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Litigated Learning, Law's Limits, and Urban School Reform Challenges

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LITIGATED LEARNING, LAW'S LIMITS, AND URBAN SCHOOL REFORM CHALLENGES*

MICHAEL HEISE**

This Article assesses the likely efficacy of litigation efforts seeking to enhance equal educational opportunity by improving student academic achievement in the nation's urban public schools. Past education reform litigation efforts focusing on school desegregation and finance met with mixed success. Current litigation efforts seeking to improve student academic achievement promise to be even less successful because student academic achievement involves variables and activities located further from the reach of litigation than such variables as a school's racial composition and per pupil spending levels. Moreover, efforts to improve student achievement in the nation's urban public schools—especially high-poverty schools—face additional degrees of difficulty owing to the unique challenges that distinguish many urban public schools. That urban public school reform litigation efforts will confront significant difficulty in achieving their goals suggests only that litigation, as an instrument of social change, is not without its structural and institutional limits.

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INTRODUCTION

The equal educational opportunity doctrine, long considered the “holy grail” in American education, continues to evolve in ways that make it less amenable to litigation.¹ This is especially true in the urban public school context because of the unique challenges that many urban schools confront. Past (and present) major education litigation movements seeking to enhance educational opportunity focused on school desegregation and finance efforts and met with mixed success. Current litigation trends focusing on student academic achievement promise even less success because student academic achievement implicates teaching and learning activities—activities located deep inside schools and classrooms and, consequently, further from the reach of law, litigation, and court opinions. Moreover, efforts to improve student achievement in urban public schools—especially the numerous high-poverty urban public schools—confront additional degrees of difficulty that present further obstacles to litigation seeking education reform and greater equal educational opportunity.

1. See Michael Heise, *Litigated Learning and the Limits of Law*, 57 VAND. L. REV. 2417, 2442–50 (2004).

The equal educational opportunity doctrine simultaneously addresses public and private goods. The doctrine endeavors to ensure that all children benefit from equal and fair access to an institution—public education—that seeks to provide a foundation upon which children can rise above their circumstances, realize their full intellectual potential, participate robustly in political, social, and economic life, and ably discharge their responsibilities as citizens.² The American common school movement, launched in the nineteenth century, evidenced the nation's commitment to this doctrine and the belief that a fully functioning democratic government required an educated citizenry.³ Given these stakes, it is not surprising that courts are increasingly called upon to put legal teeth into the equal educational opportunity doctrine and to help deliver an implied promise.

Because of the equal educational opportunity doctrine's critical role in America's political, social, and economic life, it was inevitable that law would be called upon to help ensure its efficacy. What equal educational opportunity has meant and its intersection with law, however, have changed over time. While the equal educational opportunity doctrine pivoted principally on either race or resources (or both) during the second half of the twentieth century, the doctrine now focuses on student academic achievement, with a particular emphasis on persistent achievement gaps among various student subgroups. Despite this doctrinal shift, those seeking to enhance educational opportunity continue to press litigation into service.

Three salient factors distinguish many public urban schools from other schools in ways that disfavor the efficacy of litigation as a mechanism to promote desired reform, especially as it relates to student academic performance. First, urban public schools confront many challenges that are unique in kind or severity or both. Challenges such as household stability, poverty, and adverse peer-cohort effects are substantial, structural, and largely outside the reach of judicial remedies' immediate scope.⁴ Second, spending in many urban districts already exceeds state spending averages.⁵ This is

2. For a general discussion, see ROSEMARY C. SALOMONE, *EQUAL EDUCATION UNDER LAW* 1–2 (1986).

3. See, e.g., LAWRENCE A. CREMIN, *TRADITIONS OF AMERICAN EDUCATION* 49–50 (1976) (describing the factors contributing to the American common school movement); CARL F. KAESTLE, *PILLARS OF THE REPUBLIC: COMMON SCHOOLS & AMERICAN SOCIETY 1780–1860*, at 102 (Eric Foner ed., 1983) (same).

4. See *infra* Part II.

5. See *infra* tbl.5; see also MICHAEL CASSERLY, *COUNCIL OF THE GREAT CITY SCH., BEATING THE ODDS V: A CITY-BY-CITY ANALYSIS OF STUDENT PERFORMANCE*

important insofar as it implicates a critical assumption found in many judicial remedies in urban education reform litigation: the link between school spending and student academic achievement.⁶ Third, perhaps due to the unique challenges urban schools confront and notwithstanding robust per pupil spending, too many urban school students do not perform academically at needed or desired levels.⁷ Moreover, academic achievement gaps among various subgroups persist notwithstanding sustained attention from reformers.⁸

Many urban public schools continue to struggle despite decades of school desegregation and finance litigation that sought to increase school integration and per pupil spending, respectively. Consistent with changes in how the equal educational opportunity doctrine is presently understood, student academic achievement now frames education reform efforts.⁹ The present focus on student academic achievement was reinforced by the passage and implementation of the No Child Left Behind Act of 2001 ("NCLB").¹⁰ Academic performance—or, more specifically, responsibility for it—as well as concerns over persistent achievement gaps among various student groups animated many lawmakers that supported NCLB's passage.¹¹

Frustrated by the slow pace of reform and stagnant student achievement indicators, litigants continue to turn to the courts to help improve urban public schools. Such litigation efforts, however, often place courts in the difficult position of seeking to understand and

AND ACHIEVEMENT GAPS ON STATE ASSESSMENTS, at viii (2005), available at <http://www.cgcs.org/pdfs/BTOVFINALFULLCOPY3.30.05.pdf>.

6. See, e.g., Heise, *supra* note 1, at 2445 (noting that school finance litigation assumes a positive relation between school spending and student outcomes).

7. See *infra* Part II.

8. See generally CASSERLY, *supra* note 5 (documenting student performance in the nation's largest urban school districts).

9. See generally Heise, *supra* note 1 (noting the shift in education policy focus from education resources to student outcomes).

10. No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified at 20 U.S.C. §§ 6301-6578 (Supp. II 2002)).

11. To take one example, John Boehner, Chairman of the Committee on Education and the Workforce, U.S. House of Representatives, stated:

For a generation, we have pumped billions of dollars into a system that lacked accountability, never insisting on results I believe that kind of thinking is no longer acceptable, and it is why No Child Left Behind has the potential to be a pivotal moment in American education Accountability is the centerpiece of President Bush's plan to improve public schools and close this achievement gap that has existed between disadvantaged students and their peers.

Implementation of the No Child Left Behind Act: Hearing on H.R. 1 Before the H. Comm. on Education and the Workforce, 107th Cong. 2-3 (2002) (statement of John Boehner, Chairman, H. Comm. on Education and the Workforce).

grapple with a complex set of variables that interact in an almost limitless number of ways.¹² As well, to an even greater degree than school desegregation and finance, many of the variables germane to student achievement reside deep *inside* schools and classrooms and, as such, are further away from the reach of litigation and court decisions. The resilience of such variables to successful past litigation underscores their underlying complexity, non-legal components, and, more generally, the structural limitations of law and litigation as tools to achieve desired policy outcomes. Even when successful, education reform litigation often stimulates remedies that amount to judicial demands for more resources to underperforming schools.¹³ Such judicial remedies frequently assume a causal relation between increased resource levels and student academic achievement.¹⁴ Regrettably, student achievement is far more nuanced and complex. To ask litigation to influence student achievement—especially in the urban school setting—is to ask a lot of our legal system. Even more regrettable is the paradox that those students most in need of better schools, many non-white students from low-income households, are far more likely to be among those consigned to struggling urban schools whose challenges are less amenable to litigation.

Four Parts comprise this Article. Part I briefly summarizes the juxtaposition of school investment and student achievement trends that frames many efforts seeking to reform the nation's elementary and secondary schools. Part II extends the general discussion by focusing on how these trends present within the urban public school setting. Part III looks backward and assesses the two major litigation movements that involved urban public schools: desegregation and school finance. Based on an assessment of past and present school litigation efforts, Part IV considers the efficacy of future litigation efforts seeking to improve equal educational opportunity in urban school districts. To be sure, such an effort is difficult under the best of circumstances. The main point is that urban schools frequently differ from other schools in ways that diminish the promise of

12. See JAMES S. COLEMAN ET AL., U.S. DEP'T OF HEALTH, EDUC., & WELFARE, *EQUALITY OF EDUCATIONAL OPPORTUNITY* 22–23 (1966) (studying student achievement and finding a stronger correlation between student achievement and non-school factors than between achievement and school factors).

13. See, e.g., *Campaign for Fiscal Equity v. State*, 861 N.E.2d 50, 52 (N.Y. 2006) (directing approximately \$1.93 billion in additional state funds to New York City public schools).

14. See, e.g., *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 211–12 (Ky. 1989) (arguing that increased education funding would better enable Kentucky students to academically achieve in a way that would enhance their economic competitiveness).

litigation efforts endeavoring to accomplish reform goals. The conclusion stresses the argument's limitation to the urban school setting owing to its unique challenges for reform litigation.

I. EDUCATION REFORM AND THE UNCERTAIN RELATION BETWEEN SCHOOL RESOURCES AND STUDENT ACHIEVEMENT

Discussions about urban public school reform do not take place in a vacuum. Similar discussions relating to the American K–12 education system as a whole frame parallel discussions about the state of urban schools. Consequently, a brief survey of the American K–12 education reform terrain necessarily precedes a focus on urban public school reform.

Although the history of American education, especially urban K–12 education, is one of perpetual crisis and reform,¹⁵ a review of recent education litigation reform efforts reveals two key features. First, from a remedies perspective, litigation efforts enlisted into the service of such reform efforts frequently assume a positive relation between school resources and student achievement. That is, litigants seeking to increase equal educational opportunity (however defined) almost invariably ask for judicial assistance in directing greater resources to schools and students. Second, concerns about student achievement moor most reform efforts.¹⁶ More specifically, current reforms typically aspire to improve overall student achievement and close (or reduce) persisting achievement gaps separating various student subgroups.

A. *School and Student Resources*

One common barometer of the nation's investment in its public schools is current per pupil spending.¹⁷ This barometer emphasizes the primary focus of our educational efforts—students—and involves a resource that is easily understood—current spending. A second barometer of our national commitment to the schools, pupil-teacher

15. See generally DAVID B. TYACK, *THE ONE BEST SYSTEM: A HISTORY OF AMERICAN URBAN EDUCATION* (1974) (addressing the “history of the organizational revolution that took place in American schooling during the last century”); see also Martha Minow, *Reforming School Reform*, 68 *FORDHAM L. REV.* 257, 288 (1999) (noting that “school reform traditionally chews up and spits out undigested initiatives”).

16. As used in this Article, the term “student achievement” is construed broadly enough to include notions of achievement ranging from traditional academic performance indicia to other desired student outcomes, such as high school graduation.

17. See generally Goodwin Liu, *Interstate Inequality in Educational Opportunity*, 81 *N.Y.U. L. REV.* 2044 (2006) (considering per pupil spending and its derivations in assessing the nation's commitment to educational opportunity).

ratio, also pivots around students, but describes the commitment in terms of available instructional resources.¹⁸ Not surprisingly, many education reformers suggest that higher levels of per pupil spending and smaller pupil-teacher ratios benefit students and enhance their learning processes and experiences.¹⁹ These two measures of the nation's investment in and commitment to public elementary and secondary schools, per pupil spending and pupil-teacher ratios, figure prominently in discussions about school reform, educational quality, and equal educational opportunity.²⁰ Many education reform (and legal) arguments focus on whether such resources are adequate in supply and equal in distribution.

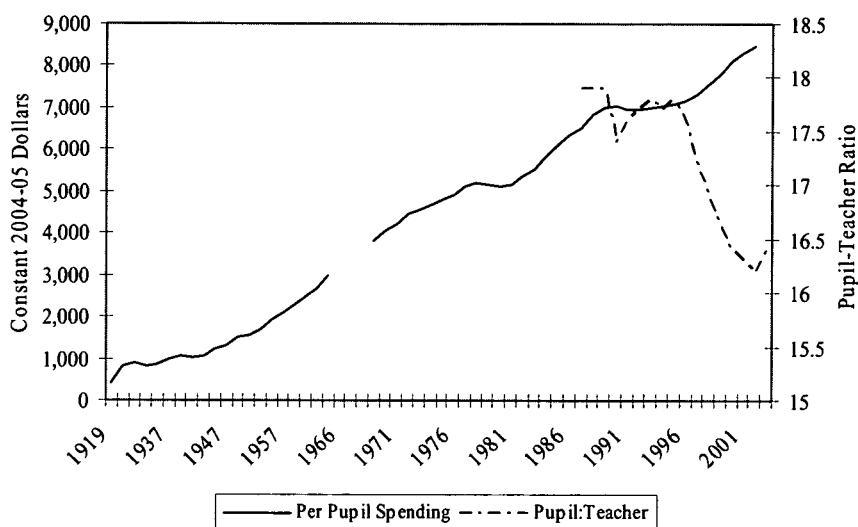
Table 1 plots these resource measures and shows (where data are available) how they vary through most of the twentieth century. Average per pupil spending, in real dollars, steadily increased almost every year during most of the past century and through today. Partly owing to consistent increases in per pupil spending, the national average pupil-teacher ratio declined, somewhat dramatically between 1996 and 2002. These two proxies for the nation's elementary and secondary education investment, taken individually or collectively, evidence a sustained and increased investment in public schools and students over time.

