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IMPLEMENTING *BROWN* IN THE NINETIES: POLITICAL RECONSTRUCTION, LIBERAL RECOLLECTION, AND LITIGATIVELY ENFORCED LEGISLATIVE REFORM

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OPPPOSED for a decade by a hostile national administration,¹ faced with the prospect for decades to come of an unsympathetic federal judiciary,² and amidst declarations of the Second Reconstruc-

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¹ E.g., N. Amaker, *Civil Rights and the Reagan Administration* (1988); Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 Harv. L. Rev. 1331, 1332-33 & n.4 (1988) (citing authority); Selig, *The Reagan Justice Department and Civil Rights: What Went Wrong*, 1985 U. Ill. L. Rev. 785; Holmes, *Bill Would Overturn Court's Rights Decisions*, N.Y. Times, Feb. 8, 1990, at A23, col.6 (opposition of Bush Administration to majority of proposals in bipartisan bill in Congress to reverse Supreme Court's 1989 decisions cutting back on civil rights laws); Marcus, *Goodwill for Thornburgh Erodes*, Wash. Post, Jan. 6, 1990, at A1, col. 3 (increasing disappointment expressed by civil rights community towards Bush Administration's civil rights policies); Ostrow, *Senate Panel Rejects Lucas as Rights Chief*, L.A. Times, Aug. 2, 1989, at 1, col. 4 (civil rights community's successful opposition to President Bush's initial appointment to head the Civil Rights Division of the Department of Justice).

² E.g., Note, *All the President's Men? A Study of Ronald Reagan's Appointments to the U.S. Courts of Appeals*, 87 Colum. L. Rev. 766 (1987).

tion's demise,³ civil rights organizations have undertaken recently to rethink their litigation agendas.⁴ I have two motivations for offering some thoughts in support of that task. First, the civil rights community has requested the assistance of the academy in reshaping the community's litigation agenda and, in my case, in identifying "new strategies for implementing *Brown v. Board of Education*."⁵ Second,

³ Dionne, *Politics: Civil Rights Rulings Have Many Asking, Is the Second Reconstruction Coming to an End?*, N.Y. Times, July 13, 1989, at A20, col. 5; see Savage & Lauter, *Rehnquist Gavels an End to Era of Judicial Activism*, L.A. Times, July 7, 1989, at 24, col. 2.

⁴ Illustrating these efforts are the agendas of a number of conferences that civil rights and other organizations have conducted recently with the aim in part of identifying new civil rights enforcement strategies. See, e.g., Agenda of Conference on Education Strategies for the 90's (Chicago, May 19-21, 1989) (sponsored by the American Civil Liberties Union, the Center for Law and Social Policy, and the NAACP Legal Defense and Educational Fund, Inc.); Agenda of Conference on Recent Supreme Court Civil Rights Decisions (New York City, Aug. 15-16, 1989) (sponsored by the NAACP Legal Defense and Educational Fund, Inc.); Agenda of Conference on the Right to a Minimally Adequate Education: Putting Minimum Standards to the Test—A Legal Strategy for Educational Reform (New York City, Mar. 27, 1987) (sponsored by the Education Law Project of the Columbia University School of Law); Agenda of Joint Housing Conference (Warrenton, Virginia, Dec. 9-11, 1988) (sponsored by the American Civil Liberties Union, the Center for Law and Social Policy, the NAACP Legal Defense and Educational Fund, Inc., and the National Housing Law Project); Program of a Century of Civil Rights Struggle: A Conference on Racial Justice in the United States (University of Wisconsin, Madison, Nov. 2-3, 1989) (sponsored by the Institute for Legal Studies). Also illustrating these efforts to rethink litigation agendas are the results of long-range planning studies conducted recently by civil rights organizations. E.g., NAACP Legal Defense and Educational Fund, Inc., Report of the Long-Range Planning Committee to the Board of Directors 13 (Aug. 1985) (concluding that "[t]he times call for a reordering of LDF's priorities," in part because of the concerted campaigns . . . "to reverse [civil rights] progress and dismantle civil rights enforcement mechanisms"); see also *infra* note 5 (creation in 1989 of Poverty Advocates Research Council to develop new litigation strategies to assist the minority poor).

⁵ 347 U.S. 483 (1954) (*Brown I*). Excerpts from this Article were presented orally during a session on "New Strategies for the Implementation of *Brown*" at A Century of Civil Rights Struggle: A Conference on Racial Justice in the United States, sponsored by the Institute for Legal Studies at the University of Wisconsin, Madison, Nov. 2, 1989. As their agendas reveal, the other conferences discussed *supra* note 4 also were designed in part as forums for scholars to provide assistance and advice to civil rights organizations engaged in the process of reformulating their litigative activities. The importance the civil rights community has attached recently to receiving scholarly assistance in the creation of new civil rights enforcement strategies was underscored by the creation in 1989 of the Poverty Advocates Research Council, a federation of over 20 civil rights, civil liberties, and other legal organizations active in serving the minority poor, with the stated objectives of helping "existing organizations identify new, innovative areas for joint litigation and advocacy" and funding new scholarly research "critical to that work." Poverty Advocates Research Council, What Is the Poverty Advocates Research Council (PARC)?, attached to Letter from J. Boger & F. Roisman to Dr. Chester Hartman, Institute for Policy Studies (Feb. 20, 1990). The civil rights bar has sought the legal academy's assistance before. For example, the important debate

my analysis of the principal "old" strategy for implementing *Brown*, school desegregation litigation,⁶ leads me to conclude that it is the old strategy's capacity for political rather than educational reform that accounts for our legal system's partial embrace of that strategy.⁷ The old strategy's incidental enhancement of educational opportunity consequently is not available to significant numbers of educationally disadvantaged minority children. This Article accordingly fashions an answer to the call for "new" strategies for implementing *Brown* by finding in recent legislation a basis for a program of litigative reform that fills some of the educational gaps left by a politically focused reorientation of the principal "old" strategy for implementing *Brown*.

In order to implement *Brown* in the nineties, we might begin by trying to understand it.⁸ Notwithstanding the decision's

on *Brown* conducted by Professors Charles Black, Louis Pollak, and Herbert Wechsler during the 1950's was not simply an academic exchange among prominent scholars but also a continuation of discussions among advisors to the NAACP Legal Defense Fund on the strategy that led to and followed *Brown*. See Black, *The Lawfulness of the Segregation Decisions*, 69 Yale L.J. 421 (1960); Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. Pa. L. Rev. 1 (1959); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1, 34 (1959). See generally R. Kluger, *Simple Justice* 529-34, 644, 722 (1977) (discussing civil rights advisory roles of and debates among Professors Black, Pollak, and Wechsler).

⁶ By school desegregation, I mean the attendance together in public schools and classrooms of substantial proportions of white and minority children as a result of judicial or administrative orders or the threat of such orders. The reasons why I limit *Brown* to the "field of education," hence why I consider school desegregation the principal "old" strategy for implementing *Brown*, are discussed infra note 8.

⁷ See Liebman, *Desegregating Politics: "All-Out" School Desegregation Explained*, 90 Colum. L. Rev. — (forthcoming 1990).

⁸ Setting to one side *Brown's* implications for the debates over judicial review, constitutional interpretation, equal protection, and the public-private distinction and also the decision's application since 1954 in a wide variety of "public" spheres, I limit my discussion of *Brown* to the sphere the decision itself singled out—the "field of public education." *Brown I*, 347 U.S. at 495. I do so, first, because, absent a limiting principle, the topic of new strategies for implementing *Brown* is too vast for a single article. Second, identifying new schools-focused strategies is, justifiably, a high priority for the civil rights community. E.g., Chambers, *Adequate Education for All: A Right, an Achievable Goal*, 22 Harv. C.R.-C.L. L. Rev. 55 (1987). Indeed, many of the reasons that led the NAACP Legal Defense Fund to limit the litigation culminating in *Brown* to the sphere of education and led civil rights organizations thereafter to enforce *Brown's* holding most vigorously in that same sphere remain valid today. See R. Kluger, *supra* note 5, at 132-37, 155, 163-65, 168-72, 327-66, 511-21 (schools-focused strategy adopted because of, inter alia, the important effect of education on the opportunities available to blacks, the strong desire among blacks to improve their educational lot, the dismal state of black education, the availability of quantitative input and output measures of educational quality that unequivocally revealed the educational deficits of blacks and black

"thirtysomething" maturity, however, understanding *Brown* has proven difficult. The decision itself has been called "inscrutable" and has been charged with harboring a "number of possible antidiscrimination principles."⁹ So, too, the desegregation decisions that followed *Brown I*—zigging from *Brown II*¹⁰ in 1955 to *Green*¹¹ and *Swann*¹² in the late 1960's and early 1970's, then zagging to *Keyes*,¹³ *Milliken I*,¹⁴ and *Dayton I*¹⁵ in the mid-1970's and *Columbus*¹⁶ and *Dayton II*¹⁷ in the late 1970's—have with reason been described as "a patchwork of unintelligibility," "chaos out of confusion," and "surrealistic."¹⁸ Collectively, the *Brown* jurisprudence (hereinafter abbreviated simply as *Brown*) has invited the age's most damning epithet,

schools, the dearth of evidence showing all-black schools could succeed educationally under existing financial and political circumstances, and the difficulty public officials faced in arguing that they justifiably could withhold adequate schooling from blacks); J. Wilkinson, *From Brown to Bakke: The Supreme Court and School Integration: 1954-1978*, at 40-49 (1979) (similar). Moreover, the sorry state of the public schools that many minority children attend today—sorrrier on average than the public schools white students attend—reveals how much remains to be accomplished on behalf of minorities in the important sphere of education. See, e.g., R. Farley & W. Allen, *The Color Line and the Quality of Life in America 188-208* (1987); A. Common Destiny: Blacks and American Society 331-54 (G. Jaynes & R. Williams eds. 1989); *infra* note 94. Third, my own scholarly interests have focused on the meaning of *Brown* in the field of public education. See Liebman, *supra* note 7. Although that focus has led me to understand school desegregation as a political and not an educational reform—albeit a reform that applies with particular force to political processes governing schools, see *infra* notes 54-89 and accompanying text—that conclusion only begs more eloquently the question whether the educational goals that motivated some of the constitutional lawyers who brought the case and many of those who have written about it since, see authority cited *infra* note 163, can be fulfilled through post-*Brown* legal strategies other than judicially compelled desegregation.

⁹ Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 Minn. L. Rev. 1049, 1057 (1978); see J. Wilkinson, *supra* note 8, at 29.

¹⁰ *Brown v. Board of Educ.*, 349 U.S. 294 (1955) (discussed *infra* note 21).

¹¹ *Green v. County School Bd.*, 391 U.S. 430 (1968) (discussed *infra* note 22).

¹² *Swann v. Charlotte-Mecklenberg Bd. of Educ.*, 402 U.S. 1 (1971) (discussed *infra* note 22).

¹³ *Keyes v. School Dist. No. 1*, 413 U.S. 189 (1973) (discussed *infra* notes 23, 31, and accompanying text).

¹⁴ *Milliken v. Bradley*, 418 U.S. 717 (1974) (discussed *infra* note 24 and accompanying text).

¹⁵ *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406 (1977) (discussed *infra* note 24 and accompanying text).

¹⁶ *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449 (1979).

¹⁷ *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526 (1979).

¹⁸ Yudof, *School Desegregation: Legal Realism, Reasoned Elaboration and Social Science Research in the Supreme Court*, 42 Law & Contemp. Probs. 57, 87, 99, 102, 105 (1978).

"incoherent."¹⁹ As one observer wrote a few years ago, "[M]ore than 30 years after the *Brown* decision there is no political or intellectual consensus about where we are, what we have learned or where we should be going."²⁰

Heeded differently, however, *Brown's* meaning need not be discerned from the discordant messages the decision seems to voice and instead may be described in the changing tenor of the times through which the decision has lived. For like the rest of its "rock and roll" generation, *Brown* has taken on a number of personalities and politics over the course of its not-yet-middle-aged career. During the late 1950's and early 1960's, *Brown* was simultaneously simple, optimistic, and naive. Its uncomplicated demand for formal equality was made with the confident assumption—credulous, it is true, given the nation's history, but perhaps excusably so given the period's flush economic conditions—that nothing more than abolishing "separate but equal" was needed to end the subordination of black Americans.²¹

Then came the short-lived radicalization of the late 1960's and early 1970's. Still operating in a period in which economic prosperity and growth were assumed, *Brown* veered to the left, away from formal equality and toward something like constitutionally mandated distributive equality. No longer would it suffice to say, history notwithstanding, that blacks were free to choose and, once they chose, to succeed at any school they liked. Instead, it was up to local officials and, in default by them, to the courts, to distribute places to blacks as well as whites within the nation's dominant social and economic institutions, beginning with its formerly all-white schools.²²

¹⁹ Id. at 87.

²⁰ Orfield, Knowledge, Ideology, and School Desegregation: Views Through Different Prisms, 1 Metro. Educ. 92 (1986).

²¹ The emblem of *Brown's* youthful personality and politics was *Brown II*, 349 U.S. 294, which called for admitting blacks to formerly white schools "on a racially nondiscriminatory basis with all deliberate speed," leaving the means to that end up to the "good faith" of local school officials in the first instance and to local courts in the second. Id. at 300-01.

²² The emblems of this age of desegregation are *Green*, 391 U.S. 430, and *Swann*, 402 U.S. 1. *Green* simultaneously jettisoned "all deliberate speed" in favor of a demand for immediate action, withdrew primary control over *Brown's* implementation from local school officials and gave it to the courts, and replaced the demand for formal equality—which the "freedom of choice" plans ruled insufficient in *Green* seemed to offer—with a demand that "white" and "black" schools be closed and that integrated schools operate in their place. *Green*, 391 U.S. at 438-41. *Swann* then made clear that the Court meant what it had said in *Green*, namely, that if

Then followed the ambivalent seventies. As economic expansion and optimism gave way to stagnation and uncertainty, *Brown's* late-sixties radicalization and outcome-focused distributivism gave way to a mid-seventies mixture of liberal reformism and moralistic, process-oriented correctivism. This new corrective rationale for the Court's desegregation decisions wavered between a relatively broad focus on historical and systemic evils, demanding societywide correction,²³ and a narrower focus on the individual misdeeds of idiosyncratic wrongdoers, requiring isolated compensation for identifiable victims.²⁴

On the one hand, the seventies saw desegregation march northward and westward, reaching Columbus,²⁵ Detroit,²⁶ Denver,²⁷ and Pasadena,²⁸ and requiring those districts, as the Charlotte²⁹ and Mobile³⁰ districts previously had been required, to redistribute places in their formerly all-white schools among mixtures of black and white students. On the other hand, the conditions precedent to and the explanations for that redistribution narrowed. It became clear that: (1) an evil act (deliberate racial discrimination) was required to trigger judicial intervention³¹ and that racial separation itself, even when coupled with vast disparities in economic input and educational outcome, did not suffice;³² (2) discrimination had to occur on a grand scale in order to justify distributive intervention;³³ and (3) even upon proof of widespread intentional discrimination in a given urban dis-

local boards did not integrate the schools, the courts would, by transporting black and white children from wherever they lived to racially mixed schools. *Swann*, 402 U.S. at 29-31.

²³ E.g., *Dayton II*, 443 U.S. 526; *Keyes*, 413 U.S. at 203, 204, 208, 214 ("all-out desegregation" orders premised on findings of "system-wide" segregation).

²⁴ E.g., *Dayton I*, 433 U.S. at 420 (limiting remedy in case to curing violation's "incremental segregative effect"); *Milliken I*, 418 U.S. 717 (forbidding multidistrict remedy for state and local officials' unidistrict violation).

²⁵ *Columbus*, 443 U.S. 449.

²⁶ *Milliken v. Bradley*, 433 U.S. 267 (1977) (*Milliken II*).

²⁷ *Keyes*, 413 U.S. 189.

²⁸ *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424 (1976).

²⁹ *Swann*, 402 U.S. 1.

³⁰ *Davis v. Board of School Comm'rs*, 402 U.S. 33, 37 (1971).

³¹ E.g., *Keyes*, 413 U.S. 189.

³² E.g., *Milliken I*, 418 U.S. 717; see also *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973) (holding, inter alia, that vast disparities in per capita wealth and expenditures by Texas school districts, among which were a number of predominantly minority school districts at the lower end of the spectrum, did not violate the equal protection clause).

³³ E.g., *Dayton I*, 433 U.S. 406.

strict, courts were not free to distribute to black children seats in surrounding all-white suburban school districts, notwithstanding that available seats in integrated schools in the city district had been exhausted.³⁴

In the 1980's *Brown* received little attention from the Court, but the treatment of *Brown*'s employment-discrimination and affirmative-action cousins suggests a continuing move away from radical redistribution, and even reformist systemwide correction, toward an individualistic and narrowly focused compensatory scheme in which the limited remedies available are predicated upon the proximate linkage between intentional wrongs committed by identifiable wrongdoers and cognizable injuries suffered by identifiable victims.³⁵

In this Article, I search for understandings of *Brown* that permit the continued implementation of its original desegregation strategy and the immediate implementation of a supplemental strategy. In keeping with that pragmatic purpose, I forgo trying here to divine everything that *Brown* meant or could mean were it invested with the authority to determine the direction of the new age to which we might aspire.³⁶ Instead, I propose arguments and strategies for interpreting and implementing *Brown* anew in the disappointing age in which the civil rights community in fact finds itself.

In Part I, I suggest a theoretical reorientation of *Brown* that situates the "old" desegregation strategy more securely within the antidistributivist and process-oriented philosophical trends that dominated the eighties and appear to be well entrenched as we enter the nineties. Acknowledging that the price of desegregation's politically focused reorientation is the partial diminution of its value as an ever-ready mechanism for enhancing educational opportunity, Part II proposes a supplemental strategy that fills some of the educational gaps left by the old strategy's reorientation, while still avoiding the for-now fatal charge of judicially mandated race-based redistribution. The new strategy finds in the recent enactment of minimum educational-performance standards a democratically legitimated basis for requiring public authorities to provide children with the instruction and other educational services necessary to meet those standards.

³⁴ *Milliken I*, 418 U.S. 717.

³⁵ E.g., *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115 (1989); *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775 (1989); *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706 (1989).

³⁶ Cf. Liebman, *supra* note 7, § III (comprehensive exposition of *Brown*'s meaning).

I. A THEORETICAL REORIENTATION OF *BROWN*A. *The Case for Reorientation*

Brown and the cases that followed it embody both a practice and a justification of desegregation. Unlike others,³⁷ I do not find much wrong with the desegregative *practices* that *Brown* in its best moments has inspired. Exemplifying the bases for my sanguinity on this score are some recent data from a couple of unlikely sources that actually belie the two most damaging charges against desegregation: that it does not improve the "life chances" of blacks and that it instead injures their school districts by driving out whites.

On the life-chances question, Christopher Jencks—whose skeptical reviews of the empirical literature on desegregation have been a staple of civil rights debates over the last couple of decades³⁸—concludes in his latest review that school desegregation in the North has shown itself capable of erasing one-third of the achievement-score disparity that normally characterizes black and white children in that region. If faint praise can sanctify, then Christopher Jencks's commendations surely have that power, and he has now concluded not-so-faintly that northern desegregation has "a substantial positive effect on black students' achievement."³⁹ Moreover, improving achievement test scores is the *least* clear of desegregation's beneficial consequences. More certain is desegregation's positive impact on dropout, teenage pregnancy, and delinquency rates; on the likelihood that blacks will attend and succeed at college (particularly four-year colleges), secure employ-

³⁷ E.g., D. Bell, *And We Are Not Saved: The Elusive Quest for Racial Justice* 107-08 (1987); T. Sowell, *Civil Rights: Rhetoric or Reality?* 13-35 (1984).

³⁸ E.g., C. Jencks, M. Smith, H. Acland, M. Bane, D. Cohen, H. Gintis, B. Heyns & S. Michelson, *Inequality: A Reassessment of the Effect of Family and Schooling in America* (1972).

³⁹ C. Jencks & S. Mayer, *The Social Consequences of Growing Up in a Poor Neighborhood: A Review* 65, 55-65 (Center for Urban Affairs and Policy Research, Northwestern University, Apr. 1989), summarized in Mayer & Jencks, *Growing Up in Poor Neighborhoods: How Much Does It Matter*, 243 *Science* 1441, 1442-43 (1989). Jencks and Mayer conclude that: (1) the "best estimates" of desegregation's cumulative impact are that black students attending mostly white schools in the North score "something like a third of a standard deviation higher on most tests" than do blacks in all-black schools; (2) this improvement erases one-third of the overall difference between scores of Northern blacks and whites, hence gains from desegregation are "substantial"; and (3) that twelve years in "predominantly white Northern school[s]" probably has a substantial positive effect on black students' achievement." The authors conclude that no reliable data regarding the impact of school desegregation on southern black children are available.

ment in predominantly white job settings, and live in integrated neighborhoods as adults; and on the salary levels blacks attain in the labor market.⁴⁰

On the "white flight" question, the only study of desegregation the federal government funded during the Reagan years—which used a sample that probably underestimated desegregation's accomplishments and overemphasized its weaknesses⁴¹—reached the following conclusions: (1) desegregation halved the proportion of black students in this country attending all-minority schools⁴² at a time when housing segregation among blacks and school segregation among Latinos (who were not much involved in desegregation⁴³) substantially increased;⁴⁴ (2) the more intrusive—that is, the more mandatory and

⁴⁰ Recent reviews of and contributions to the relevant literature include R. Crain & J. Strauss, *School Desegregation and Black Occupational Attainments: Results from a Long-Term Experiment* (Reprinted from Center for Social Organization of Schools Report No. 359, Johns Hopkins University, July 1985); C. Jencks & S. Mayer, *supra* note 39; D. Kirp & M. Yudof, *Educational Policy and the Law* 494-507 (2d ed. 1982); Braddock, Crain & McPartland, *A Long-Term View of School Desegregation: Some Recent Studies of Graduates as Adults*, 66 *Phi Delta Kappan* 259, 260-61 (1984); Braddock & McPartland, *The Social and Academic Consequences of School Desegregation, Equity & Choice*, Feb. 1988, at 5; Hawley & Smylie, *The Contribution of School Desegregation to Academic Achievement and Racial Integration*, in *Eliminating Racism: Profiles in Controversy* 281 (P. Katz & D. Taylor eds. 1988); Mahard & Crain, *Research on Minority Achievement in Desegregated Schools*, in *The Consequences of School Desegregation* 103 (C. Rossell & W. Hawley eds. 1983); Pettigrew, *New Patterns of Racism: The Different Worlds of 1984 and 1964*, 37 *Rutgers L. Rev.* 673 (1985); Taylor, *The Crucial Role of Education in Achieving the Civil Rights Goals of the 1980's*, 37 *Rutgers L. Rev.* 961 (1985).

⁴¹ The survey overrepresented large urban districts and underrepresented smaller urban and rural districts. See Pear, *Adviser to U.S. Desegregation Study Quits, Saying It's Biased*, N.Y. Times, Oct. 30, 1985, at A12, col. 1.

⁴² F. Welch & A. Light, *New Evidence on School Desegregation* 40, 67 & table 12 (U.S. Comm'n on Civil Rights Clearinghouse Publication No. 92, 1987); accord, e.g., G. Orfield, *Public School Desegregation in the United States, 1968-1980*, at 1-12 (1983).

⁴³ See W. Hawley, R. Crain, C. Rossell, M. Smylie, R. Fernandez, J. Schofield, R. Tompkins, W. Trent & M. Zlotnik, *Strategies for Effective Desegregation: Lessons from Research 3-4* (1983) [hereinafter W. Hawley]; G. Orfield, *supra* note 42, at 12-13; see also Aronson & Gonzalez, *Desegregation, Jigsaw, and the Mexican-American Experience*, in *Eliminating Racism: Profiles in Controversy*, *supra* note 40, at 301 (discussing the problems of integration for Latinos).

