

BEYOND DOLLARS?
THE PROMISES AND PITFALLS OF THE NEXT
GENERATION OF EDUCATIONAL RIGHTS LITIGATION

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With recent rejections of plaintiff challenges in Colorado, Texas, and California, and continued battles over implementation of court orders in Kansas and Washington, state court judges may be sounding a cautious note on the limitations of the almost half-century-old educational finance reform litigation movement. Undeterred, advocates for economically disadvantaged schoolchildren have not abandoned the judiciary as an institution for advancing educational rights and equality of educational opportunity. Rather, they have begun to retool their strategies to make their claims more palatable to a wary judiciary by targeting specific educational resource deprivations and advancing promising educational interventions on the one hand, or challenging the regulatory and policy barriers to greater family choice and administrative discretion on the other. This Essay examines these new litigation strategies and explains why plaintiffs might feel that these more targeted lawsuits will receive a better reception in the courts. But there is more going on here than legal strategy. This “next generation” of educational rights litigation is also a manifestation of the political and policy rift in the education policy arena between those who blame poor student performance on systemic failure to provide students with equitable and adequate resources and those who emphasize the inefficiency of state, local, and collectively bargained policies that stifle administrative discretion and family choice. Armed with hotly contested social science research on both sides, advocates are asking the courts to dive deep into some of the most difficult ideological and empirical educational reform questions of today. This Essay will highlight several of these “next-generation” cases in order to demonstrate how the policy divide is spilling into the courts and to caution advocates and courts alike on the risks of narrow understandings of the causes of educational failure and how to address it. This Essay also calls for pragmatic expectations for the next generation and continued attention to educational finance adequacy and equity.

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INTRODUCTION

There can be no doubt that the Supreme Court in *Brown v. Board of Education*¹ sought to combat racial inequality and segregation. And yet, in one of the most celebrated passages in the *Brown* opinion, the terms “race” and “segregation” are conspicuously absent:

In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.²

1. 347 U.S. 483 (1954).

2. *Id.* at 493.

In other words, *Brown* is also about education—education as a civil right. No such civil right existed until Judge Constance Baker Motley and her colleagues at the Legal Defense Fund established it and defended it in the face of massive resistance. This Essay honors Judge Motley’s legacy.

Since then, the content and contours of the right to an education have remained far from static—the right continues to evolve as education becomes even more important for individual success and our collective well-being; our educational institutions and pedagogy become more complex; and our recognition of the role that litigation and courts play in securing equality of educational opportunity becomes more nuanced. From the abolition of state-sponsored segregation to racial desegregation as remedy; from the provision of school access for students with disabilities to integration with nondisabled peers of even those with serious emotional or cognitive disabilities; and from the equitable funding of schools across district lines to the provision of funding sufficient to ensure an adequate education, Judge Motley’s legacy of educational rights continues to evolve.

This Essay both takes stock and looks to the future of modern educational rights litigation with a focus on educational finance litigation, litigation aimed at enhancing the equity and adequacy of school funding. That future, what this Essay labels the “next generation” of education rights litigation, is emerging on parallel tracks. The first track continues to focus on the deprivation of educational resources as the fundamental violation of students’ rights and proclaims that it is still the money—or at least the things that money can buy—that matters. The second track, meanwhile, takes aim at legislative, regulatory, and collectively bargained policies that some claim stifle administrative discretion and family choice, arguing that there is plenty of money, it is just being spent poorly.

Part I of this Essay provides a brief description of the history of educational finance litigation, which established the foundation for current educational rights strategies. Though still chugging along, the modern “adequacy” finance litigation appears to be stagnating. With the recent rejections of plaintiff challenges in Colorado, Texas, and California, and continued battles over implementation of court orders in Kansas and Washington, state court judges may be signaling their weariness with and the limitations of the quarter-century-old adequacy litigation movement.³ Highlighting a recent rejection of a plaintiff challenge in California and the ongoing struggle to implement judicial orders in Washington, this Essay argues that state courts appear to be approaching educational finance litigation with increased caution, an eye toward the perceived efficacy of their work, and greater concern over the prospect of a constitutional quagmire vis-à-vis recalcitrant state legislatures.

3. See *infra* section I.B.

Undeterred, advocates for economically disadvantaged schoolchildren have not abandoned the judiciary as an institution for advancing educational rights. To the contrary, Part II argues that advocates have begun to retool their strategies to make their claims more palatable to a wary judiciary by either targeting discrete resource deprivations and advancing promising educational interventions or challenging the regulatory and policy barriers to greater student choice and administrative discretion. In the great majority of these cases, plaintiffs are relying on tread-worn state constitutional hooks found in the education articles of state constitutions, but refraining from arguing that money (or at least money alone) is the cause of the educational harm. The theory behind these claims is that more targeted lawsuits will receive a better reception in the courts. Because the targets of reform (e.g., certain “anti-opportunity” policies in Connecticut⁴) and the scope of the litigations (e.g., teacher turnover in a handful of Los Angeles schools due to teacher layoff rules⁵) are more discrete and judicially manageable than complicated school finance regimes, and because the educational wrongs are so vivid that liability may be easier to demonstrate (e.g., denial of the basic right to “literacy” in Detroit⁶), plaintiffs are hoping that the courts will see that they are capable of playing an effective role in reforming schools and educational policy.

But there is more at play here than legal strategy. Part III argues that this next generation of educational rights litigation also highlights the ideological and policy rift in modern education policy between those who blame flagging student performance on schools’ failure to provide students with equitable and adequate resources and those who emphasize the inefficiency of state, local, and collectively bargained policies that stifle administrative discretion and family choice. Armed with hotly contested social science research on both sides, advocates are asking the courts to dive deep into some of the most difficult ideological and empirical educational reform questions of today. Against that backdrop of political divisiveness and empirical uncertainty, this Essay sounds a note of caution to advocates and courts alike on the potential unintended consequences of narrow understandings of the causes of educational failure and how to address it. But that does not mean the next generation of litigation should be abandoned before it takes hold. To the contrary, with appropriate modesty and recognition that both tracks are

4. See Complaint at 4, *Martinez v. Malloy*, No. 3:16-cv-01439 (D. Conn. Aug. 23, 2016), <http://studentsmatter.org/wp-content/uploads/2016/08/Martinez-v-Malloy-Complaint.pdf> [<http://perma.cc/98NP-QQE7>].

5. See Second Amended Complaint for Injunctive and Declaratory Relief at 1, *Reed v. State*, No. BC432420 (Cal. Super. Ct. Feb. 24, 2010) [hereinafter *Reed* Second Amended Complaint] (on file with the *Columbia Law Review*).

6. See Class Action Complaint at 21, *Gary B. v. Snyder*, No. 16-CV-13292 (E.D. Mich. filed Sept. 13, 2016) [hereinafter *Gary B. Class Action Complaint*], <http://www.publiccounsel.org/tools/assets/files/0812.pdf> [<http://perma.cc/KQ7Y-3BNB>].

aimed at the same destination, a remedial strategy may emerge that seeks both equitable and adequate resources, while requiring modest reform to ensure that those resources are wisely deployed. Money still matters, as does reform.

I. EDUCATIONAL FINANCE REFORM LITIGATION: THE RIGHT TO EQUAL AND ADEQUATE EDUCATIONAL DOLLARS

For some forty-five years, courts have played a significant role in shaping educational finance policy. Seizing upon arcane and often indeterminate state constitutional language, state supreme courts have invalidated the educational finance schemes of state legislatures and ordered them to reform those systems in accordance with constitutional strictures.⁷ Through 2016, school finance lawsuits had reached the highest court in forty-four states, with challengers prevailing or achieving mixed results in all but eighteen cases.⁸ Although early litigation focused on the development of the right to equal per-pupil funding, or at least a school finance scheme not dependent upon local property wealth, more recent litigation has sought to define qualitatively the substantive education to which children are constitutionally entitled. Section I.A briefly explores the history of educational finance reform litigation from the battle for funding equity to the modern litigation aimed at ensuring that all schools are adequately funded. Section I.B then suggests that the modern adequacy litigation has begun to stagnate as some courts' remedial orders have been stymied by recalcitrant legislatures, while other courts have declined to intervene in educational finance policy by deferring to state legislative prerogative. To better understand this judicial wariness, section I.B considers in detail the ongoing implementation struggle between the court and the legislature in Washington as well as the California Supreme Court's refusal to strike down the State's educational finance scheme.

A. *Educational Finance Reform Litigation: A Brief History*

Though ill-fitting at best, scholars have employed a "wave" metaphor to describe the history of educational finance reform litigation,⁹ so this

7. See generally Michael A. Rebell, *Courts and Kids: Pursuing Educational Equity Through the State Courts* (2009) (explaining how and why state courts came to take an active role in education reform); William S. Koski, *Of Fuzzy Standards and Institutional Constraints: A Re-Examination of the Jurisprudential History of Educational Finance Reform Litigation*, 43 *Santa Clara L. Rev.* 1185, 1186 (2003) [hereinafter Koski, *Fuzzy Standards*] (examining "the jurisprudential history of educational finance reform litigation, focusing on the role of legal doctrine and theory in state supreme court decision-making").

8. See *SchoolFunding.Info*, <http://schoolfunding.info/> [<http://perma.cc/LVZ4-YPK7>] (last visited Aug. 7, 2017).

9. See, e.g., Michael Heise, *State Constitutions, School Finance Litigation, and the "Third Wave": From Equity to Adequacy*, 68 *Temp. L. Rev.* 1151, 1152–53 (1995); William

Essay sticks with that convention. This section discusses in turn each of the three waves of reform litigation.

1. *The First Wave: Federal Equal Protection Litigation (1970–1973)*. — Launched in the late 1960s, educational finance litigation initially focused on the federal Constitution’s Equal Protection Clause and the theory that “per-student funding should be substantially equal or at least not dependent upon the wealth of the school district in which the student resided.”¹⁰ After enjoying initial success in at least two federal district courts¹¹ and the California Supreme Court in *Serrano v. Priest* (*Serrano I*),¹² the federal equal protection theory was quashed by the U.S. Supreme Court in *San Antonio Independent School District v. Rodriguez*.¹³

At issue in *Rodriguez* was Texas’s system of educational finance, which relied almost exclusively on local property tax wealth and resulted in local school districts receiving radically unequal levels of education funding.¹⁴ The question before the Court was whether such a system violated the federal Equal Protection Clause. More specifically, the Court was tasked with deciding whether poor children in poor school districts formed a suspect classification and whether education was a fundamental interest under the federal Constitution such that strict scrutiny analysis would apply to the Texas school funding scheme.¹⁵ Finding neither a suspect classification in children who lived in property-poor school districts nor a fundamental interest in education, a 5-4 majority of the Court

E. Thro, *Judicial Analysis During the Third Wave of School Finance Litigation: The Massachusetts Decision as a Model*, 35 B.C. L. Rev. 597, 598 (1994). For a critique of the “wave” metaphor, see Koski, *Fuzzy Standards*, supra note 7, at 1264.

10. See Koski, *Fuzzy Standards*, supra note 7, at 1188.

11. *Rodriguez v. San Antonio Indep. Sch. Dist.*, 337 F. Supp. 280 (W.D. Tex. 1971), rev’d, 411 U.S. 1 (1973); *Van Dusartz v. Hatfield*, 334 F. Supp. 870 (D. Minn. 1971).

12. 487 P.2d 1241 (Cal. 1971), aff’d, 557 P.2d 929 (Cal. 1976). *Serrano I* is widely recognized as the case all equity litigations thereafter sought to emulate. In *Serrano I*, the California Supreme Court considered the now-infamous discrepancy in funding between the Baldwin Park and Beverly Hills school districts. Id. at 1247–48. In 1968–1969, Beverly Hills enjoyed a per-pupil assessed valuation of \$50,885, while the largely minority Baldwin Park suffered a \$3,706 valuation. Id. at 1248. These disparities were naturally reflected in per-pupil expenditures: Beverly Hills lavished \$1,231.72 on each of its students, whereas Baldwin Park could afford to spend only \$577.49 per student. Id. This difference prevailed in spite of the fact that Baldwin Park taxed itself more aggressively than Beverly Hills. Id. at 1250. Based on the federal Equal Protection Clause, the California Supreme Court found that education was a “fundamental right” and poverty a “suspect classification.” Id. at 1261. Therefore, judicial “strict scrutiny” should apply. California could provide no compelling state interest for the local property-tax-based finance system nor demonstrate that the system was narrowly tailored to achieve the State’s interests. Id. at 1263. Although the court found the funding system unconstitutional under the federal Constitution, the court would later reconsider the matter and again find the State’s funding scheme unconstitutional under the state constitution. *Serrano v. Priest* (*Serrano II*), 557 P.2d at 957–58.

