
The Case for a Collaborative Enforcement Model for a Federal Right to Education

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TABLE OF CONTENTS

INTRODUCTION	1655
I. THE EXISTING VEHICLES TO ADDRESS EDUCATIONAL INEQUITIES FOR DISADVANTAGED STUDENTS AND WHY THEY HAVE NOT FULLY ACHIEVED THEIR GOALS	1660
A. <i>School Desegregation Litigation</i>	1660
B. <i>School Finance Litigation</i>	1667
C. <i>Federal Legislation to Assist Disadvantaged Students</i>	1673
II. SCHOLARLY APPROACHES TO A FEDERAL RIGHT TO EDUCATION AND WHY SCHOOLS NEED A NEW FEDERAL APPROACH.....	1682
A. <i>Scholarship on a Federal Right to Education</i>	1682
B. <i>Why Federal Action Is Necessary to Address the Lack of Equal Educational Opportunity</i>	1686
III. INTERNATIONAL HUMAN RIGHTS ENFORCEMENT MODELS AS GUIDEPOSTS FOR ENFORCING A FEDERAL RIGHT TO EDUCATION	1689
A. <i>The Definition and Enforcement of the Right to Education in the ICESCR</i>	1691
1. Overview of the ICESCR.....	1691
2. The ICESCR Enforcement Mechanism	1693

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B.	<i>The Definition and Enforcement of the Right to Education in the CRC</i>	1701
C.	<i>The Individual Complaint Mechanism in the ICCPR</i>	1709
IV.	RETHINKING ENFORCEMENT OF A FEDERAL RIGHT TO EDUCATION	1711
A.	<i>Defining a Federal Right to Education</i>	1712
B.	<i>A Collaborative Enforcement Model for a Federal Right to Education</i>	1715
1.	Reporting Obligation	1716
2.	Technical Assistance	1719
3.	Financial Assistance and Withholding Funds	1720
4.	Complaint Mechanism	1721
C.	<i>Establishing a Federal Right to Education Through Spending Legislation</i>	1722
V.	THE CASE FOR A COLLABORATIVE APPROACH TO A FEDERAL RIGHT TO EDUCATION	1726
A.	<i>The Benefits of Collaboration and a Legislatively Defined Approach to a Federal Right to Education</i>	1726
B.	<i>Building upon NCLB</i>	1737
C.	<i>The Politics of a Collaborative Approach to a Federal Right to Education</i>	1741
	CONCLUSION	1744

Our progress as a nation can be no swifter than our progress in education.

— John F. Kennedy¹

INTRODUCTION

In a nation that professes a strong belief in equal opportunity,² many of America's public schools still fail to offer children a high-quality education. Too often the children who receive substandard educational opportunities are poor, minority, and urban students. Low-income and minority schoolchildren attend markedly inferior schools relative to their more affluent and white counterparts.³

¹ John Fitzgerald Kennedy, Special Message to the Congress on Education, H.R. Doc. No. 92, at 1 (1961), available at <http://www.brainyquote.com/quotes/quotes/j/johnfkenn100832.html>.

² See JENNIFER HOCHSCHILD & NATHAN SCOVRONICK, *THE AMERICAN DREAM AND THE PUBLIC SCHOOLS 10-11* (2003); CASS R. SUNSTEIN, *THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER 186* (2004) ("In principle, Americans on both right and left are committed to 'equal opportunity.' This goal is widely taken to be uncontroversial.").

³ See, e.g., Dorinda J. Carter et al., *Editors' Introduction* to LEGACIES OF BROWN: MULTIRACIAL EQUITY IN AMERICAN EDUCATION 3 (Dorinda J. Carter et al. eds., 2004) ("[S]tudents of color continue to have fewer qualified and effective teachers and less access to challenging and rigorous curricula. Their schools, by and large, get less state and local money without legislative intervention, and public education, as represented by political will and financial support, invests fewer of its hopes, expectations, and aspirations in students of color.") (citations omitted); SHERYLL CASHIN, *THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM*, at xvii (2004) ("Black and brown public school children are now more segregated than at any time in the past thirty years. Typically they are relegated to high-poverty, racially identifiable schools that offer a separate and unequal education."); Jay P. Heubert, *Six Law-Driven School Reforms: Developments, Lessons, and Prospects*, in LAW & SCHOOL REFORM: SIX STRATEGIES FOR PROMOTING EDUCATIONAL EQUITY 1, 15 (Jay P. Heubert ed., 1999) ("The gaps between 'haves' and 'have nots' seem to be increasing, despite strong evidence that such gaps produce highly undesirable educational consequences for the 'have nots.'"); HOCHSCHILD & SCOVRONICK, *supra* note 2, at 54 ("[C]hildren in affluent (predominantly white) districts receive a better education than do children in poor (disproportionately minority) districts, and children in this country do not approach adulthood with anything like an equal chance to pursue their dreams."); CHARLES J. OGLETREE, JR., *ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF-CENTURY OF BROWN V. BOARD OF EDUCATION 260-61* (2004) ("[I]t remains overwhelmingly true that black and Latino children in central cities are educated in virtually all-minority schools with decidedly inferior facilities and educational opportunities."); GARY ORFIELD & SUSAN E. EATON, *DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION*, at xv (1996) ("The currently stratified opportunity structure denies economically disadvantaged minorities access to middle-class schools, and to the world beyond them."); Janice Petrovich, *The*

Research undeniably demonstrates that higher teacher quality results in better student achievement, “regardless of the student’s background,” yet numerous studies show that schools that enroll higher numbers of poor and minority students employ less experienced and qualified teachers.⁴ More than fifty years and a host of educational reform efforts have passed since *Brown v. Board of Education*, and yet children in poor and disproportionately minority communities still receive vastly unequal educational opportunities.⁵

Disparities in financial resources for schools and school districts that affect the quality of educational opportunity exist both within states⁶ and between states. Inequality between states currently represents the larger proportion of these disparities.⁷ The burden of

Shifting Terrain of Educational Policy: Why We Must Bring Equity Back, in BRINGING EQUITY BACK: RESEARCH FOR A NEW ERA IN AMERICAN EDUCATIONAL POLICY 3, 8 (Janice Petrovich & Amy Stuart Wells eds., 2005) (“Minority children are concentrated in large, outdated, overcrowded schools that need repair and have large proportions of teachers who are not certified to teach in their subject areas.”).

⁴ James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 971, 974 (2004) (“Study after study documents that high-poverty and high-minority schools have less qualified and less experienced teachers.”). Whether the measure is “experience, education background, subject matter knowledge, or unquantifiable traits,” the research generally demonstrates that “better teachers tend to be found in middle class schools rather than in high-poverty schools.” See *id.* at 971.

⁵ See HOCHSCHILD & SCOVONICK, *supra* note 2, at 54; see also NAT’L RESEARCH COUNCIL, MAKING MONEY MATTER: FINANCING AMERICA’S SCHOOLS 18 (Helen F. Ladd & Janet S. Hansen eds., 1999) (“[T]he United States still has an education finance system supporting schools that in many places are separate and unequal.”); Michael A. Rebell, *Adequacy Litigations: A New Path to Equity?*, in BRINGING EQUITY BACK, *supra* note 3, at 291 (“Today, 50 years later, *Brown*’s vision of equal educational opportunity is far from being realized.”).

⁶ For example, a June 2006 report supported by a bipartisan group of education leaders noted:

Within states, large gulfs separate the best-funded and worst-funded school districts, in ways that favor the more affluent. Whether a child attends a well-funded school or poorly funded school still depends heavily on where he/she lives. Even within school districts, there are often vast disparities between schools — disparities that generally favor schools with savvy leaders and wealthier parents. The latest research shows that these gaps between disparate schools and districts can amount to thousands of dollars per student per year.

THOMAS B. FORDHAM INST., FUND THE CHILD: TACKLING INEQUITY & ANTIQUITY IN SCHOOL FINANCE 2 (2006).

⁷ See Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330, 332 (2006) (explaining that “the most significant component of educational

interstate disparities falls disproportionately on disadvantaged students who have greater educational needs.⁸ Furthermore, while urban districts have higher expenditures on average than suburban districts, urban districts spend less on programs for regular education because they have higher costs for special education and repairs for older buildings and equipment.⁹

Given these disparities in educational opportunities, it remains no surprise that the achievement of far too many low-income and minority students remains below that of their more affluent and non-minority peers.¹⁰ The achievement gap along racial lines persists even for students from the same socioeconomic background.¹¹ Students in urban districts often have lower test scores and higher dropout rates.¹² Black and Hispanic students complete high school at lower rates than white students,¹³ which is particularly troubling because high school typically plays a determinative role in how individuals will integrate

inequality across the nation is not inequality within states but inequality *between* states”).

⁸ See *id.* at 333.

⁹ HOCHSCHILD & SCOVRONICK, *supra* note 2, at 62-63; Petrovich, *supra* note 3, at 12 (“Schools servicing poor and minority students have fewer financial and educational resources than those serving middle-class White students.”).

¹⁰ *But see* David J. Armor, *The End of School Desegregation and the Achievement Gap*, 28 HASTINGS CONST. L.Q. 629, 653 (2001) (“The evidence is compelling that neither school segregation nor differences in school resources are responsible for the current achievement gap that exists between African American and white children.”).

¹¹ See NAT’L CTR. FOR EDUC. STATISTICS, U.S. DEP’T OF EDUC., THE CONDITION OF EDUCATION 2006, at 46 (2006) [hereinafter THE CONDITION OF EDUCATION], available at <http://nces.ed.gov/pubs2006/2006071.pdf> (presenting data on achievement gap in math and reading between black and white and Hispanic and white students on National Assessment of Educational Progress and commenting that it has not changed substantially since early 1990s); RICHARD ROTHSTEIN, CLASS AND SCHOOLS: USING SOCIAL, ECONOMIC, AND EDUCATIONAL REFORM TO CLOSE THE BLACK-WHITE ACHIEVEMENT GAP 1 (2004) (“The black-white gap is partly the difference between the achievement of all lower-class and middle-class students, but there is an additional gap between black and white students even when the blacks and whites come from families with similar incomes.”); Larry V. Hedges & Amy Nowell, *Changes in the Black-White Gap in Achievement Test Scores*, 72 SOC. EDUC. 111, 130 (1999) (explaining that achievement test score gap between blacks and whites remains substantial even after adjusting for “social class, family structure, and community variables”); see also Martha Minow, *Surprising Legacies of Brown v. Board*, 16 WASH. U. J.L. & POL’Y 11, 13 (2004) (noting persistence of achievement gap along racial lines within socioeconomic classes).

¹² HOCHSCHILD & SCOVRONICK, *supra* note 2, at 25.

¹³ THE CONDITION OF EDUCATION, *supra* note 11, at 11.

into the workforce and the remainder of society.¹⁴ The lower an individual's educational attainment, the more likely the student is to become unemployed.¹⁵ Furthermore, the strong linkage between poor reading ability and crime has led some states to determine the number of prison beds based, at least in part, on the percentage of children who cannot read at certain elementary grade levels.¹⁶

Public concern over education in recent elections reveals that the inadequacy of our schools has not gone unnoticed. In the 2000 presidential election, for the first time voters ranked education as their most important priority.¹⁷ An overview of recent public opinion polls reveals that generally "the public . . . remains very concerned about the performance of American public schools and supports federal leadership in education reform."¹⁸

Congress passed the No Child Left Behind Act of 2001 ("NCLB") with bipartisan support in substantial part because lawmakers developed a consensus that a new approach to the federal role in education was necessary to address some of the problems plaguing the nation's schools.¹⁹ NCLB requires schools and districts to disaggregate assessment scores by major income and minority groups.²⁰ The law also holds schools and districts accountable for achievement of those groups by requiring corrective steps if any major subgroup does not attain the established performance measures.²¹ However, as discussed in Part I, the law has numerous shortcomings that make it inadequate to address longstanding disparities in educational opportunity.²²

¹⁴ Martin Carnoy et al., *Introduction to THE NEW ACCOUNTABILITY: HIGH SCHOOLS AND HIGH-STAKES TESTING 1* (Martin Carnoy et al. eds., 2003) ("If students do not finish high school with their cohort, they are likely to be marginalized from the mainstream, and to become a social liability.").

¹⁵ THE CONDITION OF EDUCATION, *supra* note 11, at 51.

¹⁶ Andrew Block & Virginia Weisz, *Choosing Prisoners over Pupils*, WASH. POST, July 6, 2004, at A19; Mike Schmoker, *The Quiet Revolution in Achievement*, SPECIAL EDGE, Autumn 2001, at 3.

¹⁷ PATRICK J. MCGUINN, NO CHILD LEFT BEHIND AND THE TRANSFORMATION OF FEDERAL EDUCATION POLICY, 1965-2005, at 146 (2006) ("Education was, for the first time, the dominant issue of a presidential campaign, with voters ranking it as their most important priority.").

¹⁸ *See id.* at 192.

¹⁹ *See* No Child Left Behind Act of 2001, 20 U.S.C. §§ 6301, 6311 (2006); MCGUINN, *supra* note 17, at 165.

²⁰ No Child Left Behind Act of 2001, § 6311.

²¹ *See id.* § 6316 (2006).

²² For an excellent assessment of the ways in which NCLB ultimately may harm the achievement of disadvantaged students, see Ryan, *supra* note 4, at 944-70.

This Article proposes an innovative approach for directing the expanding federal role in education that will encourage states to address disparities in educational opportunities that prevent disadvantaged students from achieving their full potential. The proposed approach builds on the understanding reflected in NCLB that the federal government will remain critical in public education reform. This Article reexamines one avenue for federal involvement that the U.S. Supreme Court considered in several cases and that scholars have debated for more than thirty years: a federal right to education.

San Antonio Independent School District v. Rodriguez explicitly offered the Supreme Court the opportunity to recognize education as a fundamental constitutional right when poor, minority schoolchildren who resided in districts with “a low property tax base” challenged the constitutionality of the Texas school financing system.²³ The Court refused to recognize a federal right to education because it determined that the Constitution neither explicitly nor implicitly recognized education as a fundamental right.²⁴ Furthermore, the Court found that education’s importance and relationship to other rights, such as the right to speak and vote, were insufficient to transform it into a fundamental right.²⁵

Numerous scholars have disagreed with the Court’s opinion in *Rodriguez* and argued that the United States should recognize a federal right to education.²⁶ However, those arguments, as have many of the

²³ 411 U.S. 1, 4-5 (1973).

²⁴ *Id.* at 35.

²⁵ *Id.* at 35-36.

²⁶ See, e.g., SUNSTEIN, *supra* note 2, at 13-14, 234 (arguing that United States should reclaim former President Franklin Delano Roosevelt’s second bill of rights that included national “right to a good education” and that such right is still needed today in light of fact that “[m]illions of young Americans receive an inadequate education”); Susan H. Bitensky, *Theoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 NW. U. L. REV. 550, 574 (1992) (“The Constitution contains a number of provisions any one of which arguably forms the analytical basis for an implied positive right to education.”); Erwin Chemerinsky, *The Deconstitutionalization of Education*, 36 LOY. U. CHI. L.J. 111, 123 (2004) (arguing that decisions such as *Rodriguez* and *Kadrmas v. Dickinson Public Schools* “are wrong — tragically wrong — in holding that there is not a fundamental right to education. Education is essential for the exercise of constitutional rights, for economic opportunity, and ultimately for achieving equality.”); Thomas J. Walsh, *Education as a Fundamental Right Under the United States Constitution*, 29 WILLAMETTE L. REV. 279, 296 (1993) (“The Constitution can be interpreted to include a fundamental right to education.”).

proposals to reform education, envision a court-defined and enforced reform effort.²⁷ In contrast, this Article contends that Congress should recognize a federal right to education through spending legislation that the federal and state governments collaboratively enforce. This reconceptualization of the enforcement of a federal right to education draws upon the implementation and enforcement mechanisms for a right to education in international human rights law.

This Article proceeds in five parts. Part I briefly considers the major attempts to address inequities in educational opportunity — school desegregation litigation, school finance suits, and current federal education legislation — and analyzes why these approaches have not eliminated persistent inequities. Part II summarizes the arguments presented in the existing scholarship on a federal right to education. It then presents arguments for why federal action is necessary to address the persistent disparities in educational opportunities. Part III considers the human rights enforcement mechanisms for a right to education. Part IV then proposes how these models could inform the development and enforcement of a federal right to education in the United States. Part V explores some of the strengths and weaknesses of this Article's proposed approach.

I. THE EXISTING VEHICLES TO ADDRESS EDUCATIONAL INEQUITIES
FOR DISADVANTAGED STUDENTS AND WHY THEY HAVE NOT FULLY
ACHIEVED THEIR GOALS

Over the last half century, the efforts to address inferior educational opportunities for minority and low-income schoolchildren have focused on desegregating public schools, reducing inequities and inferior outcomes through school finance litigation, and providing additional federal funding to low-income children.²⁸ Part I provides an overview of these efforts, acknowledges their achievements, and analyzes their shortcomings as a predicate for establishing why a new approach must address remaining barriers to equal educational opportunity for disadvantaged students.

²⁷ DOUGLAS S. REED, *ON EQUAL TERMS: THE CONSTITUTIONAL POLITICS OF EDUCATIONAL OPPORTUNITY*, at xiii (2001) (“Educational reformers, aggrieved parents and students, social movement activists, and public interest litigators almost reflexively rely on judicial intervention in public education to transform institutions of learning.”).

²⁸ PETER SCHRAG, *FINAL TEST: THE BATTLE FOR ADEQUACY IN AMERICA'S SCHOOLS* 1 (2003).

A. School Desegregation Litigation

Civil rights advocates initially believed that the 1954 victory in *Brown v. Board of Education* (“*Brown I*”) heralded an end to the separate and unequal educational opportunities experienced by minority schoolchildren.²⁹ In that decision, the Court held that states denied minority schoolchildren “equal educational opportunities” when they provided separate schools for white schoolchildren.³⁰ In striking down the segregated schools, the Court acknowledged the importance of education as the mechanism for exposing children to the building blocks of citizenship, introducing children to cultural norms, and developing the skills necessary to enter the workforce.³¹ In light of education’s importance, the Court explained that “[s]uch an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.”³²

To guide lower courts in implementing this groundbreaking decision, the Court in *Brown v. Board of Education* (1955) (“*Brown II*”) ordered the states to admit minority schoolchildren to public schools on a nondiscriminatory basis “with all deliberate speed,” a standard that the Court alleged represented an acknowledgement of the complexity of the changes that districts must implement.³³ However, this language opened the door for districts opposed to the decision to move exceedingly slowly or not at all.³⁴ Those who sought to implement *Brown I* and *II* faced violent and sustained opposition.³⁵ Many federal courts did little to respond to this violence and instead delayed resolving desegregation litigation or approved superficial changes.³⁶

²⁹ See OGLETREE, *supra* note 3, at 3-4 (“The Court’s decision seemed to call for a new era in which black children and white children would have equal opportunities to achieve the proverbial American dream.”).

³⁰ *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

³¹ *See id.*

³² *Id.*

³³ 349 U.S. 294, 301 (1955).

³⁴ See HOCHSCHILD & SCOVRONICK, *supra* note 2, at 32-33 (“Desegregation . . . took place with a great deal of deliberation and very little speed”); OGLETREE, *supra* note 3, at 10-13.

³⁵ See RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY* 755 (2d ed. 2004) (“[I]t was the schoolhouse that became the arena for the South’s fiercest show of hostility to desegregation.”); OGLETREE, *supra* note 3, at 11-12; Michael J. Klarman, *Brown at 50*, 90 VA. L. REV. 1613, 1623-24 (2004).

³⁶ See ORFIELD & EATON, *supra* note 3, at 7.

In the face of this resistance, the Court slowly began issuing decisions that signaled that it would not tolerate such opposition.³⁷ The Court's clearest signal that segregation must end came in 1968 in *Green v. County School Board*.³⁸ The Court held that states must eliminate discrimination "root and branch"³⁹ and that school boards bore the burden to immediately implement realistic desegregation plans.⁴⁰ In addition to signaling the end of *Brown II*'s "deliberate speed" standard, *Green* declared that beyond student enrollment, districts also must desegregate "faculty, staff, transportation, extracurricular activities, and facilities."⁴¹ The Court shortly thereafter placed its imprimatur on busing as a constitutionally permissible means to achieve desegregation in *Swann v. Charlotte-Mecklenburg Board of Education*.⁴²

Ultimately, the Court's decisions needed the support of legislative action to achieve meaningful desegregation, particularly in southern parts of the United States.⁴³ The 1964 Civil Rights Act was a powerful weapon against segregation that "forced rapid and dramatic changes on the South."⁴⁴ The Johnson Administration actively enforced the Act's prohibition of discrimination by bringing litigation against school districts that received federal funds and by terminating funding for noncompliant districts.⁴⁵ The integration of large districts that contained urban and suburban schools led the South to achieve the greatest desegregation gains.⁴⁶ White flight and changes in demographics that left schools with too few white students to achieve integration caused desegregation in the North to occur more slowly, if

³⁷ E.g., *Cooper v. Aaron*, 358 U.S. 1, 4 (1958) (refusing to uphold suspension of Little Rock school board's desegregation plan).

³⁸ 391 U.S. 430 (1968).

³⁹ *Id.* at 438.

⁴⁰ *Id.* at 439 (stating that "[t]he burden on the school board today is to come forward with a plan that promises realistically to work, and promises realistically to work now").

⁴¹ *Id.* at 435.

⁴² 402 U.S. 1, 29-31 (1971); see also *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 201, 208 (1973) (extending requirements to desegregate to district that had not maintained legally mandated or authorized dual systems but in which school board actions had established segregated schools).

⁴³ See GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 52-53 (1991).

⁴⁴ ORFIELD & EATON, *supra* note 3, at 8.

⁴⁵ See *id.*

⁴⁶ See HOCHSCHILD & SCOVRONICK, *supra* note 2, at 36-37; ORFIELD & EATON, *supra* note 3, at 14-15.

at all.⁴⁷

Where desegregation occurred, African Americans received improved educational opportunities, such as access to more experienced teachers and better curricular offerings.⁴⁸ Minority students in desegregated schools also experienced superior educational and occupational outcomes.⁴⁹ For example, black students in desegregated schools earned “higher scores on national standardized tests, better college admissions records, and higher-status jobs afterward than those in heavily black-majority schools.”⁵⁰ Students realized such gains when districts encouraged equitable practices within schools, rather than simply assumed that desegregation’s benefits flowed from placing minority and white schoolchildren within the same school.⁵¹ Additionally, during the period after desegregation began, African Americans experienced numerous benefits such as higher high school and college graduation rates.⁵² With few exceptions, desegregation also either benefited white students academically or had little effect on them.⁵³ Thus, where desegregation occurred, it successfully shifted the American educational landscape.⁵⁴

However, the Court’s decisions beginning in the mid-1970s began to circumscribe and undermine desegregation. In the 1974 *Milliken v.*

⁴⁷ See sources cited *supra* note 46.

⁴⁸ KLUGER, *supra* note 35, at 768.

⁴⁹ Roslyn Arlin Mikelson, *How Tracking Undermines Race Equity in Desegregated Schools*, in BRINGING EQUITY BACK, *supra* note 3, at 49, 55.

⁵⁰ KLUGER, *supra* note 35, at 768; see also Mikelson, *supra* note 49, at 56 (noting higher achievement for both whites and minorities in racially desegregated schools). Also, compared to black students from racially isolated schools, blacks in desegregated schools “have higher job aspirations, . . . usually do better in college, have more racially mixed social and professional networks in adult life, and are somewhat more likely to hold white-collar and professional jobs in the private sector.” HOCHSCHILD & SCOVRONICK, *supra* note 2, at 40. In desegregated schools, the reading scores of blacks and Latinos are significantly closer to white students’ scores than in segregated schools after controlling for the influence of past achievement and family background. *Id.* at 39.

⁵¹ See Mikelson, *supra* note 49, at 55. African American students improved more academically when desegregation plans included both a city and its suburbs, when districts implemented desegregation in the early grades, and when they left their poor school districts to attend school in wealthier districts. See HOCHSCHILD & SCOVRONICK, *supra* note 2, at 39.

⁵² See HOCHSCHILD & SCOVRONICK, *supra* note 2, at 38-39.

⁵³ See *id.* at 38; Mikelson, *supra* note 49, at 55-56.

⁵⁴ See HOCHSCHILD & SCOVRONICK, *supra* note 2, at 29 (noting desegregation had real “social and educational benefits”).

Bradley decision, the Court ruled that district courts lacked power to order remedial decrees covering school districts that did not show evidence of operating legally separated schools.⁵⁵ This ruling left Detroit and many similarly situated cities to try to desegregate its entire district with the few white students who remained in the city — a quickly shrinking population.⁵⁶ Thus, *Milliken* assisted those who continued to oppose desegregation⁵⁷ by providing white families the opportunity to escape desegregation merely by crossing district lines.⁵⁸ This particularly eviscerated desegregation in the North because it became difficult to prove intentional discrimination in establishing district lines.⁵⁹

Post-*Milliken* decisions in the early to mid-1990s further cemented the Court's retreat from desegregation. In *Board of Education v. Dowell*, the Court explained that district courts should consider whether school districts had "complied in good faith with the desegregation decree since it was entered, and whether the vestiges of past discrimination had been eliminated to the extent practicable."⁶⁰ *Dowell* released districts from the desegregation required under *Green* after only a brief attempt.⁶¹ In *Freeman v. Pitts*, the Court permitted

⁵⁵ 418 U.S. 717, 748-49 (1974).

⁵⁶ See KLUGER, *supra* note 35, at 766-67.

⁵⁷ See, e.g., OGLETREE, *supra* note 3, at 133 (2004) (contending *Milliken* "represented the first major Supreme Court move against school desegregation"); ORFIELD & EATON, *supra* note 3, at 10 ("The impetus of *Brown* and the civil rights movement for desegregating American schools hit a stone wall with the 1974 *Milliken v. Bradley* decision.").

⁵⁸ See KLUGER, *supra* note 35, at 766; OGLETREE, *supra* note 3, at 170.

⁵⁹ See HOCHSCHILD & SCOVONICK, *supra* note 2, at 34. Gary Orfield and Susan Eaton capture *Milliken*'s impact by explaining that "[r]ejection of city-suburban desegregation brought an end to the period of rapidly increasing school desegregation for black students, which began in 1965. No longer was the most severe segregation found among schools within the same community; the starkest racial separations occurred between urban and suburban school districts within a metropolitan area. But *Milliken* made this segregation almost untouchable." ORFIELD & EATON, *supra* note 3, at 12; see also KLUGER, *supra* note 35, at 767 ("*Milliken* had a quickly chilling effect on whatever hopes remained for a truly integrated America before the end of the twentieth century. Not only had the Court made school desegregation a logistical impossibility now for the center-city ghettos, but it also wiped away such a solution in suburbia where interdistrict remedies might have worked fewer hardships and proven highly effective.").

⁶⁰ 498 U.S. 237, 249-50 (1991).

⁶¹ See ORFIELD & EATON, *supra* note 3, at 3 ("Under *Dowell*, a district briefly taking the steps outlined in *Green* can be termed 'unitary' and is thus freed from its legal obligation to purge itself of segregation.").

districts to achieve desegregation in the *Green* components in a piecemeal fashion.⁶² The combined effect of these decisions permitted districts to return to neighborhood schools despite their lower quality and ongoing segregation.⁶³

The final blow to desegregation came in *Missouri v. Jenkins*, where the Court held that a remedy designed to attract suburban students into urban districts was unconstitutional when only the urban school district had committed a constitutional violation.⁶⁴ The Court further rejected considering minority schoolchildren's test scores as a measure of desegregation's effectiveness.⁶⁵ Once the Court decided *Dowell*, *Pitts*, and *Jenkins*, it minimized judicial involvement in education and restored power to state and local governments.⁶⁶ The subsequent release of many schools districts from court supervision oftentimes marked a return to racially segregated neighborhood schools and inferior educational opportunities for many minority children in those schools.⁶⁷

In addition to the limiting effect of Supreme Court decisions, desegregation suffered from many implementation shortcomings. The vast majority of districts sent black students to white schools with more funding, while schools that remained predominantly minority did not receive the equalized resources that the *Brown I* lawyers had hoped would accompany integration.⁶⁸ Thus, even successful desegregation efforts left many minority children in schools inferior to those attended by whites. Many schools with students of both races engaged in tracking by placing students in different classes,

⁶² 503 U.S. 467, 496-98 (1992).

⁶³ See ORFIELD & EATON, *supra* note 3, at 2.

⁶⁴ 515 U.S. 70, 92-93 (1995).

⁶⁵ See *id.* at 100-01.

⁶⁶ ORFIELD & EATON, *supra* note 3, at 2-3 (explaining Court "largely displace[d] the goal of rooting out the lingering damage of racial segregation and discrimination with the twin goals of minimizing judicial involvement in education and restoring power to local and state governments, whatever the consequences"); see also Rebell, *supra* note 5, at 295 ("These developments led many civil rights advocates to conclude that the federal courts were abandoning any serious efforts to implement *Brown's* vision of equal educational opportunity.").

⁶⁷ See KLUGER, *supra* note 35, at 772; ORFIELD & EATON, *supra* note 3, at 20-21.

