Educational Adequacy as Legal Theory:
Implications from Equal Educational Opportunity Doctrine

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Evolving school finance litigation theory reflects an evolving equal educational opportunity doctrine. Decades ago race and school desegregation litigation forged the initial modern understanding of equal opportunity. More recently, school finance litigation displaced desegregation litigation as the major instrument for enhancing equal educational opportunity. Within the school finance litigation movement equity theory understood equal educational opportunity from the perspective of school resources, principally per pupil spending. Current school finance litigation theory—adequacy—approaches the equal educational opportunity doctrine with an eye towards results, notably student academic achievement. If my central claim that adequacy litigation is the most recent judicial articulation of an evolving equal educational opportunity doctrine is correct, an understanding of adequacy litigation requires some understanding of educational opportunity. Society’s unending quest for greater educational opportunity, at least since the mid-twentieth century, implies a robust role for state and federal courts. Advocates’ reliance on the courts for a drive toward enhanced educational opportunity, however, places critical—and increasingly uneasy—institutional stress on the judiciary. As a consequence, adequacy litigation’s future efficacy relies partly on the equal educational opportunity doctrine’s stability as well as the courts’ institutional capacity to achieve desired educational policy changes.
I. Introduction

America’s quest for greater equal educational opportunity—framed by the nation's historic drive for greater racial equality—presently involves a persistent quest for large sums of money. For example, incident to a successful adequacy lawsuit, New York state supreme court Justice DeGrasse recently ordered the State of New York to provide an additional $5.6 billion to the New York City public schools. This award is on top of an additional $9.2 billion ordered for New York City school facilities. How New York lawmakers will digest the court order and how school spending might change are far from clear. Nevertheless, New York's experience, while perhaps extreme in terms of the size of the judicial award, is a recent—albeit notable—product of a multi-decade nationwide litigation campaign designed to enlist the courts’ assistance to extract additional resources for public schools.

Adequacy lawsuits do not exist in a vacuum. Indeed, they occupy a central position in education policy and school reform discourse. Adequacy litigation represents the latest iteration of an enduring struggle for and over the meaning of equal educational opportunity, a struggle ignited by the Brown v. Board of Education decision. This struggle involves two related though distinct parts. One part involves the equal educational opportunity doctrine’s evolution. A second part involves intergovernmental jockeying to define equal education among the legislative, executive, and judicial branches. The struggle has stimulated a run of litigation that already spans more than

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2 See Sam Roberts, Judicial Enforcement: Rare Ruling on New York City Schools Sets Amount for Other Branches to Pay, N.Y. TIMES, Feb. 22, 2005, at B3 (Nat’l ed.).
3 Id.
three decades and traverses federal and state courts. Because judges and lawyers—prompted by litigants—second-guess lawmakers and governors’ decisions about public school spending with increased regularity, it is an appropriate moment to pause and reflect upon adequacy litigation and its consequences for education and public policy. Especially important is what the current school finance terrain in general, and adequacy litigation in particular, imply for the future of educational policymaking, the equal educational opportunity doctrine, and the courts’ role in the policymaking enterprise.

This paper briefly traces the judiciary’s role in the struggle for greater equal educational opportunity and for control over defining its meaning. Part two maps the salient historic contours of those struggles, especially the transition from a focus on school desegregation to finance. Part three considers the shift within school finance litigation from equity to adequacy theory, as well as school finance litigation’s role in the evolving equal educational opportunity doctrine. Part four examines three main consequences flowing from school finance litigation, including how school finance litigation increasingly interacts with the No Child Left Behind Act (NCLB). An array of unanticipated consequences stimulated by adequacy lawsuits partly account for an emerging hint of judicial humility. Part five considers the implications of the recent decisions by a few courts to pull-back from their engagement with school finance reform. Part six discusses adequacy litigation in the twenty-first century. Although the present run of adequacy litigation will endure until society (once again) reconceptualizes the equal educational opportunity doctrine or the institutional strains on the courts imposed by adequacy lawsuits becomes too great, the prospect of either condition arising anytime in the near future is unlikely.
II. History and Context: School Finance Litigation’s Role in the Evolving Equal Educational Opportunity Doctrine

American courts have long recognized the equal educational opportunity doctrine’s importance and joined with efforts to enhance it. The courts’ sustained engagement with the doctrine has evolved along with the doctrine itself. A brief review of the doctrine’s modern history evidences how equal education or, more precisely, the doctrine’s judicial articulation of it, has changed over time.

In Brown v. Board of Education, a unanimous Supreme Court described providing education—on equal terms—as a state and local government’s most important function. Courts have since echoed similar sentiments. Two decades after Brown, the Supreme Court reaffirmed its “historic dedication to public education,” noting education’s grave significance as a public and private good. The Court also noted that its view of education and its role in American society reflects widely held public values: “American people have always regarded education and acquisition of knowledge as matters of supreme importance.”

A general judicial commitment to the equal educational opportunity doctrine and its ideals, however, neither fixes the doctrine’s definition nor provides an organizing principle or unifying theme to assist with interpretative endeavors. Since the mid-twentieth century’s civil rights movement, race provided one such definition and unifying theme. In Brown, the Court famously concluded that public schools separated
by race were inherently unequal.\textsuperscript{10} The decision helped propel a broader social movement seeking greater racial equality. \textit{Brown} had the effect of focusing many legal and policy discussions about the equal educational opportunity doctrine through the lens of race. Decades of subsequent school desegregation litigation evidenced this orientation.\textsuperscript{11} Although it is difficult, if not impossible, to overstate \textit{Brown}'s impact on American education and society,\textsuperscript{12} prevailing wisdom today emphasizes race’s centrality to legal and policy debates about education and school reform is waning. The generation-long struggle either assigned to or assumed by the courts to define equal educational opportunity in terms of race has been eclipsed by other concerns, organizing principles, and unifying themes.

\textbf{A. From Race to Resources: The Emerging Influence of School Finance Litigation on Equal Educational Opportunity}

The school finance movement ascended just as the school desegregation movement matured and began to wane. Early school finance litigation, demarked by its focus on resources, understood the equal educational opportunity doctrine to pivot on resources rather than race. From the start, school finance lawsuits targeted the long-standing practice of funding public schools through, in large part, local property taxes. Variation in property values within a state and, in some instances, taxing efforts, virtually guarantees per pupil spending differences among students. These per pupil spending

\textsuperscript{10} 347 U.S. 483, 495 (1954).
\textsuperscript{11} The literature on equal educational opportunity and school desegregation, already substantial, continues to grow. The celebration of the \textit{Brown} decision’s fiftieth anniversary in 2004 animated the most recent scholarly surge. For a summary and discussion, see generally Michael Heise, \textit{Litigated Learning and the Limits of Law}, 57 VAND. L. REV. 2417 (2004).
differences arise even though students within a state benefit from the same state constitutional protections.