⁴⁴ On the increase in housing segregation, see, e.g., R. Farley & W. Allen, *supra* note 8, at 140-45; Massey & Denton, *Hypersegregation in U.S. Metropolitan Areas: Black and Hispanic Segregation Along Five Dimensions*, 26 *Demography* 373 (1989); Tobin, *Introduction: Housing Segregation in the 1980s, in Divided Neighborhoods: Changing Patterns of Racial Segregation 10-11* (G. Tobin ed. 1987) (*Urban Affairs Annual Review* No. 32, 1987). On the increase in school segregation of Latinos, see Inst. for Educ. Leadership Center for Demographic Policy, *The Same Client: The Demographics of Education and Service Delivery*

geographically extensive—a desegregation plan is, the greater its desegregative impact is likely to be, without concomitant increases in white flight;⁴⁵ (3) the hypothesis that “desegregation might trigger such a large exodus of white students that racial isolation actually increases” is false;⁴⁶ and (4) several categories of desegregation plans in fact seem to *decelerate* preexisting rates of white loss from urban districts.⁴⁷

At a time of increasing pessimism about the willingness and capacity of the public schools to educate minority children and about the future of public education generally,⁴⁸ these data suggest that the practices that have been inspired by *Brown* do not need reorientation at all but rather deserve high billing among available educational reforms. Thus, to the extent that there is a problem with *Brown*, it is

System (1989) [hereinafter *The Same Client*] (Latino students are now more segregated in urban schools than blacks); G. Orfield & F. Monfort, *Change and Desegregation in Large School Districts 28-33* (Nat'l School Bds. Ass'n Council of Urban Bds. of Educ., July 1988) (same); F. Welch & A. Light, *supra* note 42, at 4, 16 (reporting a decrease in proportion of Latinos attending schools with more than 75% white students, from 24% in 1968 to 13% in 1980); Woolbright & Hartmann, *The New Segregation: Asians and Hispanics, in Divided Neighborhoods: Changing Patterns of Racial Segregation*, *supra*, at 138-57.

⁴⁵ White flight notwithstanding, the “implementation of desegregation plans is usually associated with sharp reductions in segregation”; moreover, mandatory and countywide plans have much “larger desegregative effects than other plan types” and are not well correlated with white loss. F. Welch & A. Light, *supra* note 42, at 6-7, 56, 59, 62-67 & table 22. Combining all 109 desegregation plans examined, Welch and Light found that a 300% increase in desegregation was accompanied by a drop in white enrollment of only six percentage points more than what would have occurred but for desegregation; among “pairing and clustering” plans, a 1200% increase in desegregation was accompanied by only a four percentage point marginal decline in white enrollment. *Id.* at 55, 58-59 & tables 19-20a; accord J. Hochschild, *The New American Dilemma: Liberal Democracy and School Desegregation* 60, 64-65 (1984); Orfield, *Housing Patterns and Desegregation Policy, in Effective School Desegregation: Equity, Quality, and Feasibility* 185, 202-07, 213 (W. Hawley ed. 1981) [hereinafter *Effective Desegregation*]; Rossell & Hawley, *Understanding White Flight and Doing Something About It, in Effective Desegregation*, *supra*, at 157, 170-71.

⁴⁶ F. Welch & A. Light, *supra* note 42, at 6, 56, 66-67.

⁴⁷ *Id.* at 49-50, 57-61 & tables 19-21a (reporting aggregate postimplementation declines in white-enrollment loss in plan types implemented in Boston, Buffalo, Detroit, Indianapolis, Kansas City, Kansas, Los Angeles, Odessa, Pittsburgh, Rockford, San Francisco, St. Louis, Shreveport, and Seattle); see also Hawley & Smylie, *supra* note 40, at 290 (documenting increase in housing integration associated with implementation of mandatory school desegregation plans); Rossell & Hawley, *supra* note 45, at 170-71 (in some districts, “short-term implementation losses appear to be compensated for by less than normal postimplementation losses”).

⁴⁸ See Boyd, *Public Education's Last Hurrah?: Schizophrenia, Amnesia, and Ignorance in School Politics*, 9 *Educ. Evaluation & Pol'y Analysis* 85 (1987).

not at the level of *practice*, but at the levels of *philosophy* and *politics*. For unlike in the late 1960's and early 1970's, when mainstream voices were heard to say that desegregation ought to be used constitutionally to redistribute educational resources among the races if it could be shown to do so effectively,⁴⁹ the reigning legal view today is instead that reforms like desegregation are anathema precisely because they can and do constitutionally redistribute on the basis of race. While we waited for researchers to supply the empirical predicate for an earlier period's constitutionally distributive justification of desegregation, the nation's rightward swing withdrew the political and philosophical predicates for that justification.

Equally troublesome, the narrowly corrective justification that increasingly has replaced the earlier period's distributive explanation has great difficulty explaining our actual desegregative practices. From the point of view of whites, desegregation distributively *overcorrects* by imposing remedial burdens on parents and children who, for all corrective theory can show, are "innocent," and by conferring remedial benefits on at least some black children who, according to corrective theory, are not victims.⁵⁰ Likewise, from the point of view of blacks, desegregation is distributively *undercorrective* because it fails to compensate actual black victims of intentional discrimination for the vast majority of the injuries segregation causes them, not the least of which is a lifetime of lost or decreased earnings of the sort that the desegregation cases have never deemed compensable.⁵¹

⁴⁹ E.g., Dimond, *School Segregation in the North: There Is But One Constitution*, 7 Harv. C.R.-C.L. L. Rev. 1, 15-17 (1972); Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concepts*, 78 Harv. L. Rev. 564, 583-617 (1965); Horowitz, *Unseparate But Unequal—The Emerging Fourteenth Amendment Issue in Public School Education*, 13 UCLA L. Rev. 1147 (1966); Rousselot, *Achieving Equal Educational Opportunity for Negroes in the Public Schools of the North and West: The Emerging Role for Private Constitutional Litigation*, 35 Geo. Wash. L. Rev. 698 (1967).

⁵⁰ See Freeman, *School Desegregation Law: Promise, Contradiction, Rationalization, in Shades of Brown: New Perspectives on School Desegregation* 75 (D. Bell ed. 1980) ("One aspect of the [corrective principle] is very, very pernicious: those who are not, under current versions of the doctrine, labeled perpetrators, have every reason to believe in their own innocence. . . . And why, then, should [they] be called to account or implicated at all in the business of eradicating the past?").

⁵¹ See D. Bell, *supra* note 37, at 48 (criticizing desegregation decisions because of their unwillingness "to recognize and remedy the real losses resulting from long-held, race-based subordinate status").

For these reasons and for reasons I and others discuss at length elsewhere, corrective theory represents a theoretical and practical dead-end for desegregation.⁵² A reorientation is needed, therefore, not because our desegregative practices lack positive value for minorities, but rather because the prevailing ideology, having eschewed judicially mandated, race-based redistribution, thus far has yielded no serviceable substitute explanation that captures and justifies those practices. Accordingly, absent overthrow of the prevailing ideology—which I have not taken as my topic here—what is called for is an explanation that reorients desegregation in the direction of the prevailing antidistributive ideology.

In the next Section, I briefly outline a promising means of theoretically reorienting the arguments in favor of desegregation.⁵³ Because that reorientation only partly solves the problem of redistribution, the succeeding Section presents arguments designed to neutralize the accusatory charge of redistribution in the field of education. Because that reorientation recognizes limitations on the civil rights community's ability to extend the old strategy's educational benefits to significant numbers of educationally disadvantaged minority children, the following Part offers a new strategy for achieving *Brown*'s unmet educational goals.

B. Reconstructing Politics Through Desegregation

Rather than being portrayed or vilified in the language of corrective theory as the redistribution of resources from "innocent" whites to "unjustly enriched" blacks,⁵⁴ *Brown* may be understood and justified on the basis of a number of less controversial, political-process-oriented capabilities that the remedy possesses, but with which it thus far has not been credited.⁵⁵ Start with the simple and uncontroversial view of equal protection violations that reigns in the classrooms as well as the courts today—namely, that the political process has

⁵² E.g., J. Wilkinson, *supra* note 8, at 112-13, 133-45, 222-23; E. Wolf, *Trial and Error: The Detroit Desegregation Case* (1981); Freeman, *supra* note 50, at 75, 81-82; Liebman, *supra* note 7, § III.A.3.

⁵³ For a fuller exposition of the approach sketched here, see Liebman, *supra* note 7, §§ III, IV.

⁵⁴ See *supra* note 50 and accompanying text.

⁵⁵ See generally Liebman, *supra* note 7 (detailed examination of the inability of existing theories of school desegregation either to explain or to justify that reform and of the capacity of a political-process-based theory to do both).

improperly counted and acted upon citizens' "whites-are-better-than-blacks" preferences.⁵⁶ According to this view, equal protection violations are not based upon any constitutionally mandated educational or other kind of outcome but rather upon the political process by which that outcome was achieved. The Constitution is not seen as demanding some substantive end that legislators, and, if not them, the courts, must confer on all citizens equally, but only as requiring a fair political procedure that accords each self-defining citizen equal voice and respect in the process of democratically deciding how to distribute resources.

An effective remedy for equal protection violations so-defined would require that a formerly discriminatory political process be restructured so that its participants are not disposed to continue discriminating and instead are inclined to accord the interests of minorities the political respect that the equal protection clause demands.⁵⁷ One way to accomplish this goal, consistent with the design of both the Constitution and the equal protection clause, is to reconstruct the political process so that the previously discriminating majority cannot harm members of the minority without simultaneously harming its own members.⁵⁸ To use the language of the Revolutionary War era, the goal is to force prior discriminators to be the "virtual representa-

⁵⁶ See, e.g., J. Ely, *Democracy and Distrust* 82 (1980) (identifying the "denial to minorities of . . . 'equal concern and respect in the design and administration of the political institutions that govern them' " as the evil the equal protection clause is designed to eradicate) (quoting R. Dworkin, *Taking Rights Seriously* 180 (1977)). For a series of articles discussing this approach to judicial review, constitutionalism, and equal protection, see Symposium: *Judicial Review Versus Democracy*, 42 *Ohio St. L.J.* 1 (1981).

⁵⁷ How, that is, can we simulate the philosophers' ideal "initial situation" in which just thinking is positionally assured? See, e.g., J. Rawls, *A Theory of Justice* 118-19 (1971).

⁵⁸ James Madison extolled the Constitution's reliance on representative democracy in just these terms. The Constitution, he said, "restrain[s]" legislators "from oppressive measures" because "they can make no law which will not have its full operation on themselves and their friends, as well as on [others]," and thereby forges "one of the strongest bonds by which human policy can connect the rulers and the [ruled] together" and "creates between them that communion of interests and sympathy of sentiments, of which few governments have furnished examples; but without which every government degenerates into tyranny." *The Federalist* No. 57, at 352-53 (J. Madison) (C. Rossiter ed. 1961); see *Railway Express Agency v. New York*, 336 U.S. 106, 112-13 (1949) (Jackson, J., concurring) (stating that there is "no more effective practical guaranty against arbitrary and unreasonable government than to require [as does the equal protection clause] that the principles of law which officials would impose upon a minority must be imposed generally"); see also J. Ely, *supra* note 56, at 82-84 (discussing the use of a virtual-representation mechanism in the privileges and immunities clause of U.S. Const. art. IV, § 2, cl. 1).

tives" of the persons against whom they previously discriminated.⁵⁹ To use more modern language, the goal is to find social structures or "ethical situation[s]" that compel empathy on the part of political actors toward the former objects of their chauvinistic hostility.⁶⁰

School desegregation neatly conforms to these specifications for an effective but still simple and uncontroversial remedy. Assuming only that schools and classrooms have substantial proportions of minority as well as majority members,⁶¹ desegregation situates formerly discriminating citizens so that they cannot harm their previous victims without harming themselves via their own children. In so doing, desegregation compels members of the majority who are concerned for the welfare of their own offspring virtually to represent the welfare concerns of minority parents and their offspring (and vice versa). In the best of worlds—and, the empirical data suggest, in our *own* imperfect world—this ethical resituation of citizens induces empathy by making each person recognize the interests she potentially shares with all other persons, based on the fact that any harming missiles she directs at those persons may as easily fall on her own child.⁶² In Pro-

⁵⁹ See J. Ely, *supra* note 56, at 83-84.

⁶⁰ Michelman, *Foreword: Traces of Self-Government*, 100 Harv. L. Rev. 4, 26 (1986) (quoting Cornell, *Toward a Modern/Postmodern Reconstruction of Ethics*, 133 U. Pa. L. Rev. 291, 294 (1986)); see C. Gilligan, *In a Different Voice: Psychological Theory and Women's Development* 14, 24-39 (1982); Benhabib, *The Generalized and the Concrete Other: The Kohlberg-Gilligan Controversy and Moral Theory*, in *Women and Moral Theory* 154 (E. Kittay & D. Meyers eds. 1987); Minnow, *Foreword: Justice Engendered*, 101 Harv. L. Rev. 10, 74, 76, 95 (1987). See generally Liebman, *supra* note 7, § IV.C.

⁶¹ Discussing the case law holding that districts undergoing desegregation may not intentionally or effectively substitute segregation within the classroom for segregation within the school is Dimond, *supra* note 49, at 52-53 & n.210. Discussing the social science data showing that desegregation works best when it places substantial proportions (at least 15-20%) of each race in each integrated school and avoids tracking and other forms of classroom segregation are W. Hawley, *supra* note 43, at 41-43; R. Rist, *The Invisible Children: School Integration in American Society* 263-68 (1978); Braddock & McPartland, *supra* note 40, at 66-67.

⁶² Demonstrating that actually taking part in desegregation dramatically changes the attitudes of whites towards the value of interracial contact are, e.g., A. Gutmann, *Democratic Education* 164-66 (1987) (discussing 1978 poll data showing that 85-89% of whites in general population oppose busing, but only 16% of whites whose children experienced desegregative busing found experience "not satisfactory"); J. Hochschild, *supra* note 45, at 179-88 (1978-83 Harris surveys); Orfield, *School Desegregation in the 1980's, Equity & Choice*, Feb. 1988, at 28 (1986 poll data); Taylor, Sheatsley & Greeley, *Attitudes Toward Racial Integration*, *Sci. Am.*, June 1978, at 42, 48. Discussing the positive impact of desegregation on white attitudes towards blacks generally are, e.g., R. Crain & J. Strauss, *supra* note 40; Braddock & McPartland, *supra* note 40, at 63, 67-69; Schofield & Sagar, *Desegregation, School Practices,*

fessor Derrick Bell's phrase, desegregation impels the interests of whites and blacks to "converge"—as they must if the dominant race is to be counted on to improve the lot of minorities.⁶³

Brown, then, need not be seen as forthrightly or covertly redistributing to minorities certain "private" resources in which the reigning ideology assigns a sacrosanct property interest to the majority race. Instead, desegregation may—and to survive probably must—be seen as reconstructing a political process, in which we *all* share an interest, that has gone dangerously awry.

Nor does this view threaten courts with having to order desegregative remedies in spheres outside "the field of public education."⁶⁴ For it so happens that public education is about the only area of political concern in which the government (through long-accepted compulsory attendance laws and publicly funded schools) already has its distributive hands on a sufficient proportion of the citizenry so that the courts may resituate citizens without substantially undermining their preexisting liberties.

A comparison of public-employment and public-school discrimination illustrates the point. Public employment does not encompass anything like a majority of the nation's job market, nor is the state generally understood to control who may apply to enter and who may exit the segment of the market that the state does occupy. Accordingly, the state cannot easily rearrange all or most citizens with respect to public employment so that the harms white citizens might wish to visit discriminatorily on actual and prospective public employees of another race are equally likely to be visited on themselves. If the state tried to do so, whites would simply seek employment in the private sector or, if barred from doing so or from escaping desegregation thereby, would vociferously and accurately complain that their longstanding liberty to determine when and where to work was being destroyed. By contrast, the state has long been understood to control a huge segment of the "market" for elementary and secondary education, to exercise plenary control over the assignment of places within that segment of the market, and to place significant con-

and Student Race Relations, in *The Consequences of School Desegregation*, supra note 40, at 58.

⁶³ See Bell, *Brown* and the Interest-Convergence Dilemma, in *Shades of Brown: New Perspectives on School Desegregation*, supra note 50, at 90; Liebman, supra note 7, § IV.D.

⁶⁴ *Brown I*, 347 U.S. at 495.

straints on exit inasmuch as no child may exit the market entirely,⁶⁵ nor may any child exit the state's segment of the market without incurring a substantial financial penalty.⁶⁶

Seen from this political-process perspective, *Brown* begins to look relatively *nonredistributive*. In the first place, the "resource" that *Brown* is now understood to be distributing via constitutional mandate—access to and respect in the political system—is, even under a fairly miserly view of the public sphere, a public good and, hence, one that is especially fit for both governmental and constitutional distribution.⁶⁷

Furthermore, the dislocation of "private" interests that *Brown's* particular distribution of public, political rights necessitates is modest. Once advocates give up arguing that desegregation corrects imbalances in the distribution of private rights when it palpably does not, they are free to point out that the rearrangement of private rights that *Brown* incidentally does effect is relatively inconsequential and clearly worth the politically reconstructive candle.

To begin with, *Brown's* opponents have not produced any respectable evidence that desegregation harms white children.⁶⁸ Rather, desegregation probably increases slightly the chances that children will arrive at school safely and increases more significantly the chances that they will associate with members of the minority race in later life.⁶⁹

⁶⁵ See *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

⁶⁶ See *infra* notes 72, 88 and accompanying text.

⁶⁷ Cf. M. Friedman, *Capitalism and Freedom* 85-107 (1962) (questioning governmental distribution of educational resources).

⁶⁸ Busing is safer than walking to school, and neither it nor desegregation generally has harmful academic or attitudinal effects on white children. See, e.g., J. Hochschild, *supra* note 45, at 58-61; C. Jencks & S. Mayer, *supra* note 39, at 33, 45, 96; Hawley & Smylie, *supra* note 40, at 284, 287; Mayer & Jencks, *supra* note 39, at 1443; NAACP Legal Defense Fund, Inc., *It's Not the Distance, It's the Niggers: Comments on the Controversy over School Busing* 3, 36-43 (May 1972); see also 1 Nat'l Inst. of Educ., U.S. Dep't of Health, Educ., & Welfare, *Violent Schools—Safe Schools: The Safe School Study Report to the Congress* 132 (1978) (finding that "a school's being under court order to desegregate is associated with only a slight increase in the amount of student violence" in the first couple years of implementation and that "as time goes on and larger numbers of students are bussed to achieve racial balance, the desegregation process ceases to be a factor").

⁶⁹ Braddock, Crain & McPartland, *supra* note 40, at 260 (surveying the literature and concluding that "[w]ithout exception the studies . . . show that desegregation of schools leads to desegregation in later life—in college, in social situations, and on the job").

To the extent that *Brown* constitutionally redistributes private rights at all, it is distributive vis-a-vis white parents, not their children. Indeed, the truly distributive aspect of *Brown* for white parents is the flip side of the benefit desegregation affords to—no, I'm not going to say to minorities, but rather—white *children*. By giving white children a wider range of choices about the persons with whom they might associate and the values they might adopt as they approach adulthood, desegregation withdraws control from white parents. As Justice Powell put the point only a little euphemistically, *Brown* harms white parents' interest in having their children attend schools that match "the personal features of the surrounding neighborhood"⁷⁰ in which those parents have chosen to live—that is, their interest in having their children grow up to match the "personal features" and values those parents have chosen as their own.

If, however, we take as a baseline the actual world in which twentieth-century Americans live—and not the more (in this regard) libertarian world that, for example, Thomas Aquinas, John Locke, Hannah Arendt, Milton Friedman, and John Coons have envisioned⁷¹—it becomes clear that even this aspect of *Brown*'s distributive character is moderate to minuscule. For as the conservative five-ninths of the Supreme Court recently concluded, addressing both the "Why just schools?" question I discuss above and the "How much coercion or redistribution?" question I address here, coercion, though not appropriate in other areas, has long been a part of the public educational scene:

Green v. School Board of New Kent County held that voluntary choice programs in the public schools were inadequate and that the schools must take affirmative action to integrate their student bodies. . . . [*Green*, however,] has no application to the voluntary associations supported by [North Carolina's] Extension Service. . . . While school-children must go to school, there is no compulsion to join 4-H or Homemaker Clubs, and while school boards customarily have the power to create school attendance areas and otherwise designate the

⁷⁰ *Keyes v. School Dist. No. 1*, 413 U.S. 189, 246 (1973) (Powell, J., concurring and dissenting).

⁷¹ J. Coons & S. Sugarman, *Education by Choice: The Case for Family Control* (1978); M. Friedman, *supra* note 67, at 85-107; A. Gutmann, *supra* note 62, at 31-32 (discussing Aquinas); Locke, *The Second Treatise of Government*, in J. Locke, *Two Treatises of Government* 355 (P. Laslett ed. 1960); Arendt, *Reflections on Little Rock*, 6 *Dissent* 45, 50 (1959).

school that particular students may attend, there is no statutory or regulatory authority to deny a young person the right to join any Club he or she wishes to join.⁷²

Indeed, conservative Justices have long been at pains to distinguish school desegregation from other so-called "race-conscious" remedies on the ground that the "harms" suffered by white parents when the state substitutes one mandatory school assignment for another are less important than those inflicted on whites in other race-conscious remedial settings.⁷³ Justice Powell, for example, although long an expositor of the view that desegregation constitutionally distributes, more recently has acknowledged that it does so only modestly:

To be sure, a pupil who is bused from a neighborhood school to a comparable school in a different neighborhood may be inconvenienced. Indeed, I have said that "[e]xtensive pupil transportation may threaten liberty or privacy interests." But the position of bused pupils is far different from that of employees who are laid off or denied promotion. Court-ordered busing does not deprive students of any race of an equal opportunity for an education. Moreover, as the Court noted in *Swann*, "busing had been common for years in many schools [sic] districts throughout the country."⁷⁴

In sum, short of stripping the fourteenth amendment of its well-established proscription of dispositive "white-over-black" motivations in the political process and the courts of their now well-established judicial-review⁷⁵—and their logically included remedial⁷⁶—role in enforcing the ban on such motivations, the only remaining argument

⁷² *Bazemore v. Friday*, 478 U.S. 385, 408 (1986) (White, J., joined by Burger, C.J., and Powell, Rehnquist, and O'Connor, JJ., concurring in a per curiam opinion) (citation omitted).

⁷³ E.g., *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 283 n.11 (1986) (Powell, J., plurality opinion); see also *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706, 737-38 (1989) (Scalia, J., concurring in the judgment) (arguing that race-conscious remedies, although appropriate in the school desegregation context, are inappropriate in other contexts).

⁷⁴ *United States v. Paradise*, 480 U.S. 149, 187 n.2 (1987) (Powell, J., concurring) (citations omitted).

⁷⁵ See L. Lusky, *Our Nine Tribunes 1-4* (4th draft, June 22, 1989) (unpublished manuscript) (noting how clearly Congress and the public confirmed the centrality and acceptability of judicial review in the process of the Senate's decision not to confirm President Reagan's nomination of Robert Bork to the Supreme Court).

⁷⁶ Although process theorists have shown a peculiar penchant for run-the-process-over-again remedies for political-process violations, e.g., J. Ely, *supra* note 56, at 102-03, they more logically ought to seek ways to repair or reconstruct the process. See Liebman, *supra* note 7, § IV.C.

against *Brown* reconstructively understood runs as follows: *Brown*'s modestly distributive incidental costs, even when discounted by the significant educational benefits the remedy incidentally provides society,⁷⁷ are more important than the remedy's effective purging of pervasive or "systemwide" white-over-black thinking from the political process.⁷⁸ I have no doubt that some members of the current federal judiciary would reach this conclusion. But I think they would be less comfortable doing so and less likely to form a majority than they would be in brushing aside a remedy that was either redistributively explained or correctively misexplained.

C. *Recollecting the Role of Education in a Liberal Polity*

The preceding discussion begs the question of why we consider compulsory school attendance and assignment less troublesome than compulsory participation and assignment in, for example, the realms of public employment or publicly funded clubs. Acknowledging that *Brown* redistributes at least incidentally, is there some reason why that brand of redistribution is more acceptable than other kinds? The affirmative answer to this question provides a means of neutralizing even further the condemnatory charge that desegregation constitutionally redistributes.

The nation's history treats the public distribution of educational resources not only as tolerable, but in fact as positively integral to the constitutional role of the state. Consider among other available evidence⁷⁹ the nation's foundational legal sources, its fifty-one state and federal constitutions. Of those, virtually none explicitly, and only a few by recent and grudging interpretation, assure citizens of anything

⁷⁷ See *supra* notes 39-40 and accompanying text.

