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ARTICLES

WHEN “ADEQUATE” ISN’T: THE RETREAT FROM EQUITY IN EDUCATIONAL LAW AND POLICY AND WHY IT MATTERS

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INTRODUCTION	547
I. THE RETREAT FROM EQUALITY IN EDUCATIONAL LAW AND POLICY	554
A. <i>From “a right which must be made available to all on equal terms” to “a sound basic education”:</i> <i>The Judiciary’s Retreat from Equality</i>	555
1. <i>A Brief History of School Finance Litigation</i>	556
2. <i>Adequacy as a State Constitutional Standard</i>	562
3. <i>Adequacy as a Remedy</i>	565
B. <i>From Targeting the Needy to Expecting that All Children Can Learn: Educational Policy’s Shift from Targeted Equity to One-Size-Fits-All Accountability</i>	571

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1. <i>Title I and the Great Society</i>	572
2. <i>The Reagan Era's Focus on Excellence</i>	575
3. <i>Standards-Based Reform, the New Accountability in Education, and the No Child Left Behind Act</i>	577
II. WHY EQUALITY MATTERS MORE THAN EVER IN EDUCATIONAL POLICY: A NORMATIVE FRAMEWORK	589
A. <i>Equality and Adequacy</i>	589
B. <i>The Case for Adequacy</i>	592
1. <i>Equality Is Economically Inefficient</i>	593
2. <i>Equality Unfairly Constrains Liberty</i>	593
3. <i>Equality of What?</i>	594
C. <i>The Case for Equality</i>	595
1. <i>What Is a Positional Good?</i>	596
2. <i>Education as a Positional Good</i>	597
3. <i>Evidence for the Positional Aspects of Education</i>	599
a. <i>Connection to Success in College and Postsecondary Admissions</i>	599
b. <i>Connection to Success in the Labor Market</i>	600
c. <i>Credentialism and Signaling</i>	603
D. <i>Why We Should Endorse Equality, Not Adequacy</i>	604
1. <i>Dignitary Harms of Unequal Education</i>	606
2. <i>Fairness in Competition for Postsecondary Admissions and Spots in the Labor Market</i>	606
E. <i>Equal Educational Opportunity</i>	608
1. <i>Four Conceptions of Equal Educational Opportunity</i>	608
2. <i>Adequacy Cannot Satisfy Any Form of Equality of Educational Opportunity</i>	610
F. <i>Tempering Our Normative Conclusions</i>	612
1. <i>Education Is a Multifaceted Good</i>	612
2. <i>Reject Equality Monism</i>	613
III. EDUCATIONAL POLICY AND EDUCATIONAL EQUALITY	614
CONCLUSION	615

ABSTRACT

In the wake of *Brown v. Board of Education* and the Great Society's social agenda, congressional and judicial policymaking in the arena of education was decidedly focused on creating greater equality of educational opportunity for poor children by tying the fortunes of

poor and privileged children together and targeting resources to those in need. In the past two decades or so, however, there has been a shift away from the rhetoric and policy of providing equal educational opportunities to the rhetoric and policy of providing an “adequate” quality of education irrespective of resource inequalities among schools. This shift, we argue, is reflected in two important policymaking venues: (1) the federal and state courts, in several waves of educational finance litigation, and (2) federal and state legislatures, in the decline of laws designed specifically to enhance educational resources in poor communities and the concomitant rise in one-size-fits-all standards-based accountability regimes that pay less attention to ensuring the provision of resources to the needy.

In this Article, we seek to inject equality back into the policy conversation by arguing that “adequate” is not good enough in educational policy. Although education is in many respects a public good in that we all benefit from a well-educated citizenry, education is also a private good in that students gain psychic, economic, and status benefits throughout their lives. As a private good, however, education possesses unusually strong “positional good” aspects. That is, one’s position or relative standing in the distribution of education, rather than one’s absolute attainment of education, matters a great deal. To the extent that education is positional, one person’s possession of more education necessarily decreases the value of another’s education. From a public policy perspective, then, we should be concerned about making some people educationally worse off whenever we adopt policies that exacerbate or fail to diminish educational inequalities. More to the point, the recent shift away from equity-minded policies to adequacy-minded (or equity-neutral) policies must be reconsidered; to the extent that education is a good with strong positional aspects, we need to focus on the comparatively worse off, targeting resources to the needy, and we ought still to object to inequalities even above a threshold level of adequacy.

INTRODUCTION

Just over a half a century ago, the United States Supreme Court held that when a state undertakes to provide children with an education, such an opportunity is a “right which must be made available to all on equal terms.”¹ In a similar spirit, upon signing the Elementary and Secondary Education Act of 1965, Title I of which constituted unprecedented federal support to low-

¹ *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

income children in public schools, President Lyndon B. Johnson declared that “[b]y passing this bill, we bridge the gap between helplessness and hope for more than 5 million educationally deprived children.”² Educational law and policy had the unambiguous objective of achieving equal educational opportunity for children and, more specifically, targeting resources and attention to the neediest among our children.

The past two decades or so, however, have witnessed a decided shift away from the rhetoric and policy of providing equal educational opportunities to the rhetoric and policy of providing an “adequate” education to all children, irrespective of resource inequalities among schools and school districts and sometimes irrespective of the economic or educational needs of students. Defended on pragmatic political grounds, on the perceived failure of equity-driven school reform, and on the difficulty of defining “equality of educational opportunity,” the concept of “educational adequacy” has framed the recent discussion among scholars, courts, and policymakers. Nowhere is this more evident than in the arena of educational finance reform litigation, where advocates and courts abandoned the doctrine and rhetoric of equity and adopted the language of adequacy. So clear was this shift that Peter Enrich, in an influential 1995 article, argued that educational finance policy was “leaving equality behind.”³ More recently, the standards-based reform and educational accountability movements of the 1990s, culminating in the 2001 No Child Left Behind Act (NCLB), have focused on setting educational content standards that “all children can learn” without particular regard to whether all children are receiving, or should receive, equal educational resources.

In this Article, we aim to return equity to the fore. We argue that the shift from equity to adequacy in education and the concomitant shift from the rhetoric and policies targeted to poor and underprivileged students to rhetoric and policies that apply to all students cannot be supported on normative grounds and will ultimately not ensure broad-based support for public schooling. Put simply, “adequate” is not good enough in educational policy. We base this conclusion on a normative analysis of equality and adequacy concepts in educational policy, an analysis that gains additional strength in light of our contention that education is in large part what has been called a “positional good.”

² Remarks in Johnson City, Texas upon Signing the Elementary and Secondary Education Bill, 1 PUB. PAPERS 413 (Apr. 11, 1965).

³ Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101, 101 (1995).

Although education is in many respects a public good in that we all benefit from a well-educated citizenry, education is also undoubtedly a private good in that students gain psychic, economic, and status benefits throughout their lives. We argue that as a private good, however, education possesses unusually strong “positional good” aspects. *That is, one’s position or relative standing in the distribution of education, rather than one’s absolute attainment of education, matters a great deal. To the extent that education is positional, one person’s possession of more education necessarily decreases the value of another’s education.* From a public policy perspective, then, we should be concerned about making some people educationally worse off whenever we adopt policies that exacerbate or fail to diminish inequality. More to the point, from a normative perspective, the recent shift away from equity-minded policies to adequacy (or equity-neutral) policies must be reconsidered.

Not all will agree that the adequacy litigation, standards-based reform, and “new accountability” movements in education are antithetical to egalitarian goals such as achieving equality of educational opportunity. To the contrary, we suspect that supporters of these policies—particularly those who would leave no child behind—would argue that they hold the promise, if not the design, of promoting equity. We disagree. Though there are some aspects of those policies that may improve education in some jurisdictions, the adequacy framework in its purest form gives state sanction to a system that permits objectionable inequalities, and in some cases, may even serve to worsen those inequalities.⁴ After we provide a skeletal conceptual framework for the discussion at the end of this Introduction, in Part I we examine two major legal and policy initiatives in education since *Brown v. Board of Education*⁵ and argue that both courts and policymakers have backed away from efforts at targeting educational resources to underprivileged children with the aim of producing equal opportunities and outcomes among all children. In their stead, legal doctrine, political discourse, and educational policy are, at best, indifferent to whether underprivileged children are provided opportunities on par with their wealthier peers and, at worst, calculated to highlight and exacerbate the differences in students’ educational achievement and

⁴ We recognize that recent proponents of “adequacy” litigations argue that the adequacy framework is geared toward enhancing equity by targeting additional resources to underprivileged children so that they can achieve an adequate level of academic proficiency. *See infra* note 11 and accompanying text. But, as we explain in Parts II and III, this version of adequacy reimports equity concepts, essentially recognizing the shortcomings of the unmodified adequacy framework and does nothing to prevent those at the top of the distribution from increasing their positional advantages.

⁵ 347 U.S. 483.

attainment. In that Part, we first examine the judiciary's initial enthusiasm for educational policy designed to equalize educational funding. Beginning with the fiscal equity mandate of *Serrano v. Priest*,⁶ state judicial decisions initially paved the way for equity-minded educational policy reform that specifically targeted the underprivileged. Perhaps chastened by the political backlash against "Robin Hood" tax revenue sharing plans, however, courts have recently crafted doctrinal theories that are neutral toward children of color and the poor and have as their objective not equality of educational opportunity, but rather adequacy of educational opportunity for all (while allowing excellent educational opportunities for some). We then turn to educational policymaking and map the decline of programs targeted to the poor and educationally disadvantaged onto the rise of policies aimed at "excellence," minimum standards, and accountability.

In Part II, we lay out the normative case for equity-minded educational policy reform. We clarify the conceptual distinction between equality and adequacy—equality is by definition relational, concerned with comparisons, and adequacy is by contrast absolute, concerned with acceptable or high minimums, and we discuss how the equity–adequacy debate in education reform can profit from a consideration of the essentially parallel equality–sufficiency debate in moral and political philosophy. We then show how education is in part, and has historically become in larger part, a good with strong positional aspects. That is, the value of education to its holder depends in part on how much education other people possess. Education is central to concerns about equality of opportunity, opportunities to gain admission to college and professional schools, and opportunities to compete for high-paying and high-status jobs in the marketplace. Roughly speaking, the more education a person possesses, the greater the positional advantage of that person in the competition for college admission and economic success. If this is true, then the adequacy framework is, to put it bluntly, inadequate because adequacy tolerates wide inequalities above the specified threshold of educational opportunity and proficiency, and inequalities above this threshold will disadvantage those in the bottom end of the distribution. Even on the most minimal conception of equality of educational opportunity—the view that schools should do no harm to students, reproducing but not exacerbating the social inequalities that they bring with them into the schoolhouse—the adequacy framework cannot prevent, and indeed may provide incentives for, those who are already well off to increase their positional advantage. We

⁶ 487 P.2d 1241 (Cal. 1971), *aff'd after remand*, 557 P.2d 929 (Cal. 1976).

conclude this Part by tempering our commitment to egalitarianism, both for philosophical reasons (equality monism is undesirable) and for pragmatic reasons (the pursuit of equity-minded reform can be politically unpopular and have severe unintended consequences).

Part III concludes by fleshing out the policy implications of our argument. Again, we are mindful of the political constraints and challenges that any educational equity agenda may face and accordingly propose modest policy reform in the name of equity. Recognizing the political challenges facing any policy proposal that would significantly redistribute educational resources from wealthy to underprivileged students, we argue that any educational policy reform designed to improve the performance and outcomes for children should at least conform to our modified educational policy reform version of Hippocrates’s principle: “[F]irst, any educational policy reform should do no harm.”⁷ Though easily articulated, such a principle is more difficult to implement. For instance, do standardized assessment reporting requirements for schools ensure equity or only serve as guideposts for wealthy parents on which districts they should populate? That said, one policy consequence appears to flow directly from the “do no harm” principle: Educational accountability regimes that tie rewards and sanctions to student proficiency should be modified to ensure a dynamic definition of “proficiency” or “success”—a definition that is constantly changing and pegged to the performance of those at the top of the performance distribution.

Although we elaborate our normative views regarding the distribution of educational resources in Part II, it is necessary at the outset to provide a map of the conceptual landscape that structures the discussion of equity and adequacy. Much has been written on the theoretical underpinnings of educational resource distribution.⁸ Generally speaking, such theories seek to define

⁷ Robert Bartz, *Remembering the Hippocratics: Knowledge, Practice, and Ethos of the Ancient Greek Physician-Healers*, in *BIOETHICS: ANCIENT THEMES IN CONTEMPORARY ISSUES* 3, 14 (Mark G. Kuczewski & Ronald Polansky eds., 2000) (“Declare the past, diagnose the present, foretell the future; practice these acts. As to diseases, make a habit of two things—to help, or at least to do no harm.”).

⁸ See, e.g., ROBERT BERNE & LEANNA STIEFEL, *THE MEASUREMENT OF EQUITY IN SCHOOL FINANCE* 7–43 (1984); JOHN COONS, WILLIAM H. CLUNE III & STEPHEN D. SUGARMAN, *PRIVATE WEALTH AND PUBLIC EDUCATION* 395–433 (1970); ARTHUR WISE, *RICH SCHOOLS, POOR SCHOOLS: THE PROMISE OF EQUAL EDUCATIONAL OPPORTUNITY* 143–58 (1967); Harold W. Horowitz & Diana L. Neitring, *Equal Protection Aspects of Inequalities in Public Education and Public Assistance Programs from Place to Place Within a State*, 15 *UCLA L. REV.* 787 (1968); Harold W. Horowitz, *Unseparate but Unequal—the Emerging Fourteenth Amendment Issue in Public School Education*, 13 *UCLA L. REV.* 1147 (1966); Christopher Jencks, *Whom Must We Treat Equally for Educational Opportunity to Be Equal?*, 98 *ETHICS* 518, 518–33 (1988); David L. Kirp, *The Poor, the Schools, and Equal Protection*, 38 *HARV. EDUC. REV.* 635, 636 (1968).

“educational opportunity” along at least two dimensions: the object of the distribution and the distributional principle.⁹

On the first dimension—the object of distribution—one must determine whether the focus of the distribution is educational “inputs” or educational “outcomes.” “Inputs” are the resources upon which schools rely: dollars and the things that dollars can buy, such as teachers, instructional materials, and facilities. “Outputs” or “outcomes” refer to both student achievement (and related behavioral changes sought by schools) and the educational attainment, earnings, and quality of life that a student has obtained. Although traditional policy schemes sought to ensure a “fair” distribution of educational inputs or resources, much current educational policy and litigation, particularly the so-called “new accountability” in education, is focused on measuring performance by looking to educational outcomes (often student performance on academic achievement tests).¹⁰ The distinction here roughly parallels that between equality understood as equality of opportunity and equality of outcome.

The second dimension—the distributional principle—can be divided broadly into four basic schemes: “adequacy,” “horizontal equity,” “vertical equity,” and “neutrality.” An “adequate” education is understood to mean a specific qualitative level of educational resources or, focusing on the outcomes object, a specific level of resources required to achieve certain educational outcomes based on external and fixed standards.¹¹ It is a measure that does not

⁹ In their comprehensive treatment of the subject, Berne and Stiefel use the term “equity object” to denote the object of the distributional scheme and the “equity principle” to denote the principle by which educational resources are distributed. BERNE & STIEFEL, *supra* note 8, at 9. Although their dimensions are conceptually similar to ours, we use the terms “distributional object” and “distributional principle” because our principles of distribution include both equity and adequacy theories.

¹⁰ See *infra* Part I.B; see also James S. Liebman & Charles F. Sabel, *A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform*, 28 N.Y.U. REV. L. & SOC. CHANGE 183, 207–09 (2003); Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1016, 1016–28 (2004).

¹¹ See, e.g., William H. Clune, *The Shift from Equity to Adequacy in School Finance*, 8 EDUC. POL’Y 376, 377 (1994) (“Adequacy means adequate for some purpose, typically student achievement.”); Enrich, *supra* note 3, at 103 (“I will contrast the rhetoric of equality with an alternative rhetoric that focuses on the adequacy or the quality of the services provided”); Paul A. Minorini & Stephen D. Sugarman, *Educational Adequacy and the Courts: The Promise and Problems of Moving to a New Paradigm*, in EQUITY AND ADEQUACY IN EDUCATION FINANCE: ISSUES AND PERSPECTIVES 175, 188 (Helen F. Ladd, Rosemary Chalk & Janet S. Hansen eds., 1999) (“As spelled out by William Clune . . . and others, a state-guaranteed high-minimum is most often what is meant by an ‘adequate’ education.”); James E. Ryan & Thomas Saunders, *Foreword to Symposium on School Finance Litigation: Emerging Trends or New Dead Ends?*, 22 YALE L. & POL’Y REV. 463, 467 (2004) (“Adequacy focuses on bringing all schools up to a certain standard of quality, but once this standard is met, adequacy allows districts with greater means to supplement their local schools.”). Although he labels his distributional principle “minimum protection,” Frank Michelman, in his now classic

compare the educational resources or outcomes of students with each other, but rather looks only to some required level of resources for all students. As we will later argue in greater detail, adequacy is not conceptually connected to equality; theories of adequacy, or as they are more frequently labeled in the philosophical literature, theories of sufficiency, are not egalitarian. Ensuring an adequate education for all can lead to increasing equality, but ensuring adequacy is also fully consistent with increasing *inequality* above the specified threshold.

The remaining distributional principles—horizontal equity, vertical equity, and neutrality—are each egalitarian principles, or equity principles, in that they compare the educational resources or outcomes of individuals or groups of students to each other. “Horizontal equity” is the equal treatment of students irrespective of need, sometimes referred to as the “one scholar, one dollar” principle.¹² “Vertical equity” recognizes that certain students, e.g., those suffering disadvantaging conditions such as poverty or disability, may require more resources to overcome such disadvantages. Vertical equity seeks to target educational resources to those “needy” students. In its most aggressive form, vertical equity seeks to target resources based on student need such that each student has an equal opportunity for an equal outcome.¹³ Finally, the negative condition of “neutrality” requires that there be no educational input or

treatment of equal protection theory, effectively argues for an “adequacy” standard to protect against certain economic hazards, including an inadequate education. Frank I. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 13 (1969).

¹² See WISE, *supra* note 8, at 156.

¹³ At least one commentator has argued that “adequacy” is merely a form of “vertical equity,” suggesting the conceptual difference between “equity” and “adequacy” is not so great. See Julie K. Underwood, *School Finance Adequacy as Vertical Equity*, 28 U. MICH. J.L. REFORM 493, 493 (1995) (“The theme in [school finance] cases using the state education clause is adequacy from the perspective of ‘vertical equity,’ meaning that different students should be treated differently based on their special educational needs.”). Similarly, some modern “adequacy” advocates appear quite concerned about achieving greater equity by subtly conflating the concepts of “adequacy” and “vertical equity.” Michael A. Rebell, *Adequacy Litigations: A New Path to Equity?*, in BRINGING EQUITY BACK: RESEARCH FOR A NEW ERA IN AMERICAN EDUCATIONAL POLICY 291, 305 (Janice Petrovich & Amy Stuart Wells eds., 2005).

[T]he concepts of “excellence” and “equity” increasingly are becoming merged, since the society requires all students to learn to function at high cognitive skill levels. Recognizing this link, lawyers, activists, and plaintiffs in education adequacy cases have begun to articulate demanding concepts of “adequacy” in the educational opportunities they expect to be extended to historically disadvantaged minority populations.

Id.; see also Ryan & Saunders, *supra* note 11, at 468–72 (suggesting that certain recent school finance “adequacy” litigations have resulted in remedies that promote vertical equity and arguing that such a development “has the potential to invert traditional spending patterns that currently relegate the neediest students to schools unable to bear the cost of their education”).

outcome differences among students that result from “arbitrary” factors such as school district wealth, geographic location, race, or gender. As will be seen, fundamental struggles over legal doctrine and policy in education frequently focus on two dimensions of educational resource distribution: the distributional object and the distributional principle.

I. THE RETREAT FROM EQUALITY IN EDUCATIONAL LAW AND POLICY

On the fiftieth anniversary of *Brown v. Board of Education*, advocates, scholars, and educators convened across the nation to celebrate *Brown*’s promise, while lamenting that much has been left unfulfilled. Granted, many may expect too much of *Brown* and its ability to influence law, policy, and educational practice, but among the promises on which *Brown* failed to deliver, the promise of equal educational opportunity for all American children seems the most illusory. Indeed, it is nearly indisputable that educational resources—facilities revenues, experienced teachers, instructional materials, curricula—are not distributed equally among our children and those with the least frequently fall into predictable categories.¹⁴ In this Part, we argue that despite *Brown*’s promise, judicial and legislative policymaking over the last two decades has not worked to ameliorate this longstanding inequality. Although judicial activity in the 1950s through the early 1970s sought to create greater racial and fiscal equality in education by targeting resources to poor and minority students, and although the primary educational policy of the Great Society Era and its immediate aftermath sought to compensate for educational deprivation, law and policy of the last two decades has decidedly shifted away from equity to one-size-fits-all programming aimed at “excellence” or, more accurately, “adequacy” or basic “proficiency.”

¹⁴ See, e.g., Linda Darling-Hammond, *Access to Quality Teaching: An Analysis of Inequality in California’s Public Schools*, 43 SANTA CLARA L. REV. 1045 (2003) (providing evidence that children in poverty, English language learners, and “minority” children in California do not learn from as highly qualified teachers as their peers); Jeannie Oakes, *Introduction to: Educational Inadequacy, Inequality and Failed State Policy: A Synthesis of Expert Reports Prepared for Williams v. State of California*, 43 SANTA CLARA L. REV. 1299 (2003) (synthesizing reports discussing the unequal distribution of educational resources in California).