13. 411 U.S. 1.

14. Id. at 10–17.

15. Id. at 28–29, 37–38.

applied the “rational relationship” test to Texas’s school finance plan and held that the State’s interest in local control over education easily supported the school funding scheme, unequal though it was.¹⁶ Though the Court left open the door to a federal constitutional claim against a state policy that deprived children of some basic floor of educational opportunity,¹⁷ *Rodriguez* effectively shut the door on federal school finance litigation under the U.S. Constitution. However, two recently filed lawsuits aim to pry that door open.¹⁸

2. *The Second Wave: State “Equity” Litigation (1973–1989)*. — Undeterred and seeking to capitalize on the federalist structure of the judicial system, school finance reformers turned to state constitutions as sources of educational rights and finance reform. Only thirteen days after the Supreme Court handed down *Rodriguez*, the New Jersey Supreme Court in *Robinson v. Cahill* ushered in the second wave of school finance cases with its willingness to find actionable educational rights in state constitutions.¹⁹ Although the *Robinson* Court based its decision solely on the state’s education article, which imposed on the state legislature a duty to provide a “thorough and efficient” education to the state’s children, the critical aspect of the case was the court’s newfound reliance on state constitutional arguments.²⁰ Thereafter, most state high courts relied heavily on their state education article, at times employing it in conjunction with the state’s constitutional equality provision, when finding the state’s school spending scheme unconstitutional.²¹

The essence of the claim in second-wave cases was the unconstitutional inequity of school funding schemes.²² Specifically, plaintiffs primarily sought to achieve either horizontal equity among school districts, such that per-pupil revenues were roughly equalized by the state, or fiscal

16. *Id.* at 54–55.

17. *Id.* at 37. The *Rodriguez* court explained its reasoning as follows:

Whatever merit appellees’ argument might have if a State’s financing system occasioned an absolute denial of educational opportunities to any of its children, that argument provides no basis for finding an interference with fundamental rights where . . . no charge fairly could be made that the system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.

Id.

18. See *infra* section II.A.

19. 303 A.2d 273, 282 (N.J. 1973).

20. See *id.* at 291.

21. See, e.g., *Dupree v. Alma Sch. Dist. No. 30*, 651 S.W.2d 90, 93 (Ark. 1983) (noting the education article reinforced the holding that the funding system was unconstitutional under the equality provision); *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71, 104 (Wash. 1978) (en banc) (finding the State’s school finance system unconstitutional under the state’s education article); *Washakie Cty. Sch. Dist. No. One v. Herschler*, 606 P.2d 310, 337 (Wyo. 1980) (bolstering the state’s equality provision with the state’s education article to find the funding system unconstitutional).

22. See Koski, *Fuzzy Standards*, *supra* note 7, at 1187–90.

neutrality, such that the revenues available to a school district would not depend solely on the property wealth of a particular school district. Unfortunately for plaintiffs in second-wave cases, the courts were mostly unreceptive to their claims: Plaintiffs prevailed in only seven of the twenty-two final decisions in second-wave cases.²³ Notwithstanding the win-loss record of the second wave of litigation, research suggests that in those states where the court struck down the school finance system, per-student spending across districts became more equal and targeted to less wealthy school districts.²⁴ However, there is no reliable evidence that the lawsuits improved or equalized students' educational outcomes.²⁵

3. *The Third Wave: State "Adequacy" Litigation (1989–Present)*. — The third wave of educational finance litigation was launched in 1989 when the Kentucky Supreme Court found in the education article of its state constitution not an entitlement to educational equity, but rather an entitlement to a defined level of educational quality.²⁶ Interpreting its state constitution's "thorough and efficient" education clause, the Kentucky Supreme Court held that the state legislature must fund and provide its students with an adequate education, defined as one that instills in its beneficiaries certain capabilities, including, for example, sufficient oral and written communication skills to enable them to function in a complex and rapidly changing society.²⁷

"Adequacy" as a distributional principle differs from "equity" or "equality of educational opportunity."²⁸ An adequate education is understood to mean a specific qualitative level of educational resources or, focusing on outcomes, a specific level of resources required to achieve certain educational outcomes based on external and fixed standards.²⁹

23. *Id.* at 1189.

24. See, e.g., William N. Evans et al., *The Impact of Court-Mandated School Finance Reform*, in *Equity and Adequacy in Education Finance: Issues and Perspectives* 72, 74–77 (Helen F. Ladd et al. eds., 1999) (concluding in part that "court-mandated education finance reform can decrease within-state inequality significantly"); Sheila E. Murray et al., *Education-Finance Reform and the Distribution of Education Resources*, 88 *Am. Econ. Rev.* 789, 790 (1998) ("We find that court-mandated reform of school-finance systems reduces within-state inequality in spending by 19 to 34 percent.").

25. Some have argued that increased equity came at the expense of limiting overall growth in educational spending or reducing the state's educational spending compared to other states. See Evans et al., *supra* note 24, at 74–75 (noting California has achieved finance equity through leveling down high revenue districts). Others have concluded that educational spending in the wake of a successful challenge to the school finance scheme increased school funding. See G. Alan Hickrod et al., *The Effect of Constitutional Litigation on Education Finance: A Preliminary Analysis*, 18 *J. Educ. Fin.* 180, 184–89 (1992).

26. *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 205–13 (Ky. 1989).

27. *Id.* at 212.

28. See generally William S. Koski & Rob Reich, *When "Adequate" Isn't: The Retreat from Equity in Educational Law and Policy and Why It Matters*, 56 *Emory L.J.* 545 (2007) (critiquing the shift in the United States from "equity" to "adequacy" educational finance litigation).

29. *Id.* at 552.

Unlike equity or equality, adequacy is a measure that does not compare the educational resources or outcomes of students with each other; rather, it looks only to some minimally required level of resources for all students.³⁰ Notably, the very same education articles that supported equity claims in the second wave have been and continue to be used to deploy adequacy claims in the third wave of litigation.³¹

Considering the modest success rate of equity litigation, there are several reasons to believe that the move from equity to adequacy may have reflected strategic necessity. First, by relying solely upon education provisions of state constitutions, adequacy theories would seem less likely to create spillover effects in other areas of public policy. Changing the black letter law of equal protection might invalidate not only locally financed education, but all other locally funded government services as well—an approach that courts were unprepared to engage in during the second wave. Second, adequacy arguments seem to flow naturally from the language of education articles, which generally require that the legislature provide a “thorough and efficient,”³² “uniform,”³³ or even “high quality”³⁴ education to its children. The court need not bend the language of these provisions beyond recognition nor search for elusive “fundamental rights” and “suspect classes” in order to reach the adequacy standard. Third, a standard that relies on absolute rather than relative levels of educational opportunity seems likely, at least in theory, to avoid the ire of the state’s political and economic elite. A constitutional floor of adequacy permits local districts to provide their children more than what the court deems an “adequate” education. Similarly, an adequacy standard seems to intrude less upon the value of local control. The decisionmaking authority of well-to-do districts need not be diminished simply because of a court order to the state that a poor school district be provided resources. Finally, at least upon initial examination, the adequacy standard appears to enjoy a conceptual clarity that equality of educational opportunity lacks. Nettlesome concerns about input versus outcome equity and vertical versus horizontal equity are avoided.³⁵ All the legislature needs to do is define what constitutes an adequate education and provide districts with the resources and conditions necessary to deliver that level of education.

30. *Id.* at 552–53.

31. See, e.g., William H. Clune, *The Shift from Equity to Adequacy in School Finance*, 8 *Educ. Pol’y* 376, 377 (1994).

32. See, e.g., N.J. Const. art. VIII, § 4, cl. 1 (“The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools . . .”).

33. See, e.g., Wis. Const. art. X, § 3 (“The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable.”).

34. See, e.g., Ill. Const. art. X, § 1 (“The State shall provide for an efficient system of high quality public educational institutions and services.”).

35. For a discussion of the various concepts and measurements of equity in school finance, see generally Robert Berne & Leanna Stiefel, *The Measurement of Equity in School Finance* (1984).

Moreover, at least since the late 1990s, the adequacy movement has also enjoyed a boost in state legislatures from the push toward standards-based reform and accountability, and in Congress through the landmark No Child Left Behind Act of 2001 (NCLB).³⁶ By establishing challenging educational content standards that define what all children should know and be able to do, standards-based reform aimed to raise the level of all children's achievement to what the State determines is "proficient" (read: "adequate"). Because these twenty-first-century educational standards are crafted and approved by executive agencies and legislative bodies, courts have looked—albeit tentatively—toward those standards when considering adequacy under state education articles. After all, as the argument goes, if the political branches have established what is an "adequate" education through their content standards, courts can hardly be accused of meddling with legislative prerogative. Although no state court has gone so far as to constitutionalize state educational standards, many judges have cited the failure of students to reach proficiency on state-mandated tests as evidence of educational inadequacy.³⁷

Whether at the point of identifying the substantive entitlement to an education (the skills and capacities all children should receive) or designing the appropriate remedy (costing out an adequate education based on student need or providing specific interventions and programs geared toward achieving the standards-based outcomes), court rulings in third-wave litigations began to compel policymakers to provide a substantive entitlement to an education, sometimes based on states' own expected educational outcomes. In sum, the modern adequacy movement had,

36. Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified as amended in scattered titles of the U.S.C.); see also Rebell, *supra* note 7, at 17–20.

37. See, e.g., *Idaho Schs. for Equal Educ. Opportunity v. Evans*, 850 P.2d 724, 734–35 (Idaho 1993) ("We believe that our acknowledgement of these [legislatively mandated academic] standards appropriately involves the other branches of state government while allowing the judiciary to hold fast to its independent duty of interpreting the constitution when and as required."); *Montoy v. Kansas*, 102 P.3d 1160, 1164 (Kan. 2005) (relying on the Kansas school accreditation standards, which incorporate student performance measures, in determining that the State's school funding scheme did not provide a constitutionally "suitable" education); *Unified Sch. Dist. No. 229 v. State*, 885 P.2d 1170, 1172 (Kan. 1994) (arguing that the court could fulfill its constitutional obligations to safeguard the "basic rights" of the people by utilizing the educational standards enunciated by the legislature); *Abbott ex rel. Abbott v. Burke (Abbott IV)*, 693 A.2d 417, 428 (N.J. 1997) (noting that state standards "spell out and explain the meaning of a constitutional education"); *Campaign for Fiscal Equity, Inc. v. State*, 801 N.E.2d 326, 332 (N.Y. 2003) (relying on the New York Regents' "Learning Standards" in finding that the State had not provided the constitutionally required "sound basic education"); *Leandro v. State*, 488 S.E.2d 249, 259 (N.C. 1997) (relying on "educational goals and standards adopted by the legislature" in determining "whether any of the state's children are being denied their right to a sound basic education").

for a time, and for a variety of reasons, much more success in the courts than the second wave of litigation.³⁸

B. Are the Courts Growing Weary and Wary of Intervening in School Finance Policy?

In the last eight years or so, courts appear to have grown more reluctant to intervene in educational finance policy and, as a result, third-wave adequacy litigations may be receding.³⁹ For instance, despite strong constitutional precedent and *Serrano's* recognition that education is a fundamental right in California, the California Supreme Court refused to hear plaintiffs' appeal from an appellate court decision that rejected a challenge to the sufficiency and rationality of the school finance system.⁴⁰ Similarly, citing separation of powers and justiciability concerns, high

38. Funding Court Decisions, SchoolFunding.Info, <http://schoolfunding.info/school-funding-court-decisions/> [<http://perma.cc/HZA6-QPQ4>] (last visited Aug. 8, 2017) (noting that while plaintiffs won only about one third of the equity litigations, "plaintiffs have won almost 60% of these 'adequacy' cases").