18. See, e.g., Ronald F. Ferguson, *Paying for Public Education: New Evidence on How and Why Money Matters*, 28 HARV. J. ON LEGIS. 465, 488–89 (1991) (concluding that such resources as preschool education, strong teachers, and smaller class sizes all have positive effects on academic achievement).

19. See, e.g., DAVID W. GRISSMER ET AL., *IMPROVING STUDENT ACHIEVEMENT: WHAT STATE NAEP TEST SCORES TELL US*, at xxv–xxx (2000) (arguing that increased resources and smaller class sizes correlate with increased student achievement).

20. See generally Ferguson, *supra* note 18 (discussing classroom resources such as favorable pupil-teacher ratios); Liu, *supra* note 17 (emphasizing per pupil spending).

Table 1. Annual Average Current Per Pupil Expenditures for U.S. Elementary and Secondary Schools and Annual Average Pupil-Teacher Ratios (Selected Years, 1919–2003).



Sources: Per pupil spending: National Center for Education Statistics, U.S. Department of Education, Biennial Survey of Education in the U.S., 1919–55; Statistics of State School Systems, 1957–69; Revenues and Expenditures for Public Elementary and Secondary Education, 1970–86; NCES Common Core of Data (CCD), National Public Education Financial Survey, 1987–2002. Pupil-Teacher ratio: National Center for Education Statistics, U.S. Department of Education, NCES Common Core of Data (CCD), Public Elementary/Secondary School Universe Survey, 1987–2003.

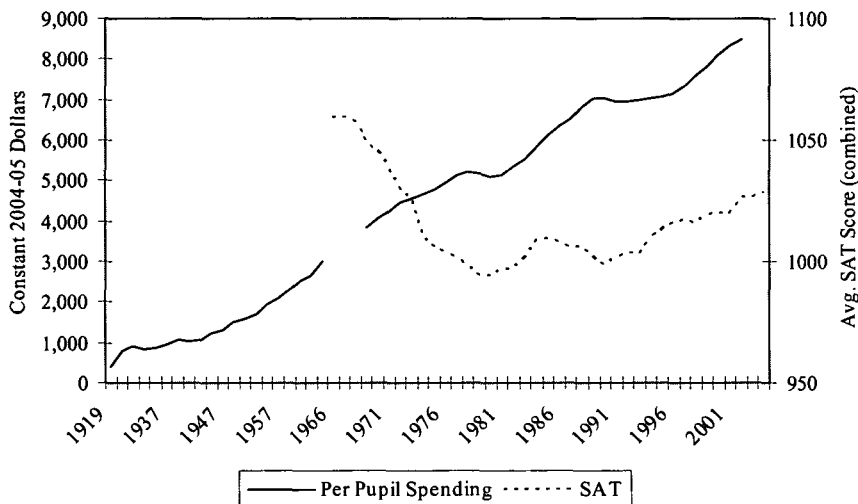
B. Student Academic Achievement

Similar to concerns about resources, education reformers and litigants increasingly assess whether student academic achievement is both adequate in supply and equal in distribution.²¹ One common student achievement indicator, the SAT score, benefits from widespread use over a significant number of years (although the use

21. See Alan Krueger et al., *Race, Income, and College in 25 Years: Evaluating Justice O'Connor's Conjecture*, 8 AM. L. & ECON. REV. 282, 291 fig.3 (2006) (evaluating the distribution of student SAT scores across various student subgroups); Charles Murray & R.J. Herrnstein, *What's Really Behind the SAT-Score Decline?*, 106 PUB. INT. 32, 33 fig.1 (1992) (describing a decline in the mean SAT score).

has been uneven across various student subgroups).²² As Table 2 illustrates, despite increased per pupil spending, average total SAT scores declined between 1963 and 1980. Despite a slight rise during the mid-1980s, SAT scores remain essentially flat. Although scores improved after 1991, they have not returned to 1966 levels.²³

Table 2. Annual Average Current Per Pupil Expenditures for U.S. Elementary and Secondary Schools and Annual Total SAT Scores (Selected Years, 1919–2004).



Sources: Per pupil spending: National Center for Education Statistics, U.S. Department of Education, Biennial Survey of Education in the U.S., 1919–55; Statistics of State School Systems, 1957–69; Revenues and Expenditures for Public Elementary and Secondary Education, 1970–86; NCES Common Core of Data (CCD), National Public Education Financial Survey, 1987–2002. SAT scores: College Entrance Examination Board, National Report on College-Bound Seniors, Selected Years, 1966–2004.

To be sure, debates persist about the degree to which SAT scores serve as a helpful and proper proxy for student academic

22. Murray & Herrnstein, *supra* note 21, at 35–36 (describing changes in the SAT test taker pool over time).

23. See *id.* at 33–34. But see David W. Grissmer, *The Continuing Use and Misuse of SAT Scores*, 6 PSYCHOL. PUB. POL'Y & L. 223, 224–26 (2000) (arguing that the expanded pool of SAT test takers explains much of the SAT score decline over the past decades).

achievement.²⁴ A paucity of alternative student achievement data contributed to such debates in the past. Indeed, the absence of helpful student achievement data frustrated reform efforts and blocked attempts to track achievement trends longitudinally.

Alternative psychometrically valid subject-specific tests were not readily available until relatively recently. Prominent among them are the National Assessment of Educational Progress (“NAEP”) tests, which are designed to provide such data.²⁵ NAEP data remain the nation’s only reliable student achievement metric that facilitates comparisons across states and, indeed, across nations.²⁶ Until the implementation of NCLB,²⁷ state participation in the NAEP testing regime was voluntary. Since NCLB, however, states desiring to receive federal education dollars must now participate in NAEP reading and math tests, administered every other year.²⁸ Table 3 reports results of average scaled math and reading scores for a representative sample of the nation’s seventeen-year-old students. The results illustrate NAEP test scores’ remarkable stability, despite ever-increasing per pupil spending.

24. See, e.g., Charles R. Lawrence III, *Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 COLUM. L. REV. 928, 946 (2001) (discussing the role of the SAT in the “regular” college admissions processes).

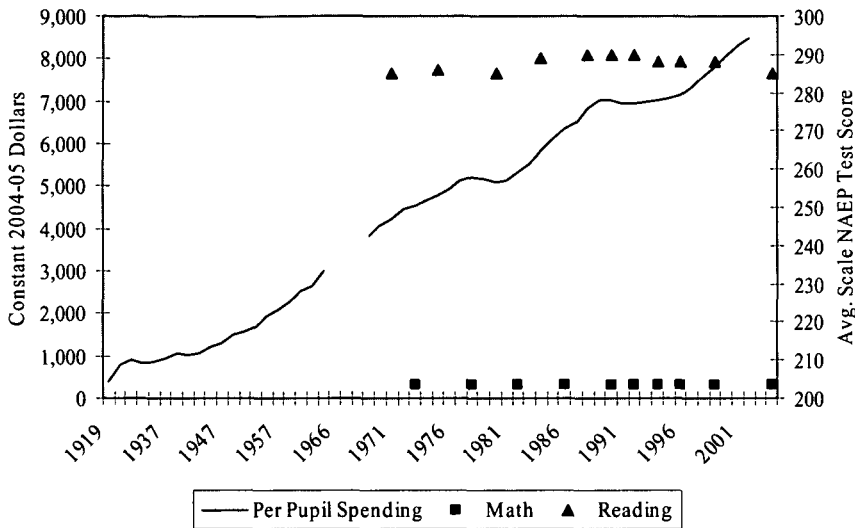
25. Nat’l Ctr. for Educ. Statistics, NAEP Overview, <http://nces.ed.gov/nationsreportcard/about> (last visited Apr. 15, 2007).

26. See Michael Heise, *The Political Economy of Education Federalism*, 56 EMORY L.J. 125, 145 (2006) (describing the NAEP tests).

27. 20 U.S.C. § 6301 (Supp. II 2002).

28. *Id.* § 6311(c)(2).

Table 3. Annual Average Current Per Pupil Expenditures for U.S. Elementary and Secondary Schools and Average NAEP Math and Reading Scores (Selected Years, 1919–2004).



Sources: Per pupil spending: National Center for Education Statistics, U.S. Department of Education, Biennial Survey of Education in the U.S., 1919–55; Statistics of State School Systems, 1957–69; Revenues and Expenditures for Public Elementary and Secondary Education, 1970–86; NCES Common Core of Data (CCD), National Public Education Financial Survey, 1987–2002. NAEP scores: National Center for Education Statistics, U.S. Department of Education, National Assessment of Educational Progress (NAEP), NAEP 2004 Trends in Academic Progress.

Stagnant student SAT and NAEP scores support assertions that “[d]uring the past three decades . . . student performance has, at best, stayed constant and may have fallen.”²⁹ For example, a Congressional Budget Office survey reviewed available data and concluded:

The existence of a sizable drop in test scores during the 1960s and 1970s has been well known for some time. The decline was

29. ERIC HANUSHEK ET AL., MAKING SCHOOLS WORK: IMPROVING PERFORMANCE AND CONTROLLING COSTS, at xviii (1994). See generally MARIANNE PERLE ET AL., U.S. DEP’T OF EDUC., NAEP 2004 TRENDS IN ACADEMIC PROGRESS: THREE DECADES OF STUDENT PERFORMANCE IN READING AND MATHEMATICS: FINDINGS IN BRIEF (2005) (describing inconsistent NAEP data trends from 1971 to 2004).

remarkably pervasive affecting many different types of students in most grades, in all regions of the United States, in Catholic as well as public schools and even in Canadian schools. The drop was apparent in the results of different kinds of tests covering many subject areas.³⁰

Even the more sanguine note that optimistic interpretations of achievement data uncover important problems. Even if the performance of American students remained constant over time in absolute terms, it fell in relative terms due to the improved performance of many foreign students.³¹ At the same time, employment demands for educated and skilled workers increased.³² Levels of achievement and mastery of skills that might have sufficed a generation ago no longer appear adequate,³³ especially in today's increasingly globalized economy.³⁴

Given the issue's complexity, it is not surprising to find disagreement over whether American student academic achievement has truly slipped over the years. A RAND Corporation report³⁵ and a

30. Sam Peltzman, *The Political Economy of the Decline of American Public Education*, 36 J.L. & ECON. 331, 333 (1993) (quoting CONG. BUDGET OFFICE, EDUCATIONAL ACHIEVEMENT: EXPLANATIONS AND IMPLICATIONS OF RECENT TRENDS (1987)).

31. *Id.*; see also ORG. FOR ECON. CO-OPERATION AND DEV., EDUCATION AT A GLANCE: OECD INDICATORS 2005 EXECUTIVE SUMMARY 14, 16 (2006), available at <http://www.oecd.org/dataoecd/20/25/35345692.pdf> (reporting that American student performance in mathematics and problem solving falls below the mean for the twenty-nine participating OECD nations).

32. See generally COMM'N ON THE SKILLS OF THE AM. WORKFORCE, NAT'L CTR. ON EDUC. & THE ECON., AMERICA'S CHOICE: HIGH SKILLS OR LOW WAGES!, THE REPORT OF THE COMMISSION ON THE SKILLS OF THE AMERICAN WORKFORCE (1990) (noting the implications for education and training imposed by a more technology-based labor market); RAY MARSHALL & MARC TUCKER, THINKING FOR A LIVING: EDUCATION AND THE WEALTH OF NATIONS (1992) (same).

33. Indeed, lingering concern over the competitiveness of the American workforce has generated recent calls for legislation. See, e.g., *Joint Approach To Raising Skills of Workforce Sought*, 140 Lab. Rel. Rep. (BNA) 116 (May 25, 1992) (discussing labor union officials' support for incentives for increased worker training as well as union support for the High Skills Competitive Workforce Act of 1991, S. 1790, 102d Cong. (1991)). The House and Senate both held hearings on the bill but never brought it to a vote on the floor. *Id.*

34. See generally HANUSHEK ET AL., *supra* note 29; see also Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 144 (2003) ("It makes economic sense for employers to emphasize skills sets rather than static job descriptions in order to create flexibility in the workforce to meet increasingly globalized demands.").

35. DAVID W. GRISSMER ET AL., RAND CORP., STUDENT ACHIEVEMENT AND THE CHANGING AMERICAN FAMILY, at xli (1994).

book by Professors David C. Berliner and Bruce J. Biddle³⁶ present dissenting viewpoints and argue that American student academic achievement did not decline during the past few decades.³⁷ What might speak volumes, however, is that even the strongest defenders of American public schools' performance, such as Berliner and Biddle, argue only that student performance has not declined.³⁸ No serious observer argues that, on average, American student academic achievement improved, despite concurrent per pupil spending increases and pupil-teacher ratio decreases. Rather, a judicious, conservative understanding of these trends suggests that despite ever-increasing investments, measured in terms of per pupil spending and pupil-teacher ratios, leading educational student achievement indicators evidence stagnation at best and, at worst, slight decline.

II. URBAN PUBLIC SCHOOL PERFORMANCE INDICATORS

While reasoned debate endures about the precise magnitude of the crisis confronting American student performance, markedly few serious scholars dissent from the proposition that many urban public schools confront substantial challenges in their efforts to serve their students, many of whom are members of minority groups or come from low-income households or both.³⁹ Recent policy and legal attention to urban public schools also reflects growing frustration with the pace of desired education reform.⁴⁰ Two sources of this frustration are clear. First, too many of the students attending urban public schools do not achieve academically at the desired levels. Second, an alarming number of urban public school students drop out prior to completing high school.