A. From “a right which must be made available to all on equal terms”¹⁵ to “a sound basic education”:¹⁶ *The Judiciary’s Retreat from Equality*

Even before the Supreme Court had begun to make it more difficult to pursue educational equity through traditional desegregation litigation,¹⁷ educational equity advocates had become restless with the seemingly slow pace of desegregation, its inability to resolve educational inequalities that were not a product of racially segregated schools, and the political backlash from “forced” busing. What is more, due to the tradition of local control over public schooling, those advocates observed that state educational finance systems tended to rely heavily on local property taxes to generate revenues for local schools. The result was, in many instances, dramatically unequal per-student spending and educational resource distribution among districts within states. Although race, class, and property wealth were not perfect correlates with unequal school funding, the fact that many poor or minority children were concentrated in property poor school districts provided educational equity advocates a reasonably well-defined target for resource distribution. Those advocates turned to the courts to intervene and correct such inequality through school finance reform.

¹⁵ *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

¹⁶ *Vincent v. Voight*, 614 N.W.2d 388, 396 (Wis. 2000); *Campaign for Fiscal Equity, Inc. v. State (CFE I)*, 655 N.E.2d 661, 666 (N.Y. 1995).

¹⁷ See Goodwin Liu, *Brown, Bollinger, and Beyond*, 47 HOWARD L.J. 705, 717–29 (2004).

1. A Brief History of School Finance Litigation

The school finance litigation story is now quite familiar.¹⁸ According to the standard narrative, school finance litigation has developed in three waves.¹⁹ Though the three waves are hardly monolithic,²⁰ this standard narrative demonstrates the shift in school finance jurisprudence from the rhetoric and doctrine of equality to the rhetoric and doctrine of adequacy. In the remainder of this section, we further describe the three waves of litigation and analyze how remedial policies resulting from adequacy litigation, although increasingly recognizing modest vertical equity concepts, tend to be targeted to all students, irrespective of race or class, and designed to distribute educational resources at a level “adequate” for some purpose. Significantly, such remedial policies do nothing to limit the ability of suburban and wealthy districts to maintain or even increase their competitive advantage over others and therefore do not address the gap in educational resources between rich and poor at all.²¹ The

¹⁸ An enormous amount has been written on educational finance reform litigation. See, e.g., Clune, *supra* note 11; William H. Clune, *New Answers to Hard Questions Posed by Rodriguez: Ending the Separation of School Finance and Educational Policy by Bridging the Gap Between Wrong and Remedy*, 24 CONN. L. REV. 721 (1992); Enrich, *supra* note 3; Michael Heise, *State Constitutions, School Finance Litigation, and the “Third Wave”*: From Equity to Adequacy, 68 TEMP. L. REV. 1151 (1995); 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 (2003) [hereinafter Koski, *Of Fuzzy Standards*]; William S. Koski, *The Politics of Judicial Decision-Making in Educational Policy Reform Litigation*, 55 HASTINGS L.J. 1077 (2004) [hereinafter Koski, *The Politics of Judicial Decision-Making*]; Ryan & Saunders, *supra*, note 11; James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249 (1999); 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 (1994) [hereinafter Thro, *Judicial Analysis During the Third Wave*]; William E. Thro, *The Third Wave: The Impact of the Montana, Kentucky, and Texas Decisions on the Future of Public School Finance Reform Litigation*, 19 J.L. & EDUC. 219 (1990) [hereinafter Thro, *Public School Finance Reform Litigation*]; William E. Thro, *To Render Them Safe: The Analysis of State Constitutional Provisions in Public School Finance Litigation*, 75 VA. L. REV. 1639 (1989) [hereinafter Thro, *To Render Them Safe*]; Underwood, *supra* note 13, at 493; Julie K. Underwood & William E. Sparkman, *School Finance Litigation: A New Wave of Reform*, 14 HARV. J.L. & PUB. POL’Y 517 (1991); Gail F. Levine, Note, *Meeting the Third Wave: Legislative Approaches to Recent Judicial School Finance Rulings*, 28 HARV. J. ON LEGIS. 507 (1991); see also EQUITY AND ADEQUACY IN EDUCATION FINANCE: ISSUES AND PERSPECTIVES, *supra* note 11; Symposium, *School Finance Litigation*, 22 YALE L. & POL’Y REV. 463 (2004); Symposium, *Adequacy Litigation in School Finance*, 28 U. MICH. J.L. REFORM 481 (1995); Symposium, *Issues in Educational Law and Policy*, 35 B.C. L. REV. 543 (1994); Symposium, *Investing in Our Children’s Future: School Finance Reform in the ‘90s*, 28 HARV. J. ON LEGIS. 293 (1991).

¹⁹ See Thro, *Public School Finance Reform Litigation*, *supra* note 18, at 222 (developing the wave metaphor which has provided a useful descriptive typology for three eras in educational finance reform).

²⁰ See Koski, *The Politics of Judicial Decision-Making*, *supra* note 18, at 1084–88; Ryan & Saunders, *supra* note 11, at 467–68.

²¹ James Ryan and Michael Heise make this general point about both equity and adequacy litigation: “School finance litigation has been somewhat successful on the state level, but, even after court-ordered reform, the general rule is that states must provide more money for poorer districts, while wealthier districts

adequacy framework might indeed provide new incentives to well-off people and school districts to start a kind of educational arms race, where the well off always maintain their competitive advantage. Increasing resource inputs for low- or middle-income school districts in order to achieve adequacy has failed to curb—and, some might argue, has even caused—objectionable inequalities as upper-income school districts remain free to spend as much as they wish and may feel the need to spend ever more as the bottom and middle receive more funding. As we argue in Part II, these comparative inequalities are undesirable and are ignored by the adequacy regime.

The initial wave (1971–73) of school finance litigation relied primarily on the Federal Equal Protection Clause and argued that equal protection guaranteed a right to substantially equal funding among school districts.²² This argument was premised on the theoretical claim that the revenues of a school district should not be based on the wealth of the people or property within the district.²³ After enjoying initial success in at least two federal district courts²⁴ and the California Supreme Court in *Serrano v. Priest*,²⁵ however, the federal equal protection theory came to a screeching halt in *San Antonio Independent School District v. Rodriguez*.²⁶

The New Jersey Supreme Court ushered in the second wave (1973–89) of school finance cases with its discovery of educational rights in state constitutions.²⁷ Although the *Robinson v. Cahill* court based its decision solely on the State’s education article, which imposed on the state legislature a duty

remain largely free to devote locally raised funds to local schools.” James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043, 2046 (2002).

²² See Heise, *supra* note 18, at 1153–57.

²³ See COONS ET AL., *supra* note 8, at 2.

²⁴ *Rodriguez v. San Antonio Indep. Sch. Dist.*, 337 F. Supp. 280 (W.D. Tex. 1971), *rev’d*, 411 U.S. 1 (1973); *Van Duzart v. Hatfield*, 334 F. Supp. 870 (D. Minn. 1971).

²⁵ 487 P.2d 1241 (Cal. 1971), *aff’d after remand*, 557 P.2d 929 (Cal. 1976).

²⁶ 411 U.S. 1 (1973). At issue in *Rodriguez* was the State of Texas’s system of educational finance which relied almost exclusively on local property tax wealth and resulted in a radically unequal level of educational funding for local school districts. *Id.* at 11–17. The question before the Court was whether such a system violated the Equal Protection Clause and, more specifically, whether poor children in poor school districts formed a suspect classification requiring any public policy that burdened such children to be subjected to heightened scrutiny or whether education was a fundamental right under the Constitution such that the infringement of that right required heightened scrutiny. *Id.* at 17. Finding neither a suspect classification in poverty nor a fundamental interest in education, a 5–4 majority of the Court applied the “rational relationship” test to Texas’s school finance plan and held that the state’s interest in local control over education easily supported the school funding scheme, unequal as it was. *Id.* at 55.

²⁷ *Robinson v. Cahill*, 303 A.2d 273, 282 (N.J. 1973).

to provide a “thorough and efficient” education to the state’s children,²⁸ the critical aspect of the case, according to some, was the newfound reliance on state constitutional arguments.²⁹ Thereafter, most state high courts relied heavily on the state education article and at times employed it in conjunction with the state’s constitutional equality provision to find the state’s school spending scheme unconstitutional.³⁰ The essence of the claim in the second wave cases, according to the wave typology, was the equity of school funding schemes. More specifically, courts primarily sought to achieve either horizontal equity among school districts such that per-pupil revenues were roughly equalized by the state, or at least fiscal neutrality such that the revenues available to a school district would not be dependent solely on the property wealth of the school district (this usually meant greater state-level involvement in educational funding through the institution of state-guaranteed tax base plans and, on rare occasion, state-backed equal yield, a.k.a. district power equalization, plans that sought to recapture “excess” revenues from wealthy districts).

The actual impact of second-wave, equity-minded educational finance litigation has been much discussed,³¹ and although there is continued debate over the efficacy such litigation, several modest conclusions can be made. First, in those states in which the state’s high court overturned the educational

²⁸ N.J. CONST. art. VIII, § 4, para. 1.

²⁹ See Heise, *supra* note 18, at 1157–62; Thro, *To Render Them Safe*, *supra* note 18, at 1653–56.

³⁰ See, e.g., *Washakie County Sch. Dist. No. One v. Herschler*, 606 P.2d 310 (Wyo. 1980) (bolstering the state’s equality provision with the state’s education article to find the funding system unconstitutional); *Dupree v. Alma Sch. Dist. No. 30*, 651 S.W.2d 90, 93 (Ark. 1983) (finding that an analysis of the education article reinforces the holding that the funding system was unconstitutional under the equality provision).

³¹ There is a large and growing literature on the effects of school finance reform litigation. See, e.g., DOUGLAS S. REED, *ON EQUAL TERMS: THE CONSTITUTIONAL POLITICS OF EDUCATIONAL OPPORTUNITY* (2001); John Dayton, *Examining the Efficacy of Judicial Involvement in Public School Funding Reform*, 22 J. EDUC. FIN. 1 (1996); William N. Evans et al., *Schoolhouses, Courthouses, and Statehouses After Serrano*, 16 J. POL’Y ANALYSIS & MGMT. 10 (1997) [hereinafter Evans et al., *Schoolhouses, Courthouses*]; William N. Evans et al., *The Impact of Court-Mandated School Finance Reform*, in *EQUITY AND ADEQUACY IN EDUCATION FINANCE: ISSUES AND PERSPECTIVES*, *supra* note 11, at 72, 74–75 [hereinafter Evans et al., *Impact of Court-Mandated School Finance Reform*]; Michael Heise, *The Effect of Constitutional Litigation on Education Finance: More Preliminary Analyses and Modeling*, 21 J. EDUC. FIN. 195 (1995); G. Alan Hickrod et al., *The Effect of Constitutional Litigation on Education Finance: A Preliminary Analysis*, 18 J. EDUC. FIN. 180 (1992); Bradley W. Joondeph, *The Good, the Bad, and the Ugly: An Empirical Analysis of Litigation Prompted School Finance Reform*, 35 SANTA CLARA L. REV. 763, 793–97 (1995); William S. Koski & Henry M. Levin, *Twenty-Five Years After Rodriguez: What Have We Learned?*, 102 TEACHERS COLLEGE REC. 480 (2000); Sheila E. Murray et al., *Education-Finance Reform and the Distribution of Education Resources*, 88 AM. ECON. REV. 789 (1998).

finance system, per-student spending across districts has become more equal.³² Second, this greater equity has in part been realized by greater funds being targeted to less wealthy school districts.³³ Third, while some have argued that this greater equity has also been at the expense of limiting the overall growth in educational spending or a decline in the state’s educational spending compared to other states,³⁴ others have concluded that educational spending in the wake of a successful challenge to the school finance scheme increased school funding.³⁵ Finally, a declaration that the educational finance system is unconstitutional typically leads to a greater centralization in educational spending at the state level.³⁶

The third wave (1989–present) was launched by the Kentucky Supreme Court in 1989 when it considered the type of substantive education that the education article of its state constitution mandates.³⁷ Third wave cases are typified by their shift toward theories of educational adequacy, not equity. Notably, those very same education articles that provided for a “thorough and efficient” education, for instance, that supported equity claims in the second wave would now be deployed for adequacy claims in the third wave. The Kentucky Supreme Court, in interpreting its thorough and efficient clause, held

³² See Evans et al., *Impact of Court-Mandated School Finance Reform*, *supra* note 31, at 77 (“[C]ourt-mandated education finance reform can decrease within-state inequality significantly.”); Murray et al., *supra* note 31, at 799–804.

³³ See Evans et al., *Impact of Court-Mandated School Finance Reform*, *supra* note 31, at 77 (“[O]ur results imply that reform in the wake of a court decision reduces spending inequality within a state . . . by raising spending at the bottom of the distribution while leaving spending at the top unchanged.”); Murray et al., *supra* note 31, at 806.

³⁴ See JON SONSTELIE, ERIC BRUNNER & KENNETH ARDON, PUB. POL’Y INST. OF CAL., FOR BETTER OR FOR WORSE? SCHOOL FINANCE REFORM IN CALIFORNIA 90 (2000), http://www.ppic.org/content/pubs/report/R_200JSR.pdf (“[S]pending per pupil in California between 1969 and 1998 fell about 15 percent relative to the average for the other states.”); Evans et al., *Impact of Court-Mandated School Finance Reform*, *supra* note 31, at 74–75 (noting that California has achieved finance equity through leveling down high revenue districts); Heise, *supra* note 31, at 212 (finding a negative relationship between judicial intervention in Connecticut’s school finance policy and overall state educational spending); Joondeph, *supra* note 31, at 810–13 (concluding that California’s *Serrano* decision depressed educational spending in the state). It should be noted, however, that some of the evidence for this proposition comes from California, a state in which school funding has been further stymied by the property-tax-capping effects of Proposition 13. See Fabio Silva & Jon Sonsteli, *Did Serrano Cause a Decline in School Spending?*, 48 NAT’L TAX J. 199 (1995).

³⁵ See Hickrod et al., *supra* note 31, at 207 (finding a greater increase in the rate of growth in total per pupil spending from state and local funds in those states in which the school finance system was declared unconstitutional); Evans et al., *Impact of Court-Mandated School Finance Reform*, *supra* note 31, at 77 (“[F]inance reform leads states to increase spending for education and leave spending in other areas unchanged.”).

³⁶ See Evans et al., *Schoolhouses, Courthouses*, *supra* note 31, at 12 (finding that successful litigation had the effect of raising state educational revenues, while leaving local revenues unchanged).

³⁷ *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 205–13 (Ky. 1989).

that the state legislature must provide its students with an adequate education. The Court defined an adequate education as one that instills in its beneficiaries seven capabilities, including, for example, sufficient oral and written communication skills to enable them to function in a complex and rapidly changing society and sufficient levels of academic or vocational skills to enable them to compete favorably with their counterparts in surrounding states.³⁸ After that, commentators and scholars identified the importance of the 1989 Kentucky case as the bellwether for the shift from equity to adequacy.³⁹

One might argue that the move from equity to adequacy was a strategic necessity, as the adequacy principle based on state education articles possesses many advantages over the equity principle based either on state equality provisions or education articles.

First, by relying upon the education provision of the state constitution, judges would be less likely to create spillover effects in other areas of public policy. Changing the black-letter law of equal protection might not only apply to education but also to other government policies and legislation.

Second, adequacy arguments seem to flow naturally from the language of the education articles, which generally require that the legislature provide a “thorough and efficient,”⁴⁰ “uniform,”⁴¹ or even “high quality”⁴² education to children. The court need not bend the language of these provisions beyond recognition to reach the adequacy standard or search for elusive “fundamental rights” and “suspect classes.”

Third, a standard that relies on absolute levels of educational opportunity rather than relative levels of educational opportunity would, at least in theory, avoid the ire of the political and economic elite in the state. For instance, a constitutional floor of adequacy would permit some local districts to provide their children more than what the court would deem “adequate” education. Thus, less political resistance to those schemes that would potentially “level

³⁸ *Id.* at 212.

³⁹ Thro, *To Render Them Safe*, *supra* note 18, at 1644; *see also* Levine, *supra* note 18; Thro, *Public School Finance Reform Litigation*, *supra* note 18; Thro, *Judicial Analysis During the Third Wave*, *supra* note 18; Underwood & Sparkman, *supra* note 18.

⁴⁰ *See, e.g.*, N.J. CONST. art. VIII, § 4, cl. 1 (“The Legislature shall provide for maintenance and support of a thorough and efficient system of free public schools . . .”).

⁴¹ *See, e.g.*, WIS. CONST. art. X, § 3 (“The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable.”).

⁴² *See e.g.*, ILL. CONST. art. X, § 1 (“The State shall provide for an efficient system of high quality public educational institutions and services.”).

down” the wealthier districts could be anticipated with an adequacy remedy. Similarly, an adequacy standard seems to intrude less upon the value of local control. The decision-making authority of well-to-do districts need not be curtailed simply because of a court order to the state that a poor school district be provided resources. Indeed, giving that school district the financial wherewithal to improve itself enhances local control. Thus, the symbolic value of the adequacy standard was great and school finance reformers today recognize its political potency.⁴³

Fourth, an adequacy standard may, at first blush, simply be more appealing to certain norms of fairness and opportunity. In modern American society, we view education as among the keys to economic success and social mobility. In fact, it is not much of a stretch to say that social and economic inequality are better tolerated in this country *because* Americans believe that the necessary tools for success are provided through public education. When one learns that some children are not receiving even the minimally adequate education that will help them better their lot, one feels that an injustice has been perpetrated. Images of children in crumbling schools with no textbooks and incompetent teachers outrage onlookers. But Americans don’t seem to feel this way if one child—most often their own—receives a *better* education than another child, so long as that “other child” is getting an “adequate” education.

Finally, at least upon initial examination, the adequacy standard appears to enjoy a clarity that equality of educational opportunity lacks. Nettlesome concerns about input versus outcome equity and vertical versus horizontal equity are avoided. All the legislature needs to do is define what an adequate education is and provide schools with the resources and conditions necessary to deliver that education.

The hidden pitfall, however, is that legislatures, and ultimately courts, are given absolutely no guidance as to what is an adequate education. There is no agreed-upon list of public education goals (is it producing civic-minded democratic citizens or productive contributors to the economy?), so there is no agreement on what resources are needed to provide adequate education.

⁴³ For example, the fledgling group of school finance reformers in Ohio decided early on to dub their group the Coalition for Equity and Adequacy to capture the broader political base. See Koski, *The Politics of Judicial Decision-Making*, *supra* note 18, at 1136.

Similarly, there is no standard for the skills, competencies, and knowledge necessary for an adequate education.⁴⁴

Even if the legislature and courts were to craft those standards from whole cloth, how do we determine what resources will produce the desired outcomes? And what background characteristics of students ought to be considered in distributing those resources (e.g., linguistic, economic, genetic disadvantages)? Moreover, if legislatures or courts talk about adequacy for a particular student or narrowly defined class of students who suffer those disadvantages, are they not talking about what the student *needs* in order for the education to be adequate for their *needs*? Or, as Julie Underwood put it, adequacy can be construed as a case of vertical equity.⁴⁵

2. *Adequacy as a State Constitutional Standard*

Courts have nonetheless begun to look to adequacy principles in crafting constitutional standards and developing remedial regimes in school finance lawsuits. Initially, courts must struggle with articulating a clear and workable standard for what is an adequate education.⁴⁶ Generally speaking, and discussed further below, state education clause jurisprudence has developed three types of nonmutually exclusive standards for adequacy: (1) those that articulate a vague and broad qualitative standard aimed at furthering the state's interest in producing civic-minded and economically productive students but provide little guidance to policymakers; (2) those that identify specific, though abstract, capacities and skills that all children should receive from public education to serve both the state's and the students' individual interests and then order the legislature to provide the resources that would permit children to obtain those capacities and resources; and (3) those that tie adequacy to state educational content standards, which define with a high degree of specificity what all children should know and be able to do. It should be noted that some courts employ both broader and more refined constitutional standards, particularly as litigation develops over time and the legislature requires additional guidance. What is important for our purposes, however, is that none of these standards necessarily specifically targets poor or minority children, nor distributes educational resources on a basis that compares under-resourced

⁴⁴ For an extended discussion of the difficulties in establishing an "adequacy" standard, see Koski & Levin, *supra* note 31, at 491–93.

⁴⁵ Underwood, *supra* note 13, at 493.

⁴⁶ See Koski, *Of Fuzzy Standards*, *supra* note 18, at 1194.

schools to their privileged peers, nor seeks as a matter of principle to reduce resource inequality gaps between the well off and the poor.

Exemplary of the first type of judicial standard, which tacitly recognizes that education is a public good that furthers the state’s governance and economic goals and a private good enjoyed by each citizen, is the Wisconsin Supreme Court’s decision in *Vincent v. Voight*,⁴⁷ in which the court held that “Wisconsin students have a fundamental right to an equal opportunity for a sound basic education. An equal opportunity for a sound basic education is one that will equip students for their roles as citizens and enable them to succeed economically and personally.”⁴⁸ Note how the court employed the language of equality to establish its adequacy standard. That the court had fully embraced the adequacy standard, however, is apparent in its devaluation of the plaintiffs’ evidence of inequality and its rejection of the plaintiffs’ claim: The “evidence, however meticulously gathered, fails to demonstrate that any children lack a basic education in any school district. Merely showing disparity of the financial resources among school districts is not enough in this state to prove a lack of equal opportunity for a sound basic education.”⁴⁹

In the second category falls the storied Kentucky decision in which the court articulated an adequacy standard pegged to certain capacities:

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

⁴⁷ 614 N.W.2d 388, 396 (Wis. 2000).