While state constitutional commitments to education vary, many obligate states to provide either a “thorough and efficient”\textsuperscript{13} or a “complete and uniform”\textsuperscript{14} education to its citizens. What these state constitutional texts mean in the school finance context has been a critical issue in the 45 states that have experienced some version of school finance litigation.\textsuperscript{15} Although the specifics of school finance lawsuits vary from state to state, most litigation efforts seek two main goals: to dismantle the tradition of local property tax based school finance systems and to generate more funding for schools.

The first goal sought through school finance litigation—to dislodge or reduce the reliance on property taxes as the principle source of school revenue—represents a direct challenge to the historic engine and basic financial architecture of school finance in the United States. This goal responds to the potential (and sometimes stark) consequences that result from school districts within a state with vastly different property values. Many property-rich districts can afford salaries high enough to attract and retain first-rate teachers. Many low income districts, in contrast, continue to struggle to put a certified teacher in every classroom.\textsuperscript{16}

\textsuperscript{13} See e.g., Minn. Const. art. XIII § 1 (“The legislature shall make such provisions by taxation or otherwise as will secure a thorough and efficient system of public schools throughout the state.”); see generally Molly O’Brien & Amanda Woodrum, \textit{The Constitutional Common School}, 51 CLEV. ST. L. REV. 581, 583 (2004).

\textsuperscript{14} See e.g., Wyo. Const. art VII § 1 (“the establishment and maintenance of a complete and uniform system of public instruction.”).

\textsuperscript{15} The Campaign For Fiscal Equity, Inc., a New York-based organization that has sponsored the multi-decade litigation effort in New York reports that, as of March 2005, only five states have never had any school finance litigation. See http://www.schoolfunding.info/litigation/In-Process%20Litigations-09-2004.pdf.

\textsuperscript{16} The federal No Child Left Behind Act of 2001 increased pressure on districts regarding teacher qualifications. Under federal law public schools can hire only “highly qualified” teachers and existing veteran teachers have until the 2005-2006 school year to demonstrate that they satisfy the “highly qualified” requirement. See No Child Left Behind Act of 2001 § 1119(a)(1), 20 U.S.C.A. 6301 (2002).
School finance lawsuits also explicitly or implicitly seek to stimulate increased resources for public schools. This effort reflects a belief that at least some public schools are under-funded. Such a belief rests upon necessarily subjective assumptions. Insofar as children arrive at schools with vastly different educational needs, assessments about whether any given level of per pupil spending is too high or too low pivot almost entirely on one’s perspective. Also implicit in the desire to increase educational resources is a belief that greater educational opportunity (defined in terms of student academic achievement) will follow from greater resources.

III. School Finance Litigation: From Equity to Adequacy

The initial wave of school finance lawsuits advanced an equity theory and focused on per pupil spending gaps. Typically, low per pupil spending districts sued and sought judicial assistance in closing or narrowing per pupil spending among districts within a state. Early success in California\(^\text{17}\) prompted school finance activists to pursue a national litigation strategy in federal courts. In 1973, however, the U.S. Supreme Court declared that per pupil funding disparities arising from a local property tax based school finance system were of no federal constitutional concern.\(^\text{18}\) Consequently, school finance activists were forced to return to the states and consigned to a state-by-state litigation strategy. State-level litigation, however, benefits from more education-friendly state constitutional language.

The school finance litigation world dramatically changed during the late 1980s. Many observers point to the 1989 decision by the Kentucky Supreme Court, Rose v. Council for Better Education, as signaling the emergence of school finance adequacy litigation. Loosely described, adequacy litigation challenges school finance systems not because some districts receive more per pupil spending than others, but because some districts do not provide adequate educational services regardless of spending levels. Litigants construe “adequate educational services” mostly in terms of student academic achievement. As a consequence, adequacy lawsuits advance a new vision of the equal educational opportunity doctrine that, at a conceptual level, severs notions of educational “adequacy” from school spending. At the more practical level, however, notions of increased educational opportunity and increased school spending remained tethered as the legal remedies sought by districts pushing adequacy lawsuits invariably involved resource increases.

Thus, adequacy lawsuits reconceptualized equal educational opportunity once again. If school desegregation litigation interpreted equal education in terms of race and school finance equity theory in terms of resources, adequacy litigation construes equal education from the perspective of results, namely student achievement. By linking notions of adequacy with student academic performance, adequacy lawsuits thrust courts into disputes about whether sub-par student performance constitutes sufficient evidence that a district’s school finance system is, from a state constitutional perspective, inadequate.

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19 790 S.W.2d 186 (1989).
Despite a shared vision of what equal educational opportunity means, school finance adequacy lawsuits nonetheless follow strikingly disparate paths. Many factors contribute to adequacy litigation variation. Indeed, local conditions inform school finance lawsuits in numerous ways. A state trial judge can wield enormous influence over critical pre-judgment rulings as well as the nature and structure of the judicial opinion itself. State-specific political cultures can enormously influence the degree to which judicial decisions are implemented or resisted. At a more idiosyncratic level, state supreme court elections and parochial state economic conditions and changes exert significant influence over the destiny of school finance lawsuits. Consequently, the design of adequacy lawsuits and the implementation of successful ones invariably depend on highly state-specific factors.