⁶⁸ See OGLETREE, *supra* note 3, at 308 ("When schools were integrated, whites did not attend black schools staffed by black teachers and principals. Instead, blacks went to the better-funded white schools. In this way, integration ended one vital aspect of the 'equalization' strategy pursued by the NAACP in the cases leading up to *Brown I*, while at the same time perpetuating the segregation of public education.").

theoretically based on the student's abilities and knowledge.⁶⁹ However, research has revealed that the reality of tracking is that "[i]n racially diverse schools White students typically are disproportionately found in the top tracks, while children of color are disproportionately found in the lower ones."⁷⁰ Students in higher tracks typically receive superior educational opportunities and exposure to successful peers while those in lower tracks do not receive the opportunities they need to escape the lower tracks.⁷¹ Inferior track placement results in lower achievement outcomes and adversely shapes students' educational and professional goals.⁷²

In addition to these concerns, many minority students increasingly attend majority minority schools. Recent research reveals that the number of African American students in majority minority schools rose from sixty-six percent in the 1991-1992 school year to seventy-three percent in 2003-2004.⁷³ Latinos experience even greater segregation than African Americans as seventy-three percent of Latinos attended majority minority schools in 1991-1992 and seventy-seven percent of Latinos attended such schools in 2003-2004.⁷⁴ As outlined in the Introduction, school desegregation efforts also have not effectively addressed the inferior educational opportunities offered in predominantly minority urban districts. Thus, school desegregation litigation has not adequately remedied the disparate opportunities that many minorities receive.

More importantly, desegregation litigation no longer remains a viable option for addressing disparities in educational opportunity due to dwindling opportunities to litigate such claims.⁷⁵ Few districts have

⁶⁹ Mikelson, *supra* note 49, at 50.

⁷⁰ *Id.* at 51.

⁷¹ *Id.* at 56; Kevin G. Welner & Jeannie Oakes, *Mandates Still Matter: Examining a Key Policy Tool for Promoting Successful Equity-Minded Reform*, in BRINGING EQUITY BACK, *supra* note 3, at 77, 87 ("Tracking's benefits, if they exist, adhere to those outside the lowest tracks.")

⁷² Mikelson, *supra* note 49, at 57, 66.

⁷³ See GARY ORFIELD & CHUNGMEI LEE, RACIAL TRANSFORMATION AND THE CHANGING NATURE OF SEGREGATION 9-10 (2006), available at http://www.civilrightsproject.harvard.edu/research/deseg/Racial_Transformation.pdf.

⁷⁴ See *id.* at 10-11; see also ERICA FRANKENBERG ET AL., HARVARD CIVIL RIGHTS PROJECT, A MULTIRACIAL SOCIETY WITH SEGREGATED SCHOOLS: ARE WE LOSING THE DREAM? 30, 34 (2003), available at <http://www.civilrightsproject.harvard.edu/research/reseg03/AreWeLosingtheDream.pdf> (reporting data showing increasing racial segregation for African American and Latino students).

⁷⁵ See HOCHSCHILD & SCOVRONICK, *supra* note 2, at 29; Paul A. Minorini & Stephen D. Sugarman, *Educational Adequacy and the Courts: The Promise and Problems of*

sufficient evidence of discrimination to warrant new litigation and federal courts have consistently been releasing districts from desegregation decrees.⁷⁶ As Jennifer Hochschild and Nathan Scovronick make clear, “[I]t is very unlikely that there will be any new wave of litigation or new desegregative laws. This effort is largely over; black children must pursue the American dream by a different route.”⁷⁷ Some school districts have undertaken voluntary efforts to desegregate their schools. In the 2006-2007 Term, the Supreme Court will decide the legality of such efforts and thus determine if those communities that value integration may pursue them in the absence of court-ordered desegregation.⁷⁸

B. School Finance Litigation

When it became clear that school desegregation would not redistribute educational resources and opportunities for minority schoolchildren as some had hoped, advocates turned to school finance litigation as the vehicle to address disparities in educational opportunities.⁷⁹ The early efforts in federal courts focused on

Moving to a New Paradigm, in EQUITY AND ADEQUACY IN EDUCATION FINANCE: ISSUES AND PERSPECTIVES 175, 187 (Helen F. Ladd et al. eds., 1999); Rebell, *supra* note 5, at 292.

⁷⁶ See HOCHSCHILD & SCOVRONICK, *supra* note 2, at 37 (“Most racial and ethnic separation is now *between*, not *within*, districts; except in very unusual situations, it is beyond challenge in federal courts or any agency that follows the lead of federal courts.”).

⁷⁷ *Id.* at 36.

⁷⁸ See *Parents Involved v. Seattle Sch. Dist.*, 426 F.3d 1162 (9th Cir. 2005), *cert. granted*, 126 S. Ct. 2351 (2006); *McFarland v. Jefferson County Pub. Sch.*, 416 F.3d 513 (6th Cir. 2005), *cert. granted*, *Meredith v. Jefferson County Bd. of Educ.*, 126 S. Ct. 2351 (2006).

⁷⁹ See Molly S. McUsic, *The Law's Role in the Distribution of Education: The Promises and Pitfalls of School Finance Litigation*, in LAW & SCHOOL REFORM, *supra* note 3, at 88, 89 (“The earliest school finance cases — an outgrowth of courtroom desegregation efforts — were a species of civil rights litigation, although they did not seek an explicitly racial remedy.”); Rebell, *supra* note 5, at 295. Numerous books and articles summarize and analyze school finance litigation. This Article primarily relies upon the following: ANNA LUKEMEYER, COURTS AS POLICYMAKERS: SCHOOL FINANCE REFORM LITIGATION (Eric Rise ed., 2003); Minorini & Sugarman, *supra* note 75, at 175; Paul A. Minorini & Stephen D. Sugarman, *School Finance Litigation in the Name of Educational Equity: Its Evolution, Impact, and Future*, in EQUITY AND ADEQUACY IN EDUCATION FINANCE: ISSUES AND PERSPECTIVES 34 (Helen F. Ladd et al. eds., 1999); John Dayton & Anne Dupre, *School Funding Litigation: Who's Winning the War?*, 57 VAND. L. REV. 2351, 2352-53 (2004); Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101, 109-10 (1995).

challenges to funding disparities under the federal Equal Protection Clause.⁸⁰ These cases quickly met a roadblock to federal constitutional claims in *Rodriguez* when the Supreme Court rejected an argument that education is a fundamental constitutional right.⁸¹

After *Rodriguez*, litigants continued to bring “equity” challenges that primarily sought to remedy disparities in spending between districts.⁸² Rather than depend on the federal Equal Protection Clause, plaintiffs primarily relied on state constitutional equal protection claims.⁸³ Some litigants turned to education clauses in state constitutions that define the state’s role in public education.⁸⁴ While plaintiffs sometimes prevailed, overall, most claims that focused on remedying spending disparities did not succeed.⁸⁵

Since the late 1980s, parents, students, and school districts challenging financial disparities have focused their litigation on arguments that disadvantaged students do not receive the necessary inputs to obtain certain state-defined student outcomes.⁸⁶ These “adequacy” cases challenge financial disparities across districts under

⁸⁰ See, e.g., *Van Dusartz v. Hatfield*, 334 F. Supp. 870, 872-77 (D. Minn. 1971); *McInnis v. Shapiro*, 293 F. Supp. 327, 331-37 (N.D. Ill. 1968), *aff’d sub nom.* *McInnis v. Ogilvie*, 394 U.S. 322 (1969); see also LUKEMEYER, *supra* note 79, at 3; McUsic, *supra* note 79, at 89.

⁸¹ 411 U.S. 1, 35-36 (1973).

⁸² See LUKEMEYER, *supra* note 79, at 104-09.

⁸³ See, e.g., *DuPree v. Alma Sch. Dist.*, 651 S.W.2d 90, 92 (Ark. 1983) (holding that school finance system did not have rational state purpose); *Horton v. Meskill*, 376 A.2d 359, 374 (Conn. 1977) (holding that school finance system’s reliance on property taxes violates state’s equal protection clause); see also DAVID HURST ET AL., NAT’L CTR. FOR EDUC. STATISTICS, OVERVIEW AND INVENTORY OF STATE EDUCATION REFORMS: 1990 TO 2000, at 40 (2003), available at <http://nces.ed.gov/pubs2003/2003020.pdf>; LUKEMEYER, *supra* note 79, at 5-6; Dayton & Dupre, *supra* note 79, at 2364, 2386.

⁸⁴ See, e.g., *Robinson v. Cahill*, 303 A.2d 273 (N.J. 1973) (finding state’s education finance system unconstitutional under state education clause); *Bd. of Educ. v. Walter*, 390 N.E.2d 813 (Ohio 1979) (finding school finance system constitutional under state’s equal protection and education clauses); see LUKEMEYER, *supra* note 79, at 6.

⁸⁵ See LUKEMEYER, *supra* note 79, at 6; Minorini & Sugarman, *supra* note 79, at 47-56. Cases that were unsuccessful include *Thompson v. Engelking*, 537 P.2d 635, 640 (Idaho 1975), and *Olsen v. State*, 554 P.2d 139, 149 (Or. 1976), and cases that were successful include *Serrano v. Priest*, 557 P.2d 929, 953 (Cal. 1976), and *Robinson*, 303 A.2d at 295.

⁸⁶ See LUKEMEYER, *supra* note 79, at 6; Michael Heise, *State Constitutions, School Finance Litigation, and the “Third Wave”: From Equity to Adequacy*, 68 TEMP. L. REV. 1151, 1160 (1995); Minorini & Sugarman, *supra* note 79, at 56-62.

state constitutional education clauses.⁸⁷ Adequacy contentions sometimes include equity arguments just as equity arguments often include adequacy arguments.⁸⁸ Adequacy arguments met a much more receptive audience than prior efforts that typically focused on equity issues and have led to plaintiff victories in the majority of the cases.⁸⁹ For example, in the now-famous 1989 decision in *Rose v. Council for Better Education*, the Kentucky Supreme Court embraced seven capacities or skills that students must have the opportunity to obtain through the state's education system.⁹⁰

More recently, New York City schoolchildren won a major victory in *Campaign for Fiscal Equity, Inc. v. State of New York*, when the New York Court of Appeals rejected a lower court ruling that an eighth grade education provided a "sound basic education" and embraced a high standard for adequacy that required schools to prepare students to be "civic participants capable of voting and serving on a jury."⁹¹ The court further held that the basic education standard required students to receive a complete high school education — which remains essential for employment in modern society — and should

⁸⁷ See HURST ET AL., *supra* note 83, at 40.

⁸⁸ 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, 571 (2007).

⁸⁹ See HOCHSCHILD & SCOVRONICK, *supra* note 2, at 65; Minorini & Sugarman, *supra* note 79, at 63 ("Although courts in many states have by now rejected traditional 'equity' claims, other more ambitious cases demanding 'adequacy' are winning."); Rebell, *supra* note 5, at 297.

⁹⁰ Those seven capacities are:

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

790 S.W.2d 186, 212 (Ky. 1989).

⁹¹ 801 N.E.2d 326, 330 (N.Y. 2003) (quoting *Campaign for Fiscal Equity, Inc. v. State*, 655 N.E.2d 661, 666 (N.Y. 1995)).

prepare students for higher education.⁹² While some courts have chosen to define “adequacy,” others left the definition to the legislature after finding a school finance system unconstitutional.⁹³

Only a handful of states have not experienced some form of school finance litigation.⁹⁴

Numerous states have achieved important outcomes through school finance litigation.⁹⁵ States have realized higher “basic student funding levels, and increased state aid to poor districts” through adequacy reforms.⁹⁶ Following court orders to address educational inequities, spending in the poorest districts increased by eleven percent, increased by seven percent in the median districts, and essentially remained steady in wealthy districts.⁹⁷ Where plaintiffs succeeded, states typically increased spending levels and the spending gap between poor and rich districts narrowed.⁹⁸ States have adjusted finance systems to increase equity between school districts through such measures as reducing reliance on local funding.⁹⁹ Furthermore, as a result of school finance litigation “[m]any states have expanded adjustments for at-risk and early childhood programs, professional development or technology.”¹⁰⁰

Adequacy litigation has also exposed the fact that legislatures sometimes do not set the financial allocation for schools based on the needs of students and the desired educational opportunities and

⁹² See *id.* at 331, 351-52.

⁹³ See HURST ET AL., *supra* note 83, at 44-45 (noting that several courts relied on Kentucky’s definition of adequacy, others developed their own definition of adequacy and still others allowed legislature to define adequacy); see also *DeRolph v. State*, 678 N.E.2d 886, 887-88 (Ohio 1997) (refusing to retain exclusive jurisdiction of appeal while legislature determines how to revise school finance system consistent with court’s opinion); *Campbell County Sch. Dist. v. State*, 907 P.2d 1238, 1259 (Wyo. 1995) (“The legislature, in fulfilling its constitutional duty, must define and specify what a ‘proper education’ is for a Wyoming child.”).

⁹⁴ See LUKEMEYER, *supra* note 79, at 2.

⁹⁵ See *id.*

⁹⁶ See HURST ET AL., *supra* note 83, at 47.

⁹⁷ See NAT’L RESEARCH COUNCIL, *supra* note 5, at 90.

⁹⁸ See HOCHSCHILD & SCOVRONICK, *supra* note 2, at 68; NAT’L RESEARCH COUNCIL, *supra* note 5, at 90 (summarizing research finding that “reform in the wake of a court decision reduces spending inequality within a state by 19 to 34 percent”).

⁹⁹ See HURST ET AL., *supra* note 83, at 47.

¹⁰⁰ See *id.*

outcomes.¹⁰¹ When states define adequacy, they must determine the costs of resources that they must offer to provide an adequate education to all students.¹⁰² When states make these determinations, they benefit students because they focus the legislature's assessment of the appropriate school funding levels on the goals of the education system rather than on political compromise.

Finally, school finance litigation has led some state courts to define the right to an adequate education in terms of an array of outcomes, inputs, or a combination of both.¹⁰³ In defining a right to education, some courts have examined current social requirements such as democratic and workforce participation.¹⁰⁴ For example, the highest court in New York decided that "adequacy" required a high school education by considering what students need today to be "civic participants."¹⁰⁵ Courts in states such as New Hampshire and New Jersey have similarly linked their definitions of adequacy to the role that students will play in society.¹⁰⁶ By establishing these connections, the courts "are reinvigorating the democratic imperative and providing a basis for accelerating progress toward realizing *Brown's* vision of equal educational opportunity."¹⁰⁷

Despite these positive outcomes from school finance litigation, it will take additional measures to address the disparities in educational opportunities. First, only a few states, such as Kentucky and New York, have adopted relatively high standards for adequacy. A 2003 study of school finance litigation in all states revealed that such high

¹⁰¹ See, e.g., *Campaign for Fiscal Equity, Inc. v. State*, 801 N.E.2d 326, 347-48 (N.Y. 2003) ("[T]he political process allocates to City schools a share of state aid that does not bear a perceptible relation to the needs of City students.").

¹⁰² See HURST ET AL., *supra* note 83, at 45; Koski & Reich, *supra* note 88, at 566 ("Perhaps due to legislatures' inaction in the face of broad constitutional declarations, courts more recently have been directing legislatures or, in some instances, commissioning independent consultants to 'cost out' what is an adequate education."); see also NAT'L SCH. BDS. ASS'N, SCHOOL FINANCE LITIGATION TABLE (2004), available at <http://www.nsba.org/site/docs/33700/33652.pdf> (listing states that have undertaken study to determine education costs).

¹⁰³ See LUKEMEYER, *supra* note 79, at 88-91; Minorini & Sugarman, *supra* note 79, at 63-64; Kristen Safier, Comment, *The Question of a Fundamental Right to a Minimally Adequate Education*, 69 U. CIN. L. REV. 993, 1012-15 (2001).

¹⁰⁴ See *Rebell*, *supra* note 5, at 301.

¹⁰⁵ See *Campaign for Fiscal Equity*, 801 N.E.2d at 330-32; *Rebell*, *supra* note 5, at 301.

¹⁰⁶ See *Claremont Sch. Dist. v. Governor*, 635 A.2d 1375, 1381 (N.H. 1993); *Robinson v. Cahill*, 303 A.2d 273, 295 (N.J. 1973); *Rebell*, *supra* note 5, at 301.

¹⁰⁷ *Rebell*, *supra* note 5, at 301.

aspirations for education systems represent the exception rather than the norm.¹⁰⁸ When legislators or courts define adequacy in terms of low standards, states fail to provide disadvantaged students the resources they need to prepare for work and citizenship.

Second, even when plaintiffs prevail, court victories do not guarantee improved opportunities for disadvantaged students. As school finance expert Michael Rebell acknowledges, “[A]lthough funding disparities among school districts have been reduced dramatically in some states where courts have invalidated state educational funding systems, elsewhere such court decrees actually have resulted in educational setbacks.”¹⁰⁹ For example, a California Supreme Court decision favoring the plaintiffs, when coupled with a voter initiative, resulted in equalization of district spending at a low spending level.¹¹⁰ Other states, such as Alabama and New Jersey, experienced fierce opposition to reform following a court determination that the education finance system was inadequate and that opposition has undermined and even halted effective reform in those states.¹¹¹ Thus, as Rebell acknowledges, “Too often, judicial intervention in cases in which plaintiffs had won dramatic legal victories did not result in effective, lasting solutions to deep-rooted education controversies.”¹¹²

School finance litigation also provides little relief for children in states where state courts reject plaintiffs’ claims. For instance, in the absence of successful school finance claims, spending “disparities have stayed the same or gotten worse.”¹¹³ Where school finance reform occurred without a successful school finance case, it often proved ineffective.¹¹⁴ Furthermore, notwithstanding significant plaintiff victories, policymakers have not uniformly interpreted state constitutional obligations to require equal educational opportunity as

¹⁰⁸ See LUKEMEYER, *supra* note 79, at 91 (finding that courts’ definitions of adequacy typically set relatively low standards for what state education systems must accomplish).

¹⁰⁹ Rebell, *supra* note 5, at 293.

¹¹⁰ HOCHSCHILD & SCOVRONICK, *supra* note 2, at 66; MARK G. YUDOF ET AL., *EDUCATIONAL POLICY AND THE LAW* 776-77 (4th ed. 2002); Rebell, *supra* note 5, at 293 (contrasting successful reforms in Kentucky with leveling down of spending in California).

¹¹¹ See HURST ET AL., *supra* note 83, at 51.

¹¹² Rebell, *supra* note 5, at 308.

¹¹³ HOCHSCHILD & SCOVRONICK, *supra* note 2, at 68.

¹¹⁴ See *id.*

a constitutional minimum.¹¹⁵ As a result, disadvantaged children in many states do not have a state mechanism to address the inferior educational opportunities they receive. The concentration of political power does not rest within the districts where these children live, and thus the legislature does not have substantial incentives for reform.¹¹⁶

Equity and adequacy litigation do not address wide disparities between states in educational spending and the opportunities that such spending can purchase.¹¹⁷ If the more advantaged students and their politically influential parents cannot encourage a state to increase spending to more closely match that of states with a larger investment in education, it is no surprise that the disadvantaged children most harmed by these disparities have not convinced the state's policymakers to make such changes. Therefore, for children in low-spending states, even when plaintiffs prevail, the children only receive a more equitable distribution of limited spending, which does little to address the fact that children in other states have the additional educational programs and opportunities that higher expenditures purchase.

In conclusion, school finance litigation should remain part of the arsenal to address inequitable educational opportunities. But such litigation alone cannot address the longstanding disparities in educational opportunity that plague many states. Subpart C turns to the primary federal legislation for assisting disadvantaged students: Title I of the Elementary and Secondary Education Act of 1965.

C. Federal Legislation to Assist Disadvantaged Students

Historically, the role of the federal government in education “has been fairly limited and primarily directed toward special programs, usually targeted at particular populations such as the poor or the disabled.”¹¹⁸ This section presents the evolution and structure of past

¹¹⁵ See *id.* at 64.

¹¹⁶ See Welner & Oakes, *supra* note 71, at 89.

¹¹⁷ See Liu, *supra* note 7, at 333 (“[E]ven if we were to eliminate disparities between school districts within each state, large disparities across states would remain.”).

¹¹⁸ Ryan, *supra* note 4, at 987; see also Michael Heise, *The Political Economy of Education Federalism*, 56 EMORY L.J. 125, 127 (2006) (“Historically, the federal government’s intersections with public K-12 schools focused on either specific types of schools, such as those predominately serving children from low-income households, or discrete subpopulations of students, such as those with qualifying disabilities.”).

federal efforts to provide a historical context for the restructuring of the federal role proposed in Part IV.

The federal government has been involved in education since before the framing of the Constitution, with Congress's initial foray into public education supporting the development of schools as new states joined the Union.¹¹⁹ As states became part of the fledgling nation, Congress embraced public education as a critical component in developing a "republican form of government."¹²⁰ The political leaders of the day believed that the citizenry must be educated so that it could guide the government in an intelligent and informed manner.¹²¹ During the early to mid-twentieth century, the federal government remained involved in public education, but it limited its role to programs for a fairly narrowly defined need or population. Such programs included compensation to those districts that educated children from military bases whose families did not pay property taxes, financial support for the education of veterans through the G.I. Bill of Rights, and aid to public high schools to support vocational education.¹²² The federal government also provided additional aid for school lunch programs, repairs of public schools and other public facilities, and teacher salaries.¹²³ The Cold War witnessed the launch of Sputnik by the Soviet Union and the passage of the National Defense Education Act of 1958, which supported primary and secondary education for math, science, and foreign languages.¹²⁴

The Civil Rights Act of 1964 marked a shift toward increased federal involvement in determining educational rights.¹²⁵ Federal legislation in education then experienced a watershed when Congress passed the

¹¹⁹ DAVID TYACK ET AL., *LAW AND THE SHAPING OF PUBLIC EDUCATION 1785-1954*, at 20, 22 (1987).

¹²⁰ *Id.* at 20.

¹²¹ *See id.* at 24-25. Education provided a means to unite individuals with other loyalties into citizens of the republic while also ensuring that these individuals understood the rights and duties that accompanied citizenship. *See id.* at 24, 28. In addition to aid for public schools in the emerging states, the Morrill Act of 1862 also provided federal aid to scientific and agricultural studies in higher education. *See* Carl F. Kaestle & Marshall S. Smith, *The Federal Role in Elementary and Secondary Education, 1940-1980*, 52 *HARV. EDUC. REV.*, 384, 390 (1982).

¹²² *See* WILLIS RUDY, *BUILDING AMERICA'S SCHOOLS AND COLLEGES: THE FEDERAL CONTRIBUTION 55-63* (2003); Kaestle & Smith, *supra* note 121, at 388-89.

¹²³ RUDY, *supra* note 122, at 55; Erik W. Robelen, *The Evolving Federal Role, in* LESSONS OF A CENTURY: A NATION'S SCHOOLS COME OF AGE 240, 240-41 (2000).

¹²⁴ *See* Kaestle & Smith, *supra* note 121, at 393-94.

¹²⁵ *See* Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241; YUDOF ET AL., *supra* note 110, at 857.

Elementary and Secondary Education Act of 1965 (“ESEA”),¹²⁶ which embodied President Lyndon Johnson’s most important efforts to assist low-income and minority schoolchildren.¹²⁷ Title I, the heart of the ESEA, initially gave over \$1 billion in federal money to schools with substantial concentrations of poor children to assist in their basic education.¹²⁸ It aimed to improve the educational opportunities provided to poor schoolchildren, and it sought to achieve this goal by providing additional resources to school districts based on the number of low-income children enrolled in the district.¹²⁹

Those who wanted to constrain the federal role in education hampered Title I’s implementation by requiring schools to separate the programs that Title I supported from regular education.¹³⁰ Separating these programs required distinct staffing and administrative support and resulted in removing students from their regular classroom to receive Title I services, thereby exempting non-Title I teachers from having to focus on the educational needs of these students.¹³¹ Despite these shortcomings, some scholars conclude that Title I has positively affected students and that it has helped to revise the expectations that society had of low-income and minority students while simultaneously helping such students change what they expected of themselves.¹³² While ESEA expanded the role of the federal government in education, it “was a very targeted and limited role.”¹³³

While not directly expanding it, President George H.W. Bush set the stage for an enhanced federal role when he convened the nation’s governors in Charlottesville to discuss the future of education reform.¹³⁴ At that meeting, the governors embraced the development of voluntary national education goals designed to increase the nation’s international competitiveness in seven educational areas.¹³⁵ By

¹²⁶ Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27.

¹²⁷ John F. Jennings, *Title I: Its Legislative History and Its Promise*, 81 PHI DELTA KAPPAN 516, 517 (2000).

¹²⁸ See HOCHSCHILD & SCOVRONICK, *supra* note 2, at 33; Kaestle & Smith, *supra* note 121, at 396; Robelen, *supra* note 123, at 240.

¹²⁹ Jennings, *supra* note 127, at 517-18; Kaestle & Smith, *supra* note 121, at 398.

¹³⁰ See Kaestle & Smith, *supra* note 121, at 399-400.

¹³¹ See *id.* at 400.

¹³² Jennings, *supra* note 127, at 519; Kaestle & Smith, *supra* note 121, at 519.

¹³³ MCGUINN, *supra* note 17, at 48.

¹³⁴ See *id.* at 60-61.

¹³⁵ The President and the nation’s governors agreed that performance goals should be developed “related to: the readiness of children to start school; the performance of

embracing these goals for all children, the President and governors signaled an important philosophical shift for education reform. Instead of focusing on the needs of particular populations, they envisioned a broader effort to improve the educational outcomes for all students.¹³⁶ This shift from “educational opportunity and equity to excellence” built on the legacy of President Ronald Reagan’s administration that sought to move federal programs away from the “separate” status that marked Title I programs toward a broader agenda that promoted high achievement standards for all students.¹³⁷ While these efforts were aimed at reducing the federal role in education, it ultimately served to expand it by involving the federal government in the basic instructional function of schools.¹³⁸

The Clinton Administration continued the emphasis on high standards when it proposed and secured passage of Goals 2000, which represented the first significant instance in which the federal government passed legislation that adopted the standards movement as the framework for federal involvement in education.¹³⁹ Goals 2000 provided states small federal grants that fostered state development and adoption of accountability systems with voluntary standards and assessments.¹⁴⁰ The legislation required states that wanted funding under the statute to develop Opportunity to Learn Standards

students on international achievement tests, especially in math and science; the reduction of the dropout rate and the improvement of academic performance, especially among at-risk students; the functional literacy of adult Americans; the level of training necessary to guarantee a competitive workforce; the supply of qualified teachers and up-to-date technology; and the establishment of safe, disciplined, and drug-free schools.” George Bush, Joint Statement on the Education Summit with the Nation’s Governors in Charlottesville, Virginia (Sept. 28, 1989), *available at* <http://www.presidency.ucsb.edu/ws/index.php?pid=17580>; *see also* MARIS VINOVSIS, NAT’L EDUC. GOALS PANEL, THE ROAD TO CHARLOTTESVILLE: THE 1989 EDUCATION SUMMIT 40 (1999).

¹³⁶ See Koski & Reich, *supra* note 88, at 577.

¹³⁷ Lorraine M. McDonnell, *No Child Left Behind and the Federal Role in Education: Evolution or Revolution*, 80(2) PEABODY J. EDUC. 19, 25-27 (2005). While the first Bush Administration established a National Education Goals panel to assess progress in meeting the summit’s goals, the Education Summit would prove to be the only major education accomplishment of that Administration as it was unable to secure passage of an education reform bill. *Id.* at 27; MCGUINN, *supra* note 17, at 70.

¹³⁸ See McDonnell, *supra* note 137, at 26-27.

¹³⁹ See Goals 2000: Educate America Act, Pub. L. No. 103-227, § 211, 108 Stat. 125 (1994); MCGUINN, *supra* note 17, at 70; McDonnell, *supra* note 137, at 29.

¹⁴⁰ See Goals 2000 § 306; MCGUINN, *supra* note 17, at 90; McDonnell, *supra* note 137, at 29; Benjamin M. Superfine, *The Politics of Accountability: The Rise and Fall of Goals 2000*, 112 AM. J. EDUC. 10, 16 (2005).

(“OTLS”) that defined the necessary inputs for student achievement.¹⁴¹ Goals 2000 also created the National Education Standards and Improvement Council to oversee ongoing assessment and certification of voluntary national and state OTLS and content and performance standards.¹⁴² To help calm concerns that it sought to exercise direct federal control over education, Congress balanced these changes with assurances within the statute that recognized that the state and local governments maintained control over schools.¹⁴³ However, the statute only had a limited affect on education because Goals 2000 only provided a small amount of funds, its obligations were voluntary, and the Department of Education did not enforce many of the statute’s requirements.¹⁴⁴

When Congress reauthorized ESEA in 1994 by passing the Improving America’s Schools Act (“IASA”), it built on the growing support for standards-based accountability.¹⁴⁵ IASA directed states to set the same goals and standards for Title I students as for other students and to develop accountability systems, including rigorous content and performance standards and statewide tests.¹⁴⁶ Under the Act, districts and states identify the schools and districts that need improvement and must address consistently inadequate progress on state assessments through corrective action.¹⁴⁷ In exchange for complying with these mandates, states and districts received additional freedom in how they operated Title I programs.¹⁴⁸ To reduce the separation of Title I students from other students, the revisions also allowed any school to use Title I funds for schoolwide programs if fifty percent or more of the students were low-income.¹⁴⁹

¹⁴¹ See Goals 2000 § 306(d); Andrew Porter, *The Uses and Misuses of Opportunity-to-Learn Standards*, 24 EDUC. RESEARCHER 21, 21 (1995); Superfine, *supra* note 140, at 17.

¹⁴² See Goals 2000 §§ 212-213; Porter, *supra* note 141, at 21; Superfine, *supra* note 140, at 17.

¹⁴³ See Goals 2000 § 319; MCGUINN, *supra* note 17, at 89 n.50.