⁴⁸ *Id.*; see also *Campaign for Fiscal Equity, Inc. v. State (CFE I)*, 655 N.E.2d 661, 666 (N.Y. 1995) (relying on *Levittown Union Free School District v. Nyquist*, 439 N.E.2d 359, 369 (N.Y. 1982), and holding that New York’s children are entitled to a “sound basic education”).

⁴⁹ *Vincent*, 614 N.W.2d at 411; see also Koski, *The Politics of Judicial Decision-Making*, *supra* note 18, at 1200–11 (describing the evidence of inequality submitted in the case).

compete favorably with their counterparts in surrounding states, in academics or in the job market.⁵⁰

Courts in other states have since emulated Kentucky's standard.⁵¹ Though still undoubtedly a criterion-referenced adequacy standard, this constitutional standard is remarkable for its focus on the personal development of each of Kentucky's children. Because of the standard's reliance on adequacy principles, however, nothing in the standard compares the educational resources of Kentucky's children to one another, save one aspect of the standard with an equity focus: The seventh capacity compares the academic and vocational skills of Kentuckians to those in other states.

Since the Kentucky decision, there has been some judicial movement toward an even more refined adequacy standard. In the midst of the national educational policy reform movement towards standards-based reform, in which states are setting standards for what all children should know and be able to do in certain core academic areas and then holding schools and children accountable for achieving those outcome standards, courts have been cautiously looking to the achievement of state content standards as guidelines for what is a constitutionally adequate education.⁵² The judiciary's advantage in looking to state content standards is that it cannot be readily accused of intruding upon separation of powers insofar as those educational content standards have been legislatively authorized and (at least tacitly) approved.⁵³ On the downside, however, the constitutionalization of state educational content standards carries with it the risk of providing unintended incentives for the legislature to water down those standards. Nonetheless, New York's high court has taken tentative steps in this direction by implicating the New York State Learning Standards as guidance for what is a "sound basic education" in

⁵⁰ *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 212 (Ky. 1989). It should be noted that Kentucky's adequacy standard broadly mirrored an earlier constitutional standard articulated by the West Virginia Supreme Court. *Pauley v. Kelly*, 255 S.E.2d 859, 877 (W. Va. 1979).

⁵¹ See *McDuffy v. Sec'y of Educ.*, 615 NE.2d 516, 554-55 (Mass. 1993); *Claremont Sch. Dist. v. Governor*, 703 A.2d 1353, 1359-60 (N.H. 1997); *Opinion of the Justices No. 338*, 624 So.2d 107, 165-66 (Ala. 1993).

⁵² For a further discussion of standards-based reform, see *infra* Part I.B.3. For a discussion of how educational advocates might leverage educational content standards in the courts, see William S. Koski, *Educational Opportunity and Accountability in an Era of Standards-Based School Reform*, 12 STAN. L. & POL'Y REV. 301 (2001).

⁵³ See Koski, *supra* note 52, at 307; James S. Liebman, *Implementing Brown in the Nineties: Political Reconstruction, Liberal Recollection, and Litigatively Enforced Legislative Reform*, 76 VA. L. REV. 349, 415-16 (1990).

the most recent round of the *Campaign for Fiscal Equity* litigation.⁵⁴ In rejecting a lower court’s adequacy standard pegged to an eighth-grade education, the New York Court of Appeals held that the State’s children are entitled to a “meaningful high school education.”⁵⁵ And although the Court rejected the Learning Standards as the measure of a constitutional education—“to enshrine the Learning Standards would be to cede to a state agency the power to define a constitutional right”—the Court did look to the attainment of a high school diploma pegged to the standards as presumptive evidence of whether an adequate education was provided.⁵⁶

3. *Adequacy as a Remedy*

Beyond state constitutional standards for educational quality, courts in educational finance reform cases have the capacity to shape educational policy through their remedial orders, which may or may not strictly adhere to their liability standards. Indeed, the courts’ remedial orders determine the extent to which constitutional values are reflected in educational policymaking.

The third wave of litigation has been marked by a wide variety of remedial schemes ranging from simply “vetoing” the legislature’s operative finance plan and sending it back to the drawing board,⁵⁷ to ordering that an expert consultant be retained to “cost out” what would be an adequate education.⁵⁸ Here, we briefly review the general remedies employed by courts, including (1) the mere declaration that the current system is unconstitutional and a directive to the legislature to develop a new system in line with the court’s constitutional standard, (2) the directive that the state legislature determine the cost of an adequate education and an order that such funding be provided (an inputs standard that may be tied to outcomes), (3) the specific directive that the state provide a certain type of educational programming for certain children and schools (an inputs standard), and (4) the order that the state shall ensure that students achieve a certain outcome without dictating the specific inputs (an outcomes standard). Although each of these remedies is driven by an

⁵⁴ *Campaign for Fiscal Equity, Inc. v. State (CFE II)*, 801 N.E.2d 326, 332 (N.Y. 2003). For an analysis of the *CFE* decision and its treatment of the Learning Standards, see CAMPAIGN FOR FISCAL EQUITY, INC., *CFE v. STATE OF NEW YORK: AN ANALYTIC OVERVIEW OF THE COURT OF APPEALS DECISION 2-3* (2003), <http://www.cfequity.org/CoAAAnalysis7-16-03.PDF>; see also *Montoy v. State*, 102 P.3d 1160, 1164 (Kan. 2005) (relying on the Kansas school accreditation standards, which incorporate student performance measures in determining that the state’s school funding scheme did not provide a constitutionally “suitable” education).

⁵⁵ *CFE II*, 801 N.E.2d at 332.

⁵⁶ *Id.* at 332, 337 n.6.

⁵⁷ See *DeRolph v. State (DeRolph I)*, 677 N.W.2d 733, 747 (Ohio 1997).

⁵⁸ See *Campbell County Sch. Dist. v. State*, 907 P.2d 1238, 1279 (Wyo. 1995).

adequacy legal standard, the concept of equity has, in recent litigation, crept back in as courts and legislatures struggle with a remedy.⁵⁹

Historically speaking, the remedial orders of most state supreme courts in educational finance reform litigation have been quite limited. As one author described it, courts have typically issued “binding advisory opinions” striking down the state’s system on equity or adequacy grounds and sending the matter back to the legislature for remedial action.⁶⁰ In theory, then, the legislature would craft a new finance scheme and the court, given the opportunity to review it in further litigation, would pass constitutional judgment on the scheme.⁶¹ Some have viewed this “dialogue” between the judiciary and legislature as a logical, if not healthy, approach to reforming educational finance systems.⁶² But others have complained that this dialogic process is cumbersome, expensive, and possibly frustrating for all parties involved.

Perhaps due to legislatures’ inaction in the face of broad constitutional declarations, courts more recently have been directing legislatures or, in some instances, commissioning independent consultants to “cost out” what is an adequate education.⁶³ Naturally, difficult questions such as “adequacy for what?” and “what resources are necessary to produce such adequacy?” are central to such “costing out” (a.k.a. “adequacy”) studies. Currently, four occasionally overlapping methodologies for determining the cost of an adequate education have been employed in the face of school finance

⁵⁹ See *infra* notes 71–77 and accompanying text.

⁶⁰ George D. Brown, *Binding Advisory Opinions: A Federal Courts Perspective on the State School Finance Decisions*, 35 B.C. L. REV. 543, 546 (1994); see also Mark Jaffe & Kenneth Kersch, *Guaranteeing a State Right to a Quality Education: The Judicial-Political Dialogue in New Jersey*, 20 J.L. & EDUC. 271, 294–95 (1991).

⁶¹ The Texas and Ohio school finance sagas typify this type of judicial remedial activity. See *Edgewood Indep. Sch. Dist. v. Kirby (Edgewood I)*, 777 S.W.2d 391 (Tex. 1989); *Edgewood Indep. Sch. Dist. v. Kirby (Edgewood II)*, 804 S.W.2d 491 (Tex. 1991); *Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist. (Edgewood III)*, 826 S.W.2d 489 (Tex. 1992); *Edgewood Indep. Sch. Dist. v. Meno (Edgewood IV)*, 917 S.W.2d 717 (Tex. 1995); *DeRolph I*, 677 N.E.2d 733 (Ohio 1997); *DeRolph v. State (DeRolph II)*, 728 N.E.2d 993 (Ohio 2000); *DeRolph v. State (DeRolph III)*, 754 N.E.2d 1184 (Ohio 2001); *DeRolph v. State (DeRolph IV)*, 780 N.E.2d 529 (Ohio 2002); *State v. Lewis (DeRolph V)*, 789 N.E.2d 195 (Ohio 2003).

⁶² See Jaffe & Kersch, *supra* note 60.

⁶³ See *Lake View Sch. Dist. No. 25 v. Huckabee*, 91 S.W.3d 472, 486 (Ark. 2002) (finding the state’s school funding system unconstitutional at least in part because the state’s department of education had failed to cost-out what is an adequate education); *CFE II*, 801 N.E.2d 326, 360 (N.Y. 2003) (ordering the legislature to “determine[], to the extent possible, the actual costs of the resources needed to provide the opportunity for a sound basic education in all school districts in the state” and to “ensure[] that at a minimum every school district has the necessary funds to provide an opportunity for a sound basic education to all of its students”); *Campbell County Sch. Dist.*, 907 P.2d at 1279 (ordering that the legislature conduct a “cost of education study” to “inform the creation of a new funding system”).

litigation: the “professional judgment” (or “market basket”) model, the “evidence-based professional judgment” (or “reliable research”) model, the “successful schools” model, and the “cost function” model.⁶⁴

Both the professional judgment and evidence-based models look primarily to educational inputs for defining an adequate education. In essence, the professional judgment model identifies the types of student outcomes desired and, working backward from those outcomes, employs focus groups of experienced educators and policymakers to develop the basket of goods necessary for all children to achieve those outcomes. These goods include facilities, administrative structures, teachers, instructional materials, and so forth. Naturally, the basket would recognize cost differentials in different labor markets. The primary criticism leveled at the professional judgment approach is that it tends to produce high-cost estimates of adequacy. Put simply, what incentive is there for the “expert panel” to ensure that the market basket is the most cost-effective or efficient choice, and how can we be sure that there is a technological link between the resources in the basket and student outcomes?

The evidence-based model determines resource needs by identifying research-based “best practices” (such as class-size reduction or Robert Slavin’s “Roots and Wings/Success for All” comprehensive school reform model) and determining the costs of providing those interventions and models. The challenge with the evidence-based approach is that the extant evidence on “what works” is limited or unreliable in many areas.⁶⁵

The successful schools and cost-function strategies, on the other hand, focus on outcome data to estimate the cost of an adequate education. The

⁶⁴ For an overview of the four methodologies, see David J. Hoff, *The Bottom Line*, EDUC. WK., Jan. 6, 2005, at 29–36; Bruce D. Baker, Lori L. Taylor & Arnold Vedlitz, *Measuring Educational Adequacy in Public Schools* (Bush Sch. of Gov’t & Pub. Serv., Tex. A&M Univ., Working Paper No. 580, 2005), available at http://bush.tamu.edu/research/working%5Fpapers/ltaylor/measuring_edu_adequacy_in_public_schools.pdf; see also James W. Guthrie & Richard Rothstein, *Enabling “Adequacy” to Achieve Reality: Translating Adequacy into State School Finance Distribution Arrangements*, in EQUITY AND ADEQUACY IN EDUCATION FINANCE: ISSUES AND PERSPECTIVES, *supra* note 11, at 209, 214–46 (describing at length the professional judgment method and critiquing the “black box” inferential approach); William D. Duncombe & John M. Yinger, *Performance Standards and Educational Cost Indexes: You Can’t Have One Without the Other*, in EQUITY AND ADEQUACY IN EDUCATION FINANCE: ISSUES AND PERSPECTIVES, *supra* note 11, at 260, 282–91 (describing sophisticated statistical models for developing a foundation aid plan that would provide an “adequate” education to achieve specified performance standards).

⁶⁵ Data are so limited and unreliable primarily because problems—and solutions—in the educational context are difficult to isolate and are often situation-specific. For a more detailed discussion of the evidentiary problem with the evidence-based approach, see, e.g., Koski & Levin, *supra* note 31, at 487–88.

successful schools model looks to those school districts that are achieving the state outcomes standards and uses statistical techniques to estimate what an adequate amount of funding would be based on those districts' expenditures. This model is less concerned with determining the precise inputs because it assumes that, given a sufficient amount of overall dollars, districts would efficiently deploy those dollars to achieve the desired outcomes. The complaint lodged against this model is that its estimates rely heavily upon the assumptions made for identifying "successful schools" and the costs of funding those schools. Should any schools—e.g., the highest or lowest spending—be excluded from the model, and are the state standards even meaningful measures of adequacy? Why should we rely upon old, static data for determining adequacy for the future?

Finally, cost-function analyses employ regression techniques to estimate the relationship between school spending, student achievement, and such data as student demographics and the relevant teacher labor market. The advantage of the cost-function approach is that it allows policymakers to make fine-tuned decisions regarding the cost of achieving adequate outcomes in districts with differing characteristics, such as the proportion of poor children to well-off children or the regional cost of living. Like the successful schools model, however, its estimates are highly dependent on the assumptions made.

Although all of these models have their own advantages and disadvantages, the important point for this discussion is that while all are designed to cost out an *adequate* education, all *could* and *do* infuse *equity* into their calculations by targeting resources to underprivileged children. For instance, the expert educators developing the market basket could provide additional resources for remedial reading programs and free breakfast and lunch for low-income children, English remediation for limited English proficient (LEP) students, and mandatory preschool and all-day kindergarten for children in low-income school districts. Similarly, the statistical models employed by the successful schools approach could be "corrected" for the poverty levels within a poor school district or for the number of LEP students in the district, much like the cost-function analyses do by design.⁶⁶ Put simply, adequacy models could be

⁶⁶ See, e.g., Preston C. Green, III & Bruce D. Baker, *Montoy v. State and State Racial Finance Disparities: Did the Kansas Courts Get it Right this Time?*, 195 WEST'S EDUC. L. REP. 681 (2005) (examining the Kansas school finance litigation and arguing that the trial court in the matter appropriately focused on the State's failure to provide adequate funding to high-minority school districts); Thomas Saunders, *Settling Without "Settling": School Finance Litigation and Governance Reform in Maryland*, 22 YALE L. & POL'Y REV. 571, 605 (2004) (describing the "weighted pupil" funding model adopted by the State of Maryland in

suffused with concepts of vertical equity.⁶⁷ Yet the potential for equity to inform adequacy studies is still mostly potential, as courts have not uniformly embraced and ordered concepts of vertical equity to be included in adequacy cost studies and legislatures have done so only rarely.⁶⁸ Most importantly, even such targeted remedial schemes do not compare the resources of poor children to those of the affluent, and therefore they cannot achieve true vertical equity.⁶⁹

In a third category of remedial schemes, a few courts have not invoked adequacy principles and instead have relied on the sort of comparisons between rich and poor districts that were part of the equality-oriented waves. The consequence has been court orders that direct money and specific educational programming to needy children.⁷⁰ The prototype for such a remedial order is the now-epic *Abbott v. Burke*.⁷¹ In *Abbott*, students from twenty-nine of the state's poorest urban districts filed a lawsuit claiming that the state had failed to equalize funding among those districts and the richest districts, and had failed to provide for the educational needs of children in those districts as was required by New Jersey's *Robinson v. Cahill* decision.⁷² In response to the lawsuit, the New Jersey Supreme Court ordered the legislature to raise the spending in those poor districts to the level of the wealthy districts, and specifically ordered that additional supplemental services and resources be provided to meet the educational needs of urban children

response to a school finance lawsuit which model was based on both a professional judgment and successful schools study and which model provided greater funding for LEP, poor, and disabled students).

⁶⁷ See Ryan & Saunders, *supra* note 11, at 469.

⁶⁸ Ryan and Saunders seem to agree:

Despite its promise, the movement toward vertical equity has been slow. Although school finance litigation was partially motivated by a desire to assist poor students, those students have not been the focus of many school finance remedies. In the past, courts rarely discussed whether poor students might be entitled to additional funding to address their special needs. Even those that did discuss the issue hardly ever ordered that states provide such funding.

Id.

⁶⁹ See *supra* note 43 and accompanying text.

⁷⁰ Ryan and Saunders similarly note that such remedial schemes that target educational resources to poor and minority students reflect principles of vertical equity. Ryan & Saunders, *supra* note 11, at 468–72.

⁷¹ *Abbott v. Burke (Abbott II)*, 575 A.2d 359 (N.J. 1990); *Abbott v. Burke (Abbott III)*, 643 A.2d 575 (N.J. 1994); *Abbott v. Burke (Abbott IV)*, 693 A.2d 417 (N.J. 1997); *Abbott v. Burke (Abbott V)*, 710 A.2d 450 (N.J. 1998); *Abbott v. Burke (Abbott VI)*, 748 A.2d 82 (N.J. 2000); *Abbott v. Burke (Abbott VII)*, 751 A.2d 1032 (N.J. 2000); see also Alexandra Greif, *Politics, Practicalities, and Priorities: New Jersey's Experience Implementing the Abbott V Mandate*, 22 YALE L. & POL'Y REV. 615 (2004).

⁷² See *Abbott II*, 575 A.2d at 359.

from disadvantaged backgrounds—a classic equity remedy.⁷³ When the legislature's remedial funding scheme failed to satisfy the *Abbott II* mandate, the court ordered that spending in the twenty-nine Abbott districts should be substantially equal to the richer districts by the 1997–98 school year, as well as the provision of additional funds for educational services.⁷⁴ The legislative response this time was to overhaul the State's education system by developing educational content standards, but it did not ensure the funding necessary for all children to meet those standards. Thus, in *Abbott IV*, the court lauded the standards as providing a thorough and efficient education, but ordered the State to continue to increase the funding in the *Abbott* districts to a level that would allow children in those districts to achieve the content standards (thereby introducing adequacy elements into a classic equity case) and remanded the case for further fact finding.⁷⁵ On inevitable review, the Court this time held that to meet the State's standards and fulfill the *Abbott II* mandate, the *Abbott* districts should be provided with specific educational resources, including half-day preschool for three- and four-year-olds and implementation of certain whole-school reform models that had been demonstrated to be successful in other districts.⁷⁶

Thus, the *Abbott* litigation exhibits both equity and adequacy concerns. Most significant, however, is the court's single-minded focus on enhancing the educational resources for poor and minority school districts even while at times deploying adequacy rhetoric. Still, the vertical-equity-minded remedies of the *Abbott* litigation have been only seldom and half-heartedly deployed in other cases.⁷⁷ The potential for adequacy to achieve vertical equity remains just potential.

The final adequacy remedy—ordering states to ensure that all children achieve proficiency on state educational content standards without dictating any distribution of resources or any other inputs—is still only theoretical.

⁷³ See *id.* at 363.

⁷⁴ *Abbott III*, 643 A.2d at 576, 580.

⁷⁵ *Abbott IV*, 693 A.2d at 427, 434.

⁷⁶ *Abbott V*, 710 A.2d at 468–69.

⁷⁷ One commentator has argued that the trial court in one litigation that was plead as an adequacy lawsuit focused its remedies on providing specific resources such as quality preschool to at-risk children. See Tico A. Almeida, *Refocusing School Finance Litigation on At-Risk Children: Leandro v. State of North Carolina*, 22 YALE L. & POL'Y REV. 525, 539 (2004). Yet such examples are rare. Indeed, the Arkansas Supreme Court rejected a trial court's order that the state provide mandatory preschool for poor children. *Lake View Sch. Dist. No. 25 v. Huckabee*, 91 S.W.3d 472, 501 (Ark. 2002).

Although, as was discussed above,⁷⁸ the New York Court of Appeals nodded in the direction of such an outcomes standard, neither it nor any other court has gone so far as to constitutionalize the outcomes accountability movement. We only mention this possibility because, although it would focus state reform efforts on student outcomes (a laudable goal), it would not ensure any form of equity (neither horizontal nor vertical).

Looking back over the past three-and-a-half decades of school finance reform litigation, it is easy to see that the wave metaphor is not a perfect fit. Adequacy concerns often cropped up in second-wave equity opinions, while concerns for vertical and horizontal equity sometimes inform third-wave adequacy litigation. What is clear, however, is that the rhetoric—and much of the remedial policy—of school finance litigation has been dramatically reoriented towards concerns for basic adequacy rather than equality: Courts tolerate inequalities above basic thresholds and do not necessarily target additional resources to the demonstrably needy. The upshot is the limited availability of state supreme courts as drivers for transforming state constitutions into vehicles for achieving aggressive equity-minded reform.

B. From Targeting the Needy to Expecting that All Children Can Learn: Educational Policy’s Shift from Targeted Equity to One-Size-Fits-All Accountability

Turning from the courts to the legislatures, we consider the major educational policy trends that have most affected the educational opportunities of low-income and minority children over the last three decades. From the outset, it should be emphasized that state legislatures and Congress have not ignored the educational challenges facing our neediest children. Be it funding for bilingual education,⁷⁹ vocational education,⁸⁰ or the education of homeless children,⁸¹ the federal government has provided categorical funding to states to meet some of the needs of these populations.⁸² That said, the major policy trend over the past three decades, we argue, has been away from targeting significant resources to poor and minority students, and toward one-size-fits-all

⁷⁸ See *supra* notes 54–56 and accompanying text.