Numerous factors fueled the velocity of the theoretical migration from equity to adequacy school finance litigation, including adequacy’s enviable success rate in court. According to the Campaign for Fiscal Equity, a prominent school finance litigant, prior to 1989 (and the Rose decision in Kentucky) school finance lawsuits generated six victories and 12 losses. Since 1989 and the emergence of adequacy litigation school finance litigants have generated 19 victories and six defeats in state courts of last resort. Although not every school finance lawsuit since 1989 can be fairly characterized as an adequacy lawsuit, since 1989 the unmistakable trend among school finance activists has

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23 The CFE tally includes, however, litigation which is arguably more equity- than adequacy-based. State courts of last resort refer either to a decision by a state’s highest court or, as well, to an unappealed lower state court decision. See http://www.schoolfunding.info/litigation/adequacydecisions12-7-04.pdf
24 Id.
been toward adequacy lawsuits. While it is inevitable that later litigation benefited from learning from prior mistakes, it is also clear that the shift from equity to adequacy theory contributed to greater success in court. Whether successful equity lawsuits generated the sought after increases in education spending, however, remains debated. What little empirical research exists on the topic is mixed.\textsuperscript{25}

Adequacy litigation’s attractiveness to the nation’s urban districts also helped nudge school finance activists from equity to adequacy litigation. When the early equity lawsuits were initially launched per pupil spending in most urban districts fell below state per pupil averages. Over time, however, per pupil spending in urban districts increased. As it did, urban districts’ appetite for equity lawsuits decreased as they realized they stood to gain little, if anything, through legal efforts to equalize per pupil spending statewide. By defining educational opportunity in terms of student achievement rather than per pupil spending, however, adequacy advocates regained the support of many of the nation’s large urban districts. Although urban districts’ per pupil spending now exceeds state averages in almost all states, urban districts still struggle mightily in terms of student performance. Consequently, while urban districts had little to gain from equity litigation, these districts have much to gain from successful adequacy litigation.

\textit{A. Equity v. Adequacy Litigation}

Adequacy litigation’s rapid displacement of equity litigation in school finance reform discourse naturally emphasizes important differences between the two
legal theories. The quick transition and distinctive features, however, should not divert attention from the salient, if sometimes subtle, aspects that both legal theories share.

1. What Adequacy and Equity Theory Share

In addition to reflecting evolving conceptions of the equal educational opportunity doctrine, school finance equity and adequacy litigation share critical aspects, including a thirst for and a belief in the role of money, as well as a reliance on the judiciary to generate desired policy outcomes.

   a. Money for Remedy

   Equity and adequacy lawsuits share a thirst for increased funding and resources as well as a belief that both approaches will enhance educational opportunity. Although equity and adequacy lawsuits approach the task of legally challenging school and district funding systems from decidedly different directions, increased educational resources is the legal remedy of choice for both types of lawsuits. Such a remedy implies a belief that increased educational resources make schools constitutionally equitable or adequate.

   The relation between legal theory and remedy in the equity litigation is both straightforward and plausible. One way to reduce per pupil spending gaps is to increase resources in lower-spending districts. Per pupil spending gaps can be reduced by raising the spending floor (what plaintiffs desired) or, as litigants in California and elsewhere have learned, by reducing spending in higher-spending districts.\(^{26}\) Regardless of which approach policymakers adopted, a robust nexus existed between legal theory and remedy in equity litigation.

\(^{26}\) [insert cite]
Although adequacy lawsuits also seek increased school funding and resources, the nexus between legal theory and remedy is far less coherent and straightforward. Unsatisfactory student academic performance animates adequacy lawsuits seeking increased resources. A coherent and precise understanding of the relation between student academic achievement and educational resources, however, remains illusive. The assumption that increasing revenues is necessary to make schools constitutionally adequate—central to adequacy litigation—raises vexingly difficult and complex issues and bumps up against starkly mixed evidence. Exactly what causes some students to perform well and others to perform poorly remains hotly debated. And the empirical relation between student academic achievement and school resources is inconclusive at best. Thus far, a loose consensus focuses on the importance of peers’ socioeconomic factors on a student’s academic achievement as well as on social behavior. While many also believe that good teachers, strong principals, small schools, small class sizes, and parental involvement can improve student achievement, the significance of these variables remains subject to heated debate. Added to these specific areas of uncertainty is the more general dispute over the extent to which resources correlate with achievement—i.e., over whether money “matters”—and, if it does, how resources influence student achievement.

27 James Coleman was the first to report this, in his famous 1966 study for the (now) Department of Education, which has since become known simply as “The Coleman Report.” See JAMES S. COLEMAN ET AL., U.S. DEP’T OF HEALTH, EDUC. & WELFARE, EQUALITY OF EDUCATIONAL OPPORTUNITY 304 (1966). Scores of subsequent studies have confirmed Coleman’s conclusion. For citations to the literature, see RICHARD D. KAHLENBERG, ALL TOGETHER NOW: CREATING MIDDLE-CLASS SCHOOLS THROUGH PUBLIC SCHOOL CHOICE 26-28 (2001).

28 For further discussion of research on this point, see generally KAHLENBERG, supra note 27, at 86-90 (discussing research).

Setting aside long-standing and technically complex debates about the relation between school spending and student achievement, what is reasonably clear is that something as complex as student academic achievement almost assuredly does not pivot on any single variable, such as funding, teacher quality, racial composition, or class size. Equally clear, however, is that schools with a majority of poor students rarely, if ever, perform as well as their middle-class counterparts.30 This holds true even when substantial resources are provided to these schools. Although several reasons explain why this is so, the key point is the clear and undisputed fact that schools of concentrated poverty almost always perform poorly. Although adequacy litigants’ focus on school finance is hardly inapt, a belief that funding levels alone can boost academic achievement—pivotal to adequacy litigation—ignores the rich complexity that characterizes student academic achievement.

The shared and conventional remedial focus—more money—diminishes claims that adequacy lawsuits reflect a revolutionary break from equity lawsuits. To be sure, the sums of money litigants ask for, and sometimes receive, could be considered revolutionary in terms of their size. Regardless of the amount, however, what is curious is that such an unconventional effort to re-traject schools and student learning has not generated innovative, unconventional remedies. Indeed, the complexities surrounding the empirical relation between school spending and student achievement make distinctions between equity and adequacy theory—while plausible in the abstract—less important at a practical level. Simply put, when courts face claims about inadequate education they

must either engage in the incredibly complex task of costing-out the effort necessary to reduce student achievement gaps or, in the alternative, fall back to assessing “adequacy” in terms of per pupil spending gaps. To attempt the former requires a clear understanding about the relation between resources and student outcomes. Such an understanding simply does not exist. To attempt the latter functionally conflates adequacy and equity theory, at least as it bears on the legal remedy.

b. A Necessary Belief in Courts & Judicial Efficacy

Equity and adequacy activists cast their debates in formal legal terms and, in so doing, express a belief in courts and their ability to generate desired policy change. Such a belief, however, belies important institutional challenges and limitations. Unlike the legislative and executive branches which have ready access to policymaking expertise, courts’ access to policymaking assets is far more limited. Save for the rare court-appointed expert or special master and, of course, a small number of law clerks, by institutional design judges toil in comparative solitude. Aside from the case law itself, judges also work with briefs and memoranda supplied by the competing parties. Legal documents, designed to assist a judge reach a specific conclusion, seek to persuade rather than objectively inform judges.