¹⁴⁴ McDonnell, *supra* note 137, at 30-31; Superfine, *supra* note 140, at 17-18.

¹⁴⁵ Improving America’s Schools Act of 1994, Pub. L. No. 103-382, § 1001, 108 Stat. 3518; McDonnell, *supra* note 137, at 30-31.

¹⁴⁶ See Improving America’s Schools Act §§ 1111, 1112 (amending Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27); McDonnell, *supra* note 137, at 30-31.

¹⁴⁷ See Improving America’s Schools Act § 1116; McDonnell, *supra* note 137, at 30-31.

¹⁴⁸ See McDonnell, *supra* note 137, at 30-31.

¹⁴⁹ See Improving America’s Schools Act § 1114; McDonnell, *supra* note 137, at 31.

Undermining IASA's effectiveness, the statute did not define the percentage of students who must attain proficiency, resulting in some states only requiring fifty percent of their students to obtain proficiency while others required ninety to one hundred percent proficiency.¹⁵⁰

NCLB continues the federal focus on standards-based accountability statutes established by IASA and Goals 2000.¹⁵¹ Under NCLB, states must develop "challenging" academic standards in math and reading and assess whether students meet state standards in these subjects through annual testing in grades three to eight in math and reading and one additional assessment in grades ten to twelve.¹⁵² NCLB also requires states to administer science assessments beginning in the 2007-2008 school year.¹⁵³ States must align assessments with state standards and must disaggregate the results on the basis of students' race and ethnicity, major income groups, disability, and limited-English proficiency.¹⁵⁴ States must ensure that these groups achieve proficiency on state standards by 2014 and must establish a timetable for adequate yearly progress ("AYP").¹⁵⁵ Schools that receive Title I funding must undertake an increasingly demanding set of

¹⁵⁰ See McDonnell, *supra* note 137, at 32. In addition, some of IASA's requirements conflicted with an already ongoing standards-based reform movement and states were reluctant to abandon their state legislature's interpretation of the best way to approach the standards movement in favor of the federal approach. See *id.*

¹⁵¹ Compare McDonnell, *supra* note 137, at 32 (arguing that "NCLB can be viewed as both a direct descendent of its predecessors and an attempt to fix Title I's past shortcomings"), with MCGUINN, *supra* note 17, at 182 (disagreeing with those who contend that NCLB merely builds upon past federal statutes and contending that this "view underestimates the dramatic impact that the requirements of NCLB are having on state education policies and schools across the nation"). For helpful summaries of NCLB's key provisions, see Elizabeth H. DeBray et al., *Introduction to the Special Issue on Federalism Reconsidered: The Case of the No Child Left Behind Act*, 80(2) PEABODY J. EDUC. 1, 6-9 (2005); Erik Robelen, *An ESEA Primer*, EDUC. WK., Jan. 9, 2002, at 28-29; Ctr. on Educ. Policy, *A New Federal Role in Education*, Sept. 2002, at 1, available at <http://www.cep-dc.org/fededprograms/newfedroleedfeb2002.pdf>.

¹⁵² No Child Left Behind Act of 2001, 20 U.S.C. § 6311(b)(1)(A)-(C), (b)(3)(A)-(C) (Supp. II 2002). Annual testing for math and reading began in the 2005-2006 school year and prior to that it was administered once in grades 3 through 5, once in grades 6 through 9, and once in grades 10 through 12. *Id.* § 6311(b)(3)(A)-(C).

¹⁵³ Testing in science must be administered once in grades 3 through 5, once in grades 6 through 9, and once in grades 10 through 12. *Id.* § 6311(b)(3)(C)(v)(II).

¹⁵⁴ *Id.* § 6311(b)(3)(A), (b)(3)(C)(xiii).

¹⁵⁵ Students must be proficient within 12 years of NCLB's passage, which is 2014. *Id.* § 6311(b)(2)(F); see also Ryan, *supra* note 4, at 940.

interventions when students in any of the groups do not make AYP.¹⁵⁶ NCLB also mandates that all states publish report cards that show graduation rates, disaggregate assessment data for each subgroup, and describe the performance of each school district, specifically identifying schools undergoing interventions.¹⁵⁷ Furthermore, NCLB requires districts receiving Title I funds to hire only highly qualified teachers starting with the 2002-2003 school year and that teachers hired before that time must be highly qualified by the end of the 2005-2006 school year.¹⁵⁸

In exchange for these measures, states and districts receive more flexibility in how to use federal aid, and the poorest school districts receive additional federal funds.¹⁵⁹ NCLB continues IASA's effort to remove Title I from the margins of schools by lowering the minimum percentage of students who must be low-income students to use Title I funds for a program for the entire school from fifty to forty percent.¹⁶⁰ In addition, NCLB authorizes school districts to shift some funds among several federal programs and Title I.¹⁶¹ NCLB represents an important first step in addressing the longstanding achievement gap between poor, minority and limited-English proficient students and their peers. If schools use tests to diagnose how to revise teaching to meet students' needs, the achievement gaps gain increased public attention and may be reduced.¹⁶²

Although NCLB involves the most substantial federal intervention in

¹⁵⁶ 20 U.S.C. § 6316(b)(1)(A), (5), (7), (8).

¹⁵⁷ *Id.* § 6311(c)(1), (h).

¹⁵⁸ To be highly qualified, a teacher must obtain state licensure or certification. In addition, new elementary school teachers must hold a bachelor's degree and pass a state test that demonstrates knowledge of the areas within the elementary school curriculum. New middle or high school teachers also must hold a bachelor's degree and demonstrate competency in the field in which they teach. Veteran teachers must hold a bachelor's degree and meet the requirements of new teachers or demonstrate their proficiency in the field in all subject areas in which they teach. *Id.* § 6319(a). Teachers hired before 2002-2003 must be highly qualified by the end of the 2005-2006 school year. *Id.*

¹⁵⁹ CTR. ON EDUC. POLICY, *supra* note 151, at 1.

¹⁶⁰ No Child Left Behind Act of 2001 § 6314(a)(1) (Supp. II 2002).

¹⁶¹ *Id.* § 7305b (Supp. II 2002). These programs include those for teacher improvement, technology, and safe and drug-free schools.

¹⁶² James S. Liebman & Charles F. Sabel, *The Federal No Child Left Behind Act and the Post-Desegregation Civil Rights Agenda*, 81 N.C. L. REV. 1703, 1715 (2003) (citing James S. Liebman & Charles F. Sabel, *A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform*, 28 N.Y.U. REV. L. & SOC. CHANGE 183 (2003)).

education in the nation's history, it remains insufficient to fully address longstanding disparities in educational opportunity and outcomes for several reasons. First, NCLB does not require states and districts to directly remedy disparities in educational opportunity between and within states. NCLB's provisions requiring highly qualified teachers and para-professionals should benefit disadvantaged communities because they employ less qualified teachers than their more affluent peers.¹⁶³ However, these provisions have several shortcomings. Teachers are likely to avoid schools with poor and minority children that face a greater risk of being labeled as failing because their students typically score lower on standardized tests.¹⁶⁴ Teaching at such a school can also negatively affect the teacher's job prospects and thus reinforce the existing pattern of avoiding teaching low-income and minority students.¹⁶⁵ Furthermore, teaching may become a less desirable profession to some bright individuals because standards and testing accountability systems restrict teacher autonomy.¹⁶⁶

Second, NCLB allows each state to set its own "challenging" standards and the proficiency levels required to meet those standards.¹⁶⁷ This flexibility has led some states to set low standards, and, as James Ryan predicted, "the sanctions imposed by the NCLBA, as well as the publicity that attends labeling a school a failure, similarly will alter the political dynamics of testing and will generate both external and internal pressure to lower standards."¹⁶⁸ NCLB mandates that a sample of students from each state participate in the National Assessment of Educational Progress ("NAEP"), a nationwide achievement test, which some contend should serve as a measure of the rigor of state assessments.¹⁶⁹ However, recent data reveals that many states have set their standards relatively low compared to the

¹⁶³ Ryan, *supra* note 4, at 976.

¹⁶⁴ *Id.* at 973-74.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 972 (stating that "reducing [teachers'] autonomy can make teaching less attractive to very good teachers").

¹⁶⁷ No Child Left Behind Act of 2001, 20 U.S.C. § 6311(b)(1)(A)-(C), (b)(3)(A)-(C) (Supp. II 2002); *see also* Ryan, *supra* note 4, at 948 (stating NCLB "leaves states free to establish their own standards and tests and to determine the score needed to be considered proficient").

¹⁶⁸ Ryan, *supra* note 4, at 957.

¹⁶⁹ No Child Left Behind Act of 2001, § 6311(c)(2); *see* Heise, *supra* note 118, at 145; Ryan, *supra* note 4, at 943.

NAEP proficiency standards.¹⁷⁰ A 2006 comparison of state assessment results on fourth and eighth grade math with NAEP results revealed that the flexibility given to states “has led to the bizarre situation in which some states achieve handsome proficiency results by grading their students against low standards, while other states suffer poor proficiency ratings only because they have high standards.”¹⁷¹ Thus, states have used NCLB’s flexibility to develop divergent standards that vary substantially in substance and difficulty.¹⁷² With a large number of states setting low proficiency standards, even if the achievement gap closes on state assessments between low-income and affluent students and minority and white students, “proficient” students may not have acquired the knowledge and skills that they need for successful employment or to become productive citizens.

Third, NCLB only requires states to address the achievement gap between racial and ethnic groups on statewide assessments. A 2006 Center on Education Policy survey on the progress of states and districts in implementing NCLB revealed that “more states reported that all gaps were narrowing rather than staying the same or widening in both math and English/language arts.”¹⁷³ However, while just over half the states have started to close the gap on statewide assessments, almost half of the states have not experienced such progress, and in a substantial percentage the gap has widened.¹⁷⁴ As states continue to

¹⁷⁰ For instance, a recent review of the rigor of 2005 state assessments found that only 10 states earned a B- or better, and thus in these states it was not substantially easier to be labeled proficient on their state assessment when compared to NAEP proficiency levels. However, 21 states scored between a C+ and a C, 14 states scored between a D+ and a D- and 3 states scored an F. Tests for fourth and eighth graders were not administered in Minnesota, New Hampshire, or Vermont. See Paul E. Peterson & Frederick M. Hess, *Keeping an Eye on State Standards: A Race to the Bottom?*, EDUC. NEXT, Summer 2006, at 28-29.

¹⁷¹ *Id.* at 28. But see Liebman & Sabel, *supra* note 162, at 1736 (arguing evidence exists that suggests “NCLB will touch off a mutually reinforcing race to the top nationwide both in statewide school governance and in district, school, and classroom reform”).

¹⁷² See Liu, *supra* note 7, at 401-02 (noting that flexibility to develop their own standards has resulted in “a patchwork of state standards and assessments that vary considerably in content, ambition, and rigor”).

¹⁷³ CTR. ON EDUC. POLICY, FROM THE CAPITAL TO THE CLASSROOM: YEAR 4 OF THE NO CHILD LEFT BEHIND ACT 45 (2006), available at <http://www.cep-dc.org/nclb/Year4/CEP-NCLB-Report-4.pdf> (analyzing information that states reported without conducting independent analysis of state testing data).

¹⁷⁴ See *id.* at 48 fig.2-B. For example, 51% of the responding states reported that the achievement gap between African American students and white students on state

set low standards and proficiency levels, a substantial achievement gap will remain and go unnoticed between those students who meet the low proficiency levels and those who score well above that standard. If historic achievement patterns continue, most low-income and minority students will remain at schools that focus on minimum proficiency while more affluent and white students will attend schools that aspire to greater academic heights.¹⁷⁵ As a result, a significant achievement gap will remain between these groups of students (on such measures as the Standardized Achievement Test and NAEP scores) even in those states where the achievement gap on state assessments has closed. Thus, while NCLB's focus on the achievement gap is laudable, the statute's requirements, even if fully implemented, will leave substantial work to be done to close the achievement gap. Furthermore, NCLB creates incentives for administrators to exclude minority and low-income students to avoid having their scores lead to a failing label for the school.¹⁷⁶

Part I has established that neither school desegregation, school finance litigation, nor NCLB will effectively overcome the substantial disparities in educational opportunity between disadvantaged and advantaged students. In the next Part, this Article describes the shortcomings of current scholarly approaches to a federal right to education and explains why public schools need an alternative scholarly approach to the federal role in education.

II. SCHOLARLY APPROACHES TO A FEDERAL RIGHT TO EDUCATION AND WHY SCHOOLS NEED A NEW FEDERAL APPROACH

This Part describes some of the existing scholarship on a federal right to education in subpart A. It then identifies some of the shortcomings of the existing literature in preparation for proposing an

assessments was narrowing, while 38% reported that it stayed the same and 11% reported that it widened. Similarly, 55% of states reported that the gap between Latino and white students narrowed, while 31% reported a constant gap and 14% reported that it widened. In addition, only 4% of states reported a widening achievement gap between low-income and non-low-income students, while 55% reported a narrowing achievement gap between these students and 41% reported that the gap stayed the same. *Id.*

¹⁷⁵ *Cf.* Ryan, *supra* note 4, at 955 (noting that focusing on tests in suburban schools is sometimes criticized because "preparing for the tests dumbs down the curriculum in good suburban schools").

¹⁷⁶ *Id.* at 962.

alternative enforcement model for a federal right to education. This Article does not seek to present a novel argument in favor of establishing a federal right to education, but rather proposes an original and innovative approach for enforcement of such a right. Subpart B then examines why federal action to establish a right to education is necessary.

A. *Scholarship on a Federal Right to Education*

As noted in Part I, the Supreme Court rejected an argument that education is a fundamental constitutional right in *Rodriguez*.¹⁷⁷ In considering the claims presented in *Rodriguez*, the Court noted that the plaintiffs could not allege a total denial of educational services nor could a “charge . . . fairly 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.”¹⁷⁸ Upon subjecting the Texas school finance system to rational basis review, the Court found that the system furthered a legitimate state interest in promoting local control of the public schools.¹⁷⁹

In reaching this conclusion, the Court identified several reasons for deferring to the legislative judgments captured in the school finance scheme. The *Rodriguez* Court raised concerns about the appropriate allocation of federal and state power at stake in the case. The Court noted that given the similarities between the Texas system and the systems of other states, their decision had great potential to affect public education financing systems in nearly every state.¹⁸⁰ The Court also indicated that it lacked the expertise to second-guess complex judgments about educational policy that remained the subject of vigorous debate among scholars, legislators, and educational policymakers.¹⁸¹ The judiciary simply was not the appropriate branch of government to determine the goals of education policy and how best to achieve those goals.¹⁸²

¹⁷⁷ 411 U.S. 1, 35-36 (1973).

¹⁷⁸ *Id.* at 37.

¹⁷⁹ *See id.* at 55.

¹⁸⁰ *Id.* at 44 (“[I]t would be difficult to imagine a case having a greater potential impact on our federal system [than the case before it], in which we are urged to abrogate systems of financing public education presently in existence in virtually every State.”).

¹⁸¹ *See id.* at 55.

¹⁸² *See id.* at 36 (“Yet we have never presumed to possess either the ability or the

Since *Rodriguez*, the Court has been of two minds as to the meaning of its decision. While the Supreme Court has repeatedly reaffirmed its holding in *Rodriguez* that education is not a fundamental right,¹⁸³ it also claims that it has “not yet definitively settled the questions whether a minimally adequate education is a fundamental right and whether a statute alleged to discriminatorily infringe that right should be accorded heightened equal protection review.”¹⁸⁴ Justice White made this statement in *Papasan v. Allain*, where the plaintiffs alleged that funding disparities deprived them of a minimally adequate education.¹⁸⁵ The Court noted that the plaintiffs had failed to produce evidence that students did not receive basic educational instruction on skills such as reading and writing.¹⁸⁶ Instead, the Court held that as long as a Mississippi plan to distribute public school land funds rationally related to a legitimate state interest, the plan did not violate the Equal Protection Clause.¹⁸⁷ The Supreme Court’s prior decisions noting the absence of allegations that the state denied students basic minimal reading and writing skills suggest that the Court might only be willing to recognize a right to education that guarantees such basic skills but will not address disparities in educational opportunity beyond such basics.

In light of these Supreme Court decisions, some scholars oppose recognizing a federal right to education,¹⁸⁸ while others have suggested several potential legal arguments for recognizing such a right. Several critics disagree with the Court’s opinion in *Rodriguez* and contend that the Supreme Court should recognize education as a fundamental constitutional right for a variety of reasons, particularly emphasizing

authority to guarantee to the citizenry the most effective speech or the most informed electoral choice. . . . These are indeed goals to be pursued by a people whose thoughts and beliefs are freed from governmental interference. But they are not values to be implemented by judicial instruction into otherwise legitimate state activities.”)

¹⁸³ See *Kadrmas v. Dickinson Public Sch.*, 487 U.S. 450, 461-62 (1988); *Plyler v. Doe*, 457 U.S. 202, 221 (1982).

¹⁸⁴ *Papasan v. Allain*, 478 U.S. 265, 285 (1986).

¹⁸⁵ See *id.* at 286.

¹⁸⁶ See *id.*

¹⁸⁷ See *id.* at 289.

¹⁸⁸ See, e.g., William J. Michael, *When Originalism Fails*, 25 WHITTIER L. REV. 497, 518 (2004) (arguing that U.S. Constitution does not guarantee right to education because it neither mentions education nor includes clause securing such right, and that “nothing in the Constitution mandates protection of implicit rights or protection of rights that are important to the exercise of explicitly protected rights”).

its foundational role in American society and its importance for effectively exercising other rights.¹⁸⁹ At least one scholar argues that courts should recognize education as a judicially enforceable right, but not necessarily a fundamental right.¹⁹⁰ Scholars who contend that there should be a federal right to education typically presume that the judiciary would recognize, define, and enforce the right.¹⁹¹ This emphasis on the judiciary as the change agent reflects a historical reliance on the judiciary to reform public education.¹⁹²

Most scholars and commentators who contend that the Court should recognize a federal right to education focus on a right that guarantees a minimally adequate education.¹⁹³ This type of right to

¹⁸⁹ See Chemerinsky, *supra* note 26, at 123; Walsh, *supra* note 26, at 294-96; Timothy D. Lynch, Note, *Education as a Fundamental Right: Challenging the Supreme Court's Jurisprudence*, 26 HOFSTRA L. REV. 953, 995-96 (1998); Nicholas A. Palumbo, Note, *Protecting Access to Extracurricular Activities: The Need to Recognize a Fundamental Right to a Minimally Adequate Education*, 2004 BYU EDUC. & L.J. 393, 397-98; Safier, *supra* note 103, at 1021 ("The federal judiciary should recognize a fundamental right to a minimally adequate education under the United States Constitution."); Brooke Wilkins, Comment, *Should Public Education Be a Federal Fundamental Right?*, 2005 BYU EDUC. & L.J. 261, 288-90.

¹⁹⁰ Matthew Brunell has argued that "if schoolchildren confined to grossly underperforming schools raised a Due Process Clause challenge, Justice Kennedy's reasoning in *Lawrence v. Texas* suggests that the Court may be receptive to a non-fundamental liberty interest in a minimally adequate education." Matthew A. Brunell, *What Lawrence Brought for Show and Tell: The Non-Fundamental Liberty Interest in a Minimally Adequate Education*, 25 B.C. THIRD WORLD L.J. 343, 366 (2005).

¹⁹¹ See, e.g., Chemerinsky, *supra* note 26, at 111; Eric Lerum et al., *Strengthening America's Foundation: Why Securing the Right to an Education at Home Is Fundamental to the United States' Efforts to Spread Democracy Abroad*, HUM. RTS. BRIEF, Spring 2005, at 13, 16 (arguing for U.S. constitutional amendment for right to education that is enforced in courts); Palumbo, *supra* note 189, at 408-09, 413 (noting two possible bases on which Supreme "Court could find a fundamental right to a minimally adequate education" and discussing how Court may look to state courts and other Supreme Court decisions to define scope of that right); Safier, *supra* note 103, at 1019 ("A minimally adequate education would need to be defined by the courts."); see also Liebman & Sabel, *supra* note 162, at 1744-48 (arguing that NCLB establishes adequate education as privilege of citizenship and that enforcement of school officials' obligations under act may depend upon courts).

¹⁹² See ORFIELD & EATON, *supra* note 3, at xiv; REED, *supra* note 27, at xiii ("Educational reformers, aggrieved parents and students, social movement activists, and public interest litigators almost reflexively rely on judicial intervention in public education to transform institutions of learning.").

¹⁹³ See, e.g., Brunell, *supra* note 190, at 366 (arguing that Court should recognize liberty interest in "minimally adequate education" that would benefit students in "grossly underperforming schools"); Walsh, *supra* note 26, at 296 (positing that ordinary citizens cannot participate in democratic government without minimum,

education typically would set a fairly low substantive standard that, for example, would require a plaintiff to show that the state did not provide her basic educational instruction, such as instruction on how to read or write.¹⁹⁴ Such arguments draw primarily on the Supreme Court's decisions that leave open a possibility for recognizing a right to education but suggest that a state may only infringe such a right if it failed to provide even basic educational instruction.¹⁹⁵

Other scholars advocate for what they call a right to a "minimally adequate education," but appear to call for something beyond the basics mentioned in *Rodriguez* and *Papasan*.¹⁹⁶ For example, one commentator has suggested that such a federal right to education should ensure that schoolchildren acquire the skills necessary to serve the essential functions of education that the Supreme Court has identified: transmitting societal values, preparing citizens to participate in the democratic system, and teaching students to be financially productive.¹⁹⁷ While these standards would provide a right to education beyond the minimal requirements that the Supreme Court noted had not been denied to the plaintiffs in *Rodriguez* and *Papasan*, they still seek to establish a relatively low standard for a federal right to education. In contrast, at least one scholar, Erwin Chemerinsky, supports recognition of a federal fundamental right to education and appears to embrace "[e]qual educational opportunity" as the appropriate goal for such a right.¹⁹⁸

B. Why Federal Action Is Necessary to Address the Lack of Equal Educational Opportunity

Given the fact that the nation sits at the high watermark of federal involvement in education, some undoubtedly may question the need

adequate education); Safier, *supra* note 103, at 1019-20 (arguing for recognition of federal right to minimally adequate education).

¹⁹⁴ See Brunell, *supra* note 190, at 366.

¹⁹⁵ See *supra* text accompanying notes 178, 183-87.

¹⁹⁶ See *supra* text accompanying notes 178, 186.

¹⁹⁷ See Palumbo, *supra* note 189, at 397, 416-17. Another commentator contended that this right should provide public schoolchildren with the following: (1) safe, functional buildings and "current instructional materials"; (2) "basic oral and written communication skills, as well as the ability to read and speak English"; and (3) "basic knowledge in history, economics, politics, government processes, the sciences, mathematics, and logic, in order for students to be able to participate in the political process." Safier, *supra* note 103, at 1009, 1020 (emphasis added).

¹⁹⁸ See Chemerinsky, *supra* note 26, at 123, 135.

for enhancing the federal role in education.¹⁹⁹ Scholars and commentators have consistently documented the inferior educational opportunities provided to low-income, urban, and minority schoolchildren as compared to their more affluent, suburban, and white peers. For too many students throughout the nation, their race, socioeconomic class, or language status predetermines the opportunities they will receive at school.²⁰⁰ When compared with their suburban counterparts, schools in large urban districts — where more than half of the students are poor and almost three quarters of the students are minorities — typically have larger classes, fewer certified teachers, and inferior facilities.²⁰¹

The provision of inferior educational opportunities for many poor, urban, and minority children is far too often an accepted part of the American educational landscape. It is undeniable that “[t]ragically today, America has schools that are increasingly separate and unequal.”²⁰² One scholar and school finance expert, Douglas Reed, labeled the provision of inferior educational resources to some students “resource segregation” and has noted that:

The segregation of educational resources has increasingly characterized American schools since the suburban boom of the post-World War II era. This form of segregation results not so much from the explicit confinement of poor students to

¹⁹⁹ See PAUL MANNA, *SCHOOL’S IN: FEDERALISM AND THE NATIONAL EDUCATION AGENDA* 3 (2006) (“NCLB extended the federal governments reach into the nation’s public schools more deeply than ever before.”); Ryan, *supra* note 4, at 987 (noting that while role of federal government in education is typically limited, “[w]ith the NCLBA, the federal government has moved to center stage in education policy”); John F. Jennings & Nancy Kober, *Talk Tough, but . . . Put the Money Where Your Mouth Is*, WASH. POST, Oct. 3, 2004, at B3 (“No Child Left Behind demands more of states and school districts than any previous federal education law.”).

²⁰⁰ See Petrovich, *supra* note 3, at 12.

²⁰¹ See HOCHSCHILD & SCOVONICK, *supra* note 2, at 25; Petrovich, *supra* note 3, at 8 (citing R. Johnston, *Governors Vie with Chiefs on Policy, Politics*, EDUC. WK., May 12, 1999, at 22; A. Richard, *NCES Pegs School Repair Costs at \$127 Billion*, EDUC. WK., July 12, 2000, at 10).

²⁰² Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: The Courts’ Role*, 81 N.C. L. REV. 1597, 1622 (2003). Jonathan Kozol describes the current disparities in educational opportunity as a “national horror hidden in plain view.” JONATHAN KOZOL, *THE SHAME OF THE NATION: THE RESTORATION OF APARTHEID SCHOOLING IN AMERICA* 238 (2005). Kozol further describes schools that he visited in the United States that were overcrowded and in disrepair and that lack many basics, such as clean classrooms and bathrooms, current textbooks in good condition, and necessary laboratory supplies. See *id.* at 39, 41-42, 162, 171, 177-78.

particular schools, but from the confinement of educational revenues to particular schools. . . . While resource segregation does not target individual students, it can circumscribe learning and life opportunities just as efficiently and cruelly as racial segregation.²⁰³

William Koski and Rob Reich confirm the disparities in educational resources by noting that “it is nearly indisputable that educational resources — facilities revenues, experienced teachers, instructional materials, curricula — are not distributed equally among our children and those with the least frequently fall into predictable categories.”²⁰⁴

Based upon research beginning with James Coleman’s 1966 oft-cited study, *Equality of Educational Opportunity* — which found that once students’ background characteristics were held constant, variations in school resources did not determine disparate outcomes for students — some may respond to the evidence on disparities in educational opportunity by contending that financial resources do not matter.²⁰⁵ However, this argument is persuasively countered by the fact that “evidence that money well spent improves educational outcomes is broad and clear.”²⁰⁶ Similarly, increased state spending directed toward schools in poor districts correlates with improved test scores.²⁰⁷ In short, while financial resources alone are not determinative, researchers since Coleman have shown an assortment of ways in which school finance can be used to raise student achievement.²⁰⁸

²⁰³ REED, *supra* note 27, at xiv.

²⁰⁴ Koski & Reich, *supra* note 88, at 554.

²⁰⁵ JAMES S. COLEMAN, *EQUALITY OF EDUCATIONAL OPPORTUNITY* 628 (1966). More recently, Eric Hanushek has made similar arguments. See Eric A. Hanushek, *Conclusions and Controversies About the Effectiveness of School Resources*, 4 *FED. RES. BANK N.Y. ECON. POL’Y REV.*, Mar. 1998, at 11, 22-23; Eric A. Hanushek, *The Economics of Schooling: Production and Efficiency in Public Schools*, 24 *J. ECON. LITERATURE* 1141, 1141-1177 (1986); Eric A. Hanushek, *The Impact of Differential Expenditures on School Performance*, 18 *EDUC. RESEARCHER*, May 1989, at 45-46, 62.

²⁰⁶ HOCHSCHILD & SCOVRONICK, *supra* note 2, at 55. For example, a comprehensive analysis of student test scores from the NAEP revealed that “other things being equal, higher per pupil expenditures, lower pupil ratios in lower grades, higher reported adequacy of teacher reported resources, higher levels of participation in public prekindergarten and lower teacher turnover all show positive, statistically significant effects on achievement.” *Id.* (citing D. GRISSMER ET AL, *IMPROVING STUDENT ACHIEVEMENT: WHAT NAEP SCORES TELL US* 98 (2000)).

²⁰⁷ *Id.* at 56-57 (citing numerous studies and books that document influence of finances on student achievement).

²⁰⁸ See NAT’L RESEARCH COUNCIL, *supra* note 5, at 7 (explaining that since

Disparities in educational opportunity and outcomes for various subgroups within American society do not represent the only concern confronting the nation's schools. Comparisons between American students' achievement and those of other nations reveal that U.S. schools have significant room for improvement. For example, an overview of several international assessments provides one measure of the effectiveness of U.S. public schools.²⁰⁹ These comparisons reveal that fifteen-year-olds in the United States typically rank below average or average on many measures when compared to their peers in other industrialized countries.²¹⁰ For example, in math literacy, U.S. students scored below average and significantly below twenty-three of the thirty-eight countries that participated in international assessments.²¹¹ Similarly, in science literacy, U.S. fifteen-year-olds scored below average and below eighteen of the thirty-eight participating countries.²¹² Reading literacy scores for U.S. students were average among the thirty nations that participated in the assessments.²¹³ While U.S. fourth graders performed better than students in many countries on some international measures,²¹⁴ at the time when they are closest to leaving the education system and entering the workforce, U.S. students do not compare favorably to their international peers.

The persistence of disparities in educational opportunities for more than fifty years after *Brown I* demonstrates that state and local governments will not eradicate these disparities. Instead, the federal government remains the most likely level of government to address these concerns because it possesses the greatest ability to redistribute

Coleman's report was released "[t]hirty years' worth of insights have generated a host of ideas about how to use school finance to improve school performance").

