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Beyond School Finance: Refocusing Education Reform Litigation to Realize the Deferred Dream of Education Equality and Adequacy

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BEYOND SCHOOL FINANCE: REFOCUSING EDUCATION REFORM LITIGATION TO REALIZE THE DEFERRED DREAM OF EDUCATION EQUALITY AND ADEQUACY

ABSTRACT

The academic achievement gap between poor, minority students and their wealthier white peers has been one of the most troubling and persistent policy problems in the United States throughout its history. For the past forty years, education reformers have turned to the courts to increase educational opportunities for minority and impoverished children by increasing their access to funding. Success in court has been mixed. While the Supreme Court's decision in San Antonio Independent School District v. Rodriguez *foreclosed the possibility of a federal right to equalized education expenditures, education reform plaintiffs in many states have been able to secure a state constitutional right to equalized education funding. Yet, despite these judicial victories, education reformers have failed to achieve their ultimate goal of equalizing educational opportunity. A substantial achievement gap that cuts along racial and socioeconomic lines still exists. Thus, the focus on disparities in education expenditures appears misplaced.*

This Comment proposes that litigants should redirect their attention to challenging inequitable or inadequate distributions of skill-based education inputs at the local level. This new approach is superior to the current focus on school finance challenges because researchers have increasingly found that skill-based inputs, such as teacher quality, are substantially related to improved academic outcomes. The approach this Comment proposes is also superior to finance suits because courts should be more receptive to these locally focused challenges, which raise fewer justiciability concerns than school finance suits. Accordingly, these new claims have the potential to lead to greater success in the courtroom and the classroom.

INTRODUCTION

Education inequality and inadequacy have plagued American society for years in a phenomenon that is commonly referred to as the achievement gap.[1] This academic achievement gap cuts along racial and socioeconomic lines, and it appears to be growing wider.[2] Poor, minority students continue to perform academically at much lower levels than wealthier, white students.[3] While publicly provided education has traditionally been seen as an equalizing force between the rich and poor, analysis of the achievement gap suggests that the current public education system is having the opposite effect.[4] Although poor black and Hispanic students often enter school less prepared than their white peers, the gap between these groups actually increases over the course of a student's academic career.[5]

The idea that the achievement gap widens while students are receiving their formal education seems counterintuitive. However, it becomes less surprising when one considers that poor, minority students generally are taught by the least qualified teachers and are put in classes that teach the least challenging curriculum.[6] The resulting achievement disparity is shocking. As one education policy organization observed, "17-year-old African American and Latino students have skills in English, math, and science similar to those of 13-year-old Whites."[7]

Education reformers have often turned to the courts for help in closing this achievement gap.[8] In pursuit of this goal, reform-oriented plaintiffs have had an almost single-minded focus in their litigation over the past forty years—

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1 Sabrina Tavernise, *Poor Dropping Further Behind Rich in School*, N.Y. TIMES, Feb. 10, 2012, at A1.

2 Sean F. Reardon, *The Widening Academic Achievement Gap Between the Rich and the Poor: New Evidence and Possible Explanations*, *in* WHITHER OPPORTUNITY? 91, 94–95 (Greg J. Duncan & Richard J. Murnane eds., 2011).

3 *See infra* Part II.A; *see also* Reardon, *supra* note 2, at 94–95.

4 *See* Richard J. Murnane et al., *Understanding Trends in the Black–White Achievement Gaps During the First Years of School*, *in* BROOKINGS-WHARTON PAPERS ON URBAN AFFAIRS 97, 98–99 (Gary Burtless & Janet Rothenberg Pack eds., 2006); Meredith Phillips et al., *Does the Black–White Test Score Gap Widen After Children Enter School?*, *in* THE BLACK–WHITE TEST SCORE GAP 229, 229–33 (Christopher Jencks & Meredith Phillips eds., 1998).

5 *See* Murnane et al., *supra* note 4, at 98–99; Phillips et al., *supra* note 4, at 229–33.

6 *See infra* text accompanying notes 105–08.

7 Press Release, Educ. Trust, States Can Close the Achievement Gap by Decade's End (Mar. 2, 2001), *available at* http://www.edtrust.org/dc/press-room/press-release/states-can-close-the-achievement-gap-by-decades-end-new-education-trust-.

8 *See infra* Part II.

increasing the amount of funding available to educate poor, minority students.[9] However, their dogged persistence has failed to achieve equity and adequacy, despite numerous judicial decisions in their favor.[10] Minority students in the twelfth grade still perform academically at the level of white students in the eighth grade.[11] This is true even in states where education reform plaintiffs have won major judicial victories that led to increased education spending for poor, minority students.[12]

The fact that the achievement gap persists in states where school finance litigants have won judicial victories suggests that more money does not ensure greater educational outcomes. For that reason, this Comment challenges the assumption that the best way to improve academic achievement and reduce inequality is through education finance litigation. Rather than maintain a single-minded focus on statewide education appropriations, this Comment argues that education reform litigants should shift their attention to challenging local policies that cause an inequitable or inadequate distribution of skill-based education inputs, such as teachers. The widely used school district policy of laying off teachers based exclusively on lack of seniority is an example of one such policy that education reform litigants should challenge. This new litigation approach is advisable because research increasingly shows that teachers are the most important variable in closing the achievement gap between middle-class and poor students.[13]

Education reform litigants can use state constitutional jurisprudence developed in school finance cases to bring these types of claims throughout the country. This may even be true in states that have found finance challenges nonjusticiable on the grounds that finance claims inappropriately require courts to substitute their judgment for the legislature's concerning statewide appropriations. Because the claims this Comment proposes are focused on local school districts and do not directly challenge statewide legislative appropriations, reformers may enjoy success in states that have held that school finance challenges are nonjusticiable.

This Comment proceeds in five parts. Part I discusses the different approaches education reform litigants have taken over the past forty years in

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9 *See infra* Part I.A–C.

10 *See infra* Part I.

11 *See* Alfinio Flores, *Examining Disparities in Mathematics Education: Achievement Gap or Opportunity Gap?*, HIGH SCH. J., Oct.–Nov. 2007, at 29, 30; Press Release, Educ. Trust, *supra* note 7.

12 *See infra* text accompanying notes 112–18.

13 *See infra* Part III.A.

challenging state education finance systems, and it introduces the federal and state constitutional jurisprudence related to education rights. Part II demonstrates the failure of school finance litigation to improve the academic achievement of poor, minority students, suggesting that a focus on increasing education expenditures is insufficient to achieve equality and adequacy in education.

Part III presents evidence that skill-based education inputs are the most important variables in improving academic outcomes and argues that education reform litigants should focus their efforts on challenging policies that result in unequal or inadequate distributions of these resources. In particular, Part III offers seniority-based teacher layoffs as an example of a policy that education reform litigants should challenge, and it concludes by discussing an instance where this policy was successfully enjoined in California. Part IV then analyzes whether litigation similar to the California suit would be viable in other states, given that most education rights suits are now based on state constitutional provisions, which may differ significantly between states. Part IV ultimately argues that courts throughout the country would likely recognize claims challenging inequitable or inadequate distributions of skill-based inputs. Finally, Part V focuses on remedies, proposing that courts that find for plaintiffs in these cases should limit their intervention to declaratory relief, but should also grant injunctive relief when circumstances indicate that declaratory relief will not spur swift reform.

I. FORTY YEARS OF SCHOOL FINANCE LITIGATION

Education reform litigation has typically focused on challenges to school finance systems.[14] It is commonly seen as taking place in three "waves" of reform that differed based on the arguments raised by plaintiffs.[15] The first two sections of Part I introduce the first two waves of litigation, in turn, during which plaintiffs' claims were typically defeated. The third section looks more closely at the current third wave of litigation, in which plaintiffs have enjoyed more success in convincing courts to overturn statewide education finance

[14] This term refers to how state legislatures choose to allocate money to fund public schools throughout a state. Typically, finance systems fund local schools through a combination of local property taxes, statewide funds, and federal money. *See* Serrano v. Priest (*Serrano I*), 487 P.2d 1241, 1245–46 (Cal. 1971) (in bank). Throughout this Comment, school finance systems and school finance schemes are referred to interchangeably.

[15] Scott R. Bauries, *Is There an Elephant in the Room?: Judicial Review of Educational Adequacy and the Separation of Powers in State Constitutions*, 61 ALA. L. REV. 701, 704 (2010).

schemes. The final section concludes by discussing justiciability concerns—the primary legal barrier to school finance litigants throughout the three waves.

A. The First Wave: Equal Protection Claims Under the U.S. Constitution

The first wave of school finance litigation began in 1971,[16] when the California Supreme Court held that the state's school finance system, which resulted in significant disparities in funding between school districts,[17] violated the equal protection guarantees of the United States and California constitutions.[18] During this first wave of litigation, plaintiffs primarily argued that school finance systems that permitted unequal funding between school districts violated the Fourteenth Amendment of the U.S. Constitution.[19] The first wave came to an abrupt end in 1973, however, when the Supreme Court decided *San Antonio Independent School District v. Rodriguez*,[20] an equal protection challenge to Texas's school finance scheme that created inequalities in school district funding.

In *Rodriguez*, the Supreme Court's rejection of two arguments proved fatal to education reformers' federal finance suits. First, the Court rejected the claim that education was a fundamental right under the U.S. Constitution.[21] Second, the Court refused to recognize wealth as a suspect classification.[22] Accordingly, the equal protection challenge to Texas's finance scheme did not trigger strict scrutiny from the Court. Instead, the Court applied the more deferential standard of rational-basis scrutiny and upheld Texas's finance system as rationally related to the legitimate state interest in local control.[23] Thus, *Rodriguez* forced reformers relying on the Federal Constitution to eliminate educational inequality to pursue a new path for redress.[24] This new path lay in the Court's concluding comment in *Rodriguez* that "[t]he

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[16] William E. Thro, *Judicial Analysis During the Third Wave of School Finance Litigation: The Massachusetts Decision as a Model*, 35 B.C. L. REV. 597, 601 n.22 (1994).

[17] *Serrano I*, 487 P.2d at 1247–48.

[18] *Id.* at 1241.

[19] *See, e.g.*, Quentin A. Palfrey, *The State Judiciary's Role in Fulfilling* Brown*'s Promise*, 8 MICH. J. RACE & L. 1, 13 (2002).

[20] 411 U.S. 1 (1973).

[21] *Id.* at 37.

[22] *Id.* at 28.

[23] *Id.* at 49, 55.

[24] *But see* Justin J. Sayfie, Comment, *Education Emancipation for Inner City Students: A New Legal Paradigm for Achieving Equality of Educational Opportunity*, 48 U. MIAMI L. REV. 913, 922–23 (1994) (arguing that plaintiffs may have been successful if they claimed to be receiving "an education falling below a hypothesized constitutional floor" rather than a "*relative* disadvantage").

consideration and initiation of fundamental reforms with respect to state taxation and education are matters *reserved for . . . the various States*."[25]

B. The Second Wave: Equal Protection Claims Under State Constitutions

After the Supreme Court noted that education finance was a matter best reserved to the states,[26] school finance litigation shifted to state-specific attacks.[27] This new strategy emerged soon after the *Rodriguez* decision.[28] Specifically, litigants focused on challenging school finance schemes based on state, rather than federal, equal protection rights.[29] This new approach seemed promising because it directly addressed a shortcoming of the plaintiffs' case in *Rodriguez*—the lack of a textual right to education in the U.S. Constitution.[30]

While the U.S. Constitution does not provide for a right to education,[31] all state constitutions contain explicit provisions regarding education.[32] For that reason, litigants reasoned they might be able to argue more successfully that education was a fundamental right under state constitutions.[33] If that were the case, school finance schemes would warrant strict scrutiny under state equal protection jurisprudence.[34] This approach was bolstered by the fact that state courts were not required to follow federal constitutional jurisprudence in interpreting their own state constitutional provisions.[35]

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[25] *Rodriguez*, 411 U.S. at 58 (emphasis added).

[26] *Id.*

[27] William F. Dietz, Note, *Manageable Adequacy Standards in Education Reform Litigation*, 74 WASH. U. L.Q. 1193, 1198 (1996).

[28] Joseph S. Patt, Note, *School Finance Battles: Survey Says? It's All Just a Change in Attitudes*, 34 HARV. C.R.-C.L. L. REV. 547, 559 (1999). The second wave began with the New Jersey Supreme Court's decision in *Robinson v. Cahill*, 303 A.2d 273 (N.J. 1973). Kevin Randall McMillan, Note, *The Turning Tide: The Emerging Fourth Wave of School Finance Reform Litigation and the Courts' Lingering Institutional Concerns*, 58 OHIO ST. L.J. 1867, 1872 (1998).

[29] Derrick Darby & Richard E. Levy, *Slaying the Inequality Villain in School Finance: Is the Right to Education the Silver Bullet?*, 20 KAN. J.L. & PUB. POL'Y 351, 360 (2011).

[30] *See* Patt, *supra* note 28, at 559.

[31] *Rodriguez*, 411 U.S. at 35 ("Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected. As we have said, the undisputed importance of education will not alone cause this Court to depart from the usual standard for reviewing a State's social and economic legislation.").