Persisting concerns about academic achievement and dropout rates fuel pessimism about urban public schools. Schools with high concentrations of student poverty, including those in urban settings,

36. DAVID C. BERLINER & BRUCE J. BIDDLE, *THE MANUFACTURED CRISIS* 34 (1995).

37. The Berliner and Biddle thesis has not been widely accepted. For a recent discussion about the nature and extent of the decline in American educational performance, see David W. Murray, *Waiting for Utopia*, EDUC. NEXT, Summer 2002, at 73, 74–75 (discussing the weight of evidence rebutting the Berliner and Biddle thesis).

38. BERLINER & BIDDLE, *supra* note 36, at 34 (“[S]tandardized tests provide no evidence whatever that supports the myth of a recent decline in the school achievement of the average American student.”).

39. In 1988, forty-seven of the nation's largest urban public school systems enrolled more than 37% and 31% of the nation's black and Hispanic schoolchildren, respectively. See COUNCIL OF THE GREAT CITY SCH., NATIONAL URBAN EDUCATION GOALS: BASELINE INDICATORS, 1990–91, at 9–10 figs.9 & 11 (1992).

40. See *id.*

almost always have lower levels of academic achievement than do schools with low concentrations of student poverty.⁴¹ Studies reaching this conclusion abound.⁴² A 1997 longitudinal study of 40,000 students, for example, concluded that “[t]he poverty level of the school (over and above the economic status of an individual student) is negatively related to standardized achievement scores.”⁴³ This study confirmed that

the poverty level of certain schools places disadvantaged students in double jeopardy. School poverty depresses the scores of all students in schools where at least half of the students are eligible for subsidized lunch, and seriously depresses the scores when over 75 percent of students live in low-income households.⁴⁴

A similar study conducted in 1993 found that students in high-poverty schools typically score fifty percent to seventy-five percent lower on reading and math tests than students in low-poverty schools.⁴⁵ Indeed, the influence of poverty on student achievement assuredly contributes to the persistent and nagging gaps between minority and non-minority students. Based on her review of National Assessment of Educational Progress data, Professor Diane Ravitch concludes that while minority students have made progress in closing the achievement gap, significant statistical differences endure.⁴⁶

By almost everyone’s count, too many students—particularly those attending urban public schools—drop out of school. Even though disputes about the precise magnitude of the dropout problem persist, few quibble about the cascade of adverse consequences that befall those students that fail to complete high school. Consequences at the individual level range from the economic (reduced job prospects and lower earnings for available jobs) to the social

41. See, e.g., MICHAEL J. PUMA ET AL., U.S. DEP’T OF EDUC., PROSPECTS: FINAL REPORT ON STUDENT OUTCOMES 73 (1997).

42. See James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043, 2103–08 (2002) (summarizing research on the links between poverty and academic achievement).

43. PUMA ET AL., *supra* note 41, at 73.

44. *Id.* at 12.

45. MICHAEL J. PUMA ET AL., PROSPECTS: THE CONGRESSIONALLY MANDATED STUDY OF EDUCATIONAL GROWTH AND OPPORTUNITY 18 (1993).

46. DIANE RAVITCH, NATIONAL STANDARDS IN AMERICAN EDUCATION 72 (1995); see also John E. Chubb & Terry M. Moe, *Effective Schools and Equal Opportunity*, in PUBLIC VALUES, PRIVATE SCHOOLS 161, 161–83 (Neal E. Devins ed., 1989); Anemona Hartocollis, *Racial Gap in Test Scores Found Across New York*, N.Y. TIMES, Mar. 28, 2002, at A1 (discussing gaps in student achievement between white and non-white students in New York).

(increased likelihood of reliance upon public assistance, criminal conduct, single parenthood, and parenthood at a comparatively younger age).⁴⁷ In sum, the future for high school dropouts in the United States is a “bleak” one.⁴⁸ Moreover, as Professor Gary Orfield notes, this bleakness is not limited to the dropouts themselves as they impose important costs on communities and drag the national economy.⁴⁹

Owing to the particular challenges that confront many urban public school districts, as well as lingering student achievement gaps, school reformers increasingly approach urban schools somewhat differently than non-urban schools.⁵⁰ That urban school systems receive particular emphasis or heightened attention from reformers demonstrates the magnitude and distinctiveness of the challenges now facing many of these school systems.

A. *Urban Public Schools and Student Academic Performance*

Among the myriad of problems that confront many urban public schools, concerns about student academic performance occupy a central position. Although education policy is a field not known for exhibiting consensus of opinion among experts, few dissent from the observation that far too many urban public school students struggle to achieve desired academic performance levels.⁵¹

Evidence fueling pessimism about urban public schools’ performance abounds, and recent data flow from testing and disclosure requirements imposed by NCLB.⁵² Under NCLB, all schools must develop and self-impose challenging academic standards,⁵³ annually test students to assess progress toward state

47. JAY P. GREENE, *HIGH SCHOOL GRADUATION RATES IN THE UNITED STATES* 1 (2002), available at http://www.manhattan-institute.org/pdf/cr_baeo.pdf.

48. *Id.*

49. GARY ORFIELD ET AL., *LOSING OUR FUTURE: HOW MINORITY YOUTH ARE BEING LEFT BEHIND BY THE GRADUATION RATE CRISIS* 2 (2004), available at <http://www.civilrightsproject.harvard.edu/research/dropouts/LosingOurFuture.pdf>.

50. For example, one recent book, *NEW SCHOOLS FOR A NEW CENTURY: THE REDESIGN OF URBAN EDUCATION* (Diane Ravitch & Joseph P. Viteritti eds., 1997), focuses discussion of education reform on urban schools.

51. See, e.g., Frederick M. Hess, *Policy Churn and the Plight of Urban School Reform*, in *LEARNING FROM SCHOOL CHOICE* 107, 107 (Paul E. Peterson & Bryan C. Hassel eds., 1998) (“Critiques of urban schooling invariably start with the presumption that urban public school systems are in a state of crisis . . .”).

52. See, e.g., CASSERLY, *supra* note 5.

53. No Child Left Behind Act of 2001, Pub. L. No. 107-110, § 1111, 115 Stat. 1425, 1444 (2002) (codified at 20 U.S.C. § 6311 (Supp. II 2002)).

standards,⁵⁴ and gather and disseminate relevant information.⁵⁵ Between the 2002 and 2004 school years, some good news emerged. Reading proficiency for fourth-graders attending thirty-eight of the nation's largest urban school districts increased from 43.1% to 51%.⁵⁶ The bad news, however, is that almost one-half (49%) of these fourth-graders did not read at a level their states defined as proficient.⁵⁷ Eighth-grade reading trends were even less encouraging. While reading proficiency increased from 37.2% to 39.9%, more than one-half of all eighth-graders attending forty-three urban school districts failed to achieve reading proficiency.⁵⁸ Despite some progress on reading proficiency a perplexing trend emerged: between 2002 and 2004, the longer children attended urban public schools the less likely they were to achieve reading proficiency.

Student performance on math proficiency tests, while hardly providing grounds for celebration, slightly exceeded reading proficiency performance. Between the 2002 and 2004 school years, fourth-grade math proficiency for students attending urban public schools increased from 44.1% to 55.3%.⁵⁹ Eighth-graders evidenced less progress, however. The percentage of eighth-graders achieving proficiency in mathematics increased from 36.5% to 43.8%.⁶⁰ Nevertheless, two trends persisted. First, among eighth-graders attending urban public schools, fewer than one-half met state-defined proficiency levels.⁶¹ Second, the longer students attended urban public schools the less likely it was that students achieved math proficiency.⁶²

If NCLB-prompted reading and math proficiency reports were not enough to alarm, urban school districts' dismal performance under self-defined state proficiency standards is likely worse than it appears. The fourth- and eighth-grade reading and math performance data described above relied on state-defined proficiency standards. States with rigorous proficiency standards were more likely to fail to achieve adequate yearly progress ("AYP") and trigger

54. *Id.*

55. *Id.*

56. See CASSERLY, *supra* note 5, at 24 fig.14.

57. *Id.*

58. *Id.*

59. *Id.* at 12 fig.5.

60. *Id.*

61. *Id.* at 12 fig.5, 24 fig.14.

62. *Id.*

a host of escalating NCLB sanctions.⁶³ Conversely, states with comparatively weak proficiency standards stood a better chance of successfully navigating through NCLB requirements and avoiding increasingly onerous sanctions and the associated stigma.

As Professor Ryan observes, a school district that runs afoul of NCLB by failing to achieve adequate yearly progress invites political peril.⁶⁴ While a school that does not achieve AYP is not labeled a “failure” by the Act itself, in today’s setting such a result is all but assured, partly by popular media that translates the statutory language of “in need of improvement”⁶⁵ (applied to schools failing to achieve AYP) into “failing.”⁶⁶ Any school that fails to achieve AYP for two consecutive years must notify parents that they can send their kids to another public school that is achieving AYP.⁶⁷ Any school required to make such an admission will undoubtedly convey—whether it wants to or not—the impression that it is failing.

A desire to avoid the prospect of political peril incident to perceptions of failure unites many states, school districts, and schools. Such peril and other adverse consequences to states, districts, and schools flowing from NCLB induced some states to rollback their student performance standards.⁶⁸ In light of ever-increasing NCLB performance requirements, states that adhered to high achievement standards did so at ever-increasing political risk. For risk-averse policymakers (and governors), the policy path of least resistance became more attractive over time. As well, in states where suburban districts recoil at the prospect—however remote—of their students not achieving state proficiency standards, a decision to dilute academic standards became even easier to make.⁶⁹ The intersection of state proficiency standards and NCLB liability created pressure on states to dilute their proficiency standards. One unanticipated consequence of NCLB is that for states it may have transformed an

63. See James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 944–46 (2004) (noting the lack of policy incentives for a state to establish rigorous student performance standards).

64. *Id.* at 944–48 (describing how fear of failure prompts a dilution of student achievement standards).

65. No Child Left Behind Act of 2001, Pub. L. No. 107-110, § 1116(a)(1)(B), 115 Stat. 1425, 1478 (2002) (codified at 20 U.S.C. § 6316 (Supp. II 2002)).

66. Ryan, *supra* note 63, at 945.

67. 20 U.S.C. § 6316.

68. See Ryan, *supra* note 63, at 947–48.

69. See Paul T. O'Neill, *High Stakes Testing Law and Litigation*, 2003 BYU EDUC. & L.J. 623, 657–59 (discussing suburban backlashes against standardized testing).

education “race-to-the-top” into a “race-to-the-bottom.”⁷⁰ Thus, if any of the sixty-five large public urban districts in the Council of Great City Schools are located in states that diluted student proficiency standards, then urban school districts’ performance problems are even greater than the disquieting data already suggest.

B. Dropouts

Among these considerable ills that continue to vex many urban public school districts, student dropout rates warrant particular attention.⁷¹ The problems associated with students failing to complete high school are as easy to predict as they are dire. Making the situation even worse, however, is uncertainty surrounding the precise magnitude of the dropout problem. The absence of high-quality, reliable data fuels uncertainty.⁷² To be fair, some amount of the uncertainty can be attributed to inconsistent approaches toward defining school dropouts across states.⁷³

One student dropout definition, adopted by the U.S. Department of Education, construes “high school completers” as those students that receive a high school diploma—or a high school diploma equivalent, such as the General Education Degree (“GED”)—regardless of how long it might take the student to earn the credential.⁷⁴ According to the U.S. Department of Education, between 1972 and 2001 the percentage of high school completers ranged from 82.8 (1972) to 86.5 (2001).⁷⁵ Since 1991 the percentage essentially stabilized and has fluctuated between 84.8% and 86.5%.⁷⁶

70. See Paul E. Peterson & Frederick M. Hess, *Keeping an Eye on State Standards: A Race to the Bottom?*, EDUC. NEXT, Summer 2006, at 28, 28–29 (analyzing changes to state proficiency levels since NCLB). But see James S. Liebman & Charles F. Sabel, *A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform*, 28 N.Y.U. REV. L. & SOC. CHANGE 183, 294 (2003) (arguing that NCLB “may launch a race to the top”).

71. See RICHARD D. KAHLENBERG, ALL TOGETHER NOW: CREATING MIDDLE-CLASS SCHOOLS THROUGH PUBLIC SCHOOL CHOICE 54 (2001) (noting that in high-poverty schools, the dropout rate still exceeds two-thirds).

72. For a critique, see ORFIELD ET AL., *supra* note 49, at 7–10 (explaining how “misleading and incomplete reporting” has “obscured . . . the magnitude of the crisis”).

73. For a summary of the various leading ways to calculate dropouts, see GREENE, *supra* note 47, at 5–7.

74. *Id.* (noting that U.S. Department of Education dropout estimates exclude those who hold a GED).

75. Philip Kaufman et al., *Dropout Rates in the United States: 2001*, EDUC. STAT. Q., Nov. 23, 2005, tbl.A & fig.A, available at http://nces.ed.gov/programs/quarterly/vol_6/6_4/4_3.asp.