⁷⁸ The desegregation cases do not permit "all-out" intervention absent a finding of "systemwide" discrimination. *Keyes v. School Dist. No. 1*, 413 U.S. 189, 203, 204, 208, 214 (1973); accord, e.g., *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 457-60 & n.7, 465-68 & n.15 (1979). Compare *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526, 540-42 (1979) (holding that a systemwide remedy is justified by systemwide segregation) with *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 420 (1977) (finding that three minor segregative actions did not justify a systemwide remedy).

⁷⁹ See L. Cremin, *The Transformation of the School: Progressivism in American Education, 1876-1957*, at 8-10 (1961); D. Ravitch, *The Great School Wars: New York City, 1805-1973*, at 62, 171 (1974); Braddock, Crain & McPartland, *supra* note 40, at 260; Karst, *Why Equality Matters*, 17 Ga. L. Rev. 245, 266 (1983).

like a minimum level of nutrition, shelter, or subsistence.⁸⁰ Indeed, it may fairly be said that few or none of our constitutions give citizens a *judicially enforceable* right to even a minimum level of public security or a common defense.⁸¹ By sharp contrast, all but three of those constitutions expressly give the state a duty to provide children with a free public education and make that duty administratively or judicially enforceable at least to some minimal degree.⁸² As the Supreme Court repeatedly has recognized, the state's provision of free public schooling thus "fulfills a most fundamental obligation of government to its constituency,"⁸³ "is perhaps the most important function of state and local governments,"⁸⁴ and has always been regarded by the American people as a "matter[] of supreme importance."⁸⁵

Philosophically, the answer is the same. Liberal politics generally resist mandates requiring governments to equalize substantive outcomes among citizens on the theory that each individual—not the state—should define her own good and decide what resources are

⁸⁰ See Black, *Further Reflections on the Constitutional Justice of Livelihood*, 86 Colum. L. Rev. 1103 (1986); Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls's Theory of Justice*, 121 U. Pa. L. Rev. 962 (1973).

⁸¹ See *DeShaney v. Winnebago County Dep't of Social Servs.*, 109 S. Ct. 998 (1989); Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 Harv. L. Rev. 1388 (1988) (arguing that Supreme Court's treatment of alleged discrimination in meting out death sentences based on race of victim and other indicia suggests need for, but absence of, enforceable right on part of minority communities to effective law enforcement protection).

⁸² See Ratner, *A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills*, 63 Tex. L. Rev. 777, 814-16 (1985) (surveying state constitutional provisions); Note, *To Render Them Safe: The Analysis of State Constitutional Provisions in Public School Finance Reform Litigation*, 75 Va. L. Rev. 1639, 1656-70 (1989); see also Michelman, *supra* note 80, at 1010-11 & nn.139, 141 (identifying the right to education as the only common "insurance" right that is constitutionally protected); Shane, *Compulsory Education and the Tension Between Liberty and Equality: A Comment on Dworkin*, 73 Iowa L. Rev. 97, 100-01 (1987) (noting that every state currently limits the liberty of parents to control the education of their children); cf. *Papasan v. Allain*, 478 U.S. 263, 285-86 (1986) (reserving question whether federal Constitution includes implicit right to a minimally adequate education); *infra* notes 240-248 and accompanying text (discussing *Papasan* and related cases).

⁸³ *Ambach v. Norwick*, 441 U.S. 68, 76 (1979) (quoting *Foley v. Connelie*, 435 U.S. 291, 297 (1978)).

⁸⁴ *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 29 (1973) (quoting *Brown I*, 347 U.S. at 493); accord *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972) (providing public schools "ranks at the very apex of the function of a State").

⁸⁵ *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923); accord, e.g., *Board of Educ. v. Pico*, 457 U.S. 853, 864 (1982) (plurality opinion); *Adler v. Board of Educ.*, 342 U.S. 485, 493 (1952); *McCullum v. Board of Educ.*, 333 U.S. 203, 231 (1948) (Frankfurter, J.).

most critical to her physical, psychic, and moral well-being.⁸⁶ But those politics generally place the education of children outside the proscription of distributive mandates on the theory that education away from the home is a prerequisite to the individual's development rather than an obstacle to her exercise of a liberal capacity for choice. Recognizing the need to balance the parents' liberty interest in nurturing their child, the child's liberty interest in developing her own sense of self (both with her parents' protection against the state and the state's protection against her parents), and the state's interest in fostering liberal choice, liberal politics, while forbidding the state to withdraw children from families altogether, have long required families to yield up their children for some part of the day for instruction in schools operated and allocated, or at least substantively regulated, by the state.⁸⁷

Finally, the contemporary political scene lends credence to the singular acceptability and even the constitutional status of educational coercion and distributivism. Although the Reagan Administration's privatization impulse led it originally to support tuition tax credits for

⁸⁶ Discussing the resistance of our own liberal polity to distributive mandates are, e.g., J. Ely, *supra* note 56, at 87-101, 135-36, 162; Alexander, *Modern Equal Protection Theories: A Metatheoretical Taxonomy and Critique*, 42 Ohio St. L.J. 3, 26 n.84 (1981); Karst, *supra* note 79, at 262-63 ("Americans accept wide disparities in wealth and income, so long as the system remains open and people at the bottom of the economic scale are relieved from the kinds of deprivation that stigmatize or exclude them from participation in society."); Nagel, Introduction, *in* *Equality and Preferential Treatment* viii-ix (M. Cohen, T. Nagel & T. Scanlon eds. 1977).

⁸⁷ E.g., *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925) (stating that state constitutionally may prescribe a secular curriculum for all children including instruction in "good citizenship"); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923); *New Life Baptist Church Academy v. Town of E. Longmeadow*, 885 F.2d 940 (1st Cir. 1989) (free exercise clause not violated by local school board's requirement that religious schools file written reports, employ teachers with minimum credentials, and submit to site visits and other means of evaluating the schools' secular education programs); see B. Ackerman, *Social Justice in the Liberal State* 26-28, 139-67 (1980); J. Dewey, *Democracy and Education* 25, 99-102 (1916); A. Gutmann, *supra* note 62, at 33, 134 ("To reap the benefits of social diversity, children must be exposed to ways of life different from their parents."); J. Mill, *On Liberty* 175 (G. Himmelfarb ed. 1986); Jefferson, *Autobiography*, *in* *The Life and Selected Writings of Thomas Jefferson* 49-52 (A. Koch & W. Peden eds. 1944); J. Rawls, *supra* note 57, at 87, 73, 101, 107; M. Walzer, *Spheres of Justice* 216 (1983) ("Abolish compulsory education and . . . children become the mere subjects of their families and of the social hierarchy in which their families are implanted. Abolish the family, and . . . children become the mere subjects of the state."); Dworkin, *What Is Equality? Part 3: The Place of Liberty*, 73 Iowa L. Rev. 1, 1 (1987) (noting "popular opinion that certain liberties, including freedom of choice in education, must be limited in order to achieve true economic equality").

the cost of private schooling—potentially the death knell of public education—the Administration later backed away from that proposal, and our current “Education President” rejected it altogether.⁸⁸ So, too, the recent revival of successful finance-equity litigation in the state courts provides further evidence of a continuing recognition of the favored status of constitutionally mandated redistributive efforts in the sphere of education.⁸⁹

In sum, lest historical and philosophical lessons be forgotten in the coming debates over the future implementation of *Brown*, whether via old or new strategies, it is wise to recollect to ourselves, our advocacy forums, and *Brown*’s adversaries the pure liberal pedigree of governmental action coercing parents in regard to whether and where their children should attend schools.

II. JUDICIALLY ENFORCING STATE-MANDATED MINIMUM EDUCATIONAL STANDARD “REFORMS”

Even as desegregation’s politically focused reorientation pays important ideological dividends, it exacts an important practical price: It encumbers plaintiffs with a heavy burden of proving political inequality and distortion, which cannot be directly satisfied by evidence of educational inequality and disadvantage.⁹⁰ The old strategy’s reorientation thus withholds the benefits of court-ordered desegregation from significant numbers of educationally deprived minority children who have not or cannot prove that they have been

⁸⁸ See Bush Rejects Tax Break for Private School Cost, N.Y. Times, Mar. 30, 1989, at A20, col. 3; Snider, Parley on “Choice,” Final Budget Mark Transition: Bush Pledges His Support for Choice, but Is Mum on Private-School Option, Educ. Week, Jan. 18, 1989, at 1, col. 3.

⁸⁹ E.g., Colvin, School Finance: Equity Concerns in an Age of Reforms, Educ. Researcher, Jan.-Feb. 1989, at 11; Fiske, Historic Shift Seen in School Finance, N.Y. Times, Oct. 4, 1989, at B9, col. 1; Suro, Texas Court Rules Rich-Poor Gap in State School Spending Is Illegal, N.Y. Times, Oct. 3, 1989, at A1, col. 4; Mathis, Oregon Students’ Suit Challenges State “Safety Net,” Educ. Week, Aug. 2, 1989, at 13; Woltman, Montana Legislators Approve Education-Finance Measure, Educ. Week, Aug. 2, 1989, at 13; Walker, Kentucky Officials Begin Laying Plans to Rebuild System, Educ. Week, June 21, 1989, at 1; Mathis, In Finance Arena, a New Activism Emerges, Educ. Week, Apr. 26, 1989, at 1; Colvin, California Voters Back “Guarantee” for School Funding in Constitution, Educ. Week, Nov. 16, 1988, at 1; *infra* note 229.

⁹⁰ See Karst, The Costs of Motive-Centered Inquiry, 15 San Diego L. Rev. 1163 (1978); *supra* notes 31-34 and accompanying text.

treated unfairly in the political process.⁹¹ Also, some minority children—for example, those in Washington, D.C., and New York City—who probably could show historical distortions in the political processes governing their schools, have no recourse to an effective desegregation remedy because of the politically affected area's large size and high concentration of minority students. Particularly if state borders are considered sacrosanct, there are not enough white children subject to a remedy in such areas to permit effective desegregation. This Part responds to this practical limitation on the old strategy by developing a supplemental strategy that serves educationally where court-ordered desegregation cannot serve and that deploys recent political and legal developments against the charge of illegitimate distributivism.⁹²

Although the new strategy actually is more distributive than desegregation, it aims to be legislatively, not judicially, distributive and accordingly to erect a tenable bridge from the antidistributive seventies and eighties to the majoritarian nineties. In doing so, the new strategy draws upon two significant features of the current public scene, the first giving inajoritarian democratic shape and content to modern educational distributivism, the second suggesting a predisposition on the part of the Supreme Court's ascendant majority to resolve conflicts between the inajoritarian and antidistributive impulses in modern American conservatism in favor of the majoritarian impulse.

The first critical feature of the current scene is this: Since the early 1980's, nearly all fifty states—reacting to a widely held and publicized conclusion that the nation's schools are failing in their educational mission,⁹³ particularly as to poor and minority children⁹⁴—have legis-

⁹¹ See *Milliken v. Bradley*, 418 U.S. 717 (1974) (discussed in Liebman, *supra* note 7, § IV.G).

⁹² The discussion in this Part draws upon J. Liebman, *Putting Minimum Standards to the Test: A Legal Strategy for Educational Reform* (Columbia Univ. School of Law Educ. Law Project, Mar. 1987). Other recent "minimally adequate education" proposals and strategies include Chambers, *supra* note 8; Ratner, *supra* note 82. Minimally adequate education lawsuits that recently have been filed or are being planned are discussed *infra* note 262.

⁹³ In 1983, the President's National Commission on Excellence in Education galvanized the so-called "Excellence Movement" with its conclusions that a "rising tide of mediocrity" threatens public education in this country and that "[o]ur Nation is at risk." Nat'l Comm'n on Excellence in Educ., *A Nation at Risk: The Imperative for Educational Reform* 5 (1983) [hereinafter *A Nation at Risk*]. The Commission's report noted, *inter alia*, an increase in the number of functional illiterates, a decline in SAT and other achievement scores, and the

lated minimum educational-performance standards that students

increasing demand for remedial education. *Id.* at 8-9; accord Carnegie Task Force on Teaching as a Profession, *A Nation Prepared: Teachers for the 21st Century* (1986) [hereinafter *Carnegie Task Force*] (decline in teacher salaries, autonomy, status, and competency); Nat'l Governors' Ass'n Center for Policy Research and Analysis, *Time for Results: The Governors' 1991 Report on Education* 97-109 (1986) [hereinafter *Time for Results*] (sorely inadequate education available to "at risk" children); Task Force on Educ. for Economic Growth, Educ. Comm'n of the States, *Action for Excellence: A Comprehensive Plan to Improve Our Nation's Schools* 10-11, 30 (1983) [hereinafter *Action for Excellence*] (damage to personal and national economic prospects caused by inadequate educational development of vast amounts of human resources); Twentieth Century Fund Task Force on Fed. Elementary and Secondary Educ. Policy, *Making the Grade* 4-5, 15 (1983) [hereinafter *Making the Grade*] (demands on schools complicated by increase in truancy, dropout rates, and violent crimes); see Passow, *Tackling the Reform Reports of the 1980's*, 65 *Phi Delta Kappan* 674 (1984); see also Walsh, *In Poll, College Faculty Say Students Are Unprepared in Basic Skills*, *Educ. Week*, Nov. 8, 1989, at 5, col. 5 (Carnegie Foundation poll of 5000 college faculty members revealing overwhelming consensus that entering freshmen are seriously ill-prepared for college in terms of their basic skills); Weinraub, *Bush and Governors Set Education Goals*, *N.Y. Times*, Sept. 29, 1989, at A10, col. 1 ("consensus with[in] the Government and the education establishment that American schools [are] in turmoil and that the education system [is] increasingly lagging behind those of other industrial democracies"); Cohen, *National School Goals: Old Idea Surfaces with Newfound Intensity*, *Educ. Week*, Sept. 27, 1989, at 1, 20, col. 3 (noting America's "[p]oor results in international comparisons of student achievement and concern about the nation's economic standing in the world"); Boyer, *For Education: National Strategy, Local Control*, *N.Y. Times*, Sept. 26, 1989, at A31, col. 1 (stating that "[c]oncerns about economic competition abroad combined with our deepening fears about social pathologies here at home have focused attention on the weaknesses of our schools. Corporate leaders have called the quality of American education 'a national disaster.'"); Fiske, *Impending U.S. Jobs "Disaster": Work Force Unqualified to Work—Schools Lagging Far Behind Needs of Employers*, *N.Y. Times*, Sept. 25, 1989, at A1, col. 1 (reporting consensus in business community that American schools are graduating students without the skills needed for sophisticated new jobs). See generally Ericson, *Of Minima and Maxima: The Social Significance of Minimal Competency Testing and the Search for Educational Excellence*, 92 *Am. J. Educ.* 245, 247 (1984) (discussing causes and consequences of public belief that students being graduated from high schools lack basic skills).

⁹⁴ E.g., *A Nation at Risk*, *supra* note 93, at 32; *Time for Results*, *supra* note 93, at 97-109; *Making the Grade*, *supra* note 93, at 8-20. Documenting the dismal educational prospects of poor, minority, and limited English proficiency children are, e.g., *College Entrance Examination Bd., Equality and Excellence: The Educational Status of Black Americans* (1985); W. Grant & T. Snyder, *Digest of Educational Statistics 1983-84* (1984); H. Hodgkinson, *All in One System: Demographics of Education—Kindergarten Through Graduate School* (1985); *The Same Client*, *supra* note 44; Nat'l Coalition of Advocates for Students, *Barriers to Excellence: Our Children at Risk* (1985) [hereinafter *Barriers to Excellence*]; Nat'l Comm'n on Secondary Educ. for Hispanics, 2 "Make Something Happen": *Hispanics and Urban High School Reform* (1984) [hereinafter *Make Something Happen*]; Office of Educ. Research & Improvement, U.S. Dep't of Educ., *Poverty, Achievement and the Distribution of Compensatory Education Services* 11-30 (1986); Ratner, *supra* note 82, at 787-94; *supra* note 8.

must meet on pain of one negative consequence or another.⁹⁵ Even more recently, partly out of concern that the state-level reforms have not succeeded,⁹⁶ the President and the governors of all fifty states

⁹⁵ During most of the early 1980's, national reports on educational quality, see *supra* notes 93-94, advocated adoption of performance standards for students, teachers, and/or schools. E.g., Carnegie Task Force, *supra* note 93, at 55-103; *A Nation at Risk*, *supra* note 93, at 27-28, 20-31; *Time for Results*, *supra* note 93, at 97-98, 109; Nat'l Science Bd. Comm'n on Precollege Educ. in Mathematics, Science, and Technology, *Educating Americans for the 21st Century* 31-32, 40-41 (1983) [hereinafter *Educating Americans*]; N.Y. State Bd. of Regents, *Action Plan to Improve Elementary and Secondary Education Results in New York* 2-4, 11, 19, 37-38 (Apr. 1984) [hereinafter *Regents Action Plan*]; *Action for Excellence*, *supra* note 93, at 10-11, 40-41. But see *Barriers to Excellence*, *supra* note 94 (questioning value of minimum-competency tests and identifying the risks they pose to minority children). By the mid-1980's, virtually all 50 states had responded to the national reports by adopting some sort of statewide assessment program to measure student achievement. *Changing Course: A 50-State Survey of Reform Measures*, *Educ. Week*, Feb. 6, 1985, at 11. The vast majority of those programs rely upon mandatory minimum competency tests in reading, writing, and mathematics and, somewhat less frequently, citizenship, social studies, and science. M. Goertz, *State Educational Standards: A 50-State Survey* 9 (1986) (as of 1985, at least 42 states required local school districts to administer some sort of basic skills test to students at some time during their school careers); Piphio, *Tracking the Reforms*, Part 5: Testing—Can it Measure the Success of the Reform Movement?, *Educ. Week*, May 22, 1985, at 19 (pointing out that "[n]early every large education reform effort of the past few years has either mandated a new form of testing or expanded uses of existing testing"). Collecting minimum standards enactments are D. Burnes & B. Lindner, *State Efforts to Assess Excellence* (*Educ. Comm'n of the States Working Paper No. E-85-1*, July 1985); *Educ. Comm'n of the States, Clearinghouse Notes: Changes in Minimum High School Graduation Requirements—1980 to 1985* (Sept. 1985); M. Goertz, *supra*; Nat'l Inst. of Educ., U.S. Dep't of Educ., *The Nation Responds: Recent Efforts to Improve Education* (1984); *State Education Statistics: Student Performance, Resource Inputs, State Reforms, and Population Characteristics, 1982 and 1987*, *Educ. Week*, Mar. 2, 1988, at 18-19; *Changing Course: A 50-State Survey of Reform Measures*, *supra*; see also *infra* note 102 (listing negative consequences attached to failure to meet standards). See generally *The Educational Reform Movement of the 1980's: Perspectives and Cases* (J. Murphy ed. 1989) (collection of articles addressing numerous aspects of educational reform movement of the eighties); Resnick & Resnick, *Standards, Curriculum, and Performance: A Historical and Comparative Perspective*, 14 *Educ. Researcher* 5 (1985) (examining historically and comparatively different approaches to establishing curricula and to assessing student performance, and arguing that improvement in these areas offers the greatest opportunity for raising educational standards). In addition to test-based performance standards, most modern legislative reforms include curriculum-based performance standards that increase the number and difficulty of courses students must satisfactorily complete before receiving diplomas or other benefits. See W. Clune, P. White & J. Patterson, *The Implementation and Effects of High School Graduation Requirements: First Steps Toward Curricular Reform* (Center for Policy Research in Educ., Report No. RR-011, 1989); M. Goertz, *supra*, at 13-16.

⁹⁶ See, e.g., W. Firestone, S. Fuhrman & M. Kirst, *The Progress of Reform: An Appraisal of State Educational Initiatives 23-26* (Center for Policy Research in Educ., Report No. RR-014, 1989) (stating that the 1980's school reforms have had only "modest" beneficial impact); Cohen, *supra* note 93, at 20, col. 2 (quoting Marshall Smith, dean of education at Stanford

unanimously adopted a "Jeffersonian Compact on Education" calling for development and implementation in 1990 of "an ambitious, realistic set of [national] performance goals" that provide "a common understanding and a common mission" for all schools in the nation.⁹⁷

This fascination with educational-output standards is not, of course, an occasion for unalloyed celebration, especially in poor and minority communities. A number of commentators have subjected legislatively imposed minimum standards, particularly those relying on minimum competency tests (MCTs), to a withering triple-barreled critique based on the standards' and tests' fallibility,⁹⁸ inflexibility,⁹⁹

University, expressing "frustration with the progress of reforms" and Ernest Boyer, president of the Carnegie Foundation for the Advancement of Teaching, lamenting that "with all of the effort at school reform in the last few years, we still have not found the formula to move forward"; Johnson, *Bush Will Back National Goals on Education*, N.Y. Times, Sept. 24, 1989, at 24, col. 1 (quoting statement by Roger Porter, domestic policy advisor to President Bush, that, recent reforms notwithstanding, "we have seen little if any improvement"); Olson, *Despite Years of Rhetoric, Most Still See Little Understanding, Inadequate Efforts*, Educ. Week, Sept. 21, 1988, at 1; Miller, Bennett: *Despite Reform, "We Are Still at Risk,"* Educ. Week, May 4, 1988, at 15.

⁹⁷ "A Jeffersonian Compact": The Statement by the President and Governors, N.Y. Times, Oct. 1, 1989, at E22, col. 2 [hereinafter *Jeffersonian Compact*]. See Walker & Olson, *With Goals in Place, Focus Shifts to Setting Strategy*, Educ. Week, Mar. 7, 1990, at 1, col. 1 (discussing education goals set in early 1990 by President Bush and governors).

⁹⁸ Fallibility criticisms question the ability of MCTs to do what they claim to do—measure mastery of important daily life skills. Critics claim that MCTs are racially or ethnically biased, of dubious reliability and validity, premised on meaningless and incompatible scales and reference points, and capable of measuring only a single day's performance with regard to a limited range of testable skills that are not actually important to students and adults. For fallibility criticisms of standardized tests in general and of MCTs in particular, see, e.g., Bracey, *The \$150 Million Redundancy*, 70 Phi Delta Kappan 698 (1989); Cannell, *Nationally Normed Elementary Achievement Testing in America's Public Schools: How All Fifty States Are Above the National Average*, 7 Educ. Measurement: Issues & Prac. 5 (1988); Darling-Hammond, *Mad-Hatter Tests of Good Teaching*, in *The Great School Debate: Which Way for American Education?* 247 (B. Gross & R. Gross eds. 1985) [hereinafter *Great School Debate*]; Edelman, *The Impact of the Mandated Testing Program on Classroom Practices: Teacher Perspectives*, 102 Education 56 (1981); Glazer, *The Problem with Competence*, 92 Am. J. Educ. 306, 311-13 (1984); Haney, *Validity, Vaudeville, and Values: A Short History of Social Concerns over Standardized Testing*, 36 Am. Psychologist 1021, 1029-32 (1981); Linn, *Madaus & Pedulla, Minimum Competency Testing: Cautions on the State of the Art*, 91 Am. J. Educ. 1, 3-15, 19-27 (1982); Murname, *Improving Education Indicators and Economic Indicators: The Same Problems?*, 9 Educ. Evaluation & Pol'y Analysis 101 (1987); Neill & Medina, *Standardized Testing: Harmful to Educational Health*, 70 Phi Delta Kappan 688, 689-92 (1989); Palardy, *An Analogy for Reviewing Promotion/Retention and Minimum Competency Decisions*, 104 Education 401, 401-04 (1984); Peterson, *Minimum Competency Testing: Issues to Consider*, 15 Am. Secondary Educ. 17, 18 (1986); Wiggins, *A True Test: Toward More Authentic and Equitable Assessment*, 70 Phi Delta Kappan 703, 703-05, 708

and inequity.¹⁰⁰ In the last regard, these critics argue with much

(1989); see also S. Korcheck, *Measuring Student Learning: Statewide Student Assessment Programs in the SREB States 3* (S. Regional Educ. Bd., 1988) (summarizing a review of 1986-1987 standardized test scores that "shows that student achievement was at or above the national average in virtually every [southern] state at every grade level in every subject area tested").