[32] Molly McUsic, *The Use of Education Clauses in School Finance Reform Litigation*, 28 HARV. J. ON LEGIS. 307, 311 (1991) ("Every state constitution contains an education clause that generally requires the state legislature to establish some system of free public schools." (footnote omitted)).

[33] Patt, *supra* note 28, at 559.

[34] *Id.*

[35] *See* Dietz, *supra* note 27, at 1198.

Litigation during the second wave of reform enjoyed limited success.[36] About half of school finance plaintiffs were successful in having their state's finance system overturned.[37] When plaintiffs were successful, state courts typically applied strict scrutiny after holding that education was a fundamental right or that wealth was a suspect classification.[38] However, many state courts refused to strike down school finance schemes by simply adopting the Supreme Court's *Rodriguez* analysis.[39]

These latter courts were still reluctant to grant plaintiffs victories for several reasons. Many courts resisted equality arguments because of concern that a constitutional requirement of equal educational funding could lead to calls for equalizing state funding in all areas of government spending.[40] Courts were also hesitant to find for plaintiffs because of two justiciability concerns: (1) the perception that judges did not have the expertise to get involved in complicated problems of education finance, and (2) the lack of manageable standards for determining what qualified as a "fair and equitable" finance system.[41] Given the mixed success of school finance plaintiffs during the second wave, litigants eventually turned to a new approach that would usher in the third wave of education finance litigation.

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[36] McUsic, *supra* note 32, at 314.

[37] Aaron Y. Tang, *Broken Systems, Broken Duties: A New Theory for School Finance Litigation*, 94 MARQ. L. REV. 1195, 1202 (2011).

[38] *See, e.g.*, Serrano v. Priest (*Serrano II*), 557 P.2d 929, 951–52 (Cal. 1976) (in bank) (finding wealth to be a suspect classification); Horton v. Meskill, 376 A.2d 359, 374 (Conn. 1977) (finding a fundamental right to education); Pauley v. Kelly, 255 S.E.2d 859, 878 (W. Va. 1979) (finding a fundamental right to education); Washakie Cnty. Sch. Dist. No. One v. Herschler, 606 P.2d 310, 334 (Wyo. 1980) ("A classification on the basis of wealth is considered suspect, especially when applied to fundamental interests."). *But see* Dupree v. Alma Sch. Dist. No. 30, 651 S.W.2d 90, 93 (Ark. 1983) (striking down school finance system under rational-basis scrutiny).

[39] Allen W. Hubsch, *The Emerging Right to Education Under State Constitutional Law*, 65 TEMP. L. REV. 1325, 1325–26, 1330 (1992).

[40] Avidan Y. Cover, Note, *Is "Adequacy" a More "Political Question" than "Equality?": The Effect of Standards-Based Education on Judicial Standards for Education Finance*, 11 CORNELL J.L. & PUB. POL'Y 403, 410 (2002).

[41] William S. Koski, *Of Fuzzy Standards and Institutional Constraints: A Re-Examination of the Jurisprudential History of Educational Finance Reform Litigation*, 43 SANTA CLARA L. REV. 1185, 1189 (2003).

C. The Third Wave: Adequacy Claims Under the Education Articles of State Constitutions

The third wave of school finance litigation began in 1989 as plaintiffs shifted their equality arguments to adequacy arguments,[42] claiming that school finance schemes failed to provide a minimally adequate education as required by state constitutions.[43] During this period of litigation, which continues today, courts have interpreted the education clauses in state constitutions to require states to provide a substantive education that does not fall below a minimally adequate level.[44]

All state constitutions, except for the Mississippi Constitution, contain an education clause that directs the legislature to provide for some level of education.[45] The clauses are not uniform among the states, however, and they impose differing duties upon the legislature based on the constitutional text.[46] Despite the lack of uniformity, many clauses are similar enough to allow classification into three general categories of ascending legislative duties.[47]

The first category—"establishment provisions"—encompasses seventeen constitutions that impose a duty upon the legislature to create and maintain a system of free public education.[48] These education clauses, on their face, do not require the state to provide any particular qualitative level of education.[49] The second category includes eighteen state constitutions that provide general

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[42] The adequacy claims that characterize the third wave of reform continue as the primary approach to challenging school finance systems today. Bauries, *supra* note 15, at 705.

[43] Koski, *supra* note 41, at 1192.

[44] *Id.* at 1191. Plaintiffs often failed when relying upon an education clause to make an equity claim. Hubsch, *supra* note 39, at 1336. For example, the Colorado Supreme Court rejected the argument that the Colorado constitutional requirement of "thorough and uniform" public schools required equal school expenditures. Lujan v. Colo. State Bd. of Educ., 649 P.2d 1005, 1024 (Colo. 1982) (en banc).

[45] William E. Thro, *A New Approach to State Constitutional Analysis in School Finance Litigation*, 14 J.L. & POL. 525, 538 (1998).

[46] *Id.* at 538–39.

[47] *See, e.g.*, *id.* at 539–40.

[48] *Id.* at 539. Connecticut's constitutional requirement serves as a typical example: "There shall always be free public elementary and secondary schools in the state. The general assembly shall implement this principle by appropriate legislation." CONN. CONST. art. VIII, § 1.

[49] *See, e.g.*, Thro, *supra* note 45, at 539 n.36. For example, the Alaska Constitution provides:

> The legislature shall by general law establish and maintain a system of public schools open to all children of the State, and may provide for other public educational institutions. Schools and institutions so established shall be free from sectarian control. No money shall be paid from public funds for the direct benefit of any religious or other private educational institution.

ALASKA CONST. art. VII, § 1.

"quality provisions" regarding education.[50] These provisions typically require the legislature to create a system of public education that is "thorough," "efficient," or "thorough and efficient."[51] The third category includes the fourteen constitutions that make education a "high duty" for the state.[52] The text of these constitutional provisions indicates that the legislature's duty to provide for education trumps legislative duties in other areas.[53]

These education clauses form the bedrock of the adequacy arguments—claiming that the legislature must provide for a substantively adequate education system—that characterize the third wave. Adequacy arguments enjoy several advantages over the equality arguments of the first two reform periods.[54] First, education clauses in state constitutions provide courts with a clear textual source for finding a state duty to provide education to residents.[55] Adequacy suits are thus able to sidestep the textual hurdle that confronted earlier litigants, particularly during the first wave of litigation.[56] Second, adequacy claims appeal to traditional notions of fairness.[57] Few would disagree that all children should receive a minimally basic education. Demands for equal education are more controversial.[58] In accordance with this notion, adequacy suits do not discourage local school districts from providing a greater-than-adequate education for their students by threatening to redistribute any extra resources to a poorer district.[59] Lastly, adequacy arguments are limited to education, whereas equality arguments raise the danger that granting

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[50] Thro, *supra* note 45, at 539.

[51] *Id.* at 539 n.38. The Illinois Constitution provides an example of this type of education clause. The constitution requires: "The State shall provide for an efficient system of high quality public educational institutions and services. Education in public schools through the secondary level shall be free. There may be such other free education as the General Assembly provides by law." ILL. CONST. art. X, § 1.

[52] Thro, *supra* note 45, at 539–40.

[53] *Id.* Georgia's constitutional requirement that "[t]he provision of an adequate public education for the citizens shall be a primary obligation of the State of Georgia. . . . [which] shall be free and shall be provided for by taxation" falls within this category. GA. CONST. art. VIII, § 1.

[54] Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101, 166–70 (1995).

[55] *Id.* at 166–67.

[56] *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973) ("Education, of course, is not among the rights afforded explicit protection under our Federal Constitution.").

[57] Enrich, *supra* note 54, at 167.

[58] *Id.*

[59] *Id.* This fear was evident in the wake of the California Supreme Court's decision in *Serrano v. Priest*, which required the state to equalize funding between school districts. In the wake of *Serrano*, Californians passed Proposition 13, which dramatically limited annual real estate taxes that funded schools. Christine M. O'Neill, Comment, *Closing the Door on Positive Rights: State Court Use of the Political Question Doctrine to Deny Access to Educational Adequacy Claims*, 42 COLUM. J.L. & SOC. PROBS. 545, 552 (2009).

plaintiffs relief may spur equality demands in a variety of other sectors in which the government provides services.[60] Perhaps because of these advantages, plaintiffs have enjoyed more success during the third wave of litigation.[61] Courts in Kentucky, Montana, Texas, Arizona, Massachusetts, New Jersey, and Tennessee, among others, have found that their states' school finance systems violated the education clauses of their respective state constitutions.[62]

Despite the advantages of adequacy arguments, state courts still confront challenges when relying upon an education clause to hold that the state must provide a constitutionally adequate education.[63] The primary challenge is interpretive[64]—figuring out what exactly constitutes an adequate education based on the relatively sparse constitutional text.[65] In addition, courts still have concerns about the justiciability of adequacy claims.[66] As a result, inconsistent results still characterize the jurisprudence of the third wave.[67] While some state courts have been more willing to "make forays into educational policy-making,"[68] others have remained hesitant to enter the brier patch based on justiciability concerns.[69]

Commentators have struggled to explain this divergence between activism and restraint.[70] One might expect more activism in a state whose education clause makes education a "high duty" for the legislature, and more judicial

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60 Enrich, *supra* note 54, at 168.

61 Dietz, *supra* note 27, at 1200, 1201 n.65.

62 *Id.*

63 Enrich, *supra* note 54, at 170, 179.

64 *Id.* at 170.

65 For example, the Kentucky Constitution provides that "[t]he General Assembly shall, by appropriate legislation, provide for an efficient system of common schools throughout the State." KY. CONST. § 183.

66 *See, e.g.*, Neb. Coal. for Educ. Equity & Adequacy v. Heineman, 731 N.W.2d 164, 183 (Neb. 2007); Okla. Educ. Ass'n v. State, 2007 OK 30, ¶ 26, 158 P.3d 1058, 1066.

67 For example, the Kentucky Supreme Court struck down the state's entire school system, not just its funding scheme, even though Kentucky's constitution only contains a "quality provision" in its education clause. *See* Rose v. Council for Better Educ., Inc., 790 S.W.2d 186 (Ky. 1989). In contrast, the Illinois Supreme Court held that school finance challenges were nonjusticiable even though the Illinois Constitution has an education clause that makes education a "high duty" of the state. *See* Comm. for Educ. Rights v. Edgar, 672 N.E.2d 1178 (Ill. 1996).

68 Koski, *supra* note 41, at 1192.

69 *See, e.g.*, *Edgar*, 672 N.E.2d at 1189; City of Pawtucket v. Sundlun, 662 A.2d 40, 59 (R.I. 1995) ("[T]he absence of justiciable standards could engage the court in a morass comparable to the decades-long struggle of the Supreme Court of New Jersey that has attempted to define what constitutes the 'thorough and efficient' education specified in that state's constitution.").

70 *See, e.g.*, Karen Swenson, *School Finance Reform Litigation: Why Are Some State Supreme Courts Activist and Others Restrained?*, 63 ALB. L. REV. 1147 (2000).

restraint in a state that only has a weak "establishment provision" in its education clause. However, commentators have observed that there is surprisingly no relationship between the strength of a state constitution's education clause and a court's finding that a school finance system is unconstitutional.[71] Other commentators have argued that "courts often have ignored the meaning of the text" in interpreting their state's education article.[72] Some observers suggest that additional explanations, such as judicial frustration with the relative unwillingness of legislatures to reform a school finance scheme, do not account for the inconsistent results.[73] However, courts have been less likely to strike down a school finance scheme in states with higher per pupil expenditures.[74]

Despite the judicial activism that characterized the start of the third wave of litigation,[75] inconsistency remains. Evidence even suggests that courts are increasingly granting victories to states over plaintiffs because of lingering justiciability concerns.[76]

D. Legal Barriers to Plaintiffs: Justiciability Concerns

Justiciability concerns have loomed in the background of education finance litigation throughout the three waves.[77] Judicial reluctance to overturn school finance systems stems from two justiciability considerations. First, courts are concerned with their institutional role in deciding school finance cases, as evinced by judicial discussion of the separation of powers doctrine in these

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[71] *E.g.*, *id.* at 1175.

[72] Thro, *supra* note 45, at 540. Thro notes that activist courts in nine states determined that their constitutions guaranteed some form of quality education or considered education a fundamental right despite the fact that their education clauses merely required the legislature to establish a system of education. *Id.* at 540–41. In contrast, courts in Georgia and Illinois ignored the stronger textual mandates in their respective education clauses in holding that education was not a fundamental right. *Id.* at 542.

[73] Swenson, *supra* note 70, at 1176–77. Some commentators have relied upon "representative-reinforcement" theory to argue that courts that are fed up with legislative inaction may be more likely to declare a school finance scheme unconstitutional. *Id.* at 1179.

[74] *Id.* at 1176.

[75] *See, e.g.*, Rose v. Council for Better Educ., Inc., 790 S.W.2d 186 (Ky. 1989); Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391 (Tex. 1989).

[76] Julia A. Simon-Kerr & Robynn K. Sturm, *Justiciability and the Role of Courts in Adequacy Litigation: Preserving the Constitutional Right to Education*, 6 STAN. J. C.R. & C.L. 83, 95–96 (2010).