76. *Id.*

Independent assessments adopting an alternative definition of high school dropout rates, however, paint a less flattering picture. For example, Professor Jay Greene measured a high school's graduation rate by comparing the cohort of students that entered eighth grade in 1993 and received a "regular" high school diploma five years later (as scheduled).⁷⁷ Greene estimates the 1998 nationwide graduation rate at 71%.⁷⁸ (The Department of Education reports 84.8%.)⁷⁹ Also important is that Greene noted tremendous variation across states and districts, especially among the nation's largest urban districts. Among the fifty largest districts in 1993, graduation rates ranged from as low as 28% in Cleveland to a high of 87% in Fairfax, Virginia.⁸⁰

Professor Greene's troubling dropout rate findings do not stand alone. In its own independent student dropout rate study, the Harvard Civil Rights Project defined graduation similarly (comparing the cohort of students that entered ninth grade and received a "regular" high school diploma four years later as scheduled) and reported similar results. For the 2001 school year the researchers report a nationwide graduation rate of 68%.⁸¹ (The Department of Education reports 86.5%.)⁸² The Harvard Civil Rights Project researchers also noted troubling rate variations across racial and ethnic groups, ranging from 76.8% for Asians to 50.2% for African Americans.⁸³ Alarming, only 42.8% and 48% of African-American and Hispanic boys graduated, respectively.⁸⁴ According to the Harvard study, among the nation's largest urban districts, 2001 graduations rates ranged from 30% in Cleveland to 87.1% in Davis, Utah.⁸⁵

Disputes over how best to measure high school graduation aside, what might explain the discrepancies between governmental and independent dropout estimates? To be sure, reasonable minds surely differ about how to "count" a student who for whatever reason drops out of conventional high school and, instead, pursues and receives a

77. GREENE, *supra* note 47, at 5.

78. *Id.* at 6.

79. *Id.*

80. *Id.* at 5.

81. ORFIELD ET AL., *supra* note 49, at 2.

82. Kaufman et al., *supra* note 75.

83. ORFIELD ET AL., *supra* note 49, at 2.

84. *Id.*

85. *Id.* at 90–91 tbl.G.

GED.⁸⁶ A variation of that theme involves a student who drops out but subsequently returns to high school and finishes, but only after five or more years since entering the ninth grade. In both scenarios the student has earned a reasonable proxy for the skills roughly equivalent to those possessing a high school diploma.⁸⁷ From the school's perspective, however, a student dropped out. Whether an appropriate dropout count should adopt the perspective of the student or school remains contested. NCLB might contribute to the controversy surrounding how to define a student dropout. The threat of triggering NCLB consequences may induce states or districts to relax dropout criteria or obfuscate data.⁸⁸ Regardless of the reasons for the strikingly optimistic government dropout estimates, independent assessments of dropout rates consistently criticize government estimates for underestimating (in some instances, severely) actual dropout rates.⁸⁹

III. PAST REFORM LITIGATION IN THE URBAN SCHOOL SETTING

Although the number and type of reform litigation involving schools dramatically increased during the decades following the Supreme Court's decision in *Brown v. Board of Education*, school litigation prior to 1954, while far less frequent, was not unknown.⁹⁰ Legal historians note that a review of school litigation during the pre-*Brown* era would not uncover a "golden age of comity."⁹¹ Rather, the pre-*Brown* years witnessed less litigation, fewer and less complex state and federal regulations, and more legal deference to education professionals.⁹² Further distinguishing the litigation terrain during the pre- and post-*Brown* years is the wider range of issues legally

86. For a discussion on calculating graduation estimates, see GREENE, *supra* note 47, at 5–6.

87. Disputes about whether the GED and a high school diploma are meaningful equivalents persist. See, e.g., Thomas M. Smith, *Who Values the GED? An Examination of the Paradox Underlying the Demand for the General Educational Development Credential*, 105 TCHRS. C. REC. 375 (2003) (arguing that despite strong institutional support labor markets discount GED holders).

88. Op-Ed., *Graduation in the Eye of the Beholder*, N.Y. TIMES, June 24, 2006, at A14 (criticizing the U.S. Department of Education for not mandating a uniform approach on tallying and reporting student dropout data).

89. See, e.g., GREENE, *supra* note 47, at 1 (characterizing government calculations as "implausibly positive"); Op-Ed., *supra* note 88.

90. See, e.g., DAVID TYACK ET AL., *LAW AND THE SHAPING OF PUBLIC EDUCATION, 1785–1954*, at 215 tbl.A-3 (1987) (outlining the volume of education litigation through the nineteenth and twentieth centuries).

91. *Id.* at 194.

92. *Id.*

contested, the “scope of education jurisprudence,” and a marked increase in litigation involving traditional political “outsiders.”⁹³

Today’s concerns involving urban public schools differ from past concerns to some degree. Notwithstanding these differences, however, in assessing prospects for litigation endeavoring to improve urban public schools in the future a look backwards at past education litigation efforts during the post-*Brown* years provides helpful guidance. The intersection of litigation, law, and education policy reveals two major recent litigation efforts that involve urban public schools: desegregation and school finance.

A. Desegregation

Interpretations of the *Brown* decision, what it “means” and what it accomplished, vary tremendously and reveal just as much about ourselves as they do about the decision itself.⁹⁴ Although *Brown* has always been correctly perceived as about more than school desegregation, the decision has always been understood to be *at least* about school desegregation. Thus, assessments of *Brown*’s efficacy need to account for its impact on school desegregation. What is clear after one-half a century is that although *Brown* manifestly succeeded in eliminating de jure segregation and, more generally, in articulating the equal educational opportunity principle,⁹⁵ the decision fell short of eliminating de facto segregation. Indeed, the *Brown* decision’s inability to eradicate de facto segregation has special currency in the urban public school context. Not only did *Brown* fall short of increasing integration levels in urban public schools, but it plausibly exacerbated student racial isolation.⁹⁶

1. Urban Public School Demography

A review of demographic data on the nation’s largest school districts brings the evolving racial, ethnic, and poverty segregation intensity into focus. As Table 4 illustrates, all but one (Hillsborough County, Florida) of the nation’s largest school districts are mostly

93. *Id.* at 195–96.

94. Professor Balkin describes the *Brown* opinion as a quasi-Rorschach test for legal scholars. See Jack M. Balkin, *Brown as Icon*, in *WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID* 3, 8 (Jack M. Balkin ed., 2001).

95. See Molly S. McUsic, *The Future of Brown v. Board of Education: Economic Integration of the Public Schools*, 117 HARV. L. REV. 1334, 1334 (2004).

96. See DAVID J. ARMOR, *FORCED JUSTICE: SCHOOL DESEGREGATION AND THE LAW* 112–13 (1995) (arguing that many court-ordered school desegregation plans correlate with reduced school integration levels).

minority, many overwhelmingly so. Closer inspection of Table 4 reveals three other important, yet subtle, developments. First, columns 1 and 2 present residential and public school enrollment demographic characteristics at a single moment in time (2000). Column 1 presents Census data on the percentage of white, non-Hispanic students living in the relevant urban school district. Column 2 presents similar demographic information for the urban public school system serving the residential area for the school year that began in fall 2000. A comparison of columns 1 and 2 illustrates that in *every* instance the percentage of white, non-Hispanic individuals living in these large urban areas exceeds the percentage of non-Hispanic white students attending the urban public schools. What Table 4 suggests is that white families' mobility—both in terms of departing urban for non-urban areas and exiting public for private schools—creates a disproportionate absence of white schoolchildren in urban public school settings and contributes to levels of racial and ethnic isolation in urban districts that exceed what general residential integration levels predict.

Second, column 3 suggests that the trend evidenced in the comparison of columns 1 and 2 likely persists over time. Although Census demographic information on a school district's residential population does not exist for 2001, annual school demographic information is gathered by school districts each year. All of the ten large urban districts presented in Table 1, already predominantly minority by the 2000–01 school year, became even more so one year later in the 2001–02 school year. Jonathan Kozol, a veteran education observer and critic, has noted that, with respect to urban public schools, he “cannot discern the slightest . . . vestige of the legal victory embodied in *Brown v. Board of Education*.”⁹⁷ Kozol went on to observe that when he visits urban public schools, “I simply never see white children.”⁹⁸

Third, in addition to student racial isolation, the nation's largest school districts are noted for their concentrations of poverty as well. The relation between race and poverty in the education context is startling. A larger percentage of white students typically guarantees a school a smaller percentage of poor students. These trends interact in devastating ways. Less than 10% of schools whose enrollments are between 10% and 20% minority are predominantly poor. Exactly

97. JONATHAN KOZOL, *THE SHAME OF THE NATION: THE RESTORATION OF APARTHEID SCHOOLING IN AMERICA* 10 (2005).

98. *Id.*

half of the schools that are 50% to 60% minority are predominantly poor. And nearly 90% of schools that are 90% to 100% minority are predominantly poor.⁹⁹

Using student eligibility for federal free and reduced-price lunch programs as a crude proxy for student poverty, Table 4 illustrates that students eligible for subsidized lunches exceed 50% in seven of the ten largest school districts. Although steady movement toward school resegregation persists,¹⁰⁰ taken as a whole Table 4 suggests that the largest public school districts are already overwhelmingly identifiable in terms of whom they serve: minority students from low-income homes.

99. These figures are reported in GARY ORFIELD & JOHN T. YUN, CIVIL RIGHTS PROJECT AT HARVARD UNIV., RESEGREGATION IN AMERICAN SCHOOLS 17 tbl.13 (1999), available at http://www.civilrightsproject.harvard.edu/research/deseg/Resegregation_American_Schools99.pdf.

100. See, e.g., John Charles Boger, *Education's "Perfect Storm"? Racial Resegregation, High Stakes Testing, and School Resource Inequities: The Case of North Carolina*, 81 N.C. L. REV. 1375, 1389 (2003) (describing resegregation of schools in Southern states).

Table 4. District Residential Population,¹⁰¹ Total Public School Enrollment¹⁰² by Race and Ethnicity and Poverty¹⁰³ in the Nation's Largest School Districts¹⁰⁴ (Percent).

	(1) (2000) Residential White, Non- Hispanic	(2) (2000-01) School District White, Non- Hispanic	(3) (2001-02) School District White, Non- Hispanic	(4) (2001-02) Reduced-Lunch Eligible
New York City	35.0	15.3	15.2	73.4
Los Angeles	29.7	9.9	9.6	72.8
Chicago	31.3	9.6	9.5	81.9
Dade City, FL	41.3	11.3	10.8	59.9
Broward City, FL	58.0	41.2	39.3	38.1
Clark City, NV	60.2	49.9	47.7	38.2
Houston	30.8	10.0	9.6	72.7
Philadelphia	42.5	16.7	15.9	71.0
Hillsborough City, FL	63.3	51.8	50.5	48.8
Detroit	10.5	3.7	3.5	70.3

Source: (1) U.S. Census Bureau, Census 2000 Summary File 1; (2), (3), and (4) National Center for Education Statistics, U.S. Department of Education.

101. See U.S. CENSUS BUREAU, CENSUS 2000 SUMMARY FILE 1, Matrices P3 and P4. Beginning with the 2000 Census, respondents were permitted to select more than one ethnicity or race, or they could write in their own racial description. To account for the possibility for double counting I present racial and ethnic data in terms of either "White, non-Hispanic" or "all other." To derive the percentage of white, non-Hispanic residents, I divided the total number of single race, white-only non-Hispanics by the total population. The resulting percentage captures those individuals who described themselves as only white and non-Hispanic. Minimizing double counting comes at a cost of a loss of greater racial specificity. Insofar as school desegregation has traditionally been construed in terms of white and non-white students, such a cost, though regrettable, is reasonable. For a description of problems that now confront demographers and researchers, see, for example, Tamar Jacoby, *An End to Counting by Race?*, COMMENT, June 2001, at 37 (describing the changes to Census policy); Glenn D. Magpantay, *Asian American Voting Rights and Representation: A Perspective from the Northeast*, 28 FORDHAM URB. L.J. 739, 748 n.69 (2001) (arguing that the Census Bureau's new policy on racial and ethnic identification will complicate enforcement of voting rights); Mireya Navarro, *Going Beyond Black and White, Hispanics in Census Pick 'Other'*, N.Y. TIMES, Nov. 9, 2003, at N1 (noting how Hispanic respondents react to the new Census options regarding race and ethnicity).

102. NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., CHARACTERISTICS OF THE 100 LARGEST PUBLIC ELEMENTARY AND SECONDARY SCHOOL DISTRICTS IN THE UNITED STATES: 2000-01, at 29 tbl.9 (2002), available at <http://nces.ed.gov/pubs/2002/2002351.pdf>.

103. NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., CHARACTERISTICS OF THE 100 LARGEST PUBLIC ELEMENTARY AND SECONDARY SCHOOL DISTRICTS IN THE UNITED STATES: 2001-02, at 28 tbl.8 (2003), available at <http://nces.ed.gov/pubs/2003/2003353.pdf>.

104. Due to an array of anomalies, the list of the largest school districts excludes two districts: Puerto Rico and Hawaii.

Paradoxically, decades of school desegregation litigation that focused on urban school demographics likely obscured the importance of an equally, if not more, salient variable for student academic achievement: student socioeconomic status. To the extent that race and poverty interact it is obviously difficult to disentangle independent influences. What Professor James Coleman found in 1966 was that “a pupil’s [academic] achievement is strongly related to the educational backgrounds and aspirations of the other students in the school.”¹⁰⁵ As an explanatory variable, more often than not a school’s poverty level trumps the influence of student race and ethnicity when it comes to academic achievement.¹⁰⁶ That is to say, students of all races and ethnicities attending high-poverty schools experience lower student achievement performance, on average, even after controlling for each student’s own socioeconomic status.¹⁰⁷

Although a school’s student composition remains, in theory anyway, a manipulable variable, practical demographic and socioeconomic realities frequently push theoretical possibilities quickly aside. Even where such variable manipulation remains possible, two nonlegal factors further constrain policymakers’ efforts to alter student assignment policies in a manner designed to increase school integration. These two factors—decisions about where people choose to live and middle- and upper-income families’ access to private schools—critically influence school demographic profiles, yet remain outside of policymakers’ direct reach. Two seminal Supreme Court decisions, *Milliken v. Bradley*¹⁰⁸ and *Pierce v. Society of Sisters*,¹⁰⁹ reinforce individuals’ control over family decisions concerning where to live and private school attendance.