If courts’ ability to craft and implement public policy in general is limited due to institutional constraints, these constraints are especially pronounced in the school finance context. Put simply, courts are neither well-designed nor well-equipped to formulate and implement school finance policies. School finance issues are varied, increasingly specialized, and frequently highly technical. As well, courts lack the latitude to make the necessary and often-time delicate political tradeoffs incident to competition among public
claimants for limited public resources. Courts that wade into such political terrain too often or too dramatically risk diminishing their institutional legitimacy and disrupting a carefully calibrated separation of powers. Experience in this regard is mixed. States such as Kentucky supply hope to those looking to the courts to deliver policy changes. The protracted experiences of other states, notably New Jersey, Texas, and, more recently, New York, provide a far more cautionary tale.

2. Differences

Although equity and adequacy lawsuits share critical attributes and the line separating the two theories may blur, the two litigation theories approach school finance reform in decidedly different ways. One subtle difference involves the degree of financial exposure generated by a successful lawsuit and clarity regarding constitutional compliance. Another difference involves the triggering event that generates a potential constitutional problem.

a. Degree of Financial Exposure

Although successful school finance equity and adequacy lawsuits generate considerable financial exposure for states, the degree of a state’s financial exposure is better known ex ante in the equity than in the adequacy context. Most equity lawsuits seek to reduce or eliminate per pupil spending gaps among districts within a state by increasing per pupil expenditures in low-spending districts to the level of their high-spending counterparts. While states are certainly free to do so, no equity lawsuit has ever completely eradicated per pupil spending differences. Indeed, to do so would involve enormous expense in most states. Potential enormity aside, in an equity lawsuit a state has the benefit of knowing the upper bounds of its financial liability as the state can
readily compute the cost of bring all school districts up to the per pupil spending level enjoyed by the state’s highest spending district. States can (and have) come into constitutional compliance and reduce per pupil spending gaps by reducing spending levels in higher spending districts. More realistically, states can respond to a successful equity lawsuit by some combination of leveling up and leveling down.\textsuperscript{31} Regardless of how a state may elect to respond to a successful equity lawsuit, states enjoy some \textit{ex ante} knowledge of their potential financial liability and control over how to manage the financial exposure.

A defendant in an adequacy lawsuit, in contrast, has far less information about its potential financial exposure. In adequacy lawsuits, unlike in equity lawsuits, students’ failure to achieve desired achievement levels and the related gaps in student academic achievement triggers litigation. Because the relation between increased school spending (the desired legal remedy for inadequate schools) and student achievement is not well-settled, the financial cost of achieving adequacy by increasing achievement for low-performing students—necessary to reduce the achievement gaps between high and low-performing students—is not well known. Thus, the upper bound of a state’s financial exposure created by a successful adequacy lawsuit similarly is unknown with any meaningful degree of certainty. Indeed, school finance activists seeking judicial assistance extracting increased public investment for public schools should find the combination of theoretically limitless financial exposure and uncertainty about the determinants of student academic achievement especially attractive. This attractiveness further explains school finance litigants’ migration from equity to adequacy theory.

\textsuperscript{31} For a discussion of various responses see Caroline M. Hoxby, \textit{All School Finance Equalizations Are Not Created Equal}, 66 Q. J. OF ECON. 1189 (2001).
IV. Themes

Adequacy litigation remains prominent among the handful of key developments that have shaped education policy during the past 15 years. Indeed, educational adequacy has become something of a term-of-art that already transcends lawsuits and courtrooms. Adequate education as a concept informs current education policy and reform discourse. If anything, adequacy litigation’s import and centrality will likely increase over time for the foreseeable future.

Just as important as what adequacy litigation sets out to achieve as a movement, however, are the consequences that flow from it. These consequences include moral hazard incident to leveraging classroom failure into legal success, incentives for states to dilute educational standards, and institutional stress on courts seeking to stimulate or implement (or both) school finance reform.

A. Adequacy lawsuits leverage the standards and assessments movement, including NCLB, in a way that transforms failure in the classroom into success in the courtroom

Adequacy lawsuits gathered critical momentum once they were joined with the standards and assessments movement. Since the mid-1980s, incident to The Nation At Risk report\(^\text{32}\) and the legislative responses the report fueled,\(^\text{33}\) many states began the task of reviewing and, in some instances, articulating for the first time goals for student education outcomes. The emergence of the standards and assessment movement signaled a fundamental shift in educational policymaking’s focus from inputs (resources) to outcomes (student achievement).

\(^{32}\) [insert cite]
\(^{33}\) [insert cite]
While reasonable minds differ about the various consequences generated by the standards and assessment movement, one consequence is already clear: policymakers now understand how policy goals—educational standards—can be transformed into legal entitlements for increased resources by school finance litigants. In state after state, school finance litigants, paradoxically, have transformed failure in the classroom into success in the courtroom.34 In 2000, for example, only 27 percent of New York City’s public high school graduates earned Regents Diplomas, although 49 percent of New York’s public school graduates statewide qualified for this academic distinction.35 The plaintiffs in New York state’s adequacy litigation successfully argued that New York City schoolchildren’s dismal Regents Diploma record evidenced the claim that the state was failing to provide a “sound basic” education.36 The court awarded New York City more than $14 billion to bring its schools up to state constitutional adequacy.37

The interaction between adequacy litigation and the standards and assessments movement took on even greater force with the passage of the federal No Child Left Behind Act (NCLB) in 2001.38 Under NCLB, states (that have not already previously done so) must establish school accountability systems that moor annual student proficiency on math and reading assessments.39 Schools must achieve adequate yearly progress as construed by NCLB or face sanctions.40 Although federal law says that the state standards must be “challenging,”41 NCLB leaves states free to establish their own standards and to determine the score necessary to meet the “proficient” threshold. Thus,

34 For cynics the moral hazard implications to education reform for rewarding inefficacy are obvious.
35 [insert cite]
36 [insert cite]
37 [insert cite]
40 Id. at § 1116.
41 Id. at § 1111.
states possess virtually complete control over the mechanisms that determine whether its students and schools achieve adequate yearly progress. Moreover, NCLB does not itself impose a common student proficiency metric across all states. Indeed, the absence of a common metric frustrates comparisons between or among states.\textsuperscript{42}

At its core NCLB leverages state-created standards and assessments, increases transparency by disseminating data on progress, and imposes consequences for insufficient progress. NCLB currently requires that districts test students in grades 3 through 8 in reading and math.\textsuperscript{43} Schools also must report and disseminate test results for all students as well as for various student subgroups that contain a minimum number of students.\textsuperscript{44} A sliding scale of NCLB-specific consequences befalls any school that does not achieve adequate yearly progress.\textsuperscript{45} Thus, a school’s failure to achieve sufficient student achievement and progress generates liability under federal law. The full contour of NCLB liability was not fully appreciated, however, until school finance activists began to advance inadequate yearly progress under NCLB as conclusive legal proof of inadequate education in school finance litigation.