39. To be clear, I am not sounding the death knell of adequacy litigation. Nor does this Essay predict as much. Prediction is risky, as others have declared adequacy dead in the past only to see the continued viability of adequacy litigation in some state courts. See, e.g., Eric A. Hanushek & Alfred A. Lindseth, *Schoolhouses, Courthouses, and Statehouses 4* (2009) (arguing in 2009 that "in the last several years . . . courts [have] begun to take a more deferential attitude and to uphold appropriation levels set by state legislatures"); Eric A. Hanushek, Alfred A. Lindseth & Michael A. Rebell, *Forum: Many Schools Are Still Inadequate: Now What?*, *Educ. Next*, Fall 2009, at 49, 51 ("Although judicial remedies have played a significant role in school finance in the past, that era is drawing to a close."); see also John Dinan, *School Finance Litigation: The Third Wave Recedes*, in *From Schoolhouse to Courthouse: The Judiciary's Role in American Education* 96, 96 (Joshua M. Dunn & Martin West eds., 2009) ("Numerous state court rulings of the past several years indicate, however, that the school finance litigation movement may have peaked, in that many judges are now disinclined to undertake continuing supervision of school finance policies."). While there can be no doubt that the pace of plaintiff victories had slowed at the time, see Hanushek & Lindseth, *supra*, at 97–107, it was too early to discern any long-term trend in judicial willingness to participate in educational finance litigation and certainly too early to declare the demise of adequacy litigation. Indeed, as Michael Rebell has argued, the judiciary may have been in a period of cautious reflection in which it was contemplating what effective role it may play in reforming failing schools and school systems. In Rebell's words:

[T]here has been no diminution in the willingness of state supreme courts to issue strong rulings on students' basic constitutional right to an adequate education. What has changed in recent years is that more cases have reached the remedy stage and more courts are experiencing difficulty in seeing constitutional compliance through to a successful conclusion

In other words, the adequacy movement has matured, and the courts are now grappling with many of the same implementation and compliance issues that have stymied governors and legislatures for years. Hanushek, Lindseth & Rebell, *supra*, at 54. Indeed, what I'm calling the "next generation" of educational rights cases may be part of the maturation of the adequacy "movement."

40. See *infra* note 81 and accompanying text.

courts in Indiana and Missouri dismissed adequacy challenges.⁴¹ And, perhaps more discouraging to would-be plaintiffs, despite state supreme court precedent establishing the right to an adequate and equitable education in Colorado⁴² and Texas,⁴³ and despite factually detailed trial court judgments in plaintiffs' favor, the high courts on appeal in both states overturned those trial court decisions by reconsidering the evidence and declaring the state school finance systems constitutional. This section offers an explanation as to why the judiciary may be becoming weary and wary of traditional educational finance litigation, first by considering the Washington Supreme Court's ongoing struggle to get the state's legislature to act, and then by analyzing the California Supreme Court's refusal to involve itself with adequacy finance reform despite that same court's having previously been a leader in launching the equity-finance-reform litigation movement.

Both the Washington and California cases suggest that courts may be finding that the adequacy standard provides no more clarity than ineffable equity standards, despite the adoption of state educational content and performance standards. After all, state constitutions provide legislatures, and ultimately courts, little guidance as to what constitutes an adequate education. There is no agreed-upon list of public education goals (is the goal producing civic-minded democratic citizens, or productive contributors to the economy?). There is also no standard for the skills, competencies, and knowledge necessary to serve those goals of an adequate education, as the unraveling of the Common Core suggests. Finally, even if legislatures and courts were to craft such standards from

41. *Bonner ex rel. Bonner v. Daniels*, 907 N.E.2d 516, 518 (Ind. 2009); *Comm. for Educ. Equal. v. State*, 294 S.W.3d 477, 494–95 (Mo. 2009) (en banc).

42. In 2009, reversing a lower court decision, the Colorado Supreme Court held that the judiciary had “responsibility to review whether the actions of the legislature are consistent with its obligation to provide a thorough and uniform public school system.” *Lobato v. State*, 218 P.3d 358, 372 (Colo. 2009) (en banc). On remand, the trial court found that the State had not fulfilled that obligation, but when the case returned to the high court, it reversed and concluded that “[t]he public school financing system is rationally related to the ‘thorough and uniform’ mandate because it funds a system of free public schools that is of a quality marked by completeness, is comprehensive, and is consistent across the state.” *Lobato v. State*, 304 P.3d 1132, 1141 (Colo. 2013) (quoting Colo. Const. art IX, § 2).

43. In February 2013, a Texas trial court declared that the state's school finance system was unconstitutionally inefficient and inadequately funded, and that it created an ad valorem tax in violation of the Texas Constitution. Trial Order at *1–2, *Tex. Taxpayer & Student Fairness Coal. v. Williams*, No. D-1-GN-11-003130 (Tex. Dist. Ct. Feb. 4, 2013), 2013 WL 459357. On appeal in 2016, the Supreme Court of Texas reversed, declaring that the system was constitutional after all. *Morath v. Tex. Taxpayer & Student Fairness Coal.*, 490 S.W.3d 826, 833 (Tex. 2016). Despite recognizing that the trial court had made 1,508 findings of fact, the Supreme Court of Texas deferred instead to the state legislature: “But our judicial responsibility is not to second-guess or micromanage Texas education policy or to issue edicts from on high increasing financial inputs in hopes of increasing educational outputs.” *Id.*

whole cloth, how can one determine which resources will produce the desired outcomes for diverse student populations?

Beyond the problem of indeterminate standards, courts may also be deterred by the prospect of having reached their institutional limitations in the face of legislative recalcitrance. Nowhere has this been more evident than in the Washington litigation.⁴⁴ In Washington, contemporary educational finance reform litigation was slow to get off the ground. In 2006, a group of plaintiffs sued the State, seeking a declaratory judgment

44. Ohio's *DeRolph* and Kansas's *Gannon* educational finance reform sagas also provide cautionary tales. In Ohio, after repeatedly striking down the state's educational finance reform system and being rebuffed by the legislature (and potentially facing a constitutional crisis), the Ohio Supreme Court ultimately relinquished jurisdiction over the matter. See State ex rel. State v. Lewis (*DeRolph V*), 789 N.E.2d 195, 197–99 (Ohio 2003) (discussing the development of the case and its four past iterations). For the earlier cases in the saga, see generally *DeRolph v. State (DeRolph IV)*, 780 N.E.2d 529 (Ohio 2002); *DeRolph v. State (DeRolph III)*, 754 N.E.2d 1184 (Ohio 2001); *DeRolph v. State (DeRolph II)*, 728 N.E.2d 993 (Ohio 2000); *DeRolph v. State (DeRolph I)*, 677 N.E.2d 733 (Ohio 1997).

In Kansas, the legislature adopted the School District Finance and Quality Performance Act in 1992, 1992 Kan. Sess. Laws 1691, but it was challenged on adequacy grounds and, after five trips to the Kansas Supreme Court, the court finally found that the state legislature had brought the system into constitutional compliance. See *Montoy v. State (Montoy IV)*, 138 P.3d 755, 757–62 (Kan. 2006) (per curiam) (addressing the three prior *Montoy* cases precipitating the assessment of constitutional compliance). For the earlier cases here, see generally *Montoy v. State (Montoy III)*, 112 P.3d 923 (Kan. 2005) (per curiam); *Montoy v. State (Montoy II)*, 120 P.3d 306 (Kan. 2005) (per curiam); *Montoy v. State (Montoy I)*, 62 P.3d 228 (Kan. 2003).

In the midst of the Great Recession, however, Kansas school funding dropped significantly and a new lawsuit was filed challenging the adequacy and equity of the system, see Motion to Re-Open *Montoy v. State of Kansas* and Memorandum in Support at 2, *Montoy IV*, 138 P.3d 755 (No. 04-92032-S), <http://www.robblaw.com/PDFs/Motion-Memo-ReopenMontoy1-11-10asfiled.pdf> [<http://perma.cc/E7F3-W26T>]; Lori Yount, Kansas School Districts Move to Reopen Funding Lawsuit, Wichita Eagle (Jan. 12, 2010), <http://www.kansas.com/news/local/article1020459.html> [<http://perma.cc/5BMH-GDPY>], but it was rejected by the court on ripeness grounds. As a result, a group of school districts launched the *Gannon* litigation that resulted in the court declaring the finance system inequitable, threatening to shut down the schools in the face of legislative recalcitrance, and later finding the system inadequate. See generally *Gannon v. State (Gannon IV)*, 390 P.3d 461 (Kan. 2017) (per curiam); *Gannon v. State (Gannon III)*, 372 P.3d 1181 (Kan. 2016) (per curiam); *Gannon v. State (Gannon II)*, 368 P.3d 1024 (Kan. 2016); *Gannon v. State (Gannon I)*, 319 P.3d 1196 (Kan. 2014) (per curiam); see also John Eligon, Kansas Legislature Threatens Showdown with Court over School Financing, N.Y. Times (Oct. 8, 2013), <http://www.nytimes.com/2013/10/09/us/kansas-legislature-threatens-showdown-with-court-over-school-financing.html> (on file with the *Columbia Law Review*); Kansas Supreme Court Accepts Latest School Funding Changes, KSHB Kan. City (June 24, 2016), <http://www.kshb.com/news/state/kansas/gop-leaders-look-to-pass-schools-plan-in-kansas-legislature> (on file with the *Columbia Law Review*); Kansas Supreme Court Rules Latest School Funding Plan Unconstitutional, Kan. City Star (May 27, 2016), <http://www.kansascity.com/news/state/kansas/article80426327.html#storylink=cpy> [<http://perma.cc/4YDU-S5WB>].

that the financing scheme was unconstitutional.⁴⁵ The school system at issue allocated different teacher salary levels to each of the state's school districts, which plaintiffs claimed violated the provision of the state constitution requiring "a general and uniform system of public schools."⁴⁶ The Supreme Court of Washington disagreed, holding that the state constitution should not be interpreted to require uniform salaries.⁴⁷ In 2010, the Washington Supreme Court again declined to find that the funding scheme was unconstitutional in a suit regarding allotment for students with special needs.⁴⁸

Finally, in 2012 plaintiffs secured what initially seemed like a victory in *McCleary v. State*.⁴⁹ All nine justices on the Washington Supreme Court agreed that the legislature was not providing enough money to adequately fund the "basic education program" as defined in state statutes.⁵⁰ The court offered definitions of compliance and ordered a sweeping reform, although it left it to the legislature to implement a system that would be constitutional.⁵¹ The court resolved to maintain jurisdiction and monitor changes as proposed by the legislature.⁵² On July 18, 2012, the court then ordered that "[t]he State, through the Legislative Joint Select Committee on Article IX Litigation . . . shall file periodic reports in this case summarizing its action taken toward implementing the reforms . . . as directed by this court in *McCleary v. State*."⁵³

While the July 18, 2012 order seemed like another victory, this was again not the end of the story. The Washington state legislature repeatedly failed to provide concrete plans. Two years after the initial victory, the court held the legislature in contempt of court for failing to show a concrete plan implementing the requisite reforms.⁵⁴ In its contempt order, the court said it would give the legislature until the adjourn-

45. See *Fed. Way Sch. Dist. No. 210 v. State*, 219 P.3d 941, 941 (Wash. 2009) (en banc); Brief of Appellants at 17, *Fed. Way Sch. Dist. No. 210*, 219 P.3d 941 (No. 80943-7), 2008 WL 5484282.

46. *Fed. Way Sch. Dist. No. 210*, 219 P.3d at 943.

47. *Id.*

48. *Sch. Dists.' All. for Adequate Funding of Special Educ. v. State*, 244 P.3d 1, 2 (Wash. 2010) (holding "the existing funding mechanism for special education does not violate the Washington Constitution").

49. 269 P.3d 227, 261 (Wash. 2012) (en banc) (finding the State had "consistently provid[ed] school districts with a level of resources that falls short of the actual costs of the basic educational program").

50. *Id.*

51. *Id.* at 246–58, 261.

52. *Id.* at 261; see also Order from July 18, 2012 at 3, *McCleary*, 269 P.3d 227 (No. 84362-7), <http://www.courts.wa.gov/content/publicUpload/News/McCleary%20v.%20State%20order%207.18.12.pdf> [<http://perma.cc/SHT5JYCR>].