Two key goals—a desire for integrated schools and respect for local governmental autonomy—collided when it came to school desegregation. In *Milliken*, the Court preferenced local autonomy over a school district’s (Detroit’s) desire to increase student integration levels.¹¹⁰ Respondents in *Milliken* claimed the Detroit public school system engaged in racial segregation flowing from both official policies and the actions of state and city officials.¹¹¹

105. COLEMAN, *supra* note 12, at 22.

106. *See, e.g.*, Boger, *supra* note 100, at 1414–21.

107. *Id.* at 1414.

108. 418 U.S. 717 (1974) (preferencing local school district autonomy over urban districts’ desire for intradistrict desegregation remedies).

109. 268 U.S. 510 (1925) (holding that while a state may compel education, it cannot compel public education).

110. *See Milliken*, 418 U.S. at 741–42.

111. *Id.* at 717.

Respondents sought the creation of a single, nonracial school district in the greater-Detroit area as well as the implementation of a more general plan to curb segregation.¹¹² Even though the Detroit school system was the only named school district, the district court's order involved fifty-three of eighty-five suburban school districts,¹¹³ and the court of appeals largely affirmed.¹¹⁴ The Supreme Court reversed, however, noting that independent suburban school districts—not found to have engaged in the segregative conduct—could not be forced to participate in a legal remedy designed to address the segregative activities of the Detroit public school district.¹¹⁵ One practical consequence of the *Milliken* decision was that family decisions about where to live are insulated from school districts' desires to manipulate student assignment policies in a manner that increases integration levels.¹¹⁶ As a result, policymakers' efforts to carefully craft diverse school populations are necessarily exposed to private family decisions, regardless of the decisions' motivations, about, for example, whether to move from urban to suburban areas.

Even families districted into undesirable public schools and lacking the ability or desire to leave retain options that can frustrate policymakers' efforts to increase urban public school integration levels. One such option is for a family to remain in an urban area but exit the urban public school for non-public educational alternatives. Although the exercise of such an option directly implicates urban school demographics, this familial option also benefits from constitutional protection. In *Pierce*, two private schools sought injunctive relief against an Oregon law that held parents criminally liable for failing to send their children to public school.¹¹⁷ Famously proclaiming "the child is not the mere creature of the State,"¹¹⁸ the Supreme Court fashioned an equitable remedy by mandating an exception under the Oregon statute for children receiving private educational instruction,¹¹⁹ thereby protecting a family's right to

112. *Id.*

113. *See id.* at 733.

114. *See id.* at 735–36. Note that the court of appeals vacated the district court's order mandating the purchase of school buses to be used in the desegregation process. *See id.* at 736.

115. *See id.* at 749.

116. *Id.* at 759–60.

117. *See Pierce v. Soc'y of Sisters*, 268 U.S. 510, 530 (1925). Note that certain exceptions were included in the original law, specifically for children with mental disabilities, those who had completed the eighth grade, or those who lived excessively far from the respective public school. *Id.* at 530–31.

118. *Id.* at 535.

119. *See id.* at 536.

pursue non-public school options. Thus, just as *Milliken* insulates families' decisions about where to live, the *Pierce* decision insulates families' decisions about whether to exit public schools for non-public school options from the reach of public school student assignment policies.¹²⁰

Efforts to manage a school's racial composition, prompted by *Brown*, quickly ran into practical limitations that enjoy constitutional protection. If confronted with an undesirable public school assignment, families with the economic ability to do so could elect to attend a private school or move into a more desirable public school district that remained outside of the reach of desegregation remedies. Indeed, many families did just that and, by so doing, frustrated efforts to increase public school integration levels.¹²¹

Practical factors limiting school integration notwithstanding, the *Brown* decision nonetheless succeeded on many important dimensions. Indeed, *Brown* endures today as one of the Court's most important decisions. Although few contest the *Brown* decision's overall importance and its success in eliminating de jure school segregation, few would argue that the decision and the decades of litigation it stimulated resulted in integrated schools, particularly in the nation's urban centers. Numerous scholarly accounts delve into reasons for school desegregation litigation's failure to provide students attending many urban public schools with a racially integrated educational experience.¹²² Popular reasons include the structure of the *Brown* decision itself,¹²³ significant residential white flight from the nation's cities to surrounding suburbs,¹²⁴ and federal courts' evolving interpretation of school desegregation doctrines.¹²⁵ While the precise reason or set of reasons may never be known with

120. See *id.* at 535–36.

121. ARMOR, *supra* note 96, at 174–80 (discussing white flight from urban areas to suburbs); JEFFREY R. HENIG, RETHINKING SCHOOL CHOICE: LIMITS OF THE MARKET METAPHOR 104–06 (1994) (describing the “segregation academies” that arose in response to the *Brown* decision).

122. See, e.g., Boger, *supra* note 100, at (assessing resegregation in North Carolina).

123. See *Alexander v. Holmes County Bd. of Educ.*, 396 U.S. 1218, 1219 (1969) (arguing that the turbulent history of the desegregation agenda exposed “all deliberate speed” as little more than “a soft euphemism for delay”); Jim Chen, *With All Deliberate Speed: Brown II and Desegregation's Children*, 24 LAW & INEQ. 1, 3 (2006) (arguing that the “‘all deliberate speed’ formula enabled public school districts in the South to delay desegregation for more than a decade”).

124. See generally ARMOR, *supra* note 96 (arguing that white flight impeded public school integration efforts in many urban public school systems).

125. Gary Orfield & David Thronson, *Dismantling Desegregation: Uncertain Gains, Unexpected Costs*, 42 EMORY L.J. 759, 761–65 (1996).

certainty, what is clear is that decades of school desegregation litigation failed to eradicate de facto school segregation.

B. School Finance

Unlike the federal court strategy deployed by school desegregation activists, school finance litigants pushed their legal claims in state rather than federal courts. After the Supreme Court's decision in *San Antonio Independent School District v. Rodriguez*¹²⁶ in 1973, holding that Texas's reliance on local property taxes and the resulting unequal distribution of school funds statewide did not violate the U.S. Constitution, school finance advocates turned their attention to state constitutions and state courts, where they have experienced mixed results.¹²⁷ Since 1974, litigants have challenged the finance schemes in over forty states, and nearly twenty state supreme courts declared their respective school funding programs unconstitutional.¹²⁸ Although much has been and could be said about these cases,¹²⁹ two aspects warrant emphasis. The first has to do with how school finance litigation theory evolved. The second is how the change in school finance litigation theory implicated many urban school districts.

An important, if subtle, theoretical shift helped define the initial two decades of school finance litigation. Prior to 1989, those challenging school finance systems generally sought to equalize resources among districts within a state and pursued an equity theory.¹³⁰ Since 1989, however, adequacy-based challenges have largely supplanted equality-based claims.¹³¹ In school finance adequacy lawsuits, litigants now contend *not* that all students are entitled to the same resources, but rather that all students should

126. 411 U.S. 1 (1973).

127. Up-to-date information on the status of school finance litigation in all fifty states is maintained by the ACCESS Project at <http://www.schoolfunding.info> (last visited Apr. 28, 2007). See also Liu, *supra* note 17, at 2046–47; James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 266–69 & nn.70–86 (1999).

128. For descriptions of, and citations to, some of the cases, see Ryan, *supra* note 127, at 266–69 & nn.70–86.

129. For a helpful overview of the cases and discussion of the commentary, see Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101, 185–94 (1995).

130. See *id.* at 121–40; Michael Heise, *State Constitutions, School Finance Litigation, and the "Third Wave": From Equity to Adequacy*, 68 TEMP. L. REV. 1151, 1152–53 (1995) (noting that equity-based school finance lawsuits sought to reduce per pupil spending differences among school districts).

131. See Ryan, *supra* note 127, at 268–69 (describing the shift in theories and pointing out that not all cases since 1989 have shifted from equity to adequacy claims).

receive the funds necessary to finance an adequate education.¹³² Where school finance equity theory generally sought per pupil spending equality across districts within a state, school finance adequacy theory seeks the level of per pupil spending necessary to generate desired student outcomes.

The shift from school finance equity to adequacy theory coincided with and contributed to the re-emergence of urban school districts in school finance reform movements¹³³ and an increase in the number and rate of successful challenges to state school finance systems.¹³⁴ As a consequence of (or in addition to) these factors, per pupil spending in many urban public school districts has improved. For example, six of the ten urban districts included in Table 5 now spend more than the median district in their state.

Table 5. Current Public School Per Pupil Expenditures (2000).

	(1) School District	(2) State
New York City	9,472	9,860
Los Angeles	6,740	5,893
Chicago	7,214	6,188
Dade City, FL	6,202	5,574
Broward City, FL	5,630	5,574
Clark City, NV	5,557	6,585
Houston	6,196	6,583
Philadelphia	6,388	6,827
Hillsborough City, FL	5,811	5,574
Detroit	8,494	6,529

Source: National Center for Education Statistics, U.S. Department of Education, Common Core of Data (CCD), "School District Finance Survey (Form F-33)," Fiscal Year 2000.

Note: (1) current expenditure per pupil by school district. (2) Median school district per pupil expenditure by state. All data are for fiscal year 2000 (or the 1999–2000 school year).

Indeed, the per pupil spending data presented in Table 5 do not reflect spending changes in New York incident to a recent school finance litigation decision. As in a growing number of states, school finance litigation in New York was highly contentious and persisted

132. *Id.*

133. For a discussion, see Michael Heise, *Equal Educational Opportunity, Hollow Victories, and the Demise of School Finance Equity Theory: An Empirical Perspective and Alternative Explanation*, 32 GA. L. REV. 543, 579–83 (1998); Heise, *supra* note 130, at 1172–74.

134. Ryan, *supra* note 127, at 269 (noting adequacy theory's enviable win rate).

for many years.¹³⁵ After finding that New York's school finance formula did not provide New York City schools with enough resources to deliver a constitutionally adequate education, New York's highest court imposed on state taxpayers, at a minimum, an additional \$1.93 billion for New York City's public schools.¹³⁶

Although Table 5 makes clear that the majority of the nation's largest urban districts now spend more than their respective state average, Table 5 obscures other probative comparisons, such as those involving urban districts and their neighboring suburban districts, as well as overall per pupil spending trends. By disaggregating per pupil spending for urban, urban "fringe" (or "inner-ring" suburban),¹³⁷ and rural school districts, Figure 1 presents a more nuanced, textured picture of school spending and illustrates two important points. First, similar to annual national average per pupil spending trends evidenced in Table 1, average per pupil spending in the nation's largest public school districts increased (if unevenly) in real dollars over time. Despite a visible drop between 1993 and 1996, student spending in large urban districts increased every year since 1996. Between 1992 and 2001, large district real spending increased by 17.9%. Second, at the comparative level, student spending in large urban districts either matched or, between 1992 and 1995 and since 1999, exceeded, per pupil spending in neighboring suburban schools.¹³⁸ Since 1992 urban school spending always exceeded per pupil spending in rural schools. On balance, from a per pupil spending perspective urban public schools do not appear to have been short-changed in a comparative sense during the final decade of the twentieth century. Urban public schools' financial picture comes into

135. For a recent summary of the school finance litigation in New York, see generally Bonnie A. Scherer, *Footing the Bill for a Sound Basic Education in New York City: The Implementation of Campaign for Fiscal Equity v. State*, 32 FORDHAM URB. L.J. 901 (2005).

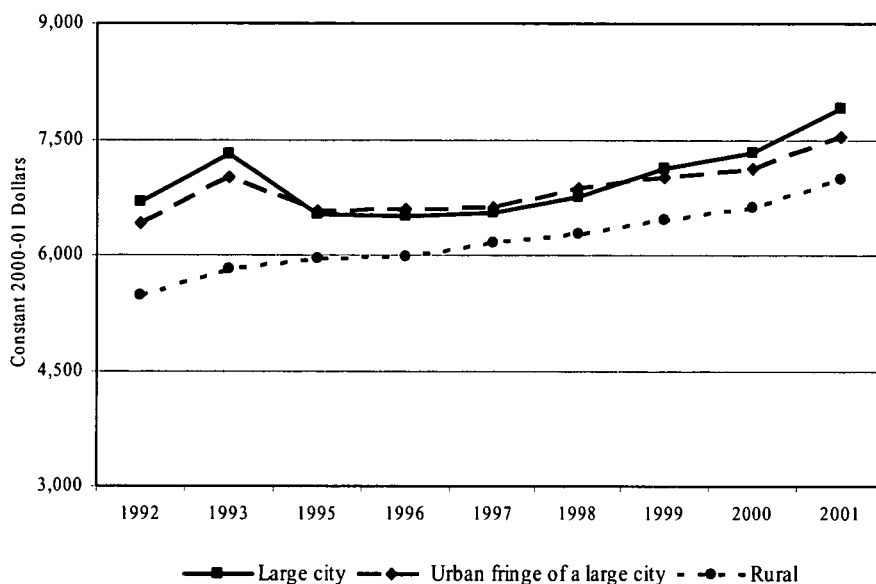
136. *Campaign for Fiscal Equity v. State*, 861 N.E.2d 50, 52 (N.Y. 2006).