²⁰⁹ The United States participates in international student assessments to compare the achievement of U.S. students to those in other countries. See MARIANN LEMKE & PATRICK GONZALES, NAT'L CTR. FOR EDUC. STATISTICS, U.S. STUDENT PERFORMANCE AND ADULT PERFORMANCE ON INTERNATIONAL ASSESSMENTS OF EDUCATION ACHIEVEMENT: FINDINGS FROM *THE CONDITION OF EDUCATION 2006*, at 1 (2006).

²¹⁰ See *THE CONDITION OF EDUCATION*, *supra* note 11, at 2 (focusing on results for 15-year-olds rather than earlier grades because 15-year-olds are preparing to exit primary and secondary education system and many will shortly enter workforce).

²¹¹ See LEMKE & GONZALES, *supra* note 209, at 16 tbl.6; *THE CONDITION OF EDUCATION*, *supra* note 11, at 2.

²¹² LEMKE & GONZALES, *supra* note 209, at 22 tbl.9; *THE CONDITION OF EDUCATION*, *supra* note 11, at 2.

²¹³ LEMKE & GONZALES, *supra* note 209, at 9.

²¹⁴ *THE CONDITION OF EDUCATION*, *supra* note 11, at 2.

wealth.²¹⁵ Without an expanded federal role, many children, particularly poor, minority, and urban children, will continue to receive low-quality educational opportunities. Similarly, only the federal government can address the substandard academic performance of students nationwide. Simply put, these national problems demand a national response. This national response may be informed by the international human rights systems described in Part III.

III. INTERNATIONAL HUMAN RIGHTS ENFORCEMENT MODELS AS GUIDEPOSTS FOR ENFORCING A FEDERAL RIGHT TO EDUCATION

Part III explains the international human rights enforcement mechanisms that define and enforce a right to education under the International Covenant on Economic, Social and Cultural Rights (“ICESCR”) and the Convention on the Rights of the Child (“CRC”). In addition, this Part describes the individual complaint mechanism for the International Covenant on Civil and Political Rights (“ICCPR”). After describing these models, Part IV analyzes how they might help guide a new approach to a federal right to education in the United States. Readers familiar with the human rights model can skip this section and proceed to Part IV.

Since the mid-twentieth century, the international community has recognized a right to education as an essential component of human rights. The Universal Declaration of Human Rights of 1948 (“UDHR”), a nonbinding resolution of the General Assembly of the United Nations that sets forth the human rights included in the U.N. Charter, first established the right to education.²¹⁶ The ICESCR²¹⁷ and

²¹⁵ See Ryan, *supra* note 4, at 989.

²¹⁶ See KLAUS DIETER BEITER, *THE PROTECTION OF THE RIGHT TO EDUCATION BY INTERNATIONAL LAW* 86, 90 (2006). The UDHR states that “[e]veryone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.” Universal Declaration of Human Rights, G.A. Res. 217, art. 26, ¶ 1, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948). The UDHR defines the aim of education as “the full development of the human personality” as well as “the strengthening of respect for human rights and fundamental freedoms.” *Id.* ¶ 2.

²¹⁷ See International Covenant on Economic, Social and Cultural Rights [ICESCR] arts. 13-14, Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976); BEITER, *supra* note 216, at 94-95.

the CRC²¹⁸ contain two important formulations of this right. The United States has signed but has not ratified either of these conventions.²¹⁹ In addition, other international covenants, such as the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination Against Women, state that education must be free from the discrimination that those conventions seek to eradicate.²²⁰ Finally, numerous regional legal instruments also protect and guarantee a right to education.²²¹

A. *The Definition and Enforcement of the Right to Education in the ICESCR*

1. Overview of the ICESCR

The right to education included in the ICESCR²²² “may arguably be

²¹⁸ See Convention on the Rights of the Child arts. 28-29, Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990).

²¹⁹ The United States has not ratified the Convention on the Rights of the Child (“CRC”) due to political opposition that contends that the CRC would allow substantial government interference in the lives of families. See HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 519 (2d ed. 2000) (excerpting Susan Kilbourne, *Placing the Convention on the Rights of the Child in an American Context*, HUM. RTS., Spring 1999, at 27). The United States has not ratified the ICESCR because of, among other reasons, the “lack of consensus within the United States as to the desirability, or philosophical and political acceptability, of the domestic recognition of economic, social and cultural rights.” Philip Alston, *U.S. Ratification of the Covenant on Economic, Social, and Cultural Rights: The Need for an Entirely New Strategy*, 84 AM. J. INT’L L. 365, 368 (1990); see also Sharon K. Hom & Eric K. Yamamoto, *Collective Memory, History and Social Justice*, 47 UCLA L. REV. 1747, 1781 (2000) (noting United States signed but has not ratified ICESCR because “of ideological and political opposition to the economic, social and cultural rights as rights”).

²²⁰ See Office of U.N. High Comm’r for Human Rights (OHCHR), International Convention on the Elimination of All Forms of Racial Discrimination art. 5, Dec. 21, 1965, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969); OHCHR, Convention on the Elimination of All Forms of Discrimination Against Women art. 10, Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sep. 3, 1981).

²²¹ See, e.g., African Charter on Human and Peoples’ Rights art. 11, June 27, 1981, 21 I.L.M. 58; Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 2, Mar. 20, 1952, 213 U.N.T.S. 262; European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221; Charter of the Organization of American States art. 49, Apr. 30, 1948, 119 U.N.T.S. 48.

²²² The ICESCR opened for signature in 1966 and entered into force in 1976. See

viewed as the most important formulation of the right to education in an international agreement.”²²³ The ICESCR recognizes education as a human right and lists the “full development of the human personality and the sense of its dignity” and effective participation in society as key goals of this right.²²⁴ It then further specifies the nature of the right at each level of education that Parties²²⁵ must recognize and work to fully realize,²²⁶ thereby allowing the progressive realization of this right.²²⁷ ICESCR provides that “[p]rimary education shall be compulsory and available free to all . . . [and s]econdary education . . . including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education.”²²⁸ Finally, for postsecondary education, the ICESCR requires Parties to provide these opportunities in a manner that is “equally accessible to

all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education.”²²⁹

The Committee on Economic, Social and Cultural Rights (“CESCR”) is comprised of eighteen human rights experts responsible

Liz Heffernan, *A Comparative View of Individual Petition Procedures Under the European Convention on Human Rights and the International Covenant on Civil and Political Rights*, 19 HUMAN RIGHTS Q. 78, 83 (1997).

²²³ See BEITER, *supra* note 216, at 341.

²²⁴ ICESCR, *supra* note 217, art. 13, ¶ 1. The ICESCR embraces as its definition of the right to education not only the text of the Covenant but also the definition of the right to education that has been included in subsequent human rights agreements. See U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. & Cultural Rts. [CESCR], *General Comment No. 13: The Right to Education* (Art. 13), ¶ 5, U.N. Doc. E/C.12/1999/10 (Dec. 8, 1999) [hereinafter *General Comment No. 13*]. ICESCR further specifically obligates Parties to ensure that education promotes the foundational principles of the United Nations, such as “understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups” and that education advances the United Nations’ activities that promote world peace. ICESCR, *supra* note 217, art. 13, ¶ 1.

²²⁵ “Parties” are countries that have signed and ratified the international treaty.

²²⁶ ICESCR, *supra* note 217, art. 13, ¶ 2.

²²⁷ See also ICESCR, *supra* note 217, art. 2, ¶ 1 (acknowledging that some Parties may not be able to provide full scope of economic, social, and cultural rights upon ratification and, thus, allowing for progressive realization of those rights).

²²⁸ See *id.* art. 13, ¶ 2(a)-(b).

²²⁹ *Id.* art. 13, ¶ 2(c). The ICESCR also protects the ability of parents to choose a private school for their children. See *id.* at art. 13, ¶ 3.

for monitoring implementation of the ICESCR,²³⁰ and it issues General Comments that assist Parties in interpreting the obligations under the Covenant.²³¹ The CESCR's General Comments on the right to education emphasize the importance of the right to education as not only an end in itself but also as a means to achieve other rights.²³² CESCR charges each Party with monitoring its educational system to ensure that it serves the objectives of the right to education.²³³ The CESCR also further clarifies the obligations under the right to education in terms of four dimensions: (1) availability (education must be available in sufficient quantity for the students in the state); (2) accessibility (education must be accessible to everyone without discrimination as well as be economically and physically accessible); (3) acceptability (the substantive provision of education must be "relevant, culturally appropriate and of good quality"); and (4) adaptability (it must be sufficiently flexible to adjust to the evolving needs of society).²³⁴ The ICESCR also prohibits race, sex, national origin, and other forms of discrimination in the provision of rights under the Covenant.²³⁵ CESCR Comments have also explained that States must eliminate both intentional and de facto discrimination.²³⁶

The ICESCR acknowledges that some Parties lack the resources to provide the full scope of economic, social, and cultural rights upon ratification, and thus it allows for progressive realization of those rights "to the maximum [extent] of [the Party's] available resources."²³⁷ However, this acknowledgment does not relieve the Party of its obligations to implement the Covenant.²³⁸ To the contrary,

²³⁰ William F. Felice, *The Viability of the United Nations Approach to Economic and Social Human Rights in a Globalized Economy*, 75 INT'L AFF. 563, 569 (1999).

²³¹ See ECOSOC, CESCR, *Report on the 2nd Session*, ¶ 367, U.N. Doc. E/1988/14 (1988); BEITER, *supra* note 216, at 365.

²³² *General Comment No. 13*, *supra* note 224, ¶ 1.

²³³ *Id.* ¶ 5.

²³⁴ *Id.* ¶ 6.

²³⁵ ICESCR, *supra* note 217, art. 2, ¶ 2.

²³⁶ *General Comment No. 13*, *supra* note 224, ¶ 6(b)(i). To further the identification and redress of de facto discrimination, CESCR notes that data on educational outcomes "should be disaggregated by the prohibited grounds of discrimination." *Id.* ¶ 37. Substantial funding disparities in education that cause disparities in educational quality throughout the State may amount to prohibited discrimination. *Id.* ¶ 35.

²³⁷ ICESCR, *supra* note 217, art. 2, ¶ 1.

²³⁸ ECOSOC, CESCR, *General Comment No. 3: The Nature of States Parties Obligations* (Art. 2), ¶¶ 1-2, 9, U.N. Doc. E/1991/23 (Dec. 14, 1990) [hereinafter *General Comment No. 3*]; see Alston, *supra* note 219, at 379 (noting that allowing

the CESCR unequivocally rejects the contention that progressive realization tolerates inaction, instead emphasizing that Parties have “specific and continuing obligation[s] ‘to move as expeditiously and effectively as possible’ towards the full realization” of the right to education.²³⁹ Parties must take steps to implement the Covenant that are “deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant.”²⁴⁰

2. The ICESCR Enforcement Mechanism

The ICESCR enforcement process requires Parties to periodically submit reports to a monitoring committee that identify the steps the Party has taken to implement the ICESCR, difficulties encountered in implementation, and its achievements in observing the rights in the Covenant.²⁴¹ The CESCR reviews these reports and meets at least twice a year.²⁴² To help Parties understand their reporting obligations, the CESCR issued reporting guidelines that identify the information that the reports must include.²⁴³ For the right to education, such

progressive implementation does not relieve state Parties of obligation to immediately begin working toward full implementation).

²³⁹ *General Comment No. 13*, *supra* note 224, ¶ 44 (quoting *General Comment No. 3*, *supra* note 238, ¶ 9).

²⁴⁰ *General Comment No. 3*, *supra* note 238, ¶ 2. The CESCR has also explained that legislation alone may be insufficient to discharge a Party’s obligation to achieve full realization of the Covenant’s rights “by all appropriate means” and instead additional action, such as recognition of judicially enforceable rights, may be necessary. *Id.* ¶¶ 4-5. Furthermore, additional educational, financial, social and administrative action may be required to effectuate the Covenant’s rights. *Id.* ¶ 7.

²⁴¹ See ICESCR, *supra* note 217, arts. 16, 17. Parties must submit reports within two years of the Covenant entering into force and every five years thereafter. See BEITER, *supra* note 216, at 346 & n.7; Alston, *supra* note 219, at 370; Audrey R. Chapman, A “Violations Approach” for Monitoring the International Covenant on Economic, Social and Cultural Rights, 18 HUM. RTS. Q. 23, 25 (1996).

²⁴² BEITER, *supra* note 216, at 349. The Covenant identifies the Secretary-General of the United Nations as the recipient of the reports and then specifies that the Secretary-General transmits the reports to the Economic and Social Council, which may transmit reports on the information received in state reports along with its recommendations for future action to the U.N. General Assembly. ICESCR, *supra* note 217, arts. 16, 21. In practice, the ECOSOC created the CESCR in 1985 to support the ECOSOC in its responsibilities under the Covenant to examine the initial and periodic state reports. See BEITER, *supra* note 216, at 348-49; Alston, *supra* note 219, at 368, 370.

²⁴³ ECOSOC, CESCR, *Revised General Guidelines Regarding the Form and Contents of Reports to Be Submitted by States Parties Under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights*, U.N. Doc. E/C.12/1991/1 (June 17,

information includes disaggregated data on literacy, graduation and dropout rates at each level of education, and any difficulties or failures in implementing the right.²⁴⁴ The guidelines also ask the Party to identify whether any disadvantaged groups do not enjoy equal access to education and the ratios of men and women that participate at each level of education.²⁴⁵

In addition to receiving information through the reporting process, the CESCR also may receive information from nongovernmental organizations (“NGOs”) that submit information about a state’s noncompliance with the Covenant, including identifying key issues on which the CESCR should focus before it orally examines the Party’s representative.²⁴⁶ The CESCR may also invite representatives from U.N. agencies who have expertise on the topics in the ICESCR to provide a written statement or oral testimony during the session in which the Party is examined.²⁴⁷ Given Parties’ unwillingness to admit violations of human rights, information supplied by NGOs often represents a critical component of the monitoring process.²⁴⁸

After a Party submits a report, it may appear before the CESCR to discuss the report and answer questions.²⁴⁹ After the CESCR reviews a Party’s report, the CESCR adopts official concluding observations that assess the Party’s fulfillment (or lack of fulfillment) of its obligations under the Covenant and includes recommendations on steps the Party may take to realize the rights in the Covenant.²⁵⁰ The CESCR has also

1991) [hereinafter *Revised General Guidelines*]; BEITER, *supra* note 216, at 351-53.

²⁴⁴ See *Revised General Guidelines*, *supra* note 243, at 18; BEITER, *supra* note 216, at 352.

²⁴⁵ *Revised General Guidelines*, *supra* note 243, at 18; BEITER, *supra* note 216, at 352.

²⁴⁶ See ECOSOC, CESCR, *NGO Participation in Activities of the Committee on Economic, Social and Cultural Rights*, ¶ 4, U.N. Doc. E/C.12/2000/6 (July 7, 2000) [hereinafter *NGO Participation*]; ECOSOC, CESCR, Rules of Procedure of the Committee, R. 69, ¶¶ 1-3, U.N. Doc. E/C.12/1990/4/Rev.1 (Sept. 1, 1993) [hereinafter *Rules of Procedure*]; BEITER, *supra* note 216, at 358-59; Chapman, *supra* note 241, at 41.

²⁴⁷ See *Rules of Procedure*, *supra* note 246, R. 69, ¶ 3; *NGO Participation*, *supra* note 246, ¶ 4; BEITER, *supra* note 216, at 356.

²⁴⁸ *The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, 20 HUM. RTS. Q. 691 (1998); Chapman, *supra* note 241, at 28;.

²⁴⁹ See *Rules of Procedure*, *supra* note 246, R. 62; BEITER, *supra* note 216, at 356.

²⁵⁰ See ECOSOC, CESCR, *Report on the Twenty-Second, Twenty-Third and Twenty-Fourth Sessions*, ¶ 39, U.N. Doc. E/2001/22 (2001) [hereinafter *Sessions Report*]; *Rules of Procedure*, *supra* note 246, R. 64-65; ECOSOC, CESCR, *Working Methods: Overview of the Present Working Methods of the Committee*, <http://www.ohchr.org/english/bodies/cescr/workingmethods.htm> (last visited Feb. 23,

adopted a number of procedures to follow up on its recommendations, including asking Parties to identify the steps they have undertaken in response to CESCR recommendations.²⁵¹ If the CESCR has not received adequate information to assess compliance with the Covenant from the Party, it may ask the Party to accept one or two CESCR members to gather the required information.²⁵²

To assist Parties in fulfilling their Covenant obligations, the ICESCR directs them to draw upon international economic and technical assistance in their efforts to achieve full realization of the rights in the Covenant.²⁵³ The CESCR instructs Parties to identify any needs they have for technical assistance or international cooperation in their reports,²⁵⁴ and the CESCR's Concluding Observations sometimes include recommendations that a Party obtain technical assistance from an appropriate U.N. agency.²⁵⁵ The CESCR may also recommend establishing a national plan.²⁵⁶ Beyond these suggestions, the CESCR

2007); BEITER, *supra* note 216, at 359-60.

²⁵¹ See *Sessions Report*, *supra* note 250, ¶ 43; BEITER, *supra* note 216, at 357.

²⁵² See *Sessions Report*, *supra* note 250, ¶ 44; BEITER, *supra* note 216, at 357-58.

²⁵³ ICESCR, *supra* note 217, art. 2, ¶ 1.

²⁵⁴ ECOSOC, CESCR, *General Comment No. 2: International Technical Assistance Measures* (Art. 22), ¶ 10, U.N. Doc. E/1990/23 (Feb. 2, 1990) [hereinafter *General Comment No. 2*].

²⁵⁵ See BEITER, *supra* note 216, at 361. Potential technical assistance providers that have specifically been identified by the CESCR include the Commission on Human Rights, the U.N. Educational, Scientific and Cultural Organization ("UNESCO"), and the U.N. Children's Fund ("UNICEF"), although the CESCR has previously admonished the U.N. agencies to take greater interest in its work, with the exception of a handful of organizations that included UNESCO who had regularly attended its sessions. *General Comment No. 2*, *supra* note 254, ¶¶ 2, 4; see also ECOSOC, CESCR, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Solomon Islands*, ¶ 28, U.N. Doc. E/C.12/1/Add.84 (Dec. 19, 2002) (recommending that Solomon Islands seek UNESCO's assistance to ensure all children have right to free and compulsory primary education); ECOSOC, CESCR, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Benin*, ¶ 46, U.N. Doc. E/C.12/1/Add.78 (June 5, 2002) (recommending that Benin seek UNECISO assistance to formulate and adopt national education plan); ECOSOC, CESCR, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Jamaica*, ¶ 32, U.N. Doc. E/C.12/1/Add.75 (Nov. 30, 2001) (recommending that Jamaica "take steps to address the declining quality of education," including requesting UNESCO's assistance); ECOSOC, CESCR, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Nepal*, ¶ 58, U.N. Doc. E/C.12/1/Add.66 (Sept. 24, 2001) (recommending that Nepal seek technical advice and assistance from UNESCO regarding both formulation and implementation of its National Education for All plan).

²⁵⁶ See ECOSOC, CESCR, *Concluding Observations of the Committee on Economic,*

typically does not make any specific recommendations to resolve identified concerns. Instead, it recommends that Parties pay due attention to the obligations of the ICESCR and allocate the necessary and appropriate funds to their education systems.²⁵⁷

The reporting process is the sole enforcement mechanism for the ICESCR.²⁵⁸ The theory behind adopting a reporting enforcement mechanism, according to Philip Alston (former Chair of the CESCR, human rights expert, and Professor of Law at New York University), is that “a constructive dialogue between the [CESCR] and the [Party], in a nonadversarial, cooperative spirit, is the most productive means of prompting the government concerned to take the requisite action.”²⁵⁹ The Party reports and the CESCR’s Observations encourage a public dialogue about a Party’s compliance with the Covenant.²⁶⁰ The Observations “are meant to be widely publicised in [Parties] and to serve as the basis for a national debate on how to improve the enforcement of the provisions of the Covenant.”²⁶¹ As a result, domestic pressure to ensure that Parties protect ICESCR rights, rather than the formal reporting process, may represent the more effective aspect of the enforcement process.²⁶² Such a system places the primary responsibility for enforcement of the ICESCR on the Party itself.²⁶³ A review of the CESCR’s Concluding Observations to state reports in recent years reveals that it has brought attention to a number of education issues including substantial illiteracy²⁶⁴ and

Social and Cultural Rights: Bolivia, ¶ 44, U.N. Doc. E/C.12/1/Add.60 (May 21, 2001) (recommending that Bolivia should implement comprehensive national plan for education for all). The Committee also recommended that Italy draw up a national strategy to address significant problems of social dropouts. ECOSOC, CESCR, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Italy*, ¶ 33, U.N. Doc. E/C.12/1/Add.43 (May 23, 2000).

²⁵⁷ See, e.g., ECOSOC, CESCR, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Republic of the Congo*, ¶ 29, U.N. Doc. E/C.12/1/Add.45 (May 23, 2000) (recommending that Congo allocate appropriate funds for teachers’ salaries, materials, and school building repairs to rehabilitate educational infrastructure).

²⁵⁸ See BEITER, *supra* note 216, at 345; Alston, *supra* note 219, at 370.

²⁵⁹ Alston, *supra* note 219, at 370.

²⁶⁰ See BEITER, *supra* note 216, at 359; Alston, *supra* note 219, at 370-71.

²⁶¹ See BEITER, *supra* note 216, at 356.

²⁶² See Alston, *supra* note 219, at 371.

²⁶³ *Id.* at 370.

²⁶⁴ See ECOSOC, CESCR, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Sudan*, ¶ 28, U.N. Doc. E/C.12/1/Add.48 (Sept. 1, 2000) (finding that Sudan has high illiteracy rate, especially among rural women); ECOSOC,

school dropout rates;²⁶⁵ disparities in educational quality along lines of nationality or race;²⁶⁶ inferior educational opportunities for the

CESCR, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Egypt*, ¶ 24, U.N. Doc. E/C.12/1/Add.44 (May 23, 2000) (finding that Egypt has “high illiteracy rates among adults, particularly women”); ECOSOC, CESCR, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Tunisia*, ¶ 17, U.N. Doc. E/C.12/1/Add.36 (May 14, 1999) (finding that one-third of population of Tunisia is illiterate, including 42% of women and 23% of men); *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Ireland*, ¶ 16, U.N. Doc. E/C.12/1/Add.35 (May 14, 1999) (finding that Ireland has “high rate of illiteracy at various levels of society, especially among adults, youth, poor children, children of the traveller community and those in rural areas”); ECOSOC, CESCR, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Iraq*, ¶ 23, U.N. Doc. E/C.12/1/Add.17 (Dec. 12, 1997) (finding that 54% of Iraq’s population, especially women, is illiterate); ECOSOC, CESCR, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Peru*, ¶ 25, U.N. Doc. E/C.12/1/Add.14 (May 20, 1997) (finding that Peru has high levels of illiteracy).

²⁶⁵ See ECOSOC, CESCR, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Iceland*, ¶ 17, U.N. Doc. E/C.12/1/Add.32 (May 12, 1999) (finding that Iceland has high rate of school dropouts); ECOSOC, CESCR, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Denmark*, ¶ 19, U.N. Doc. E/C.12/1/Add.34 (May 14, 1999) (finding that Denmark’s school dropout rate has increased); ECOSOC, CESCR, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Nigeria*, ¶ 24, U.N. Doc. E/C.12/1/Add. 23 (June 16, 1998) (finding that rate of primary school age dropouts in Nigeria is over 20%); ECOSOC, CESCR, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Luxembourg*, ¶ 16, U.N. Doc. E/C.12/1/Add.22 (Dec. 12, 1997) (finding high dropout rates in Luxembourg’s youth of secondary school age); ECOSOC, CESCR, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Russian Federation*, ¶ 29, U.N. Doc. E/C.12/1/Add.13 (May 20, 1997) (finding that education system of the Russian Federation has deteriorated, leading to higher dropout rates at all levels of system); ECOSOC, CESCR, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Peru*, ¶ 25, U.N. Doc. E/C.12/1/Add.14 (May 20, 1997) (finding that Peru has high levels of “illiteracy, truancy and school drop-out”).

²⁶⁶ See ECOSOC, CESCR, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Israel*, ¶ 16, U.N. Doc. E/C.12/1/Add.90 (June 26, 2003) (finding that Israel does not provide equal education to non-Jews, in particular Arab and Bedouin communities); ECOSOC, CESCR, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Bulgaria*, ¶ 11, U.N. Doc. E/C.12/1/Add.37 (Dec. 8, 1999) (finding that Bulgaria’s Roma minority is afforded poor quality of education in contrast to rest of population); *id.* ¶ 21 (finding that Bulgaria’s introduction of fees in higher education “may represent a serious obstacle for disadvantaged groups . . . seeking such an education”); ECOSOC, CESCR, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Israel*, ¶ 29, U.N. Doc. E/C.12/1/Add.27 (Dec. 4, 1998) (finding that Israel has gap in per capita educational expenditures for Arab sector, which is substantially less than Jewish sector).

poor;²⁶⁷ inadequate facilities;²⁶⁸ and disparities in the quality of education between rural and urban areas.²⁶⁹

As compared to civil and political rights, limited attention to economic, social, and cultural rights has hampered implementation and enforcement of the ICESCR.²⁷⁰ Thus, although 154 countries have

²⁶⁷ See ECOSOC, CESCR, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Netherlands*, ¶ 19, U.N. Doc. E/C.12/1/Add.25 (June 16, 1998) (finding that Tuition Act of Netherlands has led to constant increase in cost of education, contrary to principle of equality of opportunities between children of rich families and children of poor families); ECOSOC, CESCR, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Azerbaijan*, ¶ 38, U.N. Doc. E/C.12/1/Add.20 (Dec. 22, 1997) (finding that weakening of Azerbaijan's educational system is having disproportionate effects on poor).

²⁶⁸ See ECOSOC, CESCR, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Ukraine*, ¶ 17, U.N. Doc. E/C.12/1/Add.65 (Sept. 24, 2001) (finding that Ukraine provides "obsolete teaching materials and equipment in schools and colleges"); ECOSOC, CESCR, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Cameroon*, ¶ 28, U.N. Doc. E/C.12/1/Add.40 (Dec. 8, 1999) (finding that Cameroon has inadequate salaries for its teachers, lacks school buildings and other infrastructure and services, particularly in rural areas, and has imbalance in distribution of education resources between its ten providences); ECOSOC, CESCR, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Nigeria*, ¶ 31, U.N. Doc. E/C.12/1/Add. 23 (June 16, 1998) (finding that schoolchildren in Nigeria often have to carry their desks and chairs with them from their homes to school, and that low teacher salaries have led to incessant strikes and school closures); ECOSOC, CESCR, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Saint Vincent and the Grenadines*, ¶ 27, U.N. Doc. E/C.12/1/Add.21 (Dec. 2, 1997) (finding that Saint Vincent and Grenadines schools lack teachers and teaching materials at primary level and have insufficient facilities at postsecondary level).

²⁶⁹ See ECOSOC, CESCR, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: People's Republic of China (including Hong Kong and Macao)*, ¶ 37, U.N. Doc. E/C.12/1/Add.107 (May 13, 2005) (finding that People's Republic of China's irregular provision of education has negatively affected rural areas); ECOSOC, CESCR, *Concluding Observations of the Committee of Economic, Social and Cultural Rights: Guatemala*, ¶¶ 24, 27, U.N. Doc. E/C.12/1/Add.93 (Dec. 12, 2003) (finding that Guatemala continues to unevenly distribute its "wealth and land," affecting rural populations, and hence only 30% of children living in rural communities complete primary level of education); ECOSOC, CESCR, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Republic of Korea*, ¶ 22, U.N. Doc. E/C.12/1/Add.59 (May 21, 2001) (finding that Republic of Korea's educational programs have been developed in urban areas, while insufficiently addressing needs of persons living in rural areas).

²⁷⁰ See STEINER & ALSTON, *supra* note 219, at 237-38; see also Chapman, *supra* note 241, at 26 ("Despite a rhetorical commitment to the indivisibility and interdependence of human rights, the international community . . . has consistently treated civil and political rights as more significant, while consistently neglecting economic, social, and cultural rights.").

ratified the ICESCR,²⁷¹ most have “fail[ed] to take steps to entrench those rights constitutionally, to adopt legislative or administrative provisions based explicitly on the recognition of specific economic and social rights as international human rights, or to provide effective means of redress to individuals or groups alleging violations of those rights.”²⁷² This problem arises in part because the CESCR has not adequately defined standards for assessing compliance with some of the Covenant’s provisions, and this ambiguity hinders assessment of implementation.²⁷³

Furthermore, scholars criticize the sole inclusion of a Party reporting enforcement mechanism as “the weakest form of supervision available in international human rights law, to ensure that human rights are properly implemented.”²⁷⁴ One weakness of the reporting mechanism is that not all Parties take their reporting obligations seriously, often submitting their reports late or not at all.²⁷⁵ When Parties do submit reports, many lack the detail needed to assess compliance and focus on achievements rather than admit implementation obstacles or shortcomings.²⁷⁶ Party reports often focus on statutes or other legal provisions that support implementation but ignore the reality of how those legal provisions

²⁷¹ Office of the U.N. High Comm’r for Human Rights, CESCR, Monitoring the Economic, Social and Cultural Rights, <http://www.ohchr.org/english/bodies/cescr/index.htm> (last visited Jan. 21, 2007).

²⁷² See STEINER & ALSTON, *supra* note 219, at 237-38; see also Chapman, *supra* note 241, at 27 (“Although the Covenant has been ratified by 130 countries, few states parties take their responsibilities seriously enough to attempt to comply with the standards of the Covenant in a deliberate and carefully structured way.”).

