)(4); Rhode, *supra* note 49, at 1218.

\(^96\) *See Shapiro, supra* note 54, at 958–59 (suggesting that Rule 23 “be revised to facilitate return to the fundamental point developed by the Supreme Court over half a century ago—that the constitutional propriety of class action treatment, and the binding effect of judgment on the members of the class, turns on the issue of adequate representation” (referring to *Hansberry v. Lee*, 311 U.S. 32 (1940))). For Shapiro, adequacy of representation includes consideration of the potential existence of conflicts; he recommends that counsel remain responsible to the class as a whole by communicating regularly with a sufficiently representative group of class members and ensuring that they be heard at critical stages of the process to guard against manipulation of the class by their counsel or their adversary. *Id.* at 959–60; *see also Rubenstein, supra* note 32, at 1660 n.174 (proposing that courts “reconceptualize the notion of adequacy of representation to ensure that the legal representatives utilize[] democratic decisionmaking processes in adopting their strategies and tactics”).

\(^97\) *See Kane, supra* note 3, at 402–03 (recommending increased judicial scrutiny of class counsel’s competence and judicial approval of settlements under Rule 23(e), and suggesting that the judge should participate actively in early stages of class actions, before settlement talks begin, to increase her awareness of potential problems); Shapiro, *supra* note 54, at 960 (noting the court’s important role in overseeing class counsel); *see also Bell, supra* note 27, at 507 (asserting that principles of equity require courts to scrutinize closely whether representation provided by plaintiffs fairly and adequately protects class interests); *id.* at 507–08 (noting that courts must apply carefully the requirements of Rule 23 to determine the validity of class action allegations in order to protect the interests involved).
many cases, some scholars have proposed adjusting incentive structures to disclose and develop strategies to attend to class schisms earlier in the litigation.

Currently, Rule 23 directs the court to determine “at an early practicable time” by order whether to certify a lawsuit as a class action. Though the Rule does not specify a time limit, where the certification decision is postponed, the rights of absent class members may not be adequately protected. To inform the certification decision, the judge may conduct preliminary evidentiary hearings on the merits or the class issue, appoint special masters, request amicus briefs, or permit intervention in order to gather information. She may also grant or deny certification conditionally. The rules direct a judge to either deny class status or attempt reconciliation of disparate interests where antagonisms among class members or between named representatives and the class have been discovered. In these cases, she has at her disposal several procedural mechanisms, including sub-classing, intervention, bifurcation, and exclusion, to accommodate conflicts among class members and to protect the interests of those who are absent.

Several commentators have suggested that existing procedural protections are not sufficient for courts to meet their ethical and Rule 23 obligations, particularly as to adequacy of representation. Incorporating additional protections into the rules may assist judges in gathering the information necessary to make informed decisions re-

98 See, e.g., Piambino v. Bailey, 757 F.2d 1112, 1145–46 (11th Cir. 1985); Franks v. Kroger Co., 649 F.2d 1216, 1226 (6th Cir. 1981); Soskel v. Texaco, Inc., 94 F.R.D. 201, 203 (S.D.N.Y. 1982); see also Kane, supra note 3, at 397 (noting that, under Rule 23(e), the traditional resolutions of class conflicts that emerge later in the litigation include the withholding of judicial approval of settlement and the disqualification of class attorneys from continuing to represent the entire class).

99 See Rhode, supra note 49, at 1247–51 (proposing specific measures, such as requiring courts to create a factual record concerning notice and adequacy of representation, that would “require plaintiffs’ counsel or a court-appointed expert to submit statements detailing contact with class members and any non-privileged indications of substantial dissen-


101 See id.; see also Note, Conflicts in Class Actions and Protection of Absent Class Members, 91 Yale L.J. 590, 596–97 (1982) (discussing the rights of absent class members to receive notice of action, proposed settlement, or dismissal; request exclusion; participate in the litigation; or object to adequacy of representation).


103 See Note, supra note 101, at 598–99.

104 Id. at 591; see Harris v. Pan Am. World Airways, Inc., 74 F.R.D. 24, 39 (E.D. Cal. 1977), aff’d in part, rev’d in part 649 F.2d 679 (9th Cir. 1980).

105 See Harris, 74 F.R.D. at 37–38; Note, supra note 101, at 591–92.

106 See, e.g., Rhode, supra note 49, at 1191–94.
garding, for example, class certification and whether to approve a settlement.\textsuperscript{107} Furthermore, additional protections may assist courts in dealing with class conflicts once they have been disclosed.\textsuperscript{108} Professor Deborah Rhode describes a pluralistic approach, whereby distinct factions of a class would each have separate representatives, as one way to ensure that dissenting opinions are heard.\textsuperscript{109} Noting the problems of timing, manageability, and expense that this approach entails, she also explores a majoritarian alternative, which features polls and hearings as increased opportunities for class members’ direct expressions of their preferences.\textsuperscript{110} Rhode endorses the latter for a variety of reasons: compared to the pluralist model, the majoritarian approach is less expensive, offers the court more direct access to class members’ views rather than their attorneys’ or named representatives’ interpretive gloss, and may empower a larger number of individuals by increasing their participation in the process.\textsuperscript{111} The disadvantage of the majoritarian model is that without considerable expenditure, the views elicited through procedures such as notice and hearings may be “unrepresentative, uninformed, and unresponsive to a range of concerns particularly significant in institutional reform litigation.”\textsuperscript{112} To counteract the tendency of such presentations to be biased, especially when there is a disjuncture between class preferences or when named plaintiffs do not appear to be sufficiently informed or disinterested to speak for an entire class, Rhode recommends that the court be inten-

\textsuperscript{107} See, e.g., Garth, supra note 89, at 515–16 (discussing Abram Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281 (1976) and Owen M. Fiss, Foreword—The Forms of Justice, 93 Harv. L. Rev. 1 (1979)); see also Note, supra note 101, at 604–05 (recommending relaxation of ethical rules restricting attorney solicitation to increase the amount of class information before the court at an earlier stage).

\textsuperscript{108} See Rhode, supra note 49, at 1252. Rhode suggests that courts should refrain from denying intervention as untimely and from assuming that defendants have adequately presented the views of plaintiff class members who disagree with the position advanced by the plaintiffs’ lawyers. Id. She also proposes the use of advisory committees, recommends “clearer standards . . . for appointing and compensating separate counsel” and suggests increased use of “expert witnesses, special masters and magistrates for surrogate representation functions.” Id. at 1253, 1254, 1256. Rhode acknowledges that expense may prevent the use of these measures. Id. at 1256.

\textsuperscript{109} See id. at 1221 (indicating that this approach could involve subclasses, mandatory or permissive intervention, or amici participation).

\textsuperscript{110} See id. at 1221, 1224–25, 1228.

\textsuperscript{111} See id. at 1232–33, 1243–44 (suggesting that majoritarian strategies may help the court to understand class members’ priorities and may increase the significance accorded their opinions).

\textsuperscript{112} Id. at 1233.
tional and conscientious in seeking out and bringing in a diverse cross-section of individuals to express their opinions.113

In addition to developing new rules to guide the court’s own behavior, commentators have proposed mechanisms through which courts may regulate what happens outside of court to ensure participation in public interest litigation affecting groups.114 One scholar proposes that courts limit self-appointed community representatives’ potential for overreaching by instituting procedural rules that enhance community dialogue.115 Such measures constitute one method, short of requiring elections to make decisions about litigation, to counter the alienation and disempowerment caused by over-reliance on lawyers.116 Court rules could require that prior to filing an action on behalf of a group, lawyers present evidence of group or community participation in the filing.117 To reduce the vulnerability of a group to manipulation by a lawyer, courts could allocate to specialists decisions that implicate group rights, such as initiation, pursuit, and settlement of litigation.118 Although this model may effectively cure some of the defects inherent in decentralized decision-making by group members or top-down decision-making by lawyers, it also infringes on individual liberty and rests on the elitist assumption that specialists can better determine a community’s goals than can community members themselves.119

Ensuring participation by community members through formal court rules or court-ordered procedural mechanisms for lawyers and

113 See Rhode, supra note 49, at 1236, 1244.
114 See Garth, supra note 89, at 521 (“[C]ourts should encourage lawyers and others interested in rights enforcement to seek out, inform, and mobilize those who stand to be affected by class actions.”).
115 See Rubenstein, supra note 32, at 1659–60.
116 Id. Rubenstein further elaborates on this proposal, suggesting that a court may be authorized by rule to dismiss an action in the event that an individual or expert plaintiff seeking to represent a group is unable to demonstrate that she can fairly represent the group’s interests and that the action flows from a democratically produced group decision. Id. at 1670–71. Although this approach values individualism and expertise in addition to democratic process, it is imperfect because it is difficult to ascertain who comprises the “community” being represented. Id. at 1672.
117 Id. at 1659–60; see Garth, supra note 89, at 516 (suggesting that judges in the structural context should construct a broader representational framework); id. at 525 (courts should inquire into whether a class action brought by an organization is the result of a decision-making process responsive to its membership).
118 Rubenstein, supra note 32, at 1662–63. The specialists, who need not be attorneys, must be skilled in determining community goals. Id.
119 Id. at 1663–64. Rubenstein suggests that this model may be most appropriate for technical lawyering decisions. Id. at 1666.
class representatives would not necessarily provide the court with all of the information it needs to make informed decisions regarding adequate representation and other elements of class certification. Because their obligations are not limited to named plaintiffs but run to the class as a whole, it is especially important that class counsel expose conflicts to the court. A policy of mandatory disclosure of potential conflicts between class and attorney, or among class members themselves, is one way for lawyers and courts in class actions to meet their fiduciary obligations to both named representatives and absent class members. Mandatory disclosure may impose financial costs and unfamiliar roles and responsibilities on lawyers, and it may also impede the settlements that named plaintiffs and their counsel desire as it invariably flushes out dissension. However, mandatory disclosure would serve important due process values such as respect for individual dignity, autonomy, and self-expression. These values are especially important in institutional reform class actions, which involve “complex indeterminate remedies, fundamental personal values, nonapparent preferences, and politically vulnerable forms of intervention.” Furthermore, in institutional reform cases, the defendant has often proven itself unable to control its own behavior, presenting increased opportunities for courts to guide plaintiffs’ active participation in the design of remedies. For this reason, courts must be apprised of the full range of class members’ interests and preferences.

B. The Role of the Lawyer

Although courts have ethical and legal responsibilities in structural reform class actions, it is lawyers who meet with clients, determine which claims to file, and make tactical decisions throughout the course of the litigation. Furthermore, the relief sought in structural reform cases, like those concerning the enforceability of NCLB, frequently ex-
tends years into the future, requiring that public interest lawyers develop “long-term staying power to insure meaningful implementation” of their courtroom victories. Because ethical rules do not provide sufficient guidance and procedural protections may fall short as well, class action lawyers must be especially attentive to their roles and the balance between their interests and those of their clients. Commentators addressing this balance have focused on various aspects of, and have reached different conclusions about, the lawyer’s role.

One alternative emphasizes clients’ individual autonomy as a driving force in class actions. Professor Derrick Bell, for example, reminds lawyers that their job is to lawyer, not to attempt to lead their clients and the class in making decisions that should be determined by clients and shaped by communities. For lawyers involved in school reform, litigation as a strategy presents the seductive opportunity to focus on abstract legal principles rather than protection and advancement of client interests. By remaining receptive to those interests, lawyers may increase clients’ involvement and nurture their autonomy.

Rather than focus on individual clients’ needs, Professor William Rubenstein emphasizes the role of professional public interest litigators’ expertise in class actions. In light of the American legal system’s emphasis on individuals, he asserts, it is important to value the expertise of professional public interest litigators in litigation campaigns, even at the expense of attorney individualism or group decision-making. This paradigm of client-centered lawyering in class actions requires broad conceptions of “client” and “competence.” Proposed changes to the rules governing class actions would, for example, require plaintiffs filing an action on behalf of a group to provide pre-filing notice to anyone whose interests are at stake, which would allow dissenting class members the opportunity to be heard. By placing the burden to come forward on community members without

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128 Rabin, supra note 31, at 252.
129 See, e.g., Ellman, supra note 55, at 1104.
130 See Bell, supra note 27, at 512 (calling on lawyers involved in class action litigation to recognize their duties to the client and community); Ellman, supra note 55, at 1169 (cautioning lawyers to refrain from overreaching).
131 Bell, supra note 27, at 512; see Ellman, supra note 55, at 1169.
132 Bell, supra note 27, at 504. Although Bell’s criticism, directed at the NAACP’s role in school desegregation litigation, may not describe the lawyers involved in the cases discussed in this article, it does sound an important cautionary note. See id.
133 Rubenstein, supra note 32, at 1633.
134 Id. at 1674–75.
135 Id. at 1673.
granting them a veto power, this model both preserves the initiative of self-appointed representatives and experts and mandates that they enter into dialogue with other interested group members. Lawyers representing groups are expected to consider both their clients’ interests and the consequences of their actions for others. In Rubenstein’s view, ethical, client-centered lawyering requires that a class action attorney have experience that helps her to understand and be sensitive to the history, structure, and divisions of the community on whom her case will be binding.

Other commentators, however, might characterize Rubenstein’s emphasis on expertise and strict boundaries between the roles of lawyer and client as “regnant lawyering” because it maintains the disassociated power over clients that dominates the traditional lawyer-client model. According to Professor Gerald López, lawyers should embrace a “rebellious lawyering” model, one which demands that lawyers and those with whom they work “nurture sensibilities and skills compatible with a collective fight for social change.” Rebellious lawyers practice collaborative advocacy, connecting with the community they serve and working with their client community, not just on its behalf. They must adopt a problem-solving orientation appropriate for working with others. This model involves brainstorming, designing, and executing strategies that respond immediately to particular problems, while at the same time fighting social and political subor-

136 Id.
137 Id. at 1674 & n.226; see also Rhode, supra note 49, at 1214–15 (noting that class sentiment about appropriate remedies may evolve over the course of a protracted lawsuit, and therefore a lawyer’s duty of adequate representation “must run to all class members, present and future”).
138 Rubenstein, supra note 32, at 1675.
139 See Calmore, supra note 33, at 1933–34. Regnant lawyering focuses on the special skills of lawyers and the preservation of a formal relationship. See id. at 1934. It views service (addressing an individual problem) as separate from impact (advancing systemic change). Id. According to Calmore, regnant lawyering is cultivated under the circumstances of practice, with features such as social and cultural distance and distrust between lawyers and clients, different world views, and high demands on lawyers’ time. Id. at 1935. Regnant lawyering is likely to persist because of psychological factors, such as the felt need to address immediate concerns before longer-term ones, and institutional factors, such as the delegation of allocative decision-making to street-level lawyers. Tremblay, supra note 4, at 970.
140 GERALD R. LÓPEZ, REBELLIOUS LAWYERING: ONE CHICANO’S VISION OF PROGRESSIVE LAW PRACTICE 38 (1992); see Calmore, supra note 33, at 1933–34.
141 López, supra note 140, at 37–38; Calmore, supra note 33, at 1936.
142 López, supra note 140, at 38; Calmore, supra note 33, at 1936.
This multi-layered approach is consistent with Professor Stephen Ellman’s observation that lawyers working on behalf of those who would otherwise lack adequate representation to achieve social reform must find strategies that “target broad situations rather than individual circumstance[s].” These strategies are necessary because problems are often related to social conditions and because the needs faced by the poor will always exceed their lawyers’ capacity to meet them.

Like López, Professor Michael Diamond recognizes that the law on its own cannot provide the kind of long-term relief that poor and subordinated clients need. Accordingly, he proposes that lawyers should engage in a “cross-disciplinary and pro-active political assault on oppression” that involves interacting with clients on a non-hierarchical basis, participating with them in planning and implementing strategies designed to build client power, and viewing each client’s world beyond its legal implications. These “activist lawyers” assist their clients in developing and realizing enduring legal and non-legal solutions for addressing problems that they face in the present and may face in the future. Diamond’s approach is consistent with Bell’s admonition that lawyers seeking social change “make clear that the major social and economic obstacles are not easily amenable to

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143 López, supra note 140, at 38; see Ellman, supra note 55, at 1111 (asserting that progressive lawyers for groups should foster collective mobilization without sacrificing individual autonomy).

144 Ellman, supra note 55, at 1105–06.

145 See id.; see also Cahn & Cahn, supra note 5, at 1012 (asserting in 1970 that attorneys for the poor should focus on building self-sufficiency among consumers of legal services and “developing new ways to complement a judicial system increasingly incapable of responding to” broad classes of justice and inequity). Professor Stephen Wexler argues that in light of these realities, lawyers for the poor should concern themselves less with the attorney-client relationship and the solving of legal problems, and more with helping poor people to organize themselves to orchestrate change. Stephen Wexler, Practicing Law for Poor People, 79 YALE L.J. 1049, 1053 (1970).


147 Id. at 110.

148 See generally id. Diamond characterizes this model as drawing from several existing models, including the collaborative model, which he describes as seeking to break down barriers between the professional and clients from subordinated groups by having attorneys become, as much as possible, members of the community who help clients learn to advocate for themselves, and the client-centered model, which he describes as working to achieve collective action while protecting group members’ autonomy. Id. at 82, 97.
the legal process and that vigilance and continued activity by the disad- 
vantaged are the crucial elements in social change.”

CONCLUSION: THE ROLE OF LAWYERS IN EDUCATION REFORM

We believe minority children in Connecticut deserve a voice at the table in this litigation . . .

—John C. Brittain, chief counsel for the Lawyers’ Committee for Civil Rights Under Law

Looking forward, lawyers are likely to continue to participate in securing and enforcing the educational rights of children and their parents, and their practice should be informed by the models of lawyering discussed above. What these various models have in common is increased attention to relationships between lawyers and their clients, and awareness of the power that lawyers have the potential to wield over their clients and their communities, particularly in the context of complex litigation. To be effective, lawyers for groups must be involved with, and engaged in, the communities they represent. Education reform presents numerous opportunities for attorneys to collaborate with clients and communities. A lawyer who respects her clients’ knowledge and autonomy will refrain from imposing her own ideological preferences on their decision-making processes. She will spend considerable time in the community meeting with students and their parents, listening to their concerns, explaining their existing rights, and exploring legal and non-legal approaches to the problems community members have identified.

In the event that her clients have expressed interest in NCLB as a tool to improve education, an attorney must assist them in investigating a wide range of options and address openly any tensions that arise, including implications of each option for future enforcement of

149 Bell, supra note 27, at 514 (quoting Leroy Clark, The Lawyer in the Civil Rights Movement—Catalytic Agent or Counter-Revolutionary?, 19 U. Kan. L. Rev. 459, 470 (1971)); see also Rabin, supra note 31, at 218–19 (suggesting that diversification of attack, including lobbying, educational reform efforts, and protest, may engage community members, and out of this sense of engagement may grow a more abstract identification with organizational objectives such as litigation); Wexler, supra note 145, at 1056 (suggesting that a lawyer can help her clients use her knowledge by: 1) informing individuals and groups of their rights; 2) writing manuals and other materials; 3) training lay advocates; and 4) educating groups for confrontation).

150 Frahm, supra note 8.
related educational rights.\textsuperscript{151} If, for example, she discovers either that some students and parents wish to pursue their rights under NCLB through informal advocacy within schools and school districts, while others want to file a lawsuit to accomplish the same goals, or that the students whose education is at stake disagree with their parents (who hold many of the students’ legal rights), the lawyer should help all group members to explore and evaluate multiple approaches and attempt to seek consensus by presenting a strategy that incorporates various tactics. Furthermore, if it becomes apparent early in the discussions that the group cannot overcome its differences because, for example, some members believe poor and minority children are injured by NCLB while others seek to enforce their rights under the Act, or because some class members seek enforcement of the transfer provisions of NCLB whereas others are more concerned about securing SES or school-based assistance for struggling students given a lack of viable transfer options within their district,\textsuperscript{152} their lawyer should explore the implications of these decisions with the group and recommend that dissenters seek alternate counsel. If disagreement emerges among group members or between the group and its counsel after the commencement of litigation, the lawyer should communicate honestly with class members and, unless the class decides on an alternative course of action, disclose the disagreement to the court.

The skills required to be effective in this work may not be the same as those learned in law school.\textsuperscript{153} Training lawyers who are concerned about their relationships with clients, aware of the potential tensions between their own ideologies and clients’ and communities’ autonomy, and effective in working for structural reform, requires a fundamental shift in legal education.\textsuperscript{154} It is difficult work, but only

\textsuperscript{151} It is unclear to what extent the NCL plaintiffs’ lawyers explained the impact of their legal strategy on enforcement of their clients’ other rights under NCLB.

\textsuperscript{152} Compare 20 U.S.C.A. § 6316(b)(1)(E) (West 2003) (providing that after a child’s school has failed to make adequate yearly progress for two consecutive years, her parents have the unqualified right to transfer her to another district school that is not in need of improvement), with id. § 6316(b)(1)(G) (providing that if the district does not have an acceptable school, parents have the qualified right to transfer their child to schools run by other area LEAs). To the extent that a child attends a school that is not making adequate yearly progress, there are no vacancies in the district schools that are making adequate progress, and the district is unable to establish a cooperative agreement with other LEAs, the child’s right to transfer is meaningless.

\textsuperscript{153} See Gerald P. López, The Work We Know So Little About, 42 Stan. L. Rev. 1, 10–11 (1989) (noting that in many ways, lawyers fighting for social change have largely had to overcome rather than take advantage of the law school experience).

\textsuperscript{154} See id.
through careful attention to relationships with and among clients and communities will lawyers participate effectively in achieving meaningful education reform.
IS THERE ANY PARENT HERE?: FIXING THE FAILURES OF THE MASSACHUSETTS PUBLIC SCHOOL SYSTEM

Alan Jay Rom*

Abstract: Research has shown that many students in Massachusetts’s public schools have yet to receive the adequate education required by the McDuffy decision. Most unsettling is the fact that it is the students most marginalized in the Commonwealth—racial minorities, those from the poorest school districts, and those for whom English is a second language—who are getting the least benefit, if any at all, out of various recent education reform measures. This article discusses the shortcomings of the public education system in Massachusetts to further illustrate the inequity and dismal results of the current system. It will then argue that the Commonwealth should adopt specific measures, such as increased wages for its teachers and lengthened school hours, to finally provide all children in Massachusetts with the quality education they deserve.

Introduction

If educated extraterrestrials from a civilized planet landed in Massachusetts to study how the Commonwealth educates its residents, one might hear them say (in their own language), “Beam us up, there are no intelligent creatures here!” The Commonwealth of Massachusetts, in what can hardly be said to be its “infinite wisdom,” has concocted a scheme for educating its residents that would stymie Rube Goldberg. It is not the purpose of this article to revisit the Supreme Judicial Court’s 1993 judgment in McDuffy v. Secretary of the Executive Office of Education, in which the court stated:

[T]he Massachusetts Constitution impose[s] an enforceable duty on the magistrates and Legislatures of this Commonwealth to provide education in the public schools for the children there enrolled, whether they be rich or poor and

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without regard to the fiscal capacity of the community or district in which such children live.\footnote{1}{615 N.E.2d 516, 555 (Mass. 1993).}

Nor will this article revisit \textit{Hancock v. Commissioner of Education}, where a majority of the court declined to conclude that Massachusetts failed to meet this constitutional obligation,\footnote{2}{822 N.E.2d 1134, 1136–37 (Mass. 2005).} despite over 300 pages of uncontroverted findings of fact that children in poor school districts were not receiving the minimum state educational requirements because these districts did not have the resources to instruct these children in basic subjects.\footnote{3}{\textit{Hancock ex rel. Hancock v. Driscoll}, No. 02–2978, 2004 WL 877984, at *143–45 (Mass. Super. Ct. Apr. 26, 2004) [hereinafter \textit{Hancock Report}] (report to Massachusetts Supreme Judicial Court by Judge Margot Botsford), \textit{recommendation rejected by Hancock v. Comm’r of Educ.}, 822 N.E.2d. 1134 (Mass. 2005). “I accord great deference to [Judge Botsford’s] thoughtful and detailed findings of fact. I accept those findings . . . .” \textit{Hancock}, 822 N.E.2d at 1138 (Marshall, C.J., concurring).} Rather, the subject here is: “now what”?

It has been written, “A great many people think they are thinking when they are merely rearranging their prejudices.”\footnote{4}{Michael E. Tigar, Research Professor of Law, Washington College of Law, Universal Rights and Wrongs: \textit{Roper v. Simmons}, Torture and Judge Posner, Address at the University of Texas (Apr. 2006), \textit{in} \textit{Monthly Rev.} May–June 2006, \url{http://www.monthlyreview.org/0506tigar.htm} (quoting American philosopher William James). Professor Tigar echoed James in his address when he said, “I am going to rearrange some of my prejudices for you.” \textit{Id.}} For over twenty years, there has been plenty of hot air expended on subjects such as charter schools, pilot schools, school-based management, schools within schools, school department decentralization, school department centralization, school choice, academic vs. technical curriculum, standardized testing, school vouchers, mayoral takeovers, and, not to be left behind, “No Child Left Behind”—all terms used in the name of educational reform. Have any of these reforms made any difference in student performance?\footnote{5}{In arguing that education reform initiatives have failed to increase student performance, it has been reported:

While the state has made great progress in the 13 years since education reform was enacted, more than 60,000 children across Massachusetts still languish in schools in which more than half the students have failed either the English language arts or math MCAS exam at least two years in a row. In many of these schools, the record of failure goes back far longer, and in some the percentage of students scoring “proficient” is consistently in single digits.

These so-called reforms, which deal mainly with changes in infrastructure, have not resulted in improved educational performance as measured by objective data; not in poor districts (as the findings in Hancock demonstrated), not for racial minority students, and certainly not for children of limited English proficiency. As Dr. James P. Comer explains, changes in infrastructure “do not offer the potential for a nationwide transformation that a developmental focus does.” In light of these infrastructure reforms, this paper will explore several objective measures of performance before addressing the scope of the remedies needed, or what should be done in Massachusetts.

I. Increased School Spending as a Result of Judicial and Legislative Reforms

School funding has increased dramatically in Massachusetts and improvements in overall student performance have been ascertained since the 1993 McDuffy decision and the Education Reform Act that followed. However, standardized test scores, dropout rates, and the post-graduate plans of high school seniors show that the educational system must still be strengthened before students in property-poor school districts can enjoy equal educational opportunities.

Net school spending between 1993 and 2003 in the four focus districts from Hancock (Brockton, Lowell, Springfield, and Winchendon) provides evidence that school funding has increased in those districts.

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6 James P. Comer, Schools That Develop Children, Am. Prospect, Apr. 23, 2001, at 30, 31. Nonetheless, proposals continue to be made advocating infrastructure changes. E.g., Diane Ravitch, Failing the Wrong Grades, N.Y. Times, Mar. 15, 2005, at A25. For example, in February of 2005, the National Association of Scholars, an independent group of educators, released a report proposing a two-track education for high school students. Id. Upon entering ninth grade, students would be given the choice between a “subject-centered curriculum or a technical, career-oriented course of study.” Id. “The former would look like a traditional college-preparatory curriculum, with an emphasis on humanities, sciences or arts. The latter would include a number of technologically rigorous programs and apprenticeships.” Id. Though creative, this type of specialized education is limiting because it would force students to decide prematurely upon a career path, which may prevent them from realizing their true intellectual capabilities. See, e.g., Rebecca L. Case, Comment, Not Separate but Not Equal: How Shoule the United States Address Its International Obligations to Eradicate Racial Discrimination in the Public Education System?, 21 Penn St. Int’l L. Rev. 205, 220 (2002) (noting that early academic tracking can be “extremely detrimental to [a] child’s future” and that African-American and Latino students are “over-represented in the lower tracks and under-represented in the higher tracks”).