⁹⁹ Inflexibility criticisms contend that because of their rigidity, tests and other fixed measures of quality have harmful educational effects. These negative effects include: the numbing constraints imposed on curriculum and teaching methods by the necessity of enabling children above all else to pass tests; the devaluation of such untestable subjects and goals as writing, graphic and performing arts, critical thought, problem solving, creativity, and leadership; repression of bright students; deemphasis on learning for its own sake and trivialization of knowledge and thinking into matters of multiple choice; and the devolution of control over education from the local to the state level of government. E.g., Comm. of Correspondence, *Education for a Democratic Future*, in *Great School Debate*, supra note 98, at 374, 381-83; *Barriers to Excellence*, supra note 94, at 47; Darling-Hammond, supra note 98, at 250-51; Down, *Assassins of Excellence*, in *Great School Debate*, supra note 98, at 273, 278 (characterizing minimum competency testing as "new version of mediocrity masquerading as excellence"); Gregoire, *Don't Judge Me by Tests*, in *Great School Debate*, supra note 98, at 252; Haney & Madaus, *Searching for Alternatives to Standardized Tests: Whys, Whats, and Whithers*, 70 *Phi Delta Kappan* 683 (1989); Howe, *Giving Equity a Chance in the Excellence Game*, in *Great School Debate*, supra note 98, at 281, 284; Neill & Medina, supra note 98, at 692-95 (comprehensive survey of ill effects of standardized testing); Paulson & Ball, *Back to Basics: Minimum Competency Testing and its Impact on Minorities*, 19 *Urb. Educ.* 5, 7-8 (1984); Raywid, *The Coming Centralization of Education*, in *Great School Debate*, supra note 98, at 400, 403-04; Wiggins, "Standards" Should Mean "Qualities," Not Quantities, *Educ. Week*, Jan. 24, 1990, at 36, col. 2; Texas Officials Modify State Assessment to Minimize Ways to "Teach to the Test," *Educ. Week*, Mar. 29, 1989, at 7, col. 1; Olson, *Eight Southern States Compare Student Achievement*, *Educ. Week*, Oct. 1, 1986, at 5, col. 1 (Louisiana officials conclude that MCTs cause lower achievement in average to above-average students).

¹⁰⁰ According to the inequity critique, performance standards for students, although potentially useful to diagnose and remedy deficiencies in students' basic skills and schools' pedagogical techniques, are used in fact to mark disproportionate numbers of poor and minority children as failures and thereby to deprive them of higher educational and employment opportunities. E.g., *Barriers to Excellence*, supra note 94, at 46; Glazer, supra note 98, at 312; Paulson & Ball, supra note 99, at 8; Serow, *Effects of Minimum Competency Testing for Minority Students*, 16 *Urb. Rev.* 67, 73-74 (1984) (finding that blacks have a substantially lower pass rate than other groups on MCTs and are disproportionately likely to be sanctioned by loss of diploma for failure to pass tests). Of particular concern is the possibility that the negative self-concept caused by the failure to satisfy performance standards and the anticipated denial of the only tangible benefit disadvantaged students have to gain from competing in school will "push" those students out of school. *Barriers to Excellence*, supra note 94, at 6-7; see H. Hodgkinson, supra note 94, at 12; *Time for Results*, supra note 93, at 14; McDill, Natriello & Pallas, *A Population at Risk: Potential Consequences of Tougher School Standards for Student Dropouts*, 94 *Am. J. Educ.* 135 (1986); Paulson & Ball, supra note 99, at 8; Peterson, supra note 98, at 18; Serow, supra, at 73; Fiske, *Making Low Achievers Repeat a Grade: Though Applauded, It Doesn't Work*, *Studies Show*, *N.Y. Times*, Jan. 24, 1990, at B5, col. 6. Preliminary data suggest a link between increased use of MCTs and higher dropout rates. See Serow, supra, at 73; Texas Poll Ties Dropout-Rate Climb to Reforms,

force that the imposition of higher standards on poor and minority children than they currently can satisfy, without a concomitant change in instructional environment, can only hurt those children. The situation is exacerbated by the fact that many states have enacted minimum-standards legislation without providing remedial services¹⁰¹ to children who do not meet the standards on the first try, thus suggesting that the standards' primary purpose is exclusion, not diagnosis or resource allocation.¹⁰² As one commentator notes, "a majority of

Educ. Week, May 21, 1986, at 4, col. 3. But see W. Clune, P. White & J. Patterson, *supra* note 95, at 27 (surveying "[e]merging quantitative data" that link "higher standards to lower mean dropout rates" (emphasis added)).

¹⁰¹ By remedial services, a term used throughout this Article, I do not mean "pull-out" remedial classes and tracks but rather instructional techniques (probably not including pull-out devices) that effectively overcome students' educational deficits. See Rothman, In an Effort to Boost Achievement, Denver Abolishes Remedial Classes, *Educ. Week*, Oct. 11, 1989, at 1.

¹⁰² Minimum competency tests may be used to *diagnose* capabilities and deficiencies, to *allocate* services or resources, and to *exclude* persons or institutions from eligibility for benefits available to those that do meet the standards. Arkansas, New Jersey, and New York, for example, use intensive testing programs diagnostically to identify students lacking basic skills and schools in need of improvement, allocatively to determine students' need and eligibility for remedial services and schools' eligibility for certain dedicated funds, and exclusionarily to deny students diplomas and to single out "failing" schools. See, e.g., N.Y. Educ. Law § 3602(1)(e) (McKinney 1990); N.Y. Comp. Codes R. & Regs. tit. 8, §§ 100.2(m)(1)(i), 100.3(b)(2)-(3), 100.4(d)-(f), 100.5(a)(4), 149-1 (1989); M. Goertz, *supra* note 95, at 35, 95; Verhovek, Albany Issues List of Schools in Trouble, *N.Y. Times*, Dec. 19, 1989, at B1, col. 1; The 338 Worst Public Schools—and We Name Them All, *N.Y. Post*, Dec. 10, 1985. On the increasing diagnostic use of student test scores as a basis for measuring school quality and identifying schools in need of improvement, see Illinois Superintendent Proposes Outcome-Based Regulatory System, *Educ. Week*, Feb. 14, 1990, at 2, col. 3 (recommendation of state superintendent that state rate and regulate schools based on test scores and other outcome measures); Rothman, States Turn to Student Performance as New Measure of School Quality, *Educ. Week*, Nov. 8, 1989, at 1, col. 3 (majority of states now use measures of instructional outcomes as basis for assessing quality of schools in state); see also M. Goertz, *supra* note 95, at 11-12 (noting that, as of 1985, eight states were using test scores to decide how to distribute state educational funds; 20 offered remedial services to students who fall below standard); Connecticut to Link Aid, Test Scores, *Educ. Week*, May 25, 1988, at 10 (Connecticut plan to distribute aid to school districts based on number of students scoring below the remedial level and on test-score improvement rates). A substantial number of states use their testing programs in a primarily exclusionary fashion. M. Goertz, *supra* note 95, at 11-12 (noting that in 1985 survey, of 24 states that made test scores a basis for denial of promotion, matriculation, or a diploma, 11 made no provision for remedial services to students falling below standard); H. Hodgkinson, *supra* note 94, at 12. Among the negative or exclusionary consequences that minimum-standards legislation may impose on students falling below standard are placement in lower tracks and denial of eligibility for promotion to a higher grade, to matriculate to another school, to take part in extracurricular activities, to receive a diploma or graduate, to receive a driver's license, and to attend a state university. M. Goertz, *supra* note 95, at 10, 27-

the 'reform' States have, in essence, moved up the high jump bar from four to six feet without giving any additional coaching to the youth who were not clearing the bar when it was at four feet."¹⁰³

These events create two possible courses of action. One calls for poor and minority communities to mobilize in opposition to minimum standards on the grounds that they inevitably will be used against poor and minority children and are discriminatory, educationally anathema, and unlawful.¹⁰⁴ The other course of action seeks to harness minimum standards' educational-improvement impulses by enforcing standards *on behalf of* poor and minority children and *against* incompetent school officials, ineffective schools, and impotent educational practices.

In keeping with the general "go-with-the-political-flow" posture adopted in Part I, and given the tidal wave of support for minimum-performance standards¹⁰⁵ and the swelling concern within the "Excellence Movement" about the educational status of minority children,¹⁰⁶ I here explore the latter option. Put most simply, I examine

134; see also Birmingham Drops Skills Test as Requirement for Promotion, *Educ. Week*, Nov. 1, 1989, at 3, col. 1 (test scores eliminated as decisive basis for determining promotion to second through eighth grades because its principal effect was to prevent hundreds of students who passed all their courses from passing to the next grade).

¹⁰³ H. Hodgkinson, *supra* note 94, at 11-12.

¹⁰⁴ See Center for Law and Educ., *Minimum Competency Testing: A Manual for Legal Services Programs* (1979); Logar, *Minimum Competency Testing in Schools: Legislative Action and Judicial Review*, 13 *J.L. & Educ.* 35 (1984); Snider, *State Mandates, Equity Law: On a Collision Course?*, *Educ. Week*, Feb. 18, 1988, at 2; see also McClung, *Competency Testing Programs: Legal and Educational Issues*, 47 *Fordham L. Rev.* 651 (1979) (describing possible legal challenges to minimum standards and suggesting approaches state officials can take to avoid such challenges); Note, *Testing the Tests, The Due Process Implications of Minimum Competency Testing*, 59 *N.Y.U. L. Rev.* 577, 618 (1984) (arguing that minimum standards might violate due process if safeguards are not provided to protect important liberty interests of students).

¹⁰⁵ The recent coalescing of political support for performance standards was reflected in a Gallup Poll, in which 70% of respondents favored "requiring public schools to conform to national achievement goals." Performance standards also have the support of the nation's two largest teachers' unions and of the educational specialty groups responsible for designing standards for their specialty. Cohen, *supra* note 93, at 20, cols. 1-2. This relatively longstanding consensus among educational advocates has extended to the business community and to politicians at the state and federal levels, in the legislative and executive branches, and in both parties. *Id.*

¹⁰⁶ E.g., Carnegie Found. for the Advancement of Teaching, *An Imperiled Generation—Saving Urban Schools* (1988); Council of Chief State School Officers Study Comm., *Children at Risk: The Work of the States* (Oct. 1987); Council of Chief State School Officers, *Elements of a Model State Statute to Provide Educational Entitlements for At-Risk Students* (Nov.

the capacity of poor and minority communities to use the enactment into law of minimum educational-performance standards as a basis for inferring and enforcing a democratically legitimated obligation on the part of public authorities to distribute to children the educational means necessary to satisfy those standards.¹⁰⁷

The second feature of the early 1990's that bears favorably on the proposed strategy's likelihood of success is the preeminence the ascendant wing of the Supreme Court has given recently to majoritarian decisionmaking.¹⁰⁸ The Court's majoritarianism has two generally favorable implications for the strategy proposed here. First, it concentrates the Court's undoubted skepticism about litigative reform efforts on a characteristic of many such efforts that the strategy proposed here suppresses, namely, the demand that judges sanctify and enforce substantive values in the process of constitutional interpretation.¹⁰⁹ Second, as long as the distributive impulse being enforced

1987); *The Same Client*, supra note 44; *Barriers to Excellence*, supra note 94, at 6-7; *A Nation at Risk*, supra note 93, at 13, 32; *Time for Results*, supra note 93, at 14-15, 97-98, 107; *Educating Americans*, supra note 95, at vi-vii; *Action for Excellence*, supra note 93, at 44; *Making the Grade*, supra note 93, at 15; *Jeffersonian Compact*, supra note 97; Weinraub, supra note 93, at A10, col. 1 (reporting President Bush's statement that reforms should "[e]xploit[] the potential of every student, not only those who are gifted but also the 'average students' and the disadvantaged"); Johnson, supra note 96, at 24, col. 1 (reporting statements by Secretary of Education Cavazos and congressional Democrats that goals should be set for "reducing dropout rates, particularly among black and nonwhite Hispanic students," "narrowing the gap between the standardized test scores of white and minority students," and "raising college enrollment, particularly among minorities"); *U.S. Calls Education of Poor a Priority*, N.Y. Times, Jan. 14, 1987, at B3, col. 1. But see Mathis, *Children at Risk: "There's a Lot More Oratory than Real Money,"* Educ. Week, Apr. 26, 1989, at 9.

¹⁰⁷ Most of the legal theories developed below are available to all communities beset by failing schools. I nonetheless refer throughout this Part to "poor and minority" communities because that is the audience I am addressing here and, in any event, because the number of affluent white communities with failing schools is small.

¹⁰⁸ See, e.g., Chemerinsky, *The Vanishing Constitution*, 103 Harv. L. Rev. 43, 61-74 (1989).

¹⁰⁹ E.g., *Stanford v. Kentucky*, 109 S. Ct. 2969, 2980 (1989) (plurality opinion); *Michael H. v. Gerald D.*, 109 S. Ct. 2333, 2341 (1989) (plurality opinion); *DeShaney v. Winnebago County Dep't of Social Servs.*, 109 S. Ct. 998, 1003 (1989); *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986). One could argue that this "interpretive" aspect of the majoritarian-democratic impulse, see *infra* note 256 and accompanying text, dooms school desegregation, even as reoriented in Part I, because of the priority school desegregation strategies accord to equality when that interest collides with the will of the majority. As I develop elsewhere, however, most theories of democracy include an equality principle that assures all citizens of equal concern and respect in the democratic process. See Liebman, supra note 7, § III.B.1. Accordingly, by reorienting school desegregation as a political reform, that strategy can be seen as serving and not as opposing the priority of democracy. See *id.* In any event, if the

through litigation can be shown to arise out of the democratic process, the Court's majoritarianism leaves it less sympathetic to the conservative objection to reform efforts generally that they involve the state in redistributing wealth.¹¹⁰ Put differently, the nineties seem ripe for a reform strategy that distributes resources not, like desegregation, on the basis of judicially "discovered" constitutional norms, but rather on the basis of democratically enacted majoritarian standards.

Cutting against these favorable consequences of the Court's majoritarianism is an unfavorable consequence: the disposition of some of the Court's conservative members to interpret statutes narrowly.¹¹¹ Given its cross-cutting implications, this second feature of the modern scene, unlike the first, is unlikely to increase the propulsive political force behind the proposed strategy. Still, majoritarian predilections may decrease somewhat the modern judiciary's predictable resistance to litigatively powered reform efforts insofar as the strategy's proponents can establish the majoritarian-democratic bona fides of the distributive impulses that the strategy seeks to harness.

majoritarian-democratic impulse does undercut the old strategy, even as reoriented, it emphasizes all the more the need for the new strategy proposed here.

¹¹⁰ E.g., *Skinner v. Mid-America Pipeline Co.*, 109 S. Ct. 1726 (1989) (upholding constitutionality of statute authorizing Secretary of Transportation to impose user fees to cover costs of federal pipeline safety programs); *Pennell v. City of San Jose*, 108 S. Ct. 849 (1988) (holding that rent control ordinance that allows hearing officer to fix reasonable rent based in part on hardship of the tenant does not violate due process or equal protection clauses; takings issue deemed unripe); see Chemerinsky, *supra* note 108, at 50-51 (distinguishing *Lochner* and current judicial era in part on this basis). But see *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706 (1989) (invalidating city's democratically adopted affirmative action program favoring minority contractors).

¹¹¹ E.g., *K Mart Corp. v. Cartier, Inc.*, 108 S. Ct. 1811, 1831-34 (1988) (Scalia, J., concurring in part, dissenting in part); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 452 (1987) (Scalia, J., concurring in the judgment); *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570 (1982). The Court is by no means uniformly disposed to interpret statutes narrowly. Recent decisions reflecting a relatively broad approach to legislative interpretation include *Shell Oil Co. v. Iowa Dep't of Revenue*, 109 S. Ct. 278, 281 n.6 (1988); *EEOC v. Commercial Office Prods. Co.*, 108 S. Ct. 1666, 1671-74 (1988); *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 284-86 (1987) (plurality opinion); *Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection*, 474 U.S. 494, 505-06 (1986); *Bob Jones Univ. v. United States*, 461 U.S. 574, 591-96 (1983). On the relationship between majoritarian theory and legislative interpretation, see, e.g., Easterbrook, *Statutes' Domains*, 50 U. Chi. L. Rev. 533 (1983); Eskridge, *Spinning Legislative Supremacy*, 78 Geo. L.J. 319 (1989); Eskridge & Frickey, 42 Stan. L. Rev. 321 (1990); Farber, *Statutory Interpretation and Legislative Supremacy*, 78 Geo. L.J. 281 (1989).

The hypotheses underlying the strategy proposed here are these: By promulgating the various educational-performance standards and overlaying them on America's traditional system of compulsory and publicly available education, legislators have authoritatively identified those standards as the measure of a "minimally adequate education." (Although judges have refused to identify such a measure on their own, they now can use the democratically legitimized measure that state legislators have identified to gauge the sufficiency not only of the "education" individual children acquire, but also of the "education" public schools afford.) In addition, by promulgating standards and applying them to all children—whom the state compels to attend school and to meet performance standards or be stigmatized by force of state law—the states have committed themselves to the assumption (another step the courts have refused to take by themselves) that all children are capable of satisfying minimum standards. By taking these steps, legislators have fashioned the components of an enforceable duty on the part of school officials to provide, and a right on the part of children to receive, at least that legislatively defined "minimally adequate" level of education. Simultaneously, legislators have withdrawn the shield against outside enforcement efforts (behind which the courts long have hidden¹¹²) that education is a sacrosanct matter of local concern hence inappropriate for state- or federal-level review.¹¹³

¹¹² E.g., *Milliken v. Bradley*, 418 U.S. 717, 741-42 (1974) ("No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process."); *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 49-50 (1973); *Wright v. Council Emporia*, 407 U.S. 451, 478 (1972) (Burger, C.J., dissenting).

¹¹³ As expressed by President Bush and the 50 governors, the government has committed itself to the fourfold proposition that: (1) a minimally adequate education is indeed definable in terms of "the knowledge and skills required in an economy in which our citizens must be able to think for a living" and measurable using "clear, national performance goals"; (2) "every child *can* acquire th[at] knowledge and [those] skills"; (3) the state has a duty to provide "a rigorous program of instruction designed to ensure" that children do so; and (4) notwithstanding education's traditional place as a state responsibility, national standards are now required, as is a renewed commitment by the federal government to funding educational "services for young people most at risk." *Jeffersonian Compact*, *supra* note 97, at E22, col. 2, 3, 5 (emphasis added); accord enactments and commentary quoted *infra* notes 122-23 and accompanying text. On the weakening of local control over the schools, see Anderson & Pipho, *State-Mandated Testing and the Fate of Local Control*, 66 *Phi Delta Kappan* 209 (1984); Doyle & Finn, *American Schools and the Future of Local Control*, 77 *Pub. Interest* 77

Relying on the favored status of educational redistribution in this nation's history and liberal ideology, therefore, this strategy first identifies as the codified political consensus of the community that formal educational equality—"equal access"—does not suffice and that a kind of substantive equality—"equal chances"—is also required;¹¹⁴ the strategy then seeks to enforce this conclusion judicially.¹¹⁵

A. An Illustration, an Intuition, and an Initial Policy and Legal Inquiry

Lawyers and courts traditionally have provided redress for citizens who are legally owed unliquidated duties by public officials.¹¹⁶ The crux of the strategy explored here is that minimum-performance standards for schools and students create just such legally enforceable duties. Before supporting this conclusion with technical legal analy-

(1984); Raywid, *supra* note 99; Cohen, *supra* note 93, at 20, col. 3 (" 'weakening of localism' . . . [precipitated] by technological advancements and a more geographically mobile population"); Johnson, *supra* note 96, at 24, col. 1 (quoting statement of Albert Shanker, president of the American Federation of Teachers, contrasting President Bush's endorsement of national educational standards with tendency of prior Administrations to "steer[] clear away from anything that might have smacked of local curriculum control or anything like that"); Walker, 2 Kentucky Districts Deemed "Deficient," *Face State Takeover*, *Educ. Week*, Jan. 18, 1989, at 1; Arkansas Accountability Plan Could Force District Mergers, *Educ. Week*, Jan. 18, 1989, at 9, col. 5; *infra* note 174.

¹¹⁴ By equal access, I mean the removal of extrinsic barriers to educational attainment; by equal chances, I mean, in addition, the removal of the social contingencies affecting educational attainment.

¹¹⁵ I say a "kind" of substantive equality because the strategy I describe here does not attempt to enforce more controversial versions of substantive educational equality, namely, "equal ability" (natural contingencies affecting educational attainment also removed) or "equal outcomes" (motivational contingencies also removed). See J. Dewey, *supra* note 87, at 24 (arguing that schooling should ensure "that each individual gets an opportunity to escape from the limitations of the social group in which he was born"); *id.* at 97 (arguing that democratic society must provide citizens with schooling "of such amplitude and efficiency as will in fact and not simply in name discount the effects of economic inequalities"); J. Rawls, *supra* note 57, at 73 (defining "principle of fair equality of opportunity" as providing that "those who are at the same level of talent and ability and have the same willingness to use them, should have the same prospects of success regardless of their initial place in the social system"); cf. B. Ackerman, *supra* note 87, at 26-28, 139-67 (implying that a just liberal state must afford all children an education sufficient to answer claims that uneven family, developmental, and genetic backgrounds undermine the equality of citizens).

¹¹⁶ E.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 162-63 (1803); *infra* notes 177-85 and accompanying text; see W. Gellhorn, C. Byse, P. Strauss, T. Rakoff & R. Schotland, *Administrative Law* 985-1081 (8th ed. 1987) [hereinafter W. Gellhorn].

sis, let me first appeal to intuition by using an illustration.¹¹⁷

New York law now requires that elementary and secondary school officials administer reading and mathematics tests at the third, sixth, eighth-ninth, and tenth-eleventh grade levels. The tests are designed to assess whether students have achieved minimum mastery over those subjects and, eventually, to determine eligibility for a diploma. Below-standard student performance on the tests automatically triggers remedial assistance, which is explicitly required to afford low-scoring students the skills needed to pass similar tests administered later in their school careers, including the final tests that control eligibility for a diploma.¹¹⁸ In a number of New York City schools, upwards of half of the children taking the third grade tests fall below the state benchmark,¹¹⁹ following which either no remedial help is provided or the remedial plans that are implemented fail to enable most of the previously below-standard children to score at or above standard on the sixth grade, junior high, and high school versions of

¹¹⁷ This illustration draws upon minimum-standards enactments in New York and educational conditions in New York City. Those enactments and conditions are similar to ones in other states and urban areas in the nation. See *supra* note 93 and accompanying text.

¹¹⁸ N.Y. Comp. Codes R. & Regs. tit. 8, §§ 100.2(e), 100.3(b)(3), 100.4(f)(2), 100.5(a)(4)(iv) (1989).

¹¹⁹ Fifty-two, 58, 59, and 61% of the high school students taking the Regents Competency Test in January, 1987, in the boroughs of Queens, Bronx, Manhattan, and Brooklyn, respectively, fell below the state reference point for diplomas. Div. of Educ. Testing, N.Y. State Educ. Dep't, State Tests and High School Graduation Reference Group Summaries: October 1987, tables 1 and 2. In New York City, 42% of third graders and 41% of sixth graders fell below state reference point on reading tests administered in the Spring of 1985; statewide, the corresponding figures were 21 and 20%. Div. of Educ. Testing, N.Y. State Educ. Dep't, State Tests and High School Graduation Reference Group Summaries: 1985-86 School Year, table 1. A comparison of the percentage of elementary "schools in need of assistance" (schools reporting mean test scores and other data placing them in the lowest-performing 10% of schools in the state), which ranges from 0% in an upper middle-class subdistrict in Queens to 100% in some predominantly poor and minority subdistricts in Brooklyn and Manhattan, reveals the high concentration of low-scoring students in certain schools and subdistricts in the New York City District. Div. of Educ. Testing, N.Y. State Educ. Dep't, 1985 Comprehensive Assessment Report; see also Verhovek, *supra* note 102, at B1, col. 1 (39 of 43 most academically troubled schools in New York are in the New York City school district). Similarly, in Hartford, Connecticut, fully 70, 59, and 57% of the district's children recently fell below the state's legislatively mandated remedial benchmark on fourth, sixth, and eighth grade reading tests (compared to typically 10-20% of the children in adjacent suburban districts). Likewise, 41, 42, and 57% of Hartford's children fell below the state's remedial benchmark on fourth, sixth, and eighth grade mathematics tests (compared to typically 3-15% of the children in adjacent suburban districts). Complaint at 13-14, *Scheff v. O'Neill* (Hartford/New Britain Super. Ct. filed Apr. 26, 1989).

the same tests.¹²⁰

To lay persons and to lawyers it intuitively seems fair to say that school officials have broken a promise to students—namely, to provide them with a minimally adequate education in reading and mathematics or, more specifically, to provide them with sufficient educational resources to enable them to master the material on the state-mandated tests.¹²¹ This intuition finds considerable support in New York's minimum-standards regulations that, according to the commentary accompanying them, give "[e]very student in the State . . . an assurance of State quality control in education," "provide each student the opportunity to reach or exceed [state-mandated] standards and requirements," and assure that "differences in results [are not] the products of prejudice or discrimination."¹²² Indeed, the reg-

¹²⁰ This conclusion is based upon interviews of community school district superintendents, principals, teachers, legal aid attorneys, other community and policy advocates, and educational experts in New York City conducted by the Minimally Adequate Education Group of the Columbia University School of Law Education Law Project during the 1987 Spring term. See also Watchdog Group Calls Remediation Inadequate in New York City, *Educ. Week*, Nov. 22, 1989, at 2, col. 5 (study showing, inter alia, that more than 40% of fourth graders in New York City's public schools who are entitled to receive remedial services based on their third grade mathematics test scores do not receive such services and also documenting the use of unqualified instructors to provide those remedial services that are available).