137. In his extensive case study of school desegregation in Cleveland, Professor Henderson uses the term "inner-ring" suburbs to describe those suburbs that border Cleveland and its school district. In this context, the terms "urban fringe" and "inner-ring suburbs" should be construed as rough equivalents. See William D. Henderson, *Demography and Desegregation in the Cleveland Public Schools: Toward a Comprehensive Theory of Educational Failure and Success*, 26 N.Y.U. REV. L. & SOC. CHANGE 457, 514 (2001) (describing Cleveland's inner-ring suburbs).

138. See NAT'L CTR. FOR EDUC., DISPARITIES IN PUBLIC SCHOOL DISTRICT SPENDING, 1989-1990, app. at A1-E7 (1995); see also Heise, *supra* note 130, at 1173 tbl.1. When per pupil spending is indexed by cost and need deflators, urban spending levels remain above suburban levels, but below rural spending. *Id.*

even greater focus when juxtaposed with their students' academic performance.¹³⁹

Figure 1. Current Public School District Per Pupil Expenditures by Location (1992–2001).¹⁴⁰



Source: National Center for Education Statistics, U.S. Department of Education, Common Core of Data (CCD), "Public School District Universe Survey," 1991–92, 1992–93, and 1994–95 to 2000–01 and "Public School District Financial Survey," 1991–92, 1992–93, and 1994–95 to 2000–01.

Note: Expenditures expressed in constant 2001–01 dollars.

To be sure, similar to school desegregation litigation, school finance litigation has not succeeded in every instance. Moreover, even some of the successful school finance lawsuits failed to generate the desired per pupil spending increases.¹⁴¹ Explanations for the

139. See *infra* Part III.C.

140. Data for this figure was originally compiled by Marcus A. Winters. See Marcus A. Winters, *Savage Exaggerations: Worshipping the Cosmology of Jonathan Kozol*, 6 EDUC. NEXT 71, 74 fig.1 (Spring 2006).

141. See, e.g., Kirk Vandersall, *Post-Brown School Reform*, in STRATEGIES FOR SCHOOL EQUITY 11, 17–18 (Marilyn J. Gittell ed., 1998) (discussing studies indicating little improvement in school funding equity during the 1980s despite successful school finance litigation).

inefficacy of even successful school finance lawsuits are not hard to fathom. To equalize school funding lawmakers confront one of two basic options: raise all districts to the level of the highest-spending ones, or bring all districts down to a specified level and essentially cap any spending beyond that level. The first option is financially impractical in most states.¹⁴² The second option, while financially possible, is so controversial that it is politically infeasible in most areas.¹⁴³ Despite difficulties, those partial toward reforming schools and districts through litigation can point to greater success in the school finance than in the de facto desegregation area.

Ironically, while school finance litigation contributed to a rise in per pupil spending in large urban districts between 1992 and 2001, this result generated a dilemma for urban schools. Successful school finance adequacy lawsuits typically prompted judicial calls for increased school spending designed, in theory, to make “inadequate” schools adequate.¹⁴⁴ As Figure 1 suggests, many large urban school districts already outspend their suburban and rural counterparts. Despite benefiting from comparatively higher per pupil spending, however, many large public urban schools and their students continue to struggle academically.¹⁴⁵ The juxtaposition between large urban public school spending and student performance brings critical questions about the complex relation between school resources and student performance—a key component in school finance litigation—into sharp relief.

142. See Enrich, *supra* note 129, at 156 (noting that “bringing all districts up to the spending or service level of the top districts would be prohibitively expensive in most states”); Thomas Vitullo-Martin, *Charter Schools and Tax Reform in Michigan*, in STRATEGIES FOR SCHOOL EQUITY, *supra* note 141, at 115, 121–22 (calculating that it would cost Michigan an additional \$7 billion in state aid, which would double state spending, to bring all districts up to the level of the wealthiest districts).

143. For a discussion of the political difficulties raised by limiting spending or redistributing locally raised revenues, see Enrich, *supra* note 129, at 157–59; Margaret E. Goertz, *Steady Work: The Courts and Reform in New Jersey*, in STRATEGIES FOR SCHOOL EQUITY, *supra* note 141, at 101, 111–13; Molly S. McUsic, *The Law's Role in the Distribution of Education: The Promises and Pitfalls of School Finance Litigation*, in LAW AND SCHOOL REFORM 88, 108–15 (Jay P. Heubert ed., 1999).

144. See, e.g., *Campaign for Fiscal Equity v. State*, 861 N.E.2d 50, 52 (N.Y. 2006) (directing approximately \$1.93 billion in additional state funds to New York City public schools).

145. See *infra* Part III.C.

C. *The Complex Relations Among Spending, Student Achievement, and School Adequacy*

Two critical assumptions underpin most school finance lawsuits. One assumption is that school quality (or, in today's school finance lexicon, school "adequacy") is best understood in terms of student academic achievement.¹⁴⁶ A second assumption is that student academic achievement is a function of per pupil spending.¹⁴⁷ Such assumptions are necessary to legal arguments seeking as a remedy increased resources for inadequate schools. Courts that accept these pivotal assumptions presume causal simplicity and clarity where reality is anything but simple and clear. If anything, debates over whether money "matters," at least as it relates to student academic achievement, are noted for their technical complexities and endurance.¹⁴⁸ As well, explanations for and theories on why some students perform well and others perform poorly is endlessly debated in the literature.¹⁴⁹

Two major early studies, both by Professor Coleman, sparked the public debate about the relation between school spending and student achievement. In 1966, Coleman (and colleagues) released a large and controversial report on the nation's schools, which

146. See, e.g., Henry M. Levin, *Educational Vouchers: Effectiveness, Choice, and Costs*, 17 J. POL'Y ANALYSIS & MGMT. 373, 374 (1998) ("Because student achievement is considered to be a universal goal of schools, it has become the sine qua non for evaluating school reforms.").

147. Although most school finance lawsuits incorporate this assumption, the validity of the assumption remains the subject of intense scrutiny. For a summary of the relevant research, see KAHLENBERG, *supra* note 71, at 86–90.

148. For articles generally skeptical of a correlation between educational spending and educational opportunity, see, for example, HANUSHEK ET AL., *supra* note 29; ALLAN R. ODDEN & LAWRENCE O. PICUS, SCHOOL FINANCE: A POLICY PERSPECTIVE 277–81 (1992); Clayton P. Gillette, *Opting Out of Public Provision*, 73 DENV. U. L. REV. 1185, 1213–14 (1996); Eric A. Hanushek, *The Impact of Differential Expenditures on School Performance*, EDUC. RESEARCHER, May 1989, at 45; Eric A. Hanushek, *Money Might Matter Somewhere: A Response to Hedges, Laine, and Greenwald*, EDUC. RESEARCHER, May 1994, at 5; Eric A. Hanushek, *Throwing Money at Schools*, 1 J. POL'Y ANALYSIS & MGMT. 19 (1981); Eric A. Hanushek, *When School Finance "Reform" May Not Be Good Policy*, 28 HARV. J. ON LEGIS. 423 (1991). For articles generally supportive of a correlation between expenditures and educational opportunity, see Christopher F. Edley, Jr., *Lawyers and Education Reform*, 28 HARV. J. ON LEGIS. 293 (1991); Ronald F. Ferguson, *Paying for Public Education: New Evidence on How and Why Money Matters*, 28 HARV. J. ON LEGIS. 465 (1991); Larry V. Hedges et al., *Does Money Matter? A Meta-Analysis of Studies of the Effects of Differential School Inputs on Student Outcomes*, EDUC. RESEARCHER, April 1994, at 5.

149. See, e.g., COLEMAN, *supra* note 12, at 304 (emphasizing the influence of family background on student academic achievement). Scores of subsequent studies have confirmed Coleman's conclusion. For citations to the literature, see KAHLENBERG, *supra* note 71, at 26–28; Ryan, *supra* note 127, at 287 n.167.

emphasized the influence of a student's family and the socioeconomic status of a student's classmates on academic achievement.¹⁵⁰ The researchers found that, from the perspective of influencing student academic achievement, school spending mattered very little and that a student's socioeconomic status mattered a great deal.¹⁵¹ Although questions about the complex relations between school spending and student academic achievement remain hotly contested,¹⁵² numerous subsequent studies found that "the social composition of the student body is more highly related to achievement, independent of the student's own social background, than is any other school factor."¹⁵³ Notably, education commentators of every political stripe acknowledge the robustness and consistency of these findings.¹⁵⁴ Simply put, "[i]f there is one thing that is more related to a child's academic achievement than coming from a poor household, it is going to school with children from other poor households."¹⁵⁵

In addition to exploring the larger question of whether money "matters" in terms of student achievement, scholars have compared results from schools that spend different amounts on similar types of students. Again, research by Professor Coleman resides at the heart of this ongoing debate.¹⁵⁶ Professor Coleman (and colleagues) published the first major quantitative study exploring differences in student achievement between public and private (principally Catholic) schools and found that students in private schools performed slightly better, after controlling for student race and socioeconomic background.¹⁵⁷ What makes the comparison especially

150. See COLEMAN, *supra* note 12, at 298–305.

151. See *id.* at 21–22, 296–97, 312–16.

152. See *supra* notes 148–49 and accompanying text.

153. James S. Coleman, *Toward Open Schools*, 9 PUB. INT. 20, 20–21 (1967) (summarizing findings of Coleman report). For discussion of the numerous studies confirming this point, see KAHLENBERG, *supra* note 71, at 26–28.

154. See Chester E. Finn, Jr., *Education That Works: Make the Schools Compete*, HARV. BUS. REV., Sept.–Oct. 1987, at 64, 64 (acknowledging that "disadvantaged children [tend] to learn more when they attend[] school with middle-class youngsters"); KAHLENBERG, *supra* note 71, at 37 (stating that "money is not the only issue that determines inequality. A more important factor, I am convinced, is the makeup of the student enrollment, who is sitting next to you in class" (quoting interview by Ted Koppel with Jonathan Kozol, *Nightline* (ABC television broadcast Sept. 17, 1992))).

155. Trine Tsouderos, *Kids in City's Poor Schools Get Worse Scores*, TENNESSEAN (Nashville), Dec. 27, 1998, at A2 (quoting James Guthrie).

156. For a helpful summary of Professor Coleman's thirty-five years of research in the education policy area, see generally Richard D. Kahlenberg, *Learning from James Coleman*, 144 PUB. INT. 54 (2001).

157. See JAMES S. COLEMAN ET AL., *HIGH SCHOOL ACHIEVEMENT: PUBLIC, CATHOLIC, AND PRIVATE SCHOOLS COMPARED* 137–51 & tbls.6 & 7 (1982).

important for the school finance debate in general and urban public school reform in particular is that many of the higher-performing inner-city private schools (chiefly, but not exclusively, parochial schools) spent *less* on a per pupil basis than their urban public school counterparts.¹⁵⁸ Such a finding calls into some question predicate assumptions supporting many school finance lawsuits.

IV. IMPLICATIONS FOR LITIGATION'S EFFICACY PROMOTING URBAN PUBLIC SCHOOL REFORM

The difficulty experienced by past efforts to improve urban public schools frames the degree of difficulty confronting future efforts, including litigation-based reform endeavors. Writing in 1974, education historian David Tyack noted that "[t]he (urban education) reform scene today is a kaleidoscopic confusion of contending interests, of different assessments of need, of rhetorical panaceas and jarring hopelessness."¹⁵⁹ More recently, Professor Martha Minow observed that education reforms arrive "fast and furiously," and that "schools are littered with the carcasses of partially or wholly abandoned school reforms."¹⁶⁰ Indeed, the pace and seeming (perceived or real) inefficacy of school reform efforts gives currency to many policymakers' plea that "reforming school reform" is necessary.¹⁶¹

A glance at the two broad litigation pushes in the past one-half century in the education context—school desegregation and finance—reveals that the efficacy of such reform-minded litigation, admittedly construed in narrow practical terms, is mixed. Viewed from the perspective of improving school integration levels, successive decades of school desegregation litigation did not generate the sought-after results.¹⁶² Moreover, whatever gains may have been achieved continue to dissipate over time.¹⁶³ Although the school finance litigation movement can point to a greater number of individual successes, its overall record also varied.¹⁶⁴ Recent research suggests that while successful school finance litigation may have led to

158. Thomas C. Berg, *Anti-Catholicism and Modern Church-State Relations*, 33 LOY. U. CHI. L.J. 121, 165 (2001).

159. TYACK, *supra* note 15, at 289.

160. Minow, *supra* note 15, at 259.

161. *Id.* at 260.

162. Heise, *supra* note 1, at 2424–30.

163. See ORFIELD & YUN, *supra* note 99, at 3 (arguing that desegregation gains have dissipated over time).

164. Ryan, *supra* note 127, at 266–72.

reductions in state spending inequality, whether the successful lawsuits generated unique increases in total per pupil education spending was unclear.¹⁶⁵

From the incomplete evidence provided by experiences with school desegregation and finance litigation, what can we properly infer about the current and future desires to improve student and school academic performance in urban public schools through litigation? Although a clear answer eludes, three distinct, though related, questions immediately arise. First, has the equal educational opportunity doctrine evolved in a manner that increases or decreases the probability of successful urban public school reform through litigation? Second, in what manner (if any) do factors that distinguish urban public schools from their non-urban counterparts inform whether successful reform litigation will achieve its goals? Third, is the current policy drive to make urban (indeed, all) schools “adequate” and enhance student academic achievement amenable to litigation?