8 Id. at *113–18.

9 During this ten-year period, Brockton’s required net school spending more than doubled, from approximately $55.8 million to $143.6 million, while enrollment increased
In actuality, there has been a real increase in funds available for these schools over the last decade, meaning that, even though there has been an increase in enrollment in the four focus school districts, that increase is considerably lower than the percentage increase in funds.  

A. Increased School Funding and Student Performance

Despite these real funding increases, the student performance in many school districts remains substandard. In addition, the elevated funding has not been sufficient to meet the needs of the schools themselves. For example, in the opinion of the Lowell School District Superintendent, “Lowell’s foundation budget has not been sufficient to equip students with the seven McDuffy capabilities in any year since she became superintendent in 2000.”

In Springfield, despite the slight funding increase between [fiscal years 2002 and 2003], the superintendent had to make what he deemed "extraordinary” staff reductions in order to get through the 2002–2003 school year, cutting 85 teacher positions, 30 to 35 para-professional positions, 10 nurses, and reducing food service personnel. In addition, he reduced the per student materials/supplies allocation by 25%, froze discretionary purchases, eliminated the DARE officer anti-drug program mid-year, and stopped non-grant funded professional development programs mid-year.

Thus, while school funding has increased, in many districts it has not increased enough, and as a result the students in these districts continue to suffer.

There is a direct correlation between the amount of money spent annually per district on education and its students’ perform-

about 23%. Id. at *38. Lowell’s actual net school spending more than doubled from almost $61 million to $136.2 million, while enrollment for this period increased about 25%. Id. at *54. Springfield’s required net school spending nearly doubled from $126.2 million to $236.4 million, while enrollment increased about 20%. Id. at *73. Finally, Winchendon’s actual net school spending almost tripled, from approximately $5.78 million to almost $14 million, while its enrollment increased although did not triple. Id. at *95.

10 Id. at *95.
11 Id. at *143.
12 Hancock Report, supra note 3, at *55 (restating the opinion of Superintendent Dr. Karla Brooks).
13 Id. at *73.
14 See id. at *143–44; see also supra notes 7–13 and accompanying text.
When more money is spent, the student’s performance increases. When less money is spent per student, overall performance decreases. The four focus districts from Hancock are typical of many other property-poor school districts in the Commonwealth, which have enrolled students that constantly struggle academically.

Insufficient funding has had a devastating impact on American student performance. As the New York Times reported,

It is true that American student performance is appalling. Only a minority of students—whether in 4th, 8th or 12th grade—reach proficiency as measured by the [U.S.] Education Department’s National Assessment of Educational Progress. On a scale that has three levels—basic, proficient and advanced—most students score at the basic level or even below basic in every subject. American students also perform poorly when compared with their peers in other developed countries on tests of mathematics and science, and many other nations now have a higher proportion of their students completing high school.

But the severity of the school funding problem and the impact on student performance is even more startling when one considers the impact on American society. After compiling the testimony of 114 witnesses and over 1000 exhibits, Judge Botsford made a number of

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15 See, e.g., Ronald F. Ferguson, Praying for Public Education: New Evidence on How and Why Money Matters, 28 HArv. J. ON LEGIS. 465, 488 (1991) (presenting research and data indicating that greater funding can improve the quality of public education); Richard J. Murnane, Interpreting the Evidence on “Does Money Matter?,” 28 Harv. J. On Legis. 457, 457 (1991) (describing as “indefensible” the claim that greater funding will not help schools, and describing as “equally disturbing” the claim that reduced funding will not harm schools).

16 See sources cited supra note 15 (arguing that additional funding, if spent appropriately, can lead to increased student performance).

17 See id.; cf. Hancock Report, supra note 3, at *119 (finding persuasive evidence that “districts like the focus districts, that are not able to spend much more than their foundation budget levels on education, are not receiving adequate funding to provide the constitutional minimum of an adequate education”).

18 See Hancock Report, supra note 3, at *145 & n.215. While Massachusetts’s foundation budget formula does provide every school with minimum per-student funding, see discussion infra note 26 and accompanying text, property-rich districts can supplement foundation funds with substantial revenues generated by property taxes, a luxury unavailable to property-poor districts. See Ron Renchler, Financial Equity in the Schools, 76 ERic DigS. (Dec. 1992), available at http://www.eric.ed.gov/contentdelivery/servlet/ERICServlet?accno=ED350717.

19 See discussion infra notes 20–25 and accompanying text.

20 Ravitch, supra note 6. “The United States ranks 25th out of 41 industrialized nations in math literacy; only 15 percent of our graduates earn undergraduate degrees in science and engineering, compared with fully half in China.” Larson & Grogan, supra note 5.
sobering findings of fact in her report to the Supreme Judicial Court.\textsuperscript{21} First, the scores on the Peabody Picture Vocabulary Test, administered to incoming kindergarten students to determine school readiness, demonstrated that “approximately 25\% of the kindergarten students in Brockton and Lowell and close to 40\% of the Springfield kindergarten students tested more than one standard deviation below the norm.”\textsuperscript{22} Secondly, research showed that it becomes evident at an early age whether children in the focus districts will go on to college.\textsuperscript{23} In some Massachusetts communities, more than half of those who start the ninth grade drop out before graduation.\textsuperscript{24} Finally, nearly half of those in Massachusetts prisons do not have a high school diploma.\textsuperscript{25} The consequences of our neglect are clear.

B. The Insufficiency of the Massachusetts Foundation Budget

The funding formula enacted after \textit{McDuffy} to ensure that poor school districts receive sufficient funds is understood, if at all, by a small handful of individuals. Numerous factors go into determining what is called the foundation budget, or the allocated amount provided as state aid to education programs to ensure that all children receive an adequate education.\textsuperscript{26} However, the funding formula is fatally flawed,

\begin{itemize}
\item \textsuperscript{21} \textit{Hancock} Report, \textit{supra} note 3, at *4.
\item \textsuperscript{22} \textit{Id.} at *140 & n.204.
\item \textsuperscript{23} \textit{Id.}
\item \textsuperscript{24} \textit{Id.} at *92. In the opinion of Springfield School District Superintendent Dr. Joseph Burke, approximately 60\% of students starting ninth grade do not graduate within four years. \textit{Id.}
\item \textsuperscript{25} Research \& Planning Division, Mass. Dep’t of Corr., January 1, 2005 Inmate Statistics 8 (2005), available at http://www.mass.gov/Eeops/docs/doc/research_reports/112005.pdf. Of the 69\% of prisoners self-reporting their education level, 46\% did not graduate from high school. \textit{Id.}
\end{itemize}

The calculation of the foundation budget is based on per pupil allowances for each of nineteen spending categories. These per pupil amounts are adjusted annually for a regional wage adjustment factor, inflation and then multiplied by the district’s current enrollment based on the October 1 Foundation Enrollment Report of the prior fiscal year. The Foundation Budget establishes spending targets by grade (pre-school, kindergarten, elementary, junior high and high school) and program (special education, bilingual, vocational and low income). Grade and program spending targets are intended to serve as guidelines only and are not binding on local school districts. The aggregate of the nineteen categories equals the foundation budget.

\textit{Id.} For a complete list of all of the factors used in calculating the current foundation budget of Massachusetts, see \textit{id.}
in part because the formula was devised prior to the development of minimum state standards or curriculum frameworks and was never revised to account for them. Even the authors of the foundation budget formula conceded that it was not sufficient to ensure an adequate education. Yet, despite inequities created by the foundation budget, the Supreme Judicial Court in *Hancock* ordered no relief. The denial of relief is all the more surprising considering the plurality’s statement that “[n]o one reading the judge’s report can be left with any doubt that the question is not ‘if’ more money is needed, but how much.”

Clearly, even the minimal education would require not just an increase in taxes, an anathema in this political climate, but a new tax structure altogether.

The foundation budget formula was originally established “by asking a select number of superintendents what it would cost to provide an adequate education, but the inquiry was made in a context where no set of educational goals existed.” Thus, this formula is insufficient and must be revisited as “the school districts that are performing well are spending substantially more than their foundation budgets call for, and indeed the average spending by all the public school districts in the Commonwealth is well above the foundation budget level.”

Currently, “high performing school districts spend on average 130% above their foundation budgets.” Between 2001 and 2003, the focus districts in *Hancock* spent between 101.7% to 103.5% of their calculated foundation budgets. In contrast, between 2001 and 2003, the comparison districts in *Hancock* (Brookline, Concord/Carlisle, and Wellesley) spent between 157.8% to 161.4% of their calculated foundation budgets. The notable difference in money spent has unquestionably contributed to a substantial divergence in student performance.

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27 See id. (“Adjustments must be made to the foundation budget at this time to ensure that . . . all public school districts have adequate funding.”).

28 See 822 N.E.2d 1134, 1139 (Mass. 2005) (“[S]erious inadequacies in public education remain . . . . [But] I cannot conclude that the Commonwealth currently is not meeting its constitutional charge . . . .”).

29 Id. at 1157 (Marshall, C.J., concurring).


31 *Hancock* Report, supra note 3, at *126.

32 Id. at *124.

33 Id. at *126.

34 Id. at *122.

35 Id. at *123.
1. Failure to Raise Standardized Test Scores in Struggling Districts

Adhering to the foundation budget has also failed to improve student performance as measured by several objective measures. While state averages increased in both SAT verbal and math sections from 1995 to 2000, the four focus districts from Hancock still have below average SAT scores. From 1995 to 2000, only Springfield and Lowell increased their average SAT verbal score while both Brockton and Winchendon’s average SAT verbal score decreased. SAT math scores in all four districts decreased during the same time period. The downward changes in scores cannot be explained by greater student participation in the SAT test. Levels of participation only increased in Brockton and Springfield, while decreasing in Lowell and Winchendon. Even more troubling is the score gap between blacks and whites, which has increased in the past five years.

2. Failure to Lower Dropout Rates in Struggling Districts

In Massachusetts, “between 20 and 25 percent of all students do not graduate in four or five years after entering high school.” The average dropout rates for the four focus districts from Hancock were substantially above the state average every year from 1993 through 2001. In 1995 and 2001, the dropout rates in those districts were more than double the state average, and in 1993, 1999, and 2000, they were markedly close to double. The dropout rates in the comparison districts were a fraction of not only the focus districts, but the state averages as well. In fact, dropout rates in Massachusetts’s public high schools are the highest they have been since education reform began.

36 Hancock Report, supra note 3, at *113. Among the objective criteria used to evaluate the quality of education programs are standardized test scores, dropout rates, retention rates, on-time graduation rates, and post-graduation plans of high school seniors. Id.
37 Id. at *117.
38 Id.
39 Id.
40 Id.
42 Id. at 10.
43 Hancock Report, supra note 3, at *116.
44 See id.
45 See id.
over ten years ago. As Judge Botsford wrote in her findings of fact in *Hancock*, dropout rates are important to study because they serve as a signal that a school is not keeping its students engaged and enrolled. In addition, students who do not graduate from high school are prevented from obtaining a college degree, which hurts their employment opportunities.

3. Failure to Increase College Attendance by Students from Struggling Districts

It is impossible to overstate the importance of a college degree in today’s economy. Students without a college degree encounter great disadvantages in the professional world when competing with students who have obtained a college degree. The 21st century college degree is the equivalent of the mid-20th century high school diploma. Because a college degree has become more common and necessary in our society, the post-graduate plans of high school seniors are a good benchmark when examining the perceived opportunities each high school provides its students. Opportunity, after all, is the key element separating a high performing school district from a low performing school district.

46 Guisbond *et al.*, *supra* note 41, at 10. A Harvard Civil Rights Project/Urban Institute report on national high school graduation rates found Massachusetts’s graduation rate gap between white and Hispanic students to be one of the five worst among the thirty-three states reporting data. Gary Orfield *et al.*, *The Civil Rights Project at Harvard Univ., Losing Our Future: How Minority Youth Are Being Left Behind by the Graduation Rate Crisis* 87 (2004), available at http://www.civilrightsproject.harvard.edu/research/dropouts/LosingOurFuture.pdf. With respect to the graduation gap between white and black students, Massachusetts was eleventh worst of thirty-nine reporting states. Id. at 88. Anne Wheelock calculated percentages of students passing the Massachusetts Comprehensive Assessment System examination and in line to graduate on time by race, and found that for the class of 2005, the rate for Latino students was 51% and for African-American students the rate was 61.6%, compared with 82.5% for white students. Anne Wheelock, MA Dept. of Education *Inflates MCAS Pass Rates for Classes of 2005 and 2006, Masking Wide Opportunity and Achievement Gaps* (July 2005), http://www.massparents.org/news/2005/pass_rates.htm.


48 Id.

49 Id.

50 Id. at *115 n.139 (presenting data that median annual earnings of those aged twenty-four to thirty-four indicate non-high school graduates earn only seventy to seventy-two percent of what high school graduates earn).

51 See *id.* at *115.

52 See *Hancock v. Comm’r of Educ.*, 822 N.E.2d 1134, 1137 (Mass. 2005) (describing the deficiencies in the pre-McDuffpy funding system as leaving “property-poor communities with insufficient resources to provide students with educational opportunities comparable
The focus and comparison districts in *Hancock* demonstrate the disparity between students’ post-graduate plans in high and low performing schools.\(^{53}\) The students in school districts that spend more money annually on their educational system have a considerably higher percentage of students who plan on attending a four-year college.\(^{54}\) Not only are these schools preparing a higher percentage of their students for a post-secondary school education, but they are also instilling confidence in their students, which empowers them to pursue further education.\(^{55}\) In the focus districts, from 1997 to 2002, only Winchendon increased the percentage of students who planned on attending a four-year college.\(^{56}\) Brockton, Lowell, and Springfield’s percentages all dropped, in some cases dramatically.\(^{57}\)

II. THE FAILURE OF FEDERAL AND STATE EDUCATION REFORM MEASURES TO IMPROVE STUDENT PERFORMANCE

A. *The No Child Left Behind Act*

The No Child Left Behind Act (NCLB) was passed by the federal government in 2001 in an effort to improve the academic achievement of students in the American educational system.\(^{58}\) NCLB proposes to accomplish this goal by substantially increasing federal control over local and state educational operations.\(^{59}\) Furthermore, NCLB aims to create “a path to educational transformation, as the key to racial equity and economic success.”\(^{60}\) While it is certainly in our country’s best in-

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\(^{53}\) See *Hancock* Report, *supra* note 3, at *117.

\(^{54}\) *Id.*

\(^{55}\) *See id.;* Richard Rothstein, *Dropout Rate Is Climbing and Likely to Go Higher*, N.Y. TIMES, Oct. 9, 2002, at B8 (noting that graduation from high school gives students self-confidence that motivates them to pursue a college education).

\(^{56}\) *Hancock* Report, *supra* note 3, at *117.

\(^{57}\) *Id.* The Brockton and Lowell districts saw the number of students who planned to attend a four-year college drop by 10% or more between 1997 and 2002. *Id.*


\(^{59}\) *See, e.g.*, 20 U.S.C.A. § 6311 (requiring a state to submit an educational plan to the U.S. Secretary of Education in order to receive funds under NCLB).

\(^{60}\) GAIL L. SUNDERMAN ET AL., NCLB MEETS SCHOOL REALITIES xxv (2005).
terest if these goals are realized, it is already evident that NCLB is not effectively achieving these goals. Although NCLB mandates an adequate yearly progress (AYP) to ensure that the curriculum and instruction in every classroom are accountable for improvement, it fails to take into account the students each school serves and the resources of the school before this accountability is imposed.\footnote{Id. at x (characterizing NCLB as “dictating the pace of progress required of all schools, regardless of the students they serve and the resources they have”).} Although the act stresses accountability as a means for educational change, NCLB does not consider the resources available to individual schools.\footnote{See id. at xxix, 24. NCLB’s “one-size-fits-all accountability model . . . ignores large differences among schools or groups of students.” Id. at xxix. “Instead of viewing AYP as a dividing line between ostensibly effective and failing schools,” school decisionmakers should understand why schools failed to make AYP in order to more effectively and adequately target resources and sanctions. Id. at 37.} In order to invoke positive change measurable by the AYP, greater resources are needed in the poorest schools.\footnote{See id. at xxxv–xxxvi. Assessing school progress should reflect the “difference schools make for their students in relationship to some standard that reflects achievement gains, not just arbitrary numbers linked to the term proficiency.” Id. at xxxv. “Teachers and students should not be held accountable if they have not been given the materials to teach or the opportunity to learn.” Id. at xxxv–xxxvi.} Change will not occur just because accountability is mandatory.\footnote{See id. at 38. “No single accountability system is likely to be a panacea for measuring the performance of schools and subgroups of students in a fair and reliable way.” Id. at 38.}

In addition to accountability, another goal of NCLB is expanding schooling options for students, thereby creating competitive pressure on schools that are producing underperforming students.\footnote{See 20 U.S.C.A. § 6301 (West 2003) (describing a major principle of NCLB as “providing alternatives to students in [low-performing schools] to enable the students to receive a high-quality education”). “The competitive pressures generated by the NCLB transfer policy should create incentives for schools to be more effective . . . .” Sunderman et al., supra note 60, at 40.} By offering students the opportunity to transfer out of low-performing schools, NCLB aims to cause competitive pressure which would theoretically force low-performing schools to strive for more effective forms of instruction to improve student performance.\footnote{See 20 U.S.C.A. § 6316(b)(1)(E) (providing students the option to transfer out of schools that fail to make AYP for two consecutive years). The transfer provisions of NCLB represent “the theory that competition will produce better educational opportunities for disadvantaged students and improve the performance of low-performing schools.” Jimmy Kim & Gail L. Sunderman, The Civil Rights Project at Harvard Univ., Does NCLB Provide Good Choices for Students in Low-Performing Schools? 6 (2004), available at http://www.civilrightsproject.harvard.edu/research/esea/good_choices.pdf.} There have been multiple
studies on school transfers under NCLB. They predominately indicate that this theory may be flawed. Most students simply do not take advantage of the transfer provisions. In addition, some better schools are overcrowded and have no incentive to take on extra students. Furthermore, families considering a transfer often lack better schooling options nearby. Because students can only transfer within their school district, not only are their transferring options extremely limited, but it is rare that the other schools in their district are markedly better.

Studies have also found that “NCLB creates additional administrative and financial burdens, which make it difficult for districts to implement an effective transfer policy.” Recently published research shows:

[T]he NCLB transfer policy not only failed to create better schooling options for parents, but it also imposed adminis-


68 See BROWN, supra note 67, at 3 (finding that NCLB’s school choice provision is hampered by “state and local deficiencies in the implementation of the program”); KIM & SUNDERMAN, supra note 66, at 33 (finding that during the 2002–2003 school year, the NCLB transfer option was not widely used, the transfer provisions “failed to provide disadvantaged students with a meaningful opportunity to transfer to higher performing schools,” and that NCLB regulations made the creation of effective, workable transfer policies difficult); Casserly, supra note 67, at 210 (finding that the early stages of implementation of NCLB’s school choice provisions are “absorbing substantial amounts of time, expertise, and resources without a clear connection to what NCLB purports to be about—student performance”).

69 The Council of Great City Schools studied data from fifty urban school districts enrolling more than 7.2 million students. Casserly, supra note 67, at 192. The study found that for the 2003–2004 school year, 1.17 million students were eligible to transfer under NCLB. Id. at 194. However, only 44,373 students (3.8%) requested a transfer and only 17,879 actually moved. Id. at 194. Thus, of all students eligible to transfer, only 1.5% actually did. See id. at 194. Another survey of ten states and fifty-three school districts conducted by the Citizen’s Commission on Civil Rights, found that in the 2003–2004 school year, only 1.7% of eligible students requested a transfer and actually moved to a school not identified as in need of improvement. BROWN, supra note 67, at 6.

70 BROWN, supra note 67, at 62.

71 See id. at 63–64.

72 See KIM & SUNDERMAN, supra note 66, at 32–34. “[T]here were a limited number of higher performing schools for students to transfer to since most of the receiving schools did not have substantially higher achievement levels, on average, than schools required to offer choice. This meant that many students who transferred went from one weak school to another.” SUNDERMAN ET AL., supra note 60, at 54.

73 SUNDERMAN ET AL., supra note 60, at 50.
trative and financial burdens on urban districts by ignoring existing choice programs and state and district operating procedures that governed the testing and reporting process.

... In short, the NCLB transfer policy requires major revisions to achieve its stated goal of increasing access of disadvantaged students to high-performing schools.\textsuperscript{74}

NCLB is not proposing goals that are unattainable, but NCLB falls short because it merely mandates that goals be achieved without devising a scheme or providing the necessary resources to enable these goals to come to fruition.\textsuperscript{75} NCLB has “imposed huge new duties on the states without providing state resources to cover many costs.”\textsuperscript{76} Additionally, in some cases NCLB even hinders state transfer programs by imposing federal standards and administrative burdens.\textsuperscript{77}

Schools that fail to meet NCLB’s achievement goals “are subject to an escalating series of severe sanctions over time, ranging from mandatory school choice options and supplemental services to school reconstitution and restructuring.”\textsuperscript{78} Since predominantly minority and multi-racial schools start well below the proficiency expectations, they face a greater risk of not meeting the AYP requirements.\textsuperscript{79} Troublingly, NCLB mandated that every subgroup of students meet AYP goals, never allowing for the greater challenges facing high-poverty school districts, limited English proficiency students, and special education children.\textsuperscript{80} Counter to its objectives, NCLB seems to put the students already be-

\begin{itemize}
\item \textsuperscript{74} Id. at 53–54.
\item \textsuperscript{75} See id. at xxvii, 18. In spite of the “highly prescriptive” language of NCLB, “the legislative requirements may not be easily translated into programs that state and local officials can carry out.” Id. at 18.
\item \textsuperscript{76} Id. at xxvii.
\item \textsuperscript{77} Id. at 53–54.
\item \textsuperscript{78} Sunderman et al., supra note 60, at x.
\item \textsuperscript{79} Id. at 24. Because NCLB establishes AYP as the sole standard for student performance, “federal sanctions may fall disproportionately on schools with disadvantaged minority students.” Id.
\item \textsuperscript{80} Id. at xxvi, 37. It is curious how all school districts could comply with NCLB’s goal of 100% student proficiency in English language arts by 2013–2014, as required by 20 U.S.C.A. § 6311(b)(2)(F) (West 2003), considering that newcomers who are of limited English proficiency must be allowed into the school district. See 20 U.S.C.A. § 1703(f) (prohibiting the denial of educational opportunity to students by an educational agency that fails “to take appropriate action to overcome language barriers that impede equal participation by . . . [students in] instructional programs”).
\end{itemize}
hind at a further disadvantage.\textsuperscript{81} Instead, legislative action should take into account these challenges and “[i]f initially low-performing schools make substantial improvements but fall short of the federal goal for making AYP, they should be rewarded rather than sanctioned for their efforts.”\textsuperscript{82}

B. Changes to Bilingual Education Funding and Instruction in Massachusetts

In 1971, Massachusetts enacted Chapter 71A, the Transitional Bilingual Education Act (TBE), governing the education of Limited English Proficiency (LEP) students.\textsuperscript{83} Under the TBE, if a school district had more than twenty LEP students in a particular language group, the district had to offer TBE classes or “a program of instruction that included both literacy and content instruction in the native language of the student and the teaching of English through a method of English as a Second Language (ESL) instruction.”\textsuperscript{84} After achieving English proficiency, “TBE students were ‘mainstreamed’ into standard curriculum classes.”\textsuperscript{85} If a language group in a school district had fewer than twenty LEP students, these students “were to receive, at a minimum, ESL instruction.”\textsuperscript{86}

State aid was adjusted in light of the higher cost of educating LEP students compared with the cost of educating native English speakers:

\begin{quote}
[T]he state aid for education formula at the time created a “weighted full time equivalent” system for counting the number of students so that for every $1.00 in state aid given to school districts for a Regular Day FTE student, $1.40 was given for the education of [LEP] students who were enrolled in bi-
\end{quote}

\textsuperscript{81} Minority, low-income, and LEP student subgroups generally have lower test scores, and NCLB’s subgroup policy makes it more likely that schools predominately populated by these subgroups will fail to meet AYP. See Sunderman et al., supra note 60, at 25–35.

\textsuperscript{82} Id. at 36.


\textsuperscript{85} Id.

\textsuperscript{86} Id.
lingual education programs. No supplemental weight was given for [LEP] students not enrolled in TBE programs.\textsuperscript{87}

However, the legislation failed to provide any mechanism to “ensure that school districts actually spent the extra money generated by the bilingual program students . . . on bilingual program services.”\textsuperscript{88}

Three days after the \textit{McDuffy} ruling, the legislature passed the Education Reform Act of 1993 (ERA).\textsuperscript{89} An extensive foundation budget formula replaced the weighted full-time equivalent system for determining the amount of aid given to schools with students in bilingual programs.\textsuperscript{90} While calculation of the foundation budget takes into account bilingual enrollment, “the formula [was] not designed to generate the prior 40% additional state aid for bilingual education programs.”\textsuperscript{91}

In 2002, the legislature enacted a new Chapter 71A that replaced the TBE.\textsuperscript{92} The current law mandates that LEP students be taught via “sheltered English immersion,”\textsuperscript{93} though parents can opt their children out of this method if “sufficient numbers of parents secure waivers to allow for bilingual education or other specialized language instruction.”\textsuperscript{94} Instruction of LEP students may also take the form of “Two-Way or Dual Immersion,” whereby English proficient students and LEP students “are grouped in the same classroom and learn in two languages.”\textsuperscript{95} A primary effect of the amendments to Chapters 70 and 71A

\textsuperscript{87} \textit{Id.} at 12–13 (citation omitted).
\textsuperscript{88} \textit{Id.} at 13.
\textsuperscript{90} See Mass. Gen. Laws ch. 70, § 2 (2004); Brief for Centro Latino as Amici Curiae, \textit{supra} note 84, at 13.
\textsuperscript{91} Mass. Gen. Laws ch. 70, § 2; Brief for Centro Latino as Amici Curiae, \textit{supra} note 84, at 13.
\textsuperscript{93} Mass. Gen. Laws ch. 71A, § 4. “Sheltered” or “structured” English immersion is a process of English language acquisition “with most curriculum and presentation in English,” while allowing for “some use of the native language of the children.” \textit{Id.} § 2; Brief for Centro Latino as Amici Curiae, \textit{supra} note 84, at 14 n.2.
\textsuperscript{94} Mass. Gen. Laws ch. 71A, § 5; Brief for Centro Latino as Amici Curiae, \textit{supra} note 84, at 14.
\textsuperscript{95} Brief for Centro Latino as Amici Curiae, \textit{supra} note 84, at 14.
“is that all [LEP] students are now counted as eligible for weighted [foundation budget] funding and not just those enrolled in TBE.”96

Amid all the legislative changes to bilingual education, a myriad of statistics show just how poorly LEP students are doing in schools in the Commonwealth.97 The overwhelming majority of LEP students receive substandard scores on the English Language Arts section of the Massachusetts Comprehensive Assessment System (MCAS) examination year after year.98

As of 2005, 86% of fourth grade LEP students, 82% of seventh grade LEP students, and 90% of tenth grade LEP students scored within the two lowest performance levels, “Needs Improvement” and “Warning.”99 The percentage of students scoring in these two lowest performance levels increases as students enter high school.100 When the overwhelming majority of LEP students need improvement according to state testing, the current system is certainly not providing those students with the necessary tools to help them succeed at their current grade level, as well as at future grade levels.101

These low performance levels may invoke a feeling of inferiority in LEP students to the point that their frustration might cause them to give up on an education altogether.102 In April 2004, the Massachusetts Department of Education published dropout rates for Massachusetts Public Schools from 2002–2003.103 According to the data, the annual dropout rate for LEP students in 2002–2003 was 6.1%.104 This was greater than the annual dropout rates of low income and special education students, and was almost double the 2002–2003 annual dropout

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96 Id. at 14.
97 See discussion infra notes 98–106 and accompanying text.
99 See id. Eighty-six percent of fourth grade LEP students, 85% of seventh grade LEP students and 92% of tenth grade LEP students scored within the “Needs Improvement” or “Warning” ranges in 2001, demonstrating that there has been little change over the past five years. See id.
100 See id.
101 See id.
103 Id. at 1.
104 Id. at 4.
rate for high school students as a whole. The Department of Education’s four-year projected dropout rate for LEP students of 22% similarly exceeded the projected four-year dropout rates for these other groups.

