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David M. Engstrom

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CIVIL RIGHTS PARADOX? LAWYERS AND EDUCATIONAL EQUITY

*David M. Engstrom**

INTRODUCTION

In the past fifty years, lawyers have become increasingly involved in attempts to reform American public education. Along the way, they have achieved an incredible string of victories. Lawyer-led reform efforts have, among other things, challenged the constitutionality of segregated schooling, created constitutional and statutory rights to education for disabled, non-English-speaking, and immigrant students, and, in some states, forced the overhaul of state school finance systems in direct opposition to the cherished American value of local fiscal control.

But law-driven reform efforts have also fallen short on at least some fronts. High segregation levels remain and may have even risen in recent years.¹ Average reading, math, and science scores for African-American students lag several years behind the average reading scores of their white counterparts.² Minority

* J.D. Candidate, Stanford University, Class of 2002. Ph.D. Candidate in Political Science, Yale University. Law clerk for the Honorable Diane P. Wood, United States Court of Appeals for the 7th Circuit, 2002-03. The author would like to thank Nora Freeman, Barbara Fried, Tom Grey, Pam Karlan, Mark Kelman, Josh Klein, and Bill Koski for their helpful criticism. All errors are mine.

¹ See GARY ORFIELD, *DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION* 53-55 (1997).

² For example, in 1995-96, average scores of thirteen year old black students on the reading, math, and science segments of the National Assessment of Educational Progress Tests were, respectively, thirty-one,

students are also more likely than whites to drop out of high school.³ The proportion of disabled students who fail to earn a standard high school diploma is roughly six times that of non-disabled students.⁴ Per-pupil spending disparities between states are large.⁵ Interdistrict disparities in per-pupil spending are even greater.⁶ Family income remains the most reliable predictor of a

twenty-nine, and forty points lower than their white counterparts. *See* BUREAU OF THE CENSUS, U.S. DEPARTMENT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 2000 178 tbl. 286 (2000) [hereinafter STATISTICAL ABSTRACT 2000].

³ In 1998, the white drop-out rate was 4.4%, the black drop-out rate was 5.0%, and the Hispanic drop-out rate was 8.4%. The total percentage of whites, blacks, and Hispanics who had not completed high school and were not enrolled in 1998 was 13.7%, 17.1%, and 34.4% respectively. *See* STATISTICAL ABSTRACT 2000, *supra* note 2, at 180 tbl. 290.

⁴ In 1997-98, 29% of all students with disabilities ages seventeen to twenty-one and 74% of students with disabilities exiting the educational system (i.e., graduating, receiving a certificate of completion, reaching the maximum age for services, or dropping out) received a standard high school diploma. By comparison, the high school completion rate hovers near 90% for non-disabled students. *See* U.S. DEPARTMENT OF EDUCATION, TO ASSURE THE FREE APPROPRIATE PUBLIC EDUCATION OF ALL CHILDREN WITH DISABILITIES: TWENTIETH ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT iv-34 (1998) [hereinafter U.S. DEPARTMENT OF EDUCATION, TO ASSURE THE FREE APPROPRIATE PUBLIC EDUCATION OF ALL CHILDREN WITH DISABILITIES].

⁵ In 1999, average per-pupil expenditures in New Jersey, one of the highest spending states, was \$10,420. The average in Mississippi, one of the lowest spending states, was \$4,658. STATISTICAL ABSTRACT 2000, *supra* note 2, at 172 tbl. 275.

⁶ A representative example is Ohio, where, during the 1995-96 school year, per pupil spending ranged from \$2,346 to \$13,622—a nearly six-fold difference. *See* Amy Ellen Schwartz, *School Districts and Spending in the Schools*, Consortium for Policy Research in Education, available at <http://nces.ed.gov/pubs99/1999334/text3.html> (last visited Apr. 17, 2002). Similarly, in 1995, the town of Eden, Vermont spent \$2979 per student, while the town of Winhall, Vermont spent \$7726. *See* *Brigham v. State*, 692 A.2d 384, 389 (Vt. 1997). The Supreme Court of Vermont noted that it was common for school districts to spend more than twice as much per student as neighboring districts. *Id.* Earlier school finance suits in Montana and Texas challenged even greater inter-district disparities. The Supreme Court of Montana found a nearly eight to one differential in per-pupil spending when it

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student's educational attainment and achievement.⁷

The mixed success of lawyer-led school reform efforts has provided rich material for thinking about the limits of public law and the institutional capacity of courts to effect social and institutional change.⁸ Law-based reform efforts have also spawned critiques. Some blame legalization because legal decrees produce inflexibility and force schools to devote precious resources to compliance matters, leaving inadequate resources to provide a sound educational product to needy students.⁹ Some critics go further and argue that any additional advancement of educational equity will require institutional shocks to the system that no incremental reform program can deliver.¹⁰ These critics

struck down that state's school finance system in 1989. *See* Helena Elementary Sch. Dist. No. 30, 651 S.W.2d 90, 92 (Mont. 1989). That same year, per-pupil spending in Texas ranged from \$2,112 to \$19,333. *See* Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 392 (Tex. 1989).

⁷ *See infra* note 87 and accompanying text.

⁸ *See, e.g.*, MICHAEL W. MCMANN, *RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION* (1994); GERALD ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991).

⁹ "Legalization" has been described as having three main features: "[A] focus on the individual as the bearer of rights, the use of legal concepts and modes of reasoning, and the provision of legal techniques such as written agreements and court-like procedures to enforce and protect rights." *See* David Neal & David L. Kirp, *The Allure of Legalization Reconsidered: The Case of Special Education*, in *SCHOOL DAYS, RULE DAYS: THE LEGALIZATION AND REGULATION OF EDUCATION* 343, 344 (David L. Kirp & Donald N. Jensen eds., 1986). For a critique of legalization, *see* David L. Kirp, *Introduction: The Fourth R: Reading, Writing, 'Rithmetic—and Rules*, in *SCHOOL DAYS, RULE DAYS: THE LEGALIZATION AND REGULATION OF EDUCATION* 1, 4 (David L. Kirp & Donald N. Jensen eds., 1986) (summarizing debates about whether rights- and rule-mindedness undermines professional authority, creates inflexibility, and produces adversarial tension between parents and teachers); JOEL E. HENNING, *MANDATE FOR CHANGE: THE IMPACT OF LAW ON EDUCATIONAL INNOVATION* 231 (1979) (summarizing survey research and reporting that many respondents "view the law and courts as failing to provide appropriate support and as frustrating the schools' educational goals").

¹⁰ *See* Michael Heise, *Choosing Equal Educational Opportunity: School Reform, Law, and Public Policy*, 68 U. CHI. L. REV. 1113, 1114 (2001)

typically point to school choice, vouchers, and the application of market discipline as the surest way to wring additional equity from the system.¹¹

Jay Heubert and contributors confront these and other issues in a recent edited volume entitled *Law & School Reform: Six Strategies for Promoting Educational Opportunity*.¹² The principal aim of *Law & School Reform* is to “tell the story of the growing involvement of lawyers in America’s public schools in the past half century” and suggest “possible future roles” for lawyers in “law-driven school reform.”¹³ The scope of the volume is impressive, as is the list of contributors.¹⁴ The volume is also the first of its kind to juxtapose the many law-driven school reforms of the past fifty years. The resulting bird’s eye view provides an ideal platform for considering the role of law and lawyers in school reform efforts as a whole.

The volume’s sole failing is that Heubert does not adequately capitalize on the unique perspective his volume offers. Relying on the impressive scope of *Law & School Reform*, this review

(“[A] structural assault on the education status quo is almost assuredly a necessary condition for the generation of much needed and desired education reform.”).

¹¹ JOHN E. CHUBB & TERRY MOE, *POLITICS, MARKETS, AND AMERICA’S SCHOOLS* (1990). For a seminal statement, see MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* (1962).

¹² JAY P. HEUBERT, ED., *LAW & SCHOOL REFORM: SIX STRATEGIES FOR PROMOTING EDUCATIONAL EQUITY* (Yale Univ. Press 1999).

¹³ See Harold Howe II, *Foreword*, in *LAW & SCHOOL REFORM: SIX STRATEGIES FOR PROMOTING EDUCATIONAL EQUITY* vii (Jay. P. Heubert ed., 1999).

¹⁴ A partial list of the contributors includes Martin Gerry, a former director of the Office for Civil Rights in the U.S. Department of Health, Education, and Welfare, Thomas Hehir, former director of the Office of Special Education at the U.S. Department of Education, Harold Howe II, a former U.S. Commissioner of Education in the Johnson Administration and chair of the Educational Testing Service, Martha Minow, a Harvard Law School professor, Gary Orfield, a professor of education and social policy at Harvard University and the leading academic voice on the issue of desegregation, Carola and Marcelo Suarez-Orozco, both professors of human development and psychology at Harvard University, and Paul Weckstein, a co-director of the Center for Law and Education in Washington, D.C.

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attempts to fill that analytic gap. I argue that lawyers involved in efforts to expand educational equity—including academic lawyers like Heubert—have too often failed to acknowledge both the contested premises and the unintended consequences of civil-rights-based litigation in the area of education. In fact, the successful civil rights assault on racial segregation and the categorical exclusion of disabled and other student groups from public schooling has given way to a world in which resource allocations, not access, determine educational equity. Reform-minded lawyers need to realize that, beyond the dismantlement of Jim Crow and the opening of schoolhouse gates to excluded groups, an important legacy of the law-driven reform efforts of the past half-century has been the exacerbation of what many increasingly see as a perverse allocation of educational resources among the many student groups who make claims on scarce resources. Of particular note is the relative allocation of resources to students with disabilities as opposed to student groups who suffer from other forms of disadvantage.

The blind spot for lawyers has been understanding how law-driven reform efforts fit together and, in particular, how legal mobilizations in one policy area shape resource allocations elsewhere in the educational system. This failure is understandable. Lawyers tend to operate as part of particular legal mobilizations on behalf of particular groups. Lawyers also remain bound by professional-ethical obligations that demand zealous pursuit of localized client interests. A third possible explanation is that the inclusionary impulse of *Brown v. Board of Education*¹⁵ is so strong within legal and political culture that it tends to cloud more policy-analytic thinking about how to allocate scarce resources within the American system of public education. Whatever the cause, the law and education field seems to suffer from a disconnect between lawyers and policy analysis. This review thus adds a voice to emerging scholarly analysis that critiques the allocation of resources in the American educational system and the ways in which civil rights-oriented school reform efforts have contributed to that state of affairs.

¹⁵ 347 U.S. 483 (1954).

This review proceeds as follows. Part I provides an overview of the volume and highlights the principal arguments advanced by Heubert in his introductory essay: that lawyers should develop more policy-specific knowledge and should in turn deploy that knowledge in non-adjudicative and collaborative settings. Part II offers a brief critique of both tenets of Heubert's prescription. Part III breaks through the more compartmentalized accounts of different law-driven school reforms offered in *Law & School Reform* and sketches a broader and more dominant story. In particular, I argue that law-driven school reforms over the past half-century—particularly those that derive from civil rights-based mobilizations—highlight an important tension between bureaucratic and inclusionary reformist impulses. The former impulse focuses on targeted resource infusions as a way of maximizing educational outcomes. The latter is a legal-cultural inclusionary impulse that extends from the integration vision articulated in *Brown*. This tension is particularly important in light of the declining significance of race as a basis for resource claims, and the parallel expansion of the importance of other protected characteristics—particularly disability—as a basis for redistributions. Understanding this tension, I argue, provides the best lens for understanding the civil rights paradox at the heart of law-driven school reforms. Part IV asks whether lawyers are to blame for the current state of affairs and how they might avoid such problems going forward. In the end, I conclude that lawyers have little comparative advantage in much of what lies ahead, but that lawyers might still play a key role by policing a political process that can sometimes skew redistributions and by helping to make whatever political choices emerge from that process more transparent within the system as a whole.