[77] *See, e.g.*, McInnis v. Shapiro, 293 F. Supp. 327, 329 (N.D. Ill. 1968) (first wave), *aff'd per curiam sub nom.* McInnis v. Ogilvie, 394 U.S. 322 (1969); Comm. for Educ. Rights v. Edgar, 672 N.E.2d 1178, 1191 (Ill. 1996) (third wave); Pauley v. Kelly, 255 S.E.2d 859, 897–98 (W. Va. 1979) (Neely, J., dissenting) (second wave).

cases.[78] Second, courts are concerned with their institutional capacity to decide education finance challenges.[79] This unease is apparent from judicial discussion of the political question doctrine in these cases.[80] Courts have often relied on these two doctrines to justify their decisions to avoid deciding school finance cases on the merits.[81]

With respect to separation of powers, courts have observed that constitutional language explicitly delegates to the legislature the task of designing school finance systems.[82] Because "each branch of government has certain delineated powers that the other branches of government may not intrude upon," some courts have refused to interfere with legislative decisions concerning school finance.[83] The direct relationship between school finance and control over appropriations, a power granted exclusively to the legislature,[84] bolsters this hesitance. Accordingly, judicial concern about usurping legislative power has led courts to hold that school finance suits are nonjusticiable claims because they would force the judiciary to take on legislative duties.[85]

State courts have also used the federal political question doctrine to justify dismissing finance suits without deciding them on the merits.[86] The doctrine suggests that courts should withhold judgment in areas where they lack the institutional capacity to fully understand the issues involved in a case.[87] Justice Brennan laid out the modern political question doctrine in *Baker v. Carr*[88]

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78 *See, e.g.*, Coal. for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles, 680 So. 2d 400, 407–08 (Fla. 1996) (per curiam); City of Pawtucket v. Sundlun, 662 A.2d 40, 57–58 (R.I. 1995).

79 *See, e.g.*, *Chiles*, 680 So. 2d at 408; Neb. Coal. for Educ. Equity & Adequacy v. Heineman, 731 N.W.2d 164, 178–83 (Neb. 2007).

80 *See, e.g.*, *Chiles*, 680 So. 2d at 408; *Heineman*, 731 N.W.2d at 178–83.

81 *See, e.g.*, *Chiles*, 680 So. 2d at 407–08; *Heineman*, 731 N.W.2d at 183; *Sundlun*, 662 A.2d at 57–58.

82 *E.g.*, *Sundlun*, 662 A.2d at 57–58.

83 *Chiles*, 680 So. 2d at 407.

84 *Heineman*, 731 N.W.2d at 181–82; Okla. Educ. Ass'n v. State, 2007 OK 30, ¶ 23, 158 P.3d 1058, 1066.

85 *See, e.g.*, *Heineman*, 731 N.W.2d at 181.

86 *See, e.g.*, *Chiles*, 680 So. 2d at 407; *Okla. Educ. Ass'n*, 2007 OK 30, at ¶¶ 18–25.

87 *E.g.*, Michael Paisner, *Conceptions of the Vessel: Abu Ali, Habeas Corpus, and the Dark Side of the "War on Terrorism,"* 26 ST. LOUIS U. PUB. L. REV. 309, 327 (2007). The doctrine is also designed to ensure that courts do not intervene in areas where the constitution has placed exclusive decision-making power in another branch of government. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 7–8 (1959).

88 369 U.S. 186 (1962).

when he articulated six characteristics that might indicate that an issue is a nonjusticiable political question.[89]

Of these characteristics, several are particularly relevant for school finance cases. For example, devising school finance systems requires a balancing of competing values, a task that legislatures are often best equipped to handle.[90] As a result, these suits may be impossible to resolve "without an initial policy determination of a kind clearly for nonjudicial discretion," which is Justice Brennan's third characteristic of a political question.[91]

A nonjusticiable political question may also be present when a court lacks "judicially discoverable and manageable standards for resolving [the issue]."[92] School finance cases implicate this characteristic because the sparse language of education clauses provides little guidance for a court to decide what qualifies as an equal or adequate education.[93] This ambiguity has led to concern that deciding a finance suit on the merits will only result in years of

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[89] *Id.* at 217. These characteristics include the following: (1) "a textually demonstrable constitutional commitment of the issue to a coordinate political department," (2) "a lack of judicially discoverable and manageable standards for resolving [the issue]," (3) "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion," (4) "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government," (5) "an unusual need for unquestioning adherence to a political decision already made," and (6) "the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Id.*

[90] *See* John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1974 (2011) ("[T]he very essence of legislative choice lies not merely in the identification of an appropriate policy goal, but in the determination of what competing values will or will not be sacrificed to the achievement of a particular objective." (internal quotation marks omitted)).

[91] *Baker*, 369 U.S. at 217; *see also* Marrero v. Commonwealth, 709 A.2d 956, 966 (Pa. Commw. Ct. 1998) ("[I]t would be impossible to resolve the claims without making an initial policy determination of a kind which is clearly of legislative, and not judicial, discretion."), *aff'd*, 739 A.2d 110 (Pa. 1999).

[92] *Baker*, 369 U.S. at 217.

[93] *See, e.g.*, Coal. for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles, 680 So. 2d 400, 407 (Fla. 1996) (per curiam) (agreeing with appellees' claim that the court lacked judicially manageable standards to determine adequacy); Comm. for Educ. Rights v. Edgar, 672 N.E.2d 1178, 1191 (Ill. 1996) ("What constitutes a 'high quality' education, and how it may best be provided, cannot be ascertained by any judicially discoverable or manageable standards. The constitution provides no principled basis for a judicial definition of high quality."); Neb. Coal. for Educ. Equity & Adequacy v. Heineman, 731 N.W.2d 164, 183 (Neb. 2007) ("The Nebraska Constitution commits the issue of providing free instruction to the Legislature and fails to provide judicially discernible and manageable standards for determining what level of public education the Legislature must provide."). *But see* Alfred A. Lindseth, *The Legal Backdrop to Adequacy*, *in* COURTING FAILURE: HOW SCHOOL FINANCE LAWSUITS EXPLOIT JUDGES' GOOD INTENTIONS AND HARM OUR CHILDREN 33, 46–47 (Eric A. Hanushek ed., 2006) (noting that plaintiffs and courts have relied on standardized tests to measure adequacy); Dietz, *supra* note 27, at 1212–13 (arguing that courts should use the legislature's "statutory expressions of aspirational goals" or "school accreditation standards" as adequacy standards).

protracted litigation.[94] Justiciability concerns are a real impediment to education reform litigants and have even led some courts to overturn recent precedent holding that issues of educational adequacy were justiciable.[95]

II. THE FAILURE OF FINANCE LITIGATION TO ELIMINATE EDUCATIONAL INEQUALITY AND INADEQUACY

Despite forty years of school finance litigation, reformers have failed to realize the promise of equal educational opportunity articulated in *Brown v. Board of Education*.[96] Instead, as Part II discusses below, evidence indicates a substantial and persistent achievement gap between children growing up in poverty and children growing up in wealthier communities. This inequality also divides along racial lines. This Part first discusses the lingering inequality and inadequacy in public education, indicating that school finance litigation has been an insufficient approach to achieve the goals of *Brown*. Section B explains this insufficiency by discussing literature that directly questions the strength of the link between funding and student achievement. Overall, Part II demonstrates that education reform litigants should redirect their challenges away from school finance and toward policies that have a clearer connection to student achievement.

A. Persistent Educational Inequality and Inadequacy in the United States

Education inequality remains a fact of life throughout the United States. The academic performance of an average black or Hispanic student is equivalent to the performance of an average white student in the lowest quartile of white achievement.[97] For example, black and Hispanic students in the twelfth grade perform mathematics at the level of a white student in the eighth grade.[98] One education policy organization concretely stated the implications of this achievement gap: "17-year-old African American and

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[94] *See* City of Pawtucket v. Sundlun, 662 A.2d 40, 59 (R.I. 1995) ("[T]he absence of justiciable standards could engage the court in a morass comparable to the decades-long struggle of the Supreme Court of New Jersey that has attempted to define what constitutes the 'thorough and efficient' education specified in that state's constitution.").

[95] *Ex parte* James (*James II*), 836 So. 2d 813, 815–16 (Ala. 2002) (per curiam).

[96] *See* 347 U.S. 483, 493–96 (1954).

[97] John E. Chubb & Tom Loveless, *Bridging the Achievement Gap*, *in* BRIDGING THE ACHIEVEMENT GAP 1, 1 (John E. Chubb & Tom Loveless eds., 2002).

[98] Flores, *supra* note 11, at 30.

Latino students have skills in English, math, and science similar to those of 13-year-old Whites."[99]

Evidence suggests that the achievement gap not only begins before students enter school, but also widens while students are in school.[100] This compounding inequality may be explained by the lower academic expectations that teachers often have for minority students.[101] Some studies have found that teachers tend to provide less classroom support to minority students than to white students.[102] The end result is that minorities continue to lag behind their white counterparts in terms of high school graduation rates, which have declined since the 1960s.[103]

This persistent inequality is particularly troubling because of the inadequate education received by poor, minority students.[104] Uncertified teachers, who are often the least effective, are concentrated in schools attended by these students.[105] The implications of this instructional inadequacy are grave; curricular changes and improvements have a minimal impact on student achievement when teachers do not know how to properly implement the new curriculum.[106] Impoverished minority students also suffer because of their inadequate access to rigorous, college-preparatory classes.[107] Many of these students are simply tracked into less challenging classes.[108]

Educational inadequacy also harms students entering school with limited English-speaking ability. Schools often fail to provide instructors qualified to teach students who are still learning English, leaving these students to fend for themselves in the classroom.[109] As a result, graduation and achievement rates

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99 Press Release, Educ. Trust, *supra* note 7.

100 Murnane et al., *supra* note 4, at 98–99; Phillips et al., *supra* note 4, at 229–33.

101 Flores, *supra* note 11, at 33–35.

102 Ronald F. Ferguson, *Teachers' Perceptions and Expectations and the Black–White Test Score Gap*, *in* THE BLACK–WHITE TEST SCORE GAP, *supra* note 4, at 273, 294, 313.

103 James J. Heckman & Paul A. LaFontaine, *The American High School Graduation Rate: Trends and Levels*, 92 REV. ECON. & STAT. 244, 253 (2010).

104 Press Release, Educ. Trust, *supra* note 7. The gap would certainly be less troubling if it were the difference between an excellent and adequate education.

105 *See* Linda Darling-Hammond, *Access to Quality Teaching: An Analysis of Inequality in California's Public Schools*, 43 SANTA CLARA L. REV. 1045, 1101–03 (2003).

106 *Id.* at 1079.

107 Saul Geiser & Veronica Santelices, The Role of Advanced Placement and Honors Courses in College Admissions 4, 21 (2004) (unpublished manuscript), *available at* http://cshe.berkeley.edu/publications/docs/ROP.Geiser.4.04.pdf.

108 *Id.*

109 Darling-Hammond, *supra* note 105, at 1113–17.

for students learning English are especially low.[110] The achievement gap represents the pervasive inequality and inadequacy in American education, which is all the more troubling given that the United States already lags behind many of its international peers in terms of student achievement.[111]

Education finance suits do not seem to have changed this inequality and inadequacy. The achievement gap between white and minority students does not differ significantly between states where school finance suits have succeeded and states where plaintiffs have lost. For example, the black–white mathematics achievement gap[112] in California and Connecticut, two states where education finance plaintiffs have won,[113] is similar to the achievement gap in New York and Maryland, where education finance plaintiffs have not found success.[114] A similar pattern appears when looking at the black–white reading achievement gap.[115] States where education finance plaintiffs have enjoyed success, such as Washington and New Jersey,[116] have reading achievement gaps similar to the gaps in states such as Georgia and Ohio, where school finance suits proved unsuccessful.[117] The Hispanic–white achievement gaps in reading and math are also no narrower in states where education finance plaintiffs have won suits.[118] Thus, education reform litigants, by

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110 *See, e.g.*, ALBERT CORTEZ & ABELARDO VILLARREAL, INTERCULTURAL DEV. RESEARCH ASS'N, EDUCATION OF ENGLISH LANGUAGE LEARNERS IN U.S. AND TEXAS SCHOOLS: WHERE WE ARE, WHAT WE HAVE LEARNED AND WHERE WE NEED TO GO FROM HERE—A 2009 UPDATE 10 (2009) (indicating that secondary English learners perform much worse than their peers); Victoria-Maria MacDonald, The Status of English Language Learners in Florida: Trends and Prospects 5.11–.12 (Apr. 2004) (unpublished manuscript), *available at* http://nepc.colorado.edu/files/EPSL-0401-113-EPRU.pdf (highlighting the lower graduation rates of English language learners).

111 *See* OECD, PISA 2009 RESULTS: EXECUTIVE SUMMARY 8 fig.1 (2009).

112 *See* ALAN VANNEMAN ET AL., U.S. DEP'T OF EDUC., NCES 2009-455, ACHIEVEMENT GAPS: HOW BLACK AND WHITE STUDENTS IN PUBLIC SCHOOLS PERFORM IN MATHEMATICS AND READING ON THE NATIONAL ASSESSMENT OF EDUCATIONAL PROGRESS 21 fig.11 (2009) [hereinafter BLACK–WHITE ACHIEVEMENT GAP].