The failure of Massachusetts’s latest structured English immersion education strategy is likely due to the lack of resources required to carry out its requirements in an effective manner. Specifically, the Commonwealth has not properly trained its teachers to educate LEP students effectively. In a memorandum to the superintendents of schools, the Commissioner of the Massachusetts Department of Education wrote: “A key element to providing effective services is having well trained and qualified staff . . . .” A National Academy of Sciences study about the importance of preschool education for children from non-English-speaking backgrounds makes clear that “teachers of language-minority pre-school students need substantial additional professional training.”

The Department of Education has suggested that teachers of LEP students should have up to thirty to forty hours of professional development. However, despite the Commissioner of Education’s emphasis that a well trained and qualified staff is a “key element” to providing effective services, the Memorandum does not mention that any additional funds are available to implement this “ambitious training effort . . . . at the school and district level so as to reach the

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105 Id. In 2002–2003, low income students had an annual dropout rate of 5.1% and special education students dropped out at a rate of 4.6%. Id. During this period, the total dropout rate for grades nine through twelve was 3.3%. Id.

106 Id. The projected four-year dropout rate for low income students was 19% and 17% for special education students. Id. The Department projected that 13% of ninth graders in the class of 2006 would drop out over the next four years. Id.

107 See Brief for Centro Latino as Amici Curiae, supra note 84, at 36–45 (arguing that the Commonwealth had no plan, and did not provide the resources necessary, to give LEP students an adequate education).

108 See id. at 31–35 (arguing that the Commonwealth had failed to provide professional development for teachers who educate the growing population of LEP students).


110 COMM. ON THE PREVENTION OF READING DIFFICULTIES IN YOUNG CHILDREN, NAT’L RESEARCH COUNCIL, PREVENTING READING DIFFICULTIES IN YOUNG CHILDREN 1–3 (Catherine E. Snow et al. eds., 1998) [hereinafter PREVENTING READING DIFFICULTIES].

111 Brief for Centro Latino as Amici Curiae, supra note 84, at 35 (citing Preventing Reading Difficulties, supra note 110, at 4–6).

112 Id. at 32 n.17.

113 Memorandum, supra note 109, at 1.
teacher[s] of LEP students.” 114 Meanwhile, in light of the changes to chapter 71A discussed above, “the sheer numbers of teachers who are now expected to teach LEP students and the complexity of the demands upon them has increased exponentially.” 115

Legislative changes in Massachusetts to the structure of bilingual education have failed to result in improved performance by LEP students. Structured English immersion has not led to higher English Language Arts MCAS scores and LEP students continue to drop out of high school at rates that are well above average. The state’s new programs likely fail because the state does not fund them adequately. In addition, teachers of LEP students confront unique challenges and should receive additional training and preparation in order to help these students succeed.

C. The Charter School Experience

In response to widespread demands for better public education and for more choice among public schools, a number of state legislatures in the early 1990s permitted educators and local communities to develop charter schools. While these schools receive public funds, they operate unfettered by most state and local district regulations governing other public schools. Instead, they are held accountable for improving student performance and achieving the goals of their charter contracts. 116

Many charter schools have experienced problems that prevent them from truly improving public schools overall. 117 Charter schools offer increased flexibility to parents and administrators but result in reduced job security for school personnel. 118 Evidence shows that high staff turnover undermines school performance. 119 The problems of modern

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114 Brief for Centro Latino as Amici Curiae, supra note 84, at 32 n.17.
115 Id. at 31–32.
118 See David A. DeSchryver, Strong Charter Schools: A Necessary Condition for the “Ripple Effect,” 11 STAN. L. & POL’Y REV. 311, 311, 318 (2000) (noting that charter schools give parents and administrators more flexibility to shape educational plans and school management, but as a result, they provide teachers with less job security).
119 See Comer, supra note 6, at 35 (identifying teacher turnover as a major obstacle to school improvement in that “[f]requent changes . . . in teachers . . . can undo in several months or less a school culture that took . . . years to create”); see also David M. Herszen-
schools, which are made up of diverse student populations with special needs, are far too great to be solved by enhanced managerial authority unaccompanied by greater resources of staff and technology.120

Since they began, 444 charter schools across the country have closed because of “financial difficulties, inadequate facilities, or poor academic performance.”121 The Inspector General of the Commonwealth of Massachusetts produced a report in 1999 that highlighted many problems with the charter school system, the most common problem being poor financial management practices.122 Despite comprehensive recommendations from the Inspector General to increase accountability and strengthen the charter school initiative, further cautionary reports were issued shortly after.123 These reports, which specifically targeted charter schools in Springfield and Somerville, lend weight to the prediction that “[e]ducators who are motivated enough to create and manage charter schools could easily be burnt

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120 See Amy Stuart Wells et al., Charter School Reform and the Shifting Meaning of Educational Equity: Greater Voice and Greater Inequality?, in BRINGING EQUITY BACK 219, 220 (Janice Petrovich & Amy Stuart Wells eds., 2005) (noting that charter schools often lack the resources necessary to educate students greater needs); Bierlein & Bateman, supra note 117, at 165.


Although not subjected to the scrutiny of the Inspector General’s office, the Roxbury Charter High School was another high-profile example of a system riddled with poor financial management practices. See Megan Tench, Roxbury Charter School Loses Appeal to Stay Open, BOSTON GLOBE, Dec. 22, 2005, at B4 (noting how “serious financial difficulties” and “struggle[s] with governance and management issues” led to the decision to revoke Roxbury Charter School’s charter).
out by a process that demands increased accountability while providing little professional assistance.”

In August of 2004, the U.S. Department of Education released a number of reports on charter schools, including the first national comparison of test scores among children in charter schools and regular public schools. These 2003 results showed fourth-grade charter school students performing worse in both mathematics and reading than comparable students in regular public schools. In addition, “among students eligible for free or reduced-price lunch, fourth-graders in charter schools did not score as high in reading or mathematics, on average, as fourth-graders in other public schools.” These results were the most comprehensive so far, holding constant such factors as race, neighborhood, and income.

Charter schools do an especially poor job of addressing the needs of bilingual students. “Although charter advocates recommend the schools control all per-pupil funds, in reality [charter schools] rarely receive as much funding as other public schools.” In general, charter schools do not have access to the same funding for facilities and special programs that is available to district schools. These schools do not employ teachers who are trained in the educational needs of bilingual children.

124 Margaret Hadderman, Charter Schools, 118 ERIC Digs. (Feb. 1998), available at http://eric.uoregon.edu/pdf/digests/digest118.pdf; see SABIS INT’L CHARTER SCHOOL, supra note 123; SOMERVILLE CHARTER SCHOOL, supra note 123.


126 See 2003 CHARTER SCHOOL RESULTS, supra note 125, at 4, 7.

127 Id. at 1.


129 Bierlein & Bateman, supra note 117, at 166.

130 Id.

131 Cf. Brief for Centro Latino as Amicus Curiae, supra note 84, at 31–35 (pointing to “the crying need for comprehensive professional development for all teachers who teach [LEP] students” and a general lack of trained bilingual and ESL teachers in the Hancock focus districts).
Latino and Asian students enroll in Boston charter schools at rates lower than their enrollment rates in Boston district schools.\textsuperscript{132}

A 2004 study of the Massachusetts Department of Education’s enrollment data emphasizes the tendency of Boston charter schools to under-enroll these LEP students.\textsuperscript{133} The study found that Latino and Asian students are enrolled in Boston charter schools at less than half their enrollment rate in Boston district schools, indicating that many of the city’s bilingual students generally remain in district schools.\textsuperscript{134} As LEP students remain in district schools, a disproportionate number of charter school seats are going to students that are less challenging and less expensive to teach.\textsuperscript{135} Boston district schools are left with a higher concentration of the city’s neediest and most vulnerable students.\textsuperscript{136}

III. A Different Approach

NCLB, changes to Massachusetts bilingual programs, and charter schools have not led to improved performance as measured by objective data. This is especially true for children in the poor, low-performing districts; children who speak English as a second language; and other children with special needs in the Commonwealth. Rather than expending more energy and resources to meet mandatory, uniform standards like those in NCLB, the state and federal government should look forward, toward new ideas that have had encouraging results in public schools and specifically low-performing schools.

A. Pilot Schools and Improved Student Performance

The pilot school experience demonstrates the efficacy of giving schools greater autonomy by offering flexibility in budget, staffing, organization of the school day, the school calendar, governance, curriculum, and educational mission.\textsuperscript{137} These autonomies create the conditions schools need to become the best places for teaching and


\textsuperscript{133} Id.

\textsuperscript{134} Id.

\textsuperscript{135} See id.

\textsuperscript{136} See id.

learning in their unique communities. The Superintendent of Boston Public Schools has praised pilot schools as follows:

[Pilot schools are] a critical part of the Boston Public Schools’ reform agenda. They were conceived by the district and the union working together. Parents want their children to attend, the results are impressive, and they keep the district competitive. Now, it is important to encourage more Boston public schools to seek pilot status. The experience of the current pilot schools has been encouraging. They have positive educational results, and they have attracted highly competent faculty from both within and without the Boston public schools. Their attractiveness to new teachers is especially encouraging in light of the fact that the system will have to recruit many new teachers in the next few years.

The most discernable difference in pilot schools as compared to traditional public schools is that students and teachers in Boston pilot schools average longer days than those in Boston public schools. So far, the performance of pilot school students has been promising. The length of a pilot high school student’s day averages 392 minutes, compared to 380 minutes in the Boston public high schools. The length of a pilot high school teacher’s school day, including after-school contracted faculty meeting time, is 450 minutes compared to 406 minutes in the Boston public high schools. Finally, pilot high school teachers spend 285 minutes a week on professional collaboration time, while there is no minimum time commitment in Boston public high schools. Though these numbers are not egregiously dissimilar, they are a step in the right direction. The extra time committed each and every day by both students and teachers adds up over the course of a week, month, and school year.

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138 See id.
139 Id.
141 See id. at 17–25. According to a report from the Center for Collaborative Education, “Boston pilot school students are faring well on a wide range of indicators of engagement and performance.” Id. at 26.
142 See id. at 15.
143 Id.
144 Id.
145 See Tung et al., supra note 140, at 16.
Not surprisingly, pilot schools with longer days have engendered higher student performance as measured by objective data.\textsuperscript{146} The 2004 MCAS English language arts results for the tenth grade show that 84\% of pilot students scored in the passing category, while only 58\% scored in this range in public schools.\textsuperscript{147} In addition, 36\% of pilot school students scored in the advanced and proficient range, while only 17\% of public school students scored in the same category.\textsuperscript{148} It would be shortsighted to presume that the difference in these students’ scores should be entirely attributed to the lengthening of a student’s school day, but it would be equally shortsighted to overlook this factor.\textsuperscript{149} What is encouraging is that it may be possible to achieve similar results in non-pilot schools by increasing the teaching time.

B. A Germ of a Proposal: Massachusetts Senate Bill 2320

Germs of ideas that have the potential to improve performance in low-performing schools were also included in Massachusetts Senate Bill 2320 (“Bill 2320”).\textsuperscript{150} Bill 2320 targeted schools with the fifty worst performance rates in the Commonwealth and proposed to enroll them in a reform program, dubbed the Commonwealth Turnaround Collaborative (CTC), which would last five years and be backed by increased budget allocations.\textsuperscript{151} As part of this program, each school would administer longer school days and a longer school year, as well as provide mandatory professional development training for teachers working in underperforming schools.\textsuperscript{152} In addition, Bill 2320 sought to pay teachers extra for devoting additional time and working in challenging conditions.\textsuperscript{153} Unfortunately, only parts of Bill 2320 ultimately made their way into the current state budget, though the ideas Bill 2320 proffered certainly planted the seeds for effective change in the future.\textsuperscript{154}

In the following subsection, I will advocate the various methods proposed by Bill 2320 to catalyze increased levels of student perform-

\textsuperscript{146} See id. at 20.
\textsuperscript{147} Id. at 24.
\textsuperscript{148} Id.
\textsuperscript{149} See id. at 30.
\textsuperscript{151} Id. § 2 at ll. 15–20, 35–42, 153–166.
\textsuperscript{152} Id. § 2 at ll. 258–63, 275–81, 377–83.
\textsuperscript{153} Id. § 2 at ll. 628–31.
\textsuperscript{154} The state budget for the 2006 fiscal year now has a line item for “Turnaround Schools” as drafted in Bill 2320, however only $5 million was allocated to this category. Such a paltry amount is undoubtedly insufficient to rejuvenate even the fifty worst performing schools in the Commonwealth.
ance in Massachusetts public schools. I will also discuss other tactics that, viewed in tandem with the provisions proposed by Bill 2320, would further achieve effective school reform while focusing on those students in struggling school districts or predisposed to failure by our current system as previously discussed in this article. By enacting these proposals, Massachusetts would be able to turn the tide on public education and create the adequate and equal education that every child deserves.

1. Raising Teacher Salaries

Not only are teachers our educational system’s most valuable assets, but teacher salaries are the largest component of Massachusetts school districts’ foundation budgets. Because many school districts are not spending enough money on their educational systems as a whole, not enough money is going to the teachers society relies on to educate our children. Not only does this budgetary shortfall indicate how little we value teachers’ services, but it is, again, a result of a foundation budget formula that has been set much too low.

In our society, that which is valued is most often measured by its monetary value. Lawyers working for corporations with complicated and demanding issues, doctors in difficult specialties, and CEOs of the largest corporations are rewarded with large salaries for undertaking jobs that society considers challenging. Teachers are given charge of our children, who we claim are our most precious jewels. Today, teachers are often scapegoats for the ills of the school system with blame heaped on them for all that is wrong. Amid attacks from parents, administrators, and politicians, it is no wonder they protect themselves through unions to resist blame. They are expected to solve all the problems of public schools while being treated as blue collar workers who punch the clock instead of professionals in the same league as doctors, lawyers, and CEOs. Instead of being blamed for the bureaucratic failures taking place in public schools,

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155 See Hancock Report, supra note 3, at *127.
156 See id. The Associate Commissioner of Education in Massachusetts acknowledged that the state’s foundation budget “consistently underestimates the actual expenditures on teachers’ salaries that are made by the districts.” Id. He went on to admit that “the formula does not adequately cover the budget’s largest category of expenditure.” Id.
157 See id. at *129.
159 See id.
160 See id.
teachers should be treated as valued professionals. Teachers should be paid accordingly, in six figures, and expected to perform accordingly, their performance judged by the objective data of student achievement.\textsuperscript{161}

The best teachers are needed at the schools whose students are performing the worst because both teachers and students in those schools face the biggest challenges.\textsuperscript{162} In order to lure the best teachers into the worst districts, the salaries of teachers in those districts should be significantly higher.\textsuperscript{163} Monetary incentives speak to all teachers and would increase the likelihood that the best teachers might take on the challenges presented at the worst schools.\textsuperscript{164} Instead, data on average expenditures for teacher salaries reveals that schools that should be spending the most on their teachers are spending the least.\textsuperscript{165} It is no surprise that the turnover rate of teachers in property-poor school districts is the highest while student performance in these districts is dismal.\textsuperscript{166} To reverse this reality and decades of inherited neglect, teachers must be paid more if they are being asked to perform their jobs in a more challenging environment.\textsuperscript{167}

\textsuperscript{161} See Carnegie Forum on Educ. & the Economy, A Nation Prepared: Teachers for the 21st Century: The Report of the Task Force on Teaching as a Profession 3 (1986) (arguing in favor of the need to make salaries and standards for teachers competitive with other professions). Obviously a system would have to be developed to determine the appropriate markers for judging teacher performance. Ninth grade students reading at the third grade level might not be expected to read at grade level in one academic year, but perhaps, with intensive intervention they might reach grade level in two to three academic years. Teachers should be provided paraprofessionals to assist them in these efforts. There are undoubtedly significant issues involved with the implementation of this proposal, but this proposal, for all of its potential defects, aims to dramatically change what actually happens in the classroom.

\textsuperscript{162} Sunderman et al., supra note 60, at xxxiii.

\textsuperscript{163} See Hancock Report, supra note 3, at *127 n.127 (observing that teacher salaries in districts where student achievement is above average are higher than salaries in districts with average to below average student achievement).

\textsuperscript{164} See David M. Herszenhorn, City Will Offer Housing Subsidy to Teachers, N.Y. Times, Apr. 19, 2006, at A1. Efforts are being made to lure qualified teachers into New York City's most challenging school districts by offering housing subsidies of up to $14,600. Id. This is both a creative and aggressive way to address the chronic shortage of qualified educators in New York City. See id.

\textsuperscript{165} See Hancock Report, supra note 3, at *127.

\textsuperscript{166} Sunderman et al., supra note 60, at xxxiii.

\textsuperscript{167} See Herszenhorn, supra note 164 (describing the use of housing subsidies to encourage teachers to work in New York City schools).
2. Providing Teachers with Better Training

Not only should teachers receive an increase in salary, but a larger portion of time and money should also be directed to professional teacher training.\textsuperscript{168} After all, “teacher training, standards, certification, and testing determine education quality.”\textsuperscript{169} Education quality clearly is lacking for many students, and teaching quality is a contributing factor to low performance.\textsuperscript{170} Evidence shows that faulty teacher-training programs are a large part of this problem.\textsuperscript{171} During teacher-training programs undertaken before entering the classroom, teacher-trainees spend three to five years studying education philosophy instead of receiving vital training in teaching academic subjects.\textsuperscript{172} Training in particular subjects, also known as “content training,” provides students with professionally trained teachers with the skills to meet the each students’ needs.\textsuperscript{173} Teachers firmly believe that all children can learn, but we neglect to provide the training necessary to make that statement true, despite studies showing that teachers who know their subjects correlate with students who achieve in those disciplines.\textsuperscript{174} Also, while content training for teachers is important, it is even more crucial that teachers know how to communicate what they are teaching, and be trained accordingly.\textsuperscript{175}

3. Lengthening the School Day

If we are to value the teachers of our children the way we value the corporation’s lawyers, the medical specialists, and the CEOs by paying them a comparable salary, we must demand results for that


\textsuperscript{170} Id.

\textsuperscript{171} See Flury, Conspiracy, supra note 168.

\textsuperscript{172} Id.

\textsuperscript{173} See Larson & Grogan, supra note 5.

\textsuperscript{174} Cf. id. (“Research shows a clear correlation between teacher content knowledge and student achievement. Content training is particularly needed in math and science for elementary school teachers; not because the teachers aren’t good, but because until now they have faced only minimal requirements in these disciplines.”).

\textsuperscript{175} See, e.g., INTERSTATE NEW TEACHER ASSESSMENT & SUPPORT CONSORTIUM, MODEL STANDARDS FOR BEGINNING TEACHER LICENSING, ASSESSMENT AND DEVELOPMENT: A RESOURCE FOR STATE DIALOGUE 25 (1992) (indicating that knowledge of communication techniques is one of the key principles of effective teaching).
salary. The lawyer facing a trial cannot go home at five o’clock pm; he or she may often burn the midnight oil to be prepared for trial the next day. The medical specialist does not leave an open-heart operation because the clock struck the quitting hour. The CEO convenes weekend meetings when quarterly earnings are due to be reported. Yet the school day goes along at a measured and pre-determined beat, regardless of student needs.

The school day for both teachers and students should be expanded to last until later in the evening. Afternoon time could be reserved for extra academic tutoring, sports, art and music classes, and other extracurricular activities often lost due to budget cuts. If our post offices can be open for business for at least a few hours on Saturdays, why can’t schools be open for education during those same hours? Furthermore, ten or more weeks of summer vacation lead students to lose the information and knowledge they have acquired during the school year, making the learning process still more difficult. Instead, four or five weeks of vacation could not be staggered throughout the year. The result would be a substantial increase in the school day, week, and year, which would undoubtedly increase student performance in the Commonwealth.

4. Provision of Services Needed by Poor Children

One issue not addressed by the original Bill 2320 is the need for special services available to poor children. Children growing up in

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177 Kipp Schools, Kipp Schools in Action: Student Achievement, http://www.kipp.org/studentachieve.cfm?pageid=nav1c (last visited Oct. 24, 2006) (noting that Kipp school students spend an average of 708 hours more in school and attend college at a higher rate than students in public high schools in the same cities).

178 See Fight Crime: Invest in Kids California, California’s After-School Choice: Juvenile Crime or Safe Learning Time 27 (2001) (stating that successful after-school programs include academic tutoring and extracurricular activities). Most juvenile crime occurs between two and six o’clock in the afternoon, so there are other benefits to extending the school day. See id. at 3.


poverty face adversity not experienced by other children. They often face unstable home environments, do not have adequate medical or dental care, and are undernourished. The federal government renewed funding for the free and reduced school breakfast and lunch program in 2004, where qualified low-income children receive school meals at no cost. It has long been proposed that children in poverty also ought to have access to medical and dental care at the schools they attend in the same way that they have access to the free and reduced meal program. These are ideas that were overlooked by Senate Bill 2320, but ones that undoubtedly deserve serious consideration.

5. Questions About Massachusetts Bill 2320

Although the ideas Bill 2023 proposed were steps in the right direction, there are questions that remain regarding the effectiveness of the legislation as it was initially proposed. One of these questions surrounds the substantial increase in power Bill 2023 would have granted to the superintendents of Commonwealth school districts. While such an increase in power to operate may speed up the implementation of superintendents’ decisions, it may also lead to an increase in rash decisionmaking. Though, the superintendents of chronically underperforming schools are not entirely to blame for their schools’ performance, it is clear that their guidance has not lifted many of these schools out of the lowest performance categories. Is it in the best interest of our lowest performing students if these superintendents have “emergency powers to reorganize schools,” giving them the ability to

182 See Paul W. Newchek et al., Disparities in Adolescent Health and Health Care: Does Socioeconomic Status Matter? 38 HEALTH SERVICES RES. 1235, 1241, 1244–46 (2003) (stating that poor children are more likely to have unmet medical and dental needs); Jeanne Brooks-Dunn & Greg J. Duncan, The Effects of Poverty on Children, 7 FUTURE OF CHILD. 55, 65 (1997) (stating that a tendency of poor children to live in less desirable home situations accounts for a substantial portion of the problems they face in school).


184 See, e.g., ILL. DEPT. PUB. HEALTH, PROVIDING DENTAL SERVICES IN SCHOOLS: IT’S EASIER THAN YOU THINK! 2–3, http://www.idph.state.il.us/HealthWellness/oralhlth/Sealant%20Marketing%20-%20Providing%20Dental%20Services%20in%20Schools%20final.pdf (last visited Nov. 10, 2006). In addition, if schools are to stay open until later in the evening as I have suggested, the schools should also provide poor children with dinner.


186 See id.

187 See id. ¶ 2 at ¶ 124–29.

188 See id.
“remove principals, reassign staff, change curricula, and make organizational management and governance changes”?\textsuperscript{189}

Also, while Bill 2320 may have had a positive impact on student performance in the short term, it is important to ask: what will happen to the students in these schools once the maximum of five years in the CTC program concludes?\textsuperscript{190} How will these schools be prepared when they have to return to the current foundation formula that is vastly under-funding them?\textsuperscript{191} Bill 2320 did not propose a way in which to sustain improvements in performance.\textsuperscript{192} While students in targeted underperforming schools may show temporary increases in performance, Bill 2320 did not appear to propose a long term solution to the problems students in these schools face.\textsuperscript{193}

Finally, Bill 2320 was shrouded in euphemism-laden text at a time when euphemisms such as “charter” and “pilot” schools are already over-abundant. Bill 2320 labeled schools that are “chronically underperforming” as “Turnaround Schools.”\textsuperscript{194} Schools that currently meet the criteria for “underperforming” were labeled “Intervention Schools.”\textsuperscript{195} Instead of branding schools that are producing underperforming students with fancy titles, the legislation should have targeted these schools at the beginning with a more ambitious proposal.

**Conclusion**

We get caught up in the blind vision of the so-called education reforms, outlined at the beginning of this article, and lose sight of the greater picture. As a result, all of our energy is expended on resisting the inanities of these panaceas, without time to advocate for the kinds of reforms we truly need—changes in the classroom. Poor test results often will cause “teaching to the test,” while the love of learning is lost.

\textsuperscript{189} See id.
\textsuperscript{191} See id.
\textsuperscript{192} See id.
\textsuperscript{193} See id.
\textsuperscript{194} See id. § 2 at ll. 35–36. “Turnaround Schools” include those that are “chronically underperforming” and consist of 50% or more students failing or getting warnings in mathematics or English language arts on their MCAS in any grade for two or more consecutive years. Id.
\textsuperscript{195} See S. 2320, 184th Gen. Ct., Reg. Sess. § 2 at ll. 15–20 (Mass. 2005). “Intervention Schools” include those that are “underperforming” or have 35% to 50% of students failing or getting warnings on the mathematics or English language arts MCAS in any grade for two or more consecutive years. Id.
at an early age for many children. The fears resulting from the “teach to the test” mentality are communicated to the children. What happened to schools as the place for questioning traditionally accepted truths? What happened to the marketplace of ideas? What happened to the epiphany a child feels from discovery or the teacher feels from seeing that child’s discovery?

Recognizing that which needs to be done is extremely unlikely to happen in our lifetimes, but what should be done? It is unlikely that significantly more money is forthcoming. Also, there is the inherent tension between demanding that certain state standards be implemented in every school, and the state intervening if those standards are not met, which indicates that the development of the kind of collaborative working relationship between state and school, engendered due to cooperation rather than “orders from above,” is crucial for any reform program with such an accountability structure.