1. The Kansas Example

Recent adequacy litigation in Kansas illustrates how adequacy litigants synthesize state standards and NCLB consequences into a state constitutional entitlement for greater resources. The Kansas Constitution, as amended in 1966, requires the legislature to “make suitable provision for finance of the educational interests of the state.”\textsuperscript{46} To

\textsuperscript{44} \textit{Id}.
\textsuperscript{45} \textit{Id}.
\textsuperscript{46} KAN. CONST. art. VI, §§ 1, 2, and 5.
discharge its constitutional duty and prompted by school finance lawsuits, in 1992 Kansas lawmakers passed the School District Finance and Quality Performance Act ("SDFQPA"). The SDFQPA created a statewide property tax and a statewide system for collecting and distributing property tax revenues. Although the SDFQPA begins from a presumption of equal per pupil spending, the presumption is modified by district-specific weighting factors. As well, the SDFQPA established a guaranteed state per pupil floor along with an accountability system tied to state minimum student performance standards in specific subjects. Satisfied with Kansas lawmakers’ development and implementation of SDFQPA, litigants agreed to dismiss pending school finance litigation.

Satisfaction with the SDFQPA was relatively short-lived, however, and new school finance litigation ensued. In 2003 a Kansas judge struck down the SDFQPA. Part of the court’s reason for striking down the Kansas school finance scheme involved student academic performance. In assessing whether student academic performance evidenced “adequacy,” the Kansas trial court assessed performance data generated in response to the recently-enacted No Child Left behind Act. Notably, both parties pointed to NCLBA data as support for their opposing positions.

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49 Id. at 28.
51 Id. at *45.
52 Id.
The plaintiffs introduced into evidence 2002 and 2003 math and reading proficiency scores for 5th, 8th, and 11th grade students, by racial and ethnic cohort.\textsuperscript{53} The court noted that the evidence was both “informative and disturbingly telling.”\textsuperscript{54} The student performance data uncovered substantial achievement gaps between and among student cohorts. The court then quickly ascribed the students’ poor academic performance to inadequate funding.\textsuperscript{55}

The defendant school districts also sought (albeit unsuccessfully) legal refuge from student academic performance as defined by NCLB. The defendant districts pointed to their schools’ meeting the Adequate Yearly Progress requirements articulated in the NCLB as evidence of adequate educational services.\textsuperscript{56} The court dismissed the defendant’s interpretation of the student achievement data, however, noting that the districts could still achieve AYP requirements even though, for the 2002 and 2003 school years, up to 56 percent of all K-8 graders, and 48 percent of high school students, could fail the reading standard.\textsuperscript{57} For math performance, AYP standards permitted a 53 percent failure rate for K-8 and a 70 percent failure rate for high school students.\textsuperscript{58}

The Kansas experience evidences a key emerging dynamic. Specifically, adequacy litigants now leverage consequences flowing from a federal statute (NCLB) to support state-level school finance challenges.

\textsuperscript{53} Id. at *47.  
\textsuperscript{54} Id.  
\textsuperscript{55} Id. at *49.  
\textsuperscript{56} Id. at *41.  
\textsuperscript{57} Id.  
\textsuperscript{58} Id.
B. The specter of adequacy litigation exposure induces states to dilute their student proficiency standards.

Potential liability from school finance adequacy lawsuits fueled, partly, by a school’s inability to achieve adequate yearly progress under NCLB will prompt some states to dilute their student academic proficiency standards. Notwithstanding the federal government’s direct and significant involvement with K-12 education through NCLB, primary and secondary education endures as principally a state and local governmental concern. Indeed, notwithstanding NCLB, states retain the ability to set their own student achievement standards that interact with federal requirements for academic progress, so long as state standards receive formal U.S. Department of Education approval. Prior to 1989 many states engaged in something resembling a “race-to-the-top” in terms of developing and implementing rigorous student achievement standards and goals. The emergence of adequacy litigation, fueled by state standards and assessments and NCLB consequences, has transformed a “race-to-the-top” into an emerging “race-to-the-bottom.” Financial exposure flowing from adequacy lawsuits (as well as the independent adverse consequences to states and local school districts flowing from NCLB) has induced states to roll-back their student standards.59

When many states initiated efforts to articulate desired student academic proficiency in the early and mid-1980s they did so without the specter of federal liability under NCLB, or exposure to adequacy lawsuits. Today, such liability and exposure disquiet many policymakers and assuredly influences standards setting or tinkering and, if nothing else, generates a dilemma. States with rigorous proficiency standards are more likely to fail to achieve adequate yearly progress (AYP), trigger NCLB consequences,

and increase their respective adequacy litigation exposure. Conversely, states with comparatively weak proficiency standards stand a better chance of successfully navigating through NCLB requirements and thereby avoid NCLB sanctions and the associated stigma.

Thus, many states now confront a stark dilemma: maintain high student academic standards at the risk of increasing litigation (and financial) exposure. As state budgets tighten, and in a policymaking world of ever-increasing claimants on state resources, the policy path of least financial resistance becomes even more attractive to many lawmakers. Moreover, in states where suburban districts recoil at the prospect—however remote—of their students not achieving state proficiency standards, or in districts that resent standardized testing’s inevitable curricular pull, a decision to dilute academic standards becomes even easier to make. How state student achievement standards respond to NCLB exposure and whether NCLB will trigger a “race to the bottom” in terms of student proficiency standards is an empirical question. Early evidence, while far from definitive, is not encouraging.

1. New York State’s Regents Standards

Recent changes in New York illustrate the complexities in assessing whether states are diluting academic standards in response to adequacy litigation. On the one hand, in 1996 the New York State Board of Regents voted to require that student achievement at the state’s prestigious Regents Standards were to become necessary for any student desiring a diploma from a New York public high school.61 In 2003, however, the Board of Regents voted to delay imposing the higher standard for two additional

years. As well, New York retreated on other fronts by lowering the passing score threshold and the required number of proficiency exams. Indeed, it remains unclear whether, how, or when New York will fully implement its Regents Standards state-wide as well as whether the Regents Diploma will ever reflect the standards that existed prior to 1996.