⁷⁹ See No Child Left Behind Act of 2001 § 3001–304, 20 U.S.C. §§ 6801–7014 (Supp. II 2002).

⁸⁰ See Carl D. Perkins, Career and Technical Education Act §§ 1–9, 20 U.S.C. §§ 2301–07 (2000).

⁸¹ See McKinney-Vento Homeless Education Assistance Improvements Act of 2001 §§ 721–26, 42 U.S.C. §§ 11431–35 (Supp. II 2002).

⁸² The federal government’s contributions to K–12 schooling have grown as a result, though they remain a small percentage—7.9%—of total education spending. Lynn Olson, *Financial Evolution*, EDUC. WK., Jan. 6, 2005, at 8, 12.

standards-based accountability schemes that may not enhance equality and indeed may exacerbate existing inequalities.

Although holding the promise of increased vertical equity if designed to provide opportunities to learn and incentives to channel resources to poor and low-performing districts, most current accountability schemes may only exacerbate existing inequalities because (1) they are pegged to static proficiency standards that are not dependent upon the performance at the top end of the distribution, (2) they do not ensure sufficient educational resources to meet established high-outcome standards, (3) they may increase racial and socioeconomic segregation as wealthy districts and families will only make their high-performing enclaves more inaccessible, (4) they will create disincentives for high-quality teachers to teach in the toughest assignments, and (5) they will direct the commitment of tangible educational resources and instructional time in poor-performing schools to a narrow set of subjects, thereby increasing inequality in educational opportunity.

We want to be clear: We do not reject or criticize outcome standards as such. The shift from no- or low-expectations and input standards to high-expectation outcome standards for all students has been an important development that contains the promise of improving academic achievement for all students. But the shift has left behind the egalitarian impulse of earlier school reforms in favor of adequacy standards that lack two critical levers: First, adequacy makes it more difficult to justify targeting additional resources to poor and minority students absent demonstrated school failure in relation to minimum standards, and second, adequacy is insensitive to inequalities in educational inputs or outcomes above the specified performance level sought for all students.

1. *Title I and the Great Society*⁸³

The federal government's historical role in educational policy has been quite limited. But in the past forty years, Congress has actively shaped educational policy in the states through a combination of civil rights enforcement and funding statutes targeted toward certain populations or programs. Chief among those federal initiatives and the primary policy we discuss here is the federal government's efforts to provide additional resources

⁸³ We rely heavily upon John F. Jennings, *Title I: Its Legislative History and Its Promise*, in *TITLE I: COMPENSATORY EDUCATION AT THE CROSSROADS* 1, 1–24 (Geoffrey D. Borman, Samuel C. Stringfield & Robert E. Slavin eds., 2001), for this brief history of Title I.

for “children of low-income families” through Title I of the Elementary and Secondary Education Act of 1965.⁸⁴ Not only has Title I been the primary mechanism for promoting educational equity from Washington, but also it has both shaped and been shaped by state efforts nominally directed at achieving educational equity.

In 1964, buoyed by a large electoral victory and a large Democratic majority in Congress, President Lyndon B. Johnson not only was able to push through the Civil Rights Act of 1964 (which would, among many other things, prohibit racial discrimination and segregation in the schools), but also to appoint a commission chaired by John Gardner, then president of the Carnegie Corporation and later Secretary of Health, Education, and Welfare, to make recommendations regarding federal aid for education.⁸⁵ Tying federal education aid to President Johnson’s “War on Poverty,” the Gardner Commission recommended that such aid not be general, but rather be targeted to poor children.⁸⁶ President Johnson adopted this recommendation and proposed that federal aid be allocated on a “child benefit theory” of assistance, that is, federal money would be provided not generally to schools, but rather specifically to low-income children for the provision of supplemental (later called “compensatory”) education services.⁸⁷ Such a child-oriented compromise quelled calls for general federal aid to schools and was passed by Congress as part of the Elementary and Secondary Education Act of 1965.⁸⁸

Title I funds were initially distributed based on the concentration of children in poverty in a given school; once the funds reached the school district, they were allocated among children in the school based on educational need.⁸⁹ The idea, supported by research findings from the Coleman Report, was that a concentration of poverty, in itself, was highly detrimental to educational outcomes, and that schools with such concentrations required additional resources.⁹⁰ Conversely, although wealthier districts might receive some funding based on the presence of some concentration of children in

⁸⁴ Pub. L. No. 89-10, 79 Stat. 27 (codified as amended in scattered sections of 20 U.S.C.).

⁸⁵ See Jennings, *supra* note 83, at 3.

⁸⁶ See *id.*

⁸⁷ See *id.* at 3–4.

⁸⁸ See *id.* at 4.

⁸⁹ See *id.*

⁹⁰ See *id.* at 5–8; JAMES S. COLEMAN ET AL., U.S. DEP’T OF EDUC. & WELFARE, EQUALITY OF EDUCATIONAL OPPORTUNITY (1966) (identifying the factors affecting educational achievement and arguing that any remedy must help poor and minority youth to overcome the conditions of their educational background).

poverty, only a very small proportion of the funds were to go to such districts.⁹¹

Although the legislation was clear that Title I funds were to be used for “educationally deprived” (read: poor) children, the legislation was silent as to how those funds should be used for such children.⁹² This ambiguity fueled a debate between the “traditionalists,” who believed that Title I funds could be used as general aid to high poverty schools to pay for any school expenses, and the “reformists,” who argued that those funds were to be spent only on educational services directly provided to needy children.⁹³ The reformists prevailed.⁹⁴ The legacy of that victory was the provision of “compensatory education” to “educationally deprived” children.⁹⁵ Another legacy of that victory, as well as early reports that Title I funds were being spent on general educational programming, was what is now derisively called “pull-out” programming, or removing poor children from the general curriculum to provide direct, compensatory services.⁹⁶ The result was an accountability regime aimed at bookkeeping, auditing, and enforcement of stringent input standards that were directed at providing services to needy children.⁹⁷

Title I was an unprecedented and monumental effort to target educational funding to poor children. It signaled the federal government’s expectation that the nation’s schools were to educate all children. And the program has been measurably successful in many ways. One of the two most comprehensive evaluations of Title I, a 1981 report from the *Sustaining Effects* study noted significant gains in math and reading achievement among poor children over the fifteen-year period in which the program had been implemented, but also noted that the rich–poor, black–white achievement gap remained wide open.⁹⁸

⁹¹ See Jennings, *supra* note 83, at 8.

⁹² See *id.* at 8–9.

⁹³ See *id.* at 9.

⁹⁴ See *id.*

⁹⁵ See *id.* at 8–11.

⁹⁶ See *id.*

⁹⁷ See *id.*

⁹⁸ MING-MEI WANG ET AL., COMPENSATORY SERVICES AND EDUCATIONAL DEVELOPMENT IN THE SCHOOL YEAR (1981) (Technical Report 10 from the Study of the Sustaining Effects of Compensatory Education on Basic Skills). That study purposefully sampled “needy” control students from high-poverty schools without compensatory services against which the performance of such needy students who received services were compared. The other major Title I evaluation is the *Prospects* study. MICHAEL J. PUMA ET AL., PROSPECTS: FINAL REPORT ON STUDENT OUTCOMES (1997). This study did not employ a control group methodology, but rather compared Title I recipients to a nationally representative sample of wealthier nonrecipients. Almost predictably, the major finding from that study was that Title I “assistance was, on average, insufficient to close the gap in academic achievement between advantaged and disadvantaged

Of course, it may be naïve to expect that one programmatic intervention would completely close the achievement gap. Yet the ongoing rift between those who would provide Title I funds as a block grant for general funding to schools with concentrations of low-income children and those who would continue targeting the monies, coupled with the allegedly damning evidence that the achievement gap had not been closed, stoked the fire to retrench and reform Title I.

2. *The Reagan Era’s Focus on Excellence*

“Our Nation is at risk,” wrote the National Commission on Excellence in Education in April 1983.⁹⁹ “Our once unchallenged preeminence in commerce, industry, science, and technological innovation is being overtaken by competitors throughout the world.”¹⁰⁰ The report continued, “[T]he educational foundations of our society are presently being eroded by a rising tide of mediocrity that threatens our very future as a Nation and a people.”¹⁰¹ In response to a request by then Secretary of Education T.H. Bell in the Ronald Reagan Administration, the Commission evaluated the quality of education in the United States as of the early 1980s.¹⁰² The Commission conducted a broad-based inquiry into the state of primary, secondary, and post-secondary education in the United States and its conclusion was resoundingly clear: American society had lost sight of the basic purposes of schooling and of the high expectations and disciplined effort needed to attain those purposes.¹⁰³ The Commission’s prescription was equally clear: Policy must be “directed toward reform and excellence throughout education.”¹⁰⁴ An unfortunate consequence has been that the nation and states have diminished their focus on equity.¹⁰⁵

students.” *Id.* at vi. The *Prospects* study, however, could not make a finding on whether needy children would have been worse off without Title I. *Id.* A more recent meta-analysis of Title I evaluation studies found “a modest overall effect of [Title I] on yearly achievement gains.” Geoffrey D. Borman & Jerome V. D’Agostino, *Title I and Student Achievement: A Quantitative Synthesis*, in *TITLE I: COMPENSATORY EDUCATION AT THE CROSSROADS*, *supra* note 83, at 25, 49 (also noting, however, that there is a great deal of variability in Title I effects caused mainly by variability in program implementation and evaluation).

⁹⁹ NAT’L COMM’N ON EXCELLENCE IN EDUC., *A NATION AT RISK: THE IMPERATIVE OF EDUCATION REFORM 5* (1983).

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *See id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 12.

¹⁰⁵ We are not alone in our belief that since the Reagan Era, the focus of educational policy has shifted from equality to, at least in rhetoric, excellence:

At the outset of the Reagan Revolution, there was little support for continued targeting of educational resources to the neediest.¹⁰⁶ Rather, President Reagan sought to consolidate Title I funds into block grants with few strings attached.¹⁰⁷ Although Democrats held the line against this reform, President Reagan was successful in cutting back on Title I expenditures.¹⁰⁸ Equally significant, the Reagan Era witnessed a scaling back of other equity-minded policies of the 1960s and 1970s. No longer would the Department of Education's Office for Civil Rights affirmatively pursue school districts to abolish segregation practices, nor would it actively enforce the guidelines it had developed to ensure that schools provided access to the curriculum for those students whose first language was not English.¹⁰⁹ On the legislative and budgetary front, Congress virtually banned support for school districts that sought to integrate their student bodies in any other way than voluntary "magnet" programs.¹¹⁰

Since the 1983 publication of *A Nation at Risk*, most of the focus on education reform has centered around raising overall levels of achievement, while the core concern over equity that animated *Brown v. Board of Education* and the 1965 Elementary and Secondary Education Act has been given short shrift. Democratic and Republican administrations alike have framed their education efforts primarily in terms of raising achievement generally rather than closing the gaps between disadvantaged and advantaged students. The public policy debate, as noted journalist Peter Schrag observes, "has largely been an argument between center and right: charters and tougher standards as alternatives to vouchers and the free market."

RICHARD D. KAHLBERG, *Introduction: Making K–12 Public Education an Engine for Social Mobility*, in *A NOTION AT RISK: PRESERVING PUBLIC EDUCATION AS AN ENGINE FOR SOCIAL MOBILITY* 1, 1 (Richard D. Kahlenberg ed., 2000) (quoting Peter Schrag, *Education and the Election*, NATION, Mar. 6, 2000, at 11, 15); see also Janice Petrovich, *The Shifting Terrain of Educational Policy: Why We Must Bring Equity Back*, in *BRINGING EQUITY BACK: RESEARCH FOR A NEW ERA IN AMERICAN EDUCATIONAL POLICY* 3, 3–4 (Janice Petrovich & Amy Stuart Wells eds., 2005).

Education analysts credit the progressive and equity-minded educational policies enacted in the 1960s and 1970s for the educational progress of minorities and the poor in the decades that followed In spite of the successes of these programs, educational policies enacted since the early 1980s have sought not to advance *equality*, but ostensibly to improve the *quality* of education.

Id.

¹⁰⁶ See Jennings, *supra* note 83, at 13.

¹⁰⁷ See *id.*

¹⁰⁸ See *id.*

¹⁰⁹ See GARY ORFIELD ET AL., *DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION* 17 (1996).

¹¹⁰ See *id.* at 16–17.

Instead, federal and state policy supported the development of minimum competency exams for high school students, expansion of the movement to require teachers to pass basic skills tests, and a renewed attention to the math and science curriculum.¹¹¹ In a word: excellence. All of this culminated in a 1989 conference among all fifty of the nation’s governors and President George H. W. Bush, in which the attendees resolved to adopt nationwide education goals that focused on achieving academic excellence for all students.¹¹² So was born the standards-based reform movement.

3. *Standards-Based Reform, the New Accountability in Education, and the No Child Left Behind Act*

One seamless national educational policy thread has sewn together the George H. W. Bush, William J. Clinton, and George W. Bush administrations: standards-based reform. With its rallying cry of “all children can learn” and its promise to combat the “soft bigotry of low expectations,” standard-based reform has won the support of both liberals, like Senator Ted Kennedy, and conservatives, like George W. Bush.

There are three primary elements in the standards-based reform strategy: (1) the state (or school district) sets broad and high minimum “content standards” that delineate what all children should know and be able to do in specific subject matter areas; (2) the state similarly sets “performance standards,” which are “specific concrete examples and explicit definitions of what students must know . . . to demonstrate mastery of the content standards”; and (3) the state fairly and accurately assesses whether students have attained those standards.¹¹³ This strategy is premised upon the belief that all children can learn at high levels, master challenging subject matter, and apply their skills and knowledge to real-world problems.¹¹⁴

¹¹¹ See DIANE RAVITCH, NATIONAL STANDARDS IN AMERICAN EDUCATION: A CITIZEN’S GUIDE 48–56 (1995).

¹¹² See MILBREY W. McLAUGHLIN & LORRIE A. SHEPARD, IMPROVING EDUCATION THROUGH STANDARDS-BASED REFORM 1–2 (1995); RAVITCH *supra* note 111, at 135–50.

¹¹³ See McLAUGHLIN & SHEPARD, *supra* note 112, at xviii–xx. It should be noted that the early proponents of standards-based reform included a fourth element in the formula: opportunity to learn standards, i.e., standards for the resources and conditions necessary for all children to reach proficiency. As noted below, however, standards-based reform in practice mostly has ignored this fourth element.

¹¹⁴ So well accepted is this notion that Congress specifically made it part of its findings for the 1994 Title I amendments. According to Congress, those amendments “build[] upon the following learned information: . . . All children can master challenging content and complex problem-solving skills. Research clearly shows that children, including low-achieving children, can succeed when expectations are high and all children are given the opportunity to learn challenging material.” 20 U.S.C. § 6301(c) (2000) (amended 2002). The very

More recently, this standards-based reform formula has been supplemented by an additional policy lever—accountability of schools and students for student performance on standards-referenced achievement tests.¹¹⁵ This “new accountability” in public education provides for rewards or sanctions to schools, administrators, and teachers depending on their success in meeting certain student achievement performance targets in their schools. At a minimum, school-wide performance on standards-based assessments is published and subjected to public scrutiny. At one end of the spectrum, successful schools are provided with commendations and, sometimes, monetary rewards. At the other extreme, failing schools may be offered technical assistance and temporary grants to improve, while persistently failing schools may be subject to measures such as state takeover or reconstitution. Related to school and teacher accountability, students are being held accountable for what they know and are able to do through the use of periodic assessments and, in a growing number of states, high-stakes testing such as high school exit exams.

This reform movement has been pervasive. In the 2004–05 school year, *Education Week* reported that,

46 states have standards-based tests in place in reading and math at the elementary, middle, and high school levels. Twenty-two states have standards-based science tests in all three grade spans Twenty-two states report that their state assessments have undergone an external review since 2001 to ensure that the tests are aligned with state academic-content standards.¹¹⁶

As for accountability, “[Thirty-six] states make technical assistance available to all low-performing schools. Twenty-nine apply sanctions to such schools that may include closing the school, reconstituting the school as a charter

foundation of standards-based reform is that public education in the United States is watered down and that all students could benefit from more challenging content. More to the point: Poor and minority students stand to benefit most from standards-based reform because, as research has shown, schools have systematically held low expectations for such students who would perform better if only schools expected more of those students and “accelerated” their education (rather than subjecting them to remedial, drill, and practice pedagogy). See, e.g., 1 MICHAEL S. KNAPP ET AL., *ACADEMIC CHALLENGE FOR THE CHILDREN OF POVERTY* (1993); Jane McCarthy & Suzanne Still, *Hollibrook Accelerated Elementary School*, in *RESTRUCTURING SCHOOLS: LEARNING FROM ONGOING EFFORTS* 63 (Joseph Murphy & Philip Hallinger eds., 1993); J.M. Peterson, *Remediation Is No Remedy*, 46 *EDUC. LEADERSHIP* 24 (1989); Stuart C. Purkey & Marshall S. Smith, *Effective Schools: A Review*, 83 *ELEMENTARY SCH. J.* 427 (1983).

¹¹⁵ See, e.g., Liebman & Sabel, *supra* note 10, at 207–13 (discussing the “new accountability” in public education).

¹¹⁶ Ronald A. Skinner, *State of the States*, *EDUC. WK.*, Jan. 6, 2005, at 77.

school, or withholding funds. Seventeen states offer rewards to high-performing or improved schools.”¹¹⁷

Moreover, over the past decade, federal educational policy—particularly Title I—has been an impetus toward standards-based reform and accountability. For instance, President Clinton used the bully pulpit of his 1997 State of the Union Address to call for the design and implementation of national education standards;¹¹⁸ the Federal Goals 2000 legislation provided support for states and school districts that elect to craft their own education standards;¹¹⁹ and the 1994 reauthorization of Title I, dubbed the “Improving America’s Schools Act” (IASA), urged states receiving Title I funds to set educational proficiency standards and required those states to make “adequate progress” toward moving all students up to those standards.¹²⁰

The culmination of all this federal activity was the reauthorization of Title I, the No Child Left Behind Act of 2001 (NCLB).¹²¹ NCLB, like its predecessor, the IASA, has a threefold purpose: (1) to free school districts from burdensome and ineffective inputs monitoring under Title I, which frequently resulted in the discredited practice of pull-out compensatory education services; (2) to set high expectations for all students, especially poor and minority students who, it was believed, were not held to the same expectations as their wealthier and white peers; and (3) to hold schools accountable for student outcomes.¹²² Under NCLB, states must establish “challenging academic content standards” and “student academic achievement standards” in reading, math, and science that reflect an adequate educational outcome for all students in the state.¹²³ States then must use assessments aligned with those standards to hold schools accountable for ensuring that their students make adequate yearly progress (“AYP”) toward proficiency on the

¹¹⁷ *Id.*

¹¹⁸ President’s Address Before a Joint Session of the Congress on the State of the Union, 1 PUB. PAPERS 109, 111 (Feb. 4, 1997).

¹¹⁹ Goals 2000: Educate America Act, Pub. L. No. 103-227, 108 Stat. 125 (codified as amended in scattered sections of 20 U.S.C.).

¹²⁰ Pub. L. No. 103-382, 108 Stat. 3518 (1994) (codified at 20 U.S.C. §§ 6301–514 (2000)).

¹²¹ Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified in scattered sections of 20 U.S.C.).

¹²² See James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 938–39 (2004) (discussing how the NCLB furthers the approach of the IASA in providing funds to create high standards for all students, not merely remedial instruction for disadvantaged students); James S. Liebman & Charles F. Sabel, *The Federal No Child Left Behind Act and the Post-Desegregation Civil Rights Agenda*, 81 N.C. L. REV. 1703, 1708–25 (2003) (discussing the “new accountability” in education and the NCLB’s adoption of many of its principles).

¹²³ 20 U.S.C. § 6311(b)(1)(A) (2000 & Supp. III 2003).

state's standards with the goal of reaching one hundred percent proficiency by 2014.¹²⁴ Significantly, AYP must not only be achieved school wide, it must also be achieved for all significant socioeconomic, racial, and ethnic subpopulations (e.g., migrant students, students with disabilities, English language learners, major racial and ethnic groups).¹²⁵ Schools failing to meet these goals are deemed "in need of improvement" and subjected to graduated interventions.¹²⁶ After two years of failure, schools receive technical assistance and must develop improvement plans, while students in those schools may choose to go to another school in the district.¹²⁷ If the school continues to fail for three years, students who have not left may receive tutoring services from an outside provider.¹²⁸ After four years, school staff may be replaced, while after five years, the state must take over the school.¹²⁹

Together, standards-based reform, the new accountability, the IASA, and NCLB constitute a radical and, in significant respects, laudable, shift in educational policy. No longer are inputs the focus of monitoring; rather, federal and state governments are looking to student outcomes. And those student outcomes must meet challenging standards for all students. From an outcomes adequacy perspective, such a standards-based accountability regime would seem indispensable. Moreover, those who support NCLB argue vehemently that equity is enhanced because not only are poor and minority children held to the same high standards as wealthier children, but schools will be held accountable for ensuring that low-income, English language learner, racial, and ethnic minority subgroups reach proficiency.¹³⁰ Evidence from states such as North Carolina and Texas suggest that accountability systems have, so far, enhanced the performance of certain minority groups (though the findings in Texas have been subject to harsh criticism).¹³¹

¹²⁴ §§ 6311(b)(2)–(3), 6316.