I. OVERVIEW OF LAW & SCHOOL REFORM

What are “law-driven school reforms”? *Law & School Reform* focuses on six: desegregation; school finance reform; immigrant education; special education; school-linked service integration; and enforceable rights to quality education. The book methodically steps through the different approaches, devoting a

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chapter to each. The first four of these are distinct legal reform movements with well-established advocacy communities and long histories of mobilization both inside and outside courtrooms. The latter two are not and fit awkwardly with the rest of the volume. For example, service integration, as presented by Martin Gerry,¹⁶ is an effort to link the provision of social services and other child supports to public schools. While school-linked service provision is increasingly pervasive in urban school reform efforts in particular,¹⁷ it is unclear how the approach is in any way “law-driven.” Similarly, Paul Weckstein’s contribution provides a useful roadmap of state and federal statutory and constitutional provisions that together create “enforceable rights to quality education.”¹⁸ But the chapter is little more than a laundry list, and nowhere is a distinct legal movement or a significant lawyer-led reform opportunity discernible. These final two chapters simply distract attention from the otherwise fascinating connections that exist among the first four law-driven reform approaches that form the meat of the book.

Heubert spells out his editorial vision in the opening chapter. He seeks to “take stock systematically of a key set of law-based school reform efforts, each aimed at increasing educational opportunity.”¹⁹ *Law & School Reform* is meant to chart future reform avenues by offering up a variety of interdisciplinary perspectives on the origins, current status, and future prospects of individual reform efforts. Heubert’s principal thesis, however,

¹⁶ Martin Gerry, *Service Integration and Beyond: Implications for Lawyers and Their Training*, in *LAW & SCHOOL REFORM: SIX STRATEGIES FOR PROMOTING EDUCATIONAL EQUITY* 244 (Jay. P. Heubert ed., 1999).

¹⁷ For a general discussion of school-linked service initiatives, see Symposium, *School-Linked Services*, 2 *FUTURE CHILD* (1992); JOY G. DRYFOOS, *FULL-SERVICE SCHOOLS: A REVOLUTION IN HEALTH AND SOCIAL SERVICES FOR CHILDREN, YOUTH, AND FAMILIES* (1994).

¹⁸ Paul Weckstein, *School Reform and Enforceable Rights to Quality Education*, in *LAW & SCHOOL REFORM: SIX STRATEGIES FOR PROMOTING EDUCATIONAL EQUITY* 306 (Jay. P. Heubert ed., 1999).

¹⁹ Jay P. Heubert, *Six Law-Driven School Reforms: Developments, Lessons, and Prospects*, in *LAW & SCHOOL REFORM: SIX STRATEGIES FOR PROMOTING EDUCATIONAL EQUITY* 3 (Jay. P. Heubert ed., 1999).

is built around trend analysis and his sense that reform-minded lawyers currently face a much more nuanced and complex set of educational policy questions than their forebears.²⁰ Lawyers involved in the civil rights movements of the 1950s, 60s, and 70s deployed morally clear-cut rights claims in the fight against the segregation of African-Americans and the outright exclusion of the disabled²¹ and immigrants²² from public schools. Current legal struggles, by contrast, center on much subtler and more contested questions of how to implement and thus give content to rights previously won. As Heubert writes, the initial focus on overcoming segregation and categorical exclusion has given way to a “greater emphasis on serving children more effectively within schools and on helping students meet high standards for academic achievement.”²³ It is this critical shift in focus—from ensuring access from without to ensuring quality of instruction from within—that creates both challenges and opportunities for reform-minded education lawyers.²⁴

The most illustrative example of the complexities and challenges of rights implementation is the education of the

²⁰ *Id.* at 9, 16.

²¹ For a thorough account beyond that provided in *LAW & SCHOOL REFORM*, see R. SHEP MELNICK, *BETWEEN THE LINES: INTERPRETING WELFARE RIGHTS* 135-59 (1994).

²² *Plyer v. Doe*, 457 U.S. 202 (1982).

²³ Heubert, *supra* note 19, at 3.

²⁴ Another way to think about the contrast between rights creation and rights implementation is that the former involves adjudication of rights in a context in which most of the relevant facts are stipulated to, and the court's only job is to decide whether they constitute a violation of legal norms. The latter involves adjudication in a context in which the court must ascertain and interpret the relevant facts in the first instance. *Brown*, then, is a paradigmatic example of rights creation, insofar as the parties stipulated to the existence of *de jure* discrimination, and the announced rule did not go beyond announcing that such a practice violated equal protection. Current litigation efforts, by contrast, involve rights implementation because courts must ascertain and interpret a variety of facts that are difficult to get a handle on, because of the difficulty of measuring outcomes, determining which remedies are implementable, and penetrating school bureaucracies.

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disabled. Hehir and Gamm's chapter²⁵ on special education recounts how early victories in federal courts, including *PARC v. Commonwealth*²⁶ and *Mills v. Board of Education*,²⁷ and the passage of the Education for All Handicapped Children Act ("EHA") in 1975—now referred to as the Individuals with Disabilities Education Act ("IDEA")—created legally enforceable rights to a "free and appropriate education" in "the least restrictive environment."²⁸ At the school level, the newly-minted rights sparked nearly three decades of lawyer-supervised design of Individualized Education Programs ("IEP")²⁹ and the ongoing evolution of caselaw defining "appropriate education" and the extent of accommodation and "mainstreaming" that school

²⁵ Thomas Hehir & Sue Gamm, *Special Education: From Legalism to Collaboration*, in *LAW & SCHOOL REFORM: SIX STRATEGIES FOR PROMOTING EDUCATIONAL EQUITY* 205 (Jay. P. Heubert ed., 1999).

²⁶ 342 F. Supp. 279 (E.D. Pa. 1972).

²⁷ 348 F. Supp. 866 (D.D.C. 1972).

²⁸ The passage of the Education for All Handicapped Children Act in 1975 further consolidated the special education provision. 20 U.S.C. §§1400-1487 (1994 & Supp. V 1999). Renamed the Individuals with Disabilities Education Act in 1990, the IDEA is currently the primary source of federal aid to state and local school systems for programs and services for infants, toddlers, children, and youth with disabilities. The IDEA creates a statutory right to a "free appropriate public education" to all children with disabilities. *Id.* at § 1412(a)(1). Under the IDEA, states have the primary responsibility for providing special education programs and services to school-age children with disabilities.

²⁹ The IDEA requires that special education and related services be provided on an individualized basis in accordance with the disabled child's individualized education plan ("IEP"). 20 U.S.C. § 1412(a)(4). Under the IDEA, schools must develop an IEP for every disabled student. *Id.* The plan includes a written statement of the child's educational needs and specific goals, methodologies, and evaluation procedures for meeting them, and must contain "specially designed instruction to meet the unique needs of children with disabilities." *Id.* at § 1414(d)(1)(A). In addition, schools must ensure that due process protections are in place to ensure compliance on the part of local education agencies. If there is a dispute between parents and school authorities about the content of an IEP, then parents can appeal the proposed IEP to an administrative hearing officer, and if still unsatisfied, to the state or federal courts. *Id.* at § 1415(f), (g), (i).

districts are legally obligated to provide to students with disabilities.³⁰ While early litigants faced the daunting task of minting new rights, subsequent generations of education lawyers have worked to ensure the proper implementation of those rights at the ground level.

One reason that the elaboration of rights in the school equity context has proven so complex is that rights implementation requires the institutional engagement of schools. Earlier legal challenges to segregation and categorical exclusions could be done at a remove from the daily activities and operation of schools. Jim Crow policies barring African-American students from white schools, for example, could be met with the abstract claim that the Equal Protection Clause forbids categorization based on race. Indeed, the peculiar power of rights claims flows in part from the fact that rights exist as abstract trumps that are removed from complicated institutional contexts.³¹

But the implementation of rights in the current education context increasingly requires lawyers to understand and argue by reference to the professional practices and norms of teachers and administrators. For example, the contributions by Gary Orfield and Paul Weckstein both describe litigation arising from claims that many school districts perpetuate intra-school racial

³⁰ Important Supreme Court decisions include the following: *Cedar Rapids Comm. Sch. Dist. v. Garrett F.*, 526 U.S. 66 (1999) (requiring school district to provide full-time nursing services to disabled student during school hours); *Honig v. Doe*, 484 U.S. 305 (1988) (holding that the IDEA forbids schools from expelling students for behaviors related to their handicaps); *Board of Ed. of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176 (1982) (defining “free appropriate public education”). The remaining caselaw is too numerous to summarize here. For a comprehensive summary of recent caselaw on diagnosis and placement, see Perry A. Zirkel, *Special Education Law Update VII*, 160 ED. LAW REP. 1 (2002).

³¹ See RONALD DWORKIN, *Rights As Trumps*, in THEORIES OF RIGHTS 153, 153 (Jeremy Waldron ed., 1984) (“Rights are best understood as trumps over some background justification for political decisions that states a goal for the community as a whole.”); see also Thomas C. Grey, *Cover-Blindness*, 88 CALIF. L. REV. 65, 67 (2000) (offering an interpretive account of employment discrimination law that sets up a similar contrast between abstract and more contextualized rights claims).

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segregation by creating tracks within the curriculum and separating students into groups based on “purported differences in student ability.”³² However, to claim that a school district’s practice of ability grouping has a segregatory effect requires litigants and the legal system to engage the school as an institution to root out and assess the extent to which the challenged practices serve the purported end of ability grouping and the extent to which they provide cover for racial discrimination. The same is true with respect to bilingual education and programs that serve Limited English Proficient (“LEP”) children. In both cases, making out a successful legal claim is no longer an abstract proposition about access to public institutions, but instead requires courts to fuse legal doctrine and complex analysis of educational and pedagogical practice.

Heubert seems to identify a similar aspect of institutional engagement when he asserts that the interaction of law and education has been characterized in recent years by a “significant convergence of legal standards and educational norms.”³³ In particular, present-day reform efforts are greatly complicated by the fact that rights and remedies are increasingly defined by reference to educational practices and student outcomes.³⁴ Molly McUsic’s contribution on school finance reform provides the clearest example. Over the past thirty years, legal challenges to state school financing formulas have arisen in response to the sometimes enormous inter-district disparities in per-pupil spending that result from the funding of public education through local property taxes.³⁵ Early state constitutional challenges to school finance regimes relied upon state equal protection clauses and so-called education clauses.³⁶ Dubbed the “equity” approach,

³² Weckstein, *supra* note 18, at 341; *see also* Larry P. v. Riles, 343 F. Supp. 1306, *aff’d*, 502 F.2d 963 (9th Cir. 1974).

³³ Heubert, *supra* note 19, at 4.

³⁴ *Id.* at 32.

³⁵ For an up-to-date listing of cases brought, *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: SIX STRATEGIES FOR PROMOTING EDUCATIONAL EQUITY* 90 n.8 (Jay. P. Heubert ed., 1999).