There was a third grade teacher from a large urban area where test scores were horrible, except for her class, where all of the children were performing well. The school system approached the teacher and asked her to head up academic instruction for the entire system, at much increased pay. She refused, saying that all she wanted to do was to continue teaching her third grade class. The superintendent, frustrated at her refusal, asked her what she was doing differently than other teachers. She replied that she used the same text books as the other teachers, the same curriculum, had the same resources as other teachers, but she said that she treated each of the students with the love she gave to her own biological children. If she discovered that a child’s parent was not home with the child in the evening, she went looking for the parent and brought him or her back to the home. She refused to accept poor performance from her students, working whatever hours after school were necessary. We know there are a number of such committed teachers out there of all races and languages; how do we encourage them to come into public school systems, or, if in them now, how do we relax state and federal rules so that these teachers may flourish? The truth is that there are so many items needed at schools that require money, but it is also true that there are many things required that do

198 This kind of story was recounted involving another altruistic teacher, Jaime Escalante, in the movie Stand and Deliver. Warner Bros. Distrib. (1988).
not. Yet both items must be present for the kind of changes that need to be realized for our schools to truly become effective.\footnote{While recognizing that there are such teachers who would love their children as their own and take the time needed regardless of the time spent, such teachers are still the exception. Therefore, my thesis here is that it will take the payment of a substantial salary as an incentive to produce better results.}

What school desegregation law teaches us, in part, is that society deliberately creates schools of the “haves” and the “have-nots” and much of this distinction is based on race and national origin. Desegregation court orders had, as their underlying principle, that racial and national origin minorities would receive services if they attended schools with the “haves” (whites), otherwise the services they received were “inherently unequal.”\footnote{See Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (declaring that “separate educational facilities are inherently unequal”); Brown v. Bd. of Educ. (Brown II), 349 U.S. 294 (1955); see also Green v. County Sch. Bd., 391 U.S. 430, 436 (1968) (stating that the principle focus of cases after Brown II was obtaining for black children a place in white schools).} This was true; sad, but true. School finance litigation, whether based on theories of equity or adequacy, was predicated, in large part, on a similar principle. Such litigation sought to establish remedies that would provide resources for the minimum state curriculum requirements, rather than the resources necessary to support what is taught in the “have” districts. Since the Supreme Court outlawed “integration” over district lines in \textit{Milliken v. Bradley} and declared that education was not a fundamental right triggering strict scrutiny review in \textit{Rodriguez v. San Antonio Unified School District}, the use of litigation had to resort to an examination of state constitutions and their specific language. For example, in \textit{McDuffy}, which produced the wonderful judgment quoted at the beginning of this article, the entire meaning of the education clause turned on what the meaning of the word “cherish” was when the Massachusetts Constitution was written.\footnote{See generally 418 U.S. 717 (1974).}\footnote{See generally 411 U.S. 1 (1973).}\footnote{See McDuffy v. Sec’y of the Exec. Office of Educ. 615 N.E.2d 516, 524–528 (Mass. 1993).}

When courts have to resort to such linguistic gymnastics to provide any kind of relief, what can be said of the hope that the political process might redress these inequities? The majority usually gets what it wants through actions by the executive and legislative branches of the government. The courts are asked to intervene to protect the rights of the minority only after the political process fails to respond. This judicial review could not begin to examine the realities of our
collective value judgments, i.e. where we allocate our tax money, but can merely recognize the political reality that we currently have no collective political will to do what is necessary, i.e. radically alter how we deliver education. We tinker with euphemisms; some gain political support and become enacted into law (e.g., NCLB), but nothing changes structurally for the have-nots. Nothing will change unless we, as a society, recognize the realities of what we are actually doing and not doing correctly. Given the degree of neglect, this means colleges and universities, businesses of all sizes, and community organizations of all types, each with heavy doses of governmental assistance, must become actively involved in the operation of our schools. There have been examples of wealthy individuals adopting a class and offering to pay for the college education of those who graduate high school. We need more such individuals to step up and make that offer to all students attending the have-not schools. Also, the political environment must change so that there is governmental support for these reforms, though that is easier said than done. We have endured so many years of being governed by greed instead of doing what is necessary for the collective good. This will not change soon, but people of good will should undertake the effort.

There is a reason parents with means move to communities with quality school systems: they want their children to have the many advantages a strong education provider can offer. Is there any parent who does not want the same, or who would trade places with the have-nots? Too many people in the Commonwealth understand the message of the following reworded song lyric to allow the current education system to persist:

Is there any parent here who’d like to move from a Wellesley to a Holyoke?
Is there any parent here who thinks all schools produce the same results?
Is there any parent here who thinks she’s education-wise
Loyal to her kids, but turns away her eyes?
I wanna see her now, I want to wish her luck
I wanna shake her hand, wanna call her name
Put a medal on her pride.

Is there any parent here who would trade her kids’ teachers for those less trained?
Is there any parent here who doesn’t mind her kids not learning with the potential in their brains?
In drug infested streets, in crowded classrooms without learning tools?
I wanna see her now, I wanna wish her luck
I wanna shake her hand, wanna call her name
Put a medal on her pride.

Is there any parent here who thinks that turning her eyes makes the problems go away?
Is there any parent here who thinks educational equality will come for all one day?
Is there any parent here who thinks money isn’t needed; the problems will go away?
Wishing will make it so and she is not to blame
   I wanna see her now, I wanna wish her luck
   I wanna shake her hand, wanna call her name
       Put a medal on her pride.\textsuperscript{204}

\textsuperscript{204} With many apologies to the memory of Phil Ochs’s \textit{Is There Anybody Here}. \textit{See Phil Ochs, Is There Anybody Here, on Phil Ochs in Concert} (Elektra Entertainment 1966).
Abstract: Millions of people work in poorly paid jobs as temporary workers. These workers are hired by a temporary-help firm, but perform work for another company. As such, their status as “employees” of the company for which they actually perform work and on whose premises they generally labor is frequently challenged. This ambiguous employment status means that temporary workers fall outside the scope of federal workplace safety and health protections. This Note addresses the Occupational Safety and Health Act (OSHA), the nation’s principal federal legislation governing working conditions, as it pertains to temporary workers, as well as judicial interpretations that limit the safety and health protections OSHA extends to temporary workers. Rather than adhere to a formulaic interpretation of OSHA as the Supreme Court currently instructs, this Note urges courts to adopt Congress’s stated intent in enacting OSHA—the protection of all workers.

Outside it’s 100 degrees and inside it’s like 200. It’s real hot in there. They don’t have windows. When it’s 90 degrees, we’re just sweating. The sweat is just pouring off us. We just have fans but no ventilation.

—Latina food packer in Chicago

Introduction

Working conditions for low-skilled workers in the United States of America (USA) are not pleasant. Physical facilities may be decrepit,
overcrowded, dangerous, and unhealthy. Hazardous electrical wiring, unsanitary bathrooms, blocked fire exits, poor ventilation, and insufficient lighting are common. Workers are often required to work compulsory overtime, sometimes putting in seventy to one-hundred hour workweeks. The use of compulsory overtime contributes to workers’ overexertion, increased occupational illnesses, crippling workplace accidents, and generally poor health. Furthermore, managers regularly subject workers to psychological abuse. Workers are constantly supervised, surveillance is routine, discipline is meted out arbitrarily, intimidation and harassment are readily utilized, and workers’ movements are controlled.

In addition to difficult working conditions, today’s workers in the USA face an increasingly bifurcated labor force split between “core” workers and “contingent” workers. While “core” workers are generally understood to perform standard work—that which is perceived as permanent and full-time—members of the “contingent” workforce do not enjoy such stable employment. That is, contingent workers are employed on bases that are not perceived as long-term and full-time.

Within the contingent workforce operates a subset of workers generally labeled “temporary.” Temporary workers are hired by one company, referred to as a temporary-help firm, and assigned to work for another company, known as a “user firm.” Current laws regulating

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3 See generally Miriam Ching Yoon Louie, Sweatshop Warriors: Immigrant Women Workers Take on the Global Factory (2001) (discussing the working conditions and labor-organizing efforts of women of color working in factories in the USA).
5 Id.
6 Id.
7 See Shirley Lung, Overwork and Overtime, 39 Ind. L. Rev. 51, 56 (2005).
8 See id.
9 See id.
12 See Befort, supra note 10, at 158.
workplace safety and health conditions disfavor the temporary workforce, which is composed disproportionately of women and people of color.\textsuperscript{15} By unduly utilizing these groups and paying them less than core workers,\textsuperscript{16} the temporary workforce perpetuates long-standing racial, ethnic, and gender segmentation in the USA's labor market.\textsuperscript{17}

Into this labor context of a modern workforce polarized between core and contingent workers\textsuperscript{18} and historically entrenched racial, ethnic, and gender segmentation,\textsuperscript{19} enters the Occupational Safety and Health Act (OSHA), the principal federal legislation governing workplace conditions.\textsuperscript{20} At its most fundamental level, OSHA is designed to achieve safer and healthier workplaces.\textsuperscript{21} Technically, OSHA protections apply identically to core and contingent workers.\textsuperscript{22} However, contingent workers do not enjoy the same degree of “practical protection” as core workers\textsuperscript{23} because contemporary workplace legislation is


\textsuperscript{16} See Anne E. Polivka et al., \textit{Definition, Composition, and Economic Consequences of the Nonstandard Workforce, in Nonstandard Work: The Nature and Challenges of Changing Employment Arrangements} 41, 47, 73 (Françoise Carré et al. eds., 2000); Dau-Schmidt, \textit{supra} note 15, at 880.

\textsuperscript{17} See Françoise J. Carré, \textit{Temporary and Contracted Work in the United States: Policy Issues and Innovative Responses} 5 (Org. for Econ. Cooperation & Dev., Vol. VI Working Paper No. 87, 1998); see also Joya Misra, \textit{Latinas and African American Women in the Labor Market: Implications for Policy, in Latinas and African American Women at Work: Race, Gender, and Economic Inequality} 408, 413 (Irene Browne ed., 1999) (noting that analyses of gender segregation illustrate that women have been concentrated in low-paying occupations and that women of color are often concentrated in low-paying occupations and particular jobs within those occupations); Barbara F. Reskin, \textit{Occupational Segregation by Race and Ethnicity Among Women Workers, in Latinas and African American Women at Work, supra}, at 183–84 (stating that occupational segregation by sex contributes to sex-based differences in working conditions, and that ethnicity is an important basis of workplace inequality).

\textsuperscript{18} See Befort, \textit{supra} note 10, at 158.

\textsuperscript{19} See Carré, \textit{supra} note 17, at 5; see also Barbara F. Reskin, \textit{Segregating Workers: Occupational Differences by Race, Ethnicity, and Sex, in Industrial Relations Research Association Series: Proceedings of the Forty-Sixth Annual Meeting} 247, 254 (Paula B. Voos ed., 1994) (finding that workers’ race, ethnicity, and sex affect their access to occupations).


\textsuperscript{23} See Anthony P. Carnevale et al., \textit{Contingent Workers and Employment Law, in Contingent Work: American Employment Relations in Transition} 221, 281 (Kathleen Barker & Kathleen Christensen eds., 1998); Forster, \textit{supra} note 22, at 557.
a regulatory patchwork “riddled with loopholes”\textsuperscript{24} that often results in illusory protection for contingent, especially temporary, workers.\textsuperscript{25} Simply, contemporary labor law “does not play fair with [contingent and temporary] workers.”\textsuperscript{26}

The origins of modern-labor legislation hint at an asymmetrical employment paradigm between employers and workers.\textsuperscript{27} Modern-labor legislation was developed to protect workers from the harsh effects of the at-will employment doctrine.\textsuperscript{28} Originally developed by state courts in the 1880s,\textsuperscript{29} the at-will doctrine allows an employee to leave a job at any time.\textsuperscript{30} While the at-will doctrine’s flexibility seemingly empowers workers to become full participants in the market for labor, this flexibility also enables employers to fire a worker for a good reason, a bad reason, or no reason at all.\textsuperscript{31} In short, the at-will doctrine limits job security and presumes equal bargaining power for employers and workers.\textsuperscript{32} Low-skilled workers, however, receive only the job insecurity promised by the at-will doctrine, while shouldering the burden of functioning in the labor market equipped with less bargaining power than employers.\textsuperscript{33} In particular, the at-will doctrine gives employers disproportionate bargaining power to dictate the terms of the employment contract.\textsuperscript{34}

This Note explores the practical protections that OSHA provides temporary workers. The Introduction addressed the current employment landscape in which temporary workers labor. Part I examines the

\textsuperscript{24} Befort, \textit{supra} note 13, at 352; Lung, \textit{supra} note 4, at 294.
\textsuperscript{25} See Lung, \textit{supra} note 4, at 294.
\textsuperscript{26} Befort, \textit{supra} note 13, at 352.
\textsuperscript{28} See Kathleen C. McGowan, Note, \textit{Unequal Opportunity in At-Will Employment: The Search for a Remedy}, 72 St. John’s L. REV. 141, 170–83 (1998) (discussing state legislation enacted to address the “harshness of employment at-will” and proposing similar federal legislation); see also Deborah A. Ballam, \textit{Employment-at-Will: The Impending Death of a Doctrine}, 37 AM. BUS. L.J. 653, 655 (2000) (noting that the at-will doctrine is limited by many state and federal statutes, especially employment discrimination laws); \textit{cf. Stone, supra} note 14, at 49 (identifying the demise of internal labor markets—self-regulating expectations held by employers and employees—in the late twentieth century as sparking public concern with the at-will doctrine).
\textsuperscript{29} Stone, \textit{supra} note 14, at 24.
\textsuperscript{30} Middleton, \textit{supra} note 27, at 560.
\textsuperscript{31} See Stone, \textit{supra} note 14, at 133.
\textsuperscript{32} See Middleton, \textit{supra} note 27, at 560.
\textsuperscript{33} See Summers, \textit{supra} note 10, at 519.
\textsuperscript{34} Id.
development and contemporary construction of the temporary workforce. Special emphasis is placed on the unique employment relationship developed by the temporary-help industry (THI) in the 1970s and the demographics of the modern, temporary workforce. Part II discusses the limited protections that OSHA currently provides temporary workers. This section presents the judicial tests used to determine employment status and the implications of those tests for temporary workers. Lastly, Part III critically examines various administrative and judicial opinions that apply the dominant employment-status tests to interpret what constitutes an “employer” and “employee.” This section proposes methods for improving the workplace safety and health protections temporary workers receive under OSHA. In particular, this Note concludes by urging the adoption of a purposive interpretation of OSHA to ensure that Congress’s intended goal, to actually protect workers, is realized in regard to temporary workers.

I. FROM CORE TO TEMPORARY: THE NATURE AND GROWTH OF THE THI

A. Identifying Temporary Workers

Understanding temporary workers necessarily begins with an understanding of the contingent workforce. However, no unanimity exists regarding who or what constitutes the contingent workforce. Some scholars propose a definition of contingent work that places primary emphasis on the existence or lack of job security, entailing a close

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35 See Stone, supra note 14, at 72. No consensus exists that this segment of the labor pool should even be labeled “contingent.” See id. Indeed, the phrase “precarious employment” has been offered as a replacement to “contingent.” Id. Precarious employment is work that lacks an explicit or implicit promise of continuity. Id. Essentially, precarious employment is the opposite of long-term employment. Id. The precarious employment rubric includes temporary workers as well as people who have steady, full-time employment but lack a “reasonable expectation of job security.” Id. at 73. In spite of the disagreement about the use of “contingent” versus “precarious,” the term “contingent” is much more commonly found in the literature. But cf. id. at 72 (offering “precarious” as a substitute for “contingent”). See generally CONTINGENT WORK, supra note 23; Dau-Schmidt, supra note 15; Summers, supra note 10. Therefore, the use here of “contingent” facilitates locating this Note within other analyses of this segment of the labor force.

36 See Richard S. Belous, The Rise of the Contingent Work Force: The Key Challenges and Opportunities, 52 Wash. & Lee L. Rev. 863, 864 (1995). Attempts to define this “amorphous” group have often been abandoned. See Befort, supra note 10, at 158; see also Richard R. Carlson, Variations on a Theme of Employment: Labor Law Regulation of Alternative Worker Relations, 37 S. Tex. L. Rev. 661, 663 (1996) (“[T]here are few things as resistant to useful generalizations as the contingent workforce.”).
analysis of whether the job is expected to continue.\textsuperscript{37} Others are proponents of a definition that contrasts contingent work with the permanent, full-time nature of core employment.\textsuperscript{38} Yet others propose a definition that contrasts workers and employers by emphasizing “democratic deficits” as the primary difference between employers and contingent workers.\textsuperscript{39} Since employers “always retain a position of power over their employees,” contingent workers perpetually suffer a democratic deficit in the employment relationship.\textsuperscript{40}

Statistical analyses of the contingent workforce have included an array of workers and widely varying approximations of the size of the contingent workforce.\textsuperscript{41} Using data from 1995, at least three estimates of the contingent workforce were made using three different definitions of contingent work.\textsuperscript{42} The narrow estimate included only wage and salary workers who had their jobs for one year or less and expected the job to last for an additional year or less.\textsuperscript{43} This estimate indicated that 2.2%, or 2.7 million, of the total people employed in the USA were contingent workers.\textsuperscript{44} The middle estimate expanded on the narrow estimate by adding the self-employed and independent contractors who had been in their employment arrangement for less than or up to one year and expected to be there for another year or less.\textsuperscript{45} This estimate postured that 2.8% of the people employed in the USA were members of the contingent workforce.\textsuperscript{46} The broad estimate notably eliminated the one-year limitation and included self-employed workers and all wage and salary workers who did not expect their jobs to continue indefinitely.\textsuperscript{47} Not surprisingly, the third estimate suggested that a much larger percentage of the total employed in the country were contingent workers—4.9%, or six million peo-

\textsuperscript{37} See Sharon R. Cohany et al., \textit{Counting the Workers: Results of a First Survey, in Contingent Work}, supra note 23, at 41.
\textsuperscript{38} See Ontiveros, supra note 11, at 29. See generally Befort, supra note 10, at 158 (describing the term “contingent workforce” as a “catch-phrase” that embraces “a diverse group of non-core workers who provide work other than on a long-term, full-time basis”).
\textsuperscript{40} See id.
\textsuperscript{41} See Cohany et al., supra note 37, at 46 tbl.2.1.
\textsuperscript{42} See id.
\textsuperscript{43} See id. at 43.
\textsuperscript{44} See id. at 45, 46 tbl.2.1.
\textsuperscript{45} See id. at 44.
\textsuperscript{46} See Cohany et al., supra note 37, at 46 tbl.2.1.
\textsuperscript{47} See id.
ple. While these three groupings presented widely divergent estimates, the contingent workforce generally includes workers categorized as temporary workers, independent contractors, contracted workers, leased employees, and part-time employees.

As a subcategory of the contingent workforce, temporary work is also ambiguously defined. Indeed, the only definitional agreement that exists with respect to temporary work is that temporary workers are non-permanent workers.

In devising a definition of temporary work, the importance of the work’s actual duration remains contested. Given the lay definition of “temporary,” temporary work “generally is understood to be either for a short fixed term or to continue only from day to day, week to week, or

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48 See id. at 45, 46 tbl.2.1. Using an identical definition, another analysis estimated that, in 1999, 4.3% of the total workers employed in the USA were contingent workers. See Dale Berman & Lonnie Golden, Nonstandard and Contingent Employment: Contrasts by Job Type, Industry, and Occupation, in Nonstandard Work, supra note 16, at 167, 174; Cohany et al., supra note 37, at 46 tbl.2.1. The decline between 1995 and 1999 in the proportion of total employment that was contingent was a result of the slowing growth of economic expansion. Berman & Golden, supra, at 174.

49 See Befort, supra note 13, at 367. Temporary workers are defined as non-permanent employees. Piano v. Ameritech/SBC, No. 02 C 3237, 2003 WL 260337, at *3 n.1 (N.D. Ill. 2003). Temporary jobs lack continuity and are intended to exist for only a relatively short period. See Befort, supra note 10, at 158; Summers, supra note 10, at 505.

50 See Befort, supra note 13, at 367. Independent contractors are self-employed and provide companies with specialized services on a contract basis. See id. at 367 n.108.

51 See id. at 367. Contracted work occurs when a company uses workers employed by another company to perform services that its own employees used to perform. See Jonathan P. Hiatt & Lynn Rhinehart, The Growing Contingent Work Force: A Challenge for the Future, 10 Lab. Law. 143, 146 (1994). Examples of contract work include maintenance and housekeeping services. Id.

52 See Befort, supra note 13, at 367; Befort, supra note 10, at 158. Leased employees are workers who are selected by the company that intends to use the labor, then hired by a leasing agency, and leased to the company that intends to use their labor. See Summers, supra note 10, at 514. Leased workers are meant to be long-term or permanent workers rather than temporary. See id. In addition, leased workers are most often used for professional- and management-level work. See id.

53 See Befort, supra note 13, at 367. Part-time jobs are those that provide substantially less than the customary workweek. Summers, supra note 10, at 505.

54 See infra notes 55–61 and accompanying text.

55 See Piano v. Ameritech/SBC, No. 02 C 3237, 2003 WL 260337, at *3 n.1 (N.D. Ill. 2003). While the non-permanent nature of temporary work includes people who work directly for companies as their legal employees (i.e., direct-hire temporaries) on a temporary basis, this Note is limited to a discussion of those individuals who are hired through temporary-help firms. See Polivka et al., supra note 16, at 42–43; Forster, supra note 22, at 545 n.20.

56 See, e.g., Gonos, supra note 14, at 84–85; Summers, supra note 10, at 509.
month to month.” In practice, however, one company may hire workers and assign them to work for another company for months or even years. As such, the signifier “temporary” is a misnomer because the limited duration of temporary work assignments has never been the defining characteristic of this type of work. In addition, the at-will doctrine also calls into question the use of job duration as a definitional aspect of temporary work. Since most jobs can be terminated at any time without notice and without severance pay, the at-will doctrine renders almost all employment “legally temporary.” Perhaps as a result of these challenges to the importance of job duration, the Occupational Safety and Health Review Commission (OSHRC), the agency charged with adjudicating allegations of OSHA violations, also places little emphasis on duration when determining whether an employment relationship exists.

B. The THI’s Triangular Employment Framework

While the specific boundaries of the type of work that falls within the temporary work category remain nebulous, a common understanding does exist regarding the THI’s organizational structure. The THI operates in a triangular employment framework formed by the worker, the temporary-help firm (THF), and the user firm. The THF recruits workers, pays them directly, and is responsible for paying payroll taxes, including social security and unemployment insurance.

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57 See Summers, supra note 10, at 509. Webster’s Dictionary defines “temporary” as “lasting, existing, serving, or effective for a time only.” Webster’s Encyclopedic Unabridged Dictionary of the English Language 1462 (1996). It adds, “Temporary implies an arrangement established with no thought of continuance but with the idea of being changed soon.” Id.
58 See Stone, supra note 14, at 68.
59 See Gonos, supra note 14, at 84–85.
60 See Stone, supra note 14, at 133; Summers, supra note 10, at 509.
61 See Summers, supra note 10, at 509.
63 See Stone, supra note 14, at 68; Carlson, supra note 36, at 688; Cohany et al., supra note 37, at 63; Gonos, supra note 14, at 85; Summers, supra note 10, at 511.
64 Gonos, supra note 14, at 85.
65 See Cohany et al., supra note 37, at 63.
66 See Stone, supra note 14, at 68; Carlson, supra note 36, at 688; Cohany et al., supra note 37, at 63.
67 Summers, supra note 10, at 511.
68 Cohany et al., supra note 37, at 63.
erally, the THF does not provide workers with materials or tools.\textsuperscript{69} Legally, the THF is the workers’ employer.\textsuperscript{70} Consequently, the THFs “assume, ostensibly at least, responsibility for formal compliance with the key legal requirements connected with this [employer] role.”\textsuperscript{71}

After recruiting workers, the THF assigns them to a user firm,\textsuperscript{72} an organization that contracts with the THF to receive workers.\textsuperscript{73} In return for workers, the user firm pays a fee to the THF.\textsuperscript{74} At the worksite, the user firm supervises the day-to-day performance of temporary workers.\textsuperscript{75} Usually, the user firm exercises direct control of temporary workers working on their premises.\textsuperscript{76} Temporary workers are not technically employed until they begin work on the user firm’s premises.\textsuperscript{77}

The triangular employment framework gives new meaning to the employment relationship as it pertains to the legal standards governing workplace conditions.\textsuperscript{78} In the THI employment model, the work performed becomes the service, the THF becomes the employer, the user firm’s purchase of the service transforms the user firm into the customer, and the worker’s use of the THF renders workers into consumers.\textsuperscript{79} More importantly, given the legal and financial obligations imposed by employer status, the formal designation of THFs as legal employer to temporary workers creates the THI’s primary reason to exist—allowing the user firm to enjoy the benefits of labor while avoiding many of the legal obligations attached to employer status.\textsuperscript{80}

\section*{C. Evolution of the THI}

Between the 1940s and the 1970s, the THI transformed itself into a major component of the USA’s labor market.\textsuperscript{81} The THI was born in

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\textsuperscript{69} See Gonos, supra note 14, at 88.
\textsuperscript{70} See Stone, supra note 14, at 68; Gonos, supra note 14, at 85.
\textsuperscript{71} Gonos, supra note 14, at 85.
\textsuperscript{72} See id.
\textsuperscript{73} See Stone, supra note 14, at 68.
\textsuperscript{74} See Carlson, supra note 36, at 688; Summers, supra note 10, at 511; see also Katherine Van Wezel Stone et al., Employment Protection for Atypical Workers: Proceedings of the 2006 Annual Meeting, Association of American Law Schools Section on Labor Relations and Employment Law, 10 EMP. RTS. & EMP. POL’y J. 233, 238 (2006) (noting that the fee paid by user firms is enough to cover wages, overhead costs, including employment taxes, and profits).
\textsuperscript{75} See Stone, supra note 14, at 209; Carlson, supra note 36, at 688.
\textsuperscript{76} See Gonos, supra note 14, at 88.
\textsuperscript{77} Id.
\textsuperscript{78} Id. at 104–05.
\textsuperscript{79} Id. at 105.
\textsuperscript{80} See id. at 90, 103, 85–86.
\textsuperscript{81} See infra notes 82–91 and accompanying text.
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the manufacturing-centered economy of the late 1940s. After World War II, the USA’s economy gradually shifted from manufacturing-centered to service-centered while experiencing “heightened international competition, greater fluctuations in demand, increased costs of fringe benefits, a decline in unionization, and shifts in labor force composition.”

Until the mid-1970s, the prevailing employment paradigm consisted of full-time and continuous work unless otherwise stated. This employment arrangement would end only if the employee failed to perform satisfactorily or was no longer needed by the employer.

Throughout the 1950s and 1960s, the THI quietly but consistently lobbied legislators to alter the dominant employment practice of hiring workers full-time and continuously. In the midst of the country’s transition from a manufacturing-based economy to one dependent upon service industries, the THI’s lobbying resulted in explosive growth for the industry. In the late 1960s, THFs successfully persuaded Congress and state governments to deem THFs a worker’s employer for purposes of complying with labor and employment laws. Since many federal regulations governing workplace standards apply only to workers who have been formally labeled “employees,” formal recognition of THFs as employers shifted the cost of complying with those regulations onto the THF. Partly as a result of THI lobbying, by the 1970s the stage was set for THFs to become a “permanent fixture” in many workplaces.

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82 Dau-Schmidt, supra note 15, at 879; Gonos, supra note 14, at 90.
83 See Cohany et al., supra note 37, at 62; Dau-Schmidt, supra note 15, at 879.
84 See Summers, supra note 10, at 503.
85 See id.
86 See Cohany et al., supra note 37, at 62; Summers, supra note 10, at 504.
87 See Cohany et al., supra note 14, at 68.
88 See STONE, supra note 14, at 68. See generally Gonos, supra note 14, at 93–94 (stating that by 1971 all but two states adopted legislation sought by the THI, including twelve states that explicitly exempted THFs from regulation).
89 See Befort, supra note 10, at 417; Gonos, supra note 14, at 85.
90 See Gonos, supra note 14, at 90.
91 See Cohany et al., supra note 37, at 62; see also Marcello Estevão & Saul Lach, The Evolution of the Demand for Temporary Help Supply Employment in the United States, in NONSTANDARD WORK, supra note 16, at 123, 140 (confirming that the increased use of temporary workers was due to a change in the hiring practices of private companies such that THFs were incorporated into sectors of the labor market where THFs were not previously present).
In the last quarter-century, the number of workers hired by THFs has ballooned.\footnote{Belous, \textit{supra} note 36, at 865 tbl.1. In this period, there has been a corresponding increase in the contingent workforce. \textit{See} Befort, \textit{supra} note 10, at 158; Summers, \textit{supra} note 10, at 504.} In 1980, there were 400,000 temporary workers.\footnote{Belous, \textit{supra} note 36, at 865 tbl.1.} Eight years later this number had more than doubled, reaching 1.1 million.\footnote{\textit{Id.}} By 1993, there were approximately 1.6 million workers hired by THFs.\footnote{\textit{Id.}} In that year, Manpower, Inc., the nation’s largest THF, alone was credited with employing over 500,000 temporary workers.\footnote{See Summers, \textit{supra} note 10, at 511. Indeed, the next year \textit{Fortune Magazine} declared Manpower the USA’s largest private employer. Jaclyn Fierman, \textit{The Contingency Work Force}, \textit{Fortune Mag.}, Jan. 24, 1994, at 31.} Most recently, in 2001, there were approximately 2 million people working for THFs.\footnote{See Stone, \textit{supra} note 14, at 67. Today, three companies—Manpower, Kelly Services, and Olsten—dominate the temporary work landscape. \textit{See} Cohany et al., \textit{supra} note 37, at 62.}

D. \textit{Benefits of Temporary Work for Employers and Workers}

The growing reliance on temporary workers in the contemporary labor market results largely from employers’ desire to avoid workplace regulations.\footnote{See Befort, \textit{supra} note 13, at 361, 416.} Most importantly, user firms benefit from the legal characterization of THFs as the temporary workers’ employer because that characterization allows user firms to avoid expensive legal obligations imposed upon employers by labor laws.\footnote{\textit{Id.}} Firms perceive temporary workers to be less expensive than core workers\footnote{Cf. Polivka et al., \textit{supra} note 16, at 83 (positing that the lower probability of contingent workers receiving health insurance “suggests that employers may be using these arrangements to reduce costs”). But see Shulamit Kahn, \textit{The Bottom-Line Impact of Nonstandard Jobs on Companies’ Profitability and Productivity}, in \textit{NONSTANDARD WORK}, \textit{supra} note 16, at 235, 241 (revealing that company officers disagree about the extent of cost savings resulting from the use of THFs); Stanley D. Nollen & Helen Axel, \textit{Benefits & Costs to Employers, in CONTINGENT WORK}, \textit{supra} note 23, at 126, 136 (challenging the actual cost savings of contingent workers by taking into account training costs, turnover rates, performance and productivity levels, and costs of unavoidable legal obligations).} because the former do not receive unemployment insurance\footnote{See Befort, \textit{supra} note 13, at 369.} or workers’ com-
pensation insurance, and are paid less than core workers, and are not covered by the National Labor Relations Act (NLRA), the nation’s principal collective bargaining legislation.