¹²⁵ § 6311(b)(2)–(3).

¹²⁶ § 6316(a)(1).

¹²⁷ § 6316(b).

¹²⁸ *Id.*

¹²⁹ *Id.* The other significant aspect of the NCLB for purposes of this Article is that it requires all Title I schools to hire only "highly qualified" teachers and that current teachers must demonstrate that they are "highly qualified" by the 2005–06 school year. § 6319(a)(3).

¹³⁰ See Liebman & Sabel, *supra* note 122, at 1720 (arguing that the NCLB will boost academic achievement for all and that it provides "new and effective tools for significantly improving the educational outcomes of poor and minority children").

¹³¹ See DAVID W. GRISSMER ET AL., IMPROVING STUDENT ACHIEVEMENT: WHAT NAEP STATE TEST SCORES TELL US 59 (2000) (finding that "Texas and North Carolina [were] the states showing the highest rate of improvement" and arguing that that improvement was due to "systemic reform policies implemented in both states in the late 1980s and early 1990s"); see also Linda Skrla et al., *Accountability for Equity: Can State*

Nonetheless, over the long haul, standards-based accountability may do little to enhance equity and may, in fact, exacerbate current inequities. As an initial matter, it is far too early to draw any long-term conclusions regarding the efficacy of the new accountability in significantly narrowing and ultimately closing the achievement gap. It is entirely possible that the early gains that have been reported are only the result of picking the low-hanging fruit by focusing the instruction of poor and minority students on the subject matter of the tests and teaching those students test-taking skills.¹³² In fact, there is growing evidence that NCLB and other state accountability systems have not significantly affected the racial and socioeconomic achievement gap and that any early closing of the achievement gap stemming from accountability measures is not being sustained.¹³³

Policy Leverage Social Justice?, in EDUCATIONAL EQUITY AND ACCOUNTABILITY: PARADIGMS, POLICIES, AND POLITICS 51, 66–68 (Linda Skrla & James Joseph Scheurich eds., 2004) (concluding that African American and Latino students in Texas had narrowed the achievement gap between 1994 and 2000 on the Texas Assessment of Academic Skills (TAAS) and that the four Texas school districts studied “have shown distinctive success in closing the performance gap that historically has existed between the performance of White students and students of color”). It must be noted, however, that the so-called “Texas Miracle,” which credits the state’s strong accountability measures with the arguable closing of the racial performance gap, has been much debated. A RAND Corporation research team found that, during the time that the achievement gap on the TAAS was closing, the achievement gap on the National Assessment of Educational Progress (NAEP) was widening in Texas. STEPHEN P. KLEIN ET AL., WHAT DO TEST SCORES IN TEXAS TELL US 7 (2000). Another researcher has demonstrated that much of the gain on the TAAS may be illusory and that high-stakes testing has had the effect of pushing minority students in Texas out of school. Walter Haney, *The Myth of the Texas Miracle in Education*, 8 EDUC. POL’Y ANALYSIS ARCHIVES 41 (2000). So contentious is the Texas Miracle that an entire volume has been devoted to the research and policy jousting. EDUCATIONAL EQUITY AND ACCOUNTABILITY: PARADIGMS, POLICIES, AND POLITICS, *supra*.

¹³² There is evidence that test-based accountability regimes have had the effect of distorting the curriculum in poor and minority schools by focusing heavily on tested material to the exclusion of other subjects. See Linda McNeil & Angel Valenzuela, *The Harmful Impact of the TAAS System of Testing in Texas: Beneath the Accountability Rhetoric*, in RAISING STANDARDS OR RAISING BARRIERS? INEQUALITY AND HIGH-STAKES TESTING IN PUBLIC EDUCATION 127, 128 (Gary Orfield & Mindy L. Kornhaber eds., 2001) (“We present here our strong assessment that the [Texas Assessment of Academic Skills] system of testing is reducing the quality and quantity of education offered to the children of Texas. Most damaging are the effects of the TAAS system of testing on poor and minority youths.”).

¹³³ See JOHN CRONIN ET AL., THE IMPACT OF THE NO CHILD LEFT BEHIND ACT ON STUDENT ACHIEVEMENT AND GROWTH 60 (2005) (“Students in ethnic groups that have shown achievement gaps in the past grow less under NCLB, and may grow less than comparable European-American students.”); JAEKYUNG LEE, TRACKING ACHIEVEMENT GAPS AND ASSESSING THE IMPACT OF NCLB ON THE GAPS: AN IN-DEPTH LOOK INTO NATIONAL AND STATE READING AND MATH OUTCOME TRENDS (2006) (analyzing nationwide scores on the NAEP and concluding that the NCLB has had little effect on overall achievement and has not systematically closed achievement gaps); Eric A. Hanushek & Margaret E. Raymond, *Does School Accountability Lead to Improved Student Performance?*, 24 J. POL’Y ANALYSIS & MGMT. 297 (2005) (finding that the black–white achievement gap on the National Assessment of Education Progress (NAEP) has increased with the introduction of “consequential” accountability policies, while the Hispanic–white gap

Regardless of the data, however, our concern is that the very design of current accountability regimes cannot ensure that the achievement gap will ever fully close because those regimes are based on adequacy principles. AYP, for instance, is based on progress toward a specific goal of proficiency. AYP is not a measure of how poor and minority students perform relative to their wealthier peers. Nothing precludes the current level of proficiency from becoming nearly meaningless in the face of continuous and rapid growth at the upper levels of performance.

But perhaps the greatest flaw of standards-based reform schemes as currently designed and implemented is that they all lack a crucial ingredient: meaningful assurances that all schools—particularly poor and minority schools—possess the educational conditions and resources necessary to teach to—and achieve—the state’s high standards.¹³⁴ In other words, these adequacy-based designs do not ensure vertical resource equity. We are unaware of any state accountability regime that provides for reciprocal accountability that holds the state responsible for providing the necessary resources, i.e., the *opportunities to learn* (OTL). Since the beginning of the

modestly closed); Jaekyung Lee & Kenneth K. Wong, *The Impact of Accountability on Racial and Socioeconomic Equity: Considering Both School Resources and Achievement Outcomes*, 41 AM. EDUC. RES. J. 797, 821 (2004) (finding that “state activism in accountability policy did not bring about any significant improvements in key educational resources, including per-pupil expenditures, class size, and qualified teachers” and “that there was no discernable negative effect of accountability on minority or low-income students’ achievement and that accountability did not widen their achievement gaps”); Debra Viadero, *Second Look at Tougher Accountability Yields New Results*, EDUC. WK., May 11, 2005, at 12 (reporting that Stanford economists Martin Conroy and Susanna Loeb updated their research regarding the effects of state accountability on student performance and found that the early gains in mathematics achievement had tapered off after several years, while consequential accountability schemes have no effect at all on reading achievement). But see U.S. DEP’T OF EDUC., NAT’L CTR. FOR EDUC. EVALUATION & REG’L ASSISTANCE, NATIONAL ASSESSMENT OF TITLE I: INTERIM REPORT 18, 24 (2006) (finding that, on state assessments, there has been a “slight” reduction in the achievement gap between low-income students and all students between 2001 and 2003 and that, on the National Assessment for Education Progress, there has been no consistent pattern of change in the minority–white achievement gap during the same period); CTR. ON EDUC. POL’Y, FROM THE CAPITAL TO THE CLASSROOM: YEAR 3 OF THE NO CHILD LEFT BEHIND ACT vi (2005) (reporting on a survey of states and districts and finding that “[s]tates and districts were . . . more likely to report that achievement gaps between white and African American students, white and Hispanic students, and English language learners and non-ELL students are narrowing rather than widening or staying the same”); MARIANNE PERIE ET AL., NAEP 2004 TRENDS IN ACADEMIC PROGRESS: THREE DECADES OF STUDENT PERFORMANCE IN READING AND MATHEMATICS 1–9 (2005) (finding that the white–black test score gap on the NAEP has narrowed for nine-year olds in math and reading since the inception of the test in the 1970s).

¹³⁴ One group of “new accountability” critics put it this way: “Thus standards-based school reform misses the mark. It is structurally misdirected because it treats the symptoms of school failure (e.g., poor achievement), rather than the cause (i.e., inferior schools).” Richard R. Valencia et al., *Let’s Treat the Cause, Not the Symptoms: Equity and Accountability in Texas Revisited*, in EDUCATIONAL EQUITY AND ACCOUNTABILITY: PARADIGMS, POLICIES, AND POLITICS, *supra* note 131, at 29, 30.

standards-based reform movement, some of its architects argued for OTL standards that would identify the level of resources necessary to teach to and meet high standards.¹³⁵ But neither Congress nor the states have required specific OTL standards be developed.¹³⁶ Therefore, it remains a puzzle how poor and minority children in under-resourced schools will be able to jump over the bar just because it has been raised.

Beyond the structural failure to pursue equity, most standards-based reform and accountability schemes may actually serve to exacerbate current inequities due to the disequalizing incentives inherent in their design.¹³⁷ Specifically, as we discuss further below, NCLB and the accountability regimes it has

¹³⁵ See Jennifer A. O’Day & Marshall S. Smith, *Systemic Reform and Educational Opportunity*, in *DESIGNING COHERENT EDUCATION POLICY: IMPROVING THE SYSTEM* 250, 270–73 (Susan H. Fuhrman ed., 1993) (arguing that systemic, standards-based reform holds the potential to reduce educational inequalities but also pointing out the threats to equity that such reform may pose unless students are provided with sufficient educational resources). Even some supporters of the NCLB recognize the need for capacity building and enhanced resources in poor performing schools but remain optimistic about the prospects of the new accountability to provide those conditions and resources. See Liebman & Sabel, *supra* note 10, at 294.

In arguing that the NCLB may launch a race to the top, we do not mean to suggest that the law as enacted provides all that is required for a general and continuing improvement of education in every district and school across the country. All races produce losers as well as winners, even if we know too little about the enabling conditions of reform to predict who will place where. Moreover, . . . the NCLB provides little support for stragglers . . . [H]owever, the Act creates a framework that may well be corrigible in light of the experience it induces.

Id.

¹³⁶ Indeed, allegedly lacking the resources to implement NCLB’s mandate, several states, school districts, and the National Education Association have sued or are contemplating lawsuits against the federal government on the grounds that the statute explicitly states that school districts and states do not need “to spend any funds or incur any costs not paid for under this Act.” Bess Keller & Joetta L. Sack, *Union, States Wage Frontal Attack on NCLB*, *EDUC. WK.*, Apr. 27, 2005, at 18 (quoting 20 U.S.C. § 7907(a) (2000 & Supp.II 2002)). It should be noted that Congress had debated and ultimately rejected OTL standards in the legislative forebears of NCLB, Goals 2000, and the Improving America’s Schools Act. Some legislators called for the inclusion of OTL standards in those standards-driven reform packages. See RAVITCH, *supra* note 111, at 148–53. OTL supporters argued that simply demanding better performance without providing additional capacity and adequate resources to meet challenging performance standards is fruitless. See O’Day & Smith, *supra* note 135, at 271 (“[W]here limited capacity in preparation, resources, or personnel is a problem, as it is in many schools serving poor and minority students, [rewards and sanctions for schools based upon student performance are] unlikely to yield meaningful results.”). But many, including most Republican legislators and President Clinton, did not ultimately support the inclusion of federal OTL standards in either Goals 2000 or the Improving America’s Schools Act. President Clinton, writing to Governor Carroll Campbell to assure him that the White House would not require states to adopt OTL standards, stated: “Because I believe so strongly that every child can learn, I believe that actual student performance is the best measure of the extent to which equal opportunity to receive a world-class education has in fact been achieved.” Letter from President William Jefferson Clinton to Governor Carroll A. Campbell, Jr. (Mar. 3, 1994), in RAVITCH, *supra* note 111, at 154.

¹³⁷ Here we draw from James Ryan’s insightful critique of the NCLB. See Ryan, *supra* note 122.

supported or spawned create incentives that may exacerbate current racial and socioeconomic segregation and its resulting educational disparity, decrease graduation rates for minority students faced with high-stakes testing, discourage high-quality teachers from accepting difficult assignments in relatively low-performing schools, and narrow the curriculum in low-performing schools resulting in an even greater gap in the opportunities for poor and minority children to enjoy a rich curricular and educational experience.¹³⁸ While some of these perverse incentives can be corrected, we currently see little pressure to amend even those design flaws that can be fixed.

Although many accountability regimes consider non-achievement-related student outcomes such as dropout and graduation rates, all such regimes rely most heavily on holding schools accountable for raising school (and in the case of NCLB, all significant socioeconomic and racial and ethnic subgroups) performance to some absolute standard or for meeting year-to-year improvement targets for raising such performance (so-called “value-added” accountability).¹³⁹ The difficulty, of course, is the well-known fact that poor and minority students tend to perform worse on standardized assessments than their wealthier and white peers.¹⁴⁰ Thus, any accountability scheme that doles out rewards and punishment based on levels of student performance will tend to reward wealthier and whiter schools and punish poor and minority schools. Although a value-added approach would ameliorate this problem to some extent by rewarding schools for performance gains, rather than for absolute performance,¹⁴¹ such an approach would tolerate a wide (and possibly growing) gap in absolute levels of performance. Furthermore, depending upon

¹³⁸ *Id.* at 934.

¹³⁹ The NCLB requires that all schools and certain subgroups within those schools all reach “proficiency”—an absolute level of performance—within a twelve-year period. 20 U.S.C. § 6311(b)(2) (Supp. III 2003). On the other hand, California’s Public Schools Accountability Act requires schools to meet year-to-year improvement targets on the State’s Academic Performance Index (API), which relies heavily on the State’s standards-referenced assessment. CAL. EDUC. CODE § 52052 (West 2006). This disconnect between the two accountability criteria may result in certain schools being labeled both “successful” and “failing” at the same time, depending upon whether one looks at the NCLB or the API.

¹⁴⁰ See, e.g., PUMA ET AL., *supra* note 98, at 9; Christopher Jencks & Meredith Phillips, *The Black-White Test Score Gap: An Introduction*, in THE BLACK-WHITE TEST SCORE GAP 1, 1 (Christopher Jencks & Meredith Phillips eds., 1998) (“African Americans currently score lower than European Americans on vocabulary, reading, and mathematics tests This gap appears before children enter kindergarten . . . and it persists into adulthood.”).

¹⁴¹ See Ryan, *supra* note 122, at 935 (arguing that a value-added approach will reduce the incentives to further segregate schools).

the system’s design, a value-added regime might also tolerate smaller gains for poor and minority schools and subgroups.¹⁴²

There will also be incentives for both schools and parents to further segregate schools and increase poor and minority student isolation.¹⁴³ Already there is evidence that holding schools accountable for hitting performance targets in all racial and ethnic subgroups disadvantages schools with significant minority subgroups, including racial and ethnic minorities, English language learners, and students with disabilities.¹⁴⁴ One potential result may be that administrators and teachers in such schools will exclude students from school by encouraging ill-performing minority and poor students to attend alternative programs or high schools (thereby concentrating all of a district’s largely poor and minority low performers in one place) or by encouraging them to enroll in high school equivalency programs that would earn them a high school equivalency certificate, not a diploma.¹⁴⁵ Other administrators who may have voluntarily participated in socioeconomic or racial and ethnic integration programs may be less inclined to continue accepting racial and ethnic minorities. Likewise, many poor and minority students facing high-stakes high school exit examinations may drop out on their own accord. More likely, a tangle of school, family, and personal pressures will lead students to drop out or be pushed out of school.¹⁴⁶

¹⁴² See Koski, *supra* note 52, at 312 (describing a South Carolina accountability scheme that would permit differential growth rates among racial and ethnic subgroups).

¹⁴³ James Ryan forcefully makes this point. See Ryan, *supra* note 122, at 961–66.

¹⁴⁴ Thomas J. Kane & Douglas O. Staiger, *Unintended Consequences of Racial Subgroup Rules*, in *NO CHILD LEFT BEHIND? THE POLITICS AND PRACTICE OF SCHOOL ACCOUNTABILITY* 152, 174 (Paul E. Peterson & Martin R. West eds., 2003).

In current accountability systems, subgroup targets cause large numbers of schools to fail (as in NCLB), arbitrarily single out schools with large minority subgroups for sanctions and exclude them from awards (as in Texas), or statistically disadvantage diverse schools that are more likely to be attended by minority students (as in California) Although these targets are meant to encourage schools to focus more on the achievement of minority youth, we find no association between the application of subgroup targets and test score performance among minority youth.

Id.

¹⁴⁵ The NCLB provides modest protection against such push-out behavior by requiring both the publication of data on graduation rates and the inclusion of graduation rates in the AYP calculation. See 20 U.S.C. § 6311(b)(2)(C)(vi) (Supp. III 2003). But nowhere does it set targets for improving graduation rates as it does for academic achievement rates.

¹⁴⁶ Whether high-stakes testing results in a higher drop-out or push-out rate is a matter of much debate in the empirical literature. See, e.g., BETSY GOTBAUM, PUB. ADVOCATE FOR THE CITY OF N.Y. & ADVOCATES FOR CHILDREN, PUSHING OUT AT-RISK STUDENTS: AN ANALYSIS OF HIGH SCHOOL DISCHARGE FIGURES (2002), available at http://pubadvocate.nyc.gov/policy/pdfs/pushing_out_at-risk_students.pdf (finding that accountability systems have created incentives to push out low-performing students); Dean R. Lillard & Philip

Perhaps most likely, however, is that wealthier and white parents who are making residence and school decisions based in part on a school's performance will not opt for more socioeconomically or racially and ethnically integrated schools because those schools are more likely to perform poorly and perhaps already are designated as needing improvement. Already there is significant evidence that realtors and homebuyers are among the most avid consumers of school accountability data and that those who have the means to choose tend to choose homes in higher performing (read: wealthier and whiter) school zones.¹⁴⁷ Moreover, even those parents who value "diversity" and might prefer a more integrated setting for their children may be dissuaded by the poor performance of more "diverse" schools.¹⁴⁸ The result will be a deeper gulf between the high-performing wealthy schools and the low-performing poor and minority schools.

Common sense suggests that such a growing gulf may also affect the key educational resource in any school: quality teachers. Under many of the new accountability regimes, schools that fail to make adequate progress are subjected to a set of graduated interventions, culminating in severe sanctions. At a minimum, a failing school would be formally or informally labeled as such and subjected to a self-improvement process with outside technical assistance. After persistent failure, the school may be closed down, reconstituted, or taken over.¹⁴⁹ For persons generally considering teaching as a

P. DeCicca, *Higher Standards, More Dropouts? Evidence Within and Across Time*, 20 ECON. EDUC. REV. 459 (2001) (finding that student dropout rates increased in states that adopted tougher graduation requirements); Gary Natriello & Aaron M. Pallas, *The Development and Impact of High-Stakes Testing*, in RAISING STANDARDS OR RAISING BARRIERS? INEQUALITY AND HIGH-STAKES TESTING IN PUBLIC EDUCATION, *supra* note 132, at 19, 24–25, 29–32, 35–37 (providing data from Texas, New York, and Minnesota and finding that high-stakes testing decreases the chances of poor and minority students receiving a high school diploma); Margaret E. Raymond & Eric A. Hanushek, *High-Stakes Research*, EDUC. NEXT, Summer 2003, at 48 (arguing that accountability policies positively impact test scores); Jay P. Greene & Marcus A. Winters, *Pushed Out or Pulled Up? Exit Exams and Dropout Rates in Public High Schools* (Ctr. for Civic Innovation, Manhattan Inst. Educ. Working Paper No. 5, 2004), available at http://www.manhattan-institute.org/pdf/ewp_05.pdf (finding that the adoption of a high school exit exam has no effect on a state's graduation rate).

¹⁴⁷ David N. Figlio & Maurice E. Lucas, *What's in a Grade? School Report Cards and House Prices* 24 (Nat'l Ctr. for the Study of Privatization in Educ., Occasional Paper No. 29, 2001) (finding significant evidence that arbitrary distinctions embedded in school report cards lead to major housing price effects).

¹⁴⁸ Already anecdotal evidence of "wealthy flight" from "underperforming" schools has made headlines. Carrie Sturrock, *Families Flee School's Sinking Scores: "Underperforming" Label Exacerbates Problem in Concord*, S.F. CHRON., Feb. 1, 2005, at A1 (describing the rapid middle-class enrollment decline—leaving behind low-income families—in the Oak Grove Middle School in Concord, California after the school had been deemed a "program improvement" school under the NCLB).

¹⁴⁹ See, e.g., CAL. EDUC. CODE § 52055.5 (West 2006); TEX. EDUC. CODE ANN. § 39.131 (Vernon 2005 & Supp. 2006).

profession, and for those who would teach in poor, minority districts specifically, there will be serious disincentives to serve. At a minimum, teachers in failing schools would be shackled with the stigma of teaching in such a school and lose autonomy in that they may be subjected to a corrective action plan and compelled to teach certain material in a certain way (witness the explosion of off-the-shelf regimented literacy programs such as Open Court).¹⁵⁰ And, after persistent failure, teachers may be fired. Despite NCLB's requirement of a "highly qualified" teacher in every classroom,¹⁵¹ the persistent inequality in teachers will likely be exacerbated under the new accountability regimes.