A. Evolving Understandings of Equal Educational Opportunity and Its Distribution

Changes in how the equal educational opportunity doctrine is understood make the task for future litigants seeking to enhance evolving notions of opportunity for students attending urban public schools far more challenging. Where past and present reform efforts focused on inputs—race and resources—future reform efforts will continue to focus on student achievement. The critical variables that inform student academic achievement are invariably complex and interacting. Some of these variables are located deep inside the classroom; others are found outside of the school altogether. In both instances the variables are located in areas difficult for litigation and court opinions to reach.

Student academic achievement—never far from the center of most school reform efforts—took on increased importance with the recent passage of the No Child Left Behind Act.¹⁶⁶ Indeed, if there were any lingering doubts about the salience of student academic achievement’s role in how we assess the distribution of educational

165. See generally Christopher Berry, *The Impact of School Finance Judgments on State Fiscal Policy*, in *SCHOOL MONEY TRIALS: THE LEGAL PURSUIT OF EDUCATIONAL ADEQUACY* 213 (Martin R. West & Paul E. Peterson eds., 2007) (noting an uncertain link between successful school finance litigation and increased per pupil spending).

166. Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified at 20 U.S.C. §§ 6301-6578 (Supp. II 2002)).

opportunity, NCLB effectively erased them. Building on the state-launched “standards and assessments” movement that has defined much of education policy since the mid-1980s,¹⁶⁷ NCLB emphasizes standardized test outcomes as the basic metric in assessing student and school performance.¹⁶⁸ Although normative aspects of this development remain hotly debated,¹⁶⁹ testing’s importance for education policy purposes is generally acknowledged. As a consequence, much of current education policy and reform now pivot around standardized test results.¹⁷⁰

Partly owing to actual consequences flowing from NCLB, its unmistakable focus on standardized test scores, and questions associated with implementation costs, NCLB stimulated push-back on two visible fronts. First, many critics lament NCLB’s heavy emphasis on testing, the inevitable increase in standardized “high-stakes” tests, the centrality of standardized test instruments, and the related (and inevitable) tug to “teaching to the test.”¹⁷¹

Second, other NCLB criticism reflects concerns about costs associated with NCLB along with related federalism misgivings.¹⁷² These concerns and misgivings prompted at least two formal legal attacks on the constitutional integrity of NCLB itself.¹⁷³ Interestingly, the most significant litigation surrounding NCLB thus far has featured federalism issues.¹⁷⁴ In *School District of Pontiac v. Spellings*,¹⁷⁵ the National Education Association (the nation’s largest teachers’ union) and several Michigan public school districts sued the U.S. Department of Education and asserted that NCLB was an

167. See generally DIANE RAVITCH, NATIONAL STANDARDS IN AMERICAN EDUCATION: A CITIZEN’S GUIDE (1995) (discussing the development of and debate over academic achievement in American education).

168. Liebman & Sabel, *supra* note 70, at 284–85.

169. See, e.g., Richard F. Elmore, *Testing Trap*, HARV. MAG., Sept.–Oct. 2002, at 35, 97 (describing some successful school districts’ ambivalence to increased use of standardized tests).

170. Ryan, *supra* note 63, at 944.

171. See, e.g., Elmore, *supra* note 169, at 97 (noting various consequences to school districts’ increased reliance on standardized tests); Ryan, *supra* note 63, at 933 (same).

172. See generally Heise, *supra* note 26 (discussing NCLB’s federalism dimensions).

173. See *Sch. Dist. of Pontiac v. Spellings*, No. CIV.A.05-CV-71535-D, 2005 WL 3149545, at *2 (E.D. Mich. Nov. 23, 2005) (asserting that NCLB violates the Spending Clause of the U.S. Constitution); Complaint at 3–4, *Connecticut v. Spellings*, 453 F. Supp. 2d 459 (D. Conn. 2005) (No. 3:05CVI330), available at <http://www.state.ct.us/sde/nclb/important-press/StateofCTv.SpellingsNCLBComplaint8-22-05.pdf> (arguing that NCLB is an unfunded mandate).

174. See generally Heise, *supra* note 26 (assessing the debate over and constitutionality of NCLB).

175. No. CIV.A.05-CV-71535-D, 2005 WL 3149545 (E.D. Mich. Nov. 23, 2005).

unconstitutional unfunded mandate.¹⁷⁶ In their request for legal relief, the plaintiffs sought unfettered discretion over how they spend federal education dollars.¹⁷⁷ Similarly, in *Connecticut v. Spellings*,¹⁷⁸ the State of Connecticut sued the federal government for implementing NCLB claiming it was an unfunded mandate and that the Department of Education unjustly denied Connecticut's NCLB waiver applications.¹⁷⁹

To be sure, the federalism realignment owing to NCLB is substantial and, as a consequence, some level of state and local resistance was inevitable. Moreover, as a policy matter whether NCLB represents positive movement remains hotly contested.¹⁸⁰ As a formal legal matter, however, the Act safely navigates through constitutional doctrine and does not violate Congress's conditional spending power.¹⁸¹ Indeed, in *Spellings* the district court granted the federal government's motion to dismiss.¹⁸²

Many factors contribute to the equal educational opportunity doctrine's evolution. Since the mid-1980s and, more dramatically, the implementation of NCLB, educational opportunity (and adequacy) increasingly has been construed in terms of the distribution of student academic achievement.¹⁸³ As a result, education policy (for better or worse) and related school reform efforts will orient around and seek to improve school and student academic performance. Unfortunately, much about what variables influence student achievement remains unknown. Such uncertainty complicates policymakers' efforts to improve student achievement. If such a task is complicated for policymakers, notwithstanding their access to more

176. *Id.* at *2.

177. *Id.*

178. 453 F. Supp. 2d 459 (D. Conn. 2005).

179. *Id.* at 464–66.

180. Compare Charles Murray, *Acid Tests*, WALL ST. J., July 25, 2006, at A12 (arguing that NCLB is “uninformative” and has failed to raise test scores), with Sandy Kress, *Scores Prove That Students Are Making Significant Progress*, DALLAS MORNING NEWS, Aug. 13, 2006, at P4 (arguing that “the gains since 2000 have been of historic proportions”).

181. See Heise, *supra* note 26, at 135–44.

182. *Spellings*, 2005 WL 3149545, at *5. The district court concluded as a matter of law that even if NCLB required states to spend state funds to comply with NCLB, Congress (though not an “officer or employee of” the federal government) possesses such authority under its conditional spending authority. *Id.* at *4 (quoting 20 U.S.C. § 7907(a) (Supp. II 2002)). The Connecticut lawsuit remains pending. Robert A. Frahm, *Commission Gets No-Child Earful*, HARTFORD COURANT, May 10, 2006, at B1, available at 2006 WLNR 8002607.

183. See generally Michael Heise, *Equal Educational Opportunity by the Numbers: The Warren Court's Empirical Legacy*, 59 WASH. & LEE L. REV. 1309 (2002) (observing that the equal educational opportunity doctrine is increasingly cast in empirical terms).

appropriate reform tools and resources and presumptively greater familiarity with the substantive terrain, the task is even more difficult for litigators seeking similar results though limited to formal legal institutions and lawsuits. An already difficult task becomes even more so when the goal is to improve student achievement in urban public school districts where the obstacles to improvement are particularly challenging.

B. Urban Public School Districts' Special Challenges

Reform endeavoring to improve student academic achievement is a difficult task under the best of circumstances. Efforts that involve lawsuits are even more difficult owing to litigation's special limitations. Adding the urban public school context to the mix increases the degree of difficulty even further. This increased difficulty for urban public schools flows from numerous sources. One source of difficulty is that student academic achievement involves an array of complicated and interacting variables, including teaching and learning, as well as delicate school and non-school relations that are essential to the learning process.¹⁸⁴ Another source is that litigation's inherently adversarial structure may necessarily strain relations between and among the critical parties needed to cooperatively contribute to a student's academic development.¹⁸⁵ A third source flows from the structure of the public education market—specifically, its unionized teacher force.¹⁸⁶ Although many of the factors that make it difficult for urban public schools are also present in non-urban settings, size and scale differences that frequently distinguish urban and non-urban districts make these shared factors especially troublesome for urban districts.¹⁸⁷

1. Nature and Location of Critical Variables Necessary for Reform

The nature and location of variables critical to improving student performance increase the challenge for reform litigation. Unlike such variables as a school's racial composition or per pupil spending—both

184. See, e.g., COLEMAN, *supra* note 12, at 290–94; Boger, *supra* note 100, at 1415.

185. See, e.g., Campaign for Fiscal Equity v. State, 861 N.E.2d 50, 52 (N.Y. 2006) (directing approximately \$1.93 billion in additional state funds to New York City public schools).

186. See Brian P. Marron, *Promoting Racial Equality Through Equal Educational Opportunity: The Case for Progressive School Choice*, 2002 BYU EDUC. & L.J. 53, 97.

187. See Wilbur C. Rich, *Putting Black Kids into a Trick Bag: Anatomizing the Inner-City Public School Reform*, 8 MICH. J. RACE & L. 159, 181–83 (2002) (describing teacher union efforts to impede various school reform initiatives in large cities).

plausibly manipulable by policymakers—variables central to efforts to increase academic achievement are located deeper *inside* schools and classrooms and, as such, further away from the reach of lawsuits and court decisions. The resilience of such variables in the face of successful litigation underscores their underlying complexity, non-legal components, and, more generally, the structural limitations of law and litigation as tools to achieve desired policy goals. To an even greater degree than for school desegregation or finance, courts and lawsuits seem ill-equipped to shoulder this task.

Aside from location, another challenge posed by variables found deep within schools and classrooms is that “what goes on within schools and classrooms involves educational considerations as well as legal ones.”¹⁸⁸ Whether a particular school or classroom practice is discriminatory in a formal legal sense increasingly pivots on what educators deem to be necessary or desirable. As litigation seeks to penetrate deeper into educational processes one consequence has been a “convergence of legal standards and educational norms.”¹⁸⁹

Efforts to use litigation to influence educational practices incident to the learning processes by converging legal standards and educational norms overestimate litigation’s capabilities. The relevant educational practices often involve teacher and student interactions and expectations. Just as litigation is not well equipped to penetrate deeply into often nuanced classroom interactions, litigation is similarly not well suited to influence such delicate teacher-student and student-student relations and interactions.

Even more potentially devastating to reform litigation seeking to improve academic achievement is the likelihood that some of the salient variables are *not* located inside the school—but, rather, are found inside a student’s home, peer group, and community.¹⁹⁰ To the extent that such variables as familial interactions (or lack thereof), poverty, diet, and home stability are among the set of variables that influence student achievement and are not surmountable by whatever positive influence a school can muster, then an already difficult litigation task becomes virtually impossible. Insofar as even successful litigation often finds it difficult to influence complex social institutions like schools and school systems, the level of difficulty confronting efforts to make a student’s home environment more

188. Jay P. Heubert, *Six Law-Driven School Reforms: Developments, Lessons, and Prospects*, in *LAW AND SCHOOL REFORM* 1, 16 (Jay P. Heubert ed., 1999).

189. *Id.* at 17.

190. See COLEMAN, *supra* note 12, at 290–94; Kahlenberg, *supra* note 156, at 55–58.

amenable to academic achievement simply asks far too much from our legal system and litigation. In addition to a stable and nurturing home life, student academic achievement benefits from healthy personal relations among students, parents, and teachers. These relations are frequently delicate, fraught with nuance, and highly individualistic. To think they can endure the litigation process without damage is naive, at best. To assume otherwise simply invites failure.

2. Litigation's Adversarial Structure

Litigation's adversarial structure also works to undermine the purported goals of reform litigation. Litigation's structure relies upon the parties' adversity of competing interests. The inherently adversarial posture, necessary for legal processes, however, frequently (but not necessarily) spills over into non-legal interactions among interested parties. When it does, it jeopardizes collaboration among educators, lawyers, researchers, and parents. When collaboration is compromised, it is "difficult to use the law to advance important educational aims."¹⁹¹

The adversarial posture often persists after lawsuits end. Court orders, consent decrees, and judicial decisions that influence conduct into the future can distort behaviors among parties who need to work together to deliver quality educational services to schoolchildren. As Professor Jay Heubert notes, court orders and consent decrees can hamstring educators for decades and dramatically reduce their professional discretion and operational flexibility involving critical school policy issues.¹⁹² Such matters can also trigger other significant costs as well. The staff time necessary to implement and oversee lingering legal issues imposes opportunity costs on staff that could be otherwise deployed. This is especially true for urban public school districts, many of whom spend "significant portions of their time and money attempting to comply with multiple court orders or consent decrees on such issues as special education, bilingual education, and desegregation."¹⁹³

School desegregation illustrates how litigation's adversarial structure can frustrate efforts seeking to implement education reforms in unanticipated ways. As Judge David Tatel notes, while desegregation remedies tend to exert a "centralizing" force on a

191. Heubert, *supra* note 188, at 7.

192. *Id.*

193. *Id.*

school district, school reform efforts since the 1980s tend to emphasize decentralization.¹⁹⁴ Thus, the very centralized rigidity often necessary to help ensure that minority students receive educational services that they would not have otherwise obtained¹⁹⁵ works against experiments and reforms that, while consistent with the litigation's broader goals, require more decentralized authority and decisionmaking.¹⁹⁶

3. Unionization

Although almost all public schools operate in a unionized environment, unionization in the larger urban districts poses particularly thorny problems. The beginning of the 2006–07 school year was marked in the national press by teacher strikes involving two of the nation's largest urban school districts, Detroit, Michigan, and Gary, Indiana.¹⁹⁷ The teacher strike in Detroit lasted sixteen days and delayed the start of school for approximately 130,000 schoolchildren.¹⁹⁸ The teacher strike in Gary, Indiana, delayed the start of school for approximately 16,000 students by almost two weeks.¹⁹⁹

Setting aside the particular issues involved in both strikes, that labor disputes plagued two of the nation's most struggling school districts in terms of student achievement was, if nothing else, tragically ironic. The strike in Gary was especially troubling because for the 2005–06 school year Gary schools ranked last in Indiana in terms of student test scores.²⁰⁰ A similar point could be made about Detroit's public schools.²⁰¹

194. See David S. Tatel, *Desegregation Versus School Reform: Resolving the Conflict*, 4 STAN. L. & POL'Y REV. 61, 64 (1993).