In addition, reliance on temporary workers enables user firms to flexibly manage personnel. THFs are capable of providing workers “on demand,” to allow user firms to get workers on short notice to meet their temporary-labor needs. As a result, user firms avoid paying for more workers than they need at any given moment.

To some extent, temporary workers also benefit from temporary work status. Temporary work arrangements provide flexibility for people who do not want a steady or long-term job. In addition, temporary work serves as a stopgap measure for the unemployed by providing them with at least some income between jobs. In fact, temporary work can be a bridge to a new job. Lastly, temporary work can provide on-the-job training to workers.

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102 See id.
103 See Belous, supra note 36, at 873; Summers, supra note 10, at 512; Maria O’Brien Hylton, The Case Against Regulating the Market for Contingent Employment, 52 Wash. & Lee L. Rev. 849, 858 (1995).
105 Hylton, supra note 103, at 858. User firms engage in significant management activities including determining the wages earned by workers. See Stone et al., supra note 74, at 241. According to Stone, user firms and THFs jointly decide how much money workers earn. See id.
106 See Summers, supra note 10, at 511.
107 See Cohany et al., supra note 37, at 63. While the speed at which a THF provides workers depends on the user firm’s needs, the industry’s presumption is that a THF can provide workers at a moment’s notice to ensure maximum productivity. See Patricia Schroeder, Does the Growth in the Contingent Work Force Demand a Change in Federal Policy?, 52 Wash. & Lee L. Rev. 731, 731 (1995).
108 See Carlson, supra note 36, at 688. The temporary nature of temporary work is questionable since the duration of temporary work is often measured in months or years. See Stone, supra note 14, at 68.
109 See Cohany et al., supra note 37, at 63; Summers, supra note 10, at 511; see also Frances Raday, The Insider-Outsider Politics of Labor-Only Contracting, 20 Comp. Lab. L. & Pol’y J. 413, 417 (1999) (stating that THI employment allows user firms to quickly terminate workers “at any time without actually having to dismiss them and hence can avoid the various limitations on the right to dismiss” and the costs associated with dismissal).
110 See infra notes 111–14 and accompanying text.
111 See Cohany et al., supra note 37, at 63; Summers, supra note 10, at 512.
112 See Cohany et al., supra note 37, at 63; Summers, supra note 10, at 512.
113 See Summers, supra note 10, at 512.
114 See Cohany et al., supra note 37, at 63; Summers, supra note 10, at 512.
E. Consequences of Temporary Work

The benefits of temporary work are in direct correlation with corresponding disadvantages to temporary workers. Workplace safety protections are eroded in the drive to cut costs. In addition, temporary-work arrangements unfairly place immense risk and economic uncertainty on workers insofar as these arrangements fail to acknowledge that temporary workers are in need of such services as health insurance, paid vacation, family leave, pensions, job security, training opportunities, and promotional opportunities. Furthermore, temporary workers labor within an asymmetrical control paradigm. The triangular employment framework falsely suggests that temporary workers participate in the labor market on equal footing with THFs and user firms. Where the worker’s only “power” is to refuse or leave an unpleasant work assignment, it is “a one-sided, small-numbers bargaining problem: where one side has no alternatives, the other side will be able to set the terms of the agreement.”

Temporary employment is often reserved for low-skilled work that is poorly remunerated, exacerbating the democracy deficit that characterizes the employer-worker paradigm. The prevalence of low-skilled laborers within the temporary workforce leads to an asymmetrical power dynamic between temporary workers and firms. This asymmetry leads to the job instability that plagues most temporary workers. Temporary workers are more likely than non-temporary workers to become unemployed, involuntarily drop out of the labor force, or have to switch from one employer to another due to job instability. In addition, temporary workers lack control of the number of hours they work.

115 See discussion infra Part I.E.
116 Summers, supra note 10, at 512.
117 See Belous, supra note 36, at 875; Ontiveros, supra note 11, at 31.
118 See Forster, supra note 22, at 544.
119 See Gonos, supra note 14, at 105.
120 Jean McAllister, Sisyphus at Work in the Warehouse: Temporary Employment in Greenville, South Carolina, in Contingent Work, supra note 23, at 221, 235.
121 See Davidov, supra note 39, at 381; Summers, supra note 10, at 510.
122 See Stone, supra note 14, at 68.
123 See Carré, supra note 17, at 5. Similarly, job instability impacts all contingent workers. See Belous, supra note 36, at 865; Forster, supra note 22, at 547; see also Ontiveros, supra note 11, at 29 (noting that contingent workers do not have an ongoing expectation that their work will continue).
124 See Ontiveros, supra note 11, at 29.
While four-fifths of temporary workers work full-time,\(^{126}\) they receive few or no employment benefits.\(^{127}\) Paid vacation, paid holidays, sick leave, medical insurance, and pension plans are virtually unknown to temporary workers.\(^{128}\) The lack of employer-provided benefits has repercussions that affect more than just temporary workers.\(^{129}\) For example, in 1997, 46.4% of temporary workers had health insurance, but 39.4% of those workers received their insurance from somewhere other than their employers.\(^{130}\) That only 7% of temporary workers received health insurance from their employer suggests that a significant number of workers turned to other private and public sources for health insurance.\(^{131}\) At the same time, temporary workers receive lower pay than other workers.\(^{132}\)

Given these disadvantages, many temporary and other contingent workers desire a different work status.\(^{133}\) Most workers who use THFs do not do so because they prefer temporary work.\(^{134}\) Only 27% of non-student contingent workers claimed to be satisfied with their work arrangement.\(^{135}\) Similarly, only 34% of temporary workers report that they prefer their work arrangement.\(^{136}\) Most want a permanent job, but accept a temporary position because they have not been able to find permanent employment.\(^{137}\) Indeed, a full two-thirds of temporary workers want a traditional job.\(^{138}\)

\(^{126}\) Cohany et al., *supra* note 37, at 64.


\(^{128}\) See id.

\(^{129}\) See Schroeder, *supra* note 107, at 734–35. Schroeder notes that businesses’ failure to provide benefits to temporary and part-time workers has significant implications for workers, particularly women, who seek to take advantage of statutory “family-friendly” policies such as medical leave. See id.

\(^{130}\) Carré, *supra* note 17, at 15 tbl.1. Another commentator, citing unpublished industry data, reported that 53% of temporary workers received health insurance through a spouse, parent, or other source. Edward A. Lenz, “Contingent Work” —Dispelling the Myth, 52 Wash. & Lee L. Rev. 755, 764 (1995); see also Schroeder, *supra* note 107, at 735 (stating that many employers of temporary workers either cannot afford to pay for health insurance for their workers or simply do not want to invest in these workers).

\(^{131}\) See Carré, *supra* note 17, at 15 tbl.1.

\(^{132}\) See Lung, *supra* note 125, at 381; Summers, *supra* note 10, at 510.

\(^{133}\) See Cohany et al., *supra* note 37, at 50; Summers, *supra* note 10, at 510.

\(^{134}\) See Summers, *supra* note 10, at 510.

\(^{135}\) See Cohany et al., *supra* note 37, at 50.

\(^{136}\) Carré, *supra* note 17, at 4.


\(^{138}\) Cohany et al., *supra* note 37, at 64.
F. Women and People of Color in the Temporary Workforce

Women and people of color hold a disproportionate percentage of the rapidly increasing number of jobs available in the THI and contingent workforce.\textsuperscript{139} Women are overrepresented in the THI as compared to their share of the total workforce.\textsuperscript{140} While women represented 46\% of total employment they comprised 55\% of temporary workers.\textsuperscript{141} Similarly, people of color are overrepresented in relation to their percentage of the nation’s total population.\textsuperscript{142} In 1995, while between 2.2\% and 4.9\% of the total employed in the nation were contingent workers, between 13.3\% and 13.9\% of black workers performed contingent work and between 11.3\% and 13.6\% of Latino workers performed contingent work.\textsuperscript{143}

The use of THFs relocates work out of core labor markets and into secondary markets where workers earn less money and experience greater job instability.\textsuperscript{144} In 1995, temporary workers on average earned $1.30 per hour less than regular full-time workers.\textsuperscript{145} Earnings differentials are most devastating for people of color and women.\textsuperscript{146} While the median earnings of temporary workers working full-time was $290 per week, Latinos working full-time as temporary workers could only count on a median weekly wage of $237 per week.\textsuperscript{147} Similarly, the average hourly wage for male temporary workers was $9.19, while female temporary workers on average earned only $8.94 per hour, a difference of several hundred dollars per year.\textsuperscript{148} Due to the disproportionate representation of people of color in the THI, the earnings differential “translates into ethnic-based earnings inequal-

\textsuperscript{139} See Summers, \textit{supra} note 10, at 510; \textit{see also} Dau-Schmidt, \textit{supra} note 15, at 880 (noting that contingent workers are disproportionately female and African-American); Polivka et al., \textit{supra} note 16, at 47 (identifying an overrepresentation of women and black workers in the THI).

\textsuperscript{140} Carré, \textit{supra} note 17, at 2.

\textsuperscript{141} \textit{Id.}

\textsuperscript{142} See Cohany et al., \textit{supra} note 37, at 48 tbl.2.2. In 1995, 12\% of the total population was black and 10.3\% was Latino. See U.S. Census Bureau, 1996 \textsc{Statistical Abstract of the United States} 22 tbl.22 (1996), \textit{available at} http://www.census.gov/prod/2/gen/96statab/pop.pdf.

\textsuperscript{143} See Cohany et al., \textit{supra} note 37, at 45, 46, 48 tbl.2.2.

\textsuperscript{144} See Annette Bernhardt & Dave E. Marcotte, \textit{Is “Standard Employment” Still What It Used to Be?}, in \textsc{Nonstandard Work}, \textit{supra} note 16, at 21, 23; Gonos, \textit{supra} note 14, at 86–87; \textit{see also} Polivka et al., \textit{supra} note 16, at 73 (explaining that temporary workers “fairly uniformly earned less than regular full-time workers”).

\textsuperscript{145} Polivka et al., \textit{supra} note 16, at 75.

\textsuperscript{146} See Cohany et al., \textit{supra} note 37, at 60 tbl.2.12; Carré, \textit{supra} note 17, at 5.

\textsuperscript{147} See Cohany et al., \textit{supra} note 37, at 64, 60 tbl.2.12.

\textsuperscript{148} See Carré, \textit{supra} note 17, at 5.
ity.”

In addition, black workers have experienced the largest increase in job instability of all workers since the 1970s.

II. OSHA’s Applicability to Temporary Workers

Given the THI’s rapid growth, the overrepresentation of women and people of color in the THI, and the significant consequences of temporary work, it is important to examine how the contemporary application of OSHA uniquely impacts temporary workers.

A. Understanding OSHA

OSHA’s objective is “to assure so far as possible every working man and woman in the Nation safe and healthful working conditions.” Similarly, federal regulations state that OSHA’s purpose is “to regulate employment conditions relating to occupational safety and health and to achieve safer and healthier workplaces throughout the Nation.”

Although courts generally interpret OSHA’s main purpose as making workplaces safe from work-related hazards, courts differ in the amount of safety required. For instance, according to the Iowa Supreme Court, OSHA “intended to prevent the first injury, including those of a non-serious nature.” The Colorado Supreme Court qualified this goal, writing that OSHA did not mandate “absolutely risk-free workplaces.” The Court of Appeals for the First Circuit agreed. In Irving v. United States, the court wrote that OSHA aims for a “satisfactory standard of safety,” rather than a “guarantee [of] absolute safety.”

Regardless of which standard for protection courts use, OSHA charges the Secretary of Labor with creating and enforcing the explicit statutory safety requirements that exist under OSHA. For ex-
ample, the Secretary issued regulations requiring clean and dry workplaces, access to potable water and toilets, and the development of emergency action and fire prevention plans. The Act empowers the Secretary to cite employers for violations of OSHA standards. The Act also creates a hierarchy of civil penalties that can be issued to an employer that violates a standard. To determine the penalty for a workplace safety standard violation, OSHA distinguishes among willful or repeated violations, serious violations, not serious violations, failures to correct a violation, and willful violations that result in the death of an employee. Firms that are cited can contest the citation by turning to the OSHRC to adjudicate disagreements.

OSHA places a burden on both employers and employees to adhere to its workplace safety standards. The Act encourages employers and employees “to become aware of, and warn against, possible hazards.” The statutory text indicates that employees have separate but dependent responsibilities for maintaining safe and healthful working conditions from those imposed on employers. Specifically, employees are obligated to comply with all of OSHA’s rules and regu-
For their part, employers are required to provide a hazard-free workplace.\(^{169}\)

**B. Employment-Status Tests**

On its face, it would appear that OSHA protects all workers identically.\(^{170}\) However, the statute’s explicit goal of providing “every working man and woman in the Nation safe and healthful working conditions” stands in stark contrast to the interpretation that limits OSHA protections only to those workers found to be “employees” of the OSHA violator.\(^{171}\)

The importance of temporary workers’ legal characterization as “employer” and “employee” cannot be overstated because most workplace safety protections are only afforded to those workers statutorily defined as “employees.”\(^{172}\) Indeed, the Court of Appeals for the District of Columbia determined that “OSHA . . . covers every employer whose business affects interstate commerce,” but qualified this statement by noting, “the protection of the health of employees is the overriding concern of OSHA.”\(^{173}\) Implicitly, the court’s determination that OSHA covers only “employers” and seeks to protect “employees” limits OSHA’s applicability to instances in which an employment relationship exists.\(^{174}\) Moreover, OSHA defines an “employer” as a “per-
son engaged in a business affecting commerce who has employees.” 175 It goes on to define “employees” as “an employee of an employer who is employed in a business of his employer which affects commerce.” 176 These circular definitions are, to say the least, uninformative and leave much of the task of determining when OSHA applies to judicial interpretation. 177

Given the importance of the definition of “employee” and “employer,” an analysis of OSHA’s practical application to temporary workers must examine the four tests that courts created and historically have relied upon to determine employment status for purposes of labor and employment laws. 178 Initially, courts relied on a test that utilized the common law of agency. 179 Later, this test gave way to an analysis called the economic realities test. 180 Yet another test, the hybrid test, essentially combined the common law and economic realities tests. 181 Most recently, the Supreme Court developed the Darden test. 182 A brief examination of each of these tests shows that many opportunities remain for employers to avoid liability. 183

The common law test, rooted in the Restatement (Second) of Agency, stands out as the most restrictive of the four status tests. 184 It focuses largely on the putative employer’s right to control the “servant’s” workplace activities. 185 The Restatement defines “servant” as “a person employed to perform services in the affairs of another and who . . . is subject to the other’s control or right to control.” 186 Therefore, under the common law test, an employment relationship exists only when a user firm maintains control over the worker’s detailed physical performance, rather than merely overseeing a worker’s activities. 187 Since

177 See Brennan v. Gilles & Cotting, Inc., 504 F.2d 1255, 1260 (4th Cir. 1974).
179 Befort, supra note 13, at 417.
180 See id. at 417–19; Dau-Schmidt, supra note 15, at 884.
181 See Befort, supra note 13, at 418.
183 See Befort, supra note 10, at 163.
184 See id. at 166.
185 See Restatement (Second) of Agency § 220(1) (1958); see also id. § 220(2) (listing factors to be considered in addition to control); id. § 220 cmt. a (emphasizing the control of a putative employee’s physical movements).
186 Id. § 220(1) (1958).
187 See Leone v. U.S., 910 F.2d 46, 50 (2nd Cir. 1990); see also Schwieger v. Farm Bureau Ins. Co., 207 F.3d 480, 484–85 (8th Cir. 2000) (determining that a worker was not a company’s employee even though the worker submitted regular production reports to a com-
control is the key factor in determining whether a worker is an “employee,” a user firm is able to avoid “employer” status by mitigating its interaction with the worker.\textsuperscript{188}

The economic realities test takes a more expansive interpretive approach to employment status than advanced by the common law test.\textsuperscript{189} As initially conceptualized by the Supreme Court, the test included workers who were employees “as a matter of economic reality” within the definition of “employee.”\textsuperscript{190} Originally developed under the Social Security Act and expanded to apply to claims lodged under the Fair Labor Standards Act (FLSA), the economic realities test emphasized the workers’ dependence for their livelihood on the putative employer under various statutes governing working conditions.\textsuperscript{191} Over time, courts began to consider such factors as whether the putative employer had the power to hire and fire temporary workers, supervise and control conditions of employment and employee work schedules, determine the rate and method of payment, and maintain employment records.\textsuperscript{192} As the test is now utilized, the worker’s dependence on the firm is the most important factor in the analysis.\textsuperscript{193}

The hybrid test, in essence, embodies a combination of the common law and economic realities tests.\textsuperscript{194} Though it examines the

\textsuperscript{188} Cf. U.S. v. New England Coal & Coke Co., 318 F.2d 138, 142 (1st Cir. 1963) (explicitly rejecting, under the common law test, the proposition that a federal workplace statute that governed “all persons employed by” a company included every worker that the company relied on to complete its work).

\textsuperscript{189} Compare Restatement (Second) of Agency § 220 cmt. a (1958) (explicitly stating the common law test’s emphasis on control of a putative employee’s physical movements), with Usery v. Pilgrim Equip. Co., 527 F.2d 1308, 1311 (5th Cir. 1976) (using the economic realities test, the Court examined a worker’s dependence on a firm, in addition to control and other factors, to determine the worker’s employment status). Notably, a recent presidential commission recommended adoption of the economic realities test for determining employment status across all federal statutes. Befort, \textit{supra} note 10, at 172.

\textsuperscript{190} See United States v. Silk, 331 U.S. 704, 713 (1947).


\textsuperscript{193} See Lilley, 958 F.2d at 750; see also Usery, 527 F.2d at 1311 (“It is \textit{dependence} that indicates \textit{employee status}

\textsuperscript{194} See Ontiveros, \textit{supra} note 11, at 669.
economic realities of the employment relationship, the hybrid test, like the common law, particularly emphasizes the putative employer’s right to control the means and manner of the worker’s performance. The most recent of the commonly used tests for determining employment status is the \textit{Darden} test, named after the 1992 Supreme Court decision in which it was announced. In that case, after examining an independent insurance agent’s claim that he was an employee of a nationwide insurance company, the Court found that the economic realities test was a “feeble,” circular, and unpredictable determinant of employment status. As a result, it promulgated a thirteen-factor reformulation of the traditional common law test. The Court instructed that employment status should take into account the putative employer’s right to control the manner and means of the work; the skill required to perform the work; the source of the instrumentalities and tools used to perform the work; the actual, physical location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party’s discretion over when and how long to work; the method of payment; the hired party’s role in hiring and paying; whether the work is part of the hiring party’s regular business; whether the hiring party is actually in business; the provision of employee benefits; and the tax treatment of the hired party. While no one factor is decisive, the Court emphasized the putative employer’s right to control the manner and means of the work.

\begin{footnotes}
\item[195] See Spirides v. Reinhardt, 613 F.2d 826, 831 (D.C. Cir. 1979); Befort, \textit{supra} note 10, at 167; \textit{see also} \textit{Restatement (Second) of Agency} § 220(1) (1958) (emphasizing control of a worker’s performance as an integral component of a master-servant relationship).
\item[196] Befort, \textit{supra} note 10, at 167; \textit{see also} EEOC v. Zippo Mfg. Co., 713 F.2d 32, 38 (3rd Cir. 1983) (considering Congress’s intent in enacting Title VII and expressly combining the common law’s emphasis on the right to control with the economic realities test); Spirides, 613 F.2d at 831 (expressly incorporating common law factors into the economic realities test).
\item[198] \textit{See id.} at 321, 324, 326–27.
\item[199] \textit{See Befort, supra} note 10, at 167.
\item[200] \textit{Darden}, 503 U.S. at 323.
\item[201] \textit{See id.} at 323–24. The Court then added the other twelve factors as “other factors relevant to this inquiry.” \textit{Id.} Similarly, the traditional common law of agency analysis emphasizes the right to control while listing the other factors as some matters, among others, to be considered in determining employment status. \textit{Restatement (Second) of Agency} § 220(1), (2) (1958).
\end{footnotes}
The various status tests afford employers many legal loopholes through which they can jump to avoid liability for workplace safety conditions. When disputes under OSHA emphasize the extent to which the putative employer controls the worker, the user firm can avoid liability merely by distancing itself sufficiently from the THF’s operations and the temporary workers’ performance. In effect, the Darden test’s emphasis on the right to control incentivizes employer efforts to circumvent existing employment regulations. Darden’s narrow emphasis on the right to control invites “adroit schemes . . . to avoid the immediate burdens at the expense of the benefits sought by the legislation.” For example, an attorney for user firms who “has warned against supervising temps [sic] too closely or letting them attend general staff meetings,” advised clients not to request or reject any temporary worker by name, and not to attempt to resolve problems that arise in the course of a temporary worker’s performance. Meanwhile, legal liability rests upon THFs even though they are not required to ensure that the user firms to which they send workers comply with OSHA’s safety standards.

III. IMPROVING OSHA’S PROTECTION OF TEMPORARY WORKERS

OSHA remains the principal federal legislation governing workplace conditions. Therefore, all workers, whether temporary, contingent, or core, need OSHA’s protections if the nation’s workplaces are to be held to a meaningful and consistent standard of safety and health. Temporary workers deserve particular attention because the nature of temporary work is such that their employment limits the long-term interest that user firms have in the workers’ health and safety.
Expressly and unambiguously extending OSHA to include temporary workers would not come without costs. The existence of a regulatory hierarchy in which core workers receive more workplace safety protection than temporary workers makes temporary workers less expensive than core workers. As a result, federal legislation effectively creates an artificial cost savings incentive to use temporary workers by indirectly subsidizing the financial cost of satisfying legal obligations. However, the goal of modern labor policy, as evidenced by OSHA’s protection of workers and the NLRA’s guarantee of workers’ right to unionize, is not to maximize employer profits. Rather, the goal of modern labor policy is to strike a balance of profits and worker protections. Consequently, labor laws should be crafted to avoid the “race to the bottom” with regard to workplace safety protections for temporary workers that results from Darden’s easily manipulable employment status test.

Developing an expanded and simplified OSHA coverage scheme is feasible. Moreover, a uniform interpretation of employment status is an essential step to improving OSHA’s effectiveness, enhancing certainty regarding perceptions of the type of employment relationship that exists, and reducing litigation. The premise of a reformulated coverage scheme should be that OSHA’s obligations extend to include everyone who performs work at a place of employment regardless of the employment relationship that exists between the worker and the business owner.

Various non-judicial options exist to expand and simplify OSHA coverage. Directly revising the statutory definition of “employee”

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211 See Befort, supra note 13, at 422; Dau-Schmidt, supra note 15, at 882.
212 See Dau-Schmidt, supra note 15, at 882.
213 Id.
215 Befort, supra note 13, at 422.
217 See Befort, supra note 13, at 422.
218 See supra notes 212–13 and accompanying text.
219 See Brennan v. Gilles & Cotting, Inc., 504 F.2d 1255, 1261 (4th Cir. 1974); Linder, supra note 216, at 221.
220 See Linder, supra note 216, at 224.
and “employer” to expressly include temporary workers and THFs would most broaden the employment-status criteria. Direct revision of the OSHA definitions would have the benefit of covering the largest number of workers; removing user firm incentives to avoid employer classification, thereby evading legal obligations and their resulting financial costs; and reducing the litigation waged to determine whether an employer-employee relationship exists. However, reliance on statutory revision does not seem viable; congressional efforts to explicitly protect temporary workers have, to date, been unsuccessful. As a result, legislative reforms remain “far from imminent.”

Non-governmental organizations (NGOs) have also increased OSHA protections for temporary workers. In particular, labor unions have protected contingent workers through collective bargaining agreements and by creating employment centers, branches of a union that essentially operate as THFs in that they provide unionized temporary workers to user firms. Non-union NGOs have also attempted to protect temporary workers, especially through the formation of independent workers’ centers. In spite of these efforts, in practice, temporary workers remain unprotected by OSHA.

Lacking viable non-judicial alternatives, a clearly defined judicial interpretation remains an important route to expanded OSHA protection of temporary workers. Judicial challenges to current interpretations of OSHA are necessary to address the existing presumption that THFs are the legally recognized employer of temporary workers. Recognizing that the definition of “employer” and “employee” are socially constructed—defined and shaped over time by social, legal, and

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222 Maltby & Yamada, supra note 221, at 266.
223 See id.
224 See Middleton, supra note 27, at 583–85.
225 Id. at 620.
226 See Carré & Joshi, supra note 221, at 317, 322; Carré, supra note 17, at 8.
227 See Middleton, supra note 27, at 598–99; Carré, supra note 17, at 8.
229 See infra notes 274–77 and accompanying text.
230 See infra notes 231–32 and accompanying text.
231 Cf. Gonos, supra note 14, at 87 (implying that the fragile legal foundation that recognizes THFs as a temporary worker’s employer is ripe for judicial challenge).
political forces” indicates that these definitions can be judicially interpreted to protect temporary workers under OSHA.232

A. Current State of Employee-Status Interpretation

Since OSHA does not explicitly address the situation of workers in temporary arrangements, the OSHRC adopted the economic realities test to examine the real-world relationship that exists between workers and firms.233 The OSHRC’s adoption of the economic realities test represented an administrative attempt to expand OSHA’s purview beyond circumstances covered by the common law.234

In 1992, however, the Supreme Court clearly signaled that the OSHRC’s attempt had failed.235 In Nationwide Mutual Insurance Co. v. Darden, the Supreme Court rejected the economic realities test as it evolved under the FLSA for purposes other than FLSA analyses.236 In a claim brought by an insurance agent against an insurance company, the Court sought to determine what constitutes an “employee” under the Employee Retirement Income Security Act (ERISA) of 1974.237 ERISA defined “employee” as “any individual employed by an employer.”238 According to the Court, this statutory definition was “completely circular and explains nothing.”239 The Court determined that, unless the statute explicitly specified otherwise, Congress intended “employee” to be defined in accordance with the reformulation of the common law of agency test that it set forth.240 Implying that the economic realities test in the ERISA context led to absurd determinations of employment status, the Court remarked that the common law of agency test would not “thwart the congressional design to lead to absurd results.”241

232 See id. at 82.


236 Id. at 323; see also 29 U.S.C. § 202(a) (2000) (aiming to ameliorate “labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers”).