Finally, a growing body of evidence suggests that new accountability regimes have the effect of narrowing the curriculum and reducing the educational opportunities of students in poor-performing schools, i.e., those with poor and minority students.¹⁵² One intended consequence of accountability systems is that schools will organize their curriculum and instruction around the state's educational content and performance standards. In the vernacular, schools will "teach to the test." In the abstract, there is nothing wrong with teaching to a good test that captures all of the skills and capacities we would want for our children, including higher-order thinking skills in all subject areas, including science, social studies, and even fine and performing arts.¹⁵³ Yet many accountability regimes focus on a relatively limited number of subject areas and are tied to traditional short-answer or fill-in-the-bubble standardized tests that may not capture complex reasoning and writing skills. To prepare for those assessments, teachers in low-performing

¹⁵⁰ See Ben Clarke, *Leaving Children Behind: Exam Privatization Threatens Public Schools*, CORPWATCH, Sept. 23, 2004, <http://www.corpwatch.org/article.php?id=11543>.

¹⁵¹ 20 U.S.C. § 6319 (Supp. II 2002).

¹⁵² See Betty Achinstein, Rodney T. Ogawa & Anna Speiglman, *Are We Creating Separate and Unequal Tracks of Teachers? The Effects of State Policy, Local Conditions, and Teacher Characteristics on New Teacher Socialization*, 41 AM. EDUC. RES. J. 557, 593 (2004).

We found that underqualified new teachers were encouraged to rely on scripted programs to instruct underperforming students, ostensibly "leveling the playing field" and increasing accountability. Conversely, in the more affluent and better performing setting, more qualified new teachers were encouraged to apply professional discretion to foster students' independence and creativity.

Id.; Robert L. Linn, *Assessments and Accountability*, 29 EDUC. RESEARCHER 4, 7 (2000); McNeil & Valenzuela, *supra* note 132, at 128–30.

¹⁵³ See Dan Goldhaber, *What Might Go Wrong with the Accountability Measures of the "No Child Left Behind Act?"*, in NO CHILD LEFT BEHIND: WHAT WILL IT TAKE? 89, 92 (Thomas B. Fordham Found. ed., 2002) ("Teaching to a 'good' test would be quite beneficial were it to encourage teachers to focus on class material that is educationally beneficial to their students.").

schools are spending more time teaching to a relatively narrow test.¹⁵⁴ Educational dollars for higher-quality curricular resources such as laboratory supplies are diverted to test preparation materials. Again, some might argue that such a “basic skills” orientation is appropriate. We disagree. Those in higher-performing schools will enjoy the wide range of educational experiences necessary for admission into and success in postsecondary education and later employment. The result is a growing inequality of opportunity to experience a rich curriculum aimed at improving higher-order skills necessary for our complex economy and social life.

In the forty years since President Johnson launched an ambitious effort to target significant federal monies to poor and largely minority children so that they might enjoy equal educational opportunities, we have learned a great deal. We have learned that a singular focus on input and process accountability created less-than-ideal educational practices such as pull-out remedial programming. We have learned that, beyond resources, we must expect that all children can achieve at high levels. Today, we expect performance and hold schools and students accountable for those outcomes, but we are not ensuring that those same schools and students have the resources necessary to perform. More troubling, in leaving equity behind, we have developed accountability schemes that cannot ensure—indeed do not even aspire to ensure—that low-performing students (read: poor and minority students) will ever catch up with their high-performing peers. In some instances, these schemes create incentives to further isolate poor and minority students and widen the resource gap between rich and poor.

It is important to acknowledge that the array of perverse and inequality-producing incentives embedded in current standards-based reform and accountability regimes are not *necessary* design features. Alternative policy designs are certainly imaginable, and we have already identified a few in passing: robust opportunity-to-learn standards or defining proficiency or adequate achievement dynamically as a function of excellence, for instance. But the desertion of equity goals for adequacy goals marks a shift in the conceptual underpinnings of education reform that has ramifications far beyond better and wiser policy design. Adequacy is conceptually insensitive to equity in a number of important ways; sufficiency or proficiency is not, after all, equality. We turn now to a normative analysis of adequacy and equality in

¹⁵⁴ See McNeil & Valenzuela, *supra* note 132, at 129.

order to illuminate the real costs of deserting equity in favor of adequacy and we provide an argument for the return of equity.

II. WHY EQUALITY MATTERS MORE THAN EVER IN EDUCATIONAL POLICY: A NORMATIVE FRAMEWORK

A. *Equality and Adequacy*

The preceding discussion has already partly illuminated the contrast between equity and adequacy frameworks. To appreciate the need for reclaiming equity, however, we sharpen the precision of the contrast in this Part. Note that we shall sometimes adopt the language of contemporary moral and political philosophy, where a great deal of work has been done in the past thirty years on the topic of egalitarianism.¹⁵⁵ This work maps out, among other things, the conceptual landscape of what philosophers call equality and sufficiency rather than equity and adequacy. The two pairs of terms are equivalent for our purposes.

The fundamental conceptual difference between equality and sufficiency is that equality is necessarily comparative or relational while sufficiency is not. To ask if somebody or something is equal, we must engage in a comparative evaluation. Does X have as much as Y? Is the outcome in situation A equal to the outcome in situation B? To ask if somebody or something is sufficiently well off, however, we need not make any such comparison; we simply identify what constitutes the level of sufficiency or adequacy and then make the appropriate allocation or redistribution of resources. To put it another way, the sufficiency framework aims to combat *absolute* deprivation. The equality framework aims to combat *relative* deprivation. For the sufficiency advocate, we should not care that people are equal but only that they have enough. But it is bad, the egalitarian claims, for some people to be worse off than others.¹⁵⁶

¹⁵⁵ See, e.g., RONALD DWORKIN, *SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY* (2000); JOHN RAWLS, *A THEORY OF JUSTICE* (1971); LARRY S. TEMKIN, *INEQUALITY* (1993); Elizabeth S. Anderson, *What Is the Point of Equality?* 109 *ETHICS* 287 (1999); Harry Frankfurt, *Equality as a Moral Ideal*, 98 *ETHICS* 21 (1987); Derek Parfit, *Equality and Priority*, 10 *RATIO* 202 (1997); Larry Temkin, *Inequality: A Complex, Individualistic, and Comparative Notion*, 11 *PHIL. ISSUES* 327 (2001) [hereinafter Temkin, *Comparative Notion*].

¹⁵⁶ Temkin’s complete formulation is that “it is bad for some to be worse off than others through no fault or choice of their own.” Temkin, *Comparative Notion*, *supra* note 155, at 330. One might claim, however, that sufficiency should be understood as a kind of egalitarian argument because sufficiency applies a uniform standard equally to all. Indeed, any champion of sufficiency will claim that sufficiency possesses two features that are routinely associated with egalitarianism: First, sufficiency should be universal among the relevant

A few observations about the difference between equality and sufficiency: First, the sufficiency framework can justify equality-enhancing transfers from the well off to the needy. If many people have more than enough and a few have less than enough, then taking from the many to boost the few above the threshold that marks the level of adequacy looks like a good thing. This is equally true, of course, if few have more than enough and many have less than enough. But if all are above the threshold, then transfers from the well off to those who already have enough no longer seem justifiable.

Second, adequacy might seem less demanding than equality. All that appears to be required is that those below a specified threshold (of inputs or outcomes) be brought up to that level. Equality, by contrast, demands that all people be brought into an equal relationship. In practice, pursuing equality is often more demanding. But clarifying the conceptual relationship between the two ideals reveals that it can also be the case that adequacy is far more demanding than equality. Consider a scenario in which the level of adequacy of some good is 100 units per person. A has 10 units, B has 15 units, and C has 20 units of the good. Equality can be attained by giving A 5 units from C. Adequacy, obviously, would be much more difficult to attain.

Third, the implications of the equality and sufficiency frameworks for educational law and policy are obvious. Paul Minorini and Stephen Sugarman capture it well:

What is most distinctive about the adequacy approach is that, unlike the traditional school finance cases, it does not rest on a norm of equal treatment. Indeed, the adequacy cases aren't about equality at all, except in the sense that all pupils are equally entitled to at least a high minimum. In other words, adequacy is not a matter of comparing spending on the complaining group with spending on others. It is rather about spending what is needed (and its focus is in some respects more on the school or the pupil than on the district).¹⁵⁷

Similarly, James Ryan and Michael Heise observe that “[e]ven successful adequacy suits . . . presuppose that existing funding inequalities will remain. More precisely, adequacy suits abandon the idea of tying districts together financially by requiring access to equal resources. Those districts that can fund

group; second, and following from the first, sufficiency should be impartial and treat people equally. In practice, this means no discrimination should be made among people on the basis of arbitrary characteristics such as race and sex. Universality and impartiality are part and parcel of the sufficiency paradigm, and in this respect, the sufficiency paradigm overlaps with the equality paradigm. *See id.*

¹⁵⁷ Minorini & Sugarman, *supra* note 11, at 188.

a more-than-adequate education are free to do so.”¹⁵⁸ In Part I, we have shown how education law and policy has in fact had exactly these effects, and many others, in its shift from an equity paradigm to an adequacy paradigm.

Finally, in order to draw the conceptual contrast between equality and adequacy most clearly, consider two powerful criticisms to which the equality but not the adequacy advocate is vulnerable. The first criticism is often called the Leveling Down Objection.¹⁵⁹ Simply stated, the egalitarian should be satisfied if the well off were brought down to the same level as the worst off, for this would eliminate the inequality between them. If A has 5 and B has 2 units of some good, equality is served by making A and B equal at 5 units each but also at 2 units each. In leveling down, of course, there is a loss in overall utility; some are made worse off while no one is made better off. In Derek Parfit’s notorious illustration, the egalitarian appears forced to claim, perversely, that it must be in some way an improvement if equality of vision between the sighted and the blind were brought about by blinding those who can see.¹⁶⁰ Though philosophers prefer to illustrate the Leveling Down Objection in formal algebraic terms or with examples such as the equally blind, its bearing in the real world is perhaps nowhere greater than in school finance. It is a real concern for people that in equalizing school resources among districts with varying degrees of wealth, the actual effect will be to level down the resources of the wealthy districts rather than leveling up the resources of the poor districts. Leveling down might increase equality of educational resources, but in the process it will significantly impact the absolute quality of education provided, worsening the better off and failing to improve the worse off. Who could possibly prefer this outcome?¹⁶¹

The second criticism has been called the Envy Objection. The egalitarian, it is claimed, is motivated by envy in seeking to equalize persons, especially when the absolute value of their goods (or resources or opportunities) is above a decent minimum. Should we be concerned about relative inequalities between the rich and the super rich? When the rich complain about the inequality between them and the super rich, they can only be motivated by envy or jealousy, and this is no ground to bring about a situation of equality. On the contrary, envy is a vice. But the egalitarian is forced to see something wrong with the inequality between the rich and the super rich. Therefore, the

¹⁵⁸ Ryan & Heise, *supra* note 21, at 2062.

¹⁵⁹ Parfit, *supra* note 155, at 211.

¹⁶⁰ *Id.*

¹⁶¹ See *infra* Part II.F.1 (responding to the concerns raised by the Leveling Down Objection).

egalitarian must somehow be motivated by envy. The application of this criticism to education is of much less concern, but it is easy to construct a possible scenario in which it could occur. Consider, for instance, a student at Palo Alto High School, one of the best public high schools in the country by any conventional measure, who happens to visit, say, the famous and private Choate Rosemary Hall in Connecticut. Choate, let us assume, has significantly more resources, better teachers, a stronger curriculum, and more well-connected alumni than even Palo Alto High School. Are we to suppose that the Palo Alto student has a legitimate complaint when she points out the inequality between her education and that received by a Choate student? Is not the Palo Alto student so well above a tolerable minimum that her complaint reveals nothing but sheer envy?

In light of these two criticisms, many philosophers argue that the strict egalitarian position—caring about equality for equality's sake—must be flawed. It is important to recognize that the person committed to sufficiency or adequacy is not vulnerable to these criticisms. Leveling Down is no threat to the sufficiency advocate because he is concerned only that people have enough. This might require redistributions from the wealthy to the poor in order to bring everyone up to the tolerable or decent minimum. But the sufficiency advocate wants to level up rather than level down and has a clear way to choose between a situation in which A and B have 2 units of some good and a situation in which A and B have 5 units of some good. So long as the level of sufficiency is greater than 2 units, sufficiency points to the latter distribution as preferable; the egalitarian is indifferent. Likewise, the Envy Objection is no threat to the sufficiency paradigm, for the sufficiency advocate cares about absolute deprivation rather than relative deprivation.

B. The Case for Adequacy

It appears, therefore, that there are powerful reasons to prefer adequacy over equality. Perhaps the retreat from equity in educational law and policy to a framework of adequacy is well-advised. We, of course, argue against this claim. But before beginning our case, it is worth detailing several additional reasons why, in the context of education policy, the adequacy paradigm came to be adopted in the 1980s and 1990s in place of the equity litigation and legislation that characterized the 1960s and 1970s.

1. *Equality Is Economically Inefficient*

Egalitarian commitments can lead to economic inefficiency. Consider the following scenario. The egalitarian is indifferent to situations in which two or more parties have equal utility, however measured. Given the choice between equality at higher levels of utility, and therefore greater aggregate utility, and equality at lower levels of utility, and therefore lower aggregate utility, the strict egalitarian has no principled reason to prefer greater aggregate utility.¹⁶²

Consider a second scenario, parallel to the leveling down concern explained above. In situation A, person X has 5 units of some good and person Y has 10 units. The egalitarian can bring about equality by leveling person X up to 10 units, assuming the total pie of goods is expandable. This would increase aggregate utility. The egalitarian can also bring about equality by leveling person Y down to 5 units. This would result in a lower aggregate utility. But once again, the egalitarian has no principled reason for preferring greater to lower overall utility. Moreover, in a world of constrained overall growth and limited resources, the egalitarian will have reasons to prefer leveling down.

2. *Equality Unfairly Constrains Liberty*

That equality and liberty are uncomfortable bedfellows has long been recognized. In the context of education policy, this discomfort can be seen in several ways. First, pursuing equality unfairly constrains the liberty of localities to tax themselves at rates they prefer, thereby raising more money for their schools. Second, pursuing equality unfairly constrains the liberty of parents to act on the preferences they have, individually or collectively, for certain levels of education. Peter Enrich characterizes the overall situation well:

Equality of education, then, turns out to be in direct conflict with a cluster of other potent interests, such as preserving control over (and in preserving the value of) one’s pocketbook and securing the welfare of one’s children. These countervailing interests clothe themselves in a cluster of values—local control, individual

¹⁶² The modifier “strict” is important, for as we shall later argue, egalitarians need not be monomaniacal about equality. The ideal of equality is properly balanced against other competing ideals, some of which may also give us reasons to level up rather than level down.

autonomy, property rights—that are powerful competitors for equality’s appeal.¹⁶³

3. *Equality of What?*

As the evolution of litigation and legislation in the 1960s through the 1980s shows, it was difficult to determine in the context of education what kind of equality should be pursued. This is a ripe topic within the philosophical literature, usefully labeled “Equality of What?” Various contenders include equality of primary goods¹⁶⁴ or resources,¹⁶⁵ equality of capabilities or functionings,¹⁶⁶ equality of opportunity for welfare,¹⁶⁷ equality of real freedom,¹⁶⁸ or equality of democratic participation.¹⁶⁹ Using the language we deployed earlier, the question is what the equity object should be. Within the context of education, several answers emerged.¹⁷⁰ First, equality might demand that all students receive the same fiscal resources—i.e., strict horizontal equality in financing. Second, equality might require the equal power to raise funds locally, irrespective of local property wealth, also known in the school finance literature as “fiscal neutrality.”¹⁷¹ Third, and most radical of all, equality might demand equality of school outputs, namely student achievement. As discussed earlier, choosing among these conceptions of equality has taxed the technological limitation of educational practice and research (how do we know what types of inputs create equal outcomes?), the political limitations of policymakers (would wealthy suburban districts tolerate the resource distribution necessary to ensure equality of inputs or outcomes?), and the institutional limitations of courts (would legislatures and governors respect a judicial order to equalize resources?).¹⁷²

¹⁶³ Enrich, *supra* note 3, at 160–61.

¹⁶⁴ RAWLS, *supra* note 155.

¹⁶⁵ DWORKIN, *supra* note 155.

¹⁶⁶ MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH 5 (2000); AMARTYA SEN, INEQUALITY REEXAMINED 4 (1995).

¹⁶⁷ Richard J. Ameson, *Equality and Equal Opportunity for Welfare*, 56 PHIL. STUD. 77 (1989).

¹⁶⁸ PHILIPPE VAN PARIJS, REAL FREEDOM FOR ALL: WHAT (IF ANYTHING) CAN JUSTIFY CAPITALISM? (1995).

¹⁶⁹ Anderson, *supra* note 155; David Estlund, *Political Quality*, 17 SOC. PHIL. & POL’Y 127 (2000).

¹⁷⁰ See *supra* notes 8–13 and accompanying text; see also Enrich, *supra* note 3, at 145–53.

¹⁷¹ See COONS ET AL., *supra* note 8, at 163–65.

¹⁷² See *infra* text accompanying note 214.

C. *The Case for Equality*

These are powerful criticisms—philosophical and practical—of equity-minded advocates. How should egalitarians respond? Why is it necessary to reclaim equality?

It would be impossible to do justice here to the complexity of the philosophical arguments in favor of egalitarianism over sufficientarianism or for equality over adequacy. For the purpose of foreshadowing parts of our later argument, we can offer hints at two of the more abstract justifications: First, inequalities, even above an adequate threshold, can cause dignitary or expressive harms, cause stigmatization, and undermine the social bases of self-respect. Second, and more importantly, equality may be necessary for the realization of other important values, especially fairness. In order to enforce fairness in competitions conscientiously, we need to endorse equality, not adequacy.¹⁷³

But rather than plunging into the subtleties of the abstract debate over egalitarianism and sufficientarianism, we want to discuss two arguments in favor of egalitarianism that are specifically tailored to the case of education: First, equality is normatively important in education because education is in part, and in recent years has become in larger part, *a positional good*. Education is a positional good because the possession of education relative to one’s peers matters a great deal. This argument, we believe, will have ramifications far beyond the particular case of education, but we do not pursue these here. Second, to the extent that citizens or theories of justice embrace the ideal of equality of opportunity and view the schoolhouse as one of the primary vehicles for creating equality of opportunity out of unequal starting places in life, then egalitarian norms, virtually by definition, will be superior to norms of adequacy. Unless adequate chances can be considered fair chances or equal chances, then adequacy can never be enough to guarantee fairness or equality of opportunity. But adequate chances are not fair or equal chances, at least not in education.

¹⁷³ See Temkin, *Comparative Notion*, *supra* note 155, at 335; see also RAWLS, *supra* note 155, at 11 (Rawls dubbed his theory of justice as “justice as fairness,” which required fair equality of opportunity for its realization).

1. *What Is a Positional Good?*

The term derives from Fred Hirsch's *Social Limits to Growth*, where he discusses the way in which the value to a person of certain goods depends on other people not possessing that good or not possessing as much of that good.¹⁷⁴ Positional goods fuse the notions of absolute and relative value. The absolute value of the good one holds, to the extent it is positional, can only be determined by referring to one's standing in the distribution of that good. Positional goods are competitive goods and valued as a means to achieving some other end or goal. As an illustration, Hirsch quips, "If everyone stands on tiptoe, no one sees better."¹⁷⁵

The contrast, of course, is with goods whose absolute value is independent of how many of that good is possessed by others. Most goods, when examined closely enough, have some positional aspects. But consider the following as an example of a noncompetitive, nonpositional good: If I find a radio on the street, its use value to me is unaffected by how many radios other people have. Its marginal value to me may of course be different from its marginal value to others who occupy different places in the income distribution, but that is not the point here. If radios were positional in the use context, then the fact that another person found a radio on the street would affect the use value of the radio I have in my house.

Notice that in the case of positional goods, the typical understanding of the economic value of goods to a possessor can unravel. If a distribution of positional goods to A and B increases the holdings of each but in unequal amounts, a greater gain for B may ultimately harm A. Although the absolute holdings of A have increased and aggregate holdings of A and B have increased, A experiences a decline in welfare. Consider two groups of people in a large gallery at a golf tournament. Members of group A are short people, while members of group B are tall people. Suppose the people in group A are given short mirrored viewers to watch the putting green; their absolute viewing height has increased. But suppose, too, that the people in group B are given very tall mirrored viewers; their absolute viewing height has increased and in a greater increment than the people in group A. Each group has an absolute gain in their height. But group A is now worse off than in the original situation. The scope of the inequality in height has grown, leaving them less able to see than before.

¹⁷⁴ FRED HIRSCH, *SOCIAL LIMITS TO GROWTH* 27 (1976).

¹⁷⁵ *Id.* at 5.

So what kinds of goods are positional? Hirsch identifies at least two varieties. The first is goods that are *scarce*, either by human design or physical constraint.¹⁷⁶ Mint or proof condition coins and first edition stamps, for instance, are purposefully scarce and priced higher for this very reason. Beach houses, similarly, are scarce because there is a physical limit to the number of houses that can be built on the ocean. Education, at least at the K–12 level, does not suffer from scarcity. On the contrary, its consumption is nearly universal because of compulsory attendance laws. It is the second variant of positional goods that is relevant here.