¹²¹ Emblematic of the intent and effect of minimum-standards legislation to create accountability on the part of test-givers as well as test-takers is the following statement by Governor Bill Clinton of Arkansas about the Jeffersonian Compact on Education that the President and governors signed recently:

This is the first time a President and governors have ever stood before the American people and said: "Not only are we going to set national performance goals, which are ambitious, not only are we going to develop strategies to achieve them, but we stand here before you and tell you we expect to be held personally accountable for the progress we make in moving this country to a brighter future"

Miller, *Summit's Promise: "Social Compact" for Reforms*, *Educ. Week*, Oct. 4, 1989, at 1. On the importance of respecting expectations generated by statutory norms and the "demoralization" costs that accompany government frustration of such expectation, see J. Mashaw, *Due Process in the Administrative State* 122-23 (1985); Grey, *Procedural Fairness and Substantive Rights*, in *Due Process*, *Nomos XVIII*, at 192-94 (J. Pennock & J. Chapman eds. 1977).

¹²² Regents Action Plan, *supra* note 95, at 2, 4; accord *id.* at 2 ("the goals, objectives, standards and requirements of our plan apply to *all* students"). Similarly, the Connecticut State Department of Education stated that its goal of "[e]qual educational opportunity" means student access to a level and quality of programs and experiences which provide each child with the means to achieve a commonly defined standard of an educated citizen, "require[s] resource allocations based upon individual student needs and sufficient resources to provide each child with opportunities for developing his or her intellectual abilities and special talents," and is evidenced by "the participation of each student in programs appropriate to his

ulations themselves state that each school district “*shall* offer students attending its schools the opportunity to meet all [including the testing] requirements for and receive a Regents High School Diploma” and that “students who score below the designated state reference point on [state-mandated tests] *shall* be provided appropriate remedial instruction designed to enable them to score above the State reference point on the corresponding” test given later in the students’ educational careers.¹²³ This initial intuition is informed, finally, by the unreasonableness—particularly given the role of public education in liberal polities¹²⁴—of a legal system that forces children to attend school, requires them to take tests covering materials they cannot master on their own, fails to assist them in mastering the materials, then penalizes them for failing to do so.¹²⁵

The intuitive appeal of viewing the new standards as creating enforceable rights and duties is immediately challenged by a number of legal and policy questions: Particularly in an era of strict statutory interpretation, are judges likely—and should they be encouraged—to interpret every expression of aspirational educational policy as an

or her needs and the achievement by each of the state’s student sub-populations (as defined by such factors as wealth, race, sex or residence) of educational outcomes at least equal to that of the state’s student population as a whole.” Conn. State Bd. of Educ., Policy Statement on Equal Educational Opportunity 1 (adopted May 7, 1986) (attached to Circular Letter C-15, Series 1986-1987, from Gerald N. Tirozzi, Commissioner of Education, to Superintendents of Schools (Oct. 27, 1986)). Although New York’s regulations do not say so, I am assuming they apply only to students not properly determined to be functionally mentally handicapped and hence outside the range of normal intellectual ability, see *Board of Educ. v. Ambach*, 90 A.D.2d 227, 458 N.Y.S.2d 680 (1982), *aff’d mem.*, 60 N.Y.2d 758, 457 N.E.2d 775, 469 N.Y.S.2d 669 (1983), *cert. denied*, 465 U.S. 1101 (1984), and my discussion here likewise is only intended to apply to such students. See *infra* notes 199-201 and accompanying text for a discussion of *Ambach*.

¹²³ N.Y. Comp. Codes R. & Regs. tit. 8, §§ 100.2(e), 100.3(b)(3) (1989) (emphasis added); see also Conn. State Bd. of Educ., *supra* note 122, at 3 (providing that “[a]ll students will receive such remedial education services as are appropriate to their needs”).

¹²⁴ See *supra* notes 79-89 and accompanying text.

¹²⁵ See *Debra P. v. Turlington*, 474 F. Supp. 244 (M.D. Fla. 1979), *aff’d in part*, vacated in part, 644 F.2d 397 (5th Cir. 1981) (holding that combination of mandatory-attendance and mandatory-testing laws creates duty to provide all students with instruction sufficient to acquaint them with material covered on state-mandated tests); *infra* notes 192-208 and accompanying text; see also Note, Educational Malpractice and a Right to Education: Should Compulsory Education Laws Require a Quid Pro Quo?, 21 Washburn L.J. 555, 568 (1982) (arguing, citing *Donaldson v. O’Connor*, 493 F.2d 507 (5th Cir. 1974), vacated and remanded on other grounds, 422 U.S. 563 (1975), that students deprived of liberty to forgo attending school deserve quid pro quo of minimally adequate education just as courts have concluded that mental patients involuntarily deprived of liberty are entitled to quid pro quo of treatment).

enforceable commitment to effectuate that policy? Is it reasonable to suppose—and is it wise to invite judges to rule—that legislators, by promulgating minimum-standards laws, intended to redistribute substantial resources from citizens who do not have underachieving children in the public schools to citizens who do and from other projects of public concern to public instruction? Even if so, will plaintiffs be able to establish causal links between breaches of duties and educational underachievement, notwithstanding the myriad organic and sociological factors that contribute to educational outcomes? If so, are adequate educational remedies available? And, if so, will those remedies be of a “separate but equal” sort that only perversely can be called mechanisms for implementing “*Brown*”?

The answers to these questions depend largely upon highly contextualized analyses of the particular legal theories being utilized to enforce minimum standards and the particular standards being enforced.¹²⁶ To facilitate such analyses, the next four Sections examine a number of potential legal theories and a number of common statutory educational-performance standards. The remainder of this Section offers some initial, more broadly gauged answers to these questions.

1. *Duty*

Two perspectives on the question whether minimum-standards laws do and ought to create enforceable duties interest me here—that of someone concerned with fostering competent and democratically legitimate decisionmaking on matters of public policy¹²⁷ and that of potential plaintiffs. Considered from both perspectives, there is reason to think that principled legal conclusions will lead to desirable policy outcomes. Put differently, the questions the governing legal doctrines require courts to answer affirmatively as a matter of law before a duty is inferred appear to be the same questions that the persons whose perspectives I have identified would want answered

¹²⁶ The needs and educational deficits of the particular client populations being served and the capacities of and competing demands on the particular educational systems and political jurisdictions being scrutinized also may bear heavily on the answers to these questions, but are beyond the scope of this Article.

¹²⁷ Taking this policy perspective allows me to test the proposed strategy's capacity to take advantage of the majoritarian impulse discussed *supra* notes 108-11. In Section E *infra*, I examine the proposed strategy from a different, educationally focused, policy perspective.

affirmatively as a matter of policy and practice before a duty is imposed.

From the policy analyst's perspective, the duty-defining aspect of the proposed strategy poses two dangers: First, the strategy might put legislators to an undesirable choice between, on the one hand, not acting at all to improve education or to acknowledge the need for improvement (legislators might, for example, eschew or repeal minimum-standards laws) and, on the other hand, committing educational officials to solving all the state's educational problems at once on pain of judicial scrutiny and control if the officials fail. Second, the strategy might assign to the courts—an authority arguably lacking in competence and legitimacy—the task of redistributing resources between different groups of citizens and between competing projects of public concern on the basis of fuzzy legal standards of the courts' invention.¹²⁸ Both hazards reflect the possibility that implementing the proposed strategy would shift flexibility and control in regard to matters of public policy from authorities who are relatively more democratic and expert to authorities who are relatively less so.¹²⁹

Undoubtedly, a court's recognition and enforcement of a legal duty on the part of the state can curb substantially the flexibility and control exercised by state officials in the affected sphere of activity. As discussed in more detail in the next three Sections, however, the doctrines that determine whether a legally enforceable duty exists are designed, in theory at least, to divert judicial attention away from what judges think is good policy, and even from what judges think the framers of a constitution thought was good policy decades or centuries ago. The doctrines focus judicial attention instead on what a political majority thought was good policy when it recently spoke on the matter through its representatives. In theory, that is, every decre-

¹²⁸ See, e.g., D. Horowitz, *The Courts and Social Policy* 10-12, 167-69 (1977); J. Mashaw, *supra* note 121, at 260-64; Diver, *The Judge as Political Pawnbroker: Superintending Structural Change in Public Institutions*, 65 Va. L. Rev. 43, 69-70 (1979); Elson, *A Common Law Remedy for Educational Harms Caused by Incompetent or Careless Teaching*, 73 Nw. U.L. Rev. 641, 646 (1978); Goldstein, *A Swann Song for Remedies: Equitable Relief in the Burger Court*, 13 Harv. C.R.-C.L. L. Rev. 1, 45-48 & nn.234, 236-37 (1978).

¹²⁹ Just how much more democratic and expert legislatures are than courts is subject to considerable dispute. E.g., M. Rebell & A. Block, *Educational Policymaking and the Courts* 205-15 (1982); Cavanagh & Sarat, *Thinking About Courts: Toward and Beyond a Jurisprudence of Judicial Competence*, 14 L. & Soc. Rev. 371, 373, 411-14 (1980); Chemerinsky, *supra* note 108, at 77-87.

ment in legislative control and every increment in judicial authority caused by the recognition of a statutorily created duty—as well as the resulting redistribution of resources—depends upon the more democratic and expert body's constantly revisable choice thus to limit and bind itself, thus to empower the less democratic and expert body, and thus to allocate resources.

At best, therefore, the contemplated enforcement strategy may be seen as contingent upon a judicial finding that the legislature intentionally, or at least advertently, delegated responsibility to the courts to help enforce the public policies that a political majority adopted.¹³⁰ There is no obvious reason, moreover, why legislatively endorsed judicial enforcement mechanisms are democratically illegitimate. Indeed, to the extent that specificity and clarity in the directives legislators give to enforcement authorities enhance democratic control,¹³¹ judicial enforcement is more democratically legitimate than administrative enforcement mechanisms. For courts insist upon greater legislative specificity and clarity before recognizing and executing legislative “delegations” to themselves than they demand before allowing administrative bodies to recognize and execute delegations to those bodies.¹³² Similarly, the existence of judicial enforcement techniques increases rather than interferes with legislative flexibility.

At worst, the contemplated strategy's viability from a policy standpoint depends upon the assumption—not, I think, unreasonable—that the use of judicial as well as political devices to hold legislators to what they and their constituents legitimately understood at the time

¹³⁰ By advertent as opposed to intentional delegations, I refer to laws that legislators did not specifically design to trigger judicial enforcement but which the legislators had reason to expect would do so.

¹³¹ See, e.g., J. Ely, *supra* note 56, at 131-34 (advocating a revitalization of the nondelegation doctrine on the ground that legislative specificity and clarity increase “the sort of accountability that is crucial to the intelligible functioning of a democratic republic”).

¹³² Compare *infra* notes 176-208 and accompanying text (relatively high degree of legislative specificity and clarity upon which courts insist before recognizing enforceable duties and entitlements in mandamus and procedural due process actions) with J. Ely, *supra* note 56, at 132-33 (demise of nondelegation doctrine in judicial review of agency action pursuant to open-ended grants of legislative power) and *Chevron v. Natural Resources Dev. Council*, 467 U.S. 837, 842-43, 865-66 (1984) (in certain circumstances, administrative agencies have wider latitude in interpreting vague statutory language than do federal courts). At the very least, the nondelegation-type constraints that courts impose on themselves but not on administrative agencies neutralize the democratic advantage that administrative enforcement mechanisms might otherwise be thought to have over judicial enforcement mechanisms. See *infra* note 171.

to be promises does not substantially interfere with and probably serves the policies favoring competent and democratic decisionmaking.¹³³ In sum, there is no evident reason to expect that conscientious judicial application of the legal doctrines governing the identification of public duties will frustrate, and there is some reason to hope that it will facilitate, democratic policies.

From the perspective of potential plaintiff schoolchildren and their lawyers, this discussion raises the question of why resources should be expended to enforce legal duties that, particularly after being enforced, are at great risk of being legislatively devalued or revoked. My answer to this question is that sound judgments about the strategy's prospects for legal success ought to serve as reasonably good predictors of the likelihood that the plaintiff children actually will benefit if the strategy does succeed legally.

Poor and minority children have the greatest incentive to enforce minimum standards in their *favor* when those standards otherwise are likely to be used *against* them by, for example, occasioning a denial of matriculation, graduation, or college attendance. Assume, as I argue elsewhere, that the attachment of such negative consequences to a child's failure to meet minimum standards enhances the likelihood under existing doctrine that a court will recognize a duty on officials' part to provide the child with the means to meet the standards.¹³⁴ In that event, the child's incentive to enforce the standards actually is increased by the possibility that enforcement will lead the legislature to devalue or repeal the duty by moderating or abandoning the negative consequences triggered by a failure to meet the standards. Again, the stronger is the legal case for inferring a duty, the stronger are the pragmatic reasons in favor of seeking to have a duty inferred, even at

¹³³ See, e.g., J. Mashaw, *supra* note 121, at 219-20; Easterbrook, *Substance and Due Process*, 1982 Sup. Ct. Rev. 85; Grey, *supra* note 121, at 192-94; *infra* notes 193-94, 213 and accompanying text (link between Supreme Court's majoritarianism and its "positivist" approach to "property" rights). The democratic bona fides of judicially enforcing statutorily created entitlements clearly encompass the legal theories developed below that either (1) directly enforce substantive statutory norms, (2) use statutory norms to inform constitutional norms, or (3) protect citizens' statutorily generated expectations by enforcing procedural requirements expressed or implied in the relevant statutes. Regarding the democratic bona fides of theories that protect citizens' statutorily generated expectations by substituting judicially for legislatively specified procedures, see *infra* note 214.

¹³⁴ See *supra* notes 124-25 and accompanying text; *infra* notes 192-209, 287-89 and accompanying text.

the risk of causing the legislature to modify the statutory traits based on which the duty was inferred.

Even when children suffer no negative consequences if they fail to satisfy minimum standards, the strength of the legal case for inferring a duty—the strength of the evidence that the legislature in effect promised that public instruction would enable children, with reasonable effort, to satisfy the standards—is likely to be commensurate with the strength of the political consensus in favor of providing children with the means to do so. It seems probable, that is, that unless one or both of the following circumstances was present, politicians would not have made what reasonably could be interpreted as binding promises of a sort that are difficult to fulfill and subject to objective determination of whether they have been fulfilled: Either the public must have insisted upon such promises in lieu of expressions of aspiration, or the legislators must have concluded that their promises bound actors other than themselves whose failure would not politically disadvantage the legislators.¹³⁵ If one of these circumstances did accompany adoption of the duty-creating law, moreover, legislators are likely to have either a political disincentive or at least no particular incentive to repeal the law after a court relies on it to infer a duty. Accordingly, subject to numerous instance-specific factors, there is reason to believe that the strength of the plaintiffs' legal case in favor of recognizing a duty will be roughly commensurate with the likelihood that the duty will survive its recognition. Just how strong the plaintiffs' legal case in favor of recognizing a duty is likely to be is the question taken up in Sections B-D below.

2. *Causation*

Assuming that courts can infer duties from statutory minimum educational-performance standards, can they also link individual students' educational deficits to breaches of those duties and thereby discount the claim of organic or sociological causes? Is it wise, by so doing, to encourage the public in general and educationally deprived

¹³⁵ Below, I consider the possibility that the proposed strategy unwisely seeks to enforce duty-creating minimum-standards legislation that irresponsibly obliges administrative officials to fulfill promises they are technologically unable to fulfill. See *infra* notes 141-64 and accompanying text. On the willingness of legislators to impose unreasonable duties on administrators and to make political capital out of the administrators' failure to abide by those duties, see J. Ely, *supra* note 56, at 131-32.

children in particular to see as "injustices" what otherwise might be understood as simply irremediable "misfortunes" of birth or social milieu?¹³⁶ Here, it seems to me, an authoritative holding that the legislature has established a duty to educate children also provides an authoritative answer to the policy aspects of this causation question. That answer, in turn, may ease the plaintiffs' burden in responding to the legal aspects of the causation question.

Assume that the plaintiffs can show that not just a few but many or most students in a given school fail tests not only on the first but also on successive tries.¹³⁷ We could treat this situation as reflecting the failing children's "misfortune" of not having the intellectual or sociological means to "make it" on the tests. Or, we could treat it as reflecting the "injustice" of being deprived of outcomes that the state had the obligation to assure those children. When a court holds that a minimum-standards law creates a duty to educate, that holding supports as well, it seems to me, a democratically legitimized presumption that the latter characterization is the proper one—that, absent contrary proof by school officials, it is not the students' misfortune but the officials' derogation of duty that accounts for the students' failure to progress.

Notice, to begin with, how severely a duty-creating minimum-standards regime limits the excusatory explanations available to school officials as a matter of policy and of law. Under prior—for example, educational malpractice—regimes, school officials could abjure responsibility (or negate the plaintiffs' charge of "injustice" with the excuse of "misfortune") by showing that a given high school graduate's social milieu, rather than the schools he attended, "caused" him (unfortunately, but not unjustly) to graduate as an illiterate.¹³⁸ In a duty-creating minimum-standards regime, by contrast, school officials

¹³⁶ See J. Shklar, *The Faces of Injustice* (1989) (paper delivered at the Columbia University Legal Theory Workshop, Jan. 29, 1990) (distinguishing "misfortune" and "injustice").

¹³⁷ See *supra* note 119.

¹³⁸ E.g., *Donohue v. Copiague Unified Free School Dist.*, 47 N.Y.2d 440, 446, 391 N.E.2d 1352, 1355, 418 N.Y.S.2d 375, 379 (1979) (Wachtler, J., concurring) (agreeing with majority's conclusion that proximate cause would be "difficult" to prove because "the student's attitude, motivation, temperament, past experience, and home environment may all play an essential and immeasurable role in learning"). See generally Elson, *supra* note 128, at 746-54 (proposing standards for proving causation of harm in educational malpractice suits). Within "social milieu," I include such conditions as impoverishment, undernourishment, cultural deprivation, limited English proficiency, lack of parental support, and the like.

no longer can avail themselves of that legal defense—and the philosophical move it reflects—given the regime's democratically embraced assumption that "each" and "[e]very student in the State,"¹³⁹ social milieu notwithstanding, can master the tested material. Nor, of course, can school officials challenge the validity of the tests students use to document their educational deficiency inasmuch as state lawmakers authoritatively have validated those tests for just that purpose. The only excuse left school officials, therefore, is the claim—which, it seems to me, is sufficiently unlikely to justify requiring school officials to prove it—that many or most students in the school were individually unwilling to apply themselves conscientiously to mastering the material covered in the exams. To express this conclusion in another way, once the state defines and holds its educational personnel to minimum performance standards, it is reasonable to resolve questions of fault and causation with respect to educational failures presumptively against the state whenever many or most of the students in a school or district are initially, or at least successively, unable to achieve state-mandated benchmarks on state-mandated exams.¹⁴⁰

3. *Remedy*

The question of remedy remains: Does the relative ease with which legislatures may be found to have created, school officials found to have breached, and school children found to have been injured by the breach of public duties merely reflect the ease with which legislators irresponsibly may accumulate political capital by thrusting on administrative officials the "duty" to solve what in fact are insoluble social problems? If so, enforcement efforts, however successful at the liability stage of litigation, will founder at the remedial stage. On the other hand, if remedies for educational deficits among minorities attending predominantly minority schools are available, are they not of a sepa-

¹³⁹ See *supra* note 122 and accompanying text.

¹⁴⁰ Arkansas law, for example, creates a conclusive presumption that schools in which 15% of the students fall below standard on state-mandated tests are failing schools, which must participate in a state-mandated school-improvement program. See M. Goertz, *supra* note 95, at 35; see also *supra* note 102 (similar provisions in New Jersey, New York, and a growing body of additional states). All that is proposed here is a rebuttable presumption of school failure based on high proportions of student failures.

rate-but-equal sort that undercuts and surely does not implement anew the holding of *Brown*?

The question whether viable remedies exist is primarily one of policy, not law.¹⁴¹ Given the possibility of irresponsible legislative buck-passing or breast-beating,¹⁴² however, I do not argue here, as I did above, that we should accept on faith what, by our duty-creating hypothesis, is the legislature's affirmative answer to that question.¹⁴³

Nor does the answer "more money" suffice, as events in Connecticut recently have revealed. There, notwithstanding years of legally successful finance-equity litigation, which substantially increased both the state's proportion of educational expenditures and urban districts'

¹⁴¹ Although the feasibility of alternative measures is relevant to whether a *common law* duty of care has been breached, see Fed. R. Evid. 407; P. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on Torts* (5th ed. 1984) § 31, at 172, the probativeness of an alternative-measures inquiry is partly or even wholly neutralized by a *legislative* specification of the duty and the attributes of its breach. See *id.*, § 36, at 227-33 (quoting *St. Louis, Iron Mountain & S. Ry. Co. v. Taylor*, 210 U.S. 281 (1907)) (even if a defendant's violation of a statute designed to protect a civil plaintiff from the type of injury received does not establish negligence *per se*, it often provides strong evidence of negligence, in part because of the legislative judgment that the defendant class "'can measurably control [the injury's] causes'"); Note, *Negligence and Breach of Statutory Duty*, 4 *Oxford J. Legal Stud.* 429 (1984). Moreover, were an alternative-measures inquiry conducted, the courts would find that the triumph of the Minimum-Standards Movement in the realm of politics drew explicit support from the emergence of the Effective Schools Movement in the realm of educational theory and practice. E.g., *Regents Action Plan*, *supra* note 95, at 2 (preface to New York's minimum-standards regulations committing state to assuring "that proven characteristics of effective schools are in place throughout our State"); see, e.g., Ratner, *supra* note 82, at 796-808 (endorsing conclusions of Effective Schools advocates that the indicia of effective schools are known and can be inexpensively replicated in poor and minority schools). Not surprisingly, that is, the courts are likely to find ample evidence that legislators who enact minimum-standards laws believe that the educational means exist to satisfy those standards. In addition, school officials faced with statutory standards that apply to all children in the state will find it legally and politically difficult to sustain a defense that, given existing educational know-how, the children in their schools "cannot learn."

¹⁴² The arguably twice democratically legitimated judgment that this nation, if it chose to do so, could build a fail-safe strategic defense against nuclear attack presents a cautionary example in this regard. Still, it would be unwise to deny the power of democratically endorsed technological judgments—for example, that "America can land astronauts on the Moon by the end of the decade"—to overcome legitimate scientific doubts.