237 Darden, 503 U.S. at 319; see also 29 U.S.C. § 1001b(c) (2000) (encouraging and regulating single-employer defined benefit pension plans).


239 Darden, 503 U.S. at 323.

240 Id. at 325–26.

241 See id. at 323; cf. 29 U.S.C. § 1001b (identifying Congress’s motivations for setting the goal of encouraging single-employer defined benefit pension plans).
The Court relied on a key distinction between the definition of “employee” found in ERISA and the FLSA.242 The Court stated that the FLSA definition is broader than that found in ERISA.243 Congress, the Court deduced, intended for the FLSA to include some workers who might not qualify as “employees” under agency law principals.244 As a result, outside a specific FLSA context, the economic realities test was replaced by a return to the common law of agency analysis.245

By returning to the common law analysis, Darden rendered the statutory purpose of all federal workplace regulations, except the FLSA, irrelevant, while elevating the common law’s emphasis on control of a worker’s daily workplace activities to that of a major consideration in the employment status calculus.246 Today, fourteen years after Darden, the Court’s emphasis on control ostensibly functions as a “principal guidepost” of statutory interpretation for the OSHRC.247 Absent an express statutory direction to do otherwise,248 courts are to turn to the principals articulated in the Restatement (Second) of Agency which emphasize the extent of the control that the “master” may exercise over the work details.249

B. Conflict Within the OSHRC

While the contemporary OSHRC has clearly stated that Darden guides its determinations of employment status, Commission decisions reached since Darden sometimes use Darden’s reformulated common law test and at other times use the economic realities tests.250 For example, in Secretary of Labor v. Froedtert Memorial Lutheran Hospital (Froed-

242 See Darden, 503 U.S. at 326; see also 29 U.S.C. § 1002(6) (defining, for purposes of ERISA, “employee” as “any individual employed by an employer”); id. § 203(e) (defining, for purposes of the FLSA, “employee” as “any individual employed by an employer,” but then going on to list a long series of exceptions to this definition); id. § 203(g) (defining “employ” for purposes of the FLSA as “to suffer or permit to work”).
243 Darden, 503 U.S. at 326; see 29 U.S.C. § 203(e) (providing the FLSA definition of “employee”); id. § 1002(6) (providing the ERISA definition of “employee”).
244 See 29 U.S.C. § 203(e); Darden, 503 U.S. at 326. The Court reasoned that the FLSA defined “employ” expansively to mean ‘suffer or permit to work,” while ERISA did not. See 29 U.S.C. § 203(g); Darden, 503 U.S. at 326.
245 See Darden, 503 U.S. at 324.
246 See Linder, supra note 216, at 196.
248 See Darden, 503 U.S. at 325–26; Carlson, supra note 36, at 671.
249 See Restatement (Second) of Agency § 220(2) (a) (1958).
OSHA’s Failure to Protect Temporary Workers

A 1999 decision involving a Wisconsin hospital cited for allegedly violating reporting standards for worker injuries, the OSHRC explicitly determined that employment status should be interpreted under common law principals. The hospital challenged the citation claiming it was improper because the alleged violation concerned temporary workers rather than legal employees. There was no dispute that the workers were acquired through two THFs. In applying the common law principals, the Commission’s analysis emphasized that an employer is one “who has control over the work environment such that abatement of hazards can be obtained.” The OSHRC took into account that the hospital supplied protective equipment, uniforms, tools, and supplies to the temporary workers, in addition to controlling their day-to-day activities. It also considered that the temporary workers performed all their work on the hospital’s premises. In the end, the Commission determined that the hospital was in control of the workplace, therefore it was responsible for complying with OSHA with regard to the temporary workers.

Five years later, the OSHRC reiterated the common law principals when the same hospital again challenged a determination that temporary workers were employees under the common law. The hospital admitted to controlling the on-site activities performed by the temporary workers, as the OSHRC found in Froedtert I, but argued that “its lack of authority to hire, fire, discipline and pay precluded it from being the temps’ employer.” Using the common law test, the Commission took into account that the hospital was able to request that the THF replace or remove a particular temporary worker. Though the OSHRC acknowledged that the hospital “did not directly control all aspects” of the temporary workers’ assignment or working conditions, it found that, for purposes of OSHA, the workers were employees of the hospital.

252 See id. at *2.
253 See id.
254 Id. at *3.
255 Id. at *9.
257 Id.
259 Id. at *4.
260 Id. at *6, *2.
261 Id. at *9.
Yet in a separate case, *Secretary of Labor v. Southern Scrap Materials Co.*, decided after *Darden*, the OSHRC elected not to use the *Darden* analysis; instead, it relied on the economic realities test that *Darden* seemingly overruled for OSHA purposes.\(^ {262} \) In this case, a Louisiana scrap metal processing plant was cited for several OSHA violations.\(^ {263} \) The plant contended that the "affected employee" referred to in the citation was employed by a THF rather than by the plant.\(^ {264} \) As part of its economic realities test consideration, the Commission took into account the worker's perception of who constituted his employer; whether the plant had the power or responsibility to control the worker, including the power to fire, hire or modify the worker's employment conditions; whether the worker's ability to increase his wage depended on efficiency rather than initiative, judgment, or foresight; and how the worker's wages were established.\(^ {265} \) The "key factor," the Commission determined, was "the right to control the work."\(^ {266} \) The OSHRC then considered that the plant assigned the worker to the job; provided training; set work hours; provided tools or equipment, including safety equipment; supervised the work; controlled the working conditions; and paid the THF for the worker's service.\(^ {267} \) The Commission found that the temporary worker was indeed the plant's employee under OSHA.\(^ {268} \)

The plant presented a separate challenge to the citation based on its relationship to temporary workers provided by a separate THF.\(^ {269} \) The THF, an independent contractor, provided temporary workers hired to torch cut scrap metal on the plant's property.\(^ {270} \) The THF had an on-site supervisor; paid the workers an hourly wage; furnished the workers with rented housing; provided all equipment; was paid by the plant by the ton of scrap metal that was torch cut; was in the business of providing torch cutting services to scrap yards; was responsible for hiring, firing, and paying workers their wages; and set working


\(^ {263} \) S. Scrap Materials Co., 1997 WL 735352, at *1.

\(^ {264} \) Id. at *6.

\(^ {265} \) Id.

\(^ {266} \) Id.

\(^ {267} \) Id.


\(^ {269} \) See id. at *11.

\(^ {270} \) Id.
conditions.\textsuperscript{271} For its part, the plant provided workers with respirators and some safety training, and had the power to stop work if the work was unsatisfactory or unsafe.\textsuperscript{272} The Commission determined that temporary workers provided by this THF were not employees of the plant because the plant did not exercise sufficient control over the work they performed.\textsuperscript{273}

\textit{Scrap Materials} and the \textit{Froedert} decisions illustrate the manipulability inherent in the existing employment-status tests.\textsuperscript{274} Indeed, neither the economic realities nor \textit{Darden} tests provide an employment-status interpretation any more informative or predictable than the criteria previously criticized by courts.\textsuperscript{275} On the contrary, these cases illustrate the ambiguous nature of the status tests by leaving open the question of how much control a user firm must wield over a temporary worker in order to be legally classified as her employer for purposes of OSHA liability.\textsuperscript{276} Statutory ambiguity merely reinforces the democratic deficit that exists between temporary workers and THFs because many temporary workers are low-skilled laborers who have little bargaining power in comparison to user firms.\textsuperscript{277}

C. Adopting a Purposive Interpretation

To resolve statutory ambiguity in applying OSHA, the Act should be interpreted so as to fulfill “the objectives Congress sought to achieve through this legislation” by applying a purposive approach.\textsuperscript{278} A purposive approach ensures that the statute’s goals are achieved, rather than merely applied formally or mechanically.\textsuperscript{279} Use of a purposive approach requires measurement of the success of interpre-

\begin{footnotesize}
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\item \textsuperscript{271} See id. at *11–12.
\item \textsuperscript{272} Id. at *12.
\item \textsuperscript{273} See \textit{S. Scrap Materials Co.}, 1997 WL 735352, at *12.
\item \textsuperscript{276} See \textit{Froedert II}, 2004 WL 2308763, at *9; \textit{Froedert I}, 1999 WL 503823, at *9; \textit{S. Scrap Materials Co.}, 1997 WL 735352, at *12.
\item \textsuperscript{277} See Davidov, \textit{supra} note 39, at 381; see also \textit{Stone}, \textit{supra} note 14, at 68 (noting that temporary work is characterized by power relations that favor employers).
\item \textsuperscript{279} See Davidov, \textit{supra} note 39, at 372.
\end{itemize}
\end{footnotesize}
tations of employment status by the degree to which they effectuate Congress’s intent to protect all workers.\textsuperscript{280}

Interpreting OSHA purposively is particularly appropriate because of the statute’s textual explanation of its goals.\textsuperscript{281} In devising the Act, Congress embedded in the statutory text its motivations in enacting the law and its intended goal: “The Congress finds that personal injuries and illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments.”\textsuperscript{282} Importantly, the stated purpose identifies “personal injuries and illnesses arising out of work situations” as the problem that OSHA is intended to rectify.\textsuperscript{283} Congress did not state nor even suggest that “personal injuries and illnesses arising out of work situations” were only detrimental to the nation’s economy when they occurred to particular types of workers.\textsuperscript{284} On the contrary, the statute clearly expresses a congressional finding that such injuries and illnesses are economically detrimental whenever they occur because they adversely impact interstate commerce.\textsuperscript{285} Furthermore, while the Senate explicitly addressed injuries and illnesses prevalent in various industries, it did not discuss the employment status of the injured or ill workers it intended OSHA to cover.\textsuperscript{286} The only limitation included within the statutory purpose is that the injury or illness must arise from engagement in a “work situation.”\textsuperscript{287} Consequently, all individuals who are injured or become ill from a work situation fall within the purview of the statute’s purpose as contemplated by the Senate and explicitly stated in its text.\textsuperscript{288}

\begin{itemize}
\item \textsuperscript{280} See 29 U.S.C. § 651(a) (2000).
\item \textsuperscript{281} See id.
\item \textsuperscript{282} Id. The Senate Report attached to OSHA states that OSHA’s purpose is “to reduce the number and severity of work-related injuries and illnesses which . . . are resulting in ever-increasing human misery and economic loss.” S. Rep. No. 91-1282, at 5177 (1970), \textit{as reprinted in} 1970 U.S.C.C.A.N. 5177, 5177. The Senate noted that in the four years leading to OSHA’s enactment more people in the USA were killed at work than in the Vietnam War, and at least 2.2 million people were disabled at work. Id. at 5178.
\item \textsuperscript{283} 29 U.S.C. § 651(a).
\item \textsuperscript{284} See id.
\item \textsuperscript{285} See generally S. Rep. No. 91-1282, at 5179 (discussing such injuries and illnesses as lead and mercury poisoning, respiratory disease, and asbestosis as adversely impacting interstate commerce).
\item \textsuperscript{286} See generally S. Rep. No. 91-1282 (making no reference to employment status).
\item \textsuperscript{287} See 29 U.S.C. § 651(a).
\item \textsuperscript{288} See id.; \textit{supra} note 286 and accompanying parenthetical.
\end{itemize}
In contrast to their narrow interpretation of employee status, courts have historically applied OSHA’s provisions in accordance with the statute’s broad purpose. In 1999, the Court of Appeals for the Tenth Circuit decided that OSHA “must be liberally construed” so as to effectuate its remedial purposes. Prior to Darden, the Court of Appeals for the Second Circuit found that OSHA’s “keystone” is “preventability” of workplace injuries or illnesses without regard to the employment status of the injured or ill worker. Similarly, the OSHRC stated that OSHA’s “design” is the “improvement of working conditions and the well-being of employees.” Notably, the OSHRC did not specify that working conditions should only improve for employees of the firm responsible for creating or controlling the conditions.

A purposive interpretation of OSHA would reduce manipulability, protect workers regardless of employment status, and effectuate the congressional purpose. Moreover, a purposive application of OSHA would expand the scope of the employment relationship so as to prevent employer manipulation of the appearances of control to avoid legal liability. Such an interpretation would reverse the current course of anti-purposive interpretation that results in exposure of growing segments of the working population to the “unshielded rigors of the labor market.” It is important to recognize that the Court’s decision in Darden to revitalize the common law principals did not erase OSHA’s remedial nature.

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289 See, e.g., Universal Constr. Co. v. Occupational Safety & Health Review Comm’n, 182 F.3d 726, 729 (10th Cir. 1999) (directing that OSHA should be liberally construed so as to effectuate the Act’s remedial purpose); Brennan v. Underhill Constr. Corp., 513 F.2d 1032, 1039 (2nd Cir. 1975) (emphasizing that Congress’s intent in enacting OSHA was to prevent workplace injuries or illness without regard to the employment status of the injured or ill worker); Sec’y of Labor v. Griffin & Brand of McAllen, Inc., No. 14801, 1978 WL 7060, at *5 (O.S.H.R.C. June 9, 1978) (noting that OSHA’s purpose is to promote the safety and health of workers, therefore it should be defined in light of the statutory context rather than given a technical or narrow construction).

290 See Universal Constr. Co., 182 F.3d at 729.

291 See Brennan, 513 F.2d at 1039.


293 See id.


295 See id.

296 See id. at 230.

297 29 C.F.R. § 1977.5(a) (2005). See generally 29 U.S.C. § 660(a) (as part of the Act’s remedial nature it ensures that aggrieved persons can seek relief through the federal courts). Indeed, Darden’s return to the common law test explicitly contravenes the Execu-
This Note has explored the intersection of OSHA, the nation’s premier federal statute governing working conditions, and temporary workers. In the last thirty years, the THI has become entrenched in the USA’s labor landscape. Today, THFs disproportionately employ women and people of color who are paid less than other workers. Through prolonged legislative lobbying by the THI and key judicial interpretations, contemporary jurisprudence facilitates the THI’s growing presence in the labor market. Namely, by adopting a triangular employment relationship, contemporary legal practice artificially incentivizes the use of temporary workers. As such, temporary workers operate outside the realm of regulatory protections where they represent less expensive labor options.

The Darden analysis, as post-Darden OSHRC decisions indicate, leaves temporary workers laboring without a consistent and clearly definable interpretation of employment status. Darden’s greatest risk to temporary workers is that they will be recognized as “employees” under OSHA, but only as employees of a THF and not the user firm. Since THFs are not liable for the workplace safety conditions at the sites to which they assign temporary workers, workers are effectively left without workplace safety protections. Such an approach realizes the Tenth Circuit’s fear that “in restricting the work area in some artificial manner . . . the employer escapes responsibility for protecting an area [where people work].”

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299 See Cohany et al., supra note 37, at 62.
300 See Summers, supra note 10, at 510; Cohany et al., supra note 37, at 60 tbl.2.12; Carré, supra note 17, at 5.
301 See Stone, supra note 14, at 68.
302 See Befort, supra note 13, at 419.
303 See Stone, supra note 14, at 69; Gonos, supra note 14, at 86.
305 See Dau-Schmidt, supra note 15, at 883.
It is therefore necessary to reconceptualize the modern interpretation of employment status to fully effectuate the congressional purpose for enacting OSHA.\textsuperscript{308} The statute simply does not envision a hierarchy of workplace protections determined by employment status.\textsuperscript{309} Consequently, neither should courts.\textsuperscript{310}

The rapid growth of the temporary workforce requires a reexamination of OSHA’s workplace safety and health protections.\textsuperscript{311} As an increasing number of the USA’s workers find themselves laboring in the volatile temporary workforce, it is necessary for policymakers to strike a socially sanctioned balance of profits and workers’ protections.\textsuperscript{312} To embrace OSHA’s goal of “assur[ing] so far as possible every working man and woman in the Nation safe and healthful working conditions,” OSHA must occupy a prominent role in the regulation of working conditions for temporary workers.\textsuperscript{313}


\textsuperscript{309} See 29 U.S.C. § 651(a).


\textsuperscript{311} See 29 C.F.R. § 1910 (2006); Belous, \textit{supra} note 36, at 865 tbl.1.

\textsuperscript{312} See Befort, \textit{supra} note 13, at 422.

STRANDED AGAIN: THE INADEQUACY OF FEDERAL PLANS TO REBUILD AN AFFORDABLE NEW ORLEANS AFTER HURRICANE KATRINA

LARKIN M. MOORE*

Abstract: Hurricane Katrina was the most devastating hurricane to hit the United States in recorded history. The damage in New Orleans was most acutely felt by poor and African-American neighborhoods. One of the most pressing issues for poor residents of New Orleans in the future will be the availability of affordable housing. After the hurricane, Rep. Richard H. Baker (R-La.) proposed that the legislature create a government-run corporation with the mission of facilitating the rebuilding of Louisiana communities. His plan took into account community needs and prioritized affordable housing and well-planned development. Baker’s Bill has been rejected by the Bush Administration, which favors a free-market solution enhanced with federal tax incentives for developers and business. During the last session of Congress, Baker’s Bill never became law. Looking back at previous disasters and forward to new visions of the city, this Note concludes that Baker’s proposal should be reintroduced and the House and Senate should adopt the Baker Bill as soon as possible to provide an innovative plan for rebuilding New Orleans.

INTRODUCTION

On August 29, 2005, Hurricane Katrina made landfall in New Orleans, Louisiana. The power of the Category Five hurricane flattened homes and destroyed businesses while the storm surge breached the...
levees and flooded wide swaths of the city, which lies below sea level.\textsuperscript{2} New Orleans residents fled their homes and neighborhoods and sought refuge where they could find it.\textsuperscript{3} Americans opened their doors and pockets to help the hurricane victims while the Federal Emergency Management Agency (FEMA) eventually took the reins of the federal relief effort.\textsuperscript{4}

Just a week after the devastating hurricane hit, former first lady Barbara Bush gave an interview from the Houston Astrodome where a large number of evacuees, mostly African-American, were temporarily housed.\textsuperscript{5} She commented,

Almost everyone I’ve talked to says, “We’re going to move to Houston.” . . . What I’m hearing, which is sort of scary, is that they all want to move to Texas. Everyone is so overwhelmed by the hospitality. . . . And so many of the people in the arena here, you know, were underprivileged anyway, so this is working very well for them.\textsuperscript{6}

Combined with local outrage that the federal government was slow to act following the hurricane, Mrs. Bush’s statements led some commentators to conclude that the government generally was indifferent to the plight of certain residents of New Orleans.\textsuperscript{7} One African-American member of the House even indicated that poor African-

\begin{itemize}
\item \textsuperscript{3} See Kate Moran, Shrinking City: No One Disputes That Katrina Will Reduce Population of the New Orleans Area, but Just How Much Is Unclear, TIMES-PICAYUNE (New Orleans), Oct. 23, 2005, at 1 (noting that Hurricane Katrina will likely compound the population decline that was already occurring before the storm). During and after the storm, some New Orleans residents evacuated their homes and went to the New Orleans Superdome. Hurricane Katrina Timeline, supra note 2. Other evacuees went to the New Orleans Convention Center. Id. On August 31, 2005, the first busloads of evacuees were taken to the Houston Astrodome for temporary shelter. Id. Within a few days, New Orleans residents evacuated to both local and distant states. Id.
\item \textsuperscript{4} See Hurricane Katrina Timeline, supra note 2.
\item \textsuperscript{5} Relocation ‘Working Very Well’ for Poor Evacuees, Barbara Bush Says, DALLAS MORNING News, Sept. 6, 2005, at 16A. “The remarks were part of a larger story about the impact of a mass influx on the city.” Id.
\item \textsuperscript{6} Id.
\item \textsuperscript{7} See G. Robert Hillman & Todd J. Gillman, Claims of Prejudice Taint Recovery: White House Defends Effort to Help All Races Affected by Katrina, DALLAS MORNING News, Sept. 17, 2005, at 21A.
\end{itemize}
Americans in New Orleans feared the hurricane would be an opportunity to rid the city of low-income inhabitants.⁸

President Bush, speaking for the first time after the disaster in a nationally televised speech from Jackson Square, acknowledged that perceived indifference had deep roots in New Orleans.⁹ President Bush referred to “some deep, persistent poverty in this region” and “a history of racial discrimination, which cut off generations from the opportunity of America.”¹⁰ He stated, “We have a duty to confront this poverty with bold action,” and listed minority-owned businesses, minority homeownership, and job training as parts of this proposed “bold action.”¹¹

Yet, as Katherine Boo of the New Yorker pointed out, “[t]wo weeks later, members of the Republican Party were using the [persistent poverty] of the evacuees as evidence that contemporary anti-poverty approaches were ineffectual.”¹² Ironically, these proposals would reduce the funds that many poor New Orleans citizens rely upon for health care and other social programs in order to rebuild a city seeking to combat poverty.¹³ Reduction in funding for social programs followed the administration’s efforts to curtail or eliminate funding for some of the most widely used federal social programs that help provide affordable housing to poor Americans.¹⁴

In addition to restoring basic services to the city and surrounding areas, federal and local governments are also beginning to formulate a plan for the future.¹⁵ However, at least one commentator has remarked that various groups’ ideas seem to be a “reversion to form, as opposed to engagement with the problem.”¹⁶ Political action groups and partisan politicians, rather than taking a hard look at the specific issues in

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⁸ See id. Rep. Eddie Bernice Johnson (D-Tx.) was quoted as saying, “The fear now is that it will all be gentrification where they just throw the poor people out.” Id.


¹⁰ Id.

¹¹ See id.

¹² Katherine Boo, Shelter and the Storm: When Katrina’s Victims Came to Town, New Yorker, Nov. 28, 2005, at 86.

¹³ See id. (observing that the congressional debate centered on cutting Medicaid and other social programs to offset the reconstruction of New Orleans).


¹⁵ See Nicholas Lemann, Comment, Rebuilding, New Yorker, Oct. 10, 2005, at 32.

¹⁶ See id. at 31. Lemann notes that groups like The Heritage Foundation, The American Enterprise Institute, and MoveOn.org seem to be using the disaster to advance their pre-established political agendas. See id. He says, “A sense of political opportunity in Washington, rather than urgent need in Louisiana, pervades the discussion.” Id. at 31–32.
New Orleans, prefer to see the disaster as a means to push established policy issues such as deregulation or criticism of the current administration.\textsuperscript{17} Bucking that trend is one Republican lawmaker from suburban Baton Rouge, Rep. Richard H. Baker (R-La.).\textsuperscript{18} Though he “derides Democrats for not being sufficiently free-market,” Baker’s proposed recovery plan “would spend as much as $80 billion to pay off lenders, restore public works, buy huge ruined chunks of the city, clean them up and then sell them back to developers.”\textsuperscript{19} Unfortunately, though Baker initially thought the White House supported his plan, the Bush Administration recently stated that it opposed the Baker plan and thought the funds already earmarked for the Gulf would be sufficient.\textsuperscript{20} Furthermore, in the last legislative session, Baker’s proposal never garnered enough support to pass the the House Financial Services Committee and was cleared from the books at the end of the session.\textsuperscript{21}

However, the legislative appropriations already passed by Congress are insufficient to address the rebuilding needs of New Orleans.\textsuperscript{22} Specifically, the federal government’s response to Katrina contains no plan for improving housing affordability and quality for the poor in New Orleans who felt abandoned by their government.\textsuperscript{23} Even before Hurricane Katrina, Professor Peter W. Salsich, Jr. examined what the federal government’s role in affordable housing should be in the United States and concluded that existing programs could be improved and adapted to make them more amenable to local conditions.\textsuperscript{24} He argued that despite the positive news that existing programs have some measure of success, federal programs have never

\textsuperscript{17} See id.
\textsuperscript{19} Id.
\textsuperscript{20} Bill Walsh, White House Against Baker Bailout Bill: Bush Point Man Says Block Grants Enough, TIMES-PICAYUNE (New Orleans), Jan. 25, 2006, at 1 (stating that the White House’s estimate of flood-damaged homes eligible for Federal assistance is far below the estimate of 77,340 by the Louisiana Recovery Authority).
\textsuperscript{22} See id.
\textsuperscript{23} See id.
\textsuperscript{24} Salsich, supra note 14, at 510.
had a level of funding that reflects the severity of the problem facing poor citizens in many American cities.\textsuperscript{25}

The lack of affordable housing is an issue that impacts every part of the United States, not just New Orleans, and nationwide affordability appears to be getting worse over time.\textsuperscript{26} Recent studies indicate that “an increasing number of full-time workers, as well as unemployed or part-time workers, cannot afford to purchase a home; fully employed people making minimum wage cannot afford rental housing without substantial governmental assistance; and homelessness remains a serious problem for individuals with families, even those with jobs.”\textsuperscript{27} The National Low Income Housing Coalition estimates that “about 95 million Americans have serious affordable-housing problems—either they live in dilapidated housing or they must pay more than 30 percent of their income for housing.”\textsuperscript{28}

In New Orleans, public-housing residents were displaced from the city at a rate of nearly ninety percent after Hurricane Katrina.\textsuperscript{29} About the same percentage of the more than 9000 Section 8 voucher holders have not obtained housing again in New Orleans.\textsuperscript{30} The lack of funding for affordable housing commensurate with the need will be especially severe in New Orleans, where much of the affordable stock that existed before the storm is utterly destroyed or uninhabitable and demand problems are acute.\textsuperscript{31}

Underscoring the need for a response that will successfully meet the needs of New Orleans’s African-American and poor residents is President Bush’s reference to “a history of racial discrimination.”\textsuperscript{32} By placing discrimination issues in the past, President Bush risks minimizing the omnipresent issue of race which has pervaded the African-

\textsuperscript{25} See id.

\textsuperscript{26} See id. at 476.

\textsuperscript{27} Id.

\textsuperscript{28} Id.


\textsuperscript{30} See id. Very low-income families are allowed to choose rental housing under the Section 8 Rental Voucher Program, which increases affordable housing choices. U.S. Dept. of Hous. & Urban Dev, Section 8 Rental Voucher Program (May 13, 2004), http://www.hud.gov/progdesc/voucher.cfm. The renters pay thirty percent of their household income while the HUD pays the remainder up to eighty to one-hundred percent of fair market value. Id. The renters have the option to rent a unit either above or below the fair market rental value in their city, and can either pay or keep the difference, respectively. Id.

\textsuperscript{31} See Salsich, \textit{supra} note 14, at 510.

\textsuperscript{32} See Walsh, \textit{supra} note 20.
American perception of any government response. Kalamu ya Salaam is the best-known writer to originate from the Ninth Ward in New Orleans, a poor African-American community that suffered some of the worst flood damage after Hurricane Katrina. In an interview with the *New Yorker*, Kalamu recalled the following example of past racism:

> [I]n 1927, in the midst of the worst flooding of the Mississippi River in recorded history, the white city fathers of New Orleans—the men of the Louisiana Club, the Boston Club, and the Pickwick Club—won permission from the federal government to dynamite the Caernarvon levee, downriver from the city, to keep their interests dry. But destroying the levee also insured that the surrounding poorer St. Bernard and Plaquemines Parishes would flood. Thousands of the trappers who lived there lost their homes and their livelihoods.

In another well-known incident in 1912, the *New York Times* reported that when a levee in Washington County, Mississippi was breached during a flood, the engineers who ran out of sandbags “ordered . . . several hundred negroes . . . to lie on top of the levee and as close together as possible.” African-Americans in New Orleans are accustomed to being marginalized and ignored by their leaders and by the federal government. A plan for the future of New Orleans would chart a new and innovative course toward poverty reduction using existing federal programs and new ideas like the Baker Bill.