The successful adequacy lawsuit in New York makes clear why some states revisit achievement standards. Before 1996 New York State’s high Regents Standards were among the nation’s most rigorous. The Standards’ rigor, however, guaranteed a steady stream of students who failed to achieve the coveted Regents Diploma. Districts that successfully sued New York State partly relied on the pool of students who failed to earn Regents Diplomas. That is, school districts pushing adequacy litigation cited the pool of students failing to earn Regents Diplomas as evidence of the state’s failure to provide an adequate education. Thus, in New York high academic standards contributed to a legal judgment against the state in excess of $14 billion. In light of the immense financial exposure generated by a successful adequacy lawsuit, it is no surprise to find many states revisiting their commitment to high academic standards.

C. Successful Adequacy Lawsuits Inevitably Trigger vigorous political disputes that bog down legal remedy implementation

Successful adequacy lawsuits generate political opposition and resistance that impede implementation of court orders. Sources of political opposition and resistance include the obvious: state lawmakers and policymakers. Many lawmakers and policymakers resent outside (that is, judicial) intrusion into their budgeting processes. State budgeting is a high-wire act during the best of fiscal times. When budgets are

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62 Id.
63 Id.
tightening or contracting, the political tradeoffs incident to the budgeting process can be especially unpleasant. A court order with potentially dramatic budgetary implications can bother even lawmakers otherwise partial to school finance reform. In the world of public budget-making where delicacy and nuance often rein, a court order raising serious budgetary issues can be an especially blunt instrument.

A second source of political opposition and resistance to adequacy lawsuits is less obvious: suburbanites. At a general level, suburbanites will assuredly resist efforts designed to challenge their ability to control the fiscal destiny of their public schools. Unlike the threat posed by judicially-mandated busing during the school desegregation era that implicated suburbs’ control over who attended their schools, the principle threat posed by adequacy litigation is financial. Suburbanites care a great deal about preserving the ability to control their schools as well as how their property tax revenues are spent. As adequacy litigation continues and judgments mount, suburban and taxpayer resistance will continue to stiffen.

Policymakers will need to account for suburban resistance for one simple reason: raw political power. In most state legislatures, which almost always participate in the development of new school funding policies after courts have ruled existing policies unconstitutional, suburban lawmakers hold the balance of power. Influence over the legislative response to an adverse court ruling flows from such political power. Illustrations of suburban influence occurred in such states as New Jersey and Texas when they sought to redistribute existing funds from comparatively wealthier suburban districts.

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to lower-spending districts. The well-documented suburban opposition in those states generated considerable additional complexity to the school finance challenge.  

V. Recent Hints of Judicial Humility

The institutional stresses imposed by adequacy lawsuits on courts as well as the sometimes vigorous opposition to judicial mandates involving education spending may help explain emerging hints of increasing judicial humility. Judicial humility in the school finance context comes in three main flavors. First, some state courts simply refuse to participate. For example, state courts in Illinois and Rhode Island, when confronted with school finance challenges (either based in equity or adequacy theory) to their respective state constitutional requirements, declined jurisdiction and located refuge in the political question doctrine. 

The political question doctrine supplies at least two safe harbors for courts disinclined to resolve school finance disputes. First, a court can decide “not to decide” by concluding that the state constitution possesses a “textually demonstrable commitment of the issue to a coordinate political department.” Such a commitment flows from state constitutional text and either expressly, implicitly, or structurally directs school finance matters to the legislative branch.

When confronted with a school finance challenge the Illinois Supreme Court pointed to concerns about trenching onto legislatures’ terrain as one reason to decline plaintiff’s invitation to strike down the state’s school finance system. The Illinois

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66 [insert cite]
The Constitution’s education clause guarantees to its citizens an “efficient system of high quality public educational institutions and services.”

In *Committee for Educational Rights v. Edgar,* although the court cited to numerous grounds for upholding a lower court dismissal of plaintiff’s challenge, the court remarked: “Nor is education a subject within the judiciary's field of expertise, such that a judicial role in giving content to the education guarantee might be warranted. Rather, the question of educational quality is inherently one of policy involving philosophical and practical considerations that call for the exercise of legislative and administrative discretion.” To hold otherwise, the court warned, would “largely deprive the members of the general public of a voice in a matter which is close to the hearts of all individuals in Illinois.”

Second, even where a court is persuaded that school finance disputes are not committed to other branches of government, a court can nonetheless still decline jurisdiction by concluding that it lacks “judicially discoverable and manageable standards” to resolve the conflict. More specifically, some courts have concluded that judicially operationalizing such notions as “equal” and “adequacy” in the school finance context resist easy consensus. As the Supreme Court noted, what constitutes an equal or adequate education “is not likely to be divined for all time even by the scholars who now so earnestly debate the issues.” If such a consensus exited, a related question is whether the courts are the best institution to undertake such an effort. Too many discussions

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68 Il. Const. art 10 § 1.
69 174 Ill.2d 1 (1996).
70 174 Ill.2d 1, 29.
71 Id.
72 Id.
73 [insert cite]
about the judiciary’s involvement with school finance disputes focus on what courts should do independent of discussion about what courts can do effectively.\(^\text{74}\)

The Rhode Island Supreme Court noted such concerns in *City of Pawtucket v. Sundlum*\(^\text{75}\) when it resisted the plaintiff’s desire to engage the court in an effort to re-craft Rhode Island’s school finance system. The court concluded that it could discern no standards that would assist the court in the task of discerning whether “equal” or “adequate” education was provided to the plaintiffs. Moreover, the court declined to undertake the task of judicially crafting such standards as such an endeavor risked injecting the court into a “morass comparable to the decades-long struggle of the Supreme Court of New Jersey.”\(^\text{76}\) Indeed, the Rhode Island justices, hinting at comparative institutional disadvantages, characterized the multi-decade New Jersey school finance saga as a “chilling example of the thickets that can entrap a court that takes on the duties of a Legislature.”\(^\text{77}\)

A second type of judicial humility involves states where the courts recognize jurisdiction, accept the invitation to decide school finance challenges but, after reviewing the evidence presented in light of the relevant constitutional text, conclude that no violation exists. The Nebraska Supreme Court’s decision in *Gould v. Orr*\(^\text{78}\) illustrates this version of judicial humility. The Nebraska court did not flinch from granting jurisdiction. The court noted that while the plaintiffs—pushing an equity theory—successfully demonstrated funding inequality, the plaintiffs did not successfully

\(^{74}\) See generally Jonathan Cohen, Judicial Control of the Purse—School Finance litigation in State Courts, 28 Wayne L. Rev. 1393, 1415-16 (1982).