³⁶ *See* Peter Enrich, *Leaving Equality Behind: New Directions in School*

plaintiffs boldly argued that state constitutions required equality under the law and therefore a leveling of school finance.³⁷

Successive waves of school finance reform have followed an “adequacy” approach, relying on the same coupling of state equal protection clauses and education clauses as did earlier “equity” lawsuits, but arguing instead for a more limited right to a constitutionally “adequate” education.³⁸ In some successful lawsuits, state supreme courts have actively engaged in the process of defining educational “adequacy,” going so far as to construct a list of basic competencies that must be taught in order for the system as a whole to pass constitutional muster.³⁹

Finance Reform, 48 VAND. L. REV. 101, 105 (1995) (“[E]very state, with the arguable exception of Mississippi, includes in its constitution an ‘education clause’ that assigns to the state the responsibility for establishment of a public school system.”); Molly McUsic, *The Use of Education Clauses in School Finance Litigation*, 28 HARV. J. LEGIS. 307, 333-39 (1991) (categorizing state educational clauses by the rigor of the requirements set forth in each); see also William E. Thro, *The Third Wave: The Implications of the Montana, Kentucky, and Texas Decisions for the Future of Public School Finance Reform Litigation*, 19 J.L. & EDUC. 219, 225-32 (1990).

³⁷ See McUsic, *supra* note 35, at 89; see also Enrich, *supra* note 36, at 106-08, 125-26.

³⁸ See Enrich, *supra* note 36; William H. Clune, *New Answers to Hard Questions Posed by Rodriguez: Ending the Separation of School Finance and Education Policy by Bridging the Gap Between Wrong and Remedy*, 24 CONN. L. REV. 721, 733 (1992).

³⁹ In *Rose v. Council for Better Education*, the Kentucky Supreme Court spelled out seven “essential competencies” that a minimally adequate education would instill in its students, stating the following:

An efficient system of education must have as its goal to provide each and every child with at least the seven following capacities:

- (i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization
- (ii) sufficient knowledge of economic, social, and political systems to enable students to make informed choices
- (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation
- (iv) sufficient self-knowledge and knowledge of his or her mental and

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Similarly, in its effort to fashion remedies in the state's long-standing school finance litigation, the New Jersey Supreme Court recently sanctioned the wholesale adoption of a specific school reform package called "Success for All" as a way to meet obligations under the state constitution.⁴⁰ These examples illustrate the fact that legal standards such as "adequacy" acquire meaning only by reference to educational practices and professional norms. The inevitable result is greater institutional engagement of schools by the legal system.

Having exhaustively demonstrated the law's increasing institutional engagement of schools and the convergence of legal standards and educational norms, Heubert sets forth two related proposals for lawyers seeking to deploy law to advance educational equity. First, he asserts that lawyers must develop a greater understanding of the nuts and bolts of education policy if they wish to contribute to the lawyer-educator collaboration that he sees as critical to the success of present-day reform efforts.⁴¹ Second, Heubert argues that lawyers who wish to contribute to school reform must develop non-adjudicative skills and learn to "function effectively in the larger political process, as legislators, regulators, mediators, and consensus builders."⁴² By developing more policy-specific knowledge and deploying that knowledge in non-adjudicative and collaborative settings, Heubert believes that

physical wellness

(v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage

(vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and

(vii) sufficient level of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.

Rose v. Council for a Better Educ., 790 S.W.2d 186, 212 (Ky. 1989).

⁴⁰ See Abbott v. Burke, 710 A.2d 450, 457 (N.J. 1998). For a description of Success for All, see the program's website at <http://www.successforall.com/> (last visited Apr. 17, 2002).

⁴¹ Heubert, *supra* note 19, at 6-7.

⁴² *Id.* at 5.

lawyers can continue to make inroads against persistent educational inequities.

II. A CRITIQUE

Heubert's claim that lawyers can better represent clients in education-related litigation with a stronger substantive policy background has superficial appeal. After all, who could argue with greater policy learning on the part of lawyers bringing education-related claims? To the extent that *Law & School Reform* facilitates broader understanding of how law and policy interact, the book will likely advance equality of educational opportunity at the margins. But Heubert's call for greater policy learning, lawyer-educator collaboration, and non-adjudicative reform approaches as a means of dramatically advancing educational equity is naively optimistic. Many of the contributors to *Law & School Reform* tend to overstate the reach of law in past education reform efforts, fail to specify the advantages of non-adjudicative approaches to reform, gloss over contentious empirical debates among educational policy experts about the effectiveness of particular policies, and overstate consensus on important values issues. Many of these weaknesses result from a failure to see that educational policy debates are beset by empirical indeterminacy and deep values conflicts. As a consequence, the move to non-adjudication and collaboration risks consigning lawyers to the dismal role of debate mediator. Indeed, reading *Law & School Reform*, one wonders whether lawyers, law, and legal institutions can retain any comparative advantage at all over other policy actors in future reform efforts.

A. Non-Adjudication and Comparative Disadvantage

Non-adjudicative approaches to social and institutional reform have come into fashion in the last two decades, piggybacking on broader shifts in the law away from legal adversarialism and toward alternative dispute resolution ("ADR").⁴³ The

⁴³ JONATHAN MARKS ET AL., DISPUTE RESOLUTION IN AMERICA:

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attractiveness of such non-adjudicative approaches has been enhanced by the perceived shortcomings and social costs of more litigation-focused approaches to institutional and social reform.⁴⁴ The move to non-adjudicative approaches has also been occasioned by a sustained assault on “judicial activism” and concern about an “imperial judiciary” in response to growing judicial involvement in the reform of public institutions.⁴⁵ Public law litigation, critics have zealously argued, violates core principles of separation of powers and produces perverse policy results because courts lack the institutional capacity to carry out broad remedial tasks.⁴⁶ Nevertheless, beginning in 1954 with the Supreme Court’s decision in *Brown v. Board of Education*,⁴⁷ federal courts have become increasingly involved in remedial oversight of basic functions of state and local governments. Judicial remedial involvement accelerated throughout the 1960s

PROGRESS IN EVOLUTION 36-37 (1984); *see also* LINDA R. SINGER, *SETTLING DISPUTES* 1-14 (1994) (detailing the origins and growth of the ADR approach).

⁴⁴ *See generally* THOMAS F. BURKE, *LITIGATION AND ITS DISCONTENTS: THE STRUGGLE OVER LAWYERS, LAWSUITS, AND LEGAL RIGHTS IN AMERICAN POLITICS* (forthcoming 2002) (detailing anti-litigation reforms adopted in the United States since the late 1960s); *see also* ROSENBERG, *supra* note 8, at 336.

⁴⁵ Nathan Glazer, *Toward an Imperial Judiciary*, 41 *PUB. INTEREST* 104, 104 (1975).

⁴⁶ *See* DONALD L. HOROWITZ, *THE COURTS AND SOCIAL POLICY* 18 (1977) (arguing that the relevant question in the expansion of judicial oversight of public policy matters is not “whether courts *should* perform certain tasks but . . . whether they *can* perform them competently”); JEREMY RABKIN, *JUDICIAL COMPULSIONS: HOW PUBLIC LAW DISTORTS PUBLIC POLICY* 20 (1989) (“Courts are entirely unequipped to act as ongoing, freestanding guardians of administrative performance.”). *But see* Ralph Cavanaugh & Austin Sarat, *Thinking About Courts: Toward and Beyond a Jurisprudence of Judicial Competence*, 14 *LAW & SOC’Y REV.* 371, 373 (1980) (arguing that critiques based on institutional competency “underestimate the demonstrated ability of courts to evolve new mechanisms and procedures in response to implicit or explicit societal demands”); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 *HARV. L. REV.* 1281, 1282 (1976) (rebutting critics of the public law model and arguing that public law litigation is both workable and inevitable in an increasingly regulated society).

⁴⁷ 347 U.S. 483 (1954).

and 70s as a wide range of judicial decrees implemented reforms in public institutions beyond schools, including jails,⁴⁸ prisons,⁴⁹ mental health facilities,⁵⁰ and housing projects.⁵¹

Most contemporary calls for non-adjudicative reform approaches aim, at least in part, to respond to the foregoing criticisms. But as a definitional matter, it is not at all clear that the new approaches advocated by Heubert and the contributors to *Law & School Reform* are really non-adjudicative in any strong sense.⁵² Indeed, most of the non-adjudicative approaches cited by proponents involve consent decrees and judge-imposed “dialogic remedies.” They are clearly “quasi-adjudicative.” And even purely non-adjudicative negotiations involving lawyers and

⁴⁸ See, e.g., Taylor v. Perini, 413 F. Supp. 189 (N.D. Ohio 1976).

⁴⁹ See, e.g., Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976), *aff'd in relevant part sub nom*, Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977); Rhem v. Malcolm, 371 F. Supp. 594 (S.D.N.Y. 1974), *aff'd and remanded*, 507 F.2d 283 (2d Cir. 1974), *on remand*, 389 F. Supp. 964, *amended*, 396 F. Supp. 1195 (S.D.N.Y. 1975), *aff'd*, 527 F.2d 1041 (2d Cir. 1975), Rhem v. Malcolm, 432 F. Supp. 769 (S.D.N.Y. 1977); Holt v. Sarver, 300 F. Supp. 825 (E.D. Ark. 1969), 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971); Battle v. Anderson, 376 F. Supp. 402 (E.D. Okla. 1974).

⁵⁰ See, e.g., Wyatt v. Stickney, 334 F. Supp. 1341 (M.D. Ala. 1971), 344 F. Supp. 373 (M.D. Ala. 1976), *aff'd in part*, Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974); New York Ass'n of Retarded Children v. Rockefeller, 357 F. Supp. 752 (E.D.N.Y. 1973).

⁵¹ See, e.g., Hills v. Gautreaux, 425 U.S. 284 (1976).

⁵² Similar definitional matters have occupied other commentators as well. Compare Charles Berger, *Equity Without Adjudication: Kansas School Finance Reform and the 1992 School District Finance and Quality Performance Act*, 27 J.L. & EDUC. 1 (1998) (arguing that use of a non-adjudicative reform model was critical to the success of school finance reform in Kansas) with Perry A. Zirkel, *Non-Adjudicative? You Be the Judge*, 28 J.L. & EDUC. 231, 233 (1999) (questioning Berger's characterization of the Kansas reform process as “non-adjudicative,” because the “Mock” opinion that spurred the process was “preceded and proceeded” by state supreme court opinions); Ralph Puerta, *A Pennsylvania Perspective on Charles Berger's "Equity Without Adjudication,"* 28 J.L. & EDUC. 235, 236 (1999) (comparing school finance reform efforts in Kansas and school finance litigation in Pennsylvania and questioning whether the former approach was truly “non-adjudicative”).

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educators but no actual judicial intervention are conducted in the “shadow of the law” with the threat of litigation hanging over the proceedings throughout.⁵³

Most significantly, *Law & School Reform* provides no real explanation why quasi-adjudicative approaches to school reform will necessarily yield better results than past litigation efforts. Establishing the mixed success of past litigation efforts is easy enough. Indeed, there is substantial evidence that litigants involved in reform efforts may have overestimated the reach of courts in the public educational system. For example, desegregation litigation has had only mixed success, given continuing high levels of segregation. Similarly, even though substantial time and energy have been devoted to school finance litigation efforts over the past thirty years, the empirical evidence in states where school finance challenges prevailed suggests that courts’ ability to influence education spending is mixed.⁵⁴ In states like Connecticut, Texas, and New Jersey, the typical result has been serial litigation with extensive judicial-political dialogue but insignificant narrowing of spending inequities between school districts.⁵⁵ The principal reason for the mixed success of school finance reform efforts is political: the allocation of dollars to school districts is dictated by complicated funding formulas that

⁵³ Robert Mnoonkin & Lewis Kornhauser, *Bargaining in the Shadow of the Law*, 88 YALE L.J. 950 (1979).