This Note argues that the current focus on free-market solutions in the form of tax breaks and opportunity zones is not sufficient to create adequate affordable-housing opportunities as New Orleans rebuilds. Truly “bold action” would set the goal of creating more affordable housing and sustainable communities than existed before the hurricane. The current legislative solution is unlikely to create new

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33 Hillman & Gillman, *supra* note 7.
35 *Id.*
36 *Id.* “Patricia Turner at the University of California . . . has written extensively on the role of rumor and conspiracy theory in the African-American community, especially among the poor . . . and [has made] a convincing case that these counter-narratives emerge from decades of institutional racism and from particular episodes in American history.” *Id.*
37 *See id.*
38 *See* Nossiter, *supra* note 18.
opportunities for affordable housing because it ignores recovery successes in previous disaster areas, and refuses to support Rep. Baker’s buyout plan in New Orleans. Baker’s plan was a good compromise between free-market principles and progressive ideals about adapting institutions to address poverty, and deserves reconsideration. Part I of this Note chronicles a brief history of trends in federal affordable-housing involvement that evolved into the free-market approach favored by the current Bush Administration. Part II discusses the Baker Bill and ways in which it addressed both free-market considerations and presented new ideas for future neighborhood development in New Orleans. Part III examines reconstruction efforts following two previous natural disasters that should inform rebuilding plans in New Orleans, comparing some of their successes to the Baker Bill’s provisions. Part IV addresses a recent scholarly work that proposes a new way to think about poverty after Katrina and adopts a more pragmatic framework, one that refuses to accept that our institutions function properly as long as poverty exists.

I. Legislative Action and Affordable Housing

Any rebuilding effort in New Orleans will have a profound effect on African-American and poor residents because of where the damage from the hurricane was most severe. A recent study by Dr. John R. Logan of Brown University found that, “[o]f the 354,000 people who lived in New Orleans neighborhoods where the subsequent damage was moderate to severe, 75 percent were black, 29 percent lived below the poverty line, more than 10 percent were unemployed, and more than half were renters.” Flooding damage was most severe in low-lying areas mostly populated by poor, African-American residents. As a result, affordable housing should be the priority in any proposed rebuilding plan.

A. Federal Involvement in Affordable Housing Generally

Federal ideals regarding funding of affordable housing peaked in the 1940s when Congress stated in the Housing Act of 1949 that the federal government “should provide a decent home and suitable living

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40 Id.
41 Id.
42 See id.
environment for every American family.”

Much of the stock of public housing, constructed to house America’s neediest citizens, was built as a result of federal largesse. Unfortunately, many of the housing projects built during that time became “dystopian superblocks” invested with crime and concentrated poverty. In one housing project in Washington, DC, when the project was finally shut down in the 1990s, the median income was only $7765 and more than eighty percent of the residents had no jobs.

Over the past fifty years, federal affordable-housing programs have evolved from direct federal construction projects to incentives provided to free-market developers to build affordable housing. During the Nixon Administration, the federal government started issuing rental vouchers for the poor to live in private housing instead of building new projects. Since 1976, the share of new federal spending on subsidized housing has fallen eighty percent; in 2006 there was virtually no new housing production for low-income Americans. It comes as no surprise that the problem of affordability appears to be getting worse.

When the federal government stepped out of the home-building business, local organizations filled in to develop grassroots solutions to community housing issues. In response, local communities created an innovative new model for affordable housing—mixed-income communities that no longer look like public-housing projects and cannot be distinguished from the surrounding neighborhoods.

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43 Id.
46 Id.
47 See id.
48 Id.
49 Id.
50 See Rice, supra note 45, at 114.
51 See id.; see also Mbulu, supra note 44, at 393. Rice’s article notes that Reagan ran for president in 1980 on the idea that communities would be better off if the federal government stayed away from local issues and left the decisions to those who lived in the area. Rice, supra note 45, at 114.
52 See Rice, supra note 45, at 114. The following depiction of a mixed-income development is common in its laudatory language and encouraging description:

A new $103 million mixed-income housing development has added new life to the Boyle Heights community here. Pueblo Del Sol, which replaced a dilapidated, crime-ridden housing project known as Aliso Village, is the largest public housing revitalization to take place in California, providing resi-
ies can combine federal grants intended to replace outdated and un
safe public housing with private investment. Then, the city or developer will create new housing in which some residents who are below the poverty line rent apartments and other low-income families have the opportunity to buy at reduced rates. Some cities will even pass “inclusionary zoning” ordinances that require builders of large new developments to set aside a certain percentage of the units for buyers or renters with low to moderate incomes. The result is less concentrated poverty and more attractive, livable housing. However, destroying old buildings in favor of mixed-income housing results in a net loss of available housing units, contributing to increases in demand. In addition, many of the mixed-income units benefit those living at the higher-income end of the poverty scale, leaving some of the poorest Americans behind.

It is rare to find anyone who prefers the horrible housing projects of the 1940s. Rather, the more recent locally controlled, mixed-income model is immensely popular with both liberals and conservatives and seems to be a successful development. But helping only the

dents with 470 units of much-needed affordable housing and various community and social services.

The development was created through a unique public/private partnership between the Housing Authority of the City of Los Angeles, The Related Cos. of California, McCormack Baron Salazar, SunAmerica Affordable Housing Partners and the Los Angeles Unified School District (LAUSD). Private equity totaling $52 million was raised through the sale of Low Income Housing Tax Credits that were syndicated by SunAmerica and sold to Fannie Mae.

Built under HUD’s Hope VI program, Pueblo Del Sol boasts a sustainable living environment, incorporating mixed-income housing (rental and for
sale) with educational and recreational facilities; community supportive facilities, such as two community centers with an exercise room and pool, as well as a park with new play equipment; and services such as job training, after
school programs, computer training classes and general social services. Moreover, the existing LAUSD Utah Elementary School is located in the center of the development.


53 See infra Part I.B.1.
54 Rice, supra note 45, at 114.
55 Id.
56 See id.
57 See id.
58 See id.
59 See Rice, supra note 45, at 114.
60 See id.; Renée Lewis Glover, ATLANTA HOUS. AUTH., MAKING A CASE FOR MIXED-USE, MIXED-INCOME COMMUNITIES TO ADDRESS AMERICA’S AFFORDABLE HOUSING NEEDS
least poor of low-income Americans is not enough. In many places, mixed-income development is not occurring at all because of staunch opposition to undesirable low-income housing from settled residents. Hurricane Katrina presents a completely different environment for affordable-housing experimentation. Some neighborhoods are almost a blank slate for new development, and the federal government should not squander a chance to provide recently displaced and homeless New Orleans residents with the decent home and community every American deserves.

B. Community Development Block Grant Financing

1. Background

The Community Development Block Grant (CDBG) Program was passed under the Housing and Community Development Act of 1974. Under the CDBG program, Housing and Urban Development (HUD) funding moved away from a rigid federal administrative system to one that allowed more flexibility to meet local needs. Federal funds are no longer administered directly to specific types of projects in the form of grants, but given to cities and states to use according to their needs. Over the years, the CDBG program has increasingly restricted the use of funds to ensure that the funds are used in a way that creates economic opportunities for low and moderate income residents. CDBG program funds may be used for twenty-five separate eligible activities,


61 See Rice, supra note 45, at 114.

62 See id.


64 See id.


66 See Salsich, supra note 14, at 484; see also Paulette J. Williams, The Continuing Crisis in Affordable Housing: Systemic Issues Requiring Systemic Solutions, 31 FORDHAM URB. L.J. 413, 479 (2004) (arguing the need for a national, affordable housing policy with a clearly defined mission that is accountable to multiple and varying interests).

67 See 42 U.S.C. § 5303 (2004); Salsich, supra note 14, at 484.

68 See 42 U.S.C. § 5301(c); Salsich, supra note 14, at 484.
among them rehabilitating existing affordable-housing units and building new units altogether.\textsuperscript{69}

One academic has written that the CDBG program “is best understood as a gap-filling incentive” to “provide lump sums to states and cities to enable them to plug holes in financing plans for major developments and/or to provide some or all of the public infrastructure, such as streets and utility lines, for such developments.”\textsuperscript{70} CDBG program funds were not intended to fund new capital improvement projects.\textsuperscript{71} In the 2005 budget, CDBG appropriation levels had reached about $5 billion nationwide.\textsuperscript{72}

2. CDBG Appropriations in Response to Hurricane Katrina

CDBG program funds have not generally been viewed by the local governments in the Gulf as simple gap-filling incentives, but rather as crucial federal funding for the rebuilding effort.\textsuperscript{73} At the end of its term last year, Congress approved a hurricane aid package that included up to $6.2 billion in grant money for Louisiana and $5.3 billion for Mississippi, the two states hardest hit by Hurricane Katrina.\textsuperscript{74} But Louisiana officials say that the $6.2 billion “is nowhere near enough for the level of damage to homes, schools, hospitals and businesses, which they say far overshadows the destruction in Mississippi and the other Gulf Coast states.”\textsuperscript{75} Both Louisiana and Mississippi plan to use the CDBG program earmarks to reimburse homeowners against uninsured losses.\textsuperscript{76} However, the grants are also earmarked to repair schools and hospitals, so some of the money will likely go for that purpose according to the traditional infrastructure-building uses allowed under the CDBG program.\textsuperscript{77}

\textsuperscript{69} See 42 U.S.C. § 5305(a); see also Salsich, supra note 14, at 484 (noting that, originally, CDBG program funds could not be used to create new housing, but “as federal support for housing production has declined, limitations on the use of CDBG funds to support new construction have been relaxed”).

\textsuperscript{70} Salsich, supra note 14, at 484–86.

\textsuperscript{71} Id. at 485.

\textsuperscript{72} Id. at 487. The program “has been an important but relatively small component of the total federal effort in housing and community development.” Id. at 486.

\textsuperscript{73} See id. at 484–85; Nossiter, supra note 18.


\textsuperscript{75} Id.

\textsuperscript{76} See id.

\textsuperscript{77} See id.; Salsich, supra note 14, at 484–86.
Both Mississippi and the Louisiana Recovery Authority plan to focus CDBG program funds on reimbursing homeowners “who lacked insurance and whose property lies outside the federally designated flood plain.”78 These homeowners are perceived as the hardest hit by losses because they did not anticipate that their homes would flood, and therefore were not required to purchase insurance against that type of disaster.79 However, Louisiana estimates that 77,000 homeowners fall into this category, compared with 35,000 in Mississippi.80 The Louisiana Recovery Authority estimates it would take over $9 billion in CDBG program funds to match Mississippi’s per-household payout.81 Many people in Louisiana are frustrated by the inequality and have linked it to the power of Mississippi Republican Sen. Thad Cochran, the influential Senate Appropriations Committee chairman who was instrumental in securing the overall bailout package.82

Though the White House has said that the $6.2 billion given to Louisiana would be sufficient to reimburse the hardest-hit homeowners, it seems that many in New Orleans expect more CDBG assistance for housing or other funding to be absolutely necessary to fully rebuild New Orleans.83

C. Other Appropriations

The remaining appropriations have gone to various purposes, namely immediate, temporary-housing assistance for displaced residents; levee repair; and reimbursements to organizations that took in displaced persons.84 President Bush says a total of $85 billion in fed-

78 Walsh, supra note 74.
79 Walsh, supra note 20.
80 Walsh, supra note 74. The Louisiana Recovery Authority estimates that 77,340 homes would fall into this hardest-hit category, but the Bush Administration’s estimate is much lower, at 20,000. Walsh, supra note 20. “But, significantly, [the Bush Administration’s] figures do not include rental property, only owner-occupied dwellings[; . . . [the Administration feels] those homeowners are the most deserving of financial aid.” Id. By restricting appropriations to only owner-occupied housing, the redevelopment of rental properties used by low-income residents would become a lower priority. See id.
81 See Walsh, supra note 74.
82 Id. Louisiana residents are careful not to be too critical of Cochran because his assistance will be crucial in future appropriations. See id.
83 See Walsh, supra note 20.
84 See Bruce Alpert, Katrina Relief Package Close to Passage: Homeowner Losses, Levees May Be Funded, TIMES-PICAYUNE (New Orleans), Dec. 18, 2005, at 1; see also Eric Lipton, Leaders in Congress Agree on Aid for Gulf Recovery, N.Y. TIMES, Dec. 18, 2005, at A29 (reporting on congressional appropriations related to recovery as opposed to relief). The first legislative appropriation was for immediate relief and amounted to $62 billion. Alpert, supra; Lipton, supra. On December 18, 2005, a second appropriations bill reallocated $29 billion of the
eral assistance has been designated to assist with the recovery and rebuilding of Hurricane Katrina.\(^85\) Included in that $85 billion total is an almost $8 billion appropriation for tax credits to businesses and homeowners in the gulf region through the Katrina Emergency Tax Relief Act of 2005.\(^86\) This resulting “Gulf Opportunity Zone” is the cornerstone of President Bush’s rebuilding effort and combines an existing federal program with the White House’s initial plan offered after the hurricane.\(^87\)

The recent Gulf Opportunity Zone owes its roots to an “Enterprise Zone” program in Great Britain from the late 1970s designed “to stimulate industrial activity in London’s vacant docklands district through a drastic reduction of taxes and regulation.”\(^88\) Reagan supported the idea in the 1980s but the program never received sufficient funding.\(^89\) Congress funded a version of the Enterprise Zone program in 1993 during the Clinton Administration, calling it the Empowerment Zone and Enterprise Community program.\(^90\) The 1993 version modified the free-market approach to empower local communities to create solutions to their housing and neighborhood needs.\(^91\)

President Bush’s “Opportunity Zone” returns to the original British and Reagan model, offering $8 billion in tax incentives that are mostly targeted at encouraging businesses to open in the gulf region.\(^92\) The housing-related provisions of President Bush’s New Markets Tax Credit allow a state to receive up to $1 billion in tax credits to build low-income housing and encourage businesses to relocate to low-income

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\(^{85}\) Dao, supra note 39.


\(^{87}\) See Mbulu, supra note 44, at 404–06; White House, President Discusses Hurricane Relief, supra note 9.


\(^{89}\) Id.

\(^{90}\) Id. at 403–04.

\(^{91}\) Id. at 405.

\(^{92}\) See Walsh, supra note 86.
neighborhoods.\textsuperscript{93} Though the tax breaks were passed by the House and Senate unanimously, some legislators argued that the tax credits were a “giveaway to special interests” and that businesses would relocate in the area anyway.\textsuperscript{94} What is clear is that the tax incentive package allocates only a very small amount of tax benefits that relate to the production of new affordable housing.\textsuperscript{95}

II. The Baker Buyout Proposal

On October 20, 2005, Louisiana congressman Richard H. Baker introduced legislation detailing his proposed rebuilding plan for Louisiana, known as the Baker Bill.\textsuperscript{96} Richard Baker is a Republican who has spent considerable time in office trying to impose restrictions on governmental lenders Fannie Mae and Freddie Mac.\textsuperscript{97} Baker, a professed free-market supporter, toured neighborhoods soon after Katrina and announced that traditional recovery methods would be inadequate since this “was a problem way beyond the capacity of private enterprise.”\textsuperscript{98} The Baker Bill he drafted in response to the hurricane’s devas-

\textsuperscript{93} Id.
\textsuperscript{94} Id.
\textsuperscript{95} See id. One academic has argued that the Low-Income Housing Tax Credit, such as the one that this recent tax incentive further funded, should be subject to stricter regulation and give preference to non-profit developers because of the special role those types of organizations play in the creation of affordable-housing opportunities. Megan J. Ballard, \textit{Profiting from Poverty: The Competition Between For-Profit & Nonprofit Developers for Low-Income Housing Tax Credits}, 55 Hastings L.J. 211, 243–44 (2003).


\textsuperscript{97} See Nossiter, \textit{supra} note 18. Baker’s Sixth Congressional District is made up of Baton Rouge and the surrounding suburbs. Rep. Richard H. Baker, Louisiana and the 6th District, http://baker.house.gov/html/district.cfm (last visited Oct. 15, 2006). The district is mostly white and suburban in makeup. See Nossiter, \textit{supra} note 18. The area is also “relatively prosperous by Louisiana standards and historically resentful of the once-larger city of the east.” Id. Yet, as Nossiter points out, the most likely beneficiaries of his proposed bill are African-American New Orleans residents. Id.

tation was a detailed, well-considered rebuilding plan and should be reintroduced during the current legislative session.99

A. Structure of the Corporation

The Baker Bill proposed the creation of a federal agency called the Louisiana Recovery Corporation (the “Corporation”), which would have been independently established in the executive branch.100 Six separate divisions of the Corporation were to include: environment and land use management; economic development; property acquisition; property management; property disposition; and urban homesteading and community and faith-based organizations.101 The Corporation would have had a board of seven directors, appointed by the President, with qualifications related to the aforementioned divisions.102 Three of the seven directors, to be appointed by the President, would have been nominated by the Governor of Louisiana.103 The board was to be non-partisan, with no more than four members of the Board from the same political party.104 None of the appointees could have been current public employees, nor could they have been stockholders or employed by any institution that is a contract party with the Corporation during the time of their service.105

B. Local-Development Plans

Baker’s Bill allowed for local input from a variety of sources, as well as accountability through public hearings.106 Each Louisiana parish in which the Corporation operates would have established a “local advisory council” consisting of locally elected officials, community groups, and other “interested, qualified groups as the Corporation may determine to be appropriate.”107 The Corporation was to consult with the

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99 See generally H.R. 4100.
100 H.R. 4100 § 102(a), (b).
101 Id. § 102(d). “Management of each division shall be vested in an executive vice president who shall be appointed by the Board of Directors.” Id. § 102(d) (2).
102 Id. § 103(a) (1). The proposed terms of appointment are unclear; the Baker Bill proposed five-year terms in general, and at the same time suggests staggered terms of two to five years based on the source of the appointee’s nomination. See id. § 103(c) (1)–(2).
103 Id. § 103(a) (2). The elected chairperson cannot be one of the appointees nominated by the Louisiana Governor, but the vice chairperson must be one of the three. Id. § 103(b) (1)–(2).
104 Id. § 103(a) (3).
105 H.R. 4100 § 103(e) (1)–(2).
106 Id. § 103(g).
107 Id. § 103(g) (1) (A)–(B).
members of the local advisory council and hold public meetings before major decisions were made.108 In addition, any actions taken by the Corporation would have to conform to existing local redevelopment plans.109 Deference to local planning was explicit, as the Corporation does not allow solicitation of bids that conflict with a local government’s existing redevelopment plan.110

C. Funding the Corporation

In 2006, the Baker Bill would have allocated $100 million of already-appropriated federal Katrina disaster-relief funds toward start-up costs for the Corporation.111 Thereafter, the federal government would have assigned at most $30 billion in stock to the Corporation which was to be bought through a public debt transaction.112 Thus, the federal government would have financed the corporation through bonds issued by the Treasury.113 The Corporation was to be held accountable for its finances through a quarterly and annual reporting system that operates very much like a private company’s, with emphasis on public disclosure and accountability.114

D. The Corporation’s Objectives

The Corporation would have had a very general mission of economic stabilization and redevelopment of areas of Louisiana “devastated or significantly distressed” by Hurricane Katrina.115 Homeowners with mortgages were mostly given only a ninety-day forbearance period by their banks to delay their mortgage obligations.116 Many New Orleans residents are unsure whether they will be able to rebuild because they must continue mortgage payments or must fight insurers for dam-

108 Id. § 103(g)(1)(C).
109 Id. § 103(g)(2)(A)–(B).
110 H.R. 4100 § 103(g)(2)(B).
111 Id. § 104(g).
112 Id. § 104(a)–(c). Baker chose the amount of $30 billion funding for the program as an initial number because it was the maximum amount of the funding provided for the Tennessee Valley Authority. James Varney, President Avoids Endorsing Baker Bill: Bush Cites Progress in Recovery, Remains Coy on Category 5 Levees, TIMES-PICAYUNE (New Orleans), Jan. 13, 2006, at 1.
113 H.R. 4100 § 104(a)–(c); House Comm. on Fin. Servs., Committee Approves Corporation, supra note 96.
114 See H.R. 4100 § 104(d)(1)–(2).
115 Id. § 105(a).
116 House Comm. on Fin. Servs., Committee Approves Corporation, supra note 96.
The Baker Bill proposed paying up to $500,000 per homeowner to relieve the owner of his or her required mortgage payments, erasing the homeowner’s debt on questionably valued property and transferring title to the Corporation. In addition, the Corporation would have paid owners of flood-damaged property at least sixty percent of the equity in their homes. Once the Corporation acquired a number of properties in the same area, the properties were to be packaged together and the Corporation would have made necessary infrastructure repairs. The refurbished property would have then been sold to developers through a competitive-bidding process for redevelopment of structures and neighborhoods.

Through a revision of the bill undertaken a month after he proposed it, Baker added provisions to protect individual property rights. Under the revised bill, current property owners could have contracted with the Corporation to retain a right of first refusal to buy a similarly sized and situated piece of land after the infrastructure was repaired. In addition, current property owners could have contracted to retain interest in a similarly sized and situated piece of land. These provisions seemed to provide a mechanism for current owners to attempt to return to newly rebuilt neighborhoods if they could muster the resources. As an added bonus, the Corporation may even have been able to turn a profit by selling the renovated land to developers for more than the mortgage payoff amount.

E. Competitive-Bidding Process and Affordable Housing

The Corporation’s function, though highly similar to a private company, diverged from a private land-development company in the criteria enumerated for the competitive-bidding process. Rather

117 Id.
118 Id. Some properties in New Orleans are difficult to value because of uncertainty about how and when neighborhoods will be rebuilt. See id.
119 See Walsh, supra note 20.
120 H.R. 4100 § 105(c)(1)–(2).
121 Id. § 105(c)(3).
123 H.R. 4100 § 106(d).
124 Id. § 106(e).
125 See id. § 106(d)–(e).
126 Id. § 105(c)(3).
127 See id. § 107(a).
than selling the refurbished land to the highest bidder, the Corporation’s bidding process would have been a more subjective one, taking into consideration a variety of issues. According to the Baker Bill,

[p]urchasers are selected based on an ability to meet select criteria established by the Corporation, which shall include the following:

1. Capacity to oversee major development projects through a community-based collaborative process.
2. Commitment of private capital.
3. Effective deployment of Federal National Mortgage Association, Federal Home Loan Mortgage Corporation, Federal home loan bank, and other Federal or State resources (such as low-income housing tax credits, new markets tax credits, the HOPE IV program, enterprise zones, and the Historically Underutilized Business Zones or section 8(a) Programs of the Small Business Administration) to ensure construction of affordable housing.
4. Use of private contractors and subcontractors.
5. Use of local corporations and local employees.
6. Use of small, disadvantaged business enterprise contractors or subcontractors.
7. Scale of development and job creation.
8. Increased homeownership.

Thus, the Corporation would not have been able to dispense with land without first considering the total impact on the housing and job market of the neighborhood and parish. Baker’s plan also explicitly stated that the use of federal tax incentives to ensure construction of affordable housing was third on the list of bidding considerations, after only community input and financing.

The second part of the Baker Bill complemented the buyout plan by calling for allocation of federal funds to existing affordable-housing programs to supplement the Corporation. Had the Baker Bill passed in Congress, the rebuilding effort would have been aided by funds allocated to:

128 See H.R. 4100 § 107(a).
129 Id.
130 See id. § 103(g)(1)(C).
131 See id. § 107(a)(1)–(3).
132 Id. §§ 201–205.
• Section 9 (providing funds for capital improvements to public housing);
• Hope VI (providing funds for demolition of aging and ineffective existing public housing to construct newer public housing);
• HOME Investment Partnerships Program (providing funding to communities in connection with nonprofit groups to build or rehabilitate affordable housing for rental or purchase);
• CDBG grants (providing discretionary grant money to localities); and
• Section 8 (providing rental assistance vouchers to low-income persons).133

Finally, the bill was to use leftover funds to provide housing counseling to those still in temporary housing.134

Together, the two parts of the Baker Bill provided a comprehensive rebuilding plan for the future of New Orleans.135 While this plan included the creation of a new government agency involved in the real estate development business, it also used existing federal housing programs to supplement the efforts of the Corporation.136 Most importantly, the Baker Bill would have allocated $30 billion in federal funding and mandated community involvement to the rebuilding process.137

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• Section 9—$100 million;
• HOPE VI—$100 million;
• HOME Investment Partnership Program—$1.5 billion;
• CDBG—$13 billion;
• Section 8—$2.5 billion.


134 H.R. 4100 § 207.
135 See id.
136 See id.
137 See id. §§ 104(a)–(c), 107(a).
F. Arguments for and Against the Baker Bill

On January 24, 2006, the White House officially came out against the Baker Bill, stating that the already-allocated CDBG financing would be sufficient to compensate those homeowners hardest hit by the hurricane.\(^{138}\) However, a coherent plan for rebuilding is missing from the existing funding.\(^{139}\) The White House seems content to allow state and local officials to formulate their own plans for rebuilding, but state and local officials believe that much more money will be needed in order to rebuild effectively.\(^{140}\)

In the absence of a mortgage-buyout program like Baker’s, private entities, through the free market, may go ahead and step in to bail out homeowners and refurbish the land on their own, later selling the land or developing it as an investment.\(^{141}\) However, the difference is that a private developer’s priorities are not likely to include affordable housing, but rather will focus on making as much money as possible.\(^{142}\) The Baker Bill had specific requirements for bidding on land that took into account the needs and demands of the community, more funding, and a built-in accountability mechanism akin to a private corporation’s.\(^{143}\)

Local and state officials also liked the Baker Bill because of its potential to avoid a “jack-o’-lantern effect” during the rebuilding process.\(^{144}\) This describes a situation where some people who have the financial ability to rebuild will do so, but surrounding areas are not rebuilt and become blighted.\(^{145}\) The results are pockets of rebuilding and pockets of decay, like the gap-filled smile of a jack-o’-lantern.\(^{146}\)

Another concern for the rebuilding effort is the possibility that many residents will not be able to rebuild in low-lying areas because these areas are so likely to flood in the future that they are considered unsafe for future redevelopment.\(^{147}\) Supporters of the Baker Bill claimed that some sort of buy-out program “is a crucial component of plans to help homeowners who are willing to move to higher ground.

\(^{138}\) Walsh, \textit{supra} note 20.
\(^{139}\) See \textit{id.;} Nossiter, \textit{supra} note 18.
\(^{140}\) Walsh, \textit{supra} note 20.
\(^{141}\) See H.R. 4100.
\(^{142}\) See \textit{id.} § 107(a).
\(^{143}\) See \textit{id.}
\(^{144}\) Walsh, \textit{supra} note 20.
\(^{145}\) \textit{Id.}
\(^{146}\) \textit{Id.}
\(^{147}\) See \textit{id.}
but otherwise would be forced to renovate their flooded properties where they sit, or walk away and face foreclosure because of their flood insurance payouts.” If homeowners had assistance through the Baker Bill’s rights of first refusal and retaining interest in a similar piece of property, the goal of a more densely populated New Orleans would be more easily achieved.

Opponents of the Baker Bill were uncomfortable with creating a massive government bureaucracy instead of leaving recovery up to the market. Despite an early lack of White House support, Baker vowed to take the issue to the legislature. On December 15, 2005, the House Committee on Financial Services approved the Baker Bill by a vote of fifty to nine, sending the legislation to the full House of Representatives. However, after that the Baker Bill stalled in the Committee, and with the expiration of the last legislative session, the bill was cleared from the books. In order to be reconsidered, the Baker Bill first must be reintroduced in the current legislative session.

III. WHAT CAN BE LEARNED FROM PREVIOUS DISASTERS?

A. The Grand Forks, North Dakota Flood and Its Local Buyback Program

Commentators in New Orleans have pointed out that the rebuilding challenges facing the city are different than after past hurricanes because of the scale and nature of the damage. The devastation in New Orleans after Katrina was in large part caused by flooding after the breach of the levees, not by direct damage from hurricane-force winds and rain. Thus, it is most valuable to look at previous floods instead of hurricanes to see what lessons the federal government should take from past disaster relief efforts.