53. Order from July 18, 2012, *supra* note 52, at 2.

54. Order from Sept. 11, 2014 at 4, *McCleary*, 269 P.3d 227 (No. 84362-7), <http://www.scribd.com/doc/239448673/Court-order-on-McCleary-9-11-14> [<http://perma.cc/CZE8-Y2KD>].

ment of the 2015 legislative session to come up with a concrete plan, or it would impose sanctions.⁵⁵ The threat was still not enough to get the legislature to comply, and in August 2015, the court imposed fines of \$100,000 per day.⁵⁶ In May 2016, the legislature provided an annual report to the court, which the court deemed insufficient.⁵⁷ The court was encouraged that the monetary sanctions had at least incentivized the legislature to take some action, and so the court resolved to keep the monetary sanctions in place.⁵⁸ The court finally established a briefing schedule for determining compliance, and the State has until September 1, 2018 to implement its program for basic education.⁵⁹

It was against the backdrop of refusals to intervene in Missouri and Indiana, reversals in Texas and Colorado, and drawn-out battles in Washington and Kansas that the California Supreme Court refused to even entertain a challenge to the sufficiency and rationality of the state's school finance system. The outcome in California is notable and worthy of thorough discussion because the case demonstrates that, despite broad statewide support for improving the adequacy of school funding, favorable legal precedent, and strong evidence of student performance failure and lack of educational resources, courts may nevertheless decline to intervene, perhaps evincing their concerns about their own institutional efficacy.

In 2010, companion cases *Robles-Wong v. State* and *Campaign for Quality Education v. State* (*CQE*) were filed in California state court to challenge California's school finance system.⁶⁰ For the reasons that follow, the facts appeared to favor the plaintiffs who sought to have the state's school finance system declared unconstitutional: California, like most other states, was suffering from the fiscal effects of the Great Recession, but, even before the recession, plaintiffs alleged that cost-adjusted per-student funding in California ranked in the bottom five states (forty-seventh) in the country.⁶¹ As a consequence, California, which

55. *Id.* at 5.

56. Joseph O'Sullivan & Jim Brunner, School Funding Back on Table as Court Fines State \$100,000 a Day, *Seattle Times* (Aug. 13, 2015), <http://www.seattletimes.com/seattle-news/education/supreme-court-orders-100000-per-day-fines-in-mccleary-case/> [<http://perma.cc/G7B3-DJQJ>].

57. Order from Oct. 6, 2016 at 10, *McCleary*, 269 P.3d 227 (No. 84362-7), <http://schoolfunding.info/wp-content/uploads/2017/01/WA-decisionNL.pdf> [<http://perma.cc/G23U-MHPD>].

58. *Id.*

59. *Id.* at 13.

60. For the consolidated case, see 209 Cal. Rptr. 3d 888 (2016). I should note that I served as co-counsel for the more than sixty schoolchildren and their families who were among the plaintiff coalition in *Robles-Wong v. State*.

61. Complaint for Declaratory and Injunctive Relief at 25, *Robles-Wong v. State*, No. RG10-515768 (Cal. Super. Ct. filed May 20, 2010) [hereinafter *Robles-Wong* Complaint], 2010 WL 2033130.

educates one in eight of the nation's public school students,⁶² scraped the bottom in virtually every category measured—including achievement (forty-seventh in fourth grade reading and forty-sixth in eighth-grade math), oversized classrooms and teacher–pupil ratios (forty-ninth), overall staffing levels (forty-ninth), and ratio, vis-à-vis students, of principals and assistant principals (forty-seventh), guidance counselors (forty-ninth), and librarians (fiftieth).⁶³ Moreover, millions of students were failing to achieve proficiency on the state's academic content standards, and California students, collectively and in every socioeconomic and ethnic group, lagged far behind students in other states in terms of academic achievement as measured by the National Assessment of Education Progress (NAEP).⁶⁴ Finally, nearly a third of California's students were failing to graduate from high school.⁶⁵

Plaintiffs were able to detail the lack of rationality or coherence underlying the allocation of funds to districts and ultimately to schools, and the complete lack of alignment of the finance system to the legislatively enacted academic content standards that the State expected all students to learn.⁶⁶ As if that were not enough, the governor and legislature were aware of the problems. A 2007 report by the Governor's Committee on Education Excellence concluded that education funding in California was “fundamentally flawed,” “not close to helping each student become proficient in mastering the state's clear curricular standards,” and “simply not preparing every student to be successful in college or work.”⁶⁷

The law also seemed to be in plaintiffs' corner. At the state's inception in 1849, the founders required, in article IX, section 1, that the “general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral and agricultural improvement.”⁶⁸ Article IX, section 5 of California's constitution then demands that “[t]he Legislature shall pro-

62. See Nat'l Ctr. for Educ. Statistics, Digest of Education Statistics: Table 203.10. Enrollment in Public Elementary and Secondary Schools, by Region, State, and Jurisdiction: Selected Years, Fall 1990 Through Fall 2026 (2016), http://nces.ed.gov/programs/digest/d16/tables/dt16_203.20.asp [<http://perma.cc/J5VF-VYTJ>] (showing California accounted for 6.3 million of the total 50.3 million students enrolled in public schools in the United States in fall 2014).

63. *Robles-Wong* Complaint, *supra* note 61, at 8, 24–25.

64. *Id.* at 25–27.

65. See *id.* at 26 (explaining that fewer than seventy percent of the state's overall students and fewer than sixty percent of the state's African American and Hispanic students graduated high school).

66. See *id.* at 27–38 (contending that California's “school finance system has developed in a manner that is wholly unrelated to the educational goals and objectives of the State”).

67. *Id.* at 8–9 (internal quotation marks omitted) (quoting from the Governor's Committee on Education Excellence).

68. Cal. Const. art. IX, § 1.

vide for a system of common schools by which a free school shall be kept up and supported in each district.”⁶⁹ More to the point, California courts had repeatedly held that article IX provides schoolchildren a “fundamental” right to an education and that the purpose of the state’s education system is to teach students the skills they need to succeed as productive members of modern society.⁷⁰ This “right to an education today means more than access to a classroom”—the California courts held that the State must provide students an education of sufficient quality to impart the skills necessary to “participate in the social, cultural, and political activity of our society.”⁷¹ Finally, concerns about separation of powers were minimal, as the California Supreme Court had already struck down the state’s school finance system in the landmark *Serrano* litigation, demonstrating a willingness to contest the legislature’s judgment.

Even the politics seemed favorable and ripe for a judicial nudge. The inadequacy and irrationality of California’s school finance system was known to the governor and legislative leadership. Yet reform—absent some form of outside shock to the system—did not seem viable through the legislative process due to a host of institutional barriers, such as supermajority-voting rules for tax and budget measures. There seemed to be little overt political opposition on the one hand and a nearly unified front among those in the education sector on the other. While many educational finance reform cases are brought by student classes, school districts, or other narrow constituencies, the plaintiff coalition in the *Robles-Wong* and *CQE* matters was a motley, indeed improbable, collection of students and families, grassroots organizations, school districts, school board and administrator associations, parent and teachers associations, and the state’s largest teachers union.⁷² With no overt opposition—no opposition op-ed or editorial opinions were ever penned, and no amicus briefs were ever filed in opposition to the plaintiffs—the plaintiffs enjoyed what seemed to be a conspicuously favorable political position.

Filed in 2010, the *Robles-Wong* and *CQE* cases were associated (though never formally consolidated) in California’s Superior Court. Although there were modest differences in the legal theories advanced in both cases, the primary claim of each case was that the State had denied

69. *Id.* § 5.

70. See *Butt v. State*, 842 P.2d 1240, 1249 (Cal. 1992) (describing access to public education as a “uniquely fundamental personal interest in California”); *Hartzell v. Connell*, 679 P.2d 35, 41 (Cal. 1984) (describing the “constitutionally recognized purposes” that are facilitated by the education system); *Serrano I*, 487 P.2d 1241, 1244 (Cal. 1971) (“[T]he right to an education in our public schools is a fundamental interest.”); *Piper v. Big Pine Sch. Dist.*, 226 P. 926, 930 (Cal. 1924) (describing access to public school as a “constitutional guarant[y]”); *O’Connell v. Superior Court*, 141 Cal. App. 4th 1452, 1482 (Ct. App. 2006) (describing equal access to public education as a “fundamental issue[] of public policy”).

71. *Serrano I*, 487 P.2d at 1257 (internal quotation marks omitted) (quoting *S.F. Unified Sch. Dist. v. Johnson*, 479 P.2d 669, 676 (Cal. 1971)).

72. See *Robles-Wong* Complaint, *supra* note 61, at 1–5.

students their fundamental right to an education under article IX by failing to prepare California's students to participate successfully in the economic, civic, and social life of the state. Plaintiffs argued that the State had promulgated academic standards that identify the skills and capacities necessary for economic, civic, and social success in the twenty-first century, but the State operated a school finance system that denied many students the opportunity to learn those essential skills and capacities.⁷³ The trial court dismissed those claims,⁷⁴ and plaintiffs appealed.

In upholding the trial court's dismissal of plaintiffs' claims on a two-to-one vote, the California appellate court refused to ride the wave of modern adequacy litigation and made clear that it did not believe the court had any role in repairing California's admittedly broken educational finance and service delivery system.⁷⁵ First, the court majority recast plaintiffs' argument that article IX requires an education that provides the opportunity to participate successfully in the economic, civic, and social life of the State into an argument that article IX requires an education of "some quality," leading the court to the conclusion that "sections 1 and 5 of article IX do not provide for an education of 'some quality' that may be judicially enforced by appellants."⁷⁶ Of particular significance is the court's assertion that the education provided for in article IX is not "judicially enforce[able]."⁷⁷ Quoting extensively from the Illinois Supreme Court's *Committee for Educational Rights v. Edgar* opinion, the majority stated, "the question of educational quality is inherently one of policy involving philosophical and practical considerations that call for the exercise of legislative and administrative discretion."⁷⁸ Second, the majority held that it could not even order the plaintiffs' requested declaratory relief—a declaration that the state's school finance system is unconstitutional—because article IX does not "restrict legislative discretion in allocating funds for the education of public school children."⁷⁹ Put simply, the appellate court majority seemed quite concerned with

73. Plaintiffs also alleged that the State had violated the California Constitution's equal protection provisions by failing to ensure that plaintiff children had received an education commensurate with the state's "prevailing statewide standards," *Butt*, 842 P.2d at 1252, but that claim was not pursued on appeal.

74. See Order Sustaining Demurrers to Complaint & Complaint in Intervention with Leave to Amend at 6–14, *Robles-Wong v. State*, No. RG10-515768 (Cal. Super. Ct. ordered July 26, 2011) (on file with the *Columbia Law Review*) (finding plaintiffs had failed to state an equal protection claim).

75. See *Campaign for Quality Educ. v. State*, 209 Cal. Rptr. 3d 888, 899 (Ct. App. 2016) (rejecting the idea that education is a "subject within the judiciary's field of expertise" (internal quotation marks omitted) (quoting *Comm. for Educ. Rights v. Edgar*, 672 N.E.2d 1178, 1191 (Ill. 1996))), review denied, 209 Cal. Rptr. 3d 888, 919 (2016).

76. *Id.* at 894–95.

77. *Id.*

78. *Id.* at 899 (internal quotation marks omitted) (quoting *Edgar*, 672 N.E.2d at 1191).

79. *Id.* at 899–900.

whether the judiciary could compel the legislature to comply with a substantive obligation to provide for a sufficient education.⁸⁰

Plaintiffs appealed to the California Supreme Court, but a majority of the Court declined to review the appellate court's decision by a 4-3 vote. While it is impossible to know with certainty why the majority refused to review the appellate court's decision, two unusual written dissents—from Justices Liu and Cuéllar—advanced the view that the court not only had the ability to provide substance to article IX, but it also had the obligation to do so. Justice Liu stated:

It is regrettable that this court, having recognized education as a fundamental right in a landmark decision 45 years ago . . . , should now decline to address the substantive meaning of that right. The schoolchildren of California deserve to know whether their fundamental right to education is a paper promise or a real guarantee. I would grant the petition for review.⁸¹

Often deemed a bellwether, the State of California (and its judiciary) tend to signal where the country is heading.⁸² The California Supreme Court's decision not to join the movement to ensure adequate school funding may signal the judiciary's wariness of and weariness with the remedy of demanding money to cure educational ills.