195. Heubert, *supra* note 188, at 7.

196. Tatel, *supra* note 194, at 65–66 (noting the irony of denying students attending schools governed by consent decrees access to promising school reforms).

197. Chastity Pratt et al., *Mayor Helps Broker Deal Between Detroit Teachers, Administration*, DETROIT FREE PRESS, Sept. 12, 2006, at A1, available at 2006 WLNR 15844480; Lolly Bowean, *Gary Teachers Accept Contract, End Strike*, CHI. TRIB., Sept. 2, 2006, at 17.

198. See Pratt et al., *supra* note 197.

199. See Bowean, *supra* note 197.

200. Lolly Bowean, *Letter Warns Gary Teachers: Health Care at Risk as Strike Continues*, CHI. TRIB., Aug. 30, 2006, at C2 (noting that the Gary public school system "ranks last in the state in test scores").

201. See Alicia M. Sikkenga, *Detroit School Reform: A Necessary Means To Improve the Schools and End the Cycle of Mismanagement*, 77 U. DET. MERCY L. REV. 321, 322–23 (2000) (summarizing recent indicia of Detroit student academic performance).

In addition to union activity involving work stoppages, the union footprint on urban public schools is unmistakable, and it can further complicate the already difficult task of reforming schools. Teacher unions' influence and their vested interest in the educational status quo often impede school reform processes and efforts.²⁰² Scholars have gone as far as to refer to teachers' unions, along with powerful administrators and school activists, as both "public school cartel[s]"²⁰³ and "institutional obstacles to change."²⁰⁴ While such resistance to reform is logical, especially when one considers that teachers' livelihoods depend upon the stagnant functioning of the current educational system,²⁰⁵ teachers' unions have had a profound impact on school reform. Specifically, educational reform in the areas of school vouchers²⁰⁶ and the Edison Project initiative, which permits the private management of underperforming schools,²⁰⁷ have been significantly hamstrung by the efforts of teachers' unions.

Various aspects of teacher unions can dilute school reform efforts, such as collective bargaining agreements, which can run into the hundreds of pages in length and govern school life at truly remarkable levels of operational detail, and frequently severely limit what reform-minded building principals can even attempt to accomplish.²⁰⁸ The contract between the Board of Education of New York City and the United Federation of Teachers, for example, exceeds 200 pages and has a "substantial impact on the way education is conducted in New York City,"²⁰⁹ the nation's largest public school district, which serves more than one million children.

Although all agree that teacher unions influence education in important ways, questions persist about whether unionization and collective bargaining agreements have helped or harmed public schools. On the one hand, teacher union proponents argue that

202. See Marron, *supra* note 186, at 97.

203. See Rich, *supra* note 187, at 181.

204. See Dan Guttman, *Governance by Contract: Constitutional Visions; Time for Reflection and Choice*, 33 PUB. CONT. L.J. 321, 329 (2003-04) (internal quotations omitted).

205. See Susan L. DeJarnatt, *The Philadelphia Story: The Rhetoric of School Reform*, 72 UMKC L. REV. 949, 967 n.116 (2004).

206. See Charles Fried, *Five to Four: Reflections on the School Voucher Case*, 116 HARV. L. REV. 163, 168 n.21 (2002) (citing TERRY M. MOE, SCHOOLS, VOUCHERS, AND THE AMERICAN PUBLIC 26 (2001)).

207. See Marron, *supra* note 186, at 98.

208. See, e.g., Dale Ballou, *Contractual Constraints on School Management: Principals' Perspectives on the Teacher Contract*, in CITY SCHOOLS: LESSONS FROM NEW YORK 89, 89 (Diane Ravitch & Joseph P. Viteritti eds., 2000).

209. *Id.*

unions help ensure fair treatment of teachers and forestall “autocratic administrators and misguided school boards.”²¹⁰ On the other hand, union critics argue that unionization has impeded education reform, reduced administrative flexibility, and diminished accountability.²¹¹

Rather than debate the merits of collective bargaining generally, a focus on whether and, if so, how unionization influences education reform, especially in struggling urban school districts, warrants attention. To the extent that teachers and other service providers remain central to the delivery of education services, collective bargaining agreements that structure the resolution of such issues as teacher assignments, discipline, evaluation, salary, and dismissal underscore unionization’s importance. Perhaps owing to the sheer size of many urban school districts and the relation between union activity and urbanicity, the numerous unions involved in urban districts are likely to be more experienced, better organized, and more politically influential than their counterparts operating in non-urban settings. If so, one likely result is that the unions’ footprint and influence in urban schools is comparatively larger. To the extent that union collective bargaining agreements reduce school reformers’ latitude, they necessarily work against school reformers seeking to improve urban public schools.²¹²

C. *The Current Litigation Drive Toward Educational Adequacy*

When educational adequacy replaced equity as the dominant school finance litigation theory, urban school districts rejoined the litigation movement.²¹³ School finance lawsuits advancing an equity theory sought to close gaps in education spending between low- and high-spending districts and dominated much of the activity during the 1970s and 1980s.²¹⁴

Over time, however, urban districts lost their appetite for equity lawsuits even while they continued to struggle mightily with

210. *Id.* at 90.

211. *Id.*

212. See generally Terry M. Moe, *Reform Blockers*, EDUC. NEXT, Spring 2003, at 56 (arguing that a major factor in the lack of true educational reform is the fact that teachers have a vested interest in maintaining the status quo); Rich, *supra* note 186, at 181 (noting that any school reform, however innocuous, is viewed as a direct attack on teacher interests, including those gained through collective bargaining).

213. See Heise, *supra* note 130, at 1172–76.

214. See Martin R. West & Paul E. Peterson, *The Adequacy Lawsuit: A Critical Appraisal*, in SCHOOL MONEY TRIALS: THE LEGAL PURSUIT OF EDUCATIONAL ADEQUACY 1, 4–8 (Martin R. West & Paul E. Peterson eds., 2007) (describing the evolution of the adequacy lawsuit).

delivering basic educational services. Many urban districts realized that despite the obvious challenges they confront in serving their students, gaps in educational spending with non-urban districts are not among the problems. As Tables 5 and 6 illustrate, in many states urban public school systems benefit from spending levels that exceed state averages and per pupil spending by neighboring suburban and rural districts. As a result, in a successful equity school finance lawsuit urban public school districts stood to lose or, at best, not gain additional resources.

Unlike equity theory that sought to close spending gaps between high- and low-income school districts, adequacy-based lawsuits challenge state school finance systems not because some school districts benefit from a greater level of resources than another, but because the quality of education in some districts is inadequate. Having re-trajected school finance litigation to pursue an adequacy theory, one critical step remained. Specifically, courts were left with the vexingly difficult task of defining educational “adequacy.” The emergence of standards and assessments beginning in the 1980s²¹⁵ and policymakers’ current preoccupation with student academic performance²¹⁶ help explain why courts frequently resort to achievement indicators in assessing school adequacy claims.

The combination of defining school “adequacy” in terms of student academic performance and school finance lawsuits invariably asking for additional resources to make constitutionally “inadequate” schools “adequate” generates a dilemma for many urban public school districts. The dilemma arises because of the uncertainty of the relation between school spending and student academic performance and, as well, the jarring juxtaposition between some of the nation’s highest-spending urban public districts and their students’ academic performance.²¹⁷ Current school finance litigation theory offers little in terms of a limiting principle. It is one thing to say that more spending is needed to assist struggling urban public districts improve their students’ academic performance. It is another thing entirely to say, however, that the amount of spending necessary is whatever amount is necessary to generate the desired student outcomes. If the

215. For a discussion, see CHESTER E. FINN, JR., *WE MUST TAKE CHARGE: OUR SCHOOLS AND OUR FUTURE* 35–70 (1991); DIANE RAVITCH, *LEFT BACK: A CENTURY OF FAILED SCHOOL REFORMS* 408–52 (2000).

216. See *supra* Part I.B.

217. Compare CASSERLY, *supra* note 5, at iv–vii (offering data on urban school students’ academic performance) with fig.1, *supra* (offering data on urban public school district per pupil spending).

assumed relation between school spending and student performance does not hold (and it is anything but clear), the legal remedy simply does not speak to the desired outcome. Moreover, such a legal remedy risks triggering its own unintended consequences.²¹⁸

CONCLUSION

Two critical factors distinguish many urban schools from their non-urban counterparts: student achievement and per pupil spending. In too many instances urban public schools, especially those serving minority students from low-income households, academically underperform lower-spending counterparts. At the same time, too many students attending urban public schools confront significant obstacles that impede their ability to learn. Some of these obstacles are found in their schools; others are located elsewhere. The obstacles' varied locations make it increasingly difficult for successful litigation to address the obstacles. These are among the dynamics that distinguish urban public schools in ways that will likely diminish the potential for reform litigation to achieve sought-after results.

That litigation efforts seeking to improve student outcomes in urban public schools might not succeed is not an indictment of the legal system. Nor should it shake one's belief in litigation's ability to influence and assist certain reforms in certain contexts. Rather than pessimism, a more appropriate inference is simply that litigation as an instrument of social change is not without limits, structural and otherwise.

The observation that litigation is not without critical institutional limits finds support in the legal impact literature. This literature benefits from a robust discussion prompted by Professor Gerald Rosenberg's question: "To what degree, and under what conditions, can judicial processes be used to produce political and social change?"²¹⁹ While Rosenberg concludes that courts can influence policy change only when non-judicial actors support such a change²²⁰ and notes that "U.S. courts can *almost never* be effective producers of significant social reform,"²²¹ a softer form of Rosenberg's thesis—that

218. See generally Michael Heise, *The Courts, Educational Policy, and Unintended Consequences*, 11 CORNELL J.L. & PUB. POL'Y 633 (2002) (discussing various unintended consequences of recent school finance litigation).

219. GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 1 (1991).

220. See *id.* at 30–36.

221. *Id.* at 338.

courts, under certain conditions and with certain issues, can produce social and political change, but not nearly as much as many people seem to think²²²—would not surprise those current in the political science, legal impact, and constitutional theory literatures.²²³

To harbor doubts about the likely efficacy of litigation efforts seeking to improve student performance in the nation's urban public schools is not to submit to pessimism, however. After all, litigation efforts designed to overcome segregation and exclusions have met with success. The *Brown* decision helped unleash a civil rights revolution and ended state-sponsored school segregation. Similarly, both *Mills v. Board of Education*²²⁴ and *Pennsylvania Association for Retarded Children v. Commonwealth*²²⁵ combined to greatly enhance the educational lives of disabled schoolchildren, a group long ignored by public school systems. Finally, in *Lau v. Nichols*²²⁶ the Supreme Court expanded access to the promise of greater educational opportunity to non-English-speaking students.

That the ability of any particular lawsuit to achieve all of its desired reform goals is limited should surprise only the truly naïve. The school desegregation and finance litigation movements share a faith in the ability of lawsuits to influence social change. Has history proved this faith misplaced? Historical judgment on such a question is invariably incomplete and necessarily reliant upon what one selects as the baseline point of reference. Moreover, even if an obvious baseline exists and appropriate metrics for assessment are available, the efficacy of school reform litigation is likely to be uneven across heterogeneous public school contexts. Because the urban public school context is among those less likely to respond to such reform, litigation reformers should look to other policy instruments and institutions as well.

Moreover, despite an overall record of mixed success, it is inevitable (and, perhaps, desirable) that litigation will continue to contribute to a larger, enduring push to enhance equal educational

222. *Id.* at 342–43 (noting that courts “rarely . . . can make a difference”).

223. See, e.g., ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 1–14 (1962) (noting that the judiciary by institutional design plays a limited policymaking role); DONALD L. HOROWITZ, *THE COURTS AND SOCIAL POLICY* 4–21, 255–98 (1977) (assessing the efficacy of judicial activity in various policy sectors); Robert A. Dahl, *Decision-Making in a Democracy: The Role of the Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 *passim*. (1957) (arguing that the judiciary fulfills an important and legitimate public policymaking role).

224. 348 F. Supp. 866 (D.D.C. 1972).

225. 343 F. Supp. 279 (E.D. Pa. 1972); 334 F. Supp. 1257 (E.D. Pa. 1971).

226. 414 U.S. 563 (1974).

opportunity. Indeed, "many of the most controversial educational issues of the late 1990s are already in court, and that, for better or worse, is where many of them will be resolved."²²⁷ Framing all critical educational issues into formal litigation, however, does not itself guarantee success. Consequently, reformers seeking to improve urban public schools would be wise to look to additional institutions to carry out their much-needed and critically important work.

227. Heubert, *supra* note 188, at 4.