113 *See, e.g.*, *Serrano I*, 487 P.2d 1241 (Cal. 1971) (in bank); Horton v. Meskill, 376 A.2d 359 (Conn. 1977).

114 *See, e.g.*, Hornbeck v. Somerset Cnty. Bd. of Educ., 458 A.2d 758 (Md. 1983); Bd. of Educ. v. Nyquist, 439 N.E.2d 359 (N.Y. 1982).

115 *See* BLACK–WHITE ACHIEVEMENT GAP, *supra* note 112, at 43 fig.23.

116 *See, e.g.*, Robinson v. Cahill, 303 A.2d 273 (N.J. 1973); Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71 (Wash. 1978) (en banc).

117 *See, e.g.*, McDaniel v. Thomas, 285 S.E.2d 156 (Ga. 1981); Bd. of Educ. v. Walter, 390 N.E.2d 813 (Ohio 1979).

118 *See* F. CADELLE HEMPHILL ET AL., U.S. DEP'T OF EDUC., NCES 2011-459, ACHIEVEMENT GAPS: HOW HISPANIC AND WHITE STUDENTS IN PUBLIC SCHOOLS PERFORM IN MATHEMATICS AND READING ON THE NATIONAL ASSESSMENT OF EDUCATIONAL PROGRESS 27 fig.15, 53 fig.27 (2011) [hereinafter HISPANIC–WHITE ACHIEVEMENT GAP].

overturning state school finance schemes, do not seem to have made much headway in advancing educational equity or adequacy.

B. The Tenuous Link Between Money and Academic Achievement

The ambiguous relationship between money and academic achievement, recognized since some of the earliest school finance cases,[119] may at least partially explain the failure of education finance suits to close the achievement gap. Notable scholars have observed that general expenditures on education are not significantly related to academic achievement.[120] Similarly, economists have found that increases in per-pupil expenditures have not led to better academic achievement over the course of three decades.[121]

California provides a good example of the disjuncture between spending and achievement. Evidence indicates that equalizing finances between districts in California did not equalize educational outcomes among students across districts in the wake of the *Serrano* school finance decisions.[122] Numerous examples exist of school districts that spend liberally while achieving subpar results.[123] This phenomenon is also evident at the national level; while expenditures have consistently trended upward, achievement in reading and mathematics has remained stagnant for decades.[124] The disconnect between expenditures and achievement may occur because allocating more money to education does not necessarily ensure that the money makes it into the

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[119] *E.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 43 (1973).

[120] Julian R. Betts, *Is There a Link Between School Inputs and Earnings? Fresh Scrutiny of an Old Literature*, *in* DOES MONEY MATTER? THE EFFECT OF SCHOOL RESOURCES ON STUDENT ACHIEVEMENT AND ADULT SUCCESS 141, 141 (Gary Burtless ed., 1996); T. Stephen Childs & Charol Shakeshaft, *A Meta-Analysis of Research on the Relationship Between Educational Expenditures and Student Achievement*, 12 J. EDUC. FIN. 249, 263 (1986); Linda Darling-Hammond, *Teacher Quality and Student Achievement: A Review of State Policy Evidence*, EDUC. POL'Y ANALYSIS ARCHIVES 1, 23 (Jan. 1, 2000), http://epaa.asu.edu/ojs/article/view/392/515. *But see* Harold Wenglinsky, *How Money Matters: The Effect of School District Spending on Academic Achievement*, 70 SOC. EDUC. 221, 232–33 (1997) (arguing that increased expenditures improve academic achievement because they enable school districts to reduce class sizes).

[121] *See* Eric A. Hanushek, *The Failure of Input-Based Schooling Policies*, 113 ECON. J. F64, F67–69 (2003); *see also* Eric A. Hanushek, *Throwing Money at Schools*, 1 J. POL'Y ANALYSIS & MGMT. 19, 30 (1981).

[122] William A. Fischel, *How* Serrano *Caused Proposition 13*, 12 J.L. & POL. 607, 614 (1996).

[123] *See* Williamson M. Evers & Paul Clopton, *High-Spending, Low-Performing School Districts*, *in* COURTING FAILURE, *supra* note 93, at 103 (citing examples).

[124] Herbert J. Walberg, *Achievement in American Schools*, *in* A PRIMER ON AMERICA'S SCHOOLS 43, 44–48 (Terry M. Moe ed., 2001).

classroom.[125] Accordingly, a critical premise underlying the arguments of education finance plaintiffs has proven to be tenuous at best.

Recent court decisions demonstrate growing skepticism that additional funding effectively advances educational adequacy and equality.[126] Instead, courts have noted that considerations such as financial mismanagement, inferior school leadership, and environmental factors may be just as responsible for low academic outcomes.[127] Skeptics include state courts that previously have granted victories to school finance plaintiffs.[128]

These concerns are legitimate. Evidence indicates that management decisions within school districts are responsible for an unequal distribution of resources among schools within a given district.[129] This often deprives disadvantaged students of critical assistance.[130] The increasing judicial distrust of education finance suits has led some scholars to suggest that education reform litigants should reframe their suits so they do not appear simply to be seeking greater funding.[131] Given the weak record of education finance litigation, this strategy shift is advisable.

Education reform litigants do not face an insurmountable task. State courts have shown a willingness to find a state constitutional guarantee to an equal or minimally adequate education.[132] Nevertheless, school finance suits have been unable to overcome two obstacles previously discussed. First, the legislative aspect of funding education statewide and the vagueness of specific state constitutional language have led many courts to hold that finance suits are nonjusticiable.[133] Second, even when courts have found finance claims justiciable and awarded plaintiffs relief, the litigation victories have not

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[125] The bureaucracies of many large school districts often consume a large portion of education expenditures. *Cf.* BENJAMIN SCAFIDI, FRIEDMAN FOUND. FOR EDUC. CHOICE, THE SCHOOL STAFFING SURGE PART II: DECADES OF EMPLOYMENT GROWTH IN AMERICA'S PUBLIC SCHOOLS 1 (2013) (highlighting the growth of education bureaucracies in the United States and noting that between fiscal years 1950 and 2009 "administrators and other non-teaching staff experienced growth of 702 percent, [which is] more than seven times the [percentage] increase in students").

[126] Simon-Kerr & Sturm, *supra* note 76, at 110–13 (discussing cases).

[127] *Id.* at 110.

[128] *Compare* Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 393 (Tex. 1989), *with* Neeley v. W. Orange–Cove Consol. Indep. Sch. Dist., 176 S.W.3d 746, 788–90 (Tex. 2005).

[129] *See* Marguerite Roza & Paul T. Hill, *How Can Anyone Say What's Adequate if Nobody Knows How Money Is Spent Now?*, *in* COURTING FAILURE, *supra* note 93, at 235.

[130] *See id.*

[131] Simon-Kerr & Sturm, *supra* note 76, at 121–23.

[132] *Supra* Part I.

[133] *Supra* Part I.D.

generally led to greater educational equality or adequacy.[134] Thus, there is a pressing need for a new strategy that moves beyond finance litigation. Part III takes the next step by proposing a new path for education reform litigants to take that addresses the two main weaknesses of finance litigation.

III. SHIFTING THE FOCUS OF EDUCATION REFORM LITIGATION TO SKILL-BASED EDUCATION INPUTS

Given the historical ineffectiveness of school finance litigation in closing the achievement gap, education reform litigants should begin focusing their efforts on challenging local school district policies that lead to an unequal or inadequate distribution of skill-based education inputs. For purposes of this Comment, skill-based inputs are defined as professionally trained individuals who play a role in the running of schools. Classroom teachers and school administrators are two salient examples of skill-based inputs.

School districts follow many policies that lead to inadequate or inequitable access to skill-based inputs. An example of such a policy would be a district's use of combination classes, in which students from two separate grade levels are grouped into a classroom under the tutelage of a single teacher.[135] Under this policy, students in a combination class may only receive half the instructional time that students in a uniform class receive, since the teacher must teach two separate curriculums in the same amount of time.[136] Another example, recognized by a South Carolina court, would be the lack of access to preschool programs—an intervention that many experts argue is effective in helping poor students enter school on an equal level with their wealthier peers.[137] Education reform litigants should focus on challenging these types of policies because of the significant impact of skill-based inputs, and teachers in particular, in generating academic achievement.[138]

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134 *Supra* Part II.A.

135 *See generally* DeWayne A. Mason & Robert B. Burns, *Reassessing the Effects of Combination Classes*, 3 EDUC. RES. & EVALUATION 1 (1997).

136 Some scholars have found that the use of combination classes has a negative effect on student achievement. *See id.*

137 *See* Abbeville Cnty. Sch. Dist. v. State, No. 93-CP-31-0169, slip op. at 160–61 (S.C. Ct. Com. Pl. Dec. 29, 2005) ("There is testimony from experts and educators alike that effective early childhood intervention, especially to children who are born into poverty, can make a difference in educational abilities and achievements.").

138 *See infra* Part III.A.

Part III proceeds in three sections in suggesting this new focus for education reform litigants. Section A demonstrates the substantial impact that teacher quality, as an example of a skill-based input, has on student achievement. Section A's discussion of the impact of good teachers illustrates why this new litigation strategy may improve academic achievement more successfully than school finance litigation.

Section B focuses more specifically on a widely used layoff procedure that education reform litigants should challenge. This procedure, often referred to as "last in, first out" (LIFO), removes teachers based on lack of seniority, rather than lack of effectiveness, thus diminishing the number of quality instructors available to students. The policy also disproportionately harms students at schools staffed by significant numbers of teachers with little seniority because it exacerbates turnover problems at these schools. As a result, LIFO is a prime example of a policy that education reformers should challenge in court as violative of state constitutional protections. Section C concludes by examining a successful challenge to a California school district's use of LIFO, which may prove to be a model for similar challenges nationally.

A. The Relationship Between Teachers and Student Achievement

Teachers are the most prominent example of a skill-based education input. Ensuring equal and adequate access to quality teachers should be a focus for education reform litigants because academic research increasingly suggests that teacher quality is a critical variable in predicting a child's academic achievement,[139] often outweighing other variables typically linked to education outcomes. For example, individual teacher effectiveness[140] has a more significant impact on student achievement than class size or homogeneity.[141] In addition, curriculum and testing changes do not improve student achievement without effective teachers implementing the reforms.[142]

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[139] *See, e.g.*, Jonah E. Rockoff, *The Impact of Individual Teachers on Student Achievement: Evidence from Panel Data*, 94 AM. ECON. REV. (PAPERS & PROC.) 247, 251 (2004).

[140] Teacher effectiveness is often measured through a value-added statistical model that uses students' standardized test scores to determine the relative effectiveness of a teacher in increasing student scores. S. Paul Wright et al., *Teacher and Classroom Context Effects on Student Achievement: Implications for Teacher Evaluation*, 11 J. PERSONNEL EVALUATION EDUC. 57, 58 (1997).

[141] *Id.* at 61–63.

[142] Darling-Hammond, *supra* note 105, at 1079.

Demographic variables have traditionally been considered the most important factors in predicting student achievement.[143] Nevertheless, teacher training and certification status have a stronger impact on student achievement than demographic variables, such as socioeconomic status, race, and language background.[144] Demographic barriers can be surmounted by high-quality instruction from effective teachers.[145] Students taught by unqualified and low-quality teachers, however, show little academic achievement.[146] Teacher quality also has a significant effect on a student's long-term academic progress, and its impact on student achievement is cumulative over the years.[147] In short, good teachers have a critical and long-lasting effect on their students' success.

School environment factors also influence teacher effectiveness to some extent. High teacher turnover at individual schools creates instructional instability and often forces a school to staff classes with low-quality teachers.[148] Nevertheless, the school in which a teacher works does not necessarily determine his or her individual effectiveness.[149] Effective teachers have the greatest impact on low-performing students and minorities,[150] an important concern for education reform litigants.

Quality teachers exhibit common traits. For example, the literacy level of individual teachers has a positive impact on teacher effectiveness.[151] A teacher's mastery of the content that she teaches is also strongly related to effectiveness.[152] Teachers who have obtained a license or certification tend to be more effective,[153] but this credential alone may not indicate an individual

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143 The Coleman Report propagated the view that student background and socioeconomic status were the most significant variables affecting student achievement. *See generally* JAMES S. COLEMAN ET AL., EQUALITY OF EDUCATIONAL OPPORTUNITY (1966).

144 Darling-Hammond, *supra* note 120, at 1, 33.

145 Steven G. Rivkin et al., *Teachers, Schools, and Academic Achievement*, 73 ECONOMTERICA 417, 419 (2005).

146 *See* Darling-Hammond, *supra* note 120, at 1, 23.

147 Julian Vasquez Heilig et al., *Alternative Certification and Teach for America: The Search for High Quality Teachers*, 20 KAN. J.L. & PUB. POL'Y 388, 394 (2011).

148 Darling-Hammond, *supra* note 105, at 1107–08.

149 Rivkin et al., *supra* note 145, at 440.

150 Daniel Aaronson et al., *Teachers and Student Achievement in the Chicago Public High Schools*, 25 J. LAB. ECON. 95, 126–28 (2007).