¹⁴³ I do contend here, however, as I contend above, see *supra* notes 127-35 and accompanying text, that the litigation decisions plaintiffs are likely to make based on their assessments of available remedies are reasonably good proxies for the decisions neutral policy analysts would make. Thus, minimum-standards litigation is sufficiently expensive and the probability of success sufficiently uncertain that the absence of reasonably effective remedies can be expected to tip the balance against bringing suit. See *infra* notes 270-75 and accompanying text.

per-capita expenditures on their predominantly minority students,¹⁴⁴ the performance of those students has remained depressingly low¹⁴⁵ and has prompted both administrative and now litigative efforts to achieve programmatic remedies.¹⁴⁶ Accordingly, although financial equalization and enhancement has a role to play in improving educational outcomes, I am not prepared to rest a conclusion that sufficient remedies exist on the possibility that substantially more money could be spent on schools than is now being spent.¹⁴⁷

There are, however, programmatic remedies worth considering. To begin with, there is a growing body of literature identifying educational interventions that appear to be more effective (and cost-effective) than interventions long in vogue in the nation's schools.¹⁴⁸

¹⁴⁴ See *Horton v. Meskill*, 172 Conn. 615, 376 A.2d 359 (1977); Connecticut State Dep't of Educ., *Meeting the Challenge: Condition of Education in Connecticut 47-50* (1988-89) (attributing to *Horton* lawsuit a 35% increase in proportion of public educational expenditures in Connecticut supported by state funds). See generally Benson, *State Government Contributions to the Public Schools*, in *Public Schools: Issues in Budgetary and Financial Management* (J. Augenblick ed. 1985) (comparing states' contributions to local public education).

¹⁴⁵ See *supra* note 119.

¹⁴⁶ See Complaint at 19-24, *Scheff v. O'Neill* (Hartford/New Britain Super. Ct. filed Apr. 26, 1989) (describing recent administrative proposals to improve education of minority children through voluntary integration efforts and alleging, *inter alia*, that state's failure to implement proposals violates state and federal law); Committee on Racial Equity, *A Report on Racial/Ethnic Equity and Desegregation in Connecticut's Public Schools Prepared for Presentation to the Connecticut State Board of Education* (Jan. 1988) (report of committee appointed by State Superintendent of Schools documenting the educational deficiencies of predominantly minority schools in Connecticut and recommending voluntary statewide efforts to achieve racial integration); Connecticut State Dep't of Educ., *Quality and Integrated Education: Options for Connecticut* (Apr. 1989) (reaching similar conclusions and making similar recommendations).

¹⁴⁷ See Miller, *Study Puts U.S. Near Bottom on School Spending*, *Educ. Week*, Jan. 24, 1990, at 1, col. 1 (discussing debate between Bush Administration and educational researchers over the ranking of the United States among major industrial nations in terms of proportion of its gross national product and income devoted to public elementary and secondary education and reporting the findings of a recent report that rank the United States fourteenth among the world's top 16 industrial powers in terms of proportion of national and per capita income spent on precollegiate education).

¹⁴⁸ E.g., P. Hill, A. Wise & L. Shapiro, *Educational Progress: Cities Mobilize to Improve Their Schools* (Rand Corp. Center for the Study of the Teaching Profession, No. R-3711-JSM/cstp, Jan. 1989) [hereinafter P. Hill]; J. Oakes, *Improving Inner-City Schools: Current Directions in Urban District Reform* (Center for Policy Research in Educ., No. JNE-02, Oct. 1987) (survey of new technologies); Quality Education for Minorities Project, *Education that Works: An Action Plan for the Education of Minorities* (1989); Crain & Mahard, *Minority Achievement: Policy Implications of Research*, in *Effective Desegregation*, *supra* note 45, at 55-70 (discussing effective uses of school desegregation to improve academic performance of

Moreover, some of those interventions seem promising in an absolute sense. "Effective schools" techniques provide one example.¹⁴⁹ "School-based management" approaches, which have been used with some impressionistically documented success in predominantly black and Latino schools in East Harlem in New York City and in Miami, provide another example.¹⁵⁰ To my mind, these educational interventions have not yet proven themselves sufficiently to justify imposing on schools a common law duty to adopt them.¹⁵¹ But they do hold out enough promise to justify decisions by civil rights organizations to expend resources seeking decrees that may prompt persistently unsuccessful schools to adopt those interventions in execution of a defaulted legislative duty to educate.

As discussed earlier, moreover, there is one available intervention that has proven itself for decades now—school desegregation.¹⁵² Although the availability of desegregation as a remedy for race-based equal protection violations is limited in the ways set out above,¹⁵³ desegregation's availability as a remedy for the breach of a state's statutory duty to educate is less limited for a number of reasons. First, the plaintiffs' burden of proof in minimum-standards litigation is different from that in race-based equal protection litigation and at times

minority children); Sharan, *Cooperative Learning in Small Groups: Recent Methods and Effects on Achievement, Attitudes, and Ethnic Relations*, 50 *Rev. Educ. Res.* 241 (1980) (describing success of "cooperative learning" techniques in improving academic performance of minority children); Walberg, *Improving the Productivity of American Schools*, *Educ. Leadership*, May 1984, at 19 (meta-analysis of effectiveness of various technologies).

¹⁴⁹ See Ratner, *supra* note 82, at 796-808.

¹⁵⁰ See W. Clune & P. White, *School-Based Management: Institutional Variation, Implementation, and Issues for Further Research* (Center for Policy Research in Educ., No. RR-008, Sept. 1988); J. David, *Restructuring in Progress: Lessons from Pioneering Districts* (Nat'l Governors Ass'n 1989); P. White, *Resource Materials on School-Based Management* (Center for Policy Research in Educ., No. RR-009, Sept. 1988).

¹⁵¹ See Cuban, *Transforming the Frog into a Prince: Effective Schools Research, Policy, and Practice*, 54 *Harv. Educ. Rev.* 129 (1984) (disputing Effective Schools claims); Elson, *Suing to Make Schools Effective, or How to Make a Bad Situation Worse: A Response to Ratner*, 63 *Tex. L. Rev.* 889, 890-93 (1985) (surveying literature questioning usefulness of Effective Schools techniques); Walsh, *SES, Academic Achievement, and Reorganization of Metropolitan Area Schools: Preliminary Implications of the Milwaukee Area Study*, 1 *Metro. Educ.* 78, 88 (1986) (disappointing results of Effective Schools program in Milwaukee); cf. Ratner, *supra* note 82 (arguing that Effective Schools techniques are so consistently successful when properly implemented that a deficient school's or district's failure to implement those techniques may constitute an actionable breach of a legally enforceable duty to educate).

¹⁵² See *supra* notes 37-40 and accompanying text.

¹⁵³ See *supra* notes 31-34, 90-92 and accompanying text.

will be less onerous.¹⁵⁴ Second, the judicially constraining countermajoritarian difficulty afflicting decrees ordering desegregation under the equal protection clause is partly avoided by decrees ordering the same remedy based on duties derived from democratically adopted minimum-performance standards. Third, unlike in traditional desegregation litigation, in which the violation usually obliges judges to insist on racially integrative remedies,¹⁵⁵ the remedial order in the minimum-standards context is likely to consist of a directive to school officials to choose their own remedy.¹⁵⁶ Should those officials conclude—as the Connecticut Board of Education and Superintendent of Schools recently concluded outside the context of litigation¹⁵⁷—that desegregation is the best means of achieving the standards that the state legislature imposed, then the countermajoritarian difficulty evaporates almost entirely.¹⁵⁸ Fourth, as a practical matter, any desegregation remedy that public officials select will have to be so suffused with voluntary options and incentives that the “forced busing” complaint that has proved so troublesome in old-style desegregation cases will not apply.¹⁵⁹ Fifth, if the state department of education is among the agencies ordered to redress a breach of a statutory duty to educate, and if that agency, as is increasingly the case, has the ability to reorganize school districts or attendance patterns in the state,¹⁶⁰ the defendants will be able to achieve far more meaningful desegregation, drawing upon statewide pools of white and minority students, than the courts have been able to achieve drawing upon districtwide or, at best, metropolitanwide pools of students.

¹⁵⁴ Compare *supra* notes 90-92 and accompanying text with *infra* notes 166-275 and accompanying text.

¹⁵⁵ See, e.g., *Swann v. Charlotte-Mecklenberg Bd. of Educ.*, 402 U.S. 1 (1971); *Green v. County School Bd.*, 391 U.S. 430 (1968).

¹⁵⁶ See *infra* notes 224-25 and accompanying text.

¹⁵⁷ See Committee on Racial Equity, *supra* note 146; Connecticut State Dep't of Educ., *supra* note 146.

¹⁵⁸ Consider also the recent decision of the Seattle Board of Education to continue the operation of that city's voluntary desegregation plan and the city voters' subsequent approval by a four-to-one margin of a levy proposal needed to continue funding at existing levels. See *Seattle Voters Approve Levy; Board Backs Plan for Minorities*, *Educ. Week*, Feb. 14, 1990, at 2, col. 3; *Seattle Board Votes to Reject Controversial Anti-Busing Measure*, *Educ. Week*, Jan. 16, 1990, at 5, col. 5.

¹⁵⁹ See initiatives discussed *supra* notes 146, 157, 158.

¹⁶⁰ See *Newman, School Consolidation Garnering Legislators' Attention*, *Educ. Week*, Jan. 10, 1990, at 15, col. 1.

The availability of racially integrative remedies also weakens the claim that the new strategy undermines the old one by favoring separate-but-equal remedies. Even when liable defendants shun integration in favor of segregation-maintaining remedies, moreover, the new strategy remains consistent with the old one. Thus, the new strategy is not designed to replace but only to supplement the old one when directly integrative options are unavailable. In addition, the old strategy not only constrains, but its renewed use might be occasioned by, liable defendants' responses to the new strategy. For the old strategy forbids defendants to forgo proven integrative remedies in favor of unproven nonintegrative techniques unless the defendants have a legitimate—that is to say, nonracial—reason for doing so.¹⁶¹ Finally, from the historical perspective adopted above,¹⁶² not to mention the perspective of numerous scholars and some of the architects of *Brown*,¹⁶³ that decision is as much about enhanced educational opportunity as it is about integration, so that a strategy that pursues the former when the capacity to achieve the latter has been exhausted is not inharmonious with *Brown*.

Where integrative remedies are demographically and politically possible,¹⁶⁴ remedial questions pose no obstacle to the proposed strategy's success. Otherwise, the strategy's viability depends upon two factors: the willingness of civil rights organizations to devote substantial litigative resources to experiments with such promising but as yet unproven educational interventions as effective schools and school-based management, and the outcomes of the large-scale experiments with those techniques that now are taking place in New York, Miami, Chicago, Milwaukee, Kansas City, San Diego, and elsewhere.¹⁶⁵

¹⁶¹ See, e.g., *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 461-62 (1979); *Arthur v. Nyquist* 573 F.2d 134, 142 (2d Cir. 1978); *United States v. Board of School Comm'rs*, 573 F.2d 400, 413 (7th Cir.), cert. denied, 439 U.S. 824 (1978).

¹⁶² See *supra* notes 21-36 and accompanying text.

¹⁶³ Bell, *A Model Alternative Desegregation Plan*, in *Shades of Brown: New Perspectives on School Desegregation*, *supra* note 50, at 124; Carter, *A Reassessment of Brown v. Board*, in *id.* at 20; Fiss, *supra* note 49.

¹⁶⁴ See, e.g., *supra* notes 157 and 158.

¹⁶⁵ See, e.g., *Jenkins v. Missouri*, 639 F. Supp. 19, 33-34 (W.D. Mo. 1985) (effective schools component of school desegregation remedy in Kansas City), *aff'd* on this ground, 807 F.2d 657 (8th Cir. 1986), cert. denied, 108 S. Ct. 708 (1987); J. David, *supra* note 150 (discussing school-based management initiatives in Cincinnati, Miami, New York, Rochester, and Santa Fe); P. White, *supra* note 150, at 5-24 (school-based management initiatives in Miami, San Diego and 98 other districts in the United States and Canada); Fernandez, *The Chancellor's*

Whenever existing legal doctrine recognizes a legislatively created duty based on a statutory minimum educational-performance standard, there is reason to believe that democratic policy and the needs of the putative plaintiffs would be served by that recognition, that breaches of those duties could and ought to be identified and causally linked to the failure of large proportions of children in identifiable schools and districts to satisfy the standards, and that remedies for such breaches exist. The decisive question, therefore, is whether existing legal doctrine will recognize legislatively created duties with sufficient frequency to justify a strategy based on the intuition that they do.

The discussion that follows briefly sketches a number of legal arguments that might be deployed in order to enforce judicially this intuition, should informal and nonlegal enforcement efforts fail. Possible legal and policy objections to enforcement efforts premised on each of the arguments also are briefly addressed.

B. Statutory Actions to Enforce Minimum-Standards Legislation Directly

1. Administrative Enforcement Actions

In New York, as in other states, the chief executive officer of the department of education (in New York, the Commissioner) is statutorily empowered, subject to judicial review, to order local school personnel to cease improper conduct or to take action required by law.¹⁶⁶ The only exceptions to the Commissioner's power involve claims

Budget Request for 1990-91, at 16-20 (New York City's newly proposed school-based management/shared decisionmaking plan); Walsh, *supra* note 141 (Milwaukee's Effective Schools program); Snider, Milwaukee to Decentralize Management of Schools, *Educ. Week*, Feb. 8, 1989, at 7, col. 2; Lawmakers Pass Bill to Revamp Chicago Schools, *Educ. Week*, Dec. 7, 1988, at 1, col. 1 (Chicago's radical school-based management initiative).

¹⁶⁶ N.Y. Educ. Law §§ 310, 311 (McKinney 1990). Section 310 authorizes the Commissioner to resolve petitions by persons aggrieved by "any . . . official act or decision of any officer, school authorities, or meetings concerning any . . . matter under [the Education Law], or any other act pertaining to common schools." *Id.* § 310(7); see also N.Y. Comp. Codes R. & Regs. tit. 8, §§ 275.1-17 (1989) (procedural regulations). The Commissioner has broad authority to review determinations made by local education officials throughout the state, see, e.g., *James v. Board of Educ.*, 42 N.Y.2d 357, 366 N.E.2d 1291, 397 N.Y.S.2d 934 (1977), is not bound by the factual findings of local school officials, *Shurgin v. Ambach*, 56 N.Y.2d 700, 436 N.E.2d 1324, 451 N.Y.S.2d 722 (1982), and may substitute his discretionary judgment for that of the school official being reviewed even if the latter's actions were not arbitrary; see, e.g., *Vetere v. Allen*, 15 N.Y.2d 259, 206 N.E.2d 174, 258 N.Y.S.2d 77, cert.

based on pure questions of law or on a novel constitutional theory, as to which the courts have exclusive jurisdiction.¹⁶⁷

In New York, therefore, parents aggrieved by a school's failure to enable many or most of their children to pass state-mandated tests initially, to receive "appropriate" remedial services upon falling below standard, or, following remedial services, to pass the tests on a second or subsequent try may have a tenable legal basis for an order from the Commissioner enforcing the state's minimum-standards laws. The Commissioner arguably could act, for example, by finding that local and state school officials are not providing, then directing them to provide any of the following: (1) an education sufficient to enable all students in the school, upon reasonable effort, to meet the state standards;¹⁶⁸ (2) remedial services for students falling below standard;¹⁶⁹

denied, 382 U.S. 825 (1965); *Board of Educ. v. Nyquist*, 36 A.D.2d 199, 319 N.Y.S.2d 661 (1971).

The Commissioner's legal determinations—including those interpreting administrative regulations, such as New York's minimum-education standards, and prior Commissioner's rulings—are reviewable *de novo*, see, e.g., *Board of Educ. v. Nyquist*, 48 N.Y.2d 97, 397 N.E.2d 365, 421 N.Y.S.2d 853 (1979) (withholding of pay from suspended teacher reviewable *de novo*); *Board of Educ. v. Ambach*, 90 A.D.2d 227, 458 N.Y.S.2d 680 (1982) (minimum-competency regulations reviewable *de novo*); *Verbanic v. Nyquist*, 73 Misc. 2d 357, 397 N.Y.S.2d 949 (N.Y. Sup. Ct. 1972) (*de novo* review of Commissioner's decision to vest an overseer with absolute power over elected board of education); *In re Van Allen v. McCleary*, 27 Misc. 2d 81, 211 N.Y.S.2d 501 (N.Y. Sup. Ct. 1961) (*de novo* review of refusal to allow parents to inspect son's school records), fact determinations are reviewable for "substantial evidence," N.Y. Civ. Prac. L. & R. § 7803(4) (McKinney 1981); see, e.g., *Pell v. Board of Educ.*, 34 N.Y.2d 222, 313 N.E.2d 321, 356 N.Y.S.2d 833 (1974), and educational policy determinations are reviewable under an "arbitrary and capricious" or equivalent standard; see, e.g., *Ward v. Nyquist*, 43 N.Y.2d 57, 371 N.E.2d 477, 400 N.Y.S.2d 757 (1977); *James v. Board of Educ.*, 42 N.Y.2d 357, 366 N.E.2d 1291, 397 N.Y.S.2d 934 (1977); *Board of Educ. v. Board of Educ.*, 80 A.D.2d 564, 435 N.Y.S.2d 759 (1981).

¹⁶⁷ See, e.g., *Sikora v. Board of Educ.*, 51 A.D.2d 135, 380 N.Y.S.2d 382 (1976) (teacher's claim based on violation of constitutional rights of free speech and assembly); *Lezette v. Board of Educ.*, 43 A.D.2d 755, 350 N.Y.S.2d 26 (1973) (claim that school violated law), order modified, 35 N.Y.2d 272, 319 N.E.2d 189, 360 N.Y.S.2d 869 (1974); *Community Bd. v. Scribner*, 78 Misc. 2d 195, 356 N.Y.S.2d 500 (N.Y. Sup. Ct. 1974) (case involving "single question of law"); cf. *Guglielmo v. Long Island Lighting Co.*, 83 A.D.2d 481, 445 N.Y.S.2d 177 (1981) (holding that cases raising only novel statutory or constitutional questions must *commence* in the state courts, but, via "primary jurisdiction" procedure, may be stayed pending action by the Commissioner to consider subsidiary factual or policy questions that require or may benefit from the administrator's special expertise).

¹⁶⁸ *Regents Action Plan*, *supra* note 95, at 2 (interpreting minimum-standards regulations to require school officials to "provide each student the opportunity to reach or exceed [state-mandated] standards and requirements").

¹⁶⁹ See N.Y. Comp. Codes R. & Regs. tit. 8, § 100.3(b)(3) (1989).

or (3) “*appropriate*” remedial services for such students sufficient “to enable them” upon reasonable effort “to score above the State reference point on the corresponding” test given later in the students’ educational careers.¹⁷⁰

The advantage of administrative enforcement actions is that they are presided over by educational specialists who are better placed than judges to assure that any educational duties that are recognized are meaningful. A court, for example, might feel doctrinally constrained to distinguish the parts of a package of minimum-standards laws that are clearly directive (for example, provisions requiring tests to be given once a year and mandating remedial services for students failing the tests) from parts of the package that are not so clearly directive (for example, provisions that imply but do not specify that the remedial services must be educationally effective). By contrast, an administrative decisionmaker with the will to intervene might be more likely to recognize the educational desirability of construing the entire package of laws as a cohesive set of duties (requiring, for example, that instruction, tests, and remedial services be provided *and* be effective) and might be more legitimately able to use the decisionmaker’s wide law-interpreting discretion to construe the legislation as imposing that comprehensive “package” of duties.¹⁷¹

A principal disadvantage of administrative enforcement actions is

¹⁷⁰ *Id.* (emphasis added). In addition to making any or all of the claims delineated above, and basing those claims upon high failure rates on state-mandated tests, parents might allege, and the Commissioner might conclude, that: (1) the educational or remedial services a school offers are not properly geared to students’ instructional needs; (2) the teaching staff or leadership at the school is incapable; or (3) despite conscientious efforts at the school level, students fail because district and state officials have not afforded the school sufficient resources or technical assistance to enable it both to provide the remedial services it owes failing students and to carry out its responsibilities toward the rest of its students.

¹⁷¹ See, e.g., *Chevron v. Natural Resources Dev. Council*, 467 U.S. 837, 842-43, 865-66 (1984) (holding that judicial deference is due administrative interpretations of statutes as to which the legislative intent is unclear because of the greater democratic legitimacy of administrative than of judicial exercises of interpretive discretion); *Grant v. Cuomo*, 130 A.D.2d 154, 518 N.Y.S.2d 105 (1987) (similar); *Pierce, Political Control Versus Impermissible Bias in Agency Decisionmaking: Lessons from Chevron and Mistretta*, 57 U. Chi. L. Rev. — (forthcoming 1990). But cf. *Boreali v. Axelrod*, 71 N.Y.2d 1, 6, 517 N.E.2d 1350, 1352, 523 N.Y.S.2d 464, 466 (1987) (“the scope of [an agency’s] authority under . . . statute must be deemed limited by its role as an administrative, rather than legislative, body”).

their often unreasonable length and procedural unwieldiness.¹⁷² If that difficulty is not prohibitive in a particular state, the critical question is one of bureaucratic will. The recent politicization of the question of educational outcomes, together with the ongoing shift of administrative control over education from localities to the state,¹⁷³ makes the likelihood of state-level intervention much greater in the nineties than it was in decades past. Witness, for example, the recent spate of sua sponte state takeovers of local school districts, which were almost unheard of a decade ago.¹⁷⁴ Assuming that state officials have the will to intervene at the local level, the question remains whether they have the rarer will to share with local officials the responsibility for remedying problems found to exist locally. Although it is hard to imagine local educational failures that are not due in part to a lack of state-level funding, oversight, and technical assistance, the inclusion of state officials—including perhaps the state Commissioner himself—as parties respondent in an action brought before the Commissioner can be expected to decrease the likelihood of the action's success.¹⁷⁵

As the state takeover cases reveal, however, a state educational agency's acceptance of responsibility for identifying problems at the local level, regardless of whether state responsibility for causing those problems is acknowledged, creates its own imperative to assist in rem-

¹⁷² Consider, for example, the lengthy administrative litigation on the equalization of educational financing in New Jersey. See Briffault, *Our Localism: Part 1—The Structure of Local Government*, 90 Colum. L. Rev. 1, 34-35 n.127 (1990).

¹⁷³ See *supra* notes 93-97, 112-13 and accompanying text.

¹⁷⁴ E.g., Berger, *Chancellor Vows to Take Charge of Failing Schools in New York*, N.Y. Times, Jan. 5, 1990, at A1, col. 6; Snider, *Cleveland School Officials Move to Avert State Takeover*, Educ. Week, Jan. 18, 1989, at 1, col. 5; Walsh, *Citing Deficiencies, Georgia Board Votes to Cut Off Funds to District*, Educ. Week, Nov. 23, 1988, at 10, col. 1; N.J. First to Attempt Complete Takeover, Educ. Week, June 1, 1988, at 12, col. 5 (discussing takeover activities in five states); Jennings, *New Jersey Moves to Take Control of School District*, Educ. Week, June 1, 1988, at 1, col. 2; *supra* note 113.

¹⁷⁵ On the question whether the Commissioner might be disposed to make such findings and orders with regard to the New York City schools, see Verhovek, *Sobol Seeking To Dismantle School Board*, N.Y. Times, July 27, 1989, at B1, col. 6 (Commissioner criticizing quality of education provided in New York City and supporting structural changes to remedy situation). On the question whether state-level officials may bear some of the responsibility for the failure of the New York City schools, see Daley, *Regents Said to Neglect Problem Schools*, N.Y. Times, July 14, 1988, at B4, col. 1 ("The New York State Education Department has failed to help New York City's public schools, focusing its resources on suburban and upstate districts instead, a report made public yesterday by the State Comptroller said."); *infra* note 292.

edying the problems that are identified. Moreover, once local officials are named in an administrative complaint and particularly once liability against them is found, those officials will become important allies in the petitioners' efforts to involve state officials in implementing effective remedies. Accordingly, in the growing number of states that have overcome the "local control" barrier to state intervention, sufficient oversight responsibility for local failures already may lie at the state level to give state officials the will to intervene adjudicatively at the local level and to contribute the state's resources to solving any deficits that are found.