\(^{75}\) 662 A.2d 40 (R.I. 1995).

\(^{76}\) Id. At 59.

\(^{77}\) Id.

\(^{78}\) 506 N.W.2d 349 (1993).
demonstrate how such unequal per pupil funding led to constitutionally inadequate educational services. While the 1993 decision effectively foreclosed an equity challenge to Nebraska’s school finance system, it conspicuously left open a question about the efficaciousness of an adequacy challenge. Just such a challenge was launched in subsequent litigation in 2003.79

A. Institutional Overload

A third genre of judicial humility is recently emerging. This version involves states where courts accept jurisdiction, conclude that school finance systems violate state constitutional requirements, and demand either legislative or executive action consistent with the judicial opinion. Once state lawmakers and executives act, however, follow-up litigation invariably ensues asserting that the unconstitutional conditions endure. This follow-up litigation invites the judicial branch not only to re-engage but to assume even broader and deeper powers.

It is at this precise point where school finance litigation enters a critical stage. On the one hand, such litigation can follow the “New Jersey” path and risk a multi-decade struggle among the executive, legislative, and judicial branches over school finance turf. New Jersey’s saga—still, ongoing after more than three decades—is well chronicled. The situation unfolding in New York appears destined to follow its neighbor’s path.

Experiences in others states differ, however. During the 1990s state supreme courts in Alabama, Ohio, and Massachusetts were cited by school finance reform activists as evidence of the dominance and efficaciousness of adequacy theory.80 Subsequent

decisions in all three states, however, suggest something of a judicial retreat. An Alabama court in 1993 boldly announced that the state was obligated to provide an adequate education to its citizens. The court order was especially particular in what it meant by an adequate education. More recently, however, the Alabama Supreme Court dismissed further proceedings, pointing to separation of powers concerns. Likewise, after protracted litigation in Ohio, the Ohio Supreme Court granted a writ of prohibition in 2003 forbidding the trial court from exercising further jurisdiction over the school finance case.

**B. Emerging Judicial Hesitation: The Massachusetts Example**

As recent court decisions in Alabama and Ohio illustrate, judicial hesitation emerges even in states where courts had previously found inadequate education. A dramatic turn of events in Massachusetts embodies many of the common themes and warrants close attention. In 1993, Massachusetts’ Supreme Judicial Court ruled in *McDuffy v. Secretary of the Executive Office of Educ.*, that the state had failed to fulfill its constitutional obligation and noted in particular the deleterious consequences of that state’s overwhelming reliance on local property tax revenues. The Massachusetts court directed the state’s governor and legislature to correct the constitutional defects. Indeed, three days after the *McDuffy* opinion was announced, Massachusetts lawmakers passed the Education Reform Act of 1993. The Act radically restructured education in

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81 See Opinion of the Justices, 624 So.2d 107 (Ala. 1993).
82 Id. at 165-66.
83 See Ex Parte James, 836 So.2d 813, 815 (Ala. 2002)(“It is the Legislature, not the courts, from which any further redress should be sought.”).
86 Id. at 552.
87 Id. at 555-56.
Massachusetts, especially as it relates to school funding, student goals and performance, and school and school district accountability provisions.\textsuperscript{89}

1. Trial Court Report and Recommendations

Notwithstanding the \textit{McDuffy} opinion and the Act, in 1999 litigants sued anew claiming that data from four specific Massachusetts school districts\textsuperscript{90} evidence that education—at least for those four districts\textsuperscript{91}—has not improved since 1993 and, more important, still violates constitutional obligations, including those articulated in \textit{McDuffy}.\textsuperscript{92} After a six-month trial that involved more than 100 witnesses and 1,000 exhibits,\textsuperscript{93} a state trial court judge agreed and argued that the state department of education lacked sufficient resources and the capacity to implement necessary changes.\textsuperscript{94} Frustration with consistently poor student performance served as one critical trigger for re-commencing legal action. Data used to assess student academic achievement involved state test scores, dropout rates, SAT scores, and student post-high school graduation plans.\textsuperscript{95} The relevant reference points for comparative purposes included state averages as well as baseline districts relied upon by the court in the \textit{McDuffy} litigation. In most comparisons students from the four focus districts compared unfavorably.\textsuperscript{96}

The trial court judge found that the state’s education department lacked adequate resources to meet the requirements of Massachusetts’ education clause.\textsuperscript{97} More specifically, the trial court concluded that the plaintiff school districts were denied

\textsuperscript{90}Through the litigation these four districts were referred to as the “focus districts.” See Hancock v. Driscoll, No. 02-2978, 2004 WL 877984, at *4 (Mass. Super. Apr. 26, 2004).
\textsuperscript{91}See id. (the four districts include Brockton, Lowell, Springfield, and Winchendon).
\textsuperscript{92}Id. at *3.
\textsuperscript{93}Id. at *4.
\textsuperscript{94}See id. at *112.
\textsuperscript{95}Id. at *113.
\textsuperscript{96}Id.
\textsuperscript{97}Id. at *119.
adequate education because the state’s school finance system failed to account for the full cost of education. The trial judge recommended that the state department of education determine the “actual cost” of a “constitutionally adequate” level of education and that the state implement the funding and administrative changes necessary to achieve the desired results. Thus, once again, Massachusetts’ highest court was called upon by litigants to help restructure the state’s education system.

Similar to prior school finance litigation (McDuffy), the trial court decision in Hancock was appealed to Massachusetts’ highest court. This time, however, the Massachusetts high court pulled back. Specifically, the court rejected the lower court report’s conclusion that the “Commonwealth [State of Massachusetts] is presently neglecting or is likely to neglect its constitutional duties, thus requiring judicial intervention.”

Pivotal to the supreme court’s analysis was the selection of the appropriate constitutional standard. The Massachusetts’ high court rejected the assertion that adequacy required that all Massachusetts’ school districts achieve proficiency in the seven different areas outlined in the 1983 McDuffy decision. Rather, in Hancock, the court considered whether the state had taken reasonable and appropriate steps in a timely manner to address school funding and student achievement disparities.