151 HEATHER G. PESKE & KATI HAYCOCK, EDUC. TRUST, TEACHING INEQUALITY: HOW POOR AND MINORITY STUDENTS ARE SHORTCHANGED ON TEACHER QUALITY 8 (2006).

152 *Id.* (noting a strong connection between a teacher's mastery of content and effectiveness in teaching students math and science).

153 Darling-Hammond, *supra* note 105, at 1078–79.

teacher's success,[154] and having more academic credentials does not ensure greater classroom effectiveness.[155] Lastly, while experience correlates with teacher effectiveness at the start of a teacher's career, once teachers have completed their first few years in the profession, experience has an insignificant impact on student achievement.[156]

Given this evidence, education reform litigants seeking to increase equality and eliminate inadequacy should focus their efforts on policies that have a direct effect on student access to quality teachers.

B. A Policy that Unequally Distributes Skill-Based Inputs: "Last in, First out"

The procedures that school districts follow when implementing budget-related layoffs have a direct effect on the distribution of teachers and staff turnover throughout a district. School districts often use a last-in, first-out procedure when they implement reduction-in-force (RIF) layoffs as part of district-wide budget cuts.[157] In these circumstances, districts first determine the specific subject area or grade level where layoffs will occur.[158] The teachers that fall within the targeted layoff pool are then ranked by seniority, and the teachers with the least amount of seniority are laid off until the necessary budgetary savings are met.[159] Because teachers with less seniority earn lower salaries than more senior teachers, LIFO forces school districts to lay off a greater number of teachers in order to meet the targeted budgetary savings.[160] This results in even larger class sizes than would otherwise be necessary if fewer teachers were fired.[161]

Supporters of seniority-based layoffs rely on several arguments in advocating for LIFO. First, proponents claim that layoffs based on seniority are objective and protect against unwarranted firings that used to plague the

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154 *Id.* at 1084; *see also* PESKE & HAYCOCK, *supra* note 151, at 8.

155 Teachers with master's degrees are no more effective than teachers without one. Rivkin et al., *supra* note 145, at 449.

156 NAT'L COUNCIL ON TEACHER QUALITY, TEACHER LAYOFFS: RETHINKING "LAST-HIRED, FIRST-FIRED" POLICIES 2 (2010); Rivkin et al., *supra* note 145, at 447.

157 NAT'L COUNCIL ON TEACHER QUALITY, *supra* note 156, at 3.

158 *Id.*

159 *Id.*

160 Dan Goldhaber & Roddy Theobald, *Assessing the Determinants and Implications of Teacher Layoffs* 5 (Nat'l Ctr. for Analysis of Longitudinal Data in Educ. Research, Working Paper No. 55, 2010).

161 NAT'L COUNCIL ON TEACHER QUALITY, *supra* note 156, at 2.

schoolhouse.[162] Second, LIFO prioritizes retaining teachers whom the school district has invested in through professional development over the years.[163] Third, LIFO protects education quality because more experienced teachers are better teachers.[164] Despite these arguments, only the third rationale actually focuses on student achievement, which should be the key consideration in these circumstances. Additionally, challenges to the assumption that more senior teachers are better teachers have made the third rationale increasingly suspect.[165]

Consequently, the use of LIFO has come under increasing attack in recent years.[166] This animosity stems from the growing perception that LIFO leads to layoff decisions that completely ignore teacher effectiveness,[167] which may undermine broader efforts at school reform.[168] Under the policy, ineffective teachers who have worked in a school district for many years are retained over effective teachers who have only been on the job for a few years.[169] As a result, journalists have criticized the practice,[170] and current and former public officials have signaled their opposition to it.[171] The opposition is not empty rhetoric; several state legislatures have taken steps to end the use of LIFO in determining teacher layoffs.[172]

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[162] CTR. FOR EDUC. ORG., WHAT'S MISSING FROM THE DEBATE ON SENIORITY? 1 (2011) (noting that teachers could be fired for becoming pregnant or because the principal disliked them before seniority-based protections were established).

[163] *Id.*

[164] NAT'L COUNCIL ON TEACHER QUALITY, *supra* note 156, at 2.

[165] *See, e.g.*, DONALD J. BOYD ET AL., URBAN INST., BRIEF NO. 12, TEACHER LAYOFFS: AN EMPIRICAL ILLUSTRATION OF SENIORITY VS. MEASURES OF EFFECTIVENESS 2, 8 (2010); NAT'L COUNCIL ON TEACHER QUALITY, *supra* note 156, at 2; Rivkin et al., *supra* note 145, at 447; Goldhaber & Theobald, *supra* note 160, at 5.

[166] *See, e.g.*, Michael Barbaro & Nicholas Confessore, *Bloomberg Presses Cuomo on Teacher Seniority Rule*, N.Y. TIMES, Jan. 31, 2011, at A14; Barbara Martinez, *White House Signals Opposition to "Last in, First out,"* WALL ST. J. METROPOLIS BLOG (Mar. 3, 2011, 5:39 PM), http://blogs. wsj.com/metropolis/2011/03/03/white-house-signals-opposition-to-last-in-first-out/; Michelle Rhee, *End "Last in, First out" Teacher Layoffs*, CNN (Feb. 23, 2011, 5:47 PM), http://www.cnn.com /2011/OPINION/02/23/rhee.layoff.policy/index.html.

[167] THE NEW TEACHER PROJECT, THE CASE AGAINST QUALITY-BLIND TEACHER LAYOFFS 1–5 (2011) (noting that fourteen states prevent officials from considering anything other than seniority in layoff decisions).

[168] ROBIN LAKE ET AL., CTR. ON REINVENTING PUB. EDUC., WILL SENIORITY-BASED LAYOFFS UNDERMINE SCHOOL IMPROVEMENT EFFORTS IN WASHINGTON STATE? (2011).

[169] THE NEW TEACHER PROJECT, *supra* note 167, at 4.

[170] *See, e.g.*, Editorial, *A Message for Andrew*, N.Y. POST, Feb. 24, 2011, at 24; Jason Felch et al., *Grading the Teachers*, L.A. TIMES, Dec. 5, 2010, at A1.

[171] Barbaro & Confessore, *supra* note 166; Martinez, *supra* note 166; Rhee, *supra* note 166.

[172] April Hunt & Nancy Badertscher, *Seniority Won't Protect Teachers*, ATLANTA J.-CONST., Apr. 12, 2011, at 3B; Leslie Postal, *Scott Signs Teacher Merit Pay into Law*, ORLANDO SENTINEL, Mar. 25, 2011, at B1.

LIFO presents an opportunity for education reform litigants to branch out from classic education finance litigation. Three pressing reasons suggest that challenging LIFO in court is a good starting place for education reformers seeking to change policies that lead to unequal or inadequate distributions of skill-based education inputs. First, current budget shortfalls at the state level make it more likely that districts will need to lay off teachers.[173] Second, the practice has a broad impact across the nation because most large school districts rely on LIFO when making layoff decisions.[174] Lastly, many state legislatures have failed to meet their constitutional duty to provide an equal and adequate education system by either permitting or requiring school districts to use LIFO.[175] Thus, the constitutional rights of students who might be adversely affected by LIFO are threatened by a policy that many state legislatures have failed to address properly.

Perhaps most importantly for education reform litigants, LIFO implicates the concerns about race and socioeconomic status that have run through all three waves of school finance litigation and continue to cast a shadow over American education. Inexperienced and uncertified full-time teachers who lack seniority are disproportionately staffed in schools that serve low-income and minority communities.[176] As a result, schools located in these communities not only risk losing some of their more effective teachers who have little seniority,

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[173] MARGARET L. PLECKI & MATTHEW FINSTER, EXAMINING THE IMPACT AND EQUITY OF SENIORITY-BASED TEACHER LAYOFF NOTICES IN WASHINGTON STATE: 2008-09 TO 2009-10, at 1 (2010) ("In 2009, nearly 60,000 teachers were laid off by districts using seniority as the primary determinant." (citation omitted)); *see also* CTR. FOR EDUC. ORG., *supra* note 162, at 1.

[174] *See, e.g.*, Goldhaber & Theobald, *supra* note 160, at 3 ("[A]ll of the 75 largest school districts in the nation use seniority as *a* factor in layoff decisions, and seniority is the *sole* factor that determines the order of layoffs in over 70 percent of these districts."); NAT'L COUNCIL ON TEACHER QUALITY, *supra* note 156, at 4.

[175] THE NEW TEACHER PROJECT, *supra* note 167, at 2. *But see* CTR. FOR EDUC. ORG., *supra* note 162, at 1 (noting several states that have recently passed laws prohibiting districts from relying on seniority in RIF decisions).

[176] *See* BOYD ET AL., *supra* note 165, at 1, 8; PESKE & HAYCOCK, *supra* note 151; PLECKI & FINSTER, *supra* note 173, at 8; CRISTINA SEPE & MARGUERITE ROZA, CTR. ON REINVENTING PUB. EDUC., THE DISPROPORTIONATE IMPACT OF SENIORITY-BASED LAYOFFS ON POOR, MINORITY STUDENTS 1–5 (2010), *available at* http://www.crpe.org/publications/disproportionate-impact-seniority-based-layoffs-poor-minority-students; Darling-Hammond, *supra* note 105, at 1051, 1101–09. In an analysis of seniority-based RIF notices handed out in Washington over a two-year period, schools at which teachers received RIF notices had a higher proportion of impoverished students than the district average in nine out of ten sample districts. In addition, schools at which teachers received RIF notices had a higher proportion of minority students than the district average in eight out of ten sample districts. PLECKI & FINSTER, *supra* note 173, at 8.

but also disproportionately risk enduring the destabilizing effects of high staff turnover.[177]

Admittedly, LIFO might still spur some positive change because schools in low-income communities are not uniformly staffed by an arsenal of effective teachers. Therefore, ineffective instructors at low-income schools would also likely lose their jobs in a LIFO-based RIF. However, eliminating these less effective teachers in a RIF may still do more harm than good to academic achievement at schools serving low-income students.

This harm stems from the destabilizing effect of high staff turnover. Principals may have to replace a mediocre teacher laid off in a RIF with a line of substitute teachers.[178] These substitutes are not only less qualified than full-time teachers, but the transient nature of their job also creates an air of instability in a classroom.[179] Schools who lose fewer teachers in LIFO-based RIFs avoid this instability and the harm it causes to academic achievement.[180] Thus, LIFO leads to an unequal distribution of education benefits and disproportionately burdens schools in communities where students are already receiving an inadequate education.

C. Successful Litigation: Reed v. State

In 2010 a California court recognized the troublesome effect of LIFO on poor and minority communities. In a state where education finance litigants had previously enjoyed success,[181] *Reed v. State* recognized that LIFO violates students' state constitutional rights. The plaintiffs' success in *Reed* is significant because it shows the promise of constitutional challenges to policies, like LIFO, that lead to an inequitable distribution of skill-based education inputs. This section proceeds by (1) detailing the facts underlying *Reed*, (2) summarizing the court's analysis in the case, and (3) discussing the consequences of the court's chosen remedy.

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[177] For example, Darling-Hammond noted that "[i]n some schools, almost always in districts with high proportions of low-income and minority students, the proportion of underqualified teachers exceeds 50%." Darling-Hammond, *supra* note 105, at 1108; *see also* WILLIAM KOSKI & EILEEN L. HORNG, INST. FOR RESEARCH ON EDUC. POLICY & PRACTICE, CURBING OR FACILITATING INEQUALITY? LAW, COLLECTIVE BARGAINING, AND TEACHER ASSIGNMENT AMONG SCHOOLS IN CALIFORNIA (2007).

[178] Darling-Hammond, *supra* note 105, at 1107–08.

[179] *Id.* at 1107–08; *see also* Reed v. State, No. BC432420, slip op. at 5–6 (Cal. Super. Ct. L.A. County May 13, 2010).

[180] *See* Darling-Hammond, *supra* note 105, at 1107–08.

[181] *See, e.g.*, Butt v. State, 842 P.2d 1240, 1251, 1256 (Cal. 1992) (in bank); *Serrano I*, 487 P.2d 1241, 1247–48 (Cal. 1971) (in bank).

1. Factual Background

The *Reed* suit was brought in anticipation of a seniority-based RIF in the Los Angeles Unified School District (LAUSD) at the end of the 2009–2010 school year.[182] The *Reed* plaintiffs brought a class action suit to enjoin LAUSD from using the RIF to lay off teachers at three middle schools in the district.[183] These schools shared three common characteristics: (1) the student populations were overwhelming composed of minority students, (2) the students were impoverished, and (3) academic achievement at the schools was unacceptably low.[184]

At Gompers Middle School, with an enrollment of about 1,600 students, 100% of the students were either black or Hispanic and 76% were economically disadvantaged.[185] In the five years prior to the *Reed* lawsuit, fewer than 15% of the school's students passed the state's achievement test.[186] Markham Middle School enrolled about 1,500 students.[187] Ninety-nine percent of its students were either black or Hispanic and 82% were economically disadvantaged.[188] Fewer than 13% of Markham's students had passed the state's achievement test in the five years before the lawsuit.[189] Approximately 1,900 students attended Liechty Middle School, and 100% of them were minority students.[190] Ninety percent of Liechty's students were economically disadvantaged.[191] Fewer than 24% of the school's students had passed the state's achievement test in the two years before suit was brought.[192] These statistics show the plaintiffs' schools educated an overwhelmingly vulnerable group of minority students.