II. BEYOND DOLLARS: THE EMERGING EDUCATIONAL RIGHTS LITIGATION

Just as the move from second-wave “equity” litigation to third-wave “adequacy” litigation was prompted in part by strategic necessity due to the courts' concerns about the second-wave approach, there appears to be an emerging educational rights litigation movement that strategically departs from the third-wave focus on educational funding and educational finance systems. This next-generation litigation focuses on specific, identifiable educational “wrongs” that allegedly result in specific,

80. In dissent, Justice Pollak seemed to regret his “colleagues' decision to align California with those few state courts that have declined to accept the responsibility to enforce the right of every child to an adequate education.” *Id.* at 906 (Pollak, J., dissenting).

81. *Id.* at 921 (Liu, J., dissenting from the California Supreme Court's denial of review). Similarly, Justice Cuéllar explained that he would have granted review because “the question whether our state Constitution demands *some* minimum level of education quality . . . lies at the core of what this institution [the court] is empowered to adjudicate.” *Id.* at 929–30 (Cuéllar, J., dissenting from the California Supreme Court's denial of review).

82. See Melissa McNamara, *California Is a Political Trendsetter*, CBS Evening News (Oct. 30, 2006), <http://www.cbsnews.com/news/california-is-a-political-trendsetter/> [<http://perma.cc/8A5H-NKDC>] (discussing the eastward spread of tax reform in the wake of California passing a 1978 ballot initiative reducing taxes); see also Sam Fulwood III, *In Trendsetting California, Grassroots Organizing Brings Progressive Change*, *Ctr. for Am. Progress* (June 11, 2015), <http://www.americanprogress.org/issues/race/news/2015/06/11/114951/in-trendsetting-california-grassroots-organizing-brings-progressive-change/> [<http://perma.cc/5Q9B-XBE3>].

identifiable educational “harms” to specific, identifiable students. For instance, the litigation might target particular statutes—e.g., teacher due process protections⁸³—that make it difficult to discipline and remove underperforming teachers, thereby leaving incompetent teachers in the classroom to harm the children they are tasked with instructing. Or the litigation might target the denial of a specific resource—e.g., instructional minutes⁸⁴—that causes harm to those children who are denied meaningful learning time.

Litigants in this next generation of cases may believe the emergent strategy to be more judicially attractive for several reasons. First, proving discrete educational wrongs and drawing a causal line between the wrong and harm would seem, at first blush, to be simpler than determining whether educational dollars are inadequate or inequitably distributed and then drawing a causal link between those dollar inequities or inadequacies and harm to children. Second, striking down a statute or demanding that a school district or state provide a specific educational resource would seem, again at first blush, less likely to inject the court into complex educational policymaking issues like school finance. Third, the remedies for narrowly defined educational “problems” seem relatively manageable for a court. Provable wrongs and workable remedies, advocates might argue, are more likely to prompt a court concerned about its institutional efficacy to act.

While the destination is the same—the provision of equal educational opportunity to all children—this next-generation educational rights litigation is proceeding on parallel tracks. On one rail are those who continue to focus on the adequacy and equity of specific educational resources as being the source of the educational wrong, while on the other rail are those who believe that the educational wrong stems from inefficient management of those resources due to constraints on administrative decisionmaking and family liberty. The remainder of this Part fleshes out these two approaches to educational rights litigation, focusing first on those who wish to continue the focus of adequacy vis-à-vis specific educational wrongs (section II.A) and then on those who instead target what they deem to be inefficiency-borne educational wrongs (section II.B).

A. *Challenging Discrete Deprivations of Educational Resources*

One of the two contemporary approaches to educational rights litigation involves targeting discrete deprivations of educational resources—a refinement of the adequacy litigation movement that does not focus on the entire educational finance system but rather on specific educational resources. In July of 1999, students from Inglewood High School in Los

83. See *infra* notes 100–109 and accompanying text (discussing the *Vergara* decision).

84. See Class Action Complaint at 48, *Cruz v. State*, No. RG14727139 (Cal. Super. Ct. May 29, 2014) [hereinafter *Cruz Class Action Complaint*], 2014 WL 2390095.

Angeles filed a class action lawsuit, *Daniel v. State*, employing this approach and claiming that California's failure to ensure that they had equal access to advanced placement (AP) courses violated their right to equal protection under the California Constitution as interpreted in *Serrano* and *Butt*.⁸⁵ Legally, the case appeared to be a slam dunk. California's equal protection law made education a fundamental right, and it made the State—not local districts—responsible for ensuring equal educational opportunity absent some compelling circumstance.⁸⁶ Moreover, proving the case should not have presented a problem—one need only count the number of AP classes available at Inglewood and compare that figure to the number at Beverly Hills High School. The state legislature must have agreed, as it swiftly passed SB 1504, which established a grant program for school districts to provide AP courses.⁸⁷

With the benefit of hindsight, *Daniel* may have been the prototype for the next generation of educational resource litigation. Knowing that the second-wave “equity” finance litigation traced its roots to California's *Serrano* decision and undoubtedly aware of the third-wave “adequacy” litigation, the *Daniel* lawyers—the ACLU of Southern California—devised a more narrowly focused lawsuit that addressed one resource—AP course offering—but did not tackle the State's entire school finance system. Only a year after the *Daniel* lawsuit was filed, the lawyers on that team swiftly followed up with the *Williams v. State* lawsuit, targeting the denial to many students of certain, discrete “basic educational necessities”: instructional materials, clean and safe facilities, and qualified teachers.⁸⁸ Facing overwhelming evidence of such resource deprivation, the State again chose to settle with an agreement that provided for significant reforms of the State's system for monitoring and ensuring the provision of educational resources, as well as funding for facilities construction and maintenance.⁸⁹ *Williams*, in turn, was then followed by a suit ensuring

85. Suing State Education Offices and Inglewood Unified School District on Behalf of Students Denied Equal Access to Advanced Placement (AP) Courses, ACLU of S. Cal. (July 27, 1999), <http://www.aclusocal.org/en/news/suing-state-education-offices-and-inglewood-unified-school-district-behalf-students-denied> [<http://perma.cc/BFP7-4QUL>]; see also Sigrid Bathen, The Deeper Inequality Behind the AP-Course Suit, L.A. Times (Oct. 17, 1999), <http://articles.latimes.com/1999/oct/17/opinion/op-23243> (on file with the *Columbia Law Review*); David Hill, Test Case, Educ. Week (Mar. 1, 2000), <http://www.edweek.org/tm/articles/2000/03/01/06civil.h11.html> [<http://perma.cc/V8WD-CA2L>].

86. See Cal. Const. art. I, § 7(a).

87. See Cal. Educ. Code § 48980(k) (2017); Martha Escutia, S. Comm. on Educ., SB 1504 Bill Analysis, 1999–2000 Reg. Sess. 1 (Cal. 2000), http://www.leginfo.ca.gov/pub/99-00/bill/sen/sb_1501-1550/sb_1504_cfa_20000403_164626_sen_comm.html (on file with the *Columbia Law Review*).

88. First Amended Complaint for Injunctive and Declaratory Relief at 21, *Williams v. State*, No. 312236 (Cal. Super. Ct. Aug. 14, 2000), <http://assets.documentcloud.org/documents/400494/williams-v-california-first-amended-complaint.pdf> [<http://perma.cc/2ZWN-E85H>].

89. See Notice of Proposed Settlement at 1, *Williams*, No. 312236, <http://www.cde.ca.gov/eo/ce/wc/documents/wmssettlenotice2.doc> (on file with the *Columbia Law Review*).

that students would not have to pay for instructional materials⁹⁰ and another aimed at requiring the State to ensure that students are not denied instructional minutes by placing them in classrooms without teachers, awarding credit for classes without content, and failing to provide students with schedules for weeks into the school year.⁹¹

All of these cases share a laser-like focus on specific educational resource deprivations, coupled with the force of well-settled doctrine deeming education a fundamental right, in order to goad the state into settling quickly and providing the denied educational resources. By narrowly framing the cases and remedies to make them more attractive to the courts, this strategy has proven successful in encouraging state defendants into early settlements without protracted litigation.⁹²

While still in its inception, this next-generation litigation is beginning to mature and may ultimately develop into a reform tool aimed at the core of educational failure, rather than one used in staging attacks at the periphery. At least that appears to be the aim of a recent case focused on schools in Detroit, Michigan, wherein some of the architects of the “narrow targeting” strategy argue that students are being denied their “basic right of access to literacy,”⁹³ a discrete educational wrong, no doubt, but a much more complex problem to solve than, say, denial of instructional materials. The case, dubbed *Gary B. v. Snyder*, is also pathbreaking because the plaintiffs have chosen to resurrect educational rights litigation in federal court by seeking to breathe new life into decades-old language in the Supreme Court’s *Rodriguez* and *Plyler v. Doe* decisions.⁹⁴

Educational conditions in Detroit are, to put it bluntly, bad, according to the *Gary B.* complaint. Indeed, the complaint in many ways reads like an educational adequacy complaint, citing a wide range of

90. *Doe v. State of California*, ACLU of S. Cal., <http://www.aclusocal.org/en/cases/doe-v-state-california> [<http://perma.cc/MD5V-GFZ9>] (last visited Aug. 23, 2017); see also Daniel B. Snow, Note, Someone to Watch Over Me: A Court Mandated Right to Extracurricular Activities in California, 19 *Geo. J. on Poverty L. & Pol’y* 135, 145 (2012).

91. *Cruz* Class Action Complaint, *supra* note 84, at 1–8; see also *Cruz et al. v. State of California et al.*: Fact Sheet, ACLU of S. Cal., <http://www.aclusocal.org/sites/default/files/wp-content/uploads/2015/04/CRUZfact-sheet.2015-03-16.pdf> [<http://perma.cc/E7PH-QH7B>] (last visited Aug. 6, 2017). The continuous thread and leadership behind these cases has been Mark Rosenbaum, the veteran and venerable civil rights litigator who is now the Director of Opportunity Under Law with the public interest law firm, Public Counsel. See Mark Rosenbaum, Pub. Counsel, <http://www.publiccounsel.org/pages/?id=0080> [<http://perma.cc/NW6G-KWWQ>] (last visited Aug. 9, 2017).

92. See, e.g., *supra* note 89 and accompanying text; see also *infra* note 127.

93. See *Gary B.* Class Action Complaint, *supra* note 6, at 8, 13, 23–42; see also Tawnell D. Hobbs, Lawsuit Targets Detroit Public Schools for Failing Students, *Wall St. J.* (Sept. 13, 2016), <http://www.wsj.com/articles/lawsuit-targets-detroit-public-schools-for-failing-students-1473808179> (on file with the *Columbia Law Review*).

94. *Gary B.* Class Action Complaint, *supra* note 6, at 14–17; see also *Plyler v. Doe*, 457 U.S. 202, 222 (1982) (“Illiteracy is an enduring disability. The inability to read and write will handicap the individual deprived of a basic education each and every day of his life.”); *supra* notes 14–18 and accompanying text (discussing *Rodriguez*).

educational “wrongs,” including poor educational outcomes such as low achievement and low graduation and college attendance rates; poor educational instruction and processes such as a lack of support for teachers and no remediation or intervention for poorly performing students; and inadequate educational inputs such as facilities in disrepair, insufficient instructional materials and supplies, and inadequate staffing.⁹⁵ But, consistent with the next-generation resource litigation, the complaint then focuses on a narrow harm—the denial of the “right to literacy”—and on a narrow set of remedies—implementation of literacy screening, literacy programs and interventions, and accountability for ensuring literacy among Detroit’s schoolchildren.⁹⁶ The complaint does not ask for more money, per se, but rather seeks the implementation of discrete educational policies and interventions.