This second variant is *competitive* goods, where the possessor’s relative standing to others matters a great deal.¹⁷⁷ Thus, goods that are instrumental to competitions are positional, and goods in zero-sum games are strongly positional. Status and reputation are positional goods, for a gain in someone else’s status or reputation effectively lowers one’s own. Other examples include legal representation in an adversarial legal system. What matters to the client is not the absolute quality of her attorney, but the attorney’s quality relative to her adversary.¹⁷⁸

2. *Education as a Positional Good*

Our claim is that education is a positional good, or, to put it more accurately, that education has positional value to its holders. We do not claim that education is a pure positional good or that its value to its holders is purely positional. Education is partly a positional good, and we shall return to discuss the implications of its multifaceted value later. Consider the case for the positional value of education.

Education is a positional good in at least two very strong ways: First, education is crucial to competition for admission to college and other post-secondary opportunities; call this the *admissions benefit of education*. Those who obtain a good education are better able to gain admission to selective colleges and professional schools. Second, education is crucial to competition for well-paying jobs in the labor market; call this the *earnings benefit of education*. Those who obtain a good education are better able to win high-paying and high-status jobs in the modern economy. The admissions benefit of high-quality K–12 education feeds into the earnings benefit of high-quality

¹⁷⁶ *Id.* at 19.

¹⁷⁷ *Id.* at 52.

¹⁷⁸ See Alan Wertheimer, *The Equalization of Legal Resources*, 17 PHIL. & PUB. AFF. 303 (1988).

post-secondary education, so the first benefit reinforces the second benefit. And the results of both together—graduating from a selective college and obtaining a high-paying job—are correlated with some important long-term outcomes, including greater job satisfaction, more civic engagement, better health and access to healthcare, and general well-being.¹⁷⁹

Education is positional in a third but less important way (at least from the standpoint of social justice). Education is crucial in many quarters to social reputation and status. Consider the jockeying for admission to public exam schools and private schools—even to preschools—in New York City. Many parents are motivated to obtain a high-quality education for their children, but many parents are also angling for status within the rarified social circles of Manhattan.

Perhaps social status battles in New York City preschools are not representative of the positionality of education in most places. Leave aside, then, the third reason for now. Consider the dominant ideology about schooling in the United States as being a core element of social mobility and the American Dream.¹⁸⁰ Education is a positional good because it is deeply connected to meritocracy. By definition, meritocracy is comparative and relational. Someone is at the top and others are not.

To be sure, education brings intrinsic benefits to the individual. Education is an absolute, not positional, good insofar as those who have education gain more skills, capabilities, and talents; they are better able to pursue their goals and make use of their freedom. Capabilities and talents acquired through education are typically understood to be noncompetitive and non-zero sum. Education also brings benefits to the entire society; increases in its attainment are associated with higher political participation, greater income and productivity, and better health. While there is no doubt that education has nonpositional value, even the intrinsically good aspects of education can have positional features because education develops a person's talents, enabling him or her to employ those talents in self-development and, more generally, in flourishing as a human being. As Martin Hollis argues, in nurturing the soul,

¹⁷⁹ See DAVID BOESEL & ERIC FREDLAND, U.S. DEP'T OF EDUC., COLLEGE FOR ALL? IS THERE TOO MUCH EMPHASIS ON GETTING A 4-YEAR COLLEGE DEGREE? 25–26 (1999).

¹⁸⁰ See JENNIFER L. HOCHSCHILD & NATHAN SCOVRONICK, THE AMERICAN DREAM AND THE PUBLIC SCHOOLS 1 (2003).

so to speak, there is still a “positional moral economy.”¹⁸¹ A talent, for instance, is not a talent if everyone possesses it.

In short, education is a good that possesses many positional aspects. The claim is that absolute possession of education matters, but that relative standing in the distribution of education within one’s age cohort matters a great deal as well.

3. *Evidence for the Positional Aspects of Education*

Education, one hears frequently, is more and more a private than a public good; a good that has significant returns in some of life’s most important competitions.¹⁸² We take this to be a fairly obvious and intuitive claim. Nevertheless, it is worth demonstrating the positionality of education and how it has grown over the past few generations.

a. *Connection to Success in College and Postsecondary Admissions*

More students than ever before are seeking education beyond a high school degree. While many students easily gain entry into nonselective community colleges, the competition for admission to selective universities has never been fiercer. Elite universities have seen their applicant pools grow enormously and their admission rates dwindle. In order to position oneself for the competition for admission, the actual and perceived quality of a student’s K–12 education has acquired what we believe is an unprecedented importance.

How can we know this? A number of indicators are telling. First, the effect of private school and wealthy public school attendance on elite college admissions is significant. Though only about ten percent of American children attend private schools—a data point that has remained roughly the same for

¹⁸¹ Martin Hollis, *Education as a Positional Good*, 16 J. PHIL. EDUC. 235, 237 (1982).

¹⁸² In a discussion of the way in which the private good aspects of education have swamped the public good aspects, David Labaree writes,

From the perspective of the consumer, education is an arena for zero-sum competition filled with self-interested actors seeking opportunities for gaining educational distinctions at the expense of each other. This is especially true for families from the upper middle class, whose experience demonstrates the enormity of the potential benefit that can accrue from education and whose privileged starting position means that they also have a long distance to fall if the educational outcomes do not turn out in their favor.

David F. Labaree, *Public Goods, Private Goods: The American Struggle Over Educational Goals*, 34 AM. EDUC. RES. J. 39, 56 (1997).

many years¹⁸³—the proportion of private school students in elite college student bodies is much greater, even when one controls for confounding variables, such as college aspiration and, significantly, student achievement.¹⁸⁴

Also telling is the paltry number of low-income students, who are disproportionately from poor neighborhoods with poorly-financed public schools, in college. For all four-year colleges in 1989–90, students from the highest income quartile outnumbered students from the lowest quartile 10 to 1.¹⁸⁵ The gap is continually growing. According to economists Michael McPherson and Owen Morton Schapiro, “The gap in enrollment rates between students from the lowest-income quartile and those from the other three quartiles grew by 12 percentage points between 1980 and 1993.”¹⁸⁶

Private and wealthy public schools do not deserve credit for all the advantages enjoyed by students who attend them and then gain admission to selective universities. Wealthy school districts, families, and students clamber to obtain additional nonacademic benefits as well. These include greater access to financial aid, the availability of legacy preferences, skills in navigating early admissions policies, disparities between rich and poor students in the use of special accommodations for disabilities in test taking, disparities in quality of precollege advising, and disparities in precollege experiences. We observe positional competition in school as well as out of school.

b. Connection to Success in the Labor Market

People holding a college degree on average experience greater economic success in life than people without a college degree, and the earnings benefits

¹⁸³ JENNIFER CHEESEMAN DAY & AMIE JAMIESON, U.S. DEP’T OF COM., SCHOOL ENROLLMENT: 2000, at 8 (2003).

¹⁸⁴ WILLIAM BOWEN & DEREK BOK, THE SHAPE OF THE RIVER: LONG TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS (1998) (providing data on the disproportionate percentage of students in elite higher education who were educated at private K–12 schools); ROBERT K. FULLINWIDER & JUDITH LICHTENBERG, LEVELING THE PLAYING FIELD: JUSTICE, POLITICS AND COLLEGE ADMISSIONS 3 (2004) (providing comparative data on the dismal percentage of students from low-income families enrolled in four-year institutions); DOUGLAS S. MASSEY ET AL., THE SOURCE OF THE RIVER: THE SOCIAL ORIGINS OF FRESHMAN AT AMERICA’S SELECTIVE COLLEGES AND UNIVERSITIES (2003) (providing data on the social backgrounds of students in the sample of elite higher education institutions studied by Bowen and Bok).

¹⁸⁵ Judith Lichtenberg, *How the Academically Rich Get Richer*, PHIL. & PUB. POL’Y Q., Fall 2004, at 19.

¹⁸⁶ MICHAEL S. MCPHERSON & MORTON OWEN SCHAPIRO, THE STUDENT AID GAME: MEETING NEED AND REWARDING TALENT IN AMERICAN HIGHER EDUCATION 40 (1998).

to obtaining postsecondary education have increased significantly over the past twenty years.¹⁸⁷ Census Bureau information shows that over the course of an adult's working life, a person holding only a high school diploma earns an average of \$1.2 million; a person holding an associates degrees earns about \$1.6 million; and a person holding a bachelors degree earns about \$2.1 million.¹⁸⁸ Per year in 2002, the average high school dropout earned \$18,900; high school graduates earned \$25,900; college graduates earned \$45,400; and those holding professional degrees (e.g., M.D., J.D., D.D.S., D.V.M.) earned an average of \$99,300.¹⁸⁹ The following table provides a summary of the general earnings benefits of educational attainment.

		Mean Earnings of Men and Women by level of Schooling, 2000								
		< 9th grade	9th-12th grade	High school diploma	Some college, no degree	Associate degree	Baccalaureate degree	Master's degree	Professional degree	Doctorate
Men	White	\$20,998	\$21,941	\$32,020	\$35,704	\$42,547	\$63,216	\$76,340	\$110,517	\$89,943
	Black	\$20,737	\$23,066	\$32,834	\$36,666	\$43,893	\$65,196	\$77,277	\$111,627	\$92,727
	Latino	\$22,367	\$17,352	\$27,776	\$30,345	\$33,081	\$51,980	\$52,127	\$56,887	\$56,333
		\$19,086	\$19,898	\$26,328	\$28,669	\$34,313	\$51,658	\$51,422	\$94,081	\$91,965
Women	White	\$12,665	\$12,698	\$19,269	\$21,276	\$25,590	\$35,083	\$45,517	\$61,556	\$54,477
	Black	\$11,906	\$12,691	\$19,306	\$21,279	\$25,710	\$35,032	\$45,943	\$62,502	\$55,030
	Latino	\$16,237	\$12,811	\$19,340	\$21,719	\$25,013	\$35,862	\$42,872	\$63,793	\$47,851
		\$11,033	\$11,704	\$17,138	\$19,865	\$22,959	\$33,283	\$45,153	\$57,259	\$35,876

Source: Current Population Survey, Annual Demographic Study, March Supplement 2000.
Reprinted in Norton Grubb and Marvin Lazerson, *Education Gospel* (Harvard University Press, 2004), p. 158.

In addition, research shows that there are numerous other economic benefits besides salary that come with the acquisition of postsecondary education. These include benefits such as greater vacation time and health care, higher levels of savings, increased personal and professional mobility, improved quality of life of offspring, and better consumer decisions.¹⁹⁰ Also important are the numerous noneconomic benefits of obtaining a college degree, including better health and a longer life.¹⁹¹

Lastly, several studies show that the quality of the college affects a person's economic success. Graduating from more selective schools offers distinct earnings advantages.¹⁹² One study demonstrated that four years after

¹⁸⁷ JENNIFER CHEESEMAN DAY & ERIC C. NEWBURGER, U.S. DEP'T OF COM., THE BIG PAYOFF: EDUCATIONAL ATTAINMENT AND SYNTHETIC ESTIMATES OF WORK-LIFE EARNINGS 2 (2002).

¹⁸⁸ KATHLEEN PORTER, ERIC CLEARINGHOUSE ON HIGHER EDUC., THE VALUE OF A COLLEGE DEGREE 2 (2002).

¹⁸⁹ DAY & NEWBURGER, *supra* note 187, at 2.

¹⁹⁰ INST. FOR HIGHER EDUC. POL'Y, REAPING THE BENEFITS: DEFINING THE PUBLIC AND PRIVATE VALUE OF GOING TO COLLEGE 16-19 (1998).

¹⁹¹ BOESEL & FREDLAND, *supra* note 179, at 25-26.

¹⁹² Scott L. Thomas, *Longer-Term Economic Effects of College Selectivity and Control*, 44 RES. HIGHER EDUC. 263, 287 (2003).

graduation, students who matriculated from elite private colleges had a twelve percent earnings advantage over their peers in less selective public and private schools.¹⁹³ In addition, returns are even greater for those attending an elite private university than for those attending an elite public university.¹⁹⁴

Two objections are important to consider: First, the data demonstrating increasing returns to educational attainment may not be decisive about the role played by additional education. Some of the economic benefits are likely attributable to personal characteristics, such as perseverance, sociability, and problem-solving skills that may have been factors in higher education admission in the first place. Selection bias creeps in. We concede the point. However, it does not undermine the conclusion that the value of K–12 education is positional. The creation and development of these personal characteristics, after all, are part and parcel of what primary and secondary school is supposed to help achieve. Even if the acquisition of more or better higher education cannot account for all of the earnings benefits, it is still the case that K–12 education will be implicated in the other variables that are likely to make up the difference. Moreover, it is important to emphasize that no one believes that the acquisition of higher education has no effect on earnings. To the contrary, the nature of the nearly lockstep increase in earnings with every additional increment of educational attainment creates a strong presumptive case for a causal link between educational attainment and income.

Second, and potentially more problematic, the earnings data may not be the best evidence about education's positionality. Why? The acquisition of education plausibly can be linked to greater economic returns in the long run, which can benefit those who nevertheless did not obtain higher levels of education. Locating the positional nature of education in the earnings benefits associated with increasing levels of schooling falsely assumes, it might be said, a zero-sum economy and labor market. A rising tide lifts all boats, after all.

In response, we acknowledge that it is important to assess the implications of increasing educational attainment not merely in a snapshot view, in which the benefits to be distributed are fixed, but in a dynamic view, where the size of the pie to be distributed may expand over time. Indeed, that education is connected to a rising economic tide seems unquestionable, and that a rising

¹⁹³ *Id.* at 284.

¹⁹⁴ Dominic J. Brewer et al., *Does It Pay to Attend an Elite Private College? Cross-Cohort Evidence on the Effects of College Type on Earnings*, 34 J. HUMAN RES. 104, 105 (1999).

tide lifts all boats is at least possible. But there is still something fundamentally wrong with this objection. For even if the rising tide picture is correct, and the disadvantaged would have more income in the long run, their greater income may nevertheless not compensate for what they wanted in the first place: a fair shot at competing for a college slot or a particular job opportunity. In other words, a bigger economy with trickle down effects that effectively buys off the disadvantaged is beside the point here. Education remains positional because it confers on its possessors opportunities to compete for scarce goods, such as high-paying and satisfying jobs, for which we expect the competition to be fair. We would note, too, that the potential bite of this particular objection rests on a contestable empirical claim, namely, that an expanding economy will bring trickle down benefits to those at the bottom.

c. Credentialism and Signaling

Finally, as evidence of the positional value of education, it is worth pointing to an ongoing and evolving debate between and among economists and sociologists. It concerns whether education confers real benefits upon its possessors, such as skills and knowledge, or whether education is mainly a credentialing, signaling, or sorting device for colleges and employers. Does education create benefits in the form of skills or knowledge for individuals, wherever they stand in the distribution of educational attainment? Or does education merely signal one’s relative standing in the distribution of educational attainment amongst one’s generational cohort, irrespective of any skills or knowledge attained through that education?

Showing that education either builds human capital or serves as a sorting mechanism turns out to be a very complex and difficult empirical undertaking. No scholarly consensus has formed on the correct answer, and there is good evidence to show that both views have some truth.¹⁹⁵ To the extent, however, that the credentialing and signaling story is true, one must concede that the value of education rests in its positional nature.

Here we cannot provide new evidence to decide the scholarly debate on the question. Instead, consider for illustrative purposes some of the data that favor

¹⁹⁵ See, e.g., GARY S. BECKER, HUMAN CAPITAL: A THEORETICAL AND EMPIRICAL ANALYSIS, WITH SPECIAL REFERENCE TO EDUCATION (1993) (classic formulation of the human capital theory); Kevin Lang & David Kropp, *Human Capital Versus Sorting: The Effects of Compulsory Attendance Laws*, 101 Q. J. ECON. 609 (1986) (arguments in favor of the sorting hypothesis as applied to K–12 education).

the sorting and signaling view. First, we know that educational attainment is strongly predictive of income in the lockstep manner observed earlier. The human capital view predicts that this relationship holds because increases in years of education build human and social capital to which the labor market attaches greater value. But when economists hold skill levels constant, increasing years of education still yield significant benefits in pay. As shown by Anthony Carnevale's research, a person with basic skills and a high school diploma could expect to earn less than \$30,000 in 1998.¹⁹⁶ The person with the same basic skills but a bachelor's or graduate degree, however, earned closer to \$50,000.¹⁹⁷ Controlling for skill level, the mere possession of an education credential has a pecuniary payoff on average.

Or consider the long-recognized relationship between education and political participation. There is perhaps no stronger predictor of voting than educational attainment. But whereas average educational attainment has risen for the past several generations, the average voting rate in national elections has declined.¹⁹⁸ Relative position in the distribution of educational attainment at any given time strongly predicts who will vote; but if there is a causal connection, it rests in the positional nature of education rather than in its intrinsic benefits.¹⁹⁹

D. Why We Should Endorse Equality, Not Adequacy

The outline of our case for endorsing equality, not adequacy, as the paradigm that guides reform in education has begun to emerge. But let us now connect the particulars of the case for egalitarianism with our claims about the positional value of education. The argument is straightforward and has two key claims.

First, to the extent that education has positional value, adequacy threatens to entrench or exacerbate the positional advantages of the well off. And if education is a strong positional good, then inequalities above even an adequate threshold are objectionable. The reason is that possession of educational goods

¹⁹⁶ Anthony P. Carnevale, *Help Wanted . . . College Required*, (unpublished manuscript), available at http://eric.ed.gov/ERICDocs/data/ericdocs2/content_storage_01/0000000b/80/25/8d/90.pdf.

¹⁹⁷ *Id.*

¹⁹⁸ See U.S. CENSUS BUREAU, REPORTED VOTING AND REGISTRATION BY RACE, HISPANIC ORIGIN, SEX, AND AGE GROUPS: NOVEMBER 1964 TO 2004 (2005), <http://www.census.gov/population/socdemo/voting/tabA-1.xls>.

¹⁹⁹ Norman Nie and Alberto Simpser currently are engaged in research that purports to demonstrate the positional nature of education across of host of social and political outcomes.

above an adequate or even high minimum creates a positional advantage for their possessors, a fact that affects the value of the education of those at the minimum. Moreover, the adequacy paradigm not only tolerates but provides new incentives for the well off to maintain and increase their positional advantage. If the lowest performing schools and students begin to perform better or gain proficiency, the advantage of the well off is threatened. Parents and communities who seek to protect the positional advantages of their children will now have reason to increase ever more the educational goods for their children.²⁰⁰ In this sense, adequacy can conceivably harm children who are the intended beneficiaries of the No Child Left Behind Act and standards movement.

Second, to the extent that education has positional value, adequacy and its conceptual failure to focus attention on the worse off (instead insisting on a uniform way that every child receive and achieve at adequate levels), is insensitive to positional advantages. Only equality, which is necessarily comparative, directs attention to those who are worse off than others, and therefore only equality can fully account for and redress the unfair positional advantages in education.

Simply put, the stronger the case that education is a positional good, the more necessary it becomes to be an egalitarian. Any alternative framework that tolerates inequalities will necessarily condone worsening the position of the comparably worse off, even if their absolute quantity of educational resources or achievements increases. For positional goods, the relative amount of the good determines the absolute value of the good. With respect to education, this is why adequacy is not good enough.

Consider next two further reasons for endorsing equality over adequacy with respect to educational goods.

²⁰⁰ For vivid illustration of the intensity of positional competition, consider the phenomenon of private donations to public schools in California. The school finance equalization scheme, put in place after the decision in *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971), has given rise to widespread inequalities in private donations, to the extent that the wealthiest small school districts often raise more than \$1,000 per pupil per year. For additional data, see Rob Reich, *Philanthropy and Its Uneasy Relation to Equality*, in *TAKING PHILANTHROPY SERIOUSLY: BEYOND NOBLE INTENTIONS TO RESPONSIBLE GIVING* 43 (William Damon & Susan Verducci eds., 2006); see also Eric Brunner & Jon Sonstelie, *Coping with Serrano: Voluntary Contributions to California’s Local Public Schools*, in 1996 PROCEEDINGS OF THE EIGHTY-NINTH ANNUAL CONFERENCE ON TAXATION 372 (1997).

1. *Dignitary Harms of Unequal Education*

Equality is better than adequacy in that unequal schooling can create stigma, insult an individual's self-worth, and undermine the social bases of self-respect. Situations in which children suffer dignitary harms are far more common when students languish in schools that are both resource poor and have a terrible track record of student achievement—in short, schools where there is real deprivation. Jonathan Kozol's best-selling 1991 book *Savage Inequalities*²⁰¹ was structured around comparisons between neighboring school districts, one rich and one poor. Kozol interviewed students from the poor schools who had visited the richer schools. The language used by the students provides a rich illustration of the insulting message that is implicitly communicated but glaringly obvious when comparisons of the schools are made. The poor students commented that they learned society must not really care about them,²⁰² the rich will do whatever it takes to ensure advantages for their own children,²⁰³ and it is no accident that minority students are packed into the poor schools and white students in the rich schools.²⁰⁴

Because dignitary harms are most likely to occur when students are in terribly poor schools, it is tempting to believe that the adequacy framework would satisfactorily address this worry. But note that dignitary harms are possible even for students well above an adequate threshold. Consider, again, our example of the Palo Alto High School student who travels to see her cohort at the exclusive Choate Rosemary Hall.²⁰⁵ The offense she might feel is not due—or at least not only due—to unseemly envy. Choate students may have objectively better chances of getting into selective colleges and competing later for high-paying and high-status jobs. Does the Palo Alto student have any ground to complain here? Is the situation in any way insulting or unfair? We think so.

2. *Fairness in Competition for Postsecondary Admissions and Spots in the Labor Market*

Perhaps the grounds of the Palo Alto student's complaint cannot reasonably be understood as lodged in dignitary harm. A better reason for complaint is

²⁰¹ JONATHAN KOZOL, *SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS* (1991).