²⁷³ Chapman, *supra* note 241, at 31-32. Furthermore, substantial amounts of complex statistical data of reliable quality is needed to measure the progressive implementation of some Covenant provisions, and in the infrequent instances when that data is produced, members of the CESCR and their staff as well as NGOs oftentimes lack the expertise to assess such data. *Id.* at 33-34.

²⁷⁴ BEITER, *supra* note 216, at 345.

²⁷⁵ *Id.* at 622-23; Chapman, *supra* note 241, at 28.

²⁷⁶ See BEITER, *supra* note 216, at 623; Chapman, *supra* note 241, at 28. For example, the Committee has noted a lack of candor in the state reports for Cameroon and Australia. ECOSOC, CESCR, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Cameroon*, ¶ 30, U.N. Doc. E/C.12/1/Add.40 (Dec. 8, 1999) (finding lack of specific information in written replies from Cameroon party concerning higher education); ECOSOC, CESCR, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia*, ¶ 23, U.N. Doc. E/C.12/1/Add.50 (Sept. 11, 2000) (finding that Australia has not provided sufficient information on difference in quality of education available to students in public and private schools).

and other policies interact with the exercise of rights by individuals, particularly disadvantaged groups.²⁷⁷ Additionally, the CESCR typically bases its Concluding Observations on state reports that represent the official position of the Party on ICESCR implementation rather than a full assessment of implementation.²⁷⁸

In spite of these shortcomings, the reporting obligations of the ICESCR facilitate its implementation in several important ways. The preparation of the reports requires an assessment of the Party's progress in implementing the Covenant, and the periodic nature of the reports facilitates an ongoing assessment rather than a solitary review of implementation.²⁷⁹ This assessment also provides an opportunity for a Party to identify the policies that it will implement to fully realize the rights in the Covenant.²⁸⁰ The CESCR's independent assessment along with its recommendations on how to improve implementation also encourage Parties to implement additional measures.²⁸¹

Rather than abandon the reporting system, some scholars suggest ways to improve it, such as encouraging increased participation of NGOs and requiring a full description of implementation measures beyond legal requirements.²⁸² Some suggest that governments establish qualitative and quantitative indicators or targets that include specific timeframes by which Parties will achieve the goals in the benchmarks.²⁸³ Similarly, scholars contend that having the CESCR identify violations of economic, social, and cultural rights may best ensure effective monitoring of these rights because the "human rights violator" label would encourage Parties to develop ways to remedy the violations.²⁸⁴

Finally, scholars and other commentators suggest that an optional protocol that would allow for a group or individual to submit information to the CESCR regarding an alleged violation of a Covenant right would strengthen ICESCR enforcement.²⁸⁵ While the

²⁷⁷ See BEITER, *supra* note 216, at 623.

²⁷⁸ See *id.* at 635.

²⁷⁹ See *id.* at 622.

²⁸⁰ See *id.*

²⁸¹ See *id.*

²⁸² See *id.* at 624; STEINER & ALSTON, *supra* note 219, at 316.

²⁸³ See BEITER, *supra* note 216, at 625-29; STEINER & ALSTON, *supra* note 219, at 317 (excerpting Philip Alston, *International Governance in the Normative Areas*, in UNDP, BACKGROUND PAPERS: HUMAN DEVELOPMENT REPORT 1999, at 1, 15-18 (1999)).

²⁸⁴ See BEITER, *supra* note 216, at 652; Chapman, *supra* note 241, at 36-37.

²⁸⁵ See BEITER, *supra* note 216, at 635-36; Chapman, *supra* note 241, at 39-40. An NGO Coalition for an Optional Protocol to the ICESCR, an organization that

CESCR transmitted a draft proposal for such a protocol to the U.N. Commission on Human Rights in 1996, the Commission has not decided the final action it will take on the proposal.²⁸⁶ Other committees that implement human rights conventions have the ability to receive individual complaints of rights violations, including the committees that enforce the ICCPR, the Convention on the Elimination of Discrimination Against Women, the Convention on the Elimination of All Forms of Racial Discrimination, the Convention Against Torture, and the Convention on Migrant Workers.²⁸⁷

B. The Definition and Enforcement of the Right to Education in the CRC

All nations except for the United States and Somalia have ratified the

advocates for the adoption of an individual complaint mechanism, argues that the optional protocol is needed because it would:

- (1) "Provid[e] an International Remedial Mechanism for the Infringement of ICESCR Rights";
- (2) "Identify[] and Clarify[] State Party ICESCR Obligations";
- (3) "Assist[] State Parties in Protecting and Promoting Covenant Enshrined Rights";
- (4) "Encourag[e] the Development of Domestic Jurisprudence";
- (5) "Strengthen[] International Enforcement of Economic, Social and Cultural Rights";
- (6) "Reinforc[e] the Universality, Indivisibility, Interrelatedness and Interdependence of Human Rights"; and
- (7) "Increase Public Awareness of Economic, Social and Cultural Rights."

Amnesty Int'l et al., Joint NGO Submission to the 2006 Open Ended Working Group to Consider Options for an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights 23-26 (Jan. 2006), available at <http://www.opicescr-coalition.org/NGOWrittenSubmission2006.pdf>.

²⁸⁶ See Michael J. Dennis & David P. Stewart, *Justiciability of Economic, Social, and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?*, 98 AM. J. INT'L. L. 462, 462-63 (2004).

²⁸⁷ See Office of the United Nations High Commissioner for Human Rights, Human Rights Bodies — Complaints Procedures, <http://www.ohchr.org/english/bodies/petitions/index.htm#communications> (last visited Jan. 21, 2007). For example, an Optional Protocol that allows individuals who have had their rights violated under the ICCPR has been ratified by 109 of the 160 parties to the ICCPR. Office of the U.N. High Comm'r for Human Rights, Ratifications and Reservations: International Covenant on Civil and Political Rights, <http://www.ohchr.org/english/countries/ratification/4.htm> (last updated Mar. 13, 2007) [hereinafter OHCHR, Ratifications and Reservations: ICCPR]; Office of the U.N. High Comm'r for Human Rights, Ratifications and Reservations: Optional Protocol to the International Covenant on Civil and Political Rights, <http://www.ohchr.org/english/countries/ratification/5.htm> (last updated Mar. 13, 2007).

CRC, a comprehensive articulation of the human rights of children.²⁸⁸ Its widespread acceptance by the international community has quickly elevated the CRC to “the single most important international instrument on the rights of the child” and one that has heralded in a new focus on protecting children’s rights.²⁸⁹ The CRC education articles and interpretive documents set an ambitious agenda for education rights. Its provisions on education begin with the acknowledgement that the “Parties recognize the right of the child to education . . . with a view to achieving this right progressively and on the basis of equal opportunity. . . .”²⁹⁰ Like the ICESCR, the CRC then specifies the content for this right to education at the elementary, secondary, and postsecondary education levels.²⁹¹ The CRC also defines the goals of the right to education: to develop the child’s mental and physical abilities, personality, and talents “to their fullest potential.”²⁹² Parties must also design education to prepare “the child for responsible life in a free society,” which includes “understanding, peace, [and] tolerance . . . among all peoples.”²⁹³ The Committee on

²⁸⁸ The reasons that the United States has not ratified the CRC are explained above. See discussion *supra* note 219.

²⁸⁹ LAWRENCE J. LEBLANC, THE CONVENTION ON THE RIGHTS OF THE CHILD: UNITED NATIONS LAWMAKING ON HUMAN RIGHTS, at xii (1995); ECOSOC, CESCR, *General Comment No. 5*, ¶ 9, U.N. Doc. E/1995/22 (Sept. 12, 1994).

²⁹⁰ Convention on the Rights of the Child, *supra* note 218, art. 28. Despite a variety of concerns about the education article during the drafting process, no state challenged the provision of the right to education “on the basis of equal opportunity.” See U.N. Centre for Human Rights, *Legislative History of the Convention on the Rights of the Child (1978-1989): Article 28 (Aims of Education)*, U.N. Doc. HR/1995/Ser.1/Article.28 (Jan. 1, 1996).

²⁹¹ The CRC requires Parties to make “primary education compulsory and available free to all,” to encourage the development of various forms of secondary education that are accessible to every child, including introducing free secondary education and financial assistance when needed, and to offer higher education to all on the basis of capacity through appropriate means. Parties must also promote and encourage cooperation between nations on educational matters with particular attention to the eradication of ignorance and illiteracy and the dissemination of scientific and technical knowledge as well as modern teaching methods. Convention on the Rights of the Child, *supra* note 218, art. 28.

²⁹² *Id.* art. 29.

²⁹³ *Id.* Other articles also address the obligations of Parties related to education, but those articles are beyond the scope of this Article. For example, article 23 establishes Parties’ responsibilities for disabled children, which requires Parties to provide education to disabled children free of charge “in a manner conducive to the child’s achieving the fullest possible social integration and individual development.” *Id.* art. 23. Article 31 requires Parties to respect and promote the child’s involvement in recreational activities, cultural life, and the arts. *Id.* art. 31.

the Rights of the Child (“the Committee”) has explained in its official comments that each child has not only the right to access to education but also the right to a specific quality of education: “Every child has the right to receive an education of good quality which in turn requires a focus on the quality of the learning environment, of teaching and learning processes and materials, and of learning outputs.”²⁹⁴

Similar to ICESCR, several articles and principles in the CRC guide the interpretation of the right to education and its goals. Parties must implement the CRC free of discrimination on the basis of such characteristics as the child or parent’s race, sex, and language.²⁹⁵ A review of the Committee’s observations and recommendations to Parties in response to Parties’ reports indicate that nondiscrimination under the CRC includes a commitment to eliminate de facto and societal discrimination.²⁹⁶

A Party must submit a report within two years of initial CRC ratification and every five years thereafter.²⁹⁷ Like the ICESCR, the Committee and Party then engage in a “constructive dialogue”²⁹⁸ that involves the Party answering the Committee’s written questions both orally and in writing.²⁹⁹ To supplement the information provided in Party reports, the Committee may obtain information from other U.N. bodies as well as NGOs.³⁰⁰ The Committee has made substantial use of this mechanism and during the week before a session begins it often meets with NGOs that have knowledge of the examinee country to

²⁹⁴ Comm. on the Rights of the Child, *General Comments No. 1*, ¶ 22, U.N. Doc. CRC/GC/2001/1 (Apr. 17, 2001) (emphasis added).

²⁹⁵ Convention of the Rights of the Child, *supra* note 218, art. 2.

²⁹⁶ See Comm. on the Rights of the Child, *Report on the Thirty-Eighth Session*, ¶¶ 342, 398, 538, 619 U.N. Doc. CRC/C/146 (July 19, 2005); Comm. on the Rights of the Child, *Report on the Thirty-Seventh Session*, ¶ 128, 188, 267, 334, U.N. Doc. CRC/C/143 (Jan. 12, 2005).

²⁹⁷ Convention on the Rights of the Child, *supra* note 218, art. 44(1).

²⁹⁸ See BEITER, *supra* note 216, at 369 (internal quotation marks omitted).

²⁹⁹ See I CYNTHIA PRICE COHEN, *JURISPRUDENCE ON THE RIGHTS OF THE CHILD*, at xv (2005). Currently, the 18-member Committee convenes three times a year for four weeks a session. *Id.* at xiv.

³⁰⁰ Convention on the Rights of the Child, *supra* note 218, art. 45; see PRICE COHEN, *supra* note 299, at xv n.14 (noting that this reliance on various sources is unique among U.N. human rights treaty processes). Certain U.N. bodies, such as UNICEF, have the right to be represented at the sessions at which the CRC is implemented. Convention on the Rights of the Child, *supra* note 218, art. 45(a). They may be asked to submit reports or provide advice on implementation of the CRC. See BEITER, *supra* note 216, at 370.

assess the accuracy and completeness of the report.³⁰¹ The Committee then orally examines the Party on the content of its report and prepares a report of the session that includes its recommendations for improvement and may include a recommendation that the Party receive technical assistance.³⁰²

A review of the Committee's reports in recent years reveals that the Committee has focused attention on a number of educational concerns governed by the CRC, including: substantial illiteracy³⁰³ and school dropout rates;³⁰⁴ disparities in educational quality based on

³⁰¹ See PRICE COHEN, *supra* note 299, at xv.

³⁰² Convention on the Rights of the Child, *supra* note 218, art. 45; Comm. on the Rights of the Child, *Provisional Rules of Procedure*, ¶ 68, U.N. Doc. CRC/C/4/Rev.1 (Apr. 25, 2005).

³⁰³ See Comm. on the Rights of the Child, *Report on the Fortieth Session*, ¶ 169, U.N. Doc. CRC/C/153 (Mar. 17, 2006) [hereinafter Comm. on the Rights of the Child, *Report on the Fortieth Session*] (finding that literacy rate of Algerian girls does not keep pace with increasing literacy of boys); Comm. on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Djibouti*, ¶ 47, U.N. Doc. CRC/C/15/Add.131 (June 28, 2000) (finding high illiteracy rates); Comm. on the Rights of the Child, *Concluding Observations: Benin*, ¶ 28, U.N. Doc. CRC/C/15/Add.106 (Aug. 12, 1999) (same); Comm. on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Guatemala*, ¶ 9, U.N. Doc. CRC/C/15/Add.58 (June 7, 1996) (same); Comm. on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Jordan*, ¶ 25, U.N. Doc. CRC/C/15/Add.21 (Apr. 25, 1994) (finding that Jordan should take steps to raise level of literacy); Comm. on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Egypt*, ¶ 12, U.N. Doc. CRC/C/15/Add.5 (Feb. 18, 1993) (finding large gender gap in literacy rates in Egypt).

³⁰⁴ See Comm. on the Rights of the Child, *Report on the Fortieth Session*, *supra* note 303, ¶ 84 (finding that Australia's indigenous children and children living in remote areas have high dropout rates and lower levels of achievement); Comm. on the Rights of the Child, *Report on the Thirty-Ninth Session*, ¶ 171, U.N. Doc. CRC/C/150 (Dec. 21, 2005) [hereinafter Comm. on the Rights of the Child, *Report on the Thirty-Ninth Session*] (finding that Philippines children have high dropout rates in secondary education); Comm. on the Rights of the Child, *Concluding Observations: Pakistan*, ¶ 29, U.N. Doc. CRC/C/15/Add.217 (Oct. 27, 2003) (finding high dropout rates); Comm. on the Rights of the Child, *Concluding Observations: Estonia*, ¶ 42, U.N. Doc. CRC/C/15/Add.196 (Mar. 17, 2003) (same); Comm. on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: India*, ¶ 32, U.N. Doc. CRC/C/15/Add.115 (Feb. 23, 2000) (same); Comm. on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Mauritius*, ¶ 29, U.N. Doc. CRC/C/15/Add.64 (Oct. 30, 1996) (recommending that Mauritius take "all necessary measures" to minimize school dropout rates); Comm. on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Jordan*, ¶ 25, U.N. Doc. CRC/C/15/Add.21 (Apr. 25, 1994) (finding that Jordan should take steps to reduce school dropout rates); Comm. on the Rights of the Child, *Preliminary Observations of the Committee on the Rights of the Child: Colombia*, ¶ 15, U.N. Doc.

nationality, race or status;³⁰⁵ inferior educational opportunities for the poor;³⁰⁶ inadequate facilities;³⁰⁷ and disparities in the quality of

CRC/C/15/Add.15 (Feb. 7, 1994) (finding that Colombia should reduce high number of school dropouts).

³⁰⁵ See Comm. on the Rights of the Child, *Report on the Fortieth Session*, *supra* note 303, ¶ 255(b) (finding that Uganda should reduce socioeconomic, ethnic, and regional disparities in access to and full enjoyment of right to education); Comm. on the Rights of the Child, *Concluding Observations: Czech Republic*, ¶ 28 U.N. Doc. CRC/C/15/Add.201 (Mar. 18, 2003) (finding that Czech Republic continues to have discrimination in education against children belonging to Roma minority); Comm. on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Belgium*, ¶ 18, U.N. Doc. CRC/C/15/Add.178 (June 13, 2002) (finding that Belgium's non-Belgian children suffer disparities in their educational experience); Comm. on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Australia*, ¶ 32, U.N. Doc. CRC/C/15/Add.79 (Oct. 21, 1997) (finding that Australia's disadvantaged groups, particularly Aboriginals and Torres Strait Islanders, have lower standards of education); Comm. on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Bolivia*, ¶ 9, U.N. Doc. CRC/C/15/Add.1 (Feb. 18, 1993) (finding that Bolivia's children face discrimination as to education based on race, language, and ethnic or social origin).

³⁰⁶ See Comm. on the Rights of the Child, *Report on the Thirty-Ninth Session*, *supra* note 304, ¶ 171 (finding that impoverished children in Philippines do not have equal access to elementary education); Comm. on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Belarus*, ¶ 28, U.N. Doc. CRC/C/15/Add.180 (June 13, 2002) (finding that Belarus's economically disadvantaged children do not have adequate access to educational facilities); Comm. on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Belgium*, ¶ 18, U.N. Doc. CRC/C/15/Add.178 (June 13, 2002) (finding that Belgium's poor children suffer disparities in their educational experience); Comm. on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Chile*, ¶ 26, U.N. Doc. CRC/C/15/Add.173 (Apr. 3, 2002) (finding that Chile's poor children do not have adequate access to educational facilities); Comm. on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Egypt*, ¶ 31, U.N. Doc. CRC/C/15/Add.145 (Feb. 21, 2001) (finding Egypt has large disparities in quality of education for children of regions lagging behind in socioeconomic development); Comm. on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Latvia*, ¶ 23, U.N. Doc. CRC/C/15/Add.142 (Feb. 21, 2001) (finding that Latvia has not implemented principle of nondiscrimination against children of poor families, especially with regard to their access to adequate educational facilities); Comm. on the Rights of the Child, *Concluding Observations: Benin*, ¶ 15, U.N. Doc. CRC/C/15/Add.106 (Aug. 12, 1999) (finding that Benin's children living in extreme poverty are not guaranteed access to education).

³⁰⁷ See Comm. on the Rights of the Child, *Report on the Thirty-Ninth Session*, *supra* note 304, ¶ 88(b) (finding that Saint Lucia should continue its efforts to increase number of children entering secondary schools through provision of more

education between rural and urban areas.³⁰⁸ The Committee often recommends that the Party seek technical assistance from an agency, such as the U.N. Children's Fund ("UNICEF") or the Office of the

classrooms); Comm. on the Rights of the Child, *Concluding Observations: Estonia*, ¶ 42, U.N. Doc. CRC/C/15/Add.196 (Mar. 17, 2003) (finding that Estonia has overcrowded schools and overburdened teachers); Comm. on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Chile*, ¶ 26, U.N. Doc. CRC/C/15/Add.173 (Apr. 3, 2002) (finding that Chile's "children belonging to indigenous groups, poor children, girls, children with disabilities and children living in rural areas" do not have access to adequate educational facilities); Comm. on the Rights of the Child, *Concluding Observations: Belize*, ¶ 27, U.N. Doc. CRC/C/15/Add.99 (May 10, 1999) (finding that Belize has overcrowding, lack of basic training materials, poorly maintained infrastructure and equipment, shortages of textbooks and other materials, limited number of trained teachers, and lack of play space and recreational facilities); Comm. on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Argentina*, ¶ 21, U.N. Doc. CRC/C/15/Add.35 (Feb. 15, 1995) (finding Argentina's schools are not adequately staffed with qualified personnel).

³⁰⁸ See Comm. on the Rights of the Child, *Report on the Fortieth Session, supra* note 303, ¶ 170 (finding that only minority of children in Algeria participate in pre-primary education, particularly in rural areas); Comm. on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Belarus*, ¶ 28, U.N. Doc. CRC/C/15/Add.180 (June 13, 2002) (finding that Belarus's children living in rural areas do not have adequate access to educational facilities); Comm. on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Chile*, ¶ 26, U.N. Doc. CRC/C/15/Add.173 (Apr. 3, 2002) (finding that Chile's children living in rural areas do not have adequate access to educational facilities); Comm. on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Egypt*, ¶ 31, U.N. Doc. CRC/C/15/Add.145 (Feb. 21, 2001) (finding that Egypt has large disparities in quality of education for children of regions lagging behind in socioeconomic development); Comm. on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Latvia*, ¶ 23, U.N. Doc. CRC/C/15/Add.142 (Feb. 21, 2001) (finding that Latvia has not implemented principle of nondiscrimination against children living in rural areas, especially with regard to their access to adequate educational facilities); Comm. on the Rights of the Child, *Concluding Observations: Benin*, ¶ 15, U.N. Doc. CRC/C/15/Add.106 (Aug. 12, 1999) (finding that Benin's children living in rural areas are not guaranteed access to education); Comm. on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Australia*, ¶ 32, U.N. Doc. CRC/C/15/Add.79 (Oct. 21, 1997) (finding that Australia's children living in rural and remote areas have lower quality of education); Comm. on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Lao People's Democratic Republic*, ¶ 15, U.N. Doc. CRC/C/15/Add.78 (Oct. 10, 1997) (finding that Lao People's Democratic Republic does not ensure full enjoyment of access to education by all children, particularly children living in rural and remote areas); Comm. on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Jordan*, ¶ 25, U.N. Doc. CRC/C/15/Add.21 (Apr. 25, 1994) (finding that Jordan should take steps to improve attendance for children living in remote areas).

High Commissioner of Human Rights, to assist the Party in addressing these concerns.³⁰⁹ The Committee also sometimes suggests that a Party develop a national education plan³¹⁰ or an independent mechanism, such as an Ombudsperson for Children that would receive and act on complaints from children regarding violation of their rights.³¹¹ Beyond these suggestions, the Committee typically does not make any specific recommendations to resolve these issues. Instead, it notes that Parties must reflect the Convention's ideals in their legislation and administrative and judicial decisions, as well as in policies and programs relevant to children at both national and local

³⁰⁹ See Comm. on the Rights of the Child, *Report on the Fortieth Session, supra* note 303, ¶ 174(h) (finding that Algeria should cooperate with UNESCO, UNICEF, and NGOs to improve education sector); Comm. on the Rights of the Child, *Concluding Observations: Bangladesh*, ¶ 65(g), U.N. Doc. CRC/C/15/Add.221 (Oct. 27, 2003) (finding that Bangladesh should seek assistance from UNICEF, UNESCO, and relevant NGOs); Comm. on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Malawi*, ¶ 23(c), U.N. Doc. CRC/C/15/Add.174 (Apr. 2, 2002) (finding that Malawi should strengthen its cooperation with certain NGOs); Comm. on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Democratic Republic of the Congo*, ¶ 23, U.N. Doc. CRC/C/15/Add.153 (July 9, 2001) (finding that Democratic Republic of Congo should seek aid of UNICEF or OHCHR); Comm. on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Ethiopia*, ¶ 31, U.N. Doc. CRC/C/15/Add.144 (Feb. 21, 2001) (finding that Ethiopia should seek aid of UNICEF); Comm. on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Belize*, ¶ 27, U.N. Doc. CRC/C/15/Add.99 (May 10, 1999) (finding that Belize should seek aid of UNICEF or UNESCO); Comm. on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Lao People's Democratic Republic*, ¶ 35, U.N. Doc. CRC/C/15/Add.78 (Oct. 10, 1997) (finding that Lao People's Democratic Republic should seek assistance of OHCHR).

³¹⁰ See Comm. on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Democratic Republic of the Congo*, ¶ 61, U.N. Doc. CRC/C/15/Add.153 (July 9, 2001) (recommending that Republic of the Congo adopt comprehensive education legislation); Comm. on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Bangladesh*, ¶ 29, U.N. Doc. CRC/C/15/Add.74 (June 18, 1997) (finding that Bangladesh should pursue its efforts to ensure full compatibility of its national legislation with Convention, and develop national policy on children and integrated legal approach to child rights); Comm. on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Nigeria*, ¶ 38, U.N. Doc. CRC/C/15/Add.61 (Oct. 30, 1996) (finding that Nigeria should harmonize informal and formal education systems, particularly with respect to application of national curriculum within all schools).

³¹¹ See Comm. on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Algeria*, ¶ 33, U.N. Doc. CRC/C/15/Add.76 (June 18, 1997) (finding that Algeria should set up Ombudsperson for Children).

levels.³¹²

Scholars have criticized the CRC's enforcement mechanism as weak because the enforcement tools are limited.³¹³ However, other scholars have noted positive accomplishments under the CRC, such as the legal reforms that countries have instituted to comply with the CRC, how the ratification and reporting process raises awareness of the issues in the CRC and how the Committee's advice on compliance creates a record for the international community.³¹⁴ One such scholar has commented that "[t]he recent history of Europe suggests that the ratification of the U.N. Convention on the Rights of the Child does have an effect on internal laws and customs, and it can provide a platform for a transformative discourse on children's rights."³¹⁵ Another has noted that "[i]t is encouraging to review the numerous initiatives that have emerged as a result of the Convention at the

³¹² See Comm. on the Rights of the Child, *Report on the Fortieth Session, supra* note 303, ¶ 37 (finding that Australia should develop and implement effectively National Plan of Action for children); Comm. on the Rights of the Child, *Concluding Observations: Kazakhstan*, ¶ 26, U.N. Doc. CRC/C/15/Add.213 (July 10, 2003) (finding that Kazakhstan should apply Convention's principles in planning and policy-making at every level, as well as in actions taken by educational institutions); Comm. on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Belarus*, ¶ 27, U.N. Doc. CRC/C/15/Add.180 (June 13, 2002) (finding that Belarus should integrate principles of Convention into their legislation and apply them in all political, judicial, and administrative projects); Comm. on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Bahrain*, ¶ 23, U.N. Doc. CRC/C/15/Add.175 (Mar. 11, 2002) (finding that Bahrain's State party should integrate Convention's principles into their political, judicial, and administrative decisions); Comm. on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Algeria*, ¶ 12, U.N. Doc. CRC/C/15/Add.76 (June 18, 1997) (finding that Algeria's legislation and administration does not reflect Convention's principles); Comm. on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Azerbaijan*, ¶ 15, U.N. Doc. CRC/C/15/Add.77 (June 18, 1997) (finding that Azerbaijan has not adopted Convention's provisions in its legislation, and its administrative and judicial decisions).

³¹³ See Michael Freeman, *The Future of Children's Rights*, 14 CHILD. & SOC'Y 277, 290 (2000); James J. Silk & Meron Makonnen, *Ending Child Labor: A Role for International Human Rights Law?*, 22 ST. LOUIS U. PUB. L. REV. 359, 363 (2003); Kathy Vandergrift, *Challenges in Implementing and Enforcing Children's Rights*, 37 CORNELL INT'L L.J. 547, 551 (2004).

³¹⁴ See Gerald Abraham, *Giannella Lecture: The Cry of the Children*, 41 VILL. L. REV. 1345, 1371-72 (1996); Rebeca Rios-Kohn, *The Convention on the Rights of the Child: Progress and Challenges*, 5 GEO. J. ON FIGHTING POVERTY 139, 139-40 (1998).

³¹⁵ Mary Ann Mason, *The U.S. and the International Children's Rights Crusade: Leader or Laggard*, 38 J. SOC. HIST. 955, 961 (2005).

international, regional, national and local levels. Together they form an impressive record of achievements.³¹⁶ For example, nations such as Ireland, Nepal, New Zealand, Tunisia, Uganda, and Vietnam have revised their constitutions or passed a body of laws specifically about children to bring their laws into compliance with the CRC while other countries have revised existing laws.³¹⁷ Countries have also established national coordinating and monitoring mechanisms that guide national compliance with the CRC by monitoring children's rights.³¹⁸

Finally, given almost universal ratification of the CRC, the treaty creates a moral obligation for nations to uphold its provisions.³¹⁹ The CRC has also reinforced the right to education expressed in other international agreements such as the ICESCR.³²⁰ Thus, these accomplishments suggest that the absence of punitive enforcement mechanisms has not prevented the CRC from becoming an impetus for important changes. Instead, while some countries still do not comply, others have undertaken reforms that should bring their countries into conformance with the treaty.

C. *The Individual Complaint Mechanism in the ICCPR*

Critics have identified the inability to file an individual complaint as a weakness of both the CRC and the ICESCR.³²¹ Thus, it is helpful to

³¹⁶ Rios-Kohn, *supra* note 314, at 147.

³¹⁷ See *id.* at 152; see also Mason, *supra* note 315, at 961 (discussing legal and policy changes in United Kingdom in response to CRC).

³¹⁸ Rios-Kohn, *supra* note 314, at 153.

³¹⁹ *Id.* at 151; Cynthia Price Cohen & Hedwin Naimark, *United Nations Convention on the Rights of the Child: Individual Rights Concepts and Their Significance for Social Scientists*, 46 AM. PSYCHOLOGIST 60, 63 (1991).

³²⁰ See THOMAS HAMMARBERG, A SCHOOL FOR CHILDREN WITH RIGHTS: THE SIGNIFICANCE OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD FOR MODERN EDUCATION POLICY 28 (1998), available at <http://unicef-irc.org/publications/pdf/il2e.pdf> (1997 Innocenti Lecture held in Florence, Italy).