⁵⁴ Compare McUsic, *supra* note 35, at 105 (“[M]ost data indicate that the school finance regimes adopted under court order have generally led to more equitable funding.”), William N. Evans, *Schoolhouses, Courthouses, and Statehouses After Serrano*, 16 J. POL’Y ANALYSIS & MGMT. 10, 28 (1997) (same), and Alan Hickrod, *The Effect of Constitutional Litigation on Education Finance*, 18 J. EDUC. FIN. 180, 207-208 (1992) (same) with Michael Heise, *State Constitutional Litigation, Educational Finance, and Legal Impact: An Empirical Analysis*, 63 U. CIN. L. REV. 1735, 1763 (1995) (“When the results are considered together, the picture that emerges does not support the general assumption that state supreme court decisions involving equity lawsuits that invalidate school finance systems result in increased educational spending.”).

⁵⁵ See Mark Jaffe & Kenneth Kersch, *Guaranteeing a State Right to a Quality Education: The Judicial-Political Dialogue in New Jersey*, 20 J.L. & EDUC. 271, 297 (1991).

are periodically revised and precisely mirror the political balance of power in a given state. Governors and legislatures resent the reformers' efforts to use courts to circumvent the elected branches and to force their hand on basic resource allocation issues. By contrast, in states like Kentucky, where significant mobilization took place prior to the state supreme court's decision, the legislature responded to the court's decree with a near-total overhaul of the state's educational system.⁵⁶ Lacking the sword and purse, and dependent on other branches for implementation, courts engaged in school reform efforts have had substantial difficulty implementing decrees without an accompanying political mobilization.

The problem is that non- and quasi-adjudicative reform efforts have probably not fared any better than more traditional litigation efforts in meeting reformers' goals. Reform efforts have yielded mixed results when courts have combined litigation with non-adjudicative approaches at the remedial stage. The recent utilization of a so-called "dialogic remedy" failed to make much headway in the remedial process following the Connecticut Supreme Court's decision in *Sheff v. O'Neill*.⁵⁷ In that case, having declared unconstitutional the "de facto racial and ethnic segregation"⁵⁸ of students in Hartford public schools, the court deferred to the legislative and executive branches to "put the search for appropriate remedial measures at the top of their respective agendas."⁵⁹ The resulting statewide public engagement process sputtered and died, with no significant change in the delivery or finance of public education in Connecticut's racially

⁵⁶ See Enrich, *supra* note 36, at 175-77; see also John Dayton, *The Judicial-Political Dialogue: A Comment on Jaffe and Kersch's "Guaranteeing a State Right to a Quality Education,"* 22 J.L. & EDUC. 323, 325 (1993) (arguing that judicial decrees without popular support cannot produce meaningful education reform).

⁵⁷ 678 A.2d 1267 (Conn. 1996).

⁵⁸ *Id.* at 1271.

⁵⁹ *Id.* at 1290. For analysis of the Connecticut Supreme Court's *Sheff* decision, see James E. Ryan, *Sheff, Segregation, and School Finance Litigation*, 74 N.Y.U. L. REV. 529 (1999).

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isolated inner-city schools.⁶⁰ Similarly, the court presiding over school finance reform in Alabama appointed a facilitator to work with the parties on a proposed remedial order and at least initially managed to cobble together an “impressive consensus” on reform directions.⁶¹ However, consensus quickly unraveled and the shape of reforms quickly became a partisan and hotly-contested issue. Substantial litigation has ensued.⁶²

As a final point, Heubert and the other contributors fail to address the possibility that the checkered success of past reform efforts stems from the fact that public schools are particularly complex bureaucracies, rather than from the inherent limitations of public law litigation as a reform vehicle. The standard critique of public law litigation is that courts are peculiarly unsuited to the task of institutional reform.⁶³ But it may also be the case that schools are much more resistant to reform efforts than other public institutions. For example, organizational theorists see schools as “loosely coupled” bureaucratic forms that lack the clear lines of authority and accountability that ensure productivity in other bureaucratic environments.⁶⁴ Much of what goes on in

⁶⁰ See Michael A. Rebell & Robert L. Hughes, *Efficacy and Engagement: The Remedies Problem Posed by Sheff v. O'Neill—And a Proposed Solution*, 29 CONN. L. REV. 1115, 1143-1158 (1997) (proposing a “dialogic approach” as a remedial option in the *Sheff* litigation). For an account of the failure of the process to effect any significant reform, see Kathryn A. McDermott, *Regionalism Forestalled: Metropolitan Fragmentation and Desegregation Planning in Greater New Haven, Connecticut*, in CHANGING URBAN EDUCATION 45 (Clarence Stone ed., 1998).

⁶¹ See Michael A. Rebell & Robert L. Hughes, *Schools, Communities, and the Courts: A Dialogic Approach to Education Reform*, 14 YALE L. & POL'Y REV. 99, 161 & nn. 248-52 (1996).

⁶² *Id.*; see also, Martha I. Morgan et al., *Establishing Education Program Inadequacy: The Alabama Example*, 28 MICH. J.L. REF. 559, 562-63 n.15 (1995) (describing the post-trial litigation).

⁶³ See *supra* note 46.

⁶⁴ See Karl E. Weick, *Educational Organizations as Loosely Coupled Systems*, 21 ADMIN. SCI. Q. 1, 1 (1976); see also JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 158-71 (1989) (arguing that, as public bureaucracies, schools are particularly vulnerable to goal, output, and outcome uncertainty).

schools takes place behind closed doors by teachers who enjoy significant discretion over day-to-day activities.⁶⁵ In addition, as “open systems,” schools must mediate and overcome clashes between a wide range of stakeholders, including state and local professionals, teachers and their unions, elected officials, school boards, administrators, parents and their associations, students, community activists, the media, business leaders, and foundations.⁶⁶ The resulting lack of accountability and pursuit of proximate goals by interested parties makes change difficult. This is true whether the change at issue involves implementation of a consent decree or attempts to alter particular teacher practices in the classroom.

In the end, any effort to effect substantive and lasting reform is difficult because it is notoriously difficult to dislodge schools’ “accustomed practice and organization.”⁶⁷ And this is probably true whether would-be reformers employ adjudicative or quasi-adjudicative means. Thus, the assumptions and analysis that undergird Heubert’s call for more non-adjudicative and collaborative activity clearly need further examination and support.

B. Policy Learning and a Dismal Role for Lawyers

Equally problematic is the second component of Heubert’s call for a “new legalization” of school reform efforts—greater

⁶⁵ See MICHAEL LIPSKY, *STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICE* 13-18 (1980).

⁶⁶ See Marilyn Gittell, *School Reform in New York and Chicago: Revisiting the Ecology of Local Games*, 30 *URB. AFF. Q.* 136, 138 (describing the role of various interest groups and stakeholders in education decentralization experiments in Chicago in the late 1980s and New York City in the late 1960s); see also Marion Orr, *The Challenge of School Reform in Baltimore: Race, Jobs, and Politics*, in *CHANGING URBAN EDUCATION* 93 (Clarence Stone ed., 1998) (arguing that urban schools are patronage machines and thus subject to rent-seeking by interest groups, especially teacher unions).

⁶⁷ SEYMOUR SARASON, *THE PREDICTABLE FAILURE OF EDUCATIONAL REFORM* 70 (1990).

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policy learning on the part of lawyers.⁶⁸ The reality is that most lawyers are perfectly capable of understanding core debates within education policy circles. Most can intelligently read the semi-technical academic literature that characterizes such debates, or at least the voluminous law review literature that summarizes various positions within such debates.⁶⁹ On this point, Heubert's claims that few education lawyers "know the fields of education and educational administration"⁷⁰ and that "few know how to read and understand educational research"⁷¹ are unconvincing. Instead, an equally plausible argument can be made that any additional policy learning will merely reveal that most areas of educational policy and practice are beset by empirical indeterminacy and deep value-based contentions.⁷² Given the depth of disagreement on a range of empirical and values-based questions, lawyers and legal institutions appear to be left with a dismal role—mediating value clashes and interpreting statutory language against the backdrop of expert disagreement on efficacy.

The extent of the impasse is not made clear in *Law & School Reform*, particularly since several of the contributors, true to the lawyerly cast of the book, adopt a brief-like tone and gloss over major areas of contention. For example, Gary Orfield cites social scientific research that purports to demonstrate the educational gains that flow from racial integration.⁷³ He neglects to cite

⁶⁸ Heubert, *supra* note 19, at 6-7.

⁶⁹ Michael Rebell, a lawyer himself, has written a number of law review articles that capably and clearly summarize highly technical debates in education policy circles. See Michael A. Rebell & Robert L. Hughes, *Special Educational Inclusion and the Courts: A Proposal for a New Remedial Approach*, 25 J.L. & EDUC. 523 (1996).

⁷⁰ Heubert, *supra* note 19, at 6 (citing A. Trotter, *Flagrante Dilecto*, AM. SCH. BOARD J., Dec. 1990, at 12-18).

⁷¹ Heubert, *supra* note 19, at 6.

⁷² Heubert seems to acknowledge this fact when he states that "establishing illegal discrimination will be more difficult when there is disagreement among educators and researchers about the value or necessity of the educational policy or practice in question." *Id.* at 17. But he fails to develop the point.

⁷³ ORFIELD, *supra* note 1, at 41.

equally persuasive studies that demonstrate that the educational gains that accompany racial integration efforts are in fact quite small in the grand scheme of things and even difficult to prove empirically.⁷⁴ Martin Gerry's chapter on "service integration" reads like a brief in support of a community-centered and social service-oriented approach to public school reform that has increasingly drawn criticism from education scholars and practitioners alike.⁷⁵ Even the fundamental goal of school finance reform—the narrowing of inter-district disparities in per-pupil spending—has been criticized by a line of scholarship that calls into question whether school spending has any appreciable effect on student outcomes.⁷⁶ Similar empirical contentions characterize ongoing debates over special and bilingual education, particularly the question of the relative amount of time students should spend

⁷⁴ See DAVID ARMOR, *FORCED JUSTICE: SCHOOL DESEGREGATION AND THE LAW* 59-116 (1995) (summarizing research on the harms of segregation and the benefits of integration, citing the inconsistent results obtained by social scientific studies, and questioning the effect of desegregation on academic achievement in particular).

⁷⁵ See AMERICAN INST. FOR RESEARCH, *AN EDUCATOR'S GUIDE TO SCHOOLWIDE REFORM* 4, app. C (1999) (concluding that only three of twenty-four whole-school reform programs considered can muster convincing proof of positive effects on student achievement); PAUL T. HILL & MARY BETH CELIO, *FIXING URBAN SCHOOLS* 13-17, 28-30 (1998) (arguing that many reform programs are premised on under-specified causal theories of how program components will increase student learning); David M. Engstrom, Note, *Post-Brown Politics, Whole-School Reform, and the Case of Norfolk, Virginia*, 12 *STAN. L. & POL'Y REV.* 163, 164 (2001) ("[C]urrent urban school-reform efforts have suffered from a steady proliferation of reform packages that lack a convincing link to improved academic achievement.").