148 Id.
149 See Louisiana Recovery Corporation Act, H.R. 4100, 119th Cong. (as reported by H. Comm. on Fin. Servs., Dec. 15, 2005); see also Walsh, supra note 20 (implying that having a more densely populated city would improve the city’s tax base and help ease recovery).
150 Walsh, supra note 20.
151 Id.
152 House Comm. on Fin. Servs., Committee Approves Corporation, supra note 96.
153 See GovTrack.us, H.R. 4100, supra note 21.
154 See id.
156 See id.; Hurricane Katrina Timeline, supra note 2.
157 Hurricane Katrina Timeline, supra note 2.
1. The 1997 Grand Forks Flood

In April 1997, 52,000 residents of Grand Forks, North Dakota were awakened in the middle of the night and told to evacuate their homes. The nearby Red River had flooded its banks, resulting in flooding in ninety percent of the city and fires in eleven downtown buildings. In all, 8600 homes, or seventy-five percent of single-family units, were flooded, 1600 of 15,000 apartments had flood damage, and the entire downtown was affected. Though the area has just a little more than one-tenth of the population of New Orleans, Grand Forks faced challenges that are very similar to those confronting New Orleans. It is most important to look at the rebuilding effort in Grand Forks because it is generally considered to be a success story in rebuilding management. After an initial dip in population of ten percent, the population of the area is the same now as it was before the 1997 flood. Most importantly, residents and city leaders usually say the city is better than before.

2. Federal and Local Responses in Grand Forks

In contrast to the response to Hurricane Katrina, the immediate federal response to the Grand Forks flood was generally perceived as excellent. FEMA director James Witt even visited the town before the flood arrived. In Grand Forks, Witt is revered among residents for his swift action during the crisis. Federal funding was likewise rapidly forthcoming. Congress approved $5.6 billion appropriations bill for the area that designated money for buyouts, business loans, new infrastructure, and other

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159 Id.
160 Id.
161 See Russell, supra note 155.
162 See id.; see also FEMA, Disaster Resistance, supra note 158, at 5 (recounting the North Dakota flood as an example of a time when “taking steps before, during and after disaster strikes can make a difference for the future”).
163 Russell, supra note 155.
164 See id.
165 Id.
166 See id.
167 Id.
168 Russell, supra note 155.
needs. If that amount were to be compared to the amount appropriated so far in New Orleans on a per-capita basis, it would equal about $100 million for New Orleans alone. This is a great deal more per person than the $82 million President Bush has appropriated so far, much in tax credits, to the entire Gulf region.

Grand Forks’s rebuilding effort was spearheaded by a city buyback program funded with FEMA grants, money from the State of North Dakota, and CDBG grants from HUD. The buyback program removed damaged structures from areas that were especially vulnerable to future flooding and created open space in the structure’s place. Residents could voluntarily participate in the buyback and received a price based on the pre-flood assessment of the home and assistance in relocating to brand new neighborhoods built outside the floodplain. Though the displacement was upsetting to many of the residents, the success of the rebuilding process has led many of the displaced to praise the program in retrospect. By holding firm to a policy that refused to relax local floodplain building ordinances in order to assist people with rebuilding efforts, the city took the harder route of enforcing those restrictions and building a safer city in the long run.

3. Lessons from Grand Forks

Applying a rebuilding plan in Grand Forks was eased by the small population and size of the community, unlike New Orleans which is much larger, and has far more diverse people and needs. Yet the in-fighting and bitterness that remains among some residents of Grand Forks indicates that no rebuilding effort will be easy. One of the local

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169 Id.
170 Id.
171 See Dao, supra note 39. Of course, the political and economic climate in April 1997 was significantly different than the current one. See Russell, supra note 155. Residents of Grand Forks credit slow news days and a lack of scandals in Congress as helping to bring their plight to the attention of the public. Id. It is also fair to say that the scale of the disaster contributed to the ability of the federal government to fully fund the recovery, as did a strengthening U.S. economy that was not at war. See id.
172 FEMA, Disaster Resistance, supra note 158, at 8.
173 Id.
174 See id.; Russell, supra note 155.
175 FEMA, Disaster Resistance, supra note 158, at 12; Russell, supra note 155.
176 FEMA, Disaster Resistance, supra note 158, at 8.
177 See id. at 7 (noting that the population of Grand Forks is about 52,000).
178 Russell, supra note 155. Some Grand Forks residents refuse to visit the rebuilt downtown because they object to its urban feel. Id. Those who object wanted the city to remain more suburban in character. Id.
officials selected to lead the rebuilding effort with the Mayor said, “The leadership style you need to direct a recovery is not always a leadership style that makes everyone happy. . . . [I]f you try to do a recovery by consensus, nobody will agree and nothing will happen. So you do what’s right, and it may not be popular.”

New Orleans is likely to face the same infighting on the local level as various plans and proposals come forward. If reintroduced, the Baker Bill, by providing a federal mechanism for oversight and regulation of a buyout program, would centralize decision making regarding housing issues. However, the Baker Bill would maintain the link to vital input on the local level, and prioritize local needs in the competitive-bidding process. Furthermore, appointed leaders of Baker’s proposed Corporation would not have to face elections, and thus could focus on their duties without worrying excessively about the popularity of their decisions.

A vital lesson that the federal government should take from the flood in Grand Forks is that its current appropriation levels are insufficient to fully rebuild a major American city. There is some argument that the problem of insufficient funding may be more endemic than characteristic of policy choices. Joseph Singer, a noted property law scholar, has recently written that Americans after Katrina wanted the federal government to act, despite a strong American distrust of big government. Unfortunately, the demand for action has not been strong enough to be sufficient because although Americans saw that the needs in New Orleans were acute, there was no recognition that meeting those needs would require an increase in taxes and governmental regulation.

Finally, the most encouraging lesson to learn from Grand Forks is that rebuilding is possible, and that the city can come back better than

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179 Id.
180 See id.
182 See id. § 105(c)(3).
183 See id. § 103(b). Appointees would be held accountable for performance through the public quarterly and annual reports to the federal government. Id. § 104(d)(1)–(2).
184 See Russell, supra note 155.
186 See Singer, After the Flood, supra note 185, at 9; Singer, Lecture, supra note 185.
187 See Singer, After the Flood, supra note 185, at 5.
ever.\textsuperscript{188} Achieving this result in New Orleans will require a coherent plan supported by sufficient federal funding.\textsuperscript{189} Grand Forks used federal funds to implement their own local buyback program, which was very successful.\textsuperscript{190} The Baker Bill proposal was more complicated because the goal was more than small-scale relocation and clearing of floodplains.\textsuperscript{191} More ambitiously, the Baker Bill proposed rebuilding existing neighborhoods with an eye to accommodating the specific needs of the area.\textsuperscript{192} Though the White House has claimed that the already-appropriated funds will be sufficient, this is simply not the case.\textsuperscript{193} In addition, the already-appropriated funds may be sufficient to assist the hardest-hit residents, but it may not be enough to fully rebuild the city in a way that improves on some serious affordability problems that existed before the storm.\textsuperscript{194}

**B. Hurricane Andrew as the Model for Private-Sector Involvement**

Residents of Homestead, Florida, where Hurricane Andrew made landfall in 1992, credit much of the recovery after that devastating hurricane to the private sector.\textsuperscript{195} Although the damage caused by Andrew was similar in scale to the damage in New Orleans, there is one significant difference between the two disasters—New Orleans cannot rely only on private solutions if it is to recover from Hurricane Katrina.\textsuperscript{196} Though the private sector will be a necessary component in the recovery effort, success will depend upon the involvement of the federal government.\textsuperscript{197}

\textsuperscript{188} See Russell, supra note 155.


\textsuperscript{190} See Russell, supra note 155.

\textsuperscript{191} See id.; Louisiana Recovery Corporation Act, H.R. 4100, 119th Cong. (as reported by H. Comm. on Fin. Servs., Dec. 15, 2005).

\textsuperscript{192} See H.R. 4100 § 107(a).

\textsuperscript{193} See Walsh, supra note 20.

\textsuperscript{194} See id.

\textsuperscript{195} James Varney, Rising from Rubble, TIMES-PICAYUNE (New Orleans), Dec. 9, 2005, at 1.

\textsuperscript{196} See id.

\textsuperscript{197} Cf. Varney, supra note 195 (implying that private efforts to recovery are alone inadequate to satisfy the immense needs of New Orleans and its residents following Katrina).
1. The Hurricane Andrew Disaster

Prior to Hurricane Katrina, Hurricane Andrew was the most destructive hurricane in the United States on record. Andrew made landfall in Homestead, Florida on August 24, 1992 with wind readings establishing it as the third most powerful recorded hurricane to date. Homestead, located thirty-eight miles south of Miami, suffered crippling wind damage while the storm sideswiped the city of Miami itself. Andrew produced a seventeen foot storm surge near the landfall point in Homestead, caused twenty-three U.S. deaths, and resulted in $26.5 billion in damage in the United States. All but $1 billion of that damage was in south Florida and the vast majority of the damage in Florida was caused by winds.

Prior to Hurricane Andrew, Homestead was a city of about 26,000 people in a mostly rural area. The local economy consisted of agriculture and a dying Air Force base, both of which were decimated by the hurricane. Migrant and permanent agricultural workers who lived in mobile homes were especially affected and many were left with nothing after Andrew.

2. Federal and Local Responses to Hurricane Andrew

Residents of Homestead, Florida probably experienced déjà vu when they watched the lackluster federal response to Hurricane Katrina unfold on their television screens. On April 19, 1993, residents of that town gathered with Sen. Bob Graham at a hearing entitled Lessons Learned from Hurricane Andrew. The chief complaint was a lack of adequate federal response to the residents’ needs. Many Homestead residents were still trying to clear hurricane debris a year and a

199 Id.
200 See Varney, supra note 195.
201 NWS, Hurricane History, supra note 198.
202 Id.
203 See Varney, supra note 195.
204 See id.
205 See id.
206 See id. (citing Homestead residents’ complaints about the inadequacy of FEMA’s response to Hurricane Andrew relief).
207 Id.
208 See Varney, supra note 195.
half after the hurricane hit. In the absence of federal action, those affected by Andrew turned to the private sector, where a private nonprofit organization stepped up to “lobby for government aid to generate, leverage and spend the outpouring of private contributions” that came in after the disaster.

The nonprofit organization, called We Will Rebuild, was founded by Alvah Chapman, the head of Knight-Ridder, a massive newspaper-publishing company. In the first week after the storm, Chapman called Bob Epling, the president of Community Bank in Homestead, and several other local businessmen to bring them together to take action. Eventually, We Will Rebuild had a board of seventy-seven directors with specialized subcommittees devoted to issues like agriculture, health, the Air Force base, domestic violence, and communications with federal authorities. Chapman was chairman and Epling was one of two vice-chairmen.

We Will Rebuild combined private infrastructure and personnel with public funding to push the recovery efforts in Homestead forward. Some financial resources for the group came from private donations, but nearly nine-tenths of the total funds the group allocated came from federal recovery dollars. Using this mostly federal funding, the nonprofit financed professional recovery plans for twenty-eight neighborhoods. Committee heads from the private sector worked with local politicians to keep money and focus on south Florida.

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209 Id.
210 See id.
212 Varney, supra note 195. When Chapman called Epling, he was living out of the bank with a bag of dirty clothes and a gun because his home had been destroyed by Hurricane Andrew. Id. Epling was well known immediately after Andrew because he handed out $100 bills to Homestead residents who approached him for help. Id.
213 Id.
214 Id.
215 Id.
216 Id. We Will Rebuild received about $28 million in private donations, which it leveraged into $1 billion and added to $8.5 million in federal recovery allocations. Id.
217 Varney, supra note 195.
218 See id.
In Homestead, We Will Rebuild converted private donations, federal relief money, and benefits from existing federal programs into new developments that would best serve the community in the future.\footnote{Id.} One We Will Rebuild project used a Department of Agriculture land-use program that allowed the nonprofit to acquire a 108-acre land parcel adjacent to farm land.\footnote{Id.} We Will Rebuild then united with the nonprofit Everglades Community Association, a group dedicated to building and improving farmworker housing.\footnote{Id.} In the place of temporary migrant and poor farm worker housing destroyed by Andrew, the combined groups helped to build a permanent and appealing new community for the mostly Mexican-American farmworkers.\footnote{Id.} The result was the Everglades Farmworker Villages, which consist of 443 attractive apartments for nearly 4000 people connected to local agriculture.\footnote{Id.} In addition, the Villages boast 10,000 square feet of retail space and a ten-acre park.\footnote{Id.} Today the residents of the Everglades Farm-

Farmworkers, who are among the lowest-paid, hardest-working laborers in the nation, often have no choice but to live in shoddy temporary housing for which they pay a hefty part of their earnings. Typical was a south Dade County, Florida, “temporary” labor camp, notorious for its crime and squalid conditions, where for over 20 years farmworkers lived in trailers the county had bought secondhand from another state. When Hurricane Andrew blew the trailers away in 1992, the emergency put the need for farmworker housing high on the agenda of public officials and growers. The nonprofit Everglades Community Association, which had been managing farmworker housing and building new units on a steady but inadequate scale, seized the opportunity.

Everglades Farmworker Villages, the largest farm labor housing project ever built in the U.S., marks a turning point for more than 400 farmworker families, most of them Mexican Americans. It is not a housing complex but a community: a place where fathers come out to watch their children on the basketball courts, where families can be good neighbors, and where day care, health care, a grocery store, and a town center are all within a short walk. Farmworkers can put down roots and escape the unstable life of temporary housing. It is a safe and strong community that replaces the crime and dilapidation of trailer parks.


\footnote{Varney, supra note 195.}
worker Villages have real homes with access to laundry, a day care center, and a free clinic. At least one current resident said that while the new housing arrangement is “way different,” it is also “way better.” The nonprofits united with the help of federal money and programs to create an innovative solution to a persistent problem in south Florida, with remarkably successful results.

3. Lessons from Hurricane Andrew

The reconstruction of Homestead, Florida provides a real success story for private involvement in recovery efforts. We Will Rebuild utilized existing federal programs like the ones that the Bush Administration has funded to assist with Katrina recovery. While the involvement of the private sector in Homestead and the rest of south Florida worked after Hurricane Andrew, there are some notable differences between the aftermath of Andrew versus the aftermath of Katrina that make reliance on a purely private solution untenable.

First, the damage wrought by Andrew was mostly caused by hurricane-force winds as opposed to flooding or storm surge. As a result, insurance companies that covered the area generally honored the replacement clause in homeowner insurance policies. Those owners who lost their homes to wind damage were able to recover a great deal of the value of their damaged homes. In New Orleans, where much of the damage was caused by flooding, the flood policies paid by the federal government do not contain the same replacement clauses. Additionally, the payouts from the insurance companies after Andrew were “extremely generous,” according to a fellow at the International Hurricane Research Center. In all, after Andrew, approximately $20 billion in insurance payouts went to “a very concentrated area.”

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225 Id.
226 Id.
227 See Varney, supra note 195.
228 See id.
229 See id.; supra Part I.
230 See Varney, supra note 195.
231 See id.
232 Id.
233 Id.
234 See id.
235 Varney, supra note 195. The fellow, Shahid Hamid, stated that the payouts were so generous because the insurance industry had not yet devised methods to limit their risk with regard to hurricanes. See id. Indeed,
After Andrew, the insurance industry instituted reforms that sought to limit their risk in a future disaster, in some cases specifically limiting reimbursement for flood damage even if it was proximately caused by the covered hurricane winds. It remains to be seen whether the insurance industry’s reforms will stand up in court, but insurers do not appear eager to pay out on claims of flood damage. Much of the money already allocated by the federal government for Katrina relief has been earmarked to reimburse homeowners who suffered losses but were not required to buy federal insurance policies because their homes were outside the floodplain. Those who lost homes to Andrew were more likely to be compensated by their insurance companies, thereby freeing up federal money for innovative projects like the Everglades Farmworker Villages.

If reintroduced, the Baker Bill’s additional funding and plan to implement cohesive development in the wake of destruction would have the potential to create innovative communities for low-income residents like the Everglades Farmworker Villages. Since insurance companies limited their risk on policies after the losses from Andrew and subsequent hurricanes, the federal government must step in with additional sources of funding if New Orleans has any hope of correcting its glaring problems of inequality and affordability. Although the recovery of Homestead after Andrew was seen as a triumph for private investment, the money for the privately motivated projects overwhelm-
ingly came from federal relief funds. Adequate federal funding is imperative as a catalyst to private action.

A second point of departure between the Andrew and Katrina disasters is the number of political leaders whose constituents have a stake in recovery. We Will Rebuild received credit for bringing “unity and clarity” to Homestead’s recovery. Because the area hit by Andrew was about seventy-five percent unincorporated land, the number of local political districts affected was relatively small. One local leader involved in the Andrew recovery remarked, “You could get all the politicians affected into one room.” The lack of political involvement created a void that the private sector filled after Andrew. We Will Rebuild shaped much of the recovery, running their group like a business whose goal was to take existing programs, then focus and supplement them.

In contrast, New Orleans has many local and state leaders vying for a piece of federal funding. Those political leaders represent parishes that have disparate needs and that vary widely in economic and racial makeup. While the Bush Administration’s effort to shore up existing programs is a good start, without some sort of organization designated to motivate cohesive rebuilding, any progress could become mired in political infighting. The Baker Bill’s corporate-like, non-partisan structure would help sort out and prioritize the competing needs of the diverse communities of New Orleans.

Another significant difference between south Florida and New Orleans is the population density in the areas hit by each storm and the

243 See id.
244 See id.
245 See id.
246 Id.
248 Varney, supra note 195.
249 See id. Eventually, the local government was useful in passing new, stricter local building ordinances. Id. In addition, the Florida Legislature created the Hurricane Andrew Recovery/Rebuilding Trust Fund, which shifted $500 million in sales tax revenue from all over the state to the hardest hit areas during the first two years after the disaster. Id.
250 See id.
252 See Varney, supra note 195; Kaufman, supra note 251.
253 See Varney, supra note 195; Kaufman, supra note 251; supra Part I.C.
254 See Louisiana Recovery Corporation Act, H.R. 4100, 119th Cong. (as reported by H. Comm. on Fin. Servs., Dec. 15, 2005); Varney, supra note 195.
ensuing scale of damages. Andrew merely sideswiped Miami, while Katrina hit several heavily populated Gulf cities with full force. As a result, the damage to the primary city’s infrastructure was much more severe in Louisiana. After Andrew, most of Miami’s basic infrastructure survived the storm, which helped harder-hit outlying communities get back on their feet. In New Orleans, the failure of the levees and loss of many basic utilities has led many to rethink the layout of New Orleans entirely, with mayoral and state commissions proposing a more densely populated city in areas outside the federally designated floodplain. Regardless of the approach eventually adopted, any rebuilding plan that seeks to improve the city of New Orleans will require a more ambitious federal strategy that involves more than simple tax incentives.

IV. A Pragmatic Approach to Poverty

In discussing the public and governmental response to Hurricane Katrina, Joseph Singer observed that Katrina “changed our national conversation,” focusing politicians and the media on issues of poverty. Yet instead of thinking anew about poverty issues, Singer claims that Americans and the politicians who represented them expressed predictable responses immediately after the hurricane. Conservatives decried the big government bureaucracy that made New Orleans the mess it is and sought to ease the way for market forces. Liberals tried to argue that lack of government oversight and involvement was what caused the failure of the levees in the first place.

255 See Varney, supra note 195.
256 See id.
257 See id.
258 See id.
259 See Walsh, supra note 20.
260 See id.
261 See Singer, After the Flood, supra note 185, at 4; Singer, Lecture, supra note 185.
262 Id. Singer, After the Flood, supra note 185, at 10.
263 Id.
264 Id. To demonstrate this political side taking, Singer uses the example of President Bush’s attempt to protect federal contractors rebuilding in New Orleans from having to comply with environmental laws and pay workers the “prevailing wage.” Id. President Bush repealed the Depression-era Davis-Bacon Act, which ensured that public works projects would employ workers at the local prevailing wage. Id. President Bush argued that repeal was necessary to provide more opportunities for small businesses that could not afford the prevailing wage to compete for government contracts. Rick Klein, Rebuilding Plan Paving Way for Conservative Goals, BOSTON GLOBE, Sept. 25, 2005, at A1. Another Republican senator proposed a repeal of the Clean Air Act, which relates to the reduction of smog and atmospheric pollutants, after Katrina. Id. These actions by Republican lawmakers led many
Singer argues that progressives need new rhetoric to “explain and justify their worldview.” Because the public demand for governmental response to the disaster has been nearly unanimous, liberals and conservatives need a way to discuss poverty in ways that do not place them at extremes of a government versus no government debate. Singer says that after a disaster where everyone agrees government is necessary, relying on this type of discourse does not give elected officials of either ideology the tools to support the types of taxation and regulation that both sides desire. Specifically, liberals need a way of expressing their goals of promoting equality and security by checking the excesses of the marketplace. Conservatives counter liberal ideas by playing to the fear of taxation and regulation. Liberals need new language to express their ideas without reverting to couching them in conservative rhetoric.

If the “common view” after Katrina was that the government should do more to respond to poverty, Singer asks, how can the ideas of conservatives and liberals about the role of government be expressed to reflect that? Singer abandons a conservative versus liberal, deregulation versus regulation formula in favor of an institutional versus pragmatic balance. The ideas associated more with conservatives are institutional ideas. Singer says institutionalists want to create the right institutions, consisting of limited government and laws that support a market economy, then let individuals operate freely within the world framed by those institutions. Thus, the regulations that are needed are rules that define property rights, enforce contracts, and punish those who cause unreasonable harm to others. If the proper institutions exist and everyone is given equal access, the institutionalist believes that every person

Democratic politicians to wonder if Republicans were using the Katrina tragedy to further their prior political goals. Id.

265 Singer, After the Flood, supra note 185, at 7.
266 Id.
267 Id. at 4, 7.
268 Id. at 10.
269 Id. at 10–11.
270 Singer, After the Flood, supra note 185, at 11.
271 Id. at 9, 12.
272 Id. at 12. Singer is emphatic that the divide between institutionalists and pragmatics does not neatly fit the lines drawn by conservatives and liberals. Singer, Lecture, supra note 185. Rather, liberals can be institutionalists and conservatives can be pragmatsists. Id.
273 Singer, After the Flood, supra note 185, at 12. Singer traces the institutionalist worldview to John Locke and Robert Nozick. Id.
274 Id.
275 Id.
will have the ability to bring herself out of poverty. The result is that institutionalists accept that if poverty exists even after we create the “right” institutions, there is a certain level of poverty that will never go away. If individuals are uncomfortable with this resulting poverty baseline, the appropriate way to address it is through private charity.

On the other hand, Singer describes the pragmatists as associated to some degree with liberal ideas of poverty. A pragmatist takes the view that the best institutions are ones that result in no poverty. Pragmatists will not be satisfied until poverty is eradicated and will work to change the institutions to achieve that goal. Those who subscribe to pragmatism “are never done judging the acceptability of our institutions,” and thus are more skeptical of the ability of the market to function in a way that will reduce poverty.

These two frameworks for addressing poverty both acknowledge heavy involvement from the federal government. Singer goes on to discuss how government regulation is the very thing that defines property rights. Thus, how that government regulation is deployed has a serious impact on the resulting property regime. So far, the Bush Administration’s response has been to express confidence in existing institutions. Money for immediate relief went to FEMA to be distributed to hurricane victims despite the failure of that body to respond properly in the aftermath of the storm. Billions of dollars were earmarked for business and development tax incentives in the Gulf Opportunity Zone without addressing some serious efficiency and utiliza-

276 Id.
277 Id. at 13.
278 Singer, After the Flood, supra note 185, at 13. Singer says that under the institutionalist model, addressing poverty in any other way “harms the institutions that generate wealth and creates perverse incentives for poor people and thus only hurts the people we are trying to help.” Id.
279 Id. at 14.
280 Id. Singer traces the origin of pragmatism to John Rawls and the idea that “if poverty exists, then by definition, our institutions have failed and more work needs to be done.” Id.
281 Id.
282 Id. at 16.
283 Singer, After the Flood, supra note 185, at 18.
284 Id.
285 Id.
286 See Walsh, supra note 20.
287 See Barrett, supra note 1.
tion problems. Sadly, the smallest piece of federal appropriations went to CDBG grant funding, the federal program that actually has the most potential to impact the future of New Orleans’s residents. The federal reaction to Katrina did not take time to rethink the existing programs or consider bigger ideas for the future of New Orleans. Instead, conservatives attacked the existing institutions as failures, took funding away from social welfare programs, and left nothing in the void. Perhaps the current administration’s institutionalist worldview leads it to believe that the existing institutions, or stripped-down versions of those institutions, are the best ones and that any resulting poverty must be tolerated.

The Baker Bill was an innovative proposal because it had elements that satisfy both the institutionalist and the pragmatist. On the one hand, the Baker Bill’s structure used the free market to stimulate redevelopment. On the other hand, the Baker Bill dared to challenge the acceptability of existing institutions, in fact proposing a brand new institution to address the serious problems that lie ahead in rebuilding New Orleans. Most importantly, the Baker Bill’s redevelopment plan took into account the needs of the community and affordable housing. This is a truly pragmatic idea because it aims to improve low-income communities to reduce poverty. The injustices exposed by Hurricane Katrina demonstrate that the pragmatic idea of a critical reevaluation of our existing institutions is needed more than ever.

**Conclusion**

Hurricane Katrina dealt a crippling blow to the poor population of New Orleans. Abandoned in the Superdome and at the New Orleans Convention Center, American citizens were like refugees in their own

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289 See Salsich, supra note 14, at 484–85; Walsh, supra note 20.
290 See Walsh, supra note 20.
291 Boo, supra note 12, at 86.
292 See Walsh, supra note 20; Singer, After the Flood, supra note 185, at 12–13.
294 See Singer, After the Flood, supra note 185, at 12, 14; see generally H.R. 4100.
295 See Singer, After the Flood, supra note 185, at 12; see generally H.R. 4100.
296 See Singer, After the Flood, supra note 185, at 14; see generally H.R. 4100.
297 See Singer, After the Flood, supra note 185, at 14; see generally H.R. 4100.
298 See Singer, After the Flood, supra note 185, at 14; see generally H.R. 4100.
country. They sought asylum from a government that has continuously ignored their basic needs by slashing the budgets of federal-housing programs that help the neediest Americans. In response to New Orleans’s cries for help, President Bush approved a massive spending bill that would go primarily to corporations and short-term solutions, passing an insufficient amount to local communities.

Though Rep. Baker offered a bold idea for reconstruction, it was ignored as an expansion of government bureaucracy. Baker’s vow to take his bill through the House and Senate failed the first time, but his plan is worth a second look. The buyback program he proposed resembles a similar, successful local buyback plan implemented on a smaller scale in Grand Forks, North Dakota after a massive flood. Its corporate structure would both reduce political maneuvering for federal dollars and centralize decision-making power for more efficient and successful future development. In addition, Baker’s idea attempted to recoup the federal dollars allocated to his idea, and to preserve the vital community input that decides which projects will work. Though the current administration believes that private investment will take on the task of rebuilding as We Will Rebuild did after Hurricane Andrew, there are unique challenges after Katrina. Infrastructure was destroyed in New Orleans. Insurance companies are reluctant to pay their share. More people are fighting for a stake in the future of the city than they did in south Florida.

If the market is left to its own devices, is it entirely possible that New Orleans will be adequately rebuilt. But it is time to embrace a more pragmatic vision and attempt to rebuild New Orleans in an innovative and forward-thinking way. To do this, the federal government needs to reintroduce and reconsider the Baker Bill, which would provide more federal funding to the area in a way that is not a handout, but an investment in a future without poverty.