²⁰² *Id.* at 152–55.

²⁰³ *Id.* at 154–55.

²⁰⁴ *Id.* at 30, 154.

²⁰⁵ *See supra* Part II.A.

that exposure to the assumed luxuriousness of Choate uncovers unfair advantages and a corruption of the competitive and supposedly meritocratic process of admission to college and competition for jobs. As Thomas Scanlon suggests:

When inequality of starting points undermines the fairness of a process, domination of those who are placed at a disadvantage does not always result Unfairness, however, remains, and can take several forms: some people can simply be excluded from competition, or background conditions such as inequalities in training and resources can render the competition unfair.²⁰⁶

It is fairness, as we earlier suggested, that motivates the concern of the disadvantaged person who does not view a larger piece of an expanded economic pie in the long run as acceptable compensation for unequal chances in the competition for college slots and specific jobs today. But this concern need not apply only to the disadvantaged, as traditionally defined. The Palo Alto High School graduate might suffer the same kind of unfair positional disadvantage. Thus, fairness in competitions constitutes another strong reason to endorse egalitarianism. For competition to be fair, individuals must have equal opportunities to compete.

Beyond any normative stance, we would note that the importance of fairness in competition runs deep in the American ethos. It is tied up with notions of meritocracy and social mobility and equality of opportunity.²⁰⁷

Equality of opportunity, as many social scientists have shown and as countless politicians have proclaimed, is central to the American Dream. The modern state has a great many policies at its disposal for making equality of opportunity possible, ranging from estate and inheritance taxes to social welfare programs to antidiscrimination laws. Public and political appetite for certain of these means waxes and wanes. But perhaps the most important and uncontroversial vehicle, indeed one might say the central engine, for realizing equal opportunity is the schoolhouse. This thought leads us to a brief consideration of equal educational opportunity and the equality–adequacy debate.

²⁰⁶ T.M. SCANLON, *THE DIFFICULTY OF TOLERANCE: ESSAYS IN POLITICAL PHILOSOPHY* 205 (2003).

²⁰⁷ HOCHSCHILD & SCOVRONICK, *supra* note 180, at 2.

E. Equal Educational Opportunity

Jennifer Hochschild and Nathan Scovronick's *The American Dream and Public Schools* documents the powerful hold that educational opportunity has with Americans.²⁰⁸ They demonstrate that public schools are, and have been, absolutely central to the American Dream, defined as giving each American an equal opportunity, or fair chance, to achieve success. We conclude our brief for egalitarianism, then, with a final consideration of whether adequacy, rather than equality, is capable of meeting the conditions of fairness and achieving equality of opportunity. Were you to disagree with our previous arguments about equality and the positionality of education, we believe that the expectations of Americans that equality of educational opportunity is fundamental to the existence of the American Dream provide an independent argument in favor of egalitarianism.

1. Four Conceptions of Equal Educational Opportunity

Can any form of adequacy satisfy an ideal of equal educational opportunity? It would seem almost tautological that it cannot. *Equal* educational opportunity demands equality, not adequacy. Despite this, discussions of educational policy are permeated with references to equal educational opportunity and the ways in which adequacy frameworks of reform will inch us closer to it. In the Introduction, we provided a brief conceptual map of the dimensions that must be considered in any scheme designed to distribute educational opportunities. We revisit and elaborate those conceptions here to explain how, under any conception of educational opportunity, adequacy does not fare well.

Equal educational opportunity might mean the simple treatment of everyone equally by allocating identical resources to each student. Each student in every state receives exactly the same per-pupil dollars—the “one scholar, one dollar” standard. This is horizontal equity, as we earlier labeled it.²⁰⁹ It focuses solely on inputs, and in practical application, solely on financial inputs. It does not consider the particular needs of individual students (e.g., the physically disabled, the gifted, the cognitively disabled, English language learners) and thereby rejects vertical equity. Adequacy quite obviously falls short of this conception of equality. Even so, practically no one embraces horizontal equity as the appropriate conception of equal educational

²⁰⁸ *Id.* at 1–2.

²⁰⁹ See *supra* text accompanying note 12.

opportunity. Egalitarians and adequacy advocates alike wish to grant additional resources to the disadvantaged.

Equal educational opportunity as horizontal equity ensures that all are provided equal access to education and that education does not discriminate against any child or identifiable and “arbitrary” class of children (e.g., the poor) by creating or exacerbating their subordinate status. It is no small policy accomplishment, yet we know from a long line of social science research, e.g., the Coleman Report,²¹⁰ Christopher Jencks’s *Inequality*,²¹¹ and the recent collection by Samuel Bowles, Herbert Gintis, and Melissa A. Osborne,²¹² that a very large percentage of differential academic achievement and later social inequalities is the product of the family—the socioeconomic standing of parents, parenting styles, and the genes passed on from parents to children. Children do not show up at kindergarten at an equal starting line; they are already unequal in many relevant respects. Equal dollars per pupil cannot suffice to address these inequalities that originate outside the schoolhouse.

The “do no harm” principle of equality of educational opportunity holds that schools should at least not worsen any of the already existing inequalities that students bring with them—from their native endowment or social background—into the schoolhouse. What this amounts to is the claim that whatever is spent on education should not affect, or at least not worsen, the distribution of inequalities caused by nonschool factors. Put more bluntly, after the completion of K–12 education, children will occupy the same rank in the distribution of human and social capital as their parents.²¹³

This, too, is a conception of horizontal equity, or equal treatment. It might nevertheless also require a form of vertical equity. If schools aim to do no

²¹⁰ COLEMAN ET AL., *supra* note 90.

²¹¹ CHRISTOPHER JENCKS, *INEQUALITY: A REASSESSMENT OF THE EFFECT OF FAMILY AND SCHOOLING IN AMERICA* (1972).

²¹² *UNEQUAL CHANCES: FAMILY BACKGROUND AND ECONOMIC SUCCESS* (Samuel Bowles, Herbert Gintis & Melissa A. Osborne eds., 2005).

²¹³ Of course, the state’s decision to create and fund public schools, even if their provision and operation is governed by an adequacy rather than equality paradigm, will likely satisfy the “do no harm” principle in one respect. Rather than comparing equal educational opportunity defined as “do no harm” to some other conception of equal educational opportunity, the comparison should be to the absence of public schooling. It would be more harmful to children were the state not to create and fund schools at all. In such a scenario, the children born, through no fault of their own, into poor families or with mental or physical disabilities, would be worse off at seventeen years old than they would be with even poorly and unequally funded public schooling. This is almost certainly true. But for our purposes, it is irrelevant. The counterfactual of “no public schools” is a nonstarter as a policy proposal. The relevant comparison must be to different conceptions of educational opportunity as delivered through a publicly funded school system.

harm, yet a very large proportion of social inequality can be traced to the socioeconomic status, parenting techniques, and genetic influences of parents, then differential inputs will be necessary merely to prevent schools from becoming engines of inequality themselves.

A third conception of equal educational opportunity would aspire to eliminate the effects of socially produced inequalities. The schoolhouse serves to redress background social inequalities by directing additional resources to those students who are deemed needy. Pursuing this conception requires more aggressive vertical equity—treating differently placed children differently—thus giving the most disadvantaged substantially more resources than the advantaged. Yet such a concept begs the question of what disadvantaging background characteristics educational resources must be deployed to compensate. One such set of characteristics are those produced by social factors (poverty, language proficiency in the home, exposure to early childhood learning), while another would include those factors as well as factors intrinsic to the child such as genetic capabilities and disabilities. If we compensate for only socially produced inequality, we will target resources to the poor and those lacking social capital. This ideal is behind many of the so-called “compensatory” or “categorical” funds that are a central part of the Title I program.²¹⁴

Finally, a fourth conception of equal educational opportunity would target all background inequalities, including those that are not caused by social circumstances. Here, schools attempt to compensate for the arbitrary distributions in the genetic lottery. This is the most demanding form of equal educational opportunity. Pursuit of this conception would require more than even vertical equity; it would seem to require, at a minimum, massive social investments to compensate for disability and, in the extreme, abolishment of the family.

2. Adequacy Cannot Satisfy Any Form of Equality of Educational Opportunity

We offer the preceding as a plausible taxonomy of what equality of opportunity might mean when applied to education. As specified earlier, we make a descriptive rather than a normative argument. We do not endorse any of these conceptions of equality of educational opportunity. Instead, we take it

²¹⁴ See, e.g., Jennings, *supra* note 83, at 9–10.

for granted that equality of educational opportunity is desirable. We base this on the recognition that Americans are deeply committed to the American Dream, that the American Dream involves fair competition and equal opportunities, and that the schoolhouse is the main engine to realize the Dream. If we support equality of educational opportunity because of its centrality to the American Dream, then how does adequacy fare with respect to the various interpretations offered above?

It is obviously the case that the stronger or more demanding the conception of equality of educational opportunity, the correspondingly more demanding become the implications of pursuing equity-minded reforms. If equality of opportunity requires that society attempt to redress socially produced and genetically produced inequalities, then it seems that the family must go. The existence of the family and the promotion of strong versions of equality of opportunity are in deep and inescapable tension.

But what is important to see is that the adequacy framework necessarily undermines even the least demanding of these conceptions. If we expect fair competition in college admissions and in the labor market, where merit rather than arbitrary characteristics determine outcomes, and if fairness requires that we embrace equality of opportunity, then even under the one scholar, one dollar and the "do no harm" standards, the adequacy principle allows the well off to protect, enhance, and entrench their advantage, thereby making competitions for admissions and jobs unfair. Put most strongly, adequacy is incompatible with any form of equality of educational opportunity because adequacy is not a subspecies of egalitarianism; it is conceptually distinct from equality.

Let us now tie together the argument of this entire Part. If education is positional and one's relative standing in the distribution of K-12 education gives rise to both admissions and earnings benefits, then the positionality of education forces us to conclude that some kind of egalitarian commitment is necessary to protect children from unfairness in the competition for postsecondary admission and jobs and from suffering potential dignitary harms. And if attempts to guarantee fairness, independent of the positional value of education, force us to endorse some version of equality of educational opportunity, then we must also acknowledge that adequacy cannot satisfy even the least demanding form of equality of educational opportunity. The ultimate conclusion is clear. In education, adequacy is inadequate. Education reformers must reclaim equality.

F. Tempering Our Normative Conclusions

Equality is a magnificent ideal. It is also a fearsome ideal, for its rigorous and single-minded pursuit would produce terrible or farcical outcomes. Think here of Kurt Vonnegut's *Harrison Bergeron*, where Vonnegut imagined a society so dedicated to equality that a United States Handicapper General saddled lithe ballet dancers with weights on their legs in order to equalize dancing capacity.²¹⁵ Or consider the most demanding forms of equality of opportunity for children, which would seem to require nothing less than the abolishment of the family. In this section, we offer reasons to temper the strength of our commitment to egalitarianism.

1. Education Is a Multifaceted Good

Education is a good in both absolute (or intrinsic) and positional ways. As we have stressed, we do not claim that education is a pure positional good. Seeing education in this multifaceted way helps to see why even a committed egalitarian in education can escape the Leveling Down Objection.

Recall that the Leveling Down Objection made egalitarians look foolish, for the strict egalitarian seemed unable to produce any principled reason to prefer a world in which all students received equal educational resources at high level X to low level Y.²¹⁶

But we know that the value of education goes far beyond the positional and that absolute levels of education make significant contributions to individual and social well-being. In short, we take the following claim to be uncontroversial: In a modern society, there is an absolute level of educational attainment below which individuals will be dysfunctional and lack necessary capabilities for self-development, civic participation, and economic sufficiency. Similarly, in a modern society, there is an absolute level of educational attainment below which social growth will be stunted. In this respect, absolute levels of education, up to some adequate threshold, matter a great deal. We have very good reason, therefore, as egalitarians, to prefer a world in which students receive educational resources at high level X rather than low level Y. Here, it must be admitted the adequacy framework has some real bite. This is why global efforts to increase educational opportunities are almost always, and entirely appropriately, described in terms of adequacy and

²¹⁵ KURT VONNEGUT, *Harrison Bergeron*, in WELCOME TO THE MONKEY HOUSE 7, 8 (1998).

²¹⁶ See *supra* text accompanying notes 159–61.

not equality. Above some threshold, however, the good of education becomes increasingly positional. Here we can observe a kind of arms race in educational credentialism.

2. *Reject Equality Monism*

Equality is not all that theorists, practitioners, or citizens care about. We should be pluralists. Any ideal, when pursued monomaniacally, will likely lead to disaster. Let us acknowledge that we should curb the impulse to equalize in order to honor other important values, including freedom, privacy, and efficiency. One reason to defend the institution of the family, for instance, even if it comes at the cost of equality of opportunity for children, is that the liberty of persons to form family units is considered essential to human well-being. These other values should temper the force of egalitarian claims. Of course, the important question is how to strike the right balance.

On this issue we cannot offer a decisive answer; it is too large a question and it almost certainly defies final resolution. This represents no hasty retreat or admission of defeat on our part, however. For one thing, we hope to have given reasons for vindicating equality as an appropriate value to include in any balancing of grand ideals. We believe adequacy is an inadequate substitute for equality in education policy. Moreover, we underline that our conclusions on behalf of equality apply only to the actions of the state. Equality may lose some of its luster when we consider what is necessary to do to accomplish it. But when we concern ourselves with the organization of public institutions rather than with social policy broadly construed, equality is almost surely on its strongest footing. We are concerned with demonstrating how adequacy frameworks are wanting *as applied to public education*.

To be sure, our defense of equality may point in the direction of more wide-ranging intrusions into the economy and the family since so much inequality of opportunity is traceable to features of market economies and inescapable realities of family life. But our arguments are meant, at least here, to apply only to public schooling. It may be wrong for the state to permit inequalities that are due to arbitrary and unfair features of social life, such as luck in the birth lottery or socioeconomic standing. But we believe it is a different kind of wrong if the state arrays its own institutions to amplify these very inequalities. Adequacy threatens to compound already existing inequalities that the state may or may not be responsible for redressing. If the state settles for adequacy in the orientation of educational policy, it effectively

cements the educational advantages of the well off; it confers on them the state's imprimatur in using public schools to entrench advantages that they are already securing at home, in private. We believe this is indefensible.

III. EDUCATIONAL POLICY AND EDUCATIONAL EQUALITY

Translating normative theory into pragmatic policy is an imprecise business. In the context of educational resources, normative principles are routinely watered down and modified to meet the reality of educational policy and practice, to recognize other policy values, or to serve specific political interests. Given this inevitable deviation from the clarity and parsimony of abstract principle and keeping in mind our own tempered view of equality (it is not the only relevant policy value), we offer here some guidelines on crafting educational policy that takes equity much more seriously.

First, do no harm. Any policy aimed at altering the existing distribution of educational resources should at least not result in greater inequalities. This means that educational finance policies should be designed to promote vertical equity by providing more resources to those most in "need" (e.g., students with disabilities, low-income students, English language learner students), but it also means that any educational policy that will affect resource distribution should not have the effect of increasing the advantage of those at the top of the distribution.

We have already detailed how standards-based accountability schemes may have the perverse effect of exacerbating existing inequalities as they provide clear signals to administrators, teachers, and wealthy families as to which schools are desirable and which are to be avoided. The result may well be further segregation of poor and affluent students. By maintaining a static, nonrelational, and noncomparative definition of "proficiency" (read: "adequacy"), such accountability schemes permit unfettered growth at the top of the distribution while consigning the bottom to a basic level of proficiency (and the resources that go with it). Any definition of proficiency, we argue, must be dynamic and comparative and pegged to the performance at the top of the distribution.

We are not arguing that the low-performers should be raised to the level of the high-performers, i.e., that all educational outcomes be equalized, no matter the cost. Educational outcomes are a function of educational resources *and* of student motivation and abilities. On the contrary, we are arguing that

“proficiency” must be recalibrated on a periodic basis as some function of how the top-performing percentiles are doing both in terms of academic achievement and attainment.²¹⁷ Critical to this equity-minded ideal, of course, is the provision of educational resources to low-performing schools and children so that they may meet the evolving standards of proficiency. Also critical to this ideal is the notion that any differences in educational outcomes should not be correlated with arbitrary characteristics (e.g., race, ethnicity, gender). An opportunity to learn at levels in line with those of the top performers avoids the harm that a lack of opportunity to learn at even a static level of proficiency does.

CONCLUSION

Over the past two decades, educational policy’s orienting guide star has shifted from equity to adequacy. We have argued that this shift, while motivated by understandable political realities and championed by advocates whose interests rest with the most disadvantaged students, is ill-advised. Conceptually, equity and adequacy are fundamentally different, and the conceptual terrains of the two reform strategies ultimately lead the practical proposals that issue from them on divergent paths.

The conceptual distinction reveals that students can be absolutely deprived and relatively deprived *at the same time*. Adequacy reforms target absolute deprivations in schooling. As defenders of equality, we have nothing but praise for adequacy efforts that successfully eliminate absolute deprivation. The danger is that the path of adequacy ends too soon; adequacy suggests that warding off absolute deprivation exhausts the state’s obligation to provide education. Equality-oriented reforms, while also concerned with absolute deprivation, go further and demand that the state also worry about relative deprivation, inequalities that exist even above a threshold of proficiency.

Why are these kinds of inequalities worrisome and the proper concern of the state? We have offered several reasons here, including the implications of the positional aspects of education and the obligation of the state to pursue fair

²¹⁷ One might argue that even this standard for proficiency is simply a high *adequacy* standard. Indeed, we are not advocating for a standard of outcome equality and therefore our outcome standard is necessarily some *dynamic* qualitative standard below the performance of those at the top of the distribution. Yet the dynamic standard we propose that is tied to the top of the distribution does not allow the high performers to maintain and increase their positional advantage. Thus, ours is a relative standard that embraces equity principles. Our thanks to Jim Ryan for helping us sharpen this point.

competition in college admissions and the labor market. A more pedestrian yet no less powerful reason for state action is that the inequalities above high thresholds of proficiency are neither small nor randomly distributed. The spending of wealthy districts continues to far outpace most urban districts; the gaps between the adequately funded and the well funded are huge in many places. And the inequalities here are concentrated among the poor and minorities.

We conclude by considering the implication of our argument for what we believe is the most defensible interpretation of the adequacy framework as applied to education policy. This is the interpretation of adequacy as the setting of high and rigorous outcome standards paired with aggressive vertical equity of inputs in order to allow students with varying educational needs to reach these standards. Some who endorse the shift from equity to adequacy argue that such a move may actually enhance vertical equity in practice.²¹⁸ After all, poor and minority students in failing schools are so far from reaching even an adequate level of performance that getting them over the adequacy hurdle will require a significant infusion of resources to meet their needs, i.e., a significant enhancement in vertical equity. Set aside our arguments that most accountability and adequacy-oriented reforms are not necessarily designed to ensure such vertical resource equity and indeed may perversely exacerbate current inequalities. Focus instead on the spirit of this adequacy defense, conjoining robust outcome standards with aggressive vertical equity inputs.

Two observations are in order: First, there is something very peculiar about assigning the label “adequacy” to this approach. If the permissibility and desirability of setting state-endorsed outcome standards hinges, in the adequacy defender’s mind, on the infusion of vertical equity inputs, then perhaps it should be said that this adequacy approach rests on an egalitarian foundation. Setting outcome goals is laudable and describing them as adequacy standards is fine, too, since no one—not even the most hard-core egalitarian—insists that outcomes ought to be equal. But this is not what defines the adequacy approach. Instead, the core idea behind connecting outcome standards with vertical equity inputs is to give each child an *equal opportunity* to reach the standard; egalitarian intuitions are motivating the enterprise. So in this respect, the adequacy approach is mislabeled; it is still an equality framework at heart.

²¹⁸ See, e.g., *supra* notes 4, 13.

Are we then reaching the deeply unsatisfying conclusion that, in the end, the difference between equity and adequacy frameworks is merely semantic? No, not quite. For even on the sympathetic interpretation of adequacy offered above, there remains one crucial difference between equity-minded and adequacy-minded reforms. The difference is the object of comparison that is to drive the vertical equity of inputs. For the equity advocate, the aim is to compare the disadvantaged with the well off, to compare students with students or districts with districts, in order to assess whether a relationship of equality (of resources, of opportunities) holds. For the adequacy advocate, the aim is to compare students or districts with the specified outcome goals. We have shifted from a distribution of resources that compares what one student has to that which another has (equity) to a distribution of resources in which all receive some baseline level of resources or quality of education, while some may receive more than that (adequacy with vertical equity).

Equity orientations sought to tie together the fortunes of poor and privileged students and school districts. This was intended as more than mere metaphor. For example, funding formulas explicitly hooked together the wealthiest and the poorest districts. Adequacy severs the tie between the poor and the privileged, making the object of comparison for the poor not the fortunes of the privileged but the specified outcome standard.

This difference matters. When we continue to allow wide and increasing gaps in the quality of education that children receive (even if those at the bottom of the distribution are receiving an adequate education), the value of the education received by those at the bottom is diminished in direct relation to the growth at the top. Education has very strong positional aspects and those positional aspects are left unaddressed by a resource distribution based on adequacy principles. Of course we are not so Pollyannaish to ignore the political dangers of radically redistributing educational resources from the top to the bottom. For this reason, our modest goals have been to inject equity back into the policy conversation and propose a principle of educational policymaking that requires no harm to be done to equity. Put simply, adequacy isn't.