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182 Complaint for Injunctive and Declaratory Relief at 24, Reed v. State, No. BC432420 (Cal. Super. Ct. L.A. County Feb. 24, 2010).

183 *Id.* at 7–8.

184 *Id.* at 9–10.

185 *Id.* at 9. Economic disadvantage is typically determined based on whether a student qualifies for the federal government's free and reduced-price school lunch program. To be eligible, a student's family must be living near the poverty level. *National School Lunch Program*, U.S. DEPARTMENT AGRIC. FOOD & NUTRITION SERVICE (Aug. 2012), http://www.fns.usda.gov/cnd/lunch/aboutlunc h/NSLPFactSheet.pdf.

186 Complaint for Injunctive and Declaratory Relief, *supra* note 182, at 9.

187 *Id.* at 10.

188 *Id.*

189 *Id.*

190 *Id.* at 9.

191 *Id.* at 10.

192 *Id.* Liechty had only been open for two years before the *Reed* litigation. *Id.*

These three schools also had a disproportionate number of teachers with little seniority. The average Gompers teacher had five years of experience.[193] At Markham, the average teacher had 7.2 years of experience.[194] That figure was only 3.5 years at Liechty.[195] In contrast, the average LAUSD teacher had 11.6 years of experience.[196] Thus, a LIFO-based RIF would disproportionately threaten the less-senior teaching staff at Gompers, Markham, and Liechty.

The threat that these three schools could lose a disproportionate number of teachers had already been realized at the end of the previous school year (2008–2009), when LAUSD implemented a district-wide RIF based on LIFO that devastated the plaintiffs' schools.[197] Seventy-two percent of the teachers at Liechty lost their jobs in the RIF, resulting in twenty-six vacant positions at the school.[198] At Gompers, LAUSD fired 51% of the teaching staff, creating thirteen vacancies at the school.[199] LAUSD fired 57% of the teachers at Markham based solely on seniority, creating eighteen vacancies at the school for the following year.[200] In comparison, other middle schools within LAUSD lost fewer than 10% of their teachers from the RIF.[201]

The turnover at the plaintiffs' schools weakened the quality of education available to students.[202] Although all three schools had instituted reforms to minimize staff turnover,[203] these reforms were meaningless in light of the RIF.[204] Instead of retaining teachers who had experience teaching in challenging environments and had developed trusting relationships with the schools' students, administrators at these schools were forced to bring in replacements who did not want to teach at their schools and often quit soon after starting.[205] The schools were forced to rely on substitute teachers to fill vacancies as a result.[206]

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193 *Id.*
194 *Id.*
195 *Id.*
196 *Id.*
197 *Id.* at 12.
198 *Id.* at 12–13. Though twenty-one Liechty teachers were rehired by the school as long-term substitutes, twenty-six vacancies remained. *Id.* at 13.
199 *Id.* at 13. Though twenty teachers had to be replaced, seven teachers were rehired as long-term substitutes. *Id.*
200 *Id.*
201 *Id.* at 23.
202 *Id.* at 12–23.
203 *Id.* at 10–11.
204 *Id.* at 12–23.
205 *Id.* at 13.
206 *Id.* at 14–16.

Instructional consistency was nonexistent, as some classes were taught by a string of up to ten rotating substitutes during the first few months of school.[207] These substitutes were often unqualified, failed to teach the subject matter of the course, or taught the same material over and over.[208] With so many different substitutes teaching classes, coherent lesson planning and records of student progress were absent.[209] All the turnover made it very difficult for the administration to provide support to new teachers and ensure that students were learning.[210] The instability following the threat of mass layoffs undermined classroom instruction and discipline.[211]

Some of the most effective teachers and leaders at the schools were lost in the RIF. A "Teacher of the Year" nominee at Gompers was laid off,[212] and the school lost several teachers who served as department chairs.[213] At Liechty, a teacher who had raised student literacy scores by 1.5 grade levels was laid off.[214] These were teachers who had "learned about the students, built relationships with them, and gained experience in what strategies and approaches work with the students at the school."[215]

In light of the harm caused by the 2008–2009 RIF, the *Reed* plaintiffs brought their suit in February 2010 to enjoin further layoffs at their schools after the LAUSD superintendent announced a projection that 7,500 to 8,500 teachers would be laid off in a RIF at the end of the 2009–2010 school year.[216]

2. Judicial Analysis

California's constitution guarantees public school students a fundamental right to equality of educational opportunity.[217] In *Reed*, the superior court found the negative impact of LIFO analogous to previous instances in which the state had harmed students' rights to equal educational opportunities.[218] The

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207 *Id.* at 15.
208 *Id.*
209 *Id.*
210 *Id.* at 19 (noting Markham only had four teaching coaches to support forty-three classrooms taught by new teachers or rotating substitutes).
211 *Id.* at 20–21.
212 *Id.* at 17.
213 *Id.* at 20.
214 *Id.* at 17.
215 *Id.* at 19.
216 *Id.* at 24, 28–29.
217 Butt v. State, 842 P.2d 1240, 1251, 1256 (Cal. 1992) (in bank).
218 Reed v. State, No. BC432420, slip op. at 1–2 (Cal. Super. Ct. L.A. County May 13, 2010).

court focused a substantial amount of its opinion on the harms to the plaintiffs' educational opportunities at the hands of LIFO.[219]

Observing that the plaintiffs' schools had already failed to provide a quality education before the RIFs, the court began by outlining the unequal effect on plaintiffs' schools resulting from a LIFO-based RIF.[220] LIFO's disparate impact on the plaintiffs' schools was important to the court because it found "a distinct relationship between high teacher turnover and the quality of educational opportunities afforded."[221] In short, the court found that "[h]igh teacher turnover devastates educational opportunity."[222] The court's statement acknowledged that LIFO created unequal access to a skill-based education input—a stable teaching staff—that had a clear relationship with educational opportunity.

A clear connection existed between the RIF-induced turnover at the plaintiffs' schools and restrictions on the students' educational opportunities. The court highlighted the fact that replacement teachers were often assigned to teach subjects beyond the scope of their certification or training[223] and quit after only a few days on the job.[224] The court also agreed that rotating substitutes through a classroom has devastating repercussions for classroom learning.[225] The use of rotating substitutes meant that "little to no instruction took place" in the affected classrooms and students "miss[ed] instruction on key topics in core academic subjects."[226] Thus, the court held that the RIF had a "real and appreciable impact on Plaintiffs' fundamental right to equal educational opportunity."[227]

Applying strict scrutiny, the court indicated sensitivity to the California legislature's determination that layoffs should proceed based on seniority, yet still found no compelling state interest to justify the infringement on the plaintiffs' fundamental right.[228] California's Education Code only provided for

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219 *Id.* at 2–7.

220 *Id.* at 3–4.

221 *Id.* at 4.

222 *Id.*

223 *Id.* The court emphasized the claim by the plaintiffs' expert witness that "[t]he overall proportion of correctly assigned teachers is '*the most significant predictor* of state-level average student achievement in mathematics and reading.'" *Id.* at 5 (emphasis added).

224 *Id.* at 3.

225 *Id.* at 5.

226 *Id.*

227 *Id.* at 6–7.

228 *Id.* at 7.

qualified seniority rights in teacher layoffs, and it "allow[ed] deviations [from strict seniority layoffs] for pedagogical needs and constitutional interests."[229] The court held that LAUSD's use of LIFO violated California's guarantee of equal protection of the laws, and LAUSD was compelled to deviate from strict seniority-based layoffs in order to protect the constitutional rights of the plaintiffs.[230] As a result, the court granted the plaintiffs' requested injunction.[231]

3. Remedy and Aftermath

The *Reed* plaintiffs' victory prevented RIF-related layoffs at the plaintiffs' schools and led to a landmark settlement.[232] The settlement was not limited to the plaintiffs' schools, but focused on twenty-five schools that were in the bottom 30% in LAUSD in terms of academic achievement, had high rates of teacher turnover, and were demonstrating measurable academic improvement.[233]

The terms of the agreement addressed four different measures.[234] First, the settlement required LAUSD to provide additional support and resources to the targeted schools to improve educational stability and quality.[235] Second, LAUSD agreed not to fire teachers at the targeted schools as part of any budget-based layoffs for the 2010–2011 school year.[236] Third, any additional

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229 *Id.*

230 *Id.* at 7–9.

231 *Id.* at 9–10.

232 *See* Reed v. State, No. BC432420 (Cal. Super. Ct. approving final settlement Feb. 8, 2011), *rev'd sub nom.* Reed v. United Teachers L.A., 145 Cal. Rptr. 3d 454 (Ct. App. 2012). Over the objections of the Los Angeles teachers union (UTLA), the students, LAUSD, and the Mayor's Partnership for Los Angeles Schools agreed to this settlement. *Reed, et al. v. State of California (2012)*, LIEBERT CASSIDY WHITMORE, http://www.lcwlegal.com/79907 (last visited June 30, 2013) [hereinafter *Reed Summary*]. The superior court conducted a fairness hearing and entered a consent decree approving the settlement. *Reed*, 145 Cal. Rptr. 3d at 457. UTLA appealed the judgment, arguing that judicial approval of the settlement violated the federal due process rights of its members absent a trial on the merits. *Id.* UTLA was successful on appeal, and the matter has been remanded for an adjudication of the plaintiffs' constitutional claims on the merits. *Id.* at 466.

233 Reed v. State, No. BC432420, slip op. at 8–9 (Cal. Super. Ct. approving final settlement Feb. 8, 2011), *rev'd sub nom.* Reed v. United Teachers L.A., 145 Cal. Rptr. 3d 454 (Ct. App. 2012). The three schools attended by the *Reed* plaintiffs were included in this group of schools. The settlement also allowed for the district to consider an additional twenty schools that might be vulnerable to high levels of turnover. *Id.*

234 *Id.* at 9–11.

235 *Id.* at 9–10. The provision required LAUSD to collaborate with the schools and teachers union to fill vacancies at the schools, ensure that teachers hired were credentialed in the subject they were to teach, develop retention incentives at the targeted schools, and continually share the challenges and successes of these changes with the parties. *Id.*

236 *Id.* at 10.

RIF notices would be sent out based on seniority, but only to schools that were receiving fewer RIF notices than the average LAUSD school.[237] Fourth, the parties agreed that the court would retain jurisdiction to resolve future disputes and would hold yearly status conferences through 2013.[238] This settlement notably went far beyond the scope of the remedy that the court originally granted, which merely enjoined budget-based layoffs at Gompers, Markham, and Leichty.[239]

Education reform litigants can learn important lessons from *Reed*. First, the case demonstrates that litigants do not need to focus narrowly on school finance challenges; the jurisprudence developed through school finance litigation may proscribe policies, such as LIFO, that cause an unequal or inadequate distribution of skill-based inputs. Second, *Reed* shows that courts are willing to recognize the important role that skill-based education inputs, particularly teacher quality and instructional stability, play in students' constitutional education rights. Third, *Reed* illustrates how remedies that focus on the policy of a particular school district, as opposed to a statewide system of education finance, are more manageable for courts to devise. Lastly, the litigation illustrates how a limited remedy, here an injunction and declaration that a practice has unconstitutional effects at three schools, can spur settlement discussions, leading to policy changes and improvements in education equality and adequacy for a much broader group of students.[240]

An important remaining question, however, is whether similar challenges are viable in states other than California, given differences in state constitutional jurisprudence.[241] Part IV addresses this question.

IV. THE VIABILITY OF *REED*-LIKE CHALLENGES BEYOND CALIFORNIA

The themes and concerns from education finance cases in other states indicate that *Reed*-like suits, challenging local policies that cause an unequal or

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[237] *Id.* This provision was intended to "ensure that any impact from preserving teacher positions at the targeted schools is fairly dispersed among other LAUSD schools that can more readily absorb turnover." *Id.*

[238] *Id.* at 11.

[239] Reed v. State, No. BC432420, slip op. at 9–10 (Cal. Super. Ct. L.A. County May 13, 2010).

[240] While the appellate decision requiring an adjudication on the merits was certainly a setback for the parties' agreement in *Reed*, the initial injunction still brought key stakeholders together to discuss reforming a district-wide policy that was infringing upon the students' right to equal educational opportunity. *See Reed Summary*, *supra* note 232 (noting that "the students, the Mayor's Partnership, LAUSD, and UTLA attempted to negotiate a settlement" in the months after the superior court issued its injunction).

[241] California has proven to be a pioneering state for education reform litigants. The first wave of school finance litigation began there in 1971. *See* Thro, *supra* note 16, at 601 n.22.

inadequate distribution of skill-based education inputs, should be cognizable in states other than California. Part IV looks at education finance cases from various states to demonstrate why *Reed*-type suits show promise throughout the country. Section A uses finance cases from West Virginia and Connecticut, two states that have struck down school finance systems on equal protection grounds, to show that *Reed*-type claims should be cognizable in states that have struck down finance systems based on equal protection guarantees. Section B looks to two decisions where courts struck down school finance schemes under state constitution education articles to demonstrate that *Reed*-type claims also would be broadly viable in states that struck down school finance schemes under state education articles. Finally, because many states that have found against education finance plaintiffs did so on justiciability grounds, section C discusses why *Reed*-like claims present fewer justiciability concerns than school finance suits. This suggests that these claims may see even more widespread success than school finance suits have enjoyed.