⁷⁶ Dubbed the "cost-quality debate," economists have churned out a number of rigorous empirical studies finding that school spending has little to no explanatory power with respect to student outcomes. These studies utilize a "production function" approach and regression analysis and conclude that there is no systematic relationship between educational inputs and outputs. See, e.g., ERIC A. HANUSHEK & CHARLES S. BENSON, *MAKING SCHOOLS WORK: IMPROVING PERFORMANCE AND CONTROLLING COSTS* 25-49 (1994); Eric A. Hanushek, *When School Finance "Reform" May Not Be Good Policy*, 29 *HARV. J. LEGIS.* 423 (1991).

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in separate versus mainstream classrooms.⁷⁷

Disagreement on values questions is equally prevalent. For instance, bilingual education policies raise deep questions about citizenship, assimilation, and cultural difference in a democratic society.⁷⁸ Similarly, the political right's embrace of color-blindness as an organizing principle—and its resulting opposition to affirmative action—is based at least in part on a judgment that color-blindness will better serve the interests of white and

⁷⁷ In the disability area, for example, experts disagree on a host of important variables, particularly the relative efficacy of mainstream as against special instruction. Special education experts cast the debate in terms of “inclusion” versus “placement diversity.” See Rebell, *supra* note 69, at 537. Advocates of the inclusionist perspective argue that teachers often lack a sound pedagogic basis for referral of particular students to special education, that special education programs are overly narrow and have little impact on student achievement, and that special placement has a stigmatizing effect that counters whatever small educational gains that eventuate. Proponents of placement diversity, by contrast, maintain that separation based on needs and special interventions—including individualized instruction, smaller classes, and highly trained teachers—produce important educational benefits. See Douglas Marston, *The Effectiveness of Special Education: A Time Series Analysis of Reading Performance in Regular and Special Education Settings*, 21 J. SPECIAL EDUC. 13, 13 (1987-88); Conrad Carlberg & Kenneth Kavale, *The Efficacy of Special Versus Regular Class Placement for Exceptional Children: A Meta-Analysis*, 14 J. SPECIAL EDUC. 295, 304 (1980). They also minimize the concern with stigma, arguing that labeling is only damaging when it comes about through inappropriate interventions. See Judith D. Singer, *Should Special Education Merge with Regular Education?*, 2 EDUC. POL'Y 409, 412 (1988). For a nice overview, see David L. Kirp et al., *Legal Reform of Special Education: Empirical Studies and Procedural Proposals*, 62 CAL. L. REV. 40 (1974). Participants in bilingual education policy debates make many of the same moves. See Sonja Diaz-Granados, Note, *How Can We Take Away a Right We Have Never Protected*, 9 GEO. IMMIGR. L.J. 827, 831 (1995) (comparing the “maintenance approach,” which emphasizes “a continuation of content area education within the bilingual program,” and a “transitional approach,” which “concentrates on quickly mainstreaming LEP students); see also ROSEMARY C. SALOMONE, EQUAL EDUCATION UNDER LAW 92 (1986).

⁷⁸ See John Rhee, *Theories of Citizenship and Their Role in the Bilingual Education Debate*, 33 COL. J.L. & SOC. PROBS. 33 (1999). For broader discussion by political theorists, see WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS (1996); CHARLES TAYLOR, MULTICULTURALISM (1996).

minority citizens alike over the long-term.⁷⁹ Deep value clashes are also apparent in a variety of education policy areas not addressed by *Law & School Reform*. A good example is the implementation of “percent plans” in Texas, California, and Florida. High school students who graduate in, respectively, the top 10%, 4%, or 20% of their high school classes receive guaranteed admission—and in some cases, scholarship money—to any of the state’s flagship public universities.⁸⁰ Proponents argue that such plans are a facially neutral means of increasing diversity in public higher education without using race-conscious admissions policies.⁸¹ Others argue that percent plans are a cop-out, given that successful fulfillment of one of the plans’ principal goals of increasing diversity depends on continuing racial segregation at the secondary school level.⁸² Percent plans might also be open to criticism on the grounds that the plans send ill-prepared students to the state’s top schools, forcing those universities into the business of remedial education.⁸³

⁷⁹ See, e.g., TERRY EASTLAND, *ENDING AFFIRMATIVE ACTION: THE CASE FOR COLORBLIND JUSTICE* (1996). Thus, affirmative action debates are in part just disagreement over empirical outcomes rather than values. One can imagine opponents in the debate arriving at the same vision of what a good society would look like in twenty years, but disagreeing as to whether affirmative action will get us there more efficaciously than color-blindness.

⁸⁰ See R. Richard Banks, *Meritocratic Values and Race Outcomes: Defending Class-Based College Admissions*, 79 N.C. L. REV. 1029, 1031 n.4 (2001). For a detailed description of the Texas plan, see Danielle Holly & Delia Spencer, Note, *The Texas Ten Percent Plan*, 34 HARV. C.R.-C.L. L. REV. 245, 245 (1998).

⁸¹ See Banks, *supra* note 80, at 1033-34. The United States Court of Appeals for the Eleventh Circuit has also expressed implicit support for “percent plans.” *Johnson v. Bd. of Regents of Univ. of Ga.*, 263 F.3d 1234, 1259 (11th Cir. 2001) (describing percent plans as one of several “innovative strategies” for increasing university diversity).

⁸² See Jeffrey Selingo, *What States Aren’t Saying About the “X-Percent Solution,”* CHRON. HIGHER EDUC., June 2, 2000, at A31 (citing critics of percent plans who argue that use of high schools with large minority populations “exploits educational segregation while doing nothing to make schools better” and “discourage[s] states from integrating high schools”).

⁸³ *Id.* (reporting that even proponents of percent plans acknowledged that many students will not be ready for college and will be directed into summer

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In addition to the specific program areas referenced in *Law & School Reform*, present-day education debates suffer from deeper—and perhaps even more intractable—empirical and values-based contention about what constitutes “equity” in the first place. As a society, we might wish to advance equity by remedying past resource deprivations, by weighing the relative prospective benefits of spending more on some students than others, or by creating greater equality of educational outcomes.⁸⁴ But any effort to “equalize” immediately runs into specification problems. Application of a strict equality principle might require the leveling of educational inputs—in other words, spending the same amount of dollars per pupil. Like the “equity” approach in school finance litigation, this is probably only aspirational given political realities. Alternatively, educational equity might be measured in terms of providing a minimal floor of educational services to each student, perhaps calculated to obtain a set of valued outcomes, as in the “adequacy” approach adopted by school finance litigants.⁸⁵ This seems more reliable, but the adequacy approach to school finance finesses the relationship between inputs and outputs and assumes that a given quantum of education will ensure a given level of achievement and will thus be equally valuable to all students.⁸⁶

The problem is particularly pronounced in the educational context because social scientists know surprisingly little about the relationship between educational inputs and outputs or the extent

remedial classes).

⁸⁴ MARK KELMAN & GILLIAN LESTER, *JUMPING THE QUEUE: AN INQUIRY INTO THE LEGAL TREATMENT OF STUDENTS WITH LEARNING DISABILITIES* 9 (1997).

⁸⁵ *See supra* note 38 and accompanying text.

⁸⁶ Inputs include teachers, curriculum, and other learning tools—in short, the stuff of the educational process. Outputs range from short-term achievement measures to long-term measures of vocational success and general life chances. As an aside, a number of political theorists have grappled with the relationship of inputs to outputs—particularly the fact that some individuals may be able to derive more of a given output from a fixed quantity of input—and have thus tried to look at equity of goods and services in terms of what “functionings” that a given good like education will facilitate. *See* AMARTYA SEN, *INEQUALITY REEXAMINED* xi (1995).

to which academic achievement drives broader life chances. The most robust social scientific finding of the past four decades is an enduring and high correlation between academic achievement and family socio-economic status.⁸⁷ A “familiar corollary” of this finding, as McUsic points out, is that “income and education of parents of fellow students is also highly correlated with performance.”⁸⁸ The conclusion drawn by most experts is that income and education together create “social capital” or “cultural capital,” which can significantly improve overall educational outcomes.⁸⁹ Second, the amount of resources available to schools matters, but perhaps not as much as one would expect. For instance, social scientists continue to squabble over the extent to which “money matters” in fostering high educational achievement. Although many economists argue that per-pupil spending has little to no effect on academic achievement,⁹⁰ other studies have found that school inputs such as teacher salaries exert at least some influence on academic achievement.⁹¹ Equally

⁸⁷ The most recent comprehensive treatment of the issue is SUSAN E. MAYER, *WHAT MONEY CAN'T BUY: FAMILY INCOME AND CHILDREN'S LIFE CHANCES* (1997). Classic treatments include JAMES S. COLEMAN, *EQUALITY OF EDUCATIONAL OPPORTUNITY* (1966) and CHRISTOPHER JENCKS, *INEQUALITY: A REASSESSMENT OF THE EFFECT OF FAMILY AND SCHOOLING IN AMERICA* (1972).

⁸⁸ One reason might be that relatively wealthier parents serve as “education connoisseurs” who agitate for quality; another commonly cited theory of causation is that poor children in relatively wealthier schools are confronted with role models of academic success. *See* McUsic, *supra* note 35, at 129; James S. Liebman, *Voice, Not Choice*, 101 *YALE L.J.* 259, 301 (1991).

⁸⁹ *See* COLEMAN, *supra* note 87. Coleman coined the term “social capital”—sometimes referred to alternately as “cultural capital”—in an attempt to label the mysterious relationship between social privilege and educational attainment and achievement.

⁹⁰ *See* HANUSHEK, *supra* note 76.

⁹¹ The teacher salary finding is particularly important because it suggests that expenditures may be driving outcomes, assuming that relatively wealthier schools have greater resources to identify and attract the most highly skilled teachers from the available teacher pool in a given area. Thus, it may not be absolute expenditures, but rather relative expenditures within a teacher labor pool that matters most, a fact that would foil most economic regressions of

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mixed results obtain in studies of early childhood education programs, even those that involve sustained commitment of enormous resources.⁹² Similarly, and as mentioned previously, there is little consensus on the efficacy of special education and bilingual instruction or the impact of desegregation on the academic achievement of African-Americans.⁹³ The upshot is that it is probably indeterminate which groups stand to benefit and by how much under different resource configurations.

In the concluding contribution to *Law & School Reform*, Weckstein optimistically claims that we currently have the necessary knowledge to effect substantial educational equity.⁹⁴ But the reality is that educational outcomes depend on a staggeringly complex web of variables and value judgments that, despite the best efforts of education experts to find consensus, remain deeply contested. One could try to dress up Heubert's call for greater lawyer-led mediation of expert disputes with Rawlsian rhetoric and to portray lawyers as heroically overseeing the realization of "overlapping consensus."⁹⁵ But it is also questionable whether lawyers have any comparative advantage in such an enterprise. In short, a better-read education bar is not likely to break through the empirical and values impasse in education policy circles, even if lawyer-mediated reform efforts can help force choices between, say, relatively more or less mainstreaming of special education and bilingual students.

the sort conducted by Hanushek. See Ronald Ferguson, *Paying for Public Education: New Evidence on How and Why Money Matters*, 28 HARV. J. LEG. 465 (1991); Martha L. Minow, *School Finance: Does Money Matter?*, 28 HARV. J. LEG. 395 (1991).

⁹² While programs such as Head Start have been criticized for their failure to demonstrate long-term effects, a number of other, more intensive early childhood programs have shown at least some medium- and long-term effects on academic achievement and life chances. See W. Steven Barnett, *Long-Term Effects of Early Childhood Programs on Cognitive and School Outcomes*, 5 FUTURE OF CHILDREN 25, 32-33, 38-39 (1995).