The complaint also advances a novel federal constitutional cause of action. Citing what some might call dicta in the *Rodriguez*⁹⁷ and *Plyler*⁹⁸ decisions, plaintiffs allege that the denial of educational opportunity stigmatizes and denies students liberty in violation of the Equal Protection and Due Process Clauses. Such denial violates Detroit students’ basic right to citizenship: “Our constitutional commitments to individual liberty, equality, and participatory democracy are empty unless all children enjoy equal opportunity to attain the basic literacy skills necessary to participate in the economic, political, and civic life of the nation.”⁹⁹

Apart from the legal novelty of *Gary B.*, the basic reform strategy, a focus on a discrete group of students suffering a discrete harm and seeking discrete remedies, fits squarely among the next-generation resource litigations. And, as discussed in Part III, *Gary B.* exemplifies a number of the challenges that the next generation of litigation will face, including questions of whether the narrow remedy requested will be sufficient to address the harm and whether the requested remedies will create unintended consequences or displace other approaches to reform. Specifically, the next-generation litigation will need to consider whether

95. *Gary B.* Class Action Complaint, supra note 6, at 1–13, 70–73.

96. *Id.* at 14, 21, 128–29.

97. “[A] state system of education that ‘occasioned an absolute denial of educational opportunities to any of its children,’ or ‘fail[ed] to provide each child with an opportunity to acquire . . . basic minimal skills’ may run afoul of the U.S. Constitution.” *Id.* at 16 (second alteration in original) (omission in original) (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 37 (1973)). Another case aimed at denial of educational resources was also recently filed in federal court alleging violations of, inter alia, the Individuals with Disabilities Education Act and Section 504 of the Rehabilitation Act. Complaint at 113–26, *D.R. v. Mich. Dep’t of Educ.*, No. 16-CV-13694 (E.D. Mich. filed Oct. 18, 2016), http://www.aclumich.org/sites/default/files/D.R%20v.%20MDE%20et.%20al.FINAL_.pdf [<http://perma.cc/JC23-FUJJ>].

98. “[A] state may not ‘deny a discrete group of innocent children the free public education that it offers to other children residing within its borders.’” *Gary B.* Class Action Complaint, supra note 6, at 15 (emphasis omitted) (quoting *Plyler*, 457 U.S. at 230).

99. *Id.* at 16.

and how to address the underlying resource inadequacy and inequity that traditional school finance litigation sought to address.

B. *Challenging Barriers to Family Choice and Administrative Discretion*

Much scholarly ink has been spilled on the would-be-landmark *Vergara v. State* lawsuit.¹⁰⁰ And for good reason: *Vergara* typifies the second contemporary approach to modern educational rights litigation—a focus on inefficient educational resource allocation and the lack of both administrative discretion and family choice. Filed in 2012, the *Vergara* litigation sought—for the first time—to apply the legal theories of the equity and adequacy school finance litigation, not to argue that insufficient and unequal educational resources are causing a denial of educational rights, but rather to argue that legal barriers to administrative discretion, which result in inefficient and ineffective resource allocation, are what is causing the problem. Specifically, the *Vergara* plaintiffs alleged that the combination of California’s statutory teacher tenure rules, teacher due process protections, and “last in, first out” reduction-in-force rules resulted in “grossly ineffective” teachers being assigned to certain, usually economically disadvantaged, classrooms, thus denying children equal protection and their fundamental right to an education under the California Constitution.¹⁰¹

In a surprisingly slim sixteen-page opinion, a Los Angeles trial court judge agreed and ruled that the so-called “Challenged Statutes” violated students’—particularly economically disadvantaged students’—equal protection rights.¹⁰² According to the court, “Evidence has been elicited in this trial of the specific effect of grossly ineffective teachers on students. The evidence is compelling. Indeed, it shocks the conscience.”¹⁰³ With that, the *Vergara* case sent shockwaves throughout the nation and suggested the possibility of a tectonic shift in educational equity litigation, as copycat litigation was filed in New York,¹⁰⁴ Minnesota,¹⁰⁵ and New Jersey.¹⁰⁶

100. See, e.g., Derek W. Black, *The Constitutional Challenge to Teacher Tenure*, 104 *Calif. L. Rev.* 75, 79 (2016); Stephen Chang, *Note, Towards Moderate Teacher Tenure Reform in California: An Efficiency-Effectiveness Framework and the Legacy of Vergara*, 104 *Calif. L. Rev.* 1503, 1503 (2016); M. Rebecca Cooper, *Note, Alaska and Vergara v. California: Evaluating the Constitutionality of Teacher Tenure in Alaska*, 32 *Alaska L. Rev.* 395, 395 (2015); Molly Robertson, *Note, Blaming Teacher Tenure Is Not the Answer*, 44 *J.L. & Educ.* 463, 464 (2015); *Note, Education Policy Litigation as Devolution*, 128 *Harv. L. Rev.* 929, 929 (2015).

101. First Amended Complaint for Declaratory and Injunctive Relief at 11, 14–22, *Vergara v. State*, No. BC484642 (Cal. Super. Ct. Aug. 27, 2014), 2012 WL 10129922.

102. *Vergara*, 2014 WL 6478415, at *4.

103. *Id.*

104. Verified Amended Complaint at 15–16, *Dauids v. State*, No. 101105/14 (N.Y. Sup. Ct. filed July 24, 2014), http://studentsmatter.org/wp-content/uploads/2014/08/SM_NY_Amended-Complaint_07.25.14.pdf [<http://perma.cc/GU34-JNGQ>].

105. Findings of Fact, Conclusions of Law, Order for Judgment at 12, *Forslund v. Minnesota*, No. 62-CV-16-2161 (Minn. Dist. Ct. Oct. 26, 2016) (on file with the *Columbia*

On appeal, however, the California appellate court disagreed with the trial court and reversed the ruling, holding that “[p]laintiffs failed to establish that the challenged statutes violate equal protection, primarily because they did not show that the statutes inevitably cause a certain group of students to receive an education inferior to the education received by other students.”¹⁰⁷ The California Supreme Court then denied review of the appellate court decision on the same day and on the same 4-3 vote as the *Campaign for Quality Education* and *Robles-Wong* cases.¹⁰⁸

While the *Vergara* case did not result in the reform that the plaintiffs sought, it has become the symbol of the second track of the next-generation educational rights litigation. Like their next-generation counterparts who seek adequate and equitable resources, those who seek greater administrative discretion and family choice are focusing on specific educational “wrongs” such as over-regulation of administrators and limits on family choice that cause specific harms to students. Unlike their counterparts, however, these advocates argue that the problem is not a lack of educational resources but rather the inefficient use of those resources. In other words, it is not the money.

For instance, even in the context of a traditional school finance case in Texas, a group dubbed the “Intervener Plaintiffs” argued that the State was violating children’s right to an “efficient” education, but not because of a lack of school funding. Rather, the Intervener Plaintiffs challenged the system because they believed it was “qualitatively inefficient” due to the statutory cap on charter schools, the over-regulation of traditional public schools, the system for rating financial accountability, the failure to update the statutory control over personnel decisions, the laws governing Home Rule Charters, and the ability of a receiving district to reject a transfer student from an underperforming school.¹⁰⁹

Law Review). The *Forslund* plaintiffs challenged Minnesota’s teacher tenure law on the grounds that it violated Minnesota’s “general and uniform” education clause. In October 2016, the trial court rejected the challenge on a motion to dismiss. *Id.* at 2.

106. Complaint for Declaratory and Injunctive Relief at 2, *H.G. v. Harrington*, No. L-2170-16 (N.J. Super. Ct. dismissed May 4, 2017) (alleging a state statute that prohibits districts from considering teacher quality in making teacher layoff decisions for budget purposes violates the state constitution’s “thorough and efficient” education clause).

107. *Vergara v. State*, 209 Cal. Rptr. 3d 532, 538 (Ct. App.), review denied, 209 Cal. Rptr. 3d 532, 652 (2016).

108. *Id.* at 558; *Campaign for Quality Educ. v. State*, 209 Cal. Rptr. 3d 888, 919 (Ct. App.), review denied, 209 Cal. Rptr. 3d 888, 919 (2016).

109. *Tex. Taxpayer & Student Fairness Coal. v. Williams*, No. D-1-GN-11-003130, 2013 WL 459357 (Tex. Dist. Ct. Feb. 4, 2013). Similarly, charter school advocates have been quick to challenge state limitations on charter school establishment and growth. See *Class Action Complaint at 2, Doe v. Peyser*, No. 15-2788-F (Mass. Super. Ct. dismissed Oct. 4, 2016), http://www.wilmerhale.com/uploadedFiles/WilmerHale_Main_Website/About/Mass_Right_to_Learn/Complaint-15-2788-F.pdf [<http://perma.cc/6JBM-3BVH>] (challenging the state law cap on charter schools); see also *Cal. Charter Schs. Ass’n v. L.A. Unified Sch. Dist.*, 345 P.3d 911, 913–14 (Cal. 2015) (challenging a school district’s failure to comply

More recently, a Connecticut trial court—without urging from the plaintiffs—turned a traditional adequacy challenge into a challenge to the efficiency of Connecticut’s educational system when it declared the entire system unconstitutional, but not because of an immediate lack of resources.¹¹⁰ The court stated, “Connecticut schools more than meet the [state constitutional] standard [established by the Connecticut Supreme Court]—the state has not violated the constitution by devoting an overall inadequate level of resources to the schools”¹¹¹ and “there is no proof of a statewide problem caused by the state sending school districts too little money.”¹¹² Rather, the court found, students in some school districts were being denied their constitutional right to an adequate education on the grounds that the State’s funding system was “not a rational plan” and the State was not effectively spending its ample education dollars.¹¹³ Then, in a sweeping remedial order, the court directed the State to establish rational standards for elementary and secondary education, as well as a meaningful definition of the standard level of achievement meriting graduation; link teacher evaluation and compensation to student learning; and overhaul the special education system so that special education funds are efficiently and effectively spent.¹¹⁴ Though multifaceted in nature, the order aims not at the amount of money but how that money is spent, at least as an initial matter.

The recently filed *Martinez v. Malloy* litigation in Connecticut is perhaps the most notable example of a case being self-consciously directed not at securing equal or adequate educational resources, but rather at ensuring that the State is most effectively deploying its educational resources.¹¹⁵ Like the *Gary B.* litigation in Detroit, *Martinez* was filed in federal court alleging that Connecticut is denying certain students’ equal protection and due process rights.¹¹⁶ Unlike *Gary B.*, however, *Martinez* does not seek specific educational resources and interventions; rather, it seeks to strike down specific Connecticut policies and statutes (dubbed

with a state law that requires school districts to offer facilities to charter schools); *League of Women Voters of Wash. v. State*, 355 P.3d 1131, 1134–35 (Wash. 2015) (joining the State of Washington to defend its newly minted charter school law against constitutional attack).

110. See Memorandum of Decision at 23, Conn. Coal. for Justice in Educ. Funding, Inc. v. Rell, No. HHD-CV14-5037565-S (Conn. Super. Ct. filed Sept. 7, 2016), <http://www.ctschoollaw.com/files/2016/09/Decision.pdf> [<http://perma.cc/MFS4-774X>].

111. *Id.*

112. *Id.* at 24.

113. *Id.* at 29–31.

114. *Id.* at 90.

115. See Complaint at 67–68, *Martinez v. Malloy*, No. 3:16-cv-01439 (D. Conn. filed Aug. 23, 2016) [hereinafter *Martinez* Complaint], <http://studentsmatter.org/wp-content/uploads/2016/08/Martinez-v-Malloy-Complaint.pdf> [<http://perma.cc/J226-U629>].

116. *Id.* at 55–60. While the *Martinez* complaint also highlights the dicta from *Rodriguez* and *Plyler*, the complaint goes a step further and seeks to reconsider *Rodriguez* by now declaring that education is a “fundamental right” for purposes of equal protection analysis. *Id.* at 51–55.

the “anti-opportunity” laws) that place limitations on the number of charter schools, on interdistrict choice, and on magnet schools aimed at increasing racial integration.¹¹⁷ Stated differently, the suit takes aim at those rules that limit family choice and allegedly result in poor outcomes for students assigned to identifiable failing schools.¹¹⁸

The *Martinez* plaintiffs’ argument is as follows: (1) through its attendance laws, Connecticut deliberately compels thousands of students to attend chronically failing public schools;¹¹⁹ (2) Connecticut knows that there are viable alternatives to the low quality schools, including higher performing schools in other school districts, successful magnet schools, and successful charter schools;¹²⁰ (3) Connecticut unconstitutionally denies access to those viable alternatives through its “anti-opportunity” laws;¹²¹ and (4) therefore, those laws must be struck down.¹²² Like other next-generation cases, this argument targets a discrete, identifiable educational “wrong” and calls for a discrete, identifiable educational “remedy.” Further, like *Gary B.*, *Martinez* exposes a number of the challenges the next generation of litigation will face, including questions of whether the narrow remedy will be sufficient to address the harm and whether the requested remedies will displace other approaches to reform.