The Massachusetts’ high court disposed of the litigation and terminated jurisdiction over the matter. The decision brought to a definitive close 27 years of litigation and 12 years of state court supervision over school finance in Massachusetts. Notably, by its action the Massachusetts’ court pursued a direction other than the one

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98 Id. at *118 n.146.
99 Id.
101 Id. at 1153.
102 Id. at 1154.
pursued by its counterparts in New York, New Jersey, and elsewhere. Equally important as the decision the Massachusetts court reached are the reasons the court articulated supporting its conclusion.

Judicial notice of a long-understood fact—the inherent complexity of student academic achievement—contributes to the Massachusetts decision. By noting that the Massachusetts Constitution “does not guarantee equal outcomes in all school districts according to a certain measurable criteria,” the Massachusetts justices wandered into hotly contested intellectual terrain: the determinants of student academic achievement. To be sure, decades of research on student academic achievement has done little to quell the debate. Moreover, the court’s decision itself—holding that no constitutional violation exists notwithstanding persistent achievement gaps—implicitly recognizes that the elimination of such gaps cannot flow from the stroke of the judicial pen. The Massachusetts court may have been bowing to empirical reality and the inherent complexity surrounding the challenge of helping more kids learn more, but at least it bowed.

Massachusetts justices also feared replicating the experiences of other states. The Massachusetts decision explicitly references parallel adequacy litigation in both New Jersey and New York. The Massachusetts’ opinion conveys an almost conspicuous desire to distinguish the Massachusetts experience from that of other states. The Massachusetts jurists noted that courts in New York and New Jersey stepped in (repeatedly) “after many years of legislative failure or inability to enact education

\[^{103}\text{Id.}\]

\[^{104}\text{In an analogous context (school desegregation) the U.S. Supreme Court recognized the judiciary’s (and school district’s) limited ability to influence student academic achievement. See, e.g., Missouri v. Jenkins, 515 U.S. 70, 102 (noting that numerous external factors beyond a school district’s control affect minority student achievement).}\]
reforms and to commit resources to implement those reforms.”

According to the Massachusetts court, the circumstances in New Jersey and New York are “not present here [in Massachusetts].” Massachusetts justices also trot out the possibility that differences in state constitutional text explain its departure from its neighboring states. Specifically, the court suggests that, in comparison to other states, the Massachusetts Constitution “may provide greater flexibility to the Legislature concerning educational strategy.”

Certainly the experiences of lengthy and nasty state supreme court entanglements with their legislative and executive counterparts in New York, New Jersey and elsewhere should provided Massachusetts’ justices ample reason to pause and reflect. The damage to the state judicial branch owing to legislative and gubernatorial resistance or outright rejection of state judicial decrees is considerable. Moreover, even in states that do not outright resist state school finance decisions, the empirical evidence on the efficacy of court decisions to actually achieve the goals sought by the prevailing plaintiffs is mixed, at best. Although successful adequacy lawsuits appear to have a greater likelihood of success extracting additional funding, their impact on the overarching variable of interest—increased educational equity as defined by improved student academic achievement—is far from clear.

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105 822 N.E.2d at 1153.
106 Id.
107 Id. at 1154 n.30.
VI. Conclusion: Adequacy Litigation Into the Twenty-First Century

Regardless of adequacy litigation’s similarities to and differences from equity litigation, adequacy lawsuits presently inform current education policy and reform discourse and will likely do so for the foreseeable future. Consequently, assessing how adequacy litigation might fare in the twenty-first century warrants discussion. Two factors could dislodge adequacy litigation from its current central position within educational policy discourse. First, the equal educational opportunity doctrine could evolve once again and in a manner that diminishes the importance of student resources. Second, courts, citing institutional capacity or separation of power concerns, might increasingly balk at requests to help restructure school funding systems. While either factor might diminish adequacy litigation in the future, however, neither factor appears likely to do so at the moment.

To be sure, the Equal Educational Opportunity Doctrine is dynamic and continues to evolve. The doctrine has changed in fundamental ways since its initial modern judicial articulation in the Brown decision. Recent history evidences that such transitions do not take place instantly, but rather over time and after effort. The transition from race to resources took place as the school desegregation movement waned and school finance litigation ascended. Although the transition from school finance equity to adequacy theory was more abrupt, the analytic line separating the two theories is far from clear. Such transitions alter how courts construe the equal opportunity doctrine, albeit sometimes subtly.
The equal educational opportunity doctrine’s past changes imply future changes. While continued changes are perhaps inevitable, what the doctrine will look like in the future is unclear. The absence of clarity presents the possibility that equal educational opportunity might develop in a way that diminishes the importance of the link between per-pupil financial inputs and student academic achievement. Should such a development arise it would diminish the analytical force of school finance adequacy litigation. Of course, the current prominence of the presumed link between student resources and achievement (despite more ambiguous social science evidence) reduces the probability of equal education opportunity doctrine evolving in such a manner, at least anytime soon.

An increase in judicial reluctance to trench more deeply into educational policymaking would similarly diminish adequacy’s centrality to school reform. Such judicial reluctance could flow from either practical or institutional concerns about judicial capacity or more theoretically-moored reluctance flowing from separation of powers concerns. At some point, perhaps, state lawmakers frustrated by judicial involvement may simply try to amend state constitutions in a way that removes or reduces state education guarantees in an effort to reduce judicial activity in school finance policymaking. Such an effort, if successful, would diminish the legal salience of school finance litigation.

The likelihood of courts ceding jurisdiction over school finance litigation due to institutional capacity concerns, however, is far from certain. Existing evidence is decidedly split; clear trends elude. The Hancock decision in Massachusetts could just as easily signal a potential judicial reluctance to trench too deeply into educational
policymaking. At the same time, *Hancock* might simply be a brief diversion of a trend toward increased judicial engagement with school finance issues.

Consequently, school finance adequacy litigation’s centrality in education reform and policy discourse is unlikely to recede anytime soon. If anything, in the immediate future adequacy litigation is likely to strengthen due to its interactions with NCLB. That NCLB reinforces the salience of school finance adequacy litigation for states, of course, teems with irony. The federal legislative effort seeks to re-invigorate equal educational opportunity by, in part, structurally imposing on states standards, assessments, and the dissemination of probative data. Failure to achieve adequate progress generates actual consequences culminating in parental options to depart failing public schools. The application of NCLB, however, generates an evidentiary platform that further enables litigants to mount successful adequacy lawsuits. Although many dispute the costs imposed on states through NCLB, one undisputed cost is a state’s increased exposure to an adequacy lawsuit.