⁹³ See *supra* notes 74, 77 and accompanying text.

⁹⁴ Weckstein, *supra* note 18, at 307.

⁹⁵ JOHN RAWLS, *POLITICAL LIBERALISM* 133-72 (1993).

III. THE LARGER PICTURE

If there is reason to be skeptical about the value of the prescriptive proposals advanced in *Law & School Reform*, the book nonetheless does a great service in describing the current policy landscape. Criticisms aside, the essays in *Law & School Reform* together begin to sketch a larger and more dominant story that goes beyond Heubert's narrow prescriptions for advancing educational equity reform. For instance, a crucial trend in law and education evident in the various contributions to the book is the declining significance of race-based resource claims. In addition, Molly McUsic's insightful overview of school finance issues shows that lawyers have presided over the evolution of a system of federal mandates on behalf of disabled and limited English proficient students that exacerbates resource disparities for poor and minority students within the multi-tiered system of school finance that prevails in the United States.⁹⁶ The overall trend might be described as a comparative strengthening of the resource claims of the disabled and a comparative weakening of claims based on race and class. While this trend is unfortunate from the perspective of minority and poor students, it also demonstrates two very different impulses in tension in law-driven school reform efforts. One is a bureaucratic impulse that focuses on targeted resource allocations as a way of improving educational outcomes. The other is a legal-cultural inclusionary impulse that extends from the peculiar power of the integration ideal as articulated in *Brown v. Board of Education*.⁹⁷ Understanding this tension is an important first step in understanding the larger picture of law-driven school reform's effect on educational equity over the past fifty years.

A. *The Declining Significance of Race-Based Resource Claims*

Brown v. Board of Education sits at the very top of the canon

⁹⁶ McUsic, *supra* note 35, at 92-93.

⁹⁷ 347 U.S. 483 (1954).

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of American legal thought.⁹⁸ But nowhere else in American law is the continuing rhetorical power of a court decision matched by so little remaining power as a reform tool. Indeed, an important part of the larger backdrop against which law-driven reform efforts have evolved over the second half of the twentieth century is the declining significance of race as a basis for resource claims.

Evidence of the decline comes from a number of different quarters, but most explicitly in the demise of desegregation and affirmative action at the hands of an increasingly skeptical federal judiciary. *Law & School Reform* opens with the issue of desegregation. But Gary Orfield's lengthy chapter focuses on the resegregation of American schools and the increasingly deaf ear of the federal judiciary to desegregation claims.⁹⁹ In general, court-ordered desegregation plans that regulate student assignments are on the wane.¹⁰⁰ Even the African-American community is increasingly agnostic about the value of continued desegregation efforts.¹⁰¹ The outlook is equally bleak on the

⁹⁸ J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 974 n.43 (1998).

⁹⁹ See generally ORFIELD, *supra* note 1. For relevant Supreme Court caselaw, see *Missouri v. Jenkins*, 515 U.S. 70 (1995); *Freeman v. Pitts*, 503 U.S. 467 (1992); *Board of Educ. v. Dowell*, 498 U.S. 237 (1991); *Milliken v. Bradley*, 418 U.S. 717 (1974).

¹⁰⁰ In the last ten years, for example, courts have closed school desegregation cases in Buffalo, Denver, Savannah, Oklahoma City, Wilmington, and Charlotte-Mecklenburg and have constructed "exit plans" for Dallas, Kansas City, and Little Rock. See Wendy Parker, *The Future of School Desegregation*, 94 NW. U. L. REV. 1157, 1157-58 (2000). Note, however, that Parker argues that widespread claims that desegregation efforts are dead are overstated. *Id.*

¹⁰¹ Recent public opinion surveys have shown that an overwhelming majority of African-American parents believe that "the higher priority of the nation's schools should be to raise academic standards rather than focus on achieving more diversity and integration." See PUB. AGENDA, TIME TO MOVE ON: AFRICAN-AMERICAN AND WHITE PARENTS SET AN AGENDA FOR PUBLIC SCHOOLS 31 (1998) (reporting results of a survey conducted by Public Agenda and the Public Education Network); see also, Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 528 (1980) (suggesting that the interest of blacks in quality education might be better served by "focusing on 'educational components'")

affirmative action front. As an example, in what may prove to be the final triumph of the color-blindness principle in equal protection jurisprudence in education, the University of Michigan is currently fighting a rear-guard action in its effort to retain an admissions program that relies on weak racial preferences.¹⁰²

Another marker of the shift away from race-based claims is that much of the important doctrinal innovation over the past two decades has been confined to non-race-based policies. For instance, while the Supreme Court foreclosed school finance reform efforts in the federal courts in *San Antonio Independent School District v. Rodriguez*,¹⁰³ the constitutionality of school finance regimes has produced interesting doctrinal developments at the state level and has served as a leading example of an expanded state court role in constitutional adjudication—dubbed the “new judicial federalism.”¹⁰⁴ At the same time, the federal

rather than continued efforts at integration).

¹⁰² See *Grutter v. Bollinger*, 137 F. Supp. 2d 821 (E.D. Mich. 2001); *Gratz v. Bollinger*, 122 F. Supp. 2d 811 (E.D. Mich. 2000). Both cases are currently before the Sixth Circuit Court of Appeals. The Fifth Circuit has already held that similar affirmative action admissions programs at the University of Texas are unconstitutional. See *Hopwood v. Texas*, 78 F.3d 932 (1996); see also *Johnson v. Bd. of Regents of Univ. of Ga.*, 263 F.3d 1234 (11th Cir. 2001) (calling the question of diversity-goals “an open question,” and striking down the affirmative action program on tailoring grounds). The Ninth Circuit has determined, however, that diversity is a compelling enough state interest for affirmative action at the University of Washington to pass muster. See *Smith v. Univ. of Wash. Law Sch.*, 233 F.3d 1188 (9th Cir. 2000) (upholding affirmative action and finding diversity to be a compelling state interest). The Supreme Court is likely to grant certiorari in the Michigan case and will determine whether Powell’s plurality opinion in *Regents of the Univ. of Cal v. Bakke*, 438 U.S. 265, 305 (1978), is still good law.

¹⁰³ 411 U.S. 1 (1973) (holding that equal educational funding is not a fundamental right under the Equal Protection Clause of the Fourteenth Amendment).

¹⁰⁴ For discussion of the “equity” and “adequacy” approaches to school finance litigation, see *supra* notes 37-38 and accompanying text. For general discussion of the “new judicial federalism,” see Douglas S. Reed, *Twenty-Five Years After Rodriguez: School Finance Litigation and the Impact of the New Judicial Federalism*, 32 LAW & SOC’Y REV. 175, 176 (1998). For an early articulation, see William J. Brennan, Jr., *The Bill of Rights and the States:*

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courts have decided a neverending string of cases that define the boundaries of accommodations required under the IDEA and The Bilingual Education Act.¹⁰⁵

By contrast, race has seen little state-level doctrinal innovation with the possible exception of an isolated effort to combine school finance and race issues in *Sheff v. O'Neill*.¹⁰⁶ Moreover, the limited doctrinal development relating to race has actually worked to narrow available race-based legal claims. During the most recent term, the Supreme Court handed down *Alexander v. Sandoval*,¹⁰⁷ settling a long-standing question of whether litigants can bring claims under a disparate impact standard in Title VI implementing regulations.¹⁰⁸ The Court answered no and, in one fell swoop, eliminated the legal tool most used by education lawyers to challenge discriminatory practices in a variety of policy areas, including bilingual education,¹⁰⁹ intra-district racial segregation,¹¹⁰ and the critical

The Revival of State Constitutions as Guardians of Individual Rights, 61 N.Y.U. L. REV. 535, 548-49 (1986).

¹⁰⁵ For review of IDEA caselaw, *see supra* note 30. The principal Supreme Court case regarding bilingual education is *Lau v. Nichols*, 414 U.S. 563 (1974). For a review of federal caselaw since *Lau*, *see* Ronald D. Wenkart, *Native Language Instruction and the Special Education Student: Who Decides the Instructional Methodology?*, 125 ED. L. REP. 581, 587-90 (1998).

¹⁰⁶ 678 A.2d 1267 (Conn. 1996).

¹⁰⁷ 532 U.S. 1049 (2001).

¹⁰⁸ *Id.* In *Sandoval*, the Court held that § 602 of Title VI of the Civil Rights Act does not authorize a private right of action under a disparate-impact standard as provided by implementing regulations, forcing litigants to bring suit under § 601 under the more restrictive intentional discrimination standard. Of course, and as Justice Stevens pointed out in dissent, the Court's holding is "something of a sport" for the moment, *id.* at 300 (Stevens, J., dissenting), so long as plaintiffs are able to bring such claims under § 1983. However, the Court recently granted certiorari on a case that squarely raises the question. *See Gonzaga Univ. v. Doe*, 122 S. Ct. 865 (2002).

¹⁰⁹ *Lau v. Nichols*, 414 U.S. 563 (1974) (holding that Title VI proscription of discrimination by federal funding recipients obligated school district to provide bilingual educational services to non-English-speaking students).

¹¹⁰ *See* ORFIELD, *supra* note 1.

new area of racial impact in standardized testing.¹¹¹ The result is that education lawyers currently face a steadily shrinking toolkit from which they can draw in bringing equal protection and other race-based anti-discrimination claims.

The federal courts have clearly done the most to scale back the reach of *Brown*, but the trend away from race-conscious policies is equally evident outside the legal establishment. Indeed, concern with overall educational quality moved ahead of race on most policy agendas after an unremitting series of reports beginning in the 1980s warned of a “rising tide of mediocrity” in American public education.¹¹² Of particular note has been the increasing dominance of the standards-based approach to education reform at the state and federal levels¹¹³ and the proliferation of “whole-school reform” models that provide an off-the-rack reform template to individual schools.¹¹⁴ The result is that the past two decades have witnessed an extraordinary amount of education reform activity within state legislatures, universities, private foundations, and big-city school districts, but comparatively less policy activity that aims to foster racial

¹¹¹ See, e.g., *Debra P. v. Turlington*, 644 F.2d 397 (5th Cir. 1981). For an overview of the law of “high stakes testing,” see Paul T. O’Neill, *Special Education and High Stakes Testing for High School Graduation: An Analysis of Current Law and Policy*, 30 J.L. EDUC. 185 (2001).

¹¹² See, e.g., NAT’L COMM’N ON EXCELLENCE IN EDUC., *A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM* 5 (1983). Other commission and foundation reports decrying the state of American public education include NAT’L GOVERNOR’S ASS’N, *TIME FOR RESULTS: THE GOVERNORS’ 1991 REPORT ON EDUC.* (1991); TASK FORCE ON EDUC. FOR ECON. GROWTH, *EDUC. COMM’N OF THE STATES, ACTION FOR EXCELLENCE: A COMPREHENSIVE PLAN TO IMPROVE OUR NATION’S SCHOOLS*; and ERNEST BOYER, *HIGH SCHOOL: A REPORT ON SECONDARY EDUC. IN AM.*, THE CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING (1983).

¹¹³ The standards movement aims to link student performance on standardized tests to well-enforced rewards and sanctions as a means of creating incentives for school reform and signaling locations within the system where additional resources need to be devoted. See Helen F. Ladd, *Introduction*, in *HOLDING SCHOOLS ACCOUNTABLE: PERFORMANCE-BASED REFORMS IN EDUCATION* 5 (Helen F. Ladd ed., 1996).