III. NEXT-GENERATION EDUCATIONAL RIGHTS, POLITICS, AND POLICY

It is always risky business to declare a new era while in its infancy. Yet, assuming that we are seeing a next generation of educational rights litigation that focuses on discrete wrongs and remedies, this Part offers a tentative prognosis for the next generation, including its prospects in court (section III.A), its underlying politics and potential for meaningful

117. *Id.* at 4–6.

118. It should be noted that Professor James Liebman also analyzes the *Martinez* case in his article for this volume, *Perpetual Evolution: A Schools-Focused Public Law Litigation Model for Our Day*. Liebman argues that *Martinez* differs from prior public law litigations not because of its targeting of discrete educational wrongs and remedies, but rather, by functioning as a model for a public law litigation that embodies the ideal of “evolutionary learning” by creating a state duty “to undertake a responsible process for inquiring whether students’ serious educational deficiencies and disparities can be diminished without significant harm to other interests.” James Liebman, *Perpetual Evolution: A Schools-Focused Public Law Litigation Model for Our Day*, 117 *Colum. L. Rev.* 2005, 2038 (2017). While I don’t disagree with this characterization of *Martinez* in that Connecticut knows what schools work and should make what works available to children in failing schools, I would argue that the remedy sought, removing limitations on school choice, could also be characterized as an effort to fix educational failure without providing additional resources. That said, I heartily endorse Liebman’s process-oriented right to continuous improvement of our schools.

119. *Martinez* Complaint, *supra* note 115, at 13.

120. *Id.* at 21.

121. *Id.* at 32.

122. *Id.* at 70.

educational reform (section III.B), and a modest call for pragmatism and continued efforts to ensure equal and adequate funding (section III.C).

A. *Litigation Challenges in the Next Generation*

To a judiciary that may be concerned about the limits of its institutional efficacy, the next-generation strategy may be attractive because it focuses on discrete educational wrongs to identifiable students with workable remedies. That seeming simplicity, however, might be illusory in practice, as plaintiffs may have difficulty showing how the specific wrong caused harm to any specific students or class of students.

This is the lesson of the *Vergara* litigation. The *Vergara* plaintiffs provided ample evidence “that a teacher’s effectiveness can be assessed and measured,” “that ineffective teachers can be identified,” and that “having a highly ineffective teacher does substantial harm” to students.¹²³ The plaintiffs in *Vergara* also provided evidence that “highlighted likely drawbacks to the current tenure, dismissal, and layoff statutes.”¹²⁴ Nonetheless, the California appellate court held that plaintiffs had not demonstrated that the challenged teacher employment protections, on their face, inevitably would harm any identifiable group of students.¹²⁵

One could apply similar reasoning to arguments regarding the denial of specific educational resources. Given the manifold contributors to student performance and outcomes, drawing a causal line between the denial of a specific resource and any educational harm (beyond the denial itself) is challenging. For instance, is it possible to demonstrate that a lack of up-to-date instructional materials caused a denial of a “thorough and efficient” education? Is it possible to demonstrate that trauma-informed teaching and social emotional learning improve student outcomes? One might argue that an equal protection violation might be simpler to prove given that such proof requires only comparisons between identifiable groups of students—for example, comparing the provision of a resource (say, access to AP courses) in one school district with the provision of that resource in another. But, to the extent that a court requires that the resource deprivation have a “real and appreciable”¹²⁶ effect on the fundamental right to an education, or to the extent that the state need provide only some rational basis for the specific resource differences among schools or districts (including local

123. *Vergara v. State*, 209 Cal. Rptr. 3d 532, 538 (Ct. App.), review denied, 209 Cal. Rptr. 3d 532, 542 (2016).

124. *Id.* at 557.

125. *Id.* (explaining (1) that for the relevant statutes to be facially unconstitutional, the plaintiffs needed to show that a constitutional violation must flow inevitably from those statutes, and (2) that the plaintiffs failed to meet that burden).

126. *Butt v. State*, 842 P.2d 1240, 1251–53 (Cal. 1992) (finding that heightened scrutiny applies when unequal treatment has a “real or appreciable impact on a fundamental right or interest”).

school district autonomy and spending preferences), even an equal protection case may prove difficult to sustain.

It is true that these evidentiary challenges are in many ways no different from those in various other breeds of civil cases. Skilled attorneys and expert witnesses may very well persuade a court to intervene when the educational wrong is clear and the causal line to the harm is murky, though visible.¹²⁷ That said, the initial attractiveness of focusing on discrete harms may fade with time, given the complexity that one may find beneath superficially clear cause–effect relationships.

B. *Politics, Policy, and Social Research in the Next-Generation Litigation*

The now (in)famous *Time* magazine cover photograph of then-chancellor of the District of Columbia public schools, Michelle Rhee, depicts her standing tall in the middle of a classroom holding a broom—a not-so-subtle reference to her “sweeping out” underperforming teachers.¹²⁸ That photo of the lifelong Democrat, which raised fury among teachers and teachers unions across the country, graphically captures what has become an unusual policy divide within the Democratic ranks.¹²⁹ As one commentator observed, “Rhee was the vanguard of a wave of ‘corporate school reform’ that has used standardized test scores as the chief metric for school ‘accountability,’ promoted charter schools and vouchers, and sought to minimize or eliminate the power of teachers

127. Consider *Reed v. State*, a suit brought on behalf of children in specific Los Angeles Unified School District (LAUSD) schools who suffered the direct and serious consequences of the State’s rules that require teachers with the least seniority to be laid off first (a so-called “last in, first out” law). *Reed* Second Amended Complaint, *supra* note 5, at 13–14. There, as a result of those rules and massive budget cuts, students in those schools experienced dramatic teacher turnover and staffing shortages—two tangible harms that affected specific students—while students in some other schools lost no teachers. See *id.* In this case, the targeted nature of next-generation litigation resulted in a sensible remedy that would distribute the pain of teacher layoffs more fairly among LAUSD schools. See John Fensterwald, Judge Resolves L.A. Layoff Suit, Silicon Valley Educ. Found.: Thoughts on Pub. Educ. (Jan. 21, 2011), <http://toped.svefoundation.org/2011/01/21/judge-resolves-la-layoff-suit/> [http://perma.cc/WF8K-E3HS] (explaining the California Superior Court approved a settlement that would prevent teacher layoffs for budgetary reasons in forty-five low-performing and new schools in Los Angeles); John Fensterwald, Landmark Ruling on Teacher Layoffs, Silicon Valley Educ. Found.: Thoughts on Pub. Educ. (May 14, 2010), <http://toped.svefoundation.org/2010/05/14/landmark-ruling-on-teacher-layoffs/> [http://perma.cc/DXJ7-KQP7] (explaining the California Superior Court’s decision to issue a preliminary injunction that prevents school districts from terminating teachers for budgetary reasons).

128. Archive Image of Magazine Cover Featuring Michelle Rhee, *Time* (Dec. 8, 2008), <http://content.time.com/time/covers/0,16641,20081208,00.html> [http://perma.cc/VMM9-X5GK].

129. See Valerie Strauss, A Time Magazine Cover Enrages Teachers—Again, Wash. Post: Answer Sheet Blog (Oct. 25, 2014), http://www.washingtonpost.com/news/answer-sheet/wp/2014/10/25/a-time-magazine-cover-enrages-teachers-again/?utm_term=.bedf4c6bbc9c (on file with the *Columbia Law Review*).

unions and change the way teachers are trained.”¹³⁰ While most Republicans (and those that lean right-of-center) are also associated with the “corporate school reform” or simply the “reform” movement in public education, several prominent Democrats (including former Secretary of Education in the Obama Administration Arne Duncan, former Los Angeles Mayor Antonio Villaigrosa, and Senator Cory Booker) and some left-leaning organizations have supported this approach to school reform as well.¹³¹ This is a break from the Democrats’ staunch support of traditional public schools and teachers unions.

The central tenets of the reform movement—that schools can produce equal and excellent outcomes more efficiently through performance-based accountability, administrative deregulation, and family choice—are also the principles that animate the next-generation educational rights advocates who seek to deregulate schools and expand choice for families. Underlying these tenets is a tacit belief that we cannot determine whether our public schools have sufficient resources unless and until we first reform the sclerotic bureaucracies and stifling rules that govern our schools. Some of those reformers would go even further, arguing that there is plenty of money in the system; it just needs to be spent more efficiently.¹³²

130. *Id.*

131. See Editorial, *An Obama Retreat on School Accountability?*, *Chi. Trib.* (Oct. 30, 2015), <http://www.chicagotribune.com/ct-education-department-testing-edit-1031-20151030-story.html> (on file with *Columbia Law Review*) (“Last year, the National Education Association, the powerful teachers union, formally called for Duncan to resign. His great sin: promoting the evaluation of teachers and schools based on how their students learned, largely based on standardized tests.”); Kimberly Hefling, *Democrats Feud over Charter Schools in Los Angeles*, *Politico* (Nov. 7, 2016), <http://www.politico.com/story/2016/11/democrats-divided-on-mass-charter-school-expansion-230888> [<http://perma.cc/9JDJ-22C3>] (“The Democratic Party’s growing division over charter schools is playing out in the blue state of Massachusetts, where a ballot referendum on the expansion of charter schools has attracted national attention and tens of millions in political spending.”); Joy Resmovits, *The New Face of Democrats Who Support Education Reform*, *L.A. Times* (Sept. 3, 2015), <http://www.latimes.com/local/education/community/la-me-edu-shavar-jeffries-takes-over-democrats-for-education-reform-20150902-story.html> (on file with the *Columbia Law Review*) (quoting then-mayor of Newark, Cory Booker, stating that “[t]en years ago when I talked about school choice, I was literally tarred and feathered . . . I was literally brought into a broom closet by a union and told I would never win office if I kept talking about charters”); Michelle Rhee, *My Break with the Democrats*, *Daily Beast* (Feb. 4, 2013), <http://www.thedailybeast.com/articles/2013/02/04/michelle-rhee-my-break-with-the-democrats.html> [<http://perma.cc/7L26-SHDX>] (lending support to the efficacy of publicly funded vouchers); Laurel Rosenhall, *Democrats Clash over California Schools*, *S.F. Chron.* (May 28, 2017), <http://www.sfchronicle.com/education/article/Democrats-clash-over-California-schools-11179579.php> (on file with the *Columbia Law Review*) (“[P]ublic education in California has become a tug-of-war between camps within the Democratic Party. Democrats aligned with organized labor—who dominated local and legislative races for many years—are now facing formidable challenges from Democrats who see overhauling some union rules as a key to improving education.”).

132. The Hoover Institution’s Eric Hanushek is among the most outspoken and thoughtful among these performance-based accountability and deregulatory reformers.

Also underlying the reformers' beliefs in deregulation and accountability are empirical uncertainty and ideological preference. It is beyond the scope of this Essay to detail the ongoing theoretical and empirical debates around school choice (e.g., vouchers, tuition tax credits, and charter schools);¹³³ relaxation of teacher employment protections (e.g., seniority assignment preferences, tenure rules, and due process protections);¹³⁴ teacher evaluation and compensation reform (e.g., tying teacher evaluation and compensation to student performance);¹³⁵ and

See generally Hanushek & Lindseth, *supra* note 39; William S. Koski, *Courthouses vs. Statehouses?*, 109 Mich. L. Rev. 923, 925–26 (2011) (reviewing Hanushek & Lindseth, *supra* note 39).