³²¹ See BEITER, *supra* note 216, at 635; David A. Balton, *The Convention on the Rights of the Child: Prospects for International Enforcement*, 12 HUM. RTS. Q. 120, 128 (1990) (“[T]he implementation mechanism created by the [CRC] does not establish any concrete means of enforcement at the international level,” because “[t]he committee lacks the authority to receive any petitions alleging a violation of the Convention”); Freeman, *supra* note 313, at 290 (urging CRC to adopt mechanism for children's individual complaints against their states); Roger J.R. Levesque, *The Internationalization of Children's Human Rights: Too Radical for American Adolescents?*, 9 CONN. J. INT'L L. 237, 272 (1994) (condemning CRC as “fundamentally weak document” because it lacks an individual petition system); Timothy John Fitzgibbon,

consider how an individual complaint mechanism functions under the ICCPR. The ICCPR has an Optional Protocol that authorizes individuals who claim to be victims of violations of the Covenant to file a written complaint with the Human Rights Committee (“HRC”), the body that enforces the ICCPR.³²² The complainant must first exhaust all possible domestic remedies except “where the application of the remedies is unreasonably prolonged.”³²³ The ICCPR does not permit anonymous complaints,³²⁴ and the HRC will not review a complaint that another international committee is considering.³²⁵ The HRC or a working group of HRC members determines the complaint’s conformance with these requirements and gives the accused Party an initial opportunity to provide its observations about the communication.³²⁶

Once the working group deems the communication admissible, the HRC submits the complaint to the accused Party and the Party must clarify the issues raised and respond within six months.³²⁷ The HRC sends the Party’s response to the complainant who may respond.³²⁸ The HRC does not receive oral testimony nor can it undertake independent fact-finding; instead, it considers complaints in closed meetings in light of the available written information.³²⁹ The HRC

Comment, *The United Nations Convention on the Rights of the Child: Are Children Really Protected? A Case Study of China’s Implementation*, 20 LOY. L.A. INT’L & COMP. L.J. 325, 341 (1998) (criticizing CRC’s lack of enforcement powers, including absence of “formal mechanisms . . . to examine complaints by individual children”). *But see* Dennis & Stewart, *supra* note 286, at 466 (arguing that addition of individual complaints mechanism to ICESCR would be both impractical and ineffective).

³²² Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), arts. 1-2, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter *Optional Protocol*]. The ICCPR complaint mechanism was included in an optional protocol because States were divided in opinion over the proper enforcement mechanism for the ICCPR. *See* Heffernan, *supra* note 222, at 82. Although the United States has ratified the ICCPR, it has not ratified the optional protocol. OHCHR, *Ratifications and Reservations: ICCPR*, *supra* note 287 (listing state parties that have ratified ICCPR).

³²³ *Optional Protocol*, *supra* note 322, art. 5, ¶ 2(b).

³²⁴ *Id.* art. 3.

³²⁵ *Id.* art. 5, ¶ 2(a).

³²⁶ *See* Human Rights Comm., *Rules of Procedure of the Human Rights Committee*, R. 95-97, U.N. Doc. C/PR/C/Rev.8 (Sept. 22, 2005).

³²⁷ *See* *Optional Protocol*, *supra* note 322, art. 4.

³²⁸ *See* Human Rights Committee, *supra* note 326, R. 99, ¶ 3.

³²⁹ *Optional Protocol*, *supra* note 322, art. 5, ¶¶ 1, 3; *see* Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 343 (1997) (describing review process); *see also* Makau wa Mutua,

resolves the complaint by sending its “views” to both the individual complainant and the Party and by publishing them.³³⁰ The HRC does not have authority to negotiate a settlement between the complainant and the Party but the information exchange involved in the petition process may result in resolution of the dispute.³³¹

In cases where it has found a violation, the HRC has recommended that a Party provide an appropriate remedy for the victim, pay monetary compensation, and inform the HRC of actions it has taken within ninety days.³³² In its comments to country reports, it has asked parties to revise existing laws.³³³ The HRC’s recommendations do not bind the Parties.³³⁴ There appears to be a mixed record of compliance with HRC recommendations.³³⁵ The strength of the HRC’s recommendations “lies in the international standing and moral authority of the Human Rights Committee and in the essence of the commitment assumed by States upon ratification of the Covenant and

Looking Past the Human Rights Committee: An Argument for De-Marginalizing Enforcement, 4 BUFF. HUM. RTS. L. REV. 211, 233 (1998) (noting that these rules make Committee’s fact-finding task difficult).

³³⁰ Optional Protocol, *supra* note 322, art. 5, ¶ 4.

³³¹ Heffernan, *supra* note 222, at 108.

³³² E.g., *Hill v. Spain*, Communication No. 526/1993, ¶¶ 16-17, U.N. Doc. CCPR/C/59/D/526/1993 (Apr. 2, 1997); *Atachahua v. Peru*, Communication No. 540/1993, ¶¶ 10-11, U.N. Doc. CCPR/C/56/D/540/1993 (Mar. 25, 1996); *Thomas v. Jamaica*, Communication No. 321/1988, ¶¶ 11-12, U.N. Doc. CCPR/C/49/D/321/1988 (Nov. 3, 1993).

³³³ E.g., Comments of the Human Rights Comm., Morocco, ¶ 20, U.N. Doc. CCPR/C/79/Add.44 (Nov. 23, 1994); Comments of the Human Rights Comm., N.Z., ¶¶ 185-87, U.N. Doc. A/50/40 (Oct. 3, 1995); Concluding Observations of the Human Rights Comm., Syrian Arab Republic, ¶ 26, U.N. Doc. CCPR/CO/71/SYR (Apr. 24, 2001).

³³⁴ See Heffernan, *supra* note 222, at 102; Mutua, *supra* note 329, at 233.

³³⁵ See sources cited *supra* note 334. The HRC appears to have a mixed success record regarding state party response to its views. Scholars have noted substantial noncompliance with the Committee’s recommendations. See Heffernan, *supra* note 222, at 110 (“[T]he Committee continues to be troubled by noncompliance with its final views.”); Mutua, *supra* note 329, at 235 (noting that “many states have chosen to ignore the Committee’s recommendations”). However, the Committee has achieved some success in that “HRC decisions have directly caused States to alter their laws and/or practices so as to conform to the ICCPR,” and the desire to avoid negative publicity from an adverse finding also may act as an instrumental deterrent. Sarah Joseph, *A Rights Analysis of the Covenant on Civil and Political Rights*, 5 J. INT’L LEGAL STUD. 57, 66-67 (1999). In addition, some Parties have compensated victims in response to the Committee’s recommendations to do so. Heffernan, *supra* note 222, at 110.

Protocol.”³³⁶

IV. RETHINKING ENFORCEMENT OF A FEDERAL RIGHT TO EDUCATION

The enforcement mechanisms of human rights treaties provide instructive models when considering how to develop a collaborative approach to define and enforce a federal right to education in the United States. Subpart A explains how a federal right to education should be defined. Subpart B describes the four components of the proposed collaborative enforcement model: (1) a reporting obligation to a panel of education experts, (2) technical assistance, (3) financial assistance and withholding funds, and (4) a complaint mechanism. Subpart C contends that this collaborative approach to a federal right to education should be adopted through Spending Clause legislation and that the proposal meets constitutional requirements for such legislation.

A. Defining a Federal Right to Education

Congress should recognize a federal right to education that guarantees equal educational opportunity within each state.³³⁷ In addition, a U.S. right to education should emulate the CRC and embrace among its aims the development of the child’s mental and physical abilities, personality, and talents to her or his fullest potential. This goal would be included in a preamble to the statute and serve as the guidepost for implementation of the legislation, just as NCLB’s preamble explains that the statute seeks to ensure that all students obtain an equal opportunity to receive a “high-quality education” and achieve proficiency on “challenging state academic standards” and assessments.³³⁸ The legal requirement would mandate that states provide equal educational opportunity while the inclusion of the aim

³³⁶ Heffernan, *supra* note 222, at 102.

³³⁷ See Koski & Reich, *supra* note 88, at 604-07 (arguing for equality as goal of education reform). *But see* SUNSTEIN, *supra* note 2, at 186 (arguing that equal opportunity “is impossible to achieve”). While current federal law prohibits intentional discrimination and disparate impact discrimination, it fails to require equal educational opportunity. See Civil Rights Act of 1964, 42 U.S.C. § 2000d (2006) (prohibiting race, color, and national origin discrimination by recipients of federal financial assistance); *Washington v. Davis*, 426 U.S. 229, 239 (1976) (holding that Equal Protection Clause only prohibits intentional discrimination); 34 C.F.R. § 100.3 (2007) (prohibiting intentional and disparate impact discrimination by recipients of federal financial assistance).

³³⁸ No Child Left Behind Act of 2001, 20 U.S.C. § 6301 (Supp. II 2002).

of developing each child to her or his fullest potential serves to encourage states to increase educational opportunities and to discourage states from engaging in substantial leveling down of revenues, which occurred in some districts after some school finance decisions required equality in the school finance system.³³⁹

This recommendation stands in contrast to those scholars noted in Part II who suggest that the United States should recognize a right to a minimum adequate education that focuses on basic skills.³⁴⁰ Setting the standard for a federal right to education at such a low level would not help the nation to develop the full intellectual capacity of children, acquire the societal benefits that come from providing all children a high-quality education, or end the injustice that accompanies the current disparities.³⁴¹ Furthermore, NCLB's emphasis in its preamble on a "high-quality education" and "challenging state academic standards" represents a congressional consensus that the federal role in education should set ambitious goals or that existing deficiencies like the achievement gap and low academic standards will remain entrenched.

Along with the goal to develop each child to her or his fullest potential, the statute also should include as its purpose the reduction of interstate inequalities because, as education law scholar Goodwin Liu has explained, "the burden of such disparities tends to fall most heavily on disadvantaged children with the greatest educational needs."³⁴² The inclusion of this as a goal for the statute accomplishes two objectives. First, the federal panel that reviews state plans will keep an eye on interstate disparities as it reviews state plans and makes recommendations to states to remedy substantial, harmful disparities. Second, congressional recognition that interstate disparities should be reduced could spark some states that provide educational opportunities well below the national norm to improve what they offer, particularly if Congress sets aside funding specifically to address interstate disparities.

Recognizing a federal right to education that guarantees equal educational opportunity would benefit the nation in many ways.³⁴³

³³⁹ See, e.g., *Serrano v. Priest*, 226 Cal. Rptr. 584, 618 (Ct. App. 1986).

³⁴⁰ See *supra* text accompanying notes 193-95.

³⁴¹ See *supra* text accompanying notes 172-76.

³⁴² See Liu, *supra* note 7, at 333; see also Goodwin Liu, *Interstate Inequality in Educational Opportunity*, 81 N.Y.U. L. REV. 2044 (2006).

³⁴³ For a recent discussion of the benefits of equal educational opportunity, see Koski & Reich, *supra* note 88, at 595-607.

First, substantial disparities in educational opportunity along class and race lines³⁴⁴ impede the full educational development of many disadvantaged children. Reducing these disparities should encourage states to provide educational opportunities based upon the needs of students, which are greater in disadvantaged communities than in affluent communities. Second, combining efforts to achieve equal educational opportunity with a goal of developing children to achieve their full potential should encourage the development of rigorous educational standards in contrast to the low standards set by many states.³⁴⁵ Third, providing a federal right to education on the basis of equal opportunity would remedy the fundamental unfairness of the current educational system that has hampered the ability of disadvantaged students to pursue higher education, professional jobs, and ultimately the American dream.³⁴⁶

William Koski and Rob Reich persuasively argue this latter point in their defense of equality of educational opportunity in a recent article.³⁴⁷ They explain that, in contrast to other approaches to education, such as the adequacy movement that currently dominates much school finance litigation and education policy more generally, equality of educational opportunity is the only approach that directs attention to disadvantaged students and recognizes that education provides important positional advantages in obtaining admission to higher education and well-paying jobs.³⁴⁸ Furthermore, when some enjoy a positional advantage in the college admissions and labor markets, the education system functions contrary to “the importance of fairness in competition . . . deep in the American ethos.”³⁴⁹ Disparities in educational opportunity also can undermine the dignity and self-worth of those provided inferior educational opportunities.³⁵⁰

While some might contend that the pursuit of equal educational opportunity and the goal of developing each child to her or his fullest potential would create conflicting agendas, these objectives actually complement each other. Deeply entrenched disparities in educational

³⁴⁴ See *supra* text accompanying notes 3-9.

³⁴⁵ See *supra* text accompanying notes 170-76.

³⁴⁶ See HOCHSCHILD & SCOVONICK, *supra* note 2, at 54; see also Koski & Reich, *supra* note 88, at 599-603 (explaining some disadvantages low-income students face when they apply to postsecondary institutions and labor markets).

³⁴⁷ See Koski & Reich, *supra* note 88, at 595-607.

³⁴⁸ See *id.* at 599-604.

³⁴⁹ See *id.* at 607.

³⁵⁰ See *id.* at 606.

resources prevent many children from reaching their full potential. Instead of allowing low-income, minority, or geographical status to determine the educational opportunities children receive, the recognition of a federal right to education would encourage states and districts to design educational systems to address students' needs and harvest their full potential. As noted previously, the goal of developing each child's ability to their fullest potential should curb any tendency to level down rather than up. Once each state provides its children a high-quality education, if more affluent communities continue to create unique advantages for their students, continuing improvements in the education provided to less affluent communities could maintain equal educational opportunity and its accompanying fairness for children as they exit the educational system.³⁵¹

Recognizing a federal right to education would not be unique to the United States. As demonstrated in part by the widespread approval of the CRC, many other countries recognize a right to education on the basis of equal opportunity that aims to develop all children to their fullest potential as a fundamental human right.³⁵² Thus, federal recognition of this right would bring the United States into harmony with what other countries have accepted as a human right and would make U.S. law and policy more consistent with its support of human rights worldwide.³⁵³

B. *A Collaborative Enforcement Model for a Federal Right to Education*

In contrast to other scholarly approaches to a federal right to education in the United States that recommend a judicially defined and enforced right, this Article argues that Congress should enact federal spending legislation that implements a collaborative approach to a federal right to education.³⁵⁴ The absence of lawsuits against

³⁵¹ Cf. Liu, *supra* note 7, at 346 (arguing that Congress should recognize "educational adequacy for equal citizenship" that includes limits on inequality). See generally Koski & Reich, *supra* note 88, at 595-607 (explaining benefits of equal educational opportunity, including fairness in college and university admissions and in postsecondary employment).

³⁵² Connie de la Vega, *The Right to Equal Education: Merely a Guiding Principle or Customary International Legal Right?*, 11 HARV. BLACKLETTER L.J. 37, 48-50 (1994).

³⁵³ *Id.* at 60.

³⁵⁴ Cass Sunstein has commented that those who believe that judicial enforcement of economic and social rights is not possible might advocate for democratic protection of these rights or for an approach to enforcing those rights similar to that set out in

states and districts would encourage federal, state, and local governments to collaborate to improve the provision of educational opportunities. While an expert panel, executive order, or the U.S. Department of Education could determine additional details of the enforcement mechanism so that necessary changes would not require congressional action, this section provides the key components of how the mechanism would function. After discussing these components, this Article contends that the proposal satisfies the requirements for federal spending legislation.

Before discussing the proposed model, readers should consider two points. First, for those who do not believe that the federal government should recognize a federal right to education, the collaborative enforcement model proposed in this section could still address other educational concerns. Second, policymakers have adopted collaborative enforcement models in other areas, such as the European Employment Strategy³⁵⁵ and the North Atlantic Free Trade Agreement Environmental Side Agreement,³⁵⁶ suggesting that a collaborative

the ICESCR. SUNSTEIN, *supra* note 2, at 209. This Article proposes a model that combines these two approaches as a springboard for developing a new enforcement mechanism for a federal right to education.

³⁵⁵ See, e.g., Joanne Scott & David M. Trubek, *Mind the Gap: Law and New Approaches to Governance in the European Union*, 8 EUR. L.J. 1, 5 (2002). Under the European Employment Strategy, member States of the European Union have adopted a set of employment guidelines, and each member State must submit an annual plan that describes how they will achieve the guidelines' goals for the next year. The European Commission and the Council of Ministers review the reports and recommend improvements. The best performers share best practices and serve as benchmarks for other member States. The European Employment Strategy seeks to reduce unemployment while allowing Member States flexibility in the policies they adopt to achieve that goal. *Id.* Like education reform, the European Employment Strategy recognizes that no single approach will solve the identified problems and thus each Member State retains the flexibility to develop its own policies while pursuing the agreed upon goals. See *id.* at 5-6. The European Employment Strategy represents the most developed example of the Open Method of Coordination ("OMC"), a new and growing form of governance within the European Union through which "[m]ember States agree on a set of policy objectives but remain free to pursue these objectives in ways that make sense within their national contexts and at differing tempos." *Id.* at 5. OMC includes the establishment of "quantitative and qualitative . . . benchmarks" that member States translate into domestic policy and the submission of periodic enforcement reports along with peer assessments. Alexandra Gatto, *Governance in the European Union: A Legal Perspective*, 12 COLUM. J. EUR. L. 487, 508 (2006).

³⁵⁶ The North American Agreement on Environmental Cooperation, also known as the North Atlanta Free Trade Agreement ("NAFTA") Side Agreement, seeks to ensure that each party to NAFTA complies with its own environmental requirements by, in

approach merits consideration.

1. Reporting Obligation

In recognizing a right to education on the basis of equal opportunity that embraces among its aims the development of a child's mental and physical abilities to their fullest potential, Congress should require states to assess how best to achieve this goal while allowing states to retain the flexibility to adopt different approaches. Some states will have begun to develop expertise on these issues because school finance litigation has required them to determine what it takes to provide students an adequate education. By allowing flexibility in how the states achieve the aims of a right to education, the proposed approach would respect the expertise and authority of state and local governments in education while recognizing that federal action has become necessary to remedy the educational inequities deeply entrenched in American society.

Once Congress recognizes the right, states³⁵⁷ should submit initial and then periodic reports to a panel or commission of education experts convened by the federal government. The initial report should analyze how the state will guarantee the federal right to education and periodic reports should discuss progress the state has made toward guaranteeing the right. The inclusion of periodic reports recognizes that implementing the right will occur over time, while still ensuring that progress continues on a regular basis.

Similar to the CRC and the ICESCR, Congress should develop

part, requiring each party to submit an annual report on its enforcement of its environmental laws to the trilateral North American Commission for Environmental Cooperation. Daniel C. Esty & Damien Geradin, *Market Access, Competitiveness, and Harmonization: Environmental Protection in Regional Trade Agreements*, 21 HARV. ENVTL. L. REV. 265, 315-16 (1997).

³⁵⁷ The access point for this proposal is the state government rather than the local government because state governments possess authority and control over the laws and policies that govern education. State governments control school financing schemes that determine how revenue is allocated to the schools and how that money may be spent. See HURST ET AL., *supra* note 83, at 59. State governments also establish the allocation of control between the state and local governments, the type of taxation that is used, and determine the landscape in which districts operate. HOCHSCHILD & SCOVRONICK, *supra* note 2, at 61. While states sometimes have turned substantial control over to local governments, school districts always operate within the context of state-determined education laws and policy. Moreover, a federal reform that dealt exclusively with districts not only would raise serious concerns about a direct federal takeover of education but also would be unmanageable given the nearly 15,000 school districts within the United States. See *id.*

reporting guidelines that specify the information required in state reports. Those developing the guidelines could draw upon the scholarly literature on how to improve existing human rights reporting guidelines.³⁵⁸ For example, the panel could assess whether a state guarantees equal educational opportunity by developing qualitative and quantitative measures for educational resources including: the provision of qualified teachers and staff; funding; conditions of facilities; disparities in course offerings, such as advanced placement and other high-level course offerings; and extracurricular offerings. Congress could require states to provide disaggregated data for the state, district, and school level on disparities in educational opportunity. States should also identify obstacles to achieving the right to education, including financial, political, and policy obstacles. This reporting requirement builds on the requirements under NCLB, which, as noted above, require states and districts to make public report cards on student achievement on state assessments disaggregated along lines of poverty, race, ethnicity, disability, and limited-English proficiency.³⁵⁹

To ensure that states provide equal educational opportunity, the panel should not look for the qualitative and quantitative measures on which states report to be identical throughout the state. Instead, the panel should focus on encouraging states to reduce significant disparities in educational opportunity that are not based upon the needs of children or legitimate pedagogical choices. The panel should also examine state reports to ensure that any diminished opportunities do not systematically fall upon a specific population of children, such as low-income, minority, or rural schoolchildren.

States should submit their reports to either a federal panel or commission of experts or an independent panel or commission of experts supported by federal funding (hereinafter referred to as a panel). Panel members must possess expertise on a broad cross section of education policy issues, including school finance, teacher quality, and the unique needs of disadvantaged students. In reviewing reports, the panel should assess whether the state provides the right to

³⁵⁸ Some have suggested that parties to international treaties should establish qualitative and quantitative indicators or targets that include specific time frames by which the goals in the benchmarks will be achieved. See, e.g., BEITER, *supra* note 216, at 625-29; STEINER & ALSTON, *supra* note 219, at 317 (excerpting Philip Alston, *International Governance in the Normative Areas*, in UNDP, BACKGROUND PAPERS: HUMAN DEVELOPMENT REPORT 1999, at 1, 15-18 (1999)).

³⁵⁹ No Child Left Behind Act of 2001, 20 U.S.C. § 6311 (Supp. II 2002).

education on the basis of equal opportunity, identify any successful efforts to provide a right to education as well as impediments to guaranteeing this right, and recommend how a state could improve its provision of the right to education.³⁶⁰ The expert panel should have the capacity to conduct independent fact-finding and to receive oral testimony, in contrast to the panels that enforce the ICESCR and the CRC.³⁶¹ In addition to obtaining information from states, the panel should consider information submitted by nonprofit, nonpartisan, and independent organizations.

The panel's identification of states violating the federal right to education, along with publicity about such violations, would encourage states to take remedial action.³⁶² The panel's recommendations, however, should not be binding. Instead, the panel should encourage states to develop their own solutions and approaches to identified concerns. Thus, states could choose among a myriad of options in providing the federal right, including revising their school finance systems, improving accountability systems, and offering vouchers.

2. Technical Assistance

In addition to a state reporting mechanism, the panel, in cooperation with the federal government, would respond to state reports by encouraging states to identify effective solutions and appropriate technical assistance.³⁶³ For example, the panel could connect states with organizations such as the National Research Council, scholars and researchers, and nongovernmental organizations that have expertise on the challenges confronting states.³⁶⁴ Each year,

³⁶⁰ Chapman, *supra* note 241, at 36 (arguing that there needs to be more effective monitoring of progressive implementation of ICESCR).

³⁶¹ See Heffernan, *supra* note 222, at 108 (arguing that HRC's limitation of considering only written information is weakness in its enforcement mechanism for ICCPR).

³⁶² Chapman, *supra* note 241, 36-38 (arguing that identifying violations of economic, social, and cultural rights is best way to ensure effective monitoring of these rights because label of "human rights violator" would encourage state parties to develop ways to remedy identified rights violations).

³⁶³ See William H. Clune, *The Deregulation Critique of the Federal Role in Education*, in *SCHOOL DAYS, RULE DAYS: THE LEGALIZATION AND REGULATION OF EDUCATION* 187, 205 (David L. Kirp & Donald N. Jensen eds., 1986) (noting that "many school districts do not know how to comply with mandates requiring technical and organizational change").

³⁶⁴ Cf. Liebman & Sabel, *supra* note 162, at 1737-38 (noting some ways that

the federal government collects data on education to help the nation determine the current state of education³⁶⁵ and the Department of Education frequently disseminates reports on education success stories.³⁶⁶ The federal government could build on its role as a repository of data and information on educational best practices by developing expertise on the most common obstacles to the provision of the federal right to education and potential avenues to overcome those obstacles. This process would eschew a one-size-fits-all approach, provide information on possible reform strategies that have proven successful in other states, and facilitate direct collaboration between the states.

3. Financial Assistance and Withholding Funds

In addition to technical assistance, the federal government should provide states with substantial financial assistance. The assistance should reward those states that make good-faith efforts to provide the right to education. The federal government should also provide

nongovernmental organizations have supported accountability systems, including identification of best practices).

³⁶⁵ See THE CONDITION OF EDUCATION, *supra* note 11, at ii; see also CTR. ON EDUC. POLICY, A BRIEF HISTORY OF THE FEDERAL ROLE IN EDUCATION: WHY IT BEGAN & WHY IT'S STILL NEEDED 13 (1999), available at <http://www.cep-dc.org/fededprograms/briefhistoryfedroleed.pdf> (noting federal government's data collection efforts in education).

³⁶⁶ See, e.g., CHARLES A. DANA CTR., UNIV. OF TEX. AT AUSTIN, HOPE FOR URBAN EDUCATION: A STUDY OF NINE HIGH-PERFORMING, HIGH-POVERTY, URBAN ELEMENTARY SCHOOLS (1999), available at <http://www.ed.gov/PDFDocs/urbaned.pdf> (describing achievements of nine elementary schools located in urban areas with a majority of low-income students); U.S. DEP'T OF EDUC., OFFICE OF INNOVATION & IMPROVEMENT, INNOVATIONS IN EDUCATION: CREATING SUCCESSFUL MAGNET SCHOOL PROGRAMS (2004), available at <http://www.ed.gov/admins/comm/choice/magnet/report.pdf> (profiling six successful magnet schools); U.S. DEP'T OF EDUC., OFFICE OF INNOVATION & IMPROVEMENT, INNOVATIONS IN EDUCATION: SUCCESSFUL CHARTER SCHOOLS (2004), available at <http://www.ed.gov/admins/comm/choice/charter/report.pdf> (detailing strategies and success of eight charter schools); U.S. DEP'T OF EDUC., PLANNING & EVALUATION SERV., ELEMENTARY & SECONDARY EDUC. DIV., THE EDUCATION FOR HOMELESS CHILDREN AND YOUTH PROGRAM: LEARNING TO SUCCEED (2002), available at <http://www.ed.gov/offices/OUS/PES/esed/learnsucceed/volume1.pdf> (discussing successful practices employed by schools to improve achievement of homeless students); U.S. DEP'T OF EDUC., PLANNING & EVALUATION SERV., PROMISING RESULTS, CONTINUING CHALLENGES: THE FINAL REPORT OF THE NATIONAL ASSESSMENT OF TITLE I (1999), available at <http://www.ed.gov/rschstat/eval/disadv/promisingresults/natirpt.pdf> (discussing improvements in reading and math proficiency among Title I recipients).

financial assistance to those states that encounter obstacles but make progress toward their goals.³⁶⁷ Financial assistance would serve as an incentive for states to take action to guarantee the federal right and the amount would only provide a portion of the funds needed to cure the educational challenges confronting states. Additional federal financial assistance for states would address one of the primary criticisms of NCLB: the lack of adequate funding to achieve its comprehensive approach.³⁶⁸

This Article recommends that withholding federal funds should be considered a last resort under the proposed enforcement model. Warnings and technical assistance should precede any withholding of funds. The panel should define when a violation of the federal right to education has occurred, who bears the burden of proof, and a procedure for recommending that Congress withhold funds from a state. Congress should withhold a percentage of federal financial assistance from states unwilling to continuously take steps toward full implementation of the right to education.³⁶⁹ To remain consistent with the constitutional limits on Spending Clause legislation discussed below in subpart C, Congress should withhold a small but significant amount of financial assistance when necessary to encourage state remedial action, but it should not withhold all education funding. The federal government should not condition funds upon the state following the recommendations of the expert panel because those recommendations would represent only one possible course of action among many. Instead, Congress should withhold funds from those states that fail to take effective steps to remedy identified shortcomings. The panel should also establish criteria for withholding funds when a state's educational system performs so far below the norms established by other states.

³⁶⁷ While some may question whether the ability to receive money to address obstacles within their state may encourage states to paint a direr picture than actually exists, the panel would have information from other organizations to supplement the information provided by the state as well as the ability to conduct independent fact-finding.

³⁶⁸ William J. Mathis, *The Cost of Implementing the Federal No Child Left Behind Act: Different Assumptions, Different Answers*, 80(2) PEABODY J. EDUC. 90, 115 (2005) (noting that numerous studies "incontrovertibl[y]" demonstrate that NCLB is not funded adequately to achieve goal of proficiency for all students); William J. Mathis, *No Child Left Behind: Costs and Benefits*, 84 PHI DELTA KAPPAN 679, 685 (2003); Jennings & Kober, *supra* note 199, at B3.

³⁶⁹ See Civil Rights Act of 1964, 42 U.S.C. § 2000d (2006) (authorizing withholding of federal funds when recipient discriminates on basis of race, color, or national origin in federally funded program).

4. Complaint Mechanism

Finally, similar to what exists in the ICCPR and what has been proposed for the ICESCR,³⁷⁰ Congress should establish a complaint mechanism where groups or individuals could report a violation of the right to education.³⁷¹ This mechanism would ensure that the panel does not miss violations of the right to education because a state fails to disclose the violation. The system should first require a complainant to exhaust state remedies, such as seeking relief from the state legislature or department of education;³⁷² however, it should waive this requirement if the complainant has encountered substantial delays in receiving a remedy.³⁷³ The panel of experts should review the complaint, receive a response from the state, investigate facts, and receive necessary testimony. The panel should then issue findings and recommendations for the state.

The panel should widely publicize its findings and recommendations, which top federal officials, including the President, could highlight through public speaking engagements. While states possess latitude to choose among effective options, failure to institute remedial measures should constitute a basis for withholding a percentage of federal education funding to the state. Congress should define failure as a lack of action by the state to take steps in addressing the identified shortcomings. Thus, while the panel could not order a state to take action, it would have a strong carrot to encourage compliance.

C. Establishing a Federal Right to Education Through Spending Legislation

Congress should recognize a federal right to education through spending legislation that establishes reasonable conditions on federal

³⁷⁰ See Rios-Kohn, *supra* note 314, at 155-56.