¹¹⁴ See Engstrom, *supra* note 75.

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integration or that specifically funnels resources to minority students.¹¹⁵

B. Federalism-Based Resource Disparities

A second aspect of the larger picture painted by the various contributions to *Law & School Reform* is the extent to which law-driven reform efforts in one area of educational policy interact with reform efforts in other areas and sometimes produce unintended consequences. The bird's eye view provided by the contributors to *Law & School Reform* brings this fact into relief. For example, an important legacy of law-driven reform efforts is that legal mobilization on behalf of disabled students and, to a lesser extent, limited English proficient students, has produced a federal statutory rights scheme that exacerbates resource disparities for poor and minority students.

On this point, the most valuable contribution to *Law & School Reform* comes from Molly McUsic, who convincingly argues that the current system allocates resources in ways that shortchange students in poor school districts.¹¹⁶ McUsic summarizes the "three central features" of resource inequalities in the American system as follows:

The legal system that delivers this order of educational inequality is a unique combination of unfunded federal mandates affecting local districts unequally, state legal structures that deliver and fund education on a geographical basis (segregating children largely by race

¹¹⁵ Hess reports that an estimated 3,000 school-reform measures were implemented in the 1980s. By 1984, 275 state-level task forces were focusing on education. See FREDERICK M. HESS, *SPINNING WHEELS: THE POLITICS OF URBAN SCHOOL REFORM* 9 (1999). The sheer number of edited volumes devoted to the topic further evidences the high volume of urban school policy discussion. See, e.g., *CHANGING URBAN EDUCATION* (Clarence Stone ed., 1998); *NEW SCHOOLS FOR A NEW CENTURY: THE REDESIGN OF URBAN EDUCATION* (Diane Ravitch & Joseph Viteritti eds., 1997); *STRATEGIES FOR SCHOOL EQUITY: CREATING PRODUCTIVE SCHOOLS IN A JUST SOCIETY* (Marilyn Gittell ed., 1998).

¹¹⁶ McUsic, *supra* note 35, at 92-93.

and class), and a subsidized system of private schools that serves fewer than 10 percent of schoolchildren.¹¹⁷

While most lawyers and educators are familiar with the advantages conferred by private schooling and the resource disparities that arise from local fiscal control, substantially fewer are probably aware of the allocational impact of unfunded federal mandates relating to special and bilingual education.¹¹⁸

The allocational impact of federal mandates such as IDEA stems from the failure of the federal government to fund the cost of such mandates at anything above token levels.¹¹⁹ Reliable estimates of total special education spending by local school districts as mandated by IDEA and § 504 of the Rehabilitation Act exceed \$58 billion, more than \$33 billion above the cost of providing nonspecial education to those students.¹²⁰ Thus, disabled students receive a little less than one-fifth of total resources in the system, even though disabled students represent less than one-tenth of the total student population.¹²¹ But Congress has never provided more than 13% of special education funding (in 1980), and throughout the 1990s paid between 7% and 8%.¹²² The result is that, of the \$33 billion in marginal expenditures for special education students, Congress foots the

¹¹⁷ *Id.* at 89.

¹¹⁸ For a general discussion of unfunded mandates, see Julie A. Roin, *Reconceptualizing Unfunded Mandates and Other Regulations*, 93 N.W. L. REV. 351 (1999).

¹¹⁹ The foregoing discussion is taken largely from McUsic, *supra* note 35, at 95-97.

¹²⁰ See Jay G. Chambers et al., *What Are We Spending on Special Education in the U.S.?*, Center for Special Education Finance (Feb. 1998), available at <http://csef.air.org/papers/brief8.pdf> (last visited Apr. 18, 2002).

¹²¹ Total education expenditures at the federal, state, and local level in 1998 were \$328 billion. See STATISTICAL ABSTRACT 2000, *supra* note 2, at 172 tbl. 275. The total number of students ages six to twenty-one served under IDEA in 1996-97 was 5,235,952. See U.S. DEPARTMENT OF EDUCATION, TO ASSURE THE FREE APPROPRIATE PUBLIC EDUCATION OF ALL CHILDREN WITH DISABILITIES, *supra* note 4, at ii-16. The total student enrollment in the United States in 1997 was nearly fifty-two million. See STATISTICAL ABSTRACT 2000, *supra* note 2, at 151 tbl. 239.

¹²² McUsic, *supra* note 35, at 95.

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bill for approximately \$2 billion. The remaining \$31 billion falls to states and local school districts. Similarly, in the last year that the Department of Education issued a report to Congress, more than 2.3 million limited English proficient students received services under the Bilingual Education Act; the federal government paid for the cost of educating only about 251,000, or less than 11%, of them.¹²³

The perverse effect of token federal funding of federal mandates is fewer resources for poor, minority, and non-special education students. The reason is that enforceable federal rights under IDEA and the Bilingual Education Act require school districts to allocate resources first to special education and bilingual students, with the remainder going toward the education of nonspecial education students.¹²⁴ In addition, special education and limited-English proficient students tend to be concentrated in relatively poorer school districts.¹²⁵ The result is that poorer districts must allocate a disproportionate share of total resources to compliance efforts under federal mandates.¹²⁶ As McUSIC explains, the “predictable result” of this arrangement is that “a greater share of elementary and secondary school spending over the past twenty years has been allocated to special needs leaving a shrinking share available for nonspecial education.”¹²⁷ And in poor school districts in particular, unfunded federal mandates leave substantially fewer resources for below-average students—particularly what Mark Kelman and Gillian Lester call “garden variety bad readers”¹²⁸—who might make equally compelling claims to scarce educational resources.

¹²³ OFFICE OF BILINGUAL EDUCATION AND MINORITY LANGUAGE AFFAIRS, U.S. DEPARTMENT OF EDUCATION, *THE CONDITION OF BILINGUAL EDUCATION: A REPORT TO CONGRESS AND THE PRESIDENT 20* (1992).

¹²⁴ McUSIC, *supra* note 35, at 97.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ KELMAN & LESTER, *supra* note 84, at 24, 147-48.

C. *Competing Reform Impulses and the Peculiar Legacy of Brown*

A final theme one might glean from the assembled contributions to *Law & School Reform* is that law-driven school reform efforts of the past five decades display a deep tension between two very different reformist impulses. One is a bureaucratic impulse that uses highly targeted resource infusions as a means of maximizing the educational outcomes—and thus the life chances—of specific student groups. This impulse extends to efforts to advance educational equity by raising achievement levels of African-Americans, the poor, the disabled, the limited English proficient, or any other group perceived to be in a position to benefit from additional resources.

Another equally powerful impulse is a legal and cultural impulse extending from *Brown v. Board of Education*¹²⁹ and the broader civil rights movements of the post-war period. The *Brown* impulse is a broader inclusionary vision and, while also aimed at increasing the life chances of disfavored and disadvantaged groups, is also deeply concerned with a broader republican vision of equality that sees the participation of excluded groups in mainstream democratic discourse and social and economic life as ultimately redounding to the benefit of all.¹³⁰ Reform efforts aimed at desegregation and the education of disabled and LEP students are founded at least in part on this broader inclusionary vision.

As a policy analysis matter, the two reformist impulses seem to pose a basic incommensurability problem.¹³¹ How can reformers weigh the relative value of educational achievement

¹²⁹ 347 U.S. 483 (1954).

¹³⁰ See, e.g., Suzanna Sherry, *Responsible Republicanism: Educating for Citizenship*, 62 U. CHI. L. REV. 131 (1995) (exploring the possibility of a constitutional right to education through analysis of the requirements of “republican citizenship”).

¹³¹ See Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 796 (1994) (“Incommensurability occurs when the relevant goods cannot be aligned along a single metric without doing violence to our considered judgments about how these goods are best characterized.”).

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against the values of democratic solidarity, tolerance, or appreciation of human difference that comes with the integration of students of color and students with disabilities into mainstream classrooms?¹³² No unitary metric accounts for how policymakers actually think about the two kinds of benefits. As a result, judging the desirability of different law-driven reform avenues requires reformers to weigh costs and benefits at two very different levels of abstraction.

Of course, critics may argue in response that this incommensurability problem is not insurmountable. Incommensurability need not entail incomparability as a matter of policy analysis. Legislators and other policymakers, for example, frequently weigh costs and benefits between policy outputs to which most economists would attach the incommensurability label. Similarly, critics may point out that the alleged tension between bureaucratic and inclusionary reform impulses is little more than a disagreement about the proper institutional mission of public schools. For instance, some commentators have long argued that schools are too often used as instruments for realizing a broader social vision and that this takes schools away from a more appropriate and more focused pedagogical mission.¹³³ As an example, the “back to basics” movement that swept education policy circles in the 1980s and 1990s was, at least in part, an effort to refocus the mission of public schools.¹³⁴ But others—going all the way back to John Dewey—see moral and political

¹³² Scholars are equally concerned with various “soft” variables, including the extent of stigma that attaches to separate instruction. See MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW* 35-39, 81-86 (1992) (arguing that “least restrictive environment” determinations in the special education context pose a difficult “choice between specialized services and some degree of separate treatment on the one side, and minimized labeling and minimized segregation, on the other”).

¹³³ See DIANE RAVITCH, *LEFT BACK: A CENTURY OF FAILED SCHOOL REFORMS* 15-16 (2000) (arguing that progressive education theorists attempted to make schools more “socially useful,” but instead merely diluted and minimized the core academic curriculum).

¹³⁴ *Id.*

instruction as central to the educational mission of public schools.¹³⁵

Law & School Reform, however, places competing reform approaches side-by-side and helps make the case that the tension is real and has had important distributive implications. Indeed, what the contributions to *Law & School Reform* together suggest, and what is particularly ironic in the education context, is that judicial foreclosure of race-based resource claims has meant that the powerful vision of social inclusion articulated in *Brown* currently bolsters resource claims made by disabled students, but not resource claims made by poor or African-American students, the latter of whom were its original intended beneficiaries. One peculiar and ironic legacy of *Brown*, then, is fewer educational resources for African-Americans.

IV. THE ROLE OF LAWYERS

A. *Are Lawyers to Blame?*

To what extent are lawyers culpable in any of the above? To be sure, identifying trends is not the same as assigning blame. One might argue that the role played by lawyers in past school reform efforts is perfectly understandable. For instance, it is well known that the systemic distributional consequences of individual litigation efforts are a traditional blind spot for the judicial system as a whole.¹³⁶ In addition, lawyers advocate on behalf of particular groups of clients in pursuit of particular outcomes. And, in so doing, lawyers remain bound by professional-ethical obligations that demand zealous pursuit of client interests. Lawyers as a whole also tend to view the social world through the lens of the creation and vindication of rights. Given that the dominant legal understanding sees rights as trumps that immunize

¹³⁵ See generally JOHN DEWEY, *EXPERIENCE AND EDUCATION* (1997).

¹³⁶ See HOROWITZ, *supra* note 46, at 32-62 (describing the problems of information, vision, and piecemeal adjudication that are unique to the judicial process).

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individual rights-bearers from majoritarian decision-making,¹³⁷ it is perhaps unfair to argue that lawyers should be better attuned to the global budgeting process that drives most social policymaking in non-legal, non-rights-oriented contexts.