133. See, e.g., Ctr. for Research on Educ. Outcomes, *National Charter School Study* (2013), <http://credo.stanford.edu/documents/NCSS%202013%20Final%20Draft.pdf> [<http://perma.cc/D5JR-PQAH>]; Gary Orfield & Erica Frankenberg, *Educational Delusions?: Why Choice Can Deepen Inequality and How to Make Schools Fair* (2013); Clive R. Belfield & Henry M. Levin, *Market Reforms in Education*, in *Handbook of Education Policy Research* 513 (Gary Sykes et al. eds., 2009); John F. Witte, *Vouchers*, in *Handbook of Education Policy Research*, *supra*, at 491.

134. See, e.g., Terry M. Moe, *Special Interest: Teachers Unions and America's Public Schools* (2011).

135. For discussions of the experience with pay-for-performance schemes in education, see generally RAND Corp., *No Evidence that Incentive Pay for Teacher Teams Improves Student Outcomes* (2012), http://www.rand.org/content/dam/rand/pubs/research_briefs/2012/RAND_RB9649.pdf [<http://perma.cc/K2XH-J9QN>] (explaining that determining teacher pay on the basis of performance has had no effect on student outcomes); Dale Ballou, *Pay for Performance in Public and Private Schools*, 20 *Econ. Educ. Rev.* 51 (2001) (citing teachers unions as one reason for the failure of merit pay in public schools); Daniel Goldhaber, *Teacher Quality and Teacher Pay Structure: What Do We Know, and What Are the Options?*, 7 *Geo. Pub. Pol'y Rev.* 81 (2002) (discussing some of the difficulties with identifying observable characteristics to predict teacher quality). For a discussion of the challenges surrounding the design of teacher-evaluation schemes, see Eva L. Baker et al., *Econ. Policy Inst., Problems with the Use of Student Test Scores to Evaluate Teachers 1* (2010), <http://www.epi.org/files/page/-/pdf/bp278.pdf> [<http://perma.cc/62WP-PGRV>] (expressing skepticism that student test scores are a reliable measure of teacher performance); Henry I. Braun, *Educ. Testing Serv., Using Student Progress to Evaluate Teachers: A Primer on Value-Added Models 8–10* (2005), <http://www.ets.org/Media/Research/pdf/PICVAM.pdf> [<http://perma.cc/2Y28-G6MR>] (identifying factors that make quantitative measures of teachers' impact on students poor overall indicators of teacher effectiveness); Linda Darling-Hammond et al., *Stanford Ctr. for Opportunity Policy in Educ., Creating a Comprehensive System for Evaluating and Supporting Effective Teaching 4–5* (2012) [hereinafter *Darling-Hammond, Comprehensive System*], http://edpolicy.stanford.edu/sites/default/files/publications/creating-comprehensive-system-evaluating-and-supporting-effective-teaching_1.pdf [<http://perma.cc/V3TK-UYLA>] (suggesting five key elements of a high-quality teacher-evaluation system); Linda Darling-Hammond et al., *Getting Teacher Evaluation Right: A Background Paper for Policymakers 1, 6–8* (2011), <http://www.aera.net/Portals/38/docs/New%20Logo%20Research%20on%20Teacher%20Evaluation%20AERA-NAE%20Briefing.pdf> [<http://perma.cc/D745-WC7S>] (arguing there is a professional consensus that value-added models are not appropriate primary methods of teacher evaluation); Daniel F. McCaffrey et al., *RAND Corp., Evaluating Value-Added Models for Teacher Accountability 53 tbl.4.1* (2003), http://www.rand.org/pubs/monographs/2004/RAND_MG158.pdf

accountability regimes (e.g., content and performance standards, student testing, and performance-based rewards and sanctions).¹³⁶ Suffice it to say that these are among the most empirically contested and politically debated topics in education policy today.

That these contested ideas are finding their way into courtrooms should not come as a surprise, as those who have been unable to achieve policy reform through the legislative process often turn to the courts for relief. Indeed, that has been an explicit motivation for school finance reformers for decades and more recently motivated the architects of the *Vergara* litigation. Founded by Silicon Valley entrepreneur and *Vergara* architect David Welch,¹³⁷ the organization Students Matter developed a two-pronged strategy of litigation and media relations to target certain teacher employment protections once it perceived legislative reform impossible in the Democrat-controlled state legislature, whose members Students Matter believed to be beholden to California's teachers unions.¹³⁸

In the face of such political and ideological conflict, social science uncertainty, and divergent policy choices, it is not at all clear that courts will be willing to wade into the fray. And even if courts *do* choose to wade in, there remain questions regarding the effectiveness of the "narrow" relief requested in such next-generation cases.

C. *Judicial Remedies, Modest Expectations, and the Possibility of Compromise in the Next Generation*

If we assume that education advocates aim to improve student achievement and outcomes, and we also assume that there is broad consensus that quality teachers matter, then next-generation advocates who seek to increase administrative discretion by asking courts to relax teacher due process protections, lengthen time to tenure, and eliminate seniority preference rules possess the correct formula to solve the problem, right? Wrong.

On the one hand, in certain circumstances, it may be a necessary condition for improving teacher quality that certain rigid employment protections are reformed. Take, for instance, so-called "last in, first out" layoff rules, which come into play when school districts are compelled to reduce their teaching workforce (often due to budget shortfalls). These rules, which require that the most junior teachers be laid off first, may

[<http://perma.cc/6CYP-FRTZ>] (explaining how value-added model estimates of teacher performance can be flawed).

136. For a thorough description and critique of test-based accountability and school choice, see Diane Ravitch, *The Death and Life of the Great American School System: How Testing and Choice Undermine Education* 149–67 (2010).

137. See Founder: David F. Welch, Ph.D., Students Matter, <http://studentsmatter.org/our-team/founder/> [<http://perma.cc/S2MJ-T456>] (last visited Aug. 2, 2017).

138. See Card Stacks: What Is Our Theory of Change?, Students Matter, <http://studentsmatter.org/cardstack/vergara/#8> [<http://perma.cc/34BN-HWFG>] (last visited Aug. 19, 2017).

have the perverse effect of pink-slipping talented teachers and creating untenable turnover in our poorest schools. In the event of economic downturn, school leaders should be given more flexibility to distribute the layoff pain and ensure that bright junior teachers are kept in the classroom. Consider also the issue of tenure: If school districts and the state are willing to provide extra support for struggling new teachers, including coaching and mentoring, an extension of the time to tenure from two to, say, three or four years would benefit both junior teachers and the administrators who must make decisions about their fate.

But reform of employment protections is no panacea. Simply providing more administrative discretion over personnel decisions will not be enough to improve student learning for several identifiable reasons. First, the rules are not solely responsible for the teacher-quality gap.¹³⁹ Second, it is not clear that administrators in low-resource schools (or anyone, for that matter) will have the time, information, tools, and capacity to exercise any newfound discretion to improve student learning.¹⁴⁰ And, third, the theory that we can fire our way out of this problem assumes a ready stable of would-be teachers who want to enter underperforming classrooms.¹⁴¹

Perhaps strengthening the teacher workforce might require policies that make it more difficult—not less difficult—to become a teacher (thereby making the profession more competitive and higher performing). Perhaps more resources are needed for preservice and in-service training and capacity building. And, perhaps most of all, more resources are needed to fairly pay and improve the working conditions for teachers,

139. Other factors, such as teacher preferences, matter in how teachers are assigned. See William S. Koski & Eileen L. Horng, *Curbing or Facilitating Inequality? Law, Collective Bargaining, and Teacher Assignment Among Schools in California* 1, 9–15 (2007), <http://cepa.stanford.edu/sites/default/files/14-Koski-Horng%283-07%29.pdf> [<http://perma.cc/NV2N-7ZLJ>] (“The problems of teacher recruitment and retention likely compound each other because teachers may be wary of joining a school that many teachers are leaving and teachers may be more likely to leave a school that is unable to attract new, qualified teachers.”).

140. Although there is little consensus on the appropriate methods for evaluating teacher performance, most would agree that effective teacher evaluation is complex and time-consuming. See Darling-Hammond, *Comprehensive System*, *supra* note 135, at 1–2 (noting the lack of standardized metrics in teacher evaluation and proposing a new, integrated approach to measuring teacher effectiveness); *Designing Teacher Evaluation Systems* 1–2 (Thomas J. Kane et al. eds., 2014) (presenting an analysis of and data on the accuracy and efficacy of various methods of teacher evaluation). Principals, who have multiple demands on their time, may therefore not have the information, proper methods, and time to conduct effective evaluations.

141. For instance, California public schools are facing a dramatic teacher shortage, particularly in science, math, and special education. Desiree Carver-Thomas & Linda Darling-Hammond, *Learning Policy Inst., Addressing California’s Growing Teacher Shortage: 2017 Update 1* (2017), http://learningpolicyinstitute.org/sites/default/files/product-files/Addressing_Californias_Growing_Teacher_Shortage_2017_Update_REPORT.pdf [<http://perma.cc/X2BF-2TLT>].

particularly those in the toughest assignments. In other words and more generally speaking, the seemingly tractable beauty of the narrowly tailored, second-generation cases—like those challenging teacher tenure and reduction-in-force rules—may fade in the light of remedial policy implementation. Narrow remedies may be necessary, but they will not be sufficient.

A similar story can be told about those who seek narrow remedies that call for specific educational resources and interventions. For instance, merely creating and offering more AP courses at a high school with underprepared and economically disadvantaged students will not guarantee meaningful access to high-quality instruction and academic success for those students.¹⁴² Indeed, one may even be concerned that asking a court to order a “pet” remedy or policy prescription might divert funds from more effective alternatives like intensive reading remediation in the elementary grades or high-quality preschool for low-income children. That said, it could well be argued that access to AP and college preparatory courses is a necessary, though insufficient, condition to ensure college readiness.

Whether the focus is on discrete burdens to administrative discretion and family choice or discrete educational resources and interventions, the educational wrongs targeted by the next generation of educational rights litigation and the remedies that flow from those wrongs may be significant and even necessary components of a reform strategy that moves us toward equality of educational opportunity. But on their own, they will not be sufficient to ensure that all children will have that opportunity. And, without attention to unintended consequences, those next-generation strategies and remedies may even harm some students.

So consider this Essay a call for modesty among courts and advocates for what we can reasonably accomplish and a call for caution to avoid unintended consequences of our remedial policy choices. Consider this also a call to advocates to craft next-generation litigation strategies that couple aspects of both rails of reform: more resources combined with better accountability for how those resources are spent and relaxation of regulations that create inefficiency in the deployment of those resources. Finally, consider this a call to not make a clean break from equity and adequacy litigation and the push to ensure that our school finance systems are equitable and adequate and that public schools have the dollars to serve our children. Without sufficient and fairly distributed school funding, we may never realize the fruits of efficiency and choice-minded reforms, nor will targeted interventions and resources suffice

142. William Furry, author of a study of AP course offering and college admissions in California at the time of the *Daniel* litigation, was quoted as saying, “The bottom line is that mandating AP classes is not going to solve the problem”; rather, what will solve the problem is better preparation, “beginning in kindergarten.” Bathen, *supra* note 85.

unless they are fully funded without jeopardizing other necessary educational inputs. In other words, we may not be beyond dollars.

CONCLUSION

After some forty-five years of educational rights litigation focused on educational resources and whether those resources are adequate and equitably distributed, the judiciary seems to be considering its proper role in reforming complex educational finance systems and may be growing wary of intervening at all. Recognizing this judicial caution, a next generation of educational rights litigation appears to be emerging that focuses on judicially manageable, discrete educational wrongs and remedies. But this next generation is moving on parallel tracks—a track that focuses on the denial of educational resources and a track that focuses on strengthening administrative discretion and family choice. While it is too early to determine the success of this nascent approach, there is reason to temper expectations in the face of the complex causes of educational failure that cannot be fully addressed by focusing on discrete wrongs and remedies. For this reason, we ought not abandon an educational rights movement that focuses on ensuring sufficient and equitable educational funding, yet we should also be sure that litigation aimed at improving the adequacy and equity of school funding considers how to best hold the system accountable for ensuring that educational dollars are well spent.

The right to equality of educational opportunity did not exist before Judge Constance Baker Motley and her colleagues established it. Equally important, the right is not static—it continues to evolve to meet the needs and challenges of today. We are better able to meet those challenges because of Judge Motley. In her words, “Something which we think is impossible now is not impossible in another decade.”¹⁴³

143. Brian Lanker, *I Dream a World: Portraits of Black Women Who Changed America* 65 (1989).