A. States that Struck Down Education Finance Schemes on Equal Protection Grounds

Courts in states that struck down school finance systems as violative of state equal protection guarantees would likely overturn policies, like LIFO, that lead to an inequitable distribution of skill-based education inputs. This outcome is likely because of the strict scrutiny that courts would probably apply to such policies in these states. West Virginia and Connecticut serve as illustrative examples.

The West Virginia Supreme Court of Appeals, in *Pauley v. Kelly*, held that education was a fundamental right under the state's constitution.[242] Accordingly, the court found strict scrutiny appropriate for discriminatory classifications in education financing.[243] The court emphasized that mere funding equality was not the true goal,[244] noting that "[e]qual protection, applied to education, must mean an equality in substantive educational offerings and results, no matter what the expenditure may be."[245] These statements, coupled with the court's observation that "excellence was the goal"

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[242] 255 S.E.2d 859, 878 (W. Va. 1979).

[243] *Id.*

[244] *Id.* at 882 ("[The] constitutional mandate requires something more than a mere equality of educational funding to the counties.").

[245] *Id.* at 865 n.7.

the framers had in mind when crafting the state's education clause,[246] indicate that policies causing significant disparities in educational outcomes would be vulnerable in West Virginia courts.

Connecticut was another state to strike down its school finance system on equal protection grounds after the state's supreme court held that education was a fundamental right in *Horton v. Meskill*.[247] Like the court in *Reed*, the Connecticut Supreme Court was concerned with whether students had "equal [educational] opportunity,"[248] and held that its school financing system was unconstitutional because it led students in poorer communities to receive an education inferior to that received by students in wealthier districts.[249] Given the focus in *Horton* on ensuring the right to equal educational opportunity, and *Reed*'s illustration of how a policy like LIFO creates unequal educational opportunities, Connecticut courts would likely find that inequitable access to skill-based education inputs infringes students' fundamental rights. Accordingly, local policies, such as LIFO, would receive strict judicial scrutiny, making it more likely that a Connecticut court would strike down the policies.

Overall, the judicial analysis in *Pauley* and *Horton* is similar to the analysis that courts would apply in other states, such as Wyoming,[250] where education is a fundamental right or wealth is a suspect classification. As a result, local policies that cause an inequitable distribution of skill-based education resources should be equally vulnerable in these other states that struck down school finance systems under strict scrutiny.

B. States that Struck Down Education Finance Schemes as Violative of State Education Clauses

Reed-like challenges would also likely be cognizable in states that have struck down school finance schemes under their education clauses. LIFO and similar policies may be vulnerable because courts in these states have interpreted their constitutions' education clauses expansively.[251] Section B presents Kentucky and Texas as examples of states where *Reed*-type claims

246 *Id.* at 867.
247 376 A.2d 359, 374 (Conn. 1977).
248 *Id.*
249 *Id.*
250 *See* Washakie Cnty. Sch. Dist. No. One v. Herschler, 606 P.2d 310, 333 (Wyo. 1980).
251 *See, e.g.*, McDuffy v. Sec'y of the Exec. Office of Educ., 615 N.E.2d 516 (Mass. 1993).

may have a strong chance of prevailing based on education clauses that courts have interpreted broadly.

In *Rose v. Council for Better Education, Inc.*,[252] the Kentucky Supreme Court held that the state's school finance system was not efficient within the meaning of the state constitution and broadly struck down the state's entire education system.[253] The court interpreted the state's education clause expansively to require that the legislature provide "equal educational opportunities" for all children, "regardless of place of residence or economic circumstances."[254] Significantly, the court in *Rose* observed that its education clause jurisprudence implicated policies beyond simple funding.[255] The court stated that Kentucky's education clause includes a "prohibition against *any practice* which 'impairs the equal benefit of the common-school system' to all students."[256] Consequently, *Reed*-type challenges would likely be promising for education reform litigants in Kentucky, since the state's education clause has been interpreted to prohibit any policy that inhibits equal educational opportunities.

Texas is another state that could recognize local challenges to the unequal distribution of skill-based education inputs under its education clause. The Texas Supreme Court has held that the state's constitutional mandate of an "efficient" system of schools requires a system that provides equal educational opportunities without gross disparities.[257] The court has also indicated that the "general diffusion of knowledge" provision in the education clause creates an obligation to equalize educational opportunities, without limiting the equalization mandate to money.[258] Because Texas's education clause requires equalized educational opportunity, gross disparities in the availability of skill-based education inputs would likely be susceptible to constitutional challenge in Texas.

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252 790 S.W.2d 186 (Ky. 1989).

253 *Id.* at 215 ("This decision covers the creation of local school districts, school boards, and the Kentucky Department of Education . . . . It covers school construction and maintenance, teacher certification—the whole gamut of the common school system in Kentucky.").

254 *Id.* at 212.

255 *Id.* at 206.

256 *Id.* (quoting Major v. Cayce, 33 S.W. 93, 95 (1895)) (emphasis added).

257 Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 396–97 (Tex. 1989).

258 *Id.* at 395–97 ("The present [school finance] system, by contrast, provides not for a diffusion that is general, but for one that is limited and unbalanced. The resultant inequalities are thus directly contrary to the constitutional vision of efficiency.").

Kentucky and Texas are only two of the many states that have interpreted their education clauses expansively when overturning school finance schemes.[259] Given these robust interpretations and the diminished justiciability concerns in *Reed*-type suits,[260] other states that have overturned school finance systems under their education clauses would likely recognize *Reed*-type claims as well.

C. Diminished Justiciability Concerns

State courts that have refused to strike down school finance schemes have often justified their decisions on justiciability grounds.[261] However, because *Reed*-like suits raise fewer justiciability concerns than school finance challenges, previously unwilling states may be more likely to decide these types of suits on the merits.[262] Four features of finance suits set them apart from claims related to the local distribution of skill-based resources.

First, although courts have recognized the legislature's exclusive control over budgetary decisions,[263] finance suits directly challenge the legislature's appropriations choices. As a result, finance suits implicate the first and fourth *Baker* factors,[264] making these claims seem like nonjusticiable political questions. A political question is not present in *Reed*-like suits, however, because these challenges do not require courts to decide whether a legislature has appropriated enough money for education. Courts need only decide whether resources have been distributed according to constitutional requirements, as the *Reed* injunction demonstrates, without commenting on the

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259 *See, e.g.*, Roosevelt Elementary Sch. Dist. No. 66 v. Bishop, 877 P.2d 806 (Ariz. 1994) (en banc); McDuffy v. Sec'y of the Exec. Office of Educ., 615 N.E.2d 516 (Mass. 1993); Abbott v. Burke (*Abbott II*), 575 A.2d 359 (N.J. 1990); Tenn. Small Sch. Sys. v. McWherter, 851 S.W.2d 139 (Tenn. 1993); Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71 (Wash. 1978) (en banc).

260 *See infra* Part IV.C.

261 *See, e.g.*, Coal. for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles, 680 So. 2d 400 (Fla. 1996) (per curiam); Comm. for Educ. Rights v. Edgar, 672 N.E.2d 1178 (Ill. 1996); Neb. Coal. for Educ. Equity & Adequacy v. Heineman, 731 N.W.2d 164 (Neb. 2007); City of Pawtucket v. Sundlun, 662 A.2d 40 (R.I. 1995).

262 Nevertheless, plaintiffs may still confront insurmountable obstacles from a state's specific constitutional language and jurisprudence. Rhode Island is one such state. Its education clause only requires the state assembly to "promote public schools" and the state's supreme court will only invalidate laws that violate a constitutional provision beyond a reasonable doubt. *Sundlun*, 662 A.2d at 44–45, 47.

263 *See, e.g.*, *Chiles*, 680 So. 2d at 406–07; *Heineman*, 731 N.W.2d at 181–82.

264 These factors are "a textually demonstrable constitutional commitment of the issue to a coordinate political department" and "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government." Baker v. Carr, 369 U.S. 186, 217 (1962).

overall level of education funding.[265] Accordingly, suits contesting the unequal distribution of skill-based inputs allow the judiciary to avoid showing a lack of respect for the legislature by intruding on the appropriations power, which has been textually committed to the Legislative Branch.

Second, *Reed*-like claims do not create the same potential for popular backlash[266] that was associated with finance litigation and the mass redistribution of tax dollars necessary to equalize education funding throughout a state. The aftermath of the plaintiffs' victory in the *Serrano II*[267] education finance decision illustrates the potential unintended consequences of a court striking down a finance scheme. After the California Supreme Court held in *Serrano II* that variations in general district expenditures could not exceed one hundred dollars throughout California, the state assembly passed legislation to comply with the court's holding.[268] The enacted legislation, Assembly Bill 65, limited expenditures by districts with property-rich tax bases and transferred revenue obtained from property taxes in wealthier districts to poorer districts.[269] However, before the bill could come into force, Californians passed a constitutional amendment through Proposition 13 that created a permanent cap on property taxes, which funded local schools.[270]

Some scholars have argued that *Serrano II* was responsible for the passage of Proposition 13.[271] In the wake of the equalization mandate of *Serrano II*, spending between districts became relatively equal, but at a substantially lower rate of overall spending because of Proposition 13.[272] The quality of public education throughout California suffered because of this backlash.[273]

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265 *See* Reed v. State, No. BC432420, slip op. at 8 (Cal. Super. Ct. L.A. County May 13, 2010) ("[The court] is mindful that this remedy may force LAUSD to layoff [sic] teachers at other schools. Moreover, the Court is mindful of the fact that it cannot simply order Defendants to produce additional funds to prevent further layoffs.").

266 For a broader discussion of backlash, see, for example, JEFFREY M. SHAMAN, EQUALITY *AND* LIBERTY IN THE GOLDEN AGE OF STATE CONSTITUTIONAL LAW 243–53 (2008); Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607 (2000); Robert Post & Reva Siegel, Essay, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373 (2007); Cass R. Sunstein, *If People Would Be Outraged by Their Rulings, Should Judges Care?*, 60 STAN. L. REV. 155 (2007).

267 557 P.2d 929 (Cal. 1976) (in bank).

268 Fischel, *supra* note 122, at 611.

269 *Id.*

270 *Id.* at 612.

271 *See id.* at 608–09.

272 *See id.* at 613.

273 *See id.*

Popular backlash is less likely to result from court judgments in suits addressing the local distribution of skill-based education resources. First, as *Serrano II* and Proposition 13 indicate, taxpayers are particularly sensitive to government action that reaches into their pockets and redistributes locally raised funds throughout the state. This sensitivity is evident from the comments of a California legislator, who observed: "[Proposition 13] is the revenge of wealth against the poor. 'If the schools must actually be equal,' they are saying, 'then we'll undercut them all.'"[274] Because suits related to the local distribution of skill-based education inputs do not concern the redistribution of tax dollars throughout a state, there is less potential for public backlash after *Reed*-like decisions.

The potential for backlash is also diminished in *Reed*-like suits because the number of parties affected by a court decision is likely to be more limited than in finance cases. For example, the *Reed* injunction directly impacted families with children attending three specific Los Angeles schools and local interest groups, like the Los Angeles teachers union. In contrast, the judgment in *Serrano II* affected property owners throughout California. Since *Reed*-type claims affect fewer groups than finance suits, there will be fewer parties who may become angry and protest over an adverse decision. Finally, because the number of impacted parties is smaller in *Reed*-type suits, courts may be able to minimize any potential backlash by involving the parties when devising a judicial remedy, the subject of the next part of this Comment.

A third reason why these suits present fewer justiciability problems is that *Reed*-like claims raise fewer concerns about the judiciary's institutional competence to decide claims on the merits. *Reed*-type suits have a much more limited scope than education finance cases because they concern distribution decisions made at the local, rather than state, level. This limits the scope of the policy choices courts must keep in mind when deciding whether they should decide a case on the merits. For example, deciding a challenge to a state school finance scheme may force courts to balance resources across policy domains. If a court tells the legislature it must spend more money on education, it may be indirectly forcing the legislature to spend less on things like transportation infrastructure or health benefits for state employees.

In contrast, *Reed*-type claims do not force courts to balance resources across policy domains. *Reed*-type suits focus on resource distribution within a

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274 JONATHAN KOZOL, SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS 220 (1991).

specific policy area—education. Accordingly, in *Reed*, the court's holding only affected education resources, or more specifically, which schools would lose teachers within a school district.[275] It did not force the local government to spend less money on something like hospital construction, or to raise taxes to make more money available to retain teachers.