Also, the traditional blindness of lawyers to the distributional consequences of law-driven school reform efforts may not be grounds for critique at all, but rather should be seen as laudable and entirely consistent with the institutional role of lawyers. We might even believe that the lawyers-as-hired-guns model maximizes institutional performance of the judicial system, whether as a truth-seeking device or as a forum for resolving competing resource claims.¹³⁸ And to the extent that lawyers engaged in law-driven school reform efforts are self-consciously practicing so-called “cause lawyering,” it would be difficult to critique education lawyers for attempting to connect morality to law, particularly if such efforts ultimately legitimate the profession and the legal system as a whole.¹³⁹ In short, to lay blame at the feet of education lawyers requires a deeper—and likely unsuccessful—critique of the lawyerly craft and institutional role.

B. The Future of Law-Driven School Reform

The more important question is, how might law-driven reform efforts advance educational equity in the future? At the end of the day, *Law & School Reform* provides very little concrete guidance to education lawyers going forward. The prescriptions are simply too narrow. Reading *Law & School*

¹³⁷ See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 184-205 (1977). For further discussion of various rights conceptions, see Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEG. STUD. 725 (1998).

¹³⁸ See, e.g., STEPHAN LANDSMAN, *THE ADVERSARY SYSTEM: A DESCRIPTION AND DEFENSE* 44-51(1984).

¹³⁹ See Austin Sarat & Stuart Scheingold, *Cause Lawyering and the Reproduction of Professional Authority: An Introduction*, in *CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES* 3 (Austin Sarat & Stuart Scheingold eds., 1998).

Reform, one cannot help but think that law-driven reform efforts will never again impact educational equity to the same extent that earlier, *Brown*-inspired challenges did.¹⁴⁰ Instead, future reform efforts will likely center on the much more mundane task of optimizing resource allocations within the system as a whole. And without denigrating what remains an important task, what is most depressing from a lawyerly perspective is that it is not clear why lawyers and litigation enjoy any comparative advantage in any of the tasks that lie ahead.

That said, *Law & School Reform* is a valuable contribution to the literature because it is the first volume of its kind to juxtapose the various approaches through which lawyers, law, and legal institutions have engaged the educational system in an effort to advance educational equity. The book thus represents a coherent attempt to do what legal scholars and policy advocates have only recently started to do—to think hard about how different legal movements fit together and judge the relative efficacy of available law-driven reform approaches.¹⁴¹ Here is where *Law & School Reform* promises to spur interesting debate. And here is where Heubert's take on the issues is not so vulnerable to critique as it is to the thought that he might have productively taken his call for policy learning even further.

Policy learning may be precisely what is needed because much of the explanation for trends in the allocation of educational resources is political. Legal scholarship has only just begun to critique the political presuppositions and theories of anti-

¹⁴⁰ Of course, recent scholarship also argues that *Brown* may have been less effective than most lawyers had thought, see ROSENBERG, *supra* note 8, at 49-54 (summarizing data on the relationship of the Court's *Brown* decision and actual desegregation of public schools), or even counterproductive, see Michael Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 10-11 & n.10 (1994) (arguing that racial change would have come regardless of *Brown*, and that the Court's decision may have actually forestalled federal legislative change by crystallizing southern white resistance).

¹⁴¹ See, e.g., James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 254, 256 (1999) (assessing the relative efficacy of desegregation and school finance reform and arguing for more of the former).

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discrimination that underpin redistributive claims in the education policy context.¹⁴² Some have argued that the disabled are a readily identifiable and socially salient subset of the student population, and that their claims for resource infusions are strengthened because of the ease with which disabled students can be constructed as a plausible deserving group.¹⁴³ In addition, and as Heubert observes, “Minority children, poor children, and immigrant children do not enjoy as much political or legal support as do children whose defining characteristic—disability—cuts across all economic classes and racial groups.”¹⁴⁴ The disabled clearly enjoy an enormous amount of political power, at least relative to other more diffuse and less well-organized groups.¹⁴⁵ In addition, the IDEA was pushed through Congress with surprisingly little opposition, buffeted in part by middle class parents in search of additional resources and a less stigmatizing label for their under-achieving children.¹⁴⁶ Finally, it is worth noting that legislative efforts on behalf of the learning disabled took place in a post-1960s Washington policymaking environment that is seen by many political scientists as increasingly receptive to narrow interest group claims.¹⁴⁷

¹⁴² The most thoughtful contribution by far is KELMAN & LESTER, *supra* note 84. However, Kelman and Lester focus exclusively on special education and, in particular, those students labeled “learning disabled” (“LD”), and do not compare special education and race-based claims. For a broader treatment of the “difference dilemma” at the heart of redistributive politics, see MINOW, *supra* note 132.

¹⁴³ On this point, see KELMAN & LESTER, *supra* note 84, at 197. The authors claim that this construction matters most of all because it takes advantage of a basic distinction that underpins nearly all American welfare state politics—between the deserving and undeserving poor. See also MICHAEL B. KATZ, *THE UNDESERVING POOR: FROM THE WAR ON POVERTY TO THE WAR ON WELFARE* 10 (1989); Michele L. Landis, *Fate, Responsibility, and “Natural” Disaster Relief: Narrating the American Welfare State*, 33 *LAW & SOC’Y REV.* 257, 257 (1999).

¹⁴⁴ Heubert, *supra* note 19, at 16.

¹⁴⁵ See JAMES Q. WILSON, *POLITICAL ORGANIZATIONS* (1973).

¹⁴⁶ See KELMAN & LESTER, *supra* note 84.

¹⁴⁷ The IDEA emerged during the post-1960s dispersal of power in the Washington policymaking environment that some political scientists have

Programs that serve minority and poor students, by contrast, suffer from a form of “entitlement creep,” a familiar phenomenon whereby government programs—particularly means-tested benefits—gradually creep up the socio-economic ladder and are distributed to claimants eager to take advantage of government largesse.¹⁴⁸ Title I of the Elementary and Secondary Education Act was initially conceived as a means of topping up education spending and funneling additional federal resources to poor and, in particular, heavily African-American districts.¹⁴⁹ The program has evolved, however, in very different directions. As McUsic points out,

[T]he same political forces that shape and preserve the current legal regime also shaped Title I, turning it, in effect, into a pork barrel program with funds for every congressional district, and thereby turning federal funds

argued increased the receptivity of the political system to narrow interest group claims. The most notable changes, which likely drove the others, were internal reforms in Congress to a freewheeling and decentralized committee system that increased interest group access. See Paul J. Quirk, *Policy Making in the Contemporary Congress: Three Dimensions of Performance*, in *THE NEW POLITICS OF PUBLIC POLICY* 228, 229 (Mark K. Landy & Martin A. Levin eds., 1995). In particular, a process once dominated by policy “subgovernments”—characterized by close relations between an oligarchically organized Congress and powerful private interests—now takes place within more inclusive and diffuse “issue networks” inhabited by a more complex array of stake-holders and stake-challengers. See Hugh Hecl, *Issue Networks and the Executive Establishment*, in *THE NEW AMERICAN POLITICAL SYSTEM* 87, 88 (Anthony King ed., 1978). In addition, the development of sophisticated media technologies and changes in the electoral system—including the post-1972 embrace of direct primaries and campaign finance reforms—have produced “candidate-centered” campaigns while simultaneously weakening party affiliations. See Martin P. Wattenberg, *From a Partisan to a Candidate-Centered Electorate*, in *THE NEW AMERICAN POLITICAL SYSTEM* 139, 140 (Anthony King ed., 1990).

¹⁴⁸ See ROBERT E. GOODIN & JULIAN LE GRAND, *NOT ONLY THE POOR: THE MIDDLE CLASSES AND THE WELFARE STATE* 3 (1987) (arguing that the non-poor play a major role in “creating, expanding, sustaining, reforming, and dismantling the welfare state” and that their involvement is at least in part driven by their desire to capture programs for their direct benefit).

¹⁴⁹ See 20 U.S.C. § 6301 (1994); McUsic, *supra* note 35, at 94.

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intended to be more or less equalizing across states and districts into payments that were more or less equal across states and districts.¹⁵⁰

As of 1993, McUsic continues, approximately 90% of the nation's school districts and 71% of all public elementary schools received Title I funding.¹⁵¹

At a time when the educational system is wrestling with fundamental questions of "who gets what, when, how," it seems that the most productive activities in which lawyers can engage are proactive, challenging dialogue about future policy options and pressing for a fair allocation of resources within the political process that may or may not be skewing redistributions in unintended ways. As an example, lawyers are already playing an important role in rapidly proliferating litigation challenging the establishment and placement of charter schools.¹⁵² Thus, lawyers can make a critical contribution by ensuring that reform approaches do not disproportionately aid the better-off at the expense of the worse-off. In addition, the organization and delivery of public education is clearly in for substantial change in the coming years. Non-legal scholars have begun to stake out a position that calls for a re-alignment of the entire system of school finance at all three levels of government.¹⁵³ And on January 8, 2002, President Bush signed into law the "No Child Left Behind Act," described by some as the most sweeping federal school measure since passage of the Elementary and

¹⁵⁰ McUsic, *supra* note 35, at 94.

¹⁵¹ *Id.* at 94.

¹⁵² See, e.g., Tomiko Brown-Nagin, *Toward a Pragmatic Understanding of Status-Consciousness: The Case of Deregulated Education*, 50 DUKE L.J. 753, 758 n.15 (documenting litigation challenging charter schools that are "status identifiable" and thus aim to prevent actual and prospective charter schools from disproportionately aiding elites or practicing various forms of discrimination).

¹⁵³ See, e.g., KENNETH K. WONG, *FUNDING PUBLIC SCHOOLS: POLITICS AND POLICIES 1-2* (1999) (arguing that the key to maximizing the performance of the educational system as a whole is the creation of decision rules that better align and allocate resources among levels of government).

Secondary Education Act in 1965.¹⁵⁴ Changes to the system will undoubtedly provide opportunities and challenges for reform-minded lawyers.

CONCLUSION

In the end, *Law & School Reform* is an outstanding and much-needed contribution to the field of law and education scholarship. It is notable that the book bills itself as being “not solely for legal experts or scholars but for a general audience of educators, advocates, policy makers, parents, and scholars interested in school reform.”¹⁵⁵ For general audiences, the book elegantly covers a tremendous amount of territory. Unfortunately, for lawyers seeking to use their lawyerly skills to increase educational equity, the book probably falls short as a how-to guide. Even so, this may be the ultimate strength of *Law & School Reform*, particularly given what lies ahead. Indeed, what emerges from the juxtaposition of different reform approaches in *Law & School Reform* is a sense that lawyers can contribute greatly to the advancement of educational equity not by becoming more informed about the nuts and bolts of specific education practice areas or by initiating additional litigation, but rather by becoming better and more persuasive policy wonks. By continuing to think about how legal strategies interact, what kinds of educational equity are worth pursuing, and which groups are likely to emerge as winners and losers in the political process, lawyers can continue to broaden and deepen educational equity in ways that balance the competing impulses within prior law-driven

¹⁵⁴ See Helen Dewar, *Landmark Education Legislation Gets Final Approval in Congress*, WASH. POST, Dec. 19, 2001, at A8. Among other things, the bill mandates standardized testing for all students from grades three through eight, imposes sanctions against schools that do not demonstrate steady improvement over a twelve year period, provides failing schools with additional money for tutoring and other services, increases the federal share of special education costs, and sets into motion a limited form of school choice, whereby students in perpetually failing schools will be free to attend neighboring schools if their own schools fail to meet performance goals. *Id.*

¹⁵⁵ Heubert, *supra* note 19, at 8.

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reform efforts. By making available in a single volume nearly fifty years of law-driven school reform efforts, *Law & School Reform* almost certainly helps to move education lawyers down that path.