2. *Judicial Enforcement Actions*

If the Commissioner denies the relief sought by parents, or if the parents believe that the relief sought falls within one of the "pure law" or "novel law" situations in which judicial action is appropriate in the first instance, the parents may seek judicial enforcement of the duties they allege school officials have breached.¹⁷⁶ In general, judicial action is available to enforce any clear duty that an administrative official or agency owes the plaintiff under the laws or regulations of the state¹⁷⁷ but is not available to control mere exercises of administrative discretion that are not arbitrary and capricious.¹⁷⁸ The courts have exercised their authority in this regard to compel agencies to

¹⁷⁶ Generally, if the parents' challenge is not based on purely or novel legal considerations, a "final determination" requirement necessitates action by the Commissioner before judicial review is appropriate. See *Hamptons Hosp. & Medical Center v. Moore*, 52 N.Y.2d 88, 417 N.E.2d 533, 436 N.Y.S.2d 239 (1981); see also *supra* note 166 (standards of review of Commissioner's determinations).

¹⁷⁷ E.g., *McCain v. Koch*, 70 N.Y.2d 109, 511 N.E.2d 62, 517 N.Y.S.2d 918 (1987); *Klostermann v. Cuomo*, 61 N.Y.2d 525, 531, 463 N.E.2d 588, 590, 475 N.Y.S.2d 247, 249 (1984) (concluding that "if a statutory directive is mandatory, not precatory, it is within the courts' competence to ascertain whether an administrative agency has satisfied the duty that has been imposed on it . . . [and, if not,] to direct that the agency proceed forthwith to do so"); *Dental Soc'y v. Carey*, 61 N.Y.2d 330, 335, 462 N.E.2d 362, 364, 474 N.Y.S.2d 262, 264 (1984) ("Whether administrative action violates applicable statutes and regulations is a question within the traditional competence of the courts to decide"); *Levittown Union Free School Dist. v. Nyquist*, 57 N.Y.2d 27, 39, 439 N.E.2d 359, 363, 453 N.Y.S.2d 643, 648 (1982); *Van Allen v. McCleary*, 27 Misc. 2d 81, 211 N.Y.S.2d 501 (N.Y. Sup. Ct. 1961) (holding that clear legal right may be established by the state constitution, state statutes, regulations of the Commissioner, or even rulings and orders of the Commissioner).

¹⁷⁸ E.g., *New York State Inspection, Sec. & Law Enforcement Employees v. Cuomo*, 64 N.Y.2d 233, 475 N.E.2d 90, 485 N.Y.S.2d 719 (1984); *Jones v. Beame*, 45 N.Y.2d 402, 380 N.E.2d 277, 408 N.Y.S.2d 449 (1978). See generally *W. Gellhorn*, *supra* note 116, at 989-92 (discussing the use of writs of mandamus to review administrative actions).

perform statutorily mandated tasks, to require them to perform discretionary tasks necessary to implement a statutory scheme,¹⁷⁹ and to determine whether actions taken by administrative agencies in asserted conformity with their statutory duties in fact satisfy those duties.¹⁸⁰

These principles almost certainly permit judicial enforcement of school officials' obligations to administer mandated tests and to provide remedial services to students who score below standard. The regulations providing that "[s]tudents who score below the designated State reference point on" a test "*shall* be provided" remedial instruction "appropriate . . . to enable them to score above the State reference point on the [next] corresponding . . . test"¹⁸¹ also probably create a justiciable claim that a school's failure to provide remedial instruction techniques that enable many or most students to score at or above standard abrogates the statutory mandate.¹⁸²

Under the same logic, regulations requiring schools to provide every student with "the opportunity to meet all [including testing] requirements for . . . a Regents high school diploma"¹⁸³ and commentary to the regulations requiring schools to "provide each student the opportunity to reach or exceed standards and requirements"¹⁸⁴ also might provide children attending failing schools—schools where many or most students fail state-mandated tests—with a judicially enforceable right to adequate education itself. Even if the courts are unlikely themselves to create a right to a "minimally adequate education," or to supplant the appropriate administrator's discretion to

¹⁷⁹ E.g., *Klostermann v. Cuomo*, 61 N.Y.2d 525, 540, 463 N.E.2d 588, 596, 475 N.Y.S.2d 247, 255 (1984).

¹⁸⁰ E.g., *McCain v. Koch*, 70 N.Y.2d 109, 120, 511 N.E.2d 62, 66, 517 N.Y.S.2d 918, 923 (1987); *Klostermann v. Cuomo*, 61 N.Y.2d 525, 541, 463 N.E.2d 588, 596, 475 N.Y.S.2d 247, 255 (1984). Justiciability extends to any factual questions that determine whether a "clear legal right" exists or has been breached. See *Fehlhaber Corp. v. O'Hara*, 53 A.D.2d 746, 384 N.Y.S.2d 270 (1976); *Board of Educ. v. Levitt*, 42 A.D.2d 372, 348 N.Y.S.2d 387 (1973).

¹⁸¹ N.Y. Comp. Codes R. & Regs. tit. 8, § 100.3(b)(3) (1989) (emphasis added). The narrative explanation of this regulation emphasizes its mandatory quality, stating that "students scoring below State reference points on the [state-mandated] tests . . . must be provided with remedial programs which prepare them to meet the Regents standards successfully at the time of the next State-test level. Targeted state aid supports this remedial work." Regents Action Plan, *supra* note 95, at 3.

¹⁸² See authority cited *supra* note 180.

¹⁸³ N.Y. Comp. Codes R. & Regs. tit. 8, § 100.2(e) (1989).

¹⁸⁴ Regents Action Plan, *supra* note 95, at 2.

interpret vague phrases such as that, they might be disposed to intervene once the legislative branch gives enforceable content to that phrase by promulgating objective standards below which most of the responsible agency's charges clearly and consistently fall.¹⁸⁵

As noted, judicial enforcement efforts risk incompletely successful outcomes that might harm the plaintiffs (for example, by requiring officials to administer stigmatizing tests but absolving them of any duty to provide students with the means to pass the tests) or at least might do the plaintiffs little or no good (for example, by giving students access to remedial services but denying them the right to insist that the services be effective). Whether a particular court will be dis-

¹⁸⁵ Compare *Grant v. Cuomo*, 130 A.D.2d 154, 518 N.Y.S.2d 105 (1987) (holding claim that agency failed to provide preventive services to children "at risk" of foster care placement as required by statute not justiciable because determination of who is at risk is within agency's discretion), *aff'd*, 73 N.Y.2d 820, 534 N.E.2d 32, 537 N.Y.S.2d 115 (1988) with, e.g., *McCain v. Koch*, 70 N.Y.2d 109, 117, 511 N.E.2d 62, 64-65, 517 N.Y.S.2d 918, 921 (1987) (holding, *inter alia*, that trial court properly concluded that statutory requirement of "emergency housing" for homeless families with children implied duty to provide housing satisfying "minimum standard" of habitability; that trial court properly enjoined Department of Social Services to abide by court's interpretation of minimum standard until Department devised its own; and that Department's adoption of minimum standard between lower court decision and appeal did not render appeal moot because "[i]t is not the words of the standards, whether in the injunction or the regulations, but compliance with them which will produce the minimally adequate housing" necessary to comply with the statute) and *Klostermann v. Cuomo*, 61 N.Y.2d 525, 536-37, 463 N.E.2d 588, 593-94, 475 N.Y.S.2d 247, 252-53 (1984) (holding that where administrator has clear legal duty to prepare adequate service and follow-up plans for homeless mentally ill patients released from state psychiatric institutions, judicial review is available to determine whether administrator's efforts to comply satisfied statute's adequacy requirement) and *Barnes v. Koch*, 136 Misc. 2d 96, 100, 518 N.Y.S.2d 539, 542 (N.Y. Sup. Ct. 1987) (holding that statutory entitlement to shelter necessarily includes the right to be sheltered free of potentially significant health threats). Decisions holding that educational programs mandated by state and federal education statutes must include components beyond those actually specified in the enactments include *Lau v. Nichols*, 414 U.S. 563 (1974) (interpreting the general language of Title VI of the Civil Rights Act of 1964 to require the setting of standards for use in assessing the adequacy of educational programs for students not proficient in English); *Gladys J. v. Pearland Indep. School Dist.*, 520 F. Supp. 869 (S.D. Tex. 1981) (requirement that districts bear costs of handicapped children's educational needs implicitly encompasses residential placement when necessary); *Gary B. v. Cronin*, 542 F. Supp. 102 (N.D. Ill. 1980) ("appropriate" education requires psychotherapy for mentally handicapped children); *Rowley v. Board of Educ.*, 483 F. Supp. 528 (S.D.N.Y.) (requirement of "appropriate" educational services for handicapped children implies requirement of least restrictive environment), *aff'd*, 632 F.2d 945 (2d Cir. 1980), *rev'd*, 458 U.S. 176 (1982); *School Comm. v. Commonwealth*, [Decisions 1980-81] *Educ. for the Handicapped L. Rep.* (CRR) 552:186 (Mass. Super. Ct. 1980); *M. McCarthy & P. Deignan*, *What Legally Constitutes an Adequate Public Education* 24, 26, 41 (Phi Delta Kappa Education Foundation 1982) (citing other authority).

posed to avoid such "incomplete" results and to recognize duties based on less than absolutely directive statutory language may depend in part on how the plaintiffs resolve the difficult strategic question of whether to exhaust administrative remedies.¹⁸⁶ On the one hand, until the responsible administrator has been asked and has failed to solve the problems alleged in the petitioners' complaint, a judge may not consider the problems sufficiently intractable to warrant her intervention. On the other hand, an administrator's refusal to undertake a solution to the problems on the ground that the governing law does not create the duties the petitioners allege would decrease the probability that a state court would recognize the asserted duties. When timely and successful administrative enforcement efforts are not a feasible possibility, these considerations place a premium on the plaintiffs' ability to make a record of concerted informal efforts to secure administrative redress and on the numerous case-specific factors mentioned above and below.¹⁸⁷

3. *Implied Private Right of Action*

A less conventional but still possibly viable means by which parents could enforce minimum-standards legislation directly is by asserting an "implied private right of action" on behalf of their children under the minimum-standards laws. To be allowed an implied private right of action, the claimants must establish that they are members of a distinct class for whose benefit the statute was enacted, that their injuries were proximately caused by the breach of the statute, and that the remedy sought is not punitive or likely to impose undue burdens on the government or taxpayers.¹⁸⁸

In *Donohue v. Copiague Union Free School District*,¹⁸⁹ a student

¹⁸⁶ The strategic exhaustion question arises only if no clear legal exhaustion requirement exists. On the legal exhaustion question, see *supra* note 176.

¹⁸⁷ See *supra* note 126 and accompanying text; *infra* notes 271-75 and accompanying text.

¹⁸⁸ See, e.g., *Wright v. Brown*, 167 Conn. 464, 356 A.2d 176 (1975); *Knybel v. Kramer*, 129 Conn. 439, 443, 29 A.2d 576, 577-78 (1942); *Leger v. Kelley*, 19 Conn. Supp. 167, 110 A.2d 635 (Conn. Super. Ct. 1954), *aff'd*, 142 Conn. 585, 116 A.2d 429 (1955); *Burns, Jackson, Miller, Summit & Spitzer v. Lindner*, 59 N.Y.2d 314, 324-25, 451 N.E.2d 459, 462-63, 464 N.Y.S.2d 712, 715-16, (1983); *Steitz v. City of Beacon*, 295 N.Y. 51, 54-55, 64 N.E.2d 704, 705-06 (1945); *County of Monroe v. State*, 123 A.D.2d 141, 511 N.Y.S.2d 169 (1987). See generally *Cannon v. University of Chicago*, 441 U.S. 677 (1979) (finding private cause of action under Title IX of the Education Amendments of 1972).

¹⁸⁹ 64 A.D.2d 29, 407 N.Y.S.2d 874 (1978), *aff'd*, 47 N.Y.2d 440, 391 N.E.2d 1352, 418 N.Y.S.2d 375 (1979).

who graduated from high school as a functional illiterate sued the school district for "educational malpractice." The plaintiff argued, among other things, that article XI, section 1 of the New York Constitution, which obligates the state to "maint[ain] and support . . . a system of free common schools, wherein all the children of this State may be educated," gave him an implied cause of action for breach of duty on the part of the state to educate him. The New York courts rejected the theory based upon the "well-established principle" that "statutes which are not intended to protect [a specific class of individuals] against injury, but rather are designed to confer a benefit upon the general public, do not give rise to a cause of action by an individual to recover damages for their breach."¹⁹⁰ By contrast to the general constitutional provision interpreted in *Donohue*, modern minimum-standards legislation confers its benefits not simply on the general public, but more specifically on "[e]very student in the State."¹⁹¹ The enactment of minimum-standards legislation, therefore, increases the body of law that might be taken by the courts to create an implied right of action in students to sue for breaches of statutorily created duties to educate them.

C. *Constitutional Actions to Enforce Minimum-Standards Legislation Directly*

Procedural due process analysis, premised on either federal or state constitutional law, provides another basis for judicially enforcing expectations expressly or impliedly created by minimum-standards legislation.¹⁹² This analysis requires courts to determine whether a

¹⁹⁰ Id. at 37-38, 407 N.Y.S.2d at 880. But cf. *Wright v. Brown*, 167 Conn. 464, 356 A.2d 176 (1975) (cause of action may be appropriate where statute protects general public and plaintiff is a member of that class).

¹⁹¹ Regents Action Plan, *supra* note 95, at 4; see *supra* note 122 and accompanying text (listing the goals of New York's minimum-standards regime); see also Conn. Gen. Stat. § 10-14m (1989) (requiring districts to draft plans that: "[a] identify individual student needs in reading, language arts and mathematics skills; (b) provi[de] for remedial assistance to students with identified needs; and (c) provi[de] for evaluating the effectiveness of the reading, language arts and mathematics skills instructional program") (emphasis added).

¹⁹² Procedural due process theories have secured educational resources for handicapped students seeking a basic public education, see, e.g., *Mills v. Board of Educ.*, 348 F. Supp. 866 (D.D.C. 1972); *Pennsylvania Ass'n for Retarded Children v. Commonwealth*, 343 F. Supp. 279 (E.D. Pa. 1972), and, in limited circumstances, for students denied high school diplomas because they failed to pass minimum competency tests, see, e.g., *Brookhart v. Illinois State Bd. of Educ.*, 697 F.2d 179 (7th Cir. 1983), and the decisions discussed *infra* notes 196-201 and

so-called "property interest"—a justifiable expectation that the government will provide particular citizens with a specified benefit under particular circumstances—exists and, if so, what procedures governmental officials in fairness must afford affected citizens before depriving them of that benefit. States may create constitutionally protected property interests either by enacting positive laws that mandate benefits¹⁹³ or by otherwise fostering a mutual understanding between themselves and their citizens.¹⁹⁴ The "procedures that are due" before the state may withhold a benefit to which a citizen claims to be entitled are ones that meaningfully enable citizens—for example, via notice and an opportunity to be heard—to demonstrate that they fall within the class of persons whom state law intends to benefit.¹⁹⁵

Can it be argued, then, that students have a property interest, say, in receiving a diploma and that among the procedures that are due before the state may withdraw that benefit are instruction and remedial services sufficient to enable students applying reasonable effort to pass the tests on which diplomas are in part predicated? A quick sketch of some of the applicable case law suggests a basis for such an argument.

accompanying text. The procedural due process literature is vast and generally disapproving of current doctrine. See Terrell, *Liberty and Responsibility in the Land of "New Property": Exploring the Limits of Procedural Due Process*, 39 U. Fla. L. Rev. 351, 352 n.1 (1987) (collecting authority). The discussion here only touches upon these controversies, see *infra* note 214, taking procedural due process doctrine as it exists.

¹⁹³ See *Hewitt v. Helms*, 459 U.S. 460 (1983); Note, *The Procedural Due Process Approach to Administrative Discretion: The Courts' Inverted Analysis*, 95 Yale L.J. 1017, 1018-19 & nn.8-11 (1986) (citing authority); *id.* at 1019 (noting that "any form of governmental rule may create an entitlement—even a policy statement promulgated by the very government officials who apply it—[if] it [is] mandatory"); cf. *Student Roe v. Commonwealth*, 638 F. Supp. 929 (E.D. Pa.) (finding no protected interest where statute defining gifted and talented program stated that students with IQ scores below 130 "may" be admitted and where plaintiff scored below 130), *aff'd*, 813 F.2d 398 (3d Cir. 1986), cert. denied, 483 U.S. 1021 (1987).

¹⁹⁴ E.g., *Perry v. Sinderman*, 408 U.S. 593 (1972) (property interest in continued employment); *Lopez v. Henry Phipps Plaza S., Inc.*, 498 F.2d 937 (2d Cir. 1974) (holding that customary renewal of leases gave existing tenant right to renewed leases); *Stoller v. College of Medicine*, 562 F. Supp. 403 (M.D. Pa. 1983) (property right to continued medical education), *aff'd mem.*, 727 F.2d 1101 (3d Cir. 1984); see also Note, *supra* note 193, at 1035 (noting that the "very existence of a government program may encourage or even force private institutions and individuals to rely on it").

¹⁹⁵ See, e.g., *Goss v. Lopez*, 419 U.S. 565 (1975); *Mullane v. Central Hanover Bank & Trust*, 339 U.S. 306, 313 (1950).

In *Debra P. v. Turlington*,¹⁹⁶ federal trial and appellate courts concluded that Florida's mandatory-attendance statute had long created a mutual expectation that students who completed prescribed coursework would graduate with a diploma. Next, they concluded that Florida, by superimposing a minimum-competency test requirement on the preexisting coursework requirement, had withheld state-created expectations from students who had completed their coursework but did not pass the required test.¹⁹⁷ Having found that Florida school officials had withheld a state-created property interest, the appeals court addressed the question of what predeprivation process was due. The court concluded that fairness demanded at least a modicum of what I would call "due educational procedures"—in this case, that the tested material have been covered in classes available to students denied diplomas because they failed to pass the test.¹⁹⁸

*Board of Education v. Ambach*¹⁹⁹ involved a school district's request that New York's new minimum-competency testing requirement for graduation be waived in the case of two "functionally" mentally handicapped students who had satisfied the coursework requirements for graduation but could not pass the test. Rejecting as "false" the district's premise that *functionally* handicapped students "are capable of completing the requirements for graduating with a diploma," the Appellate Division concluded that New York's testing and graduation regulations did not afford such students a property interest in a diploma because they could not have a reasonable expectation of passing the tests under any circumstances.²⁰⁰ The court went on to conclude, however, that the state's minimum-competency regime does afford *remedially* handicapped (and, by implication, non-handicapped) students a property interest in a diploma because such

¹⁹⁶ 474 F. Supp. 244 (M.D. Fla. 1979), *aff'd* in part, *vacated* in part, 644 F.2d 397 (5th Cir. 1981).

¹⁹⁷ *Debra P.*, 644 F.2d at 404.

¹⁹⁸ *Id.*; accord *Brookhart v. Illinois State Bd. of Educ.*, 697 F.2d 179 (7th Cir. 1983) (stating that school must expose handicapped students to material examined on minimum-competence test before giving them the test); cf. *Debra P. v. Turlington*, 564 F. Supp. 177 (M.D. Fla. 1983) (on remand, accepting state's proof that coursework available to plaintiffs covered materials on tests and hence finding that due educational procedures had been provided), *aff'd*, 730 F.2d 1405 (11th Cir. 1984).

¹⁹⁹ 107 Misc. 2d 830, 436 N.Y.S.2d 564 (N.Y. Sup. Ct.), modified, 90 A.D.2d 227, 458 N.Y.S.2d 680 (1982), *aff'd*, 60 N.Y.2d 758, 457 N.E.2d 775, 469 N.Y.S.2d 669 (1983), cert. denied, 465 U.S. 1101 (1984).

²⁰⁰ *Ambach*, 90 A.D.2d at 235-37, 458 N.Y.S.2d at 686-87.

students, with proper instruction, *can* meet the requirements; hence, the state may not deprive those students of a diploma without fair educational procedures.²⁰¹

Debra P. and *Ambach* advance the "due educational process" analysis a fair distance. Both decisions establish that mandatory attendance laws and state regulations setting the requirements for graduation and competency testing give students a protected property interest in a high school diploma²⁰² that states withdraw when they deny students diplomas for failure to pass such tests. Both cases also recognize that the procedures constitutionally due before that deprivation may occur have educational components: At the least, before school officials may deprive students of a diploma for failure to pass a test, those officials must afford the students a course of study covering the subject matter of the test and a reasonable amount of time before

²⁰¹ *Id.* at 237, 241, 469 N.Y.S.2d at 686, 688. The court stated that due process in this situation would be satisfied by three years' notice of the new testing regulation. Such notice, the court concluded, would give the district and remedially handicapped students enough time to design a program of study sufficient to enable the students to pass the test.

²⁰² *Accord Goss v. Lopez*, 419 U.S. 565 (1975) (finding a property interest in receiving an education based on state compulsory attendance law and statute directing local authorities to provide education to all residents between five and 21 years of age); *Mills v. Board of Educ.*, 348 F. Supp. 866 (D.D.C. 1972) (holding that the District of Columbia has a duty to educate children with behavioral problems or mental handicaps); *Pennsylvania Ass'n v. Commonwealth*, 343 F. Supp. 279 (E.D. Pa. 1972) (holding that retarded students had a right to an education once state had undertaken to provide education to other students). Alternatively, a student may have a protected *liberty* interest, for example, in receiving a high school diploma that is a prerequisite to the practice of a chosen profession, see, e.g., Note, *supra* note 193, at 1020 & n.14 (citing, e.g., *Willner v. Committee on Character & Fitness*, 373 U.S. 96, 102 (1963) (liberty interest in bar membership); *Grove v. Ohio State Univ., College of Veterinary Medicine*, 424 F. Supp. 377, 382-83 (S.D. Ohio 1976) (possible liberty interest in admission to graduate school because it plays crucial role in entry into given profession)), or in not being defamatorily denominated a "functional illiterate" by the state, see, e.g., *Paul v. Davis*, 424 U.S. 693, 708-09 (1976) (concluding that an action for damage to reputation requires proof of government-imposed stigma based on a label that is false, has been publicized, and has either changed plaintiff's status under state law or resulted in a tangible loss); *Brookhart v. Illinois State Bd. of Educ.*, 697 F.2d 179 (7th Cir. 1983) (concluding that denial of diploma for failure to pass minimum competency tests is stigmatizing and infringes liberty interest); *Greenhill v. Bailey*, 519 F.2d 5, 8 (8th Cir. 1975) (concluding that dismissal from school for lack of "intellectual ability" infringes liberty interest); *Debra P.*, 474 F. Supp. at 258 (finding a liberty interest in not being labeled a "functional illiterate" for failure to pass state-mandated test). See also Note, *supra* note 125 (arguing that a protected liberty interest in receiving a diploma arises as a quid pro quo for loss of liberty entailed by compulsory attendance laws).

the test is given to enable the students successfully to complete that course of study.

The difficult question, of course, is whether any *other* educational procedures, in fairness, are due. In New York and elsewhere, legislators themselves have helped answer this question, concluding that in order to give students a meaningful opportunity to establish that they fall within the class of persons whom the state intends to benefit with a diploma, "[e]ach public school district shall offer students attending its schools the opportunity to meet all the requirements for . . . a Regents high school diploma."²⁰³ For students failing tests the first time, moreover, the necessary educational means include remedial instruction "appropriate . . . to enable them to score above the State reference point on the [next] corresponding" test.²⁰⁴ Likewise, by codifying the assumption that all children, upon the application of reasonable effort, are capable of passing state-mandated tests²⁰⁵—and by presumptively or conclusively blaming the schools when substantial numbers of students in the school fail the tests²⁰⁶—New York arguably has concluded that due educational procedures include instructional services sufficient so that most students in a school²⁰⁷ in fact *do* pass state-mandated examinations.²⁰⁸

²⁰³ N.Y. Comp. Codes R. & Regs. tit. 8, § 100.2(e) (1989).

²⁰⁴ *Id.* § 100.3(b); see Conn. Gen. Stat. § 10-4a (1986) (expressing "concern of the state . . . that each child shall have . . . equal opportunity to receive a suitable program of educational experiences"). Although the courts are not bound by the procedures the states themselves annex to the property interests they create, see *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985); *infra* note 213, the courts, in determining what procedures the due process clause demands, are by no means barred from considering the kinds of procedures authoritative sources have deemed necessary to protect state-given property interests. See *supra* note 133 (reliance on statutorily specified or implied procedures contributes to democratic legitimacy).

²⁰⁵ See *supra* notes 113, 122-23 and accompanying text.

²⁰⁶ See *supra* notes 102, 140; *supra* note 122 and accompanying text.