³⁷¹ While some may question whether the inclusion of an individual complaint mechanism prevents the proposed enforcement model from remaining collaborative, this concern is addressed by the limitations of what the individual complaint mechanism offers. First, the state would not be required to follow the panel's recommendations and instead could develop its own approach to the concerns raised. Second, the panel would lack the authority to force the state to take any action. Instead, the state always would have the ability to choose between rejecting federal funds and taking steps to provide the right to education.

³⁷² Individuals would not have the right to sue to enforce a federal right to education in court.

³⁷³ See Optional Protocol, *supra* note 322, art. 5, ¶ 2(b).

financial assistance for the general welfare.³⁷⁴ While some may worry that this Article's proposal would violate federalism principles in which state and local governments principally control education,³⁷⁵ the proposal addresses any potential federalism objections to congressional recognition of a federal right to education. The Supreme Court has set very limited requirements for spending legislation by requiring that such action must be "in pursuit of the 'general welfare,'" unambiguous, and related "to the federal interest in particular national projects or programs."³⁷⁶ In addition, spending legislation must not violate other constitutional provisions or be "so coercive as to pass the point at which 'pressure turns into compulsion.'"³⁷⁷ Many scholars view these requirements as rather weak limitations on the spending power and suggest that the Court revise its current approach.³⁷⁸ While scholars have noted that the Court could apply these factors in a more rigorous fashion in the future, the Court has not yet chosen to do so.³⁷⁹

If the current lenient standards for spending legislation remain in place, this Article's proposal would satisfy these requirements. First,

³⁷⁴ See *South Dakota v. Dole*, 483 U.S. 203, 206-07 (1987).

³⁷⁵ See *Milliken v. Bradley*, 418 U.S. 717, 741 (1974) ("No single tradition in public education is more deeply rooted than local control over the operation of schools."); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 39 (1973) (noting that its review of Texas school funding scheme must be "scrutinized under judicial principles sensitive to the nature of the State's efforts and to the rights reserved to the States under the Constitution").

³⁷⁶ See *Dole*, 483 U.S. at 207 (quoting *Massachusetts v. United States*, 435 U.S. 444, 461 (1978)).

³⁷⁷ See *id.* at 208, 211 (quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937)).

³⁷⁸ See, e.g., Lynn A. Baker & Mitchell N. Berman, *Getting Off the Dole: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It to Do So*, 78 *IND. L.J.* 459, 539-41 (2003) (recommending revisions to Court's current Spending Clause doctrine); Richard W. Garnett, *The New Federalism, the Spending Power, and Federal Criminal Law*, 89 *CORNELL L. REV.* 1, 33 (2003) ("Congress's essentially unquestioned power to spend money, with regulatory strings attached, continues to provide practically limitless opportunities for the national government indirectly to shape policy at the state and local levels of society and government."); Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 *IOWA L. REV.* 243, 256 n.48 (2005) (describing standards in *Dole* as "lenient").

³⁷⁹ See ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 274 (2d ed. 2002) (noting that "[i]t is possible that as the Supreme Court narrows the scope of other congressional powers and revives the Tenth Amendment as a limit on Congress's powers, the Court might impose greater restrictions on conditional spending"); Baker & Berman, *supra* note 378, at 539-41.

Congress shapes what is or is not within the general welfare and “courts should defer substantially to the judgment of Congress” on this issue.³⁸⁰ Thus, legislation establishing a federal right to education would advance the general welfare because experts have consistently viewed a strong education system as an important pillar for the foundation of the nation.³⁸¹ As education scholar Richard Elmore has explained, “There is no avoiding a national interest in education; citizenship and education are inextricable.”³⁸² The federal government has repeatedly demonstrated its interest in education, including improving the quality of education and encouraging equal educational opportunity, through past education spending legislation that has not been successfully challenged, including the Elementary and Secondary Education Act of 1965.³⁸³

Second, this approach easily satisfies the “unambiguous” requirement by advocating clear conditions in the federal right to education. Third, the requirement that a statute must not violate any “independent constitutional bar” merely demands that the power “not be used to induce the States to engage in activities that would themselves be unconstitutional.”³⁸⁴ The spending legislation proposed in this Article would not encourage states to take unconstitutional actions, such as encourage states to infringe upon the free speech of local governmental entities.³⁸⁵

The limitation on spending authority that poses the most trouble for

³⁸⁰ *Dole*, 483 U.S. at 207.

³⁸¹ See CTR. ON EDUC. POLICY, *supra* note 365, at 5 (“The founders of our nation recognized that an educated, well-informed citizenry is fundamental to a democratic form of government.”).

³⁸² Richard F. Elmore, *Education and Federalism: Doctrinal, Functional, and Strategic Views*, in SCHOOL DAYS, RULE DAYS: THE LEGALIZATION AND REGULATION OF EDUCATION 166, 175 (David L. Kirp & Donald L. Jensen eds., 1986).

³⁸³ See CTR. ON EDUC. POLICY, *supra* note 365, at 5 (noting that role of federal government in education has served “to promote democracy; to ensure equality of educational opportunity; to enhance national productivity; and to strengthen national defense”); Chester E. Finn, Jr., *Alternative Conceptions of the Federal Role in Education: Thinking Anew About What to Aid, and How*, 60 PEABODY J. EDUC. 99, 103 (1982) (“[F]ederal aid was — and today remains — a significant weapon in the arsenal of those who hold that the foremost responsibility of the national government in the field of education, indeed perhaps its only Constitutional responsibility, is to provide equal opportunity to every citizen.”).

³⁸⁴ *Dole*, 483 U.S. at 210.

³⁸⁵ The Court previously rejected an argument that Title IX of the Education Amendments, which prohibits recipients of federal funds from discriminating on the basis of sex, violated the free speech rights of educational institutions. See *Grove City Coll. v. Bell*, 465 U.S. 555, 575-76 (1984).

this proposal is that the legislation may operate so coercively that it becomes compulsory in effect.³⁸⁶ To analyze this requirement, consider that in *South Dakota v. Dole*, the Supreme Court upheld the constitutionality of a statute that conditioned five percent of federal highway funds on establishment of a minimum drinking age of twenty-one.³⁸⁷ The Court determined that the statute had not exceeded the boundaries of coercion to become compulsion because Congress merely conditioned the required action on a small percentage of highway funds.³⁸⁸

Several features of this Article's proposal satisfy the requirement that the legislation must not be compulsory. First, any funding withheld under the statute, while significant in dollar amount, should comprise a relatively small percentage of education funding overall. The Supreme Court approved withholding five percent of federal highway funding in *Dole*.³⁸⁹ Therefore, limiting the condition of funds to only a fraction of federal funding for education, even a fraction larger than five percent, could prevent the program from becoming compulsory while still encouraging state action in furtherance of the right to education.

Second, the expert panel would issue nonbinding, advisory recommendations to encourage states to develop their own approaches to identified concerns or violations. Rather than trying to convince states to follow the panel's recommendations, the panel could propose some optional approaches to concerns and leave discretion to the states to choose amongst a variety of solutions.³⁹⁰ Finally, states may choose to reject the funding available under the statute.³⁹¹ With these limitations, the proposed approach would pass constitutional muster like other exercises of congressional spending authority in recent decades that have "increased the extent to which [Congress] places conditions on recipients of federal aid."³⁹² Moreover, courts have upheld the constitutionality of far more coercive spending statutes

³⁸⁶ See *Dole*, 483 U.S. at 211. For an argument that NCLB does not violate *Dole* but that it does exert substantial coercive pressure on state and local education policy, see Heise, *supra* note 118, at 137, 141, 156 ("[W]hile NCLB does not coerce from a constitutional perspective, it achieves policy coercion.").

³⁸⁷ See *Dole*, 483 U.S. at 208-12.

³⁸⁸ See *id.* at 211.

³⁸⁹ See *id.* at 211-12.

³⁹⁰ See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42-43 (1973).

³⁹¹ See Heise, *supra* note 118, at 137 ("States that find NCLB unpalatable are, of course, free to decline to participate and forego federal education funds.").

³⁹² See DeBray et al., *supra* note 151, at 10.

than the mechanism proposed here.³⁹³

Ultimately, by focusing the federal government's attention on a collaborative approach through the Spending Clause, this Article's proposal places the federal government in a position that remains consistent with the historical role of the federal government in education.³⁹⁴ As Elmore has noted, the federal government's role "has been to assert and reassert a national interest in education, using indirect, collaborative financing mechanisms and targeting of resources on curricula and on student populations, while at the same time deferring to states and localities on basic questions of finance and organization."³⁹⁵ Under this proposal, state and local governments would continue to serve as the primary decisionmakers in education, while federal involvement and oversight would encourage the states to take effective action that will address unequal educational opportunities and poor quality schools. If the federal government focuses on encouraging states to improve the quality of schools, reducing disparities in the quality of educational opportunities, and developing expertise on how quality can be improved, such investments would reap substantial rewards for the nation.³⁹⁶

V. THE CASE FOR A COLLABORATIVE APPROACH TO A FEDERAL RIGHT TO EDUCATION

Part V considers some of the principal advantages and disadvantages of the proposed collaborative approach. It begins with an examination of why adopting a collaborative approach that builds upon cooperative federalism represents an effective way to develop and implement a right to education and why this collaborative approach possesses advantages over a litigation-centered approach. It then analyzes how the approach would build and improve upon the approach adopted in

³⁹³ See Heise, *supra* note 118, at 138 (citing *Kansas v. United States*, 214 F.3d 1196, 1201-02 (10th Cir. 2002); *Oklahoma v. Schweiker*, 655 F.2d 401, 414 (D.C. Cir. 1981)) ("Courts have permitted conditional spending programs where the federal funding at issue is so large that a state had 'no choice' but to submit to federal policy.").

³⁹⁴ Jennings, *supra* note 127, at 522 ("Over the course of two centuries of American history, the federal government has become involved in education when a national interest has been identified.").

³⁹⁵ Elmore, *supra* note 382, at 175.

³⁹⁶ Eric A. Hanushek, *Why Quality Matters in Education*, FIN. & DEV., June 2005, at 15 ("Analysis of the costs and benefits of school reform clearly shows investments that improve the quality of schools offer exceptional rewards to society.").

NCLB. This Part then concludes with the politics that would surround recognition of a federal right to education.

A. *The Benefits of Collaboration and a Legislatively Defined Approach to a Federal Right to Education*

Cooperative federalism envisions the federal and state governments negotiating shared authority and responsibility for a policy reform.³⁹⁷ While dual federalism would view education as the exclusive province of state and local governments and coercive federalism might seek new congressional authority to directly control education,³⁹⁸ cooperative federalism recognizes the need for each of the levels of government to share responsibility for progress to be made.³⁹⁹ Negotiations between federal, state, and local governments determine how to allocate responsibility.⁴⁰⁰ Each level of government brings its unique contribution to the negotiating table and thus possesses the ability to influence the negotiation's outcome.⁴⁰¹ Cooperative federalism provides a mechanism for national attention and reform without federal dominance of the shape of those reforms while also allowing the federal government to establish a framework for state action without transforming the states into mere extensions of the federal government.⁴⁰²

³⁹⁷ See Daniel J. Elazar, *Cooperative Federalism*, in *COMPETITION AMONG STATES AND LOCAL GOVERNMENTS: EFFICIENCY AND EQUITY IN AMERICAN FEDERALISM* 65, 67 (Daphne A. Kenyon & John Kincaid eds., 1991); Daphne A. Kenyon & John Kincaid, *Introduction to COMPETITION AMONG STATES AND LOCAL GOVERNMENTS*, *supra*, at 1, 7; Joseph F. Zimmerman, *National-State Relations: Cooperative Federalism in the Twentieth Century*, *PUBLIUS*, Spring 2001, at 15, 18-19.

³⁹⁸ Elazar, *supra* note 397, at 79 (noting that "in the days of dual federalism, the system was perceived as one in which the federal and state governments each functioned within their own spheres with a minimum of contact and overlapping"); Zimmerman, *supra* note 397, at 15, 17-18, 27 (describing dual federalism as recognizing separate and independent spheres of authority for Congress and states and coercive federalism as congressional removal of some state regulatory powers along with congressional coercion of states to follow national approaches to policy matters in some areas).

³⁹⁹ Elazar, *supra* note 397, at 73.

⁴⁰⁰ *Id.*

⁴⁰¹ *Id.* at 74 ("The federal government uses its superior resources and better ability to attract public attention; the states use their constitutional position as the keystones in the governmental arch; and local governments use their ability to exist as constituted governments, normally with the power to tax, and their direct connections with the citizenry.").

⁴⁰² *Id.* at 82 (contending that cooperative federalism provides "a means for

The collaborative approach proposed in this Article builds upon these virtues of cooperative federalism.⁴⁰³ Congress should herald the importance of remedying educational inequities by recognizing a federal right to education while continuing to allow state and local governments to control most education policy.⁴⁰⁴ The proposed approach encourages the federal government and states to work together to develop effective solutions to the barriers that states encounter in providing the federal right to education.⁴⁰⁵ Congress then supports states as they implement approaches tailored to their unique circumstances.⁴⁰⁶

In addition to harnessing the benefits of cooperative federalism, the proposed approach represents a more effective alternative than a litigation-centered approach. As discussed in Part II.A, scholars focus almost exclusively on the judicial branch to define and enforce a

encouraging nationwide efforts to meet particular problems without national government dominance, and a means for using the federal government as a backstop for state efforts, rather than making the states administrative arms of a dominant Washington, D.C.”).

⁴⁰³ As the Supreme Court recognized in *Schaffer ex rel. Schaffer v. Weast*, Congress previously adopted a cooperative federalism approach to combat discrimination in education against disabled children through the Education of the Handicapped Act, Pub. L. No. 91-230, 84 Stat. 175 (1970), and its numerous amendments that now constitute the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1482 (2006). See *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528, 531 (2005) (“IDEA is ‘frequently described as a model of cooperative federalism.’” (quoting *Little Rock Sch. Dist. v. Mauney*, 183 F.3d 816, 830 (8th Cir. 1999))). Those statutes successfully reversed the neglect of special education children, and IDEA currently governs the special education services provided to close to 7 million children. See IDEA.org, Table 1-1: Children and Students Served Under IDEA, by Age Group and State (Fall 2005), available at http://www.ideadata.org/tables29th/ar_1-1.xls.

⁴⁰⁴ See Elazar, *supra* note 397, at 74, 76 (arguing that for cooperative federalism to function properly “the states and localities must be the primary managers of domestic programs, whether intergovernmental or not,” but also noting important role of federal government in drawing national attention to policy needs and providing resources to address those needs). But see MANNA, *supra* note 199, at 23 (criticizing cooperative federalism because, among other things, “it does not necessarily specify the mechanisms that might enhance or retard cooperation,” and it does not provide predictions that may be tested against empirical evidence, and it does not explain why governments address some policy reforms collaboratively and not others).

⁴⁰⁵ Elazar, *supra* note 397, at 69 (explaining that “cooperative” aspect of “cooperative federalism” requires governments to “work and function together”); Robert L. Fischman, *Cooperative Federalism and Natural Resources Law*, 14 N.Y.U. ENVTL. L.J. 179, 184 (2005) (“[C]ooperative federalism typically appears as congressional or administrative efforts to induce (but not coerce or commandeer) states to participate in a coordinated federal program.”).

⁴⁰⁶ See Elazar, *supra* note 397, at 74, 76.

federal right to education.⁴⁰⁷ In contrast, this Article argues that Congress, not the federal courts, should define a federal right to education and that it should be enforced through a congressionally appointed panel for several reasons.

The education of schoolchildren involves one of the most closely held functions of state and local governments, and many Americans view local control over education as an important virtue of the American education system.⁴⁰⁸ The Supreme Court has repeatedly noted the importance of local control for ensuring community support of education and achieving educational excellence through local experimentation.⁴⁰⁹ Even if local control of education represents an “illusion” because it fails to reflect the actual operation of education policy,⁴¹⁰ actions that interfere with local control typically meet with intense resistance.⁴¹¹ For example, school finance litigation provides some important lessons on the limitations of what courts can achieve when their decisions lack substantial local political support.⁴¹² While litigation has helped usher in reform in some instances, it has failed to bring about lasting reform of the inequities in funding that exist in many states.⁴¹³ Instead, such reform requires political will and support so that those within the state will embrace and advance its goals rather than undermine and overturn the changes.⁴¹⁴

When court decisions move beyond the current political consensus,

⁴⁰⁷ See *supra* text accompanying notes 191-92.

⁴⁰⁸ See HOCHSCHILD & SCOVRONICK, *supra* note 2, at 5 (“Americans want neighborhood schools, decentralized decision making, and democratic control They simply will not permit distant politicians or experts in a centralized civil service to make educational decisions.”).

⁴⁰⁹ See *Milliken v. Bradley*, 418 U.S. 717, 741-42 (1974); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 50 (1973).

⁴¹⁰ Heise, *supra* note 118, at 131.

⁴¹¹ REED, *supra* note 27, at 121 (“Localism is paramount in American attitudes toward public education. Reforms that seek to diminish local control are much less likely to meet approval than those that do not.”).

⁴¹² See *Dayton & Dupre*, *supra* note 79, at 2406.

⁴¹³ See *id.* at 2409-10 (“Despite the persistence of school funding reformers, there is considerable evidence that the courts have not produced the desired reforms. In many states, economically advantaged districts have retained or even increased their advantaged status, while disadvantaged districts have failed to generate sufficient legislative support to overcome the political influence of advantaged districts.”).

⁴¹⁴ See *id.* at 2412; see also Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436, 1522 (2005) (“Legal claims can be tactically useful in a political strategy for achieving change — but only after social movements lay the groundwork for legal change.”).

they can spark substantial backlash and resistance that may undermine the social and policy agenda the decision sought to advance. For instance, some contend that *Brown I* galvanized the intense resistance to school integration that raged throughout the South following the decision thereby undermining the political movement for integration that had gained support before *Brown I*.⁴¹⁵ The nation's experience with desegregation accomplished much by way of ending state-sponsored segregation, but ultimately many whites fled the inner city schools to avoid integration and schools, in turn, began resegregating.⁴¹⁶ A collaborative, legislative approach developed after educating the nation about the critical need for remedying educational inequities might avoid some of the backlash that court-defined approaches sometimes engender and experience greater success in bringing about lasting change.⁴¹⁷

Moreover, congressional expression of the will of citizenry may represent the only effective counterbalance to state and local interests that would seek to maintain the status quo.⁴¹⁸ When a democratically elected body determines that the country must undertake substantial education reform to address harmful inequities, state and local governments, and ultimately the American public, may find a federal right to education more palatable. Additionally, when a democratic process defines the right to education, the citizenry through the legislature may revisit and refine the adopted approach to address shortcomings and incorporate insights from experience and new research.⁴¹⁹ If courts define and enforce a federal right to education, they could deny the public the opportunity to shape the right to

⁴¹⁵ See ROSENBERG, *supra* note 43, at 155-56; Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 MICH. L. REV. 431, 473-82 (2005) (arguing that *Brown* sparked violent backlash and undermined cause that it sought to advance).

⁴¹⁶ See HOCHSCHILD & SCOVRONICK, *supra* note 2, at 29 (“[T]he effort to desegregate schools is largely over; mandatory desegregation was a political failure.”); Dayton & Dupre, *supra* note 79, at 2406-07; ORFIELD & LEE, *supra* note 73, at 4-16, 29-41.

⁴¹⁷ See William E. Forbath, *Social Rights, Courts and Constitutional Democracy: Poverty and Welfare Rights in the United States*, in ON THE STATE OF DEMOCRACY 101, 117 (Julio Faundez ed., 2007) (noting that one problem with court enforcement of social rights is “the judiciary’s institutional limitations in devising complex, choice-laden social policy and, then, in enforcing the often costly and often politically unwelcome implementation of whatever politics it devises”).

⁴¹⁸ Cf. Elmore, *supra* note 382, at 175.

⁴¹⁹ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 59 (1973) (“[T]he ultimate solutions must come from the lawmakers and from the democratic pressures of those who elect them.”).

education and how the right should evolve over time.⁴²⁰

A collaborative approach to a federal right to education would also preserve more state and local control over education than a litigation-centered approach. Although the legislation would include substantial incentives for states to participate, states would retain the freedom to reject federal money and its accompanying pressures to provide the federal right to education.⁴²¹ In addition, when the national oversight panel identifies concerns about the provision of the federal right, the panel would exercise restraint by solely issuing recommendations on potential reforms while leaving states the authority to determine how to respond to these concerns.⁴²² This flexibility preserves the ability of states to experiment in education.⁴²³ While some may respond that courts in school finance litigation typically give state governments the opportunity to determine how they will remedy state constitutional violations and engage in a dialogue with the courts about the most effective approach,⁴²⁴ courts in those cases retain the authority to prescribe how the state will address the violation.⁴²⁵ Under the collaborative approach proposed here, the panel would lack this

⁴²⁰ See Forbath, *supra* note 417, at 117 (noting that “judicial imposition of social rights seems to preempt wide-open democratic decision-making about social and economic policy”).

⁴²¹ See *New York v. United States*, 505 U.S. 144, 168 (1992) (noting that when faced with conditions to federal grant “the residents of the State retain the ultimate decision as to whether or not the State will comply,” and “[i]f a State’s citizens view federal policy as sufficiently contrary to local interests, they may elect to decline a federal grant”).

⁴²² Elazar, *supra* note 397, at 83 (noting importance of “federal self-restraint” for cooperative federalism to operate as intended).

⁴²³ See *Rodriguez*, 411 U.S. at 50 (“Mr. Justice Brandeis identified as one of the peculiar strengths of our form of government each State’s freedom to ‘serve as a laboratory; and try novel social and economic experiments.’ No area of social concern stands to profit more from a multiplicity of viewpoints and from a diversity of approaches than does public education.”) (internal citation omitted).

⁴²⁴ See Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 669-71 (1993) (arguing that courts help to facilitate dialogue with public and legislature over meaning of Constitution); Michael A. Rebell, *Fiscal Equity in Education: Deconstructing the Reigning Myths and Facing Reality*, 21 N.Y.U. REV. L. & SOC. CHANGE 691, 723 (1995) (“Courts deciding fiscal equity issues must find remedial approaches that will promote dialogue at the local, state, and national levels to bring meaningful and lasting solutions to these difficult, but ultimately solvable, problems.”).

⁴²⁵ See, e.g., *Abbott v. Burke*, 575 A.2d 359, 409 (N.J. 1990) (“Whatever the legislative remedy, . . . it must assure that these poorer urban districts have a budget per pupil that is approximately equal to the average of the richer suburban districts, whatever that average may be, and be sufficient to address their special needs.”).

authority.

Defining and implementing a federal right to education through Congress and an executive panel also represents a superior approach to litigation because courts and judges lack the in-depth knowledge about education that effective judgments will require. For example, the Court acknowledged its lack of expertise to decide complex issues of education policy in *Rodriguez*.⁴²⁶ While courts have decided many more school finance cases since *Rodriguez*, the school finance decisions reflect a vast array of opinions on how to develop an effective and fair school finance system⁴²⁷ and the Court's acknowledgment in *Rodriguez* suggests federal judges may not possess the proficiency to select among these options. More importantly, while some courts have determined what outcomes education systems should achieve to satisfy adequacy requirements, "often the question of outcomes and always the question of 'adequacy of what' and 'how much' are left to legislatures and governors to determine."⁴²⁸ Thus, it appears unlikely that the Court will determine that its expertise on these issues has increased enough for it to render final decisions on these complex matters.⁴²⁹ In contrast, under the enforcement model proposed in this Article, federal involvement in the right to education would rely upon the expertise of education experts to assess and propose modifications for education systems.

Some might question why this Article's proposal excludes judicial enforcement from the development and enforcement of a federal right to education.⁴³⁰ The courts have and will continue to play an

⁴²⁶ *Rodriguez*, 411 U.S. at 42 ("In addition to matters of fiscal policy, this case also involves the most persistent and difficult questions of educational policy, another area in which this Court's lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels."); see also ROSENBERG, *supra* note 43, at 86 (arguing that courts lack ability to address complex and multifaceted social policies that must be considered when recognizing civil rights, such as understanding of educational process that legislators must weigh when developing policy).

⁴²⁷ See *supra* text accompanying notes 83-93.

⁴²⁸ NAT'L RESEARCH COUNCIL, *supra* note 5, at 112.

⁴²⁹ But see Liebman & Sabel, *supra* note 162, at 1747-48 ("By relying on the responsibilities and information generated by state accountability systems adopted pursuant to the NCLB, courts can thus enforce rights and remedies that are more encompassing, and yet less intrusive and difficult for courts to determine, than has typically been true of earlier phases of educational reform litigation.").

⁴³⁰ In addition to those scholars who assume a federal right to education would be enforced in federal court, support for judicial enforcement may be found in, for example, Forbath, *supra* note 417, at 120 (arguing that while social rights should not

important role in the social and constitutional order within the United States.⁴³¹ Nevertheless, scholars debate the ability of courts to influence and accomplish social change.⁴³² For example, Gerald Rosenberg contends that before the legislative and executive branch instituted reform, court decisions such as *Brown* had “virtually *no direct effect*” on ending segregation and little indirect effect on the civil rights movement, while at the same time the decision sparked a violent backlash against civil rights.⁴³³ He relies upon these findings and his examination of other cases to conclude that the constraints of courts make them “virtually powerless to produce change.”⁴³⁴ Others challenge Rosenberg’s methodology and findings and find that *Brown*

presently be pursued in federal courts, state courts have significant opportunities for enforcing such rights in United States); Chemerinsky, *supra* note 26, at 111-12; Sarah C. Rispin, Comment, *Cooperative Federalism and Constructive Waiver of State Sovereign Immunity*, 70 U. CHI. L. REV. 1639, 1639 (2003) (“In drafting cooperative federalism statutes, which rely on state government bodies to design and implement local regulation according to national standards, Congress has generally provided for private suits against state regulators to ensure that the states properly carry out the regulatory tasks they undertake on Congress’s behalf.”).

⁴³¹ See Jules Lobel, *Courts as Forums for Protest*, 52 UCLA L. REV. 477, 486 (2004) (summarizing research on important indirect effects of courts and noting that scholars have contended that these effects include using litigation “to mobilize political struggles, to gain favorable publicity, to build a political movement, to generate support for political and constitutional claims, and to provide leverage to supplement other tactics and force the opposition to settle”); Mark Tushnet, *Some Legacies of Brown v. Board of Education*, 90 VA. L. REV. 1693, 1712-20 (2004).

⁴³² See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980); DAVID L. HOROWITZ, *THE COURTS AND SOCIAL POLICY* 261-64 (1977); ROSENBERG, *supra* note 43, at 105-06; MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 153 (1999); Brown-Nagin, *supra* note 414, at 1521-22; Bradley C. Canon, *The Supreme Court and Policy Reform: The Hollow Hope Revisited*, in *LEVERAGING THE LAW: USING THE COURTS TO ACHIEVE SOCIAL CHANGE* 215 (David A. Schultz ed., 1998); Abram Chayes, *Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 59-60 (1982); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1313-16 (1976); Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 2-5 (1979); Ran Hirschl, *Constitutionalism, Judicial Review, and Progressive Change: A Rejoinder to McClain and Fleming*, 84 TEX. L. REV. 471, 475-78 (2005); Lobel, *supra* note 431, at 483-89; David A. Schultz & Stephen E. Gottlieb, *Legal Functionalism and Social Change: A Reassessment of Rosenberg’s The Hollow Hope*, in *LEVERAGING THE LAW*, *supra*, at 169, 200-02.

⁴³³ See ROSENBERG, *supra* note 43, at 70-71, 155-56; see also Klarman, *supra* note 415, at 453-54 (arguing that *Brown* provoked backlash against civil rights while also alleging that *Brown* encouraged some African Americans to sue southern school districts for desegregation, represented important symbolic victory for African Americans, and substantially increased salience of racial segregation).

⁴³⁴ See ROSENBERG, *supra* note 43, at 336.

substantially influenced social change and that the courts can and have played a key role in influencing and effectuating change.⁴³⁵ Tomiko Brown-Nagin argues that legal claims can be a helpful component of a political plan to accomplish social change once social movements have established a foundation for the change.⁴³⁶ This Article draws upon Rosenberg's work and other scholarly literature on some of the institutional limitations of courts solely to supplement the primary reasons noted above for recommending that Congress and a congressionally appointed panel rather than the courts should define and enforce a federal right to education.⁴³⁷

First, and most importantly, a judicial component would undermine the cooperative spirit central to this Article's thesis and invoke a defensive posture in states, which typically encourages the states to deny any shortcomings and defend the status quo. The collaborative approach seeks to bring policymakers together to develop effective solutions rather than spark and galvanize resistance as court decisions that mandate significant social change often do.⁴³⁸ The absence of the threat of a lawsuit acting as a sword of Damocles over states should encourage states to acknowledge shortcomings within their education systems and work together with local and federal government agencies to address them. Financial assistance should also foster reform and innovation among states that want to access the funds allocated to reward successful reforms.

Second, the collaborative framework proposed here avoids the piecemeal nature of litigation. Progress does not remain forestalled while waiting for attorneys and their clients to pursue a remedy in

⁴³⁵ See, e.g., Kevin J. McMahon & Michael Paris, *The Politics of Rights Revisited: Rosenberg, McCann, and the New Institutionalism*, in *LEVERAGING THE LAW*, *supra* note 432, at 63, 67 (disputing Rosenberg's contention that *Brown* and courts did not influence Montgomery bus boycott); Schultz & Gottlieb, *supra* note 432, at 172-73 (criticizing Rosenberg's work for, among other things, overstating his conclusions in light of his evidence and methodology and using faulty methodology and arguing that Court's greatest power lies in its ability to set agendas and to provide reason for policymakers to implement policy); Michael W. McCann, *Reform Litigation on Trial*, 17 *LAW & SOC. INQUIRY* 715, 736 (1992) (contending, among other things, that Rosenberg's analysis of influence of *Brown* missed how *Brown* influenced NAACP and social movement that pushed for equality).