The judicial inquiry in a *Reed*-type suit is also much less complex than the inquiry necessary in a school finance challenge. For example, the Wyoming Supreme Court has acknowledged the complexity of assessing whether a statewide education finance policy meets the state's constitutional requirement of equality:

> We are well aware that the formula that will provide equality will be quite complex. More money may be needed in one school district to achieve quality education than in another because of, e.g., transportation costs, building maintenance costs, construction costs, logistic considerations, number of pupils with special problems, et cetera.[276]

In contrast to this expansive investigation of every school district in a state, the court in *Reed* only had to look at three specific middle schools within Los Angeles.[277] Thus, the judicial inquiry in a *Reed*-type case is much more limited. Because *Reed*-like suits are more restricted in scope and complexity, they are less likely to result in multiple rounds and years of litigation, a justification courts have used to hold that finance suits are nonjusticiable.[278]

Lastly, courts may be more likely to decide *Reed*-like suits on the merits because there is a greater chance that judicial action will be able to remedy a constitutional wrong. Since skill-based education inputs are strongly correlated with student achievement,[279] judicial action is more likely to have a positive impact on educational outcomes in these types of suits. This contrasts with the ambiguous record of school finance suits, in which plaintiffs' victories have not always led to an equalization or raising of academic outcomes.[280]

Part IV has shown that *Reed*-like suits have a viable future in states that have previously granted victories to school finance plaintiffs. Moreover, the

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275 Reed v. State, No. BC432420, slip op. at 9 (Cal. Super. Ct. L.A. County May 13, 2010).

276 Washakie Cnty. Sch. Dist. No. One v. Herschler, 606 P.2d 310, 315 n.3 (Wyo. 1980).

277 *See* Complaint for Injunctive and Declaratory Relief, *supra* note 182, at 1.

278 *See* Neb. Coal. for Educ. Equity & Adequacy v. Heineman, 731 N.W.2d 164, 182–83 (Neb. 2007).

279 *See supra* Part III.A.

280 *See* Fischel, *supra* note 122, at 614; *see also supra* text accompanying notes 112–18.

features that distinguish *Reed*-like suits from finance suits suggest that even courts that have dismissed finance suits as nonjusticiable may be willing to decide these claims on the merits. Given this potential for greater judicial intervention, courts need to consider carefully the remedies they will grant if they find in favor of plaintiffs. This concern is the subject of the final Part of this Comment.

V. REMEDYING DISPARITIES IN SKILL-BASED EDUCATION INPUTS

In protecting the constitutional rights of children, a court's choice of remedy can have a substantial impact on the long-term educational opportunities available to vulnerable students. For example, declaratory relief labeling a practice unconstitutional has significant moral force that may lead to positive change, yet such a declaration may offer little practical relief to students if policy changes are not implemented quickly and in a way that effectively eliminates the rights violation. In contrast, if courts are too heavy-handed in granting relief, they create an opportunity for groups who favor the policies at issue to stir up popular backlash against the court's decision. In the end, this may lead to greater resistance to policy change, cause courts to be less likely to find against policies because they fear a loss of credibility, and ultimately have an adverse impact on the long-term academic interests of poor, minority students.[281] Accordingly, courts should carefully consider the potential consequences of the kinds of relief they may grant.

Part V proceeds in two sections. Section A proposes that courts initially limit their intervention to declaratory relief, so long as there is minimal risk that institutional actors will drag their feet in implementing a change in policy. Section B addresses what courts should do when they perceive that education stakeholders or policy makers may try to resist reform, ultimately concluding that declaratory relief should be coupled with injunctive relief in those circumstances.

Before discussing remedies in greater detail, a caveat is in order. This Comment does not suggest, with respect to LIFO, that courts should entirely disregard the role that seniority can play in personnel decisions. Additionally, this Comment does not argue that courts should cast aside employee rights bargained for in union contracts. These are legitimate considerations that courts should take into account when crafting a remedy. Nevertheless, courts

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281 *See* Sunstein, *supra* note 266, at 170–71.

must ultimately remember that these considerations cannot be rigidly followed at the expense of constitutional rights.

A. Preference for Declaratory Relief

Courts trying to remedy *Reed*-like violations should begin by offering plaintiffs declaratory relief. The clear act of declaring a practice unconstitutional can spur prompt action by legislative and executive actors to remedy the wrong. For example, after the Massachusetts Supreme Court held that the state's school finance scheme violated the state constitution,[282] the state legislature took three days to pass the Education Reform Act of 1993, which was intended to bring the state's funding scheme in line with the court's holding.[283] In another instance, the Kentucky legislature passed the Kentucky Education Reform Act of 1990, which completely restructured the state's entire education system, less than a year after the state's supreme court held that the entire system was unconstitutional.[284] While the swift corrective action in Massachusetts and Kentucky was atypical in the context of school finance litigation,[285] one can reasonably expect legislative and executive actors to move quickly in remedying local *Reed*-like violations because the scope of the policies in question are much narrower than statewide school finance regimes.

Several other reasons suggest that declaratory relief alone may spur swift policy change. First, a judicial declaration that a policy is unconstitutional has substantial moral force. Government officials may be uncomfortable sticking to an existing policy when the judiciary has labeled it unconstitutional. Second, declaratory relief has the potential to make the broader public aware that an extant policy violates the constitution. This may lead to increased public pressure on policy makers to make changes, especially when a child's education is at stake. Third, declaratory relief might provide additional support to public officials who have been trying to change existing policies, but have encountered resistance from other stakeholders who oppose change. The declaratory relief may serve as the additional justification these officials need to secure passage of their reforms.

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282 McDuffy v. Sec'y of the Exec. Office of Educ., 615 N.E.2d 516 (Mass. 1993).

283 Sonja Ralston Elder, Note, *Standing Up to Legislative Bullies: Separation of Powers, State Courts, and Educational Rights*, 57 DUKE L.J. 755, 775 (2007).

284 *Id.* at 774–75.

285 *See* Molly A. Hunter, *All Eyes Forward: Public Engagement and Educational Reform in Kentucky*, 28 J.L. & EDUC. 485, 498–99 (1999).

Another benefit of declaratory relief is that such limited holdings temper claims that the judiciary is usurping legislative power. Limiting judicial action to declaratory relief is responsive to justiciability concerns because such relief is the least intrusive on legislative and executive prerogatives. Declaratory relief only passes judgment on an existing policy. When a court only offers declaratory relief, it avoids giving directives to another branch of government on what specific steps that branch should take. Perhaps because of these benefits, several courts, mindful of justiciability concerns, have limited their intervention to declaratory relief in school finance cases.[286]

Nevertheless, declaratory relief may be insufficient because the lack of specific judicial directives makes it challenging for legislators to determine how to change policies in a way that will satisfy constitutional requirements. This shortcoming is evident in states where plaintiff victories in school finance suits have created additional litigation that has lasted for years.[287] Thus, while declaratory relief is a preferable first step in crafting a remedy because it displays sensitivity to justiciability concerns, it is an imperfect form of relief, and courts should not limit themselves to declaratory judgments simply to minimize claims of judicial legislating.

B. The Danger of Delayed Reform and the Potential Need for Injunctive Relief

Courts may need to grant both declaratory and injunctive relief in certain circumstances. Specifically, courts should not hesitate to grant injunctive relief, if needed to force swift policy change, because of the substantial harm that delayed action may cause. Having an ineffective teacher for a single school year has a considerable adverse impact on an individual student's academic achievement, while a year with an effective teacher can help struggling students make academic strides.[288] Thus, delayed reform creates

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[286] *See, e.g.*, Dupree v. Alma Sch. Dist. No. 30, 651 S.W.2d 90, 95 (Ark. 1983) (quoting from *Serrano II* to note that the legislature has the duty of creating the state's school system); Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 394, 399 (Tex. 1989) (refusing to instruct the legislature to enact specific legislation after declaring the state's school finance scheme unconstitutional).

[287] In New Jersey, the state supreme court struck down three legislative responses to the court's declaration that the state's education finance system was unconstitutional. The Texas Supreme Court has passed judgment on the constitutionality of the state's school finance system six times since initially holding it unconstitutional. *See* Neb. Coal. for Educ. Equity & Adequacy v. Heineman, 731 N.W.2d 164, 182–83 (Neb. 2007).

[288] *See, e.g.*, ROBERT GORDON ET AL., BROOKINGS INST., IDENTIFYING EFFECTIVE TEACHERS USING PERFORMANCE ON THE JOB 7–8 (2006); Daniel Aaronson et al., *supra* note 150, at 95.

serious potential for harm to vulnerable children. Additionally, action by organized interest groups, who favor policies like LIFO,[289] may increase the potential for foot-dragging without the clear directives of injunctive relief.

Courts should consider several factors when determining whether to grant injunctive relief in conjunction with declaratory relief. First, courts should look at the level of resistance to policy change from entrenched local interest groups. Organized resistance from teachers, administrators, school district officials, or parent groups may make it more difficult for policy makers to implement changes, so courts should be more willing to grant injunctive relief when organized resistance to policy change is strong.

Second, courts should consider whether policy makers have already contemplated changing the policy in question before plaintiffs filed their lawsuit. If policy makers have already begun planning changes, injunctive relief may be less necessary to spur action and it may even interfere with the reform policy makers were already planning.

Third, courts should consider the level of organization among local education reformers. If reform groups are well organized, they may be able to pressure policy makers to make quick reforms simply based on the declaratory relief. If this is the case, the extra push of injunctive relief may be unnecessary.

Fourth, courts should look at the recent historical record of academic achievement within the local school district, or at the specific schools that the challenged policy affects the most. Consistently low levels of achievement may signal to a court that immediate action needs to be taken to mitigate any further harm to the educational opportunities of the relevant student population. As a result, injunctive relief may be more warranted when a school district has a history of low achievement.

Finally, courts should keep in mind the complexity involved in making policy changes to prevent a constitutional violation because the political branches may need more flexibility in reforming complex policies. For example, the changes necessary in *Reed* to avoid a constitutional violation were straightforward. The school district simply had to protect teachers at a few specific schools from being laid off in a RIF. In contrast, the policy changes necessary in *Abbeville County School District v. State* were far more

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289 *See, e.g.*, Howard Blume & Jason Song, *UTLA May Sue to Block Layoff Change*, L.A. TIMES, Oct. 7, 2010, at A1; Carl Campanile, *Pro-LIFO Ads Blitzing Mike*, N.Y. POST, Mar. 22, 2011, at 2.

substantial when the court required the school district to expand student access to preschool.[290] That kind of change might require a school district to hire more teachers, adopt a new curriculum, and find space for additional classes. Injunctive relief requiring swift reform may be less appropriate when the necessary policy changes are complex because the use of specific judicial directives may make it more difficult for policy makers to implement reform.

Injunctive relief may also have indirect and unintended benefits. By forcing school districts to take immediate action, injunctive relief may show litigants that courts will not act timidly in remedying *Reed*-like violations. This may lead school districts to take greater corrective action in response to an adverse decision. This potential scenario was evident in the settlement that emerged in *Reed*.[291] The agreement created obligations for LAUSD to take protective measures at up to forty-five schools that were at risk of losing a disproportionate number of teachers from LIFO, even though students at only three of those schools had been parties to the litigation.[292]

When determining the level of relief to grant plaintiffs, courts should initially limit themselves to declaratory relief. This limited intervention minimizes concerns about judicial overreaching. However, because of the importance of education rights and the significant risk of harm resulting from delayed reform, courts should not rule out granting injunctive relief in conjunction with declaratory judgments. The considerations discussed above provide courts with a starting point for determining when injunctive relief is appropriate.

CONCLUSION

The persistence of the achievement gap in American education is one of the most troubling and pressing problems our society confronts. Through their admirable efforts, education reform litigants have sought to eliminate this gap while highlighting the continued disparities in education. Nevertheless, forty years of finance litigation has not appreciably closed the achievement gap. A new approach is necessary. Children attending schools that fail to meet their unique needs deserve nothing less.

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290 No. 93-CP-31-0169, slip op. at 161–62 (S.C. Ct. Com. Pl. Dec. 29, 2005).

291 *Compare* Reed v. State, No. BC432420 (Cal. Super. Ct. approving final settlement Feb. 8, 2011), *rev'd sub nom.* Reed v. United Teachers L.A., 145 Cal. Rptr. 3d 454 (Ct. App. 2012), *with* Reed v. State, No. BC432420, slip op. at 1 (Cal. Super. Ct. L.A. County May 13, 2010).

292 *See* Reed v. State, No. BC432420 (Cal. Super. Ct. approving final settlement Feb. 8, 2011).

In light of the shortcomings of education finance litigation, this Comment argues for a new approach that focuses on increasing and equalizing access to high-quality instructors and education professionals at the local school district level. This Comment explains why this new strategy is superior to the traditional approach of bringing education finance challenges. First, by focusing on education inputs that have a significant effect on academic outcomes, this new litigation would increase the chances that a judicial victory will translate to actual achievement gains in the classroom. Second, because these locally focused suits are more manageable for courts, this new litigation approach may reopen the courthouse doors to education reform plaintiffs in states that have refused to decide education finance cases on the merits.

While this Comment focuses on LIFO as a policy to challenge under this new strategy, several other policies may also be appropriate targets for litigants. The use of combination classes and the lack of access to preschool programs are two other potential targets on the nonexhaustive list of policies this Comment suggests litigants should challenge. By shifting the focus of their litigation, education reform plaintiffs can play an even more important role in narrowing the achievement gap and meeting the mandate of education equality articulated in *Brown* and numerous state supreme court cases throughout the United States.

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