⁴³⁶ See Brown-Nagin, *supra* note 414, at 1522.

⁴³⁷ *But see* SUNSTEIN, *supra* note 2, at 103-04, 227-29 (arguing that some judicial enforcement of economic and social rights can be effective).

⁴³⁸ See, e.g., ROSENBERG, *supra* note 43, at 78-79 (discussing support for integration and civil rights that existed among elites before *Brown* decision and describing how that decision fostered attack on Court and wave of pro-segregation activities).

each of the fifty states.⁴³⁹ Instead, the collaborative approach would require each of the fifty states to submit evidence of compliance to the panel. This approach properly places the burden on states to demonstrate that they provide a federal right to education rather than on schoolchildren and parents as plaintiffs to pay for litigation and to prove that they were denied this right.⁴⁴⁰

Litigation also oftentimes involves an inadequate forum for assessing the alternative approaches to a social problem and the costs associated with each approach.⁴⁴¹ Courts' difficulty in gathering and assessing the relevance of facts outside of the litigation, and the fact that the case before the court may not represent the predominant manner in which the problem exists, renders the courts' lack of expertise on education matters even more troubling.⁴⁴² Courts also lack the tools to orchestrate political compromises that include people outside of the litigation who may be necessary for effective change to occur.⁴⁴³ Furthermore, when courts become deeply involved in budgetary issues, their inability to ensure additional expenditures, which remain in the province of the legislature, can encourage agreeing to expenditures at a low level, which would undermine addressing educational inequities in a manner that empowers children to reach their full potential.⁴⁴⁴

The existence of one panel that reviews all of the state reports also has advantages over a litigation-centered approach. Some states provide substandard educational opportunities when compared to most states, but these substantial interstate disparities typically fly under the radar of reform efforts while inflicting a disproportionate harm on disadvantaged students.⁴⁴⁵ Having one panel examine

⁴³⁹ See *id.* at 92 (“[T]he need to bring numerous cases to be effective is an obstacle to court-ordered change.”).

⁴⁴⁰ See *id.* at 93 (noting substantial costs of litigation).

⁴⁴¹ HOROWITZ, *supra* note 432, at 257.

⁴⁴² *Id.* at 274-84.

⁴⁴³ See ROSENBERG, *supra* note 43, at 86-87; Donald L. Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 DUKE L.J. 1265, 1293 (“Parties excluded from participation in the litigation by this definition of the issue are likely to appear again later, at the implementation stage, at which point their participation may thwart, deflect, or otherwise impinge upon the implementation of the degree, often producing unintended consequences and preventing the attainment of intended consequences.”).

⁴⁴⁴ HOROWITZ, *supra* note 432, at 270.

⁴⁴⁵ See Liu, *supra* note 7, at 404 (arguing that Congress should guarantee equal citizenship by securing its educational prerequisites, including reducing interstate disparities).

interstate disparities would be superior to federal courts conducting such comparisons because the courts could reach conflicting conclusions regarding when states must remedy such disparities. A single panel also could develop benchmarks to guide state remedies of shortcomings and then consistently apply those benchmarks to determine when to strongly encourage a state to improve its educational opportunities in a way that moves the state closer to the national norm. Even if the U.S. Department of Education developed such benchmarks for courts to apply, a single panel will apply those benchmarks more consistently than federal courts throughout the nation.⁴⁴⁶ Furthermore, if courts served as the primary implementation mechanism, the Supreme Court would conduct the final review of these decisions. However, in *Rodriguez*, the Supreme Court already rejected the possibility of becoming the overseer of the education system of all fifty states.⁴⁴⁷

By utilizing a collaborative approach to address only one issue, this Article's proposal avoids the criticism that the collaborative approach embraced by human rights treaties represents a weak enforcement mechanism.⁴⁴⁸ For example, human rights agreements utilizing a collaborative approach, such as the CRC, ICCPR, and ICESCR, address many rights and obligations in one treaty and entrust enforcement of the treaty to one body. As a result, the enforcing committees must consider how a state provides a wide variety of rights when a Party appears before it. In contrast, the panel of education experts recommended in this Article would solely focus on whether states guarantee a federal right to education, thereby guaranteeing greater enforcement than human rights treaties have achieved.

In addition, geographically distant committees typically enforce human rights treaties and these bodies can be disconnected from the political and fiscal realities facing the Parties. In contrast, the collaborative enforcement model proposed here would operate within the national boundaries and would cultivate an understanding of the current fiscal and political constraints that states face. Thus, the panel would have a more effective means of publicizing its findings and recommendations, increasing the likelihood that the state will feel

⁴⁴⁶ ROSENBERG, *supra* note 43, at 88 (arguing that “[d]ifferent judges react differently to similar cases and this is inevitable”).

⁴⁴⁷ See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 55 (1973) (“We are unwilling to assume for ourselves a level of wisdom superior to that of legislators, scholars, and educational authorities in 50 States . . .”).

⁴⁴⁸ See *supra* text accompanying notes 274-80.

pressure to respond to the panel's findings and recommendations.

Finally, some may question whether this Article proposes recognition of a "right" given its reliance on Congress to create a right to education through the Spending Clause rather than advocating for the courts to recognize such a right. While this Article does not propose a judicially defined and enforced right, such as the right enforced in *Brown I* that forbid state-sponsored segregation in education,⁴⁴⁹ a federal right to education would still represent a "right" because it would include the same "legal powers or legal obligations of government officials" that other rights include.⁴⁵⁰ In focusing on the legislature to define the federal right to education, this Article agrees with those scholars, such as Cass Sunstein and Lawrence Sager, who support the recognition and protection of economic and social rights primarily through the legislature and who eschew theories that render the courts the sole arbiters of rights.⁴⁵¹ This approach reaps the important benefit of keeping the definition and evolution of a federal right to education accountable to the American people through Congress.⁴⁵² Moreover, NCLB's substantial increase in federal involvement in education invites reconsideration of an array of options for how to structure that involvement. This Article contends

⁴⁴⁹ *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

⁴⁵⁰ LAWRENCE G. SAGER, *JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE* 88 (2004) (contending that legal obligation that constitutional right imposes on government officials extends beyond those matters that may be externally enforced).

⁴⁵¹ *See id.* at 87, 96-97 (claiming that some rights, such as "right to minimum welfare," exist "wrapped in complex choices of strategy and responsibility that are properly the responsibility of popular political institutions" and that role of courts in enforcing such rights should be limited to ensuring access to legislative scheme); SUNSTEIN, *supra* note 2, at 180-82, 229, 234 (arguing for congressional recognition of social and economic rights included in former President Franklin Delano Roosevelt's second bill of rights); *see also* Peter B. Edelman, Essay, *The Next Century of Our Constitution: Rethinking Our Duty to the Poor*, 39 *HASTINGS L.J.* 1, 53 (1987) (maintaining that right to minimum income should be guaranteed through legislature: "A full antipoverty strategy is far more complex than any court, however activist, would have the capacity to handle. For complete and appropriate relief, legislative 'rights' must be created.").

⁴⁵² *See* LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 248 (2004) (stating that the American people are "the highest authority in the land on constitutional law" and that Supreme Court should yield to judgments of the American people); TUSHNET, *supra* note 432, at 194 (urging the American people to "reclaim [the Constitution] from the courts" and asserting that "the public generally should participate in shaping constitutional law more directly and openly").

that expanding the understanding of rights and how they should be defined and enforced represents a viable new approach for addressing longstanding concerns about persistent educational inequities and the quality of American education.

B. Building upon NCLB

One key advantage of this Article's proposal is that it builds on NCLB while also diverging from NCLB in several important ways. NCLB faces possible reauthorization in 2007.⁴⁵³ While the law will undoubtedly undergo modifications, so far, efforts have focused on improving rather than repealing it.⁴⁵⁴ Thus, a federal right to education that builds on NCLB's foundation will benefit from the continuity between the two reform efforts. For instance, a collaborative approach to a federal right to education would build upon NCLB's cooperative federalism approach.⁴⁵⁵ NCLB specifically prohibits federal control over state and local academic standards and tests, curriculum, and instructional programs as a condition for receiving NCLB funds.⁴⁵⁶ The collaborative approach would not run

⁴⁵³ David J. Hoff, *Big Business Going to Bat for NCLB*, EDUC. WK., Oct. 18, 2006, at 24.

⁴⁵⁴ For example, a private bipartisan panel was formed in early 2006 to study the law and how it could be improved. The commission's co-chairmen, former Georgia Governor Roy E. Barnes (a Democrat) and former Wisconsin Governor and former Secretary of Health and Human Services Tommy G. Thompson (a Republican), both agree that while changes can be considered to increase the law's effectiveness, they support NCLB's broader federal role over education policy and consider the law to be the framework upon which any of the commission's recommendations will build. See Alyson Klein, *NCLB Panel Plans to Study Teachers, Student Progress, but Not Funding Levels*, EDUC. WK., Mar 15, 2006, at 26; see also Andrew Trotter & Michelle Davis, *At 4, NCLB Gets Praise and Fresh Call to Amend It*, EDUC. WK., Jan. 18, 2006, at 26, 30 (noting that "coalition of school, civil rights, and child-advocacy groups" sent to Congress 14 recommendations for changes to NCLB but that "eliminating the law outright is not among its recommendations").

⁴⁵⁵ See Heise, *supra* note 118, at 142; James S. Liebman & Charles F. Sabel, *A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform*, 28 N.Y.U. REV. L. & SOC. CHANGE 183, 283 (2003); Schapiro, *supra* note 378, at 293 (arguing that federal and state involvement in education is consistent with "polyphonic" view of federalism). But see Heise, *supra* note 118, at 141 (arguing that NCLB has coercive effects and that "[i]t is certainly plausible that the inevitable (although not necessary) practical consequence of NCLB is to shift critical policy-making authority to the federal government and redirect state and local educational resources in ways consistent with NCLB objectives").

⁴⁵⁶ No Child Left Behind Act of 2001, 20 U.S.C. § 6575 (Supp. II 2002) ("Nothing in this subchapter shall be construed to authorize an officer or employee of the

afoul of this prohibition because the federal panel would offer nonbinding recommendations to states on how to provide a federal right to education. States would determine how to guarantee this right consistent with the proposed statute, just as states currently define their own accountability systems under NCLB.

The proposal proffered in this Article also supplements and improves NCLB by focusing attention on the elimination of inferior educational opportunities experienced by many minority, urban, and low-income students. While NCLB requires states and districts that accept funds under the statute to reduce and ultimately eliminate the achievement gap by 2014,⁴⁵⁷ it fails to acknowledge that inferior educational opportunities for some disadvantaged students represent a key contributor to the achievement gap. This Article's proposal addresses that shortcoming by supplementing existing reporting obligations with a requirement that states must identify, reduce and ultimately eliminate unjustified disparities in educational opportunities along lines of race, poverty, and other measures in light of the typically greater needs of most disadvantaged students. This additional requirement should reveal some of the causes of the achievement gap and encourage state and local action to address inequitable disparities in educational opportunities.

Additionally, NCLB directs states to educate students to high standards while providing insufficient technical and financial assistance to enable states to reach this important goal. Richard Elmore recently argued that NCLB's accountability mechanisms ask states and school districts to do things that they may not know how to do.⁴⁵⁸ In contrast, this Article's proposed approach acknowledges that

Federal Government to mandate, direct, or control a State, local educational agency, or school's specific instructional content, academic achievement standards and assessments, curriculum, or program of instruction [as a condition of eligibility to receive funds].").

⁴⁵⁷ *Id.* § 6311(b)(2)(F) (Supp. II 2002). For arguments that this goal is impossible to reach with "challenging" state standards in place, see Richard Rothstein et al., "Proficiency for All" — An Oxymoron (Nov. 14, 2006) (unpublished paper, Teachers Coll., Columbia Univ. Symposium, *Examining America's Commitment to Closing Achievement Gaps: NCLB and Its Alternatives*), available at <http://www.tc.edu/centers/EquitySymposium/symposium06/resource.asp> (follow "Proficiency for All" hyperlink).

⁴⁵⁸ Richard F. Elmore, The Problem of Capacity in the (Re)Design of Educational Accountability Systems (Nov. 14, 2006) (unpublished paper, Teachers Coll., Columbia Univ. Symposium, *Examining America's Commitment to Closing Achievement Gaps: NCLB and Its Alternatives*), available at <http://www.tc.edu/centers/EquitySymposium/symposium06/resource.asp> (follow "The Problem of Capacity in

states may need assistance in developing effective research-based reforms and includes mechanisms to deliver that assistance. Furthermore, addressing longstanding educational disparities and other impediments that hinder academic achievement may require developing innovative strategies. This Article's approach fosters developing the necessary expertise by connecting scholars and researchers with states that have difficulty guaranteeing the federal right to education. In addition, the panel's review of state reports would allow them to identify states that face similar obstacles and encourage collaboration between states to develop successful reform efforts.

The federal panel's ability to highlight interstate disparities in educational opportunity would constitute a substantial improvement over NCLB's limited attention to differences in states' standards by requiring participation in NAEP.⁴⁵⁹ While NCLB relies on states to take action once NAEP results reveal that their standards are too low, preliminary evidence suggests that this approach may prove ineffective in ensuring the rigor of state standards.⁴⁶⁰ Moreover, available evidence suggests that states lower their standards in response to NCLB's requirements.⁴⁶¹ In contrast, this Article's proposal envisions the expert panel's focus on interstate disparities serving as a catalyst to increase the likelihood of state action to address these disparities, particularly when the panel's recommendations operate in concert with financial assistance that will help states achieve their goals.

The collaborative approach recommended here also would invigorate the federal role in education by establishing the federal government as a partner in achieving NCLB's objectives. While imposing substantial and detailed requirements on states and school districts, NCLB carefully circumscribes the federal role in achieving these reforms. For example, NCLB required the Secretary of Education to review state accountability plans within 120 days of their submission.⁴⁶² However, the statute includes very limited mechanisms

the (Re)Design of Educational Accountability Systems" hyperlink).

⁴⁵⁹ No Child Left Behind Act of 2001, 20 U.S.C. § 6311(c)(2). For an argument that NAEP standards are set far too ambitiously, see generally Rothstein et al., *supra* note 457.

⁴⁶⁰ See Heise, *supra* note 118, at 145-46.

⁴⁶¹ See *supra* text accompanying notes 167-72.

⁴⁶² No Child Left Behind Act of 2001, 20 U.S.C. § 6311(e); see Liebman & Sabel, *supra* note 162, at 1724 (arguing that simultaneous submission of most state plans along with short review period make it "unlikely, except in cases of willful and blatant defiance of statutory provisions, that the Secretary will closely scrutinize state plans").

for additional federal oversight or enforcement.⁴⁶³ As a result, James Liebman and Charles Sabel have persuasively argued that “[t]he NCLB thus offers little hope of ending the Department of Education’s . . . long history of weak enforcement of federal requirements for school reform.”⁴⁶⁴ The federal panel’s oversight and nonbinding recommendations would transform the federal role from spectator to engaged partner.

This Article’s proposal also would counteract some of the current negative incentives of NCLB.⁴⁶⁵ NCLB’s requirements encourage states to lower achievement standards because the statute links sanctions to schools and districts that fail to make adequate yearly progress.⁴⁶⁶ In contrast, the collaborative approach proposed here would counterbalance these adverse incentives by providing additional technical and financial assistance to states encountering difficulty guaranteeing the right to education. The additional assistance should encourage the levels of government to work together to foster the full development of students’ abilities based upon high standards for all students.

Finally, inadequate funding to implement NCLB’s extensive changes has been a common lament among states.⁴⁶⁷ Congressional Democrats have similarly decried inadequate funding for NCLB.⁴⁶⁸ This Article’s proposal for additional financial assistance would help address that concern. Furthermore, when Congress couples financial assistance with technical assistance, states would be better equipped to use the financial assistance in an effective and efficient manner.

⁴⁶³ Liebman & Sabel, *supra* note 162, at 1724-25 (discussing § 6311(g)).

⁴⁶⁴ *Id.* at 1725.

⁴⁶⁵ James Ryan astutely captures these “perverse incentives” in contending that the law “is at war with itself.” Ryan, *supra* note 4, at 932.

⁴⁶⁶ See Robert Gordon, *The Federalism Debate: Why the Idea of National Education Standards Is Crossing Party Lines*, EDUC. WK., Mar. 15, 2006, at 48, 35 (“States have maximized their scores by defining proficiency down. That foils the law’s core goals of encouraging excellence and holding schools accountable for achieving it.”). This is precisely one of the perverse incentives that Ryan predicted. See Ryan, *supra* note 4, at 946-48.

⁴⁶⁷ David J. Hoff, *Debate Grows on True Costs of School Law*, EDUC. WK., Feb. 4, 2004, at 1.

⁴⁶⁸ See Mark Walsh, *House Panel Hits the Road to Gather Views on NCLB*, EDUC. WK., Sept. 6, 2006, at 34.

C. *The Politics of a Collaborative Approach to a Federal Right to Education*

One of the most strenuous objections to this Article's proposal may be that the nation would never embrace establishing a federal right to education, even if Congress gives state and local officials flexibility on how to achieve that right. Many scholars seem to believe that only the judiciary can achieve equal educational opportunity in the United States.⁴⁶⁹ For example, Chemerinsky contends that "the simple reality is that without judicial action equal educational opportunity will never exist" given the absence of an influential political community that favors equal educational opportunity and little attention to these issues by the President or state and local politicians.⁴⁷⁰ The myriad judiciary-focused scholarly approaches to equal educational opportunities suggest that other scholars would agree that the judicial branch may be the most likely branch to address this issue.⁴⁷¹

However, both history and recent events suggest that Congress may be willing to enact federal legislation to promote equal educational opportunity. Historically, Congress has proven its willingness to promote equal opportunity through such comprehensive legislation as the Civil Rights Act of 1964⁴⁷² in 42 U.S.C. §§ 1981,⁴⁷³ 1982,⁴⁷⁴ and 1983.⁴⁷⁵ In education, Congress has consistently enacted legislation to protect the rights of the least powerful among us when the states have failed to do so through such legislation as the Elementary and Secondary Education Act of 1965,⁴⁷⁶ Title IX of the Education Amendments of 1971,⁴⁷⁷ and the Individuals with Disabilities Education Act.⁴⁷⁸ Thus, during the 1960s and 1970s, those seeking

⁴⁶⁹ See *supra* text accompanying notes 191-92.

⁴⁷⁰ See Chemerinsky, *supra* note 26, at 111-12.

⁴⁷¹ See *supra* text accompanying notes 191-92.

⁴⁷² 42 U.S.C. §§ 2000a, 2000d, 2000e-2 (2006) (prohibiting discrimination on basis of race and national origin in public accommodations and employment, and by recipients of federal financial assistance).

⁴⁷³ *Id.* § 1981 (2006) (granting all persons same right to make contracts as white persons).

⁴⁷⁴ *Id.* § 1982 (2006) (granting all citizens same right to buy and sell property).

⁴⁷⁵ *Id.* § 1983 (2006) (prohibiting deprivation of citizen's rights under color of law).

⁴⁷⁶ Pub. L. No. 89-10, 79 Stat. 27 (1964) (codified as amended in scattered sections of 20 U.S.C.).

⁴⁷⁷ 20 U.S.C. § 1681 (2006) (prohibiting discrimination on basis of sex in education programs or activities).

⁴⁷⁸ Congress first enacted the Education for All Handicapped Children Act of 1975,

equal educational opportunity oftentimes obtained their objectives through legislation, with the courts providing enforcement for most of these statutes.⁴⁷⁹

More recently, NCLB represents a consensus that closing the achievement gap ranks high among national priorities for education. NCLB grew out of America's voters identifying education as a top priority and a political consensus that the federal role in education needed substantial reform.⁴⁸⁰ NCLB's sweeping provisions requiring each state to address the achievement gap in exchange for federal funds are particularly remarkable because Congress passed the legislation with bipartisan support.⁴⁸¹

Legislation that garnered substantial support but ultimately did not pass offers further reason to believe that Congress may take action to promote equal educational opportunity. In 2001, forty-two members of the Senate voted for an amendment, introduced by Connecticut Senator Christopher Dodd (D-Conn.), to the bill that became NCLB; it would have required states to provide comparable educational services to all schools, and it included a federal court remedy for any parent or student injured by a failure to comply with the bill.⁴⁸² Congressman Chaka Fattah (D-Pa.) initiated similar legislation in the House of Representatives in 2001, 2003, and 2005, but those bills did not succeed.⁴⁸³

These facts, along with Congress' historical willingness to promote equal educational opportunity and the substantial changes and increased federal involvement in NCLB initiated and passed during a Republican presidency and Republican-controlled Congress,⁴⁸⁴

Pub. L. No. 94-142, 89 Stat. 773, and then later renamed it the Individuals with Disabilities Education Act, Pub. L. No. 101-476, 104 Stat. 1103, 1142 (1990).

⁴⁷⁹ See YUDOF ET AL., *supra* note 110, at 857 ("Aggrieved groups, that in the recent past had gone to court, obtained through legislation much of — and in some instances more than — what they sought through litigation."). Undoubtedly, the legislation built on important court victories, such as *Brown*.

⁴⁸⁰ MCGUINN, *supra* note 17, at 146, 165-66, 175.

⁴⁸¹ See *id.* at 175-76.

⁴⁸² See 147 CONG. REC. S6102 (daily ed. June 12, 2001) (rejecting Senate Amendment 459 by vote of 42 to 58); 147 CONG. REC. S4614 (daily ed. May 9, 2001) (introducing Senate Amendment 459 to S.1, 107th Cong. (2001)); see also KOZOL, *supra* note 202, at 251.

⁴⁸³ H.R. 1234, 107th Cong. (2001); H.R. 236, 108th Cong. (2003); H.R. 2178, 109th Cong. (2005); see also KOZOL, *supra* note 202, at 249-50.

⁴⁸⁴ See Ryan, *supra* note 4, at 989 ("[W]ho would have guessed, even ten years ago, that a Republican president, with huge bipartisan support, would enact the most intrusive federal education legislation in our nation's history?").

indicate that “more than a few of our elected leaders are prepared to countenance the use of federal power to redress some of the consequences of *Rodriguez*.”⁴⁸⁵ Legislators may be waking up to the need for national action to address a national problem in light of state refusal to address the shortcomings of the American education system. Furthermore, the support for the Dodd legislation that permitted plaintiffs to sue states for failure to enforce its provisions suggests that recognizing a federal right to education enforced through a collaborative approach might win even more support, particularly when considered in light of some of the successes of recognizing a right to education at the state level.⁴⁸⁶

Reform advocates could develop a successful campaign to address inequitable educational opportunities if the nation experienced a wake-up call similar to the one it experienced after the release of the 1983 report *A Nation at Risk*, which sounded a national alarm by declaring that “the educational foundations of our society are presently being eroded by a rising tide of mediocrity that threatens our very future as a Nation and a people.”⁴⁸⁷ The report sparked new initiatives to improve student achievement. Ultimately, a collaborative approach would require convincing Congress and the public that eradicating educational inequities lies in the best interests of the nation.⁴⁸⁸ Persuading the public of this view would require educating most citizens about the economic, social, moral, and other interests the current system undermines.⁴⁸⁹

Others may argue that this Article’s approach would not achieve its

⁴⁸⁵ KOZOL, *supra* note 202, at 251.

⁴⁸⁶ See *supra* text accompanying notes 89-92, 95-101.

⁴⁸⁷ NAT’L COMM’N ON EXCELLENCE IN EDUC., *A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM* 5 (1983) (quoted in T.H. Bell, *Renaissance in American Education: The New Role of the Federal Government*, 16 ST. MARY’S L.J. 771, 772 (1985)).

⁴⁸⁸ See Dayton & Dupre, *supra* note 79, at 2410.

⁴⁸⁹ See Henry M. Levin, *The Social Costs of Inadequate Education* 16 (2005), http://www.tc.columbia.edu/i/a/3082_SocialCostsofInadequetEducation.pdf (summary of Teachers College Symposium on Educational Equity) (collecting data on costs of inadequate education, including “lost income and tax revenues and increased health expenditures, as well as on increased costs in the areas of public assistance and criminal justice activities that can be directly linked with failure to attain a high school degree”); see also Block & Weisz, *supra* note 16 (discussing data on how much more California and Virginia pay for incarcerating youths than for educating them: “For those who waste years of life in prison, we pay a price tag of many millions. With a significant fraction of that cost, we could educate and employ many of those same people.”).

goal because most states would choose to reject the funding offered under the proposed statute. However, states have typically acquiesced to congressional conditions to financial assistance and have not opted out.⁴⁹⁰ If Congress adopts this proposal, the states may similarly choose to work with the federal government rather than forego financial assistance. In this regard, it is noteworthy that although NCLB is the most intrusive federal education statute in American history, “[s]tates are responding to federal policy [in NCLB] in a way not seen since the mid-1970s, when they rose to the challenge of implementing the Individuals with Disabilities Education Act and Title IX of the Educational Amendments of 1972.”⁴⁹¹ Thus, states may continue this pattern of cooperation even if Congress increases its involvement in education.

Furthermore, any suggestion that the states will reject the funding offered under the proposal underestimates the influence that federal funds have over education. Federal funds remain only a small fraction of revenue for education, typically estimated at between seven to ten percent.⁴⁹² However, districts must use most state and local funding for expenses determined by law; therefore, federal money wields disproportionate influence because it often represents the largest source of money available to districts for innovative reforms and special programs.⁴⁹³ Consequently, states will remain reluctant to relinquish the limited funds available for school districts to develop creative approaches and new plans for their schools.

CONCLUSION

Making equal educational opportunity a reality while striving to educate children to their fullest potential are not beyond the nation’s grasp.⁴⁹⁴ Nor must this nation abandon federalism to achieve these

⁴⁹⁰ See DeBray et al., *supra* note 151, at 10.

⁴⁹¹ See *id.* at 11.

⁴⁹² See U.S. Dep’t of Educ., The Federal Role in Education, <http://www.ed.gov/about/overview/fed/role.html> (last visited Jan. 21, 2007) (stating that federal government contributes 10% to nation’s education expenditures and that U.S. Department of Education administers 8% of that money); YUDOF ET AL., *supra* note 110, at 768 (“Revenues to finance K-12 education come almost equally from state and local sources (about 93 percent of the total) and only in a small percentage from federal sources (about 7 percent of the total).”).

⁴⁹³ MICHAEL J. KAUFMAN & SHERELYN R. KAUFMAN, EDUCATION LAW, POLICY, AND PRACTICE: CASES AND MATERIALS 10 (2005); Kaestle & Smith, *supra* note 121, at 402.

⁴⁹⁴ Michael Heise, *Brown v. Board of Education*, Footnote 11, and *Multidisciplinarity*, 90 CORNELL L. REV. 279, 320 (2005) (“[H]owever discomfoting or

fundamental goals. NCLB's embrace of extensive federal involvement in education suggests that many believe that the federal government should focus its energy and attention on education.⁴⁹⁵ The federal role in education continues to require reassessment and redesign because the current system tolerates the provision of low-quality educational opportunities to many disadvantaged children, and state and local governments have refused to take sufficient action to address this important problem.⁴⁹⁶ Equity has been and must continue to be the domain of the federal government because state and local governments lack sufficient incentives to promote equity,⁴⁹⁷ and because the federal government is uniquely positioned to address disparities in the distribution of wealth.⁴⁹⁸ Moreover, NCLB's inclusion of provisions aimed at reducing the achievement gap suggests national recognition that the United States needs a federal solution to continue its efforts to provide equal educational opportunity.

This Article contends that when considering which solution to adopt, the nation should reexamine the benefits of recognizing a federal right to education. Such a right does not have to include a judicially focused approach to improve the provision of educational opportunities in the United States.⁴⁹⁹ Instead, this Article proposes that Congress recognize a federal right to education through Spending Clause legislation. States would periodically report on their enforcement of this right to a panel of education experts that would offer recommendations for improvement. Technical and financial assistance also would be available under the statute. This Article has contended that such a right would be more palatable to the American public and would reap compelling benefits.

For too long, the United States has sacrificed the education of low-income, urban, and minority students, as well as the overall quality of

difficult, the drive for greater equal educational opportunity must persist.”).

⁴⁹⁵ Schapiro, *supra* note 378, at 257 (arguing that NCLB may reveal increasing agreement that “education should be a central concern of the national government”).

⁴⁹⁶ *Cf.* Ryan, *supra* note 4, at 987-88 (arguing that if state and local governments will not develop challenging academic standards, federal government should step in and develop them).

⁴⁹⁷ See Welner & Oakes, *supra* note 71, at 89.

⁴⁹⁸ See Ryan, *supra* note 4, at 989.

⁴⁹⁹ See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 43 (1973) (“[T]he judiciary is well advised to refrain from imposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever-changing conditions.”).

American education, on the altar of local control. The nation must recognize that, as President Kennedy so eloquently stated, “[o]ur progress as a nation can be no swifter than our progress in education.”⁵⁰⁰ A collaborative approach in which the United States recognizes a federal right to education that guarantees equal educational opportunity and that aims to ensure that children develop to their fullest potential will help address longstanding educational disparities and improve the quality of public education to the benefit of the entire nation.

⁵⁰⁰ Kennedy, *supra* note 1.