²⁰⁷ See *supra* note 140 (suggesting as a presumptive benchmark an 80 or 85% passing rate).

²⁰⁸ Traditional legal analyses of "how much process is due" also support a right to adequate instruction and remedial services sufficient to enable most students at a school, upon the application of reasonable effort, to score at or above standard. First, "the private interests that will be affected," *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), by students' failure to meet minimum standards and, accordingly, to receive a diploma are great. See *Plyler v. Doe*, 457 U.S. 202, 223 (1982) (noting that result of denying children a "basic education" is "a lifetime [of] hardship" and the "stigma of illiteracy," which marks its victims "for the rest of their lives"). The irreplaceability of *public* educational services for poor children also supports the requirement of stringent procedures before benefits may be withdrawn. Compare *Goldberg v. Kelly*, 397 U.S. 254, 264, 266-71 (1970) (because welfare benefits are irreplaceable and their loss leaves recipients destitute, full predecisional hearing required) with *Mathews*, 424 U.S. at 341-

Aside from access to the federal courts, do procedural due process theories add anything to actions premised on mandamus or other direct-enforcement theories?²⁰⁹ I believe they do. Most importantly, the protocol for identifying property rights and "due" procedures is different from the protocol for identifying "mandamusable" statutory duties in ways that modestly may improve the strength of plaintiffs' case. Moreover, from the standpoint of neutral policy concerns, procedural due process claims do not diminish and may enhance the soundness of litigated outcomes.

In the absence of clearly directive language, the property right on which plaintiffs probably will rely in minimum-standards litigation is not the right to a particular outcome on a legislatively mandated test but rather the right to a diploma or some other benefit that the state conditions on scores on that test. Procedural due process analysis, that is, focuses attention not simply on the expectations that the administration of state-mandated tests do or may create, but in addition on the less debatable expectations created by laws compelling

43 (because loss of Social Security disability benefits does not deprive recipient of recourse to alternative sources of subsistence, no right to predecisional hearing). Second, "the risk of an erroneous deprivation of [this] interest"—the risk, that is, that students who want to learn the skills tested on state-mandated examinations nonetheless will fail to do so because of inadequate instruction—and the "probable value . . . of additional or substitute procedural safeguards," *id.* at 334-35, is high, given the huge numbers of poor and minority children currently falling below standards, see *supra* notes 94, 119 and accompanying text, and the known availability of educational interventions capable of forestalling that result. See, e.g., authority cited *supra* notes 148-52. Finally, there is no "government[al] interest," *Mathews*, 424 U.S. at 334-35, that justifies denying students the educational means to pass tests the state has identified as measuring the *minimum* skills necessary in modern life. For in stark contrast to more typical procedural due process situations—in which officials have sound fiscal and other reasons to deny expensive evidentiary hearings, for example, to prisoners whom the state has an interest in disciplining, or to disability recipients whose benefits the state wishes to terminate, or to debtors from whom the state has an interest in seizing property to satisfy unliquidated debts—education officials have only an uncertain fiscal interest at best in denying students educational services sufficient to enable them to become productive members of society. See *Plyler v. Doe*, 457 U.S. 202, 223 (1982) (denying children a basic education "foreclose[s] any realistic possibility that they will contribute in even the smallest way to the progress of our Nation").

²⁰⁹ Although much has been written about the relative merits of state and federal adjudication of questions fit for both forums, e.g., Brennan, *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. Rev. 535 (1986); Note, *The New Federalism: Toward a Principled Interpretation of the State Constitution*, 29 Stan. L. Rev. 297 (1977), lawyers no doubt will resolve that issue on the basis of instance-specific considerations that are not subject to interesting treatment here. See, e.g., *infra* note 257 and accompanying text.

children to attend school and the benefits, such as diplomas, that schools traditionally have provided children in return for that loss of liberty.²¹⁰ By easing the burden of proving an enforceable duty and right, procedural due process analysis may tend to increase the likelihood that plaintiffs will succeed. That analysis continues to function satisfactorily from the standpoint of democratic policy, however, because the analysis continues to focus attention on expectations that the legislature legitimately and foreseeably created among members of its constituency.

Procedural due process analysis tempers the extent to which it favors plaintiffs by including a requirement that is not analogous to any of the traditional elements of mandamus: Plaintiffs must establish a denial of some type of "process" that the state in fairness was obliged to provide before frustrating plaintiffs' legislatively created expectations. Establishing a right to meaningful "*educational process*"—the crux of the due process analysis sketched above—is likely to confront plaintiffs with a significant hurdle, moreover, because of the concept's relative novelty. Plaintiffs may find the hurdle worth interposing, however, because it so squarely presents to the courts the central question of fairness that stigmatizing minimum-standards laws raise: Whether a state fairly may harm children it compels to attend school by imposing expectations-frustrating consequences on those children when they fail state-mandated tests that they demonstrably are without the instructional means to pass.

Forcing an authoritative answer to that question also may have advantageous policy consequences. Above, I discounted the danger that the proposed strategy would enhance the harm of duty-creating minimum-standards laws that irresponsibly scapegoat school officials by blaming them for educational failures they are technologically incapable of avoiding.²¹¹ Here, I make a stronger claim: The "what process is due" analysis positively discourages the probably greater danger that legislators will enact minimum-standards laws that irresponsibly scapegoat children by denying them expected benefits on the basis of obstacles the state interposes but provides children with no fair opportunity to surmount.²¹² Thus, rather than inviting courts

²¹⁰ See authority cited *supra* note 202.

²¹¹ See *supra* notes 141-65 and accompanying text.

²¹² There are two reasons why the danger of minimum-standards laws that irresponsibly scapegoat poor and minority children is greater than the danger of laws that irresponsibly

undemocratically to create public duties that the public does not mean to impose on its officials,²¹³ procedural due process analysis arguably facilitates responsible and democratically legitimate decisionmaking by discouraging the cynical or sloppy legislative creation of politically popular expectations that the legislature does not intend to fulfill or has not thought carefully about how to fulfill.²¹⁴ To give a

scapegoat school officials. First, poor and minority children may be less capable than school officials of protecting their interests in the legislative process. Second, blaming poor and minority children for unavoidable educational failures frustrates the choice-enhancing purposes of public education in a liberal polity, see *supra* notes 86-87 and accompanying text, while scapegoating public employees is a routine and potentially salutary aspect of democratic government, see J. Shklar, *supra* note 136, at 7, 95-97.

²¹³ See *Arnett v. Kennedy*, 413 U.S. 134, 153 (1974) (Rehnquist, J., dissenting) (arguing that, absent a "bitter with the sweet" doctrine, which would limit constitutionally "due" procedures to those the state's expectations-creating legislation already supplies, procedural due process law frustrates majoritarian policies). But see *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 540-41 (1985) (eight-person majority rejects "bitter with the sweet" doctrine).

²¹⁴ Thus, once the legislature adopts a policy—say, that all children can learn, should be given the means to do so, and should be benefited if they do and penalized if they do not—and once the legislature gives administrators the duty to implement that policy, the due process clause arguably requires a "rational" bureaucratic system capable of implementing that policy "in a reasonably coherent fashion." J. Mashaw, *supra* note 121, at 227, 230, 242-44. If the legislature or administrators adopt an implementation process that is *not* "instrumental to the [policy's] achievement" or is irrational, the courts legitimately may substitute a more instrumental and rational policy. *Id.* In so doing, the courts are not dictating implementation procedures so much as "remanding to the legislature" to choose a better process for achieving its policy or to change the policy. *Id.* at 243-44. To explain the democratic legitimacy of a due process regime that substitutes judicially for legislatively specified procedures, I would take the "remand to the legislature" feature of due process adjudication further than Professor Mashaw takes it. *Cf. id.* at 165, 178-79 (noting value of enhancing participation in the making as well as the implementation of policy but finding no support in the due process case law for doing so and doubting consistency of such an approach with the administrative state). Although I cannot fully explain here how I would do so, the outlines of the theory are as follows: The imposition of demanding procedures through due process adjudication can "impose costs on government" that encourage legislators to consider "the transformation, even the abandonment of government activities." *Id.* at 5. Although often considered an undemocratic embarrassment, see *id.* at 260-64, this effect of due process adjudication becomes a democratic virtue if two prerequisites are met: (1) Judicially inspired legislative reconsideration is limited to circumstances in which the legislature's initial consideration probably left undemocratically out of account the interests of a small or insular group of persons whose legitimate expectations are frustrated by the legislation and its original implementation process, see Rubin, *Due Process and the Administrative State*, 72 *Calif. L. Rev.* 1044, 1104 (1984); and (2) "remanding" for legislative reconsideration would give the adversely affected citizens "access to the . . . forums in which rights are being created," J. Mashaw, *supra* note 121, at 36. The first prerequisite arguably is supplied by the due process doctrines that predicate judicial intervention on legislative burdens that are isolated or uneven rather than uniform, compare *Londoner v. City of Denver*, 210 U.S. 373 (1908) (adjudicatory

concrete example, a state legislature might be free to replace a relatively generous educational system—say, one in which the state compels children to attend school and to attend conscientiously to their lessons and offers a diploma in return—with a less generous system—say, one in which the state similarly compels children but offers no benefit in return.²¹⁵ But, when lawmakers decide to make such a change, a concern for responsible legislative decisionmaking suggests that they ought to do so directly and substantively, rather than by interposing indirect procedural obstacles that covertly withhold from children a benefit that the children justifiably think they have fulfilled the requirements to receive.²¹⁶ In sum, procedural due process analysis presents plaintiffs with opportunities as well as obstacles that, on balance, may increase plaintiffs' likelihood of success while at the same time generating positive policy consequences.

D. Actions to Enforce Constitutional Duties Defined by Minimum-Standards Legislation

For years, litigants have been asking courts to define a minimum level of education that the federal and state constitutions require states to provide schoolchildren. The educational finance-equity and educational malpractice initiatives of the 1970's and 1980's are examples of this quest, as are some aspects of the school desegregation

process necessary given isolated and uneven application of local tax) with *Bi-Metallic Investment Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915) (no adjudicatory process necessary given uniform application of tax), and on a significant discrepancy between the relatively large impact of the legislation and its original implementation process on the adversely affected citizens and the relatively modest benefits afforded the state by that implementation process compared to other available processes, see *Mathews v. Eldridge*, 424 U.S. 313, 334-35 (1976) (discussed *supra* note 208). The second prerequisite is satisfied if, as seems likely, the procedures the court imposes prompt burdened administrators to seek legislative relief, and if the previously successful lawsuit gives the plaintiffs or their advocates a place at the bargaining or committee-hearing table when new legislation is considered. See *J. Mashaw*, *supra* note 121, at 34, 245. The use of due process adjudication to reform the legislative process also helps explain the Court's otherwise puzzling insistence on a legislative or "positivist" property-right trigger for due process intervention. See *supra* notes 193-94 and accompanying text.

²¹⁵ But cf. Note, *supra* note 125 (arguing that removing diploma "quid pro quo" would render compelled school attendance unconstitutional).

²¹⁶ On the value of legislative candor, see *J. Ely*, *supra* note 56, at 124-31; Gunther, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 44 (1972); Sunstein, Interest Groups in American Public Law, 38 Stan. L. Rev. 29, 69-73 (1985).

movement of the preceding thirty-five years. Until recently, these efforts have had only modest success.²¹⁷ Now, however, the proliferation of state educational standards arguably eases the burden plaintiffs heretofore have faced in attempting to establish a federal or state constitutional right to a minimum level of educational services or performance. Most importantly, the new standards neutralize a series of policy arguments that commentators and courts commonly have asserted against judicial intervention in the adequate-education sphere.²¹⁸

For example, courts frequently concluded in the past that plaintiffs could not convincingly point to an "identifiable quantum of education" definitive of adequacy other than the minimum level already required under state law, which was so minimal that even plaintiffs did not contend they were not receiving it.²¹⁹ Recent minimum-standards legislation substantially alters this situation by setting the "quantum of education" that defines minimum educational competence at levels substantially higher and more objective than the "teacher, book, and a bus" formula the courts gleaned from state law and found satisfied in the seventies and early eighties.²²⁰ Today, the

²¹⁷ See Briffault, *supra* note 172, at 35-38; Elson, *supra* note 151, at 889-901; Note, *supra* note 82, at 1670-78.

²¹⁸ See, e.g., authority cited *supra* note 128.

²¹⁹ *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 24, 36-37 (1973) (noting absence of judicially "identifiable" constitutional minimum level of education, accepting Texas's "assert[ion] that [its statutory] Minimum Foundation Program [for funding schools] provides an 'adequate' education for all children in the State," and concluding both that "[n]o proof was offered at trial persuasively discrediting or refuting the State's assertion" and that in the present case "no charge fairly could be made that the system fails to provide each child with an opportunity to acquire the basic minimum skills"); see also *Papasan v. Allain*, 478 U.S. 265, 286 (1986) ("[P]etitioners do not allege that school children in the Chickasaw Counties are not taught to read or write."); *Peter W. v. San Francisco Unified School Dist.*, 60 Cal. App. 3d 814, 131 Cal. Rptr. 854 (1976) (state law identified no general duty to educate plaintiff); *Levittown Union Free School Dist. v. Nyquist*, 57 N.Y.2d 27, 48, 439 N.E.2d 359, 369, 453 N.Y.S.2d 643, 653 (1982) ("If what is made available by this system [of state education laws] . . . may properly be said to constitute an education, the constitutional mandate [to provide an education] is satisfied").

²²⁰ See, e.g., *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 24 (1973) (relying upon a Texas statute establishing a so-called "Minimum Foundation Program of Education" to conclude that the state supplied an adequate program of education "[b]y providing 12 years of free public-school education, and by assuring teachers, books, transportation, and operating funds"); *Levittown Union Free School Dist. v. Nyquist*, 57 N.Y.2d 27, 48, 439 N.E.2d 359, 368-69, 453 N.Y.S.2d 643, 653 (1982) (finding state constitutional requirement of a "system of free common schools, wherein all the children of this state may be educated," N.Y. Const. art. XI, § 1, satisfied because legislature made and state satisfied "prescriptions . . . with reference

state's own statistics are likely to document stark and consistent patterns of performance below the state's own measure of minimal adequacy.²²¹

Minimum-standards laws also answer the anti-interventionist arguments that a minimally adequate education *cannot* be identified because no one yet knows *how* to educate poor and minority children adequately and that, in any event, legislators, not judges, should make the hard decisions on such controversial matters.²²² First, by applying upgraded standards to children universally compelled to attend school, state lawmakers have implicitly, and in some cases explicitly, rejected the anti-interventionists' implied assumption that many (for example, poor and minority) children cannot learn.²²³ Second, given the comprehensive curricular and other input requirements, testing and other diagnostic procedures, remedial-services regimens, and "school improvement" programs that the minimum-standards laws themselves embody and that state and local education departments across the country have developed in response to them,²²⁴ the new laws significantly reduce the remedial burdens courts can anticipate if they entertain "minimally adequate education" litigation. Instead of having to develop their own remedial regimes, the courts need simply order school, district, and state officials to supply the educational inputs required by state law and whatever other services those officials deem necessary to enable children, with reasonable effort, to satisfy the performance standards that the state legislature has concluded all children can satisfy.²²⁵ In sum, by enacting specific and universally

to the minimum number of days of school attendance, required courses, textbooks, qualifications of teachers . . . , pupil transportation, and other matters").

²²¹ New York's statistics, for example, reveal schools filled with children falling below standard and districts filled with schools the state has labeled failures. See *supra* note 119.

²²² See *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 42-43 (1973) (expressing skepticism that additional educational inputs would enhance educational outcomes for poor children because the answer to this question "is not likely to be divined for all time even by the scholars who now so earnestly debate the issues. . . . [T]he judiciary is well advised to refrain from imposing on the States inflexible constitutional restraints . . . [on the] experimentation so vital to finding even partial solutions to educational problems").

²²³ See *supra* note 222.

²²⁴ See, e.g., P. Hill, *supra* note 148.

²²⁵ Cases tying remedial orders to state educational standards in the desegregation context are *Liddell v. Missouri*, 731 F.2d 1294, 1297 (8th Cir.) (en banc) (approving settlement of desegregation case that mandated new programs and facilities sufficient to satisfy state standards), cert. denied sub nom. *Leggett v. Liddell*, 469 U.S. 816 (1984); *Jenkins v. Missouri*, 639 F. Supp. 19, 24, 26 (W.D. Mo. 1985) (ordering state to expand financial aid to previously

applicable minimum standards, state legislators *have* made the hard policy decisions, leaving the courts with an enforcement role that conforms to traditional visions of the judicial function.²²⁶

Finally, the rash of state-mandated educational-performance requirements that students, teachers, and districts must meet—not to mention the numerous state “takeover” provisions that recently have come into vogue²²⁷—neutralize, as well, the third policy basis upon which courts over the last twenty years have refused to intervene in education matters—the asserted importance of purely local decision-making in such matters.²²⁸

The above analysis suggests that, by relying on minimum-standards legislation to illustrate the honorable role of educational distributivism in even miserly early-1990’s versions of liberalism and the hollowness of the old anti-interventionist boilerplate, plaintiffs might increase their likelihood of success in renewed finance-equity and even educational malpractice and school-desegregation litigation.²²⁹ As the following discussion demonstrates, the analysis also suggests the possibility of altogether new strategies for giving “minimally adequate education” content to equal protection and public-education provisions of the federal and state constitutions.

1. *Equal Protection Theories*

Parents may establish a violation of the federal equal protection clause by showing that school officials treat their children differently

segregated district in amount sufficient to enable it to achieve state’s highest school-district rating because highest rating signifies that the “school system quantitatively and qualitatively has the resources necessary to provide minimum basic education to its students”; also ordering school officials to take steps necessary to raise black students’ scores on state-mandated tests to national norm), *aff’d* on this ground, 807 F.2d 657 (8th Cir. 1986) (en banc), cert. denied, 108 S. Ct. 708 (1987); *Reed v. Rhodes*, 455 F. Supp. 569, 598 (N.D. Ohio 1978) (ordering educational-enhancement programs sufficient to raise the test scores of black children to specified level in order to overcome effects of de jure segregation), *aff’d*, 607 F.2d 714 (6th Cir. 1979), cert. denied sub nom. *Cleveland Bd. of Educ. v. Reed*, 445 U.S. 935 (1980).

²²⁶ See *supra* note 116 and accompanying text.

²²⁷ See *supra* notes 113 and 174.

²²⁸ See, e.g., authority cited *supra* note 113.

²²⁹ See Briffault, *supra* note 172, at 36-37 (recent increase in amount and success of finance-equity litigation); Goldberg, *School in Kentucky Faces “Malpractice” Charge*, *Educ. Week*, Nov. 16, 1988, at 6; *supra* notes 54-78, 89 and accompanying text (discussing “traditional” school desegregation and finance-equity litigation); *supra* note 89 (recent surge in litigative and legislative activity seeking statewide equalization of per capita spending on public education).

from other similarly situated children with respect to some educational benefit²³⁰ and that the disparate treatment is arbitrary²³¹ or impinges on some "important" or "fundamental" personal interest without serving some correspondingly significant or "compelling" state interest.²³² Minimum-standards legislation improves parents' chances of establishing the "disparate treatment," "arbitrariness," and "important/fundamental" interest elements of equal protection liability.

a. *Disparate Treatment*

The new standards provide an uncontroversial means of meeting the threshold "disparate treatment" requirement: If schools full of

²³⁰ Disparate treatment occurs when persons similarly situated are treated differently or when persons differently situated are treated the same. L. Tribe, *American Constitutional Law* 1438-39 (2d ed. 1988); see, e.g., *Boddie v. Connecticut*, 401 U.S. 371 (1971) (suggesting that state statute, by requiring all persons to pay filing fee to commence divorce action improperly failed to treat rich and poor differently).

²³¹ E.g., *Kadrmas v. Dickinson Pub. Schools*, 487 U.S. 450 (1988) (arbitrariness scrutiny of legislation treating patrons of some school districts differently from others with respect to availability of free transportation to school); *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973) (arbitrariness scrutiny of legislation providing different levels of educational funding above a state-mandated minimum for various districts in state).

²³² See, e.g., *Plyler v. Doe*, 457 U.S. 202, 221, 223-24 (1982) (invalidating legislation allowing school districts to refuse to educate children of illegal aliens because legislation adversely affected children's ability to receive an education—which "has a fundamental role" in our society—without serving a "substantial" state interest). Intentional discrimination against persons on the basis of their race or ethnicity also violates the equal protection clause absent a compelling state interest. See, e.g., *Brown I*, 347 U.S. 483 (1954); *Hernandez v. Texas*, 347 U.S. 475 (1954); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). Illustrating the difficulty of proving intentional discrimination absent explicit statutory categorization by race are, e.g., *Personnel Adm'r v. Feeney*, 442 U.S. 256, 279 (1979); *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977); *Washington v. Davis*, 426 U.S. 229 (1976). Although awareness on the part of lawmakers or administrators that action they take will disproportionately harm members of a suspect class is not the same as purposeful discrimination, see *Feeney*, 442 U.S. at 279, that awareness permits "a strong inference that the adverse effects were desired." *Id.* at 279 n.25. On the possibility that legislators' adoption of minimum-standards legislation despite its well known racially disparate impact on access to diplomas, see authority cited *supra* note 100, might make out a violation of the suspect-classification branch of equal protection analysis, compare *Larry P. v. Riles*, 495 F. Supp. 926, 979 (N.D. Cal. 1979) (finding intent to discriminate based on highly visible racially segregative effect of district's procedure for assigning children to "educable mentally retarded" tracks), *aff'd in part, rev'd in part*, 793 F.2d 969 (9th Cir. 1984), with *Anderson v. Banks*, 520 F. Supp. 472, 499-500 (S.D. Ga. 1981) (finding "no evidence whatsoever that [a competency-testing] policy was a subterfuge to increase the value of the diploma while denying access . . . to black children").

children on one side of a district or state are satisfying state-defined outcome measures and being awarded diplomas, while substantial portions of similarly situated children attending schools elsewhere in the district or state are not, state-sponsored disparate treatment exists.²³³ Moreover, the legislation's implicit or explicit conclusion that all children in regular programs in the state are capable of satisfying the state's minimum-performance requirements should help impoverished and minority parents establish that their children *are* for these purposes situated similarly to other children in the state and, hence, deserve the same outcomes.

b. Arbitrariness

Because officials may avoid a finding of arbitrariness by establishing merely that their disparate treatment of similarly situated citizens benefits the state in a legitimate way—including saving the state a little money²³⁴—the courts rarely hold that government-sponsored disparate treatment is actionably arbitrary.²³⁵ Nevertheless, minimum-standards enactments arguably afford a basis for such a holding by depriving state officials of any legitimate reason for affording a minimum level of education to some children but not to others. For once a state commits itself to the proposition that a minimally adequate education includes instruction sufficient to enable *all* children in the state to pass certain tests, and once it commits itself to providing *all* children with the means to do so,²³⁶ the state arguably has disclaimed the legitimacy of any, even fiscal, interest in withholding

²³³ E.g., *Debra P.*, 644 F.2d at 401; *Anderson v. Banks*, 520 F. Supp. 472, 486-88 (S.D. Ga. 1981). Contrariwise, if some students receive the same amount of educational inputs and are judged according to the same diploma-determining standards as others but for some demonstrable reason (e.g., limited English proficiency) need more resources than the others to achieve the legally specified minimum standards, it might be argued that "unlikes" are being unlawfully treated "alike." See *supra* note 230.

²³⁴ E.g., *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 54-55 (1973).

²³⁵ But cf. *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985) (invalidating Alabama statute that taxed out-of-state insurance companies at higher rate than in-state ones); *United States Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973) (holding that regulation limiting distribution of federal food stamps to households containing no unrelated persons bears no rational relationship to statute's legitimate purposes of satisfying nutritional needs and helping nation's agriculture); *Jackson v. Indiana*, 406 U.S. 715 (1972) (finding no rational basis for involuntarily committing nondangerous persons to mental institutions).

²³⁶ See *supra* notes 113, 122-23 and accompanying text.

those means from some subset of its young citizens.²³⁷ Although the state continues to retain a legitimate interest in providing some children with *less expensive* means to pass the tests than it provides other children, it has no legitimate interest in providing some children with *no* means to pass the tests, as arguably occurs, for example, when a majority of children in a particular school or district persistently falls below standard.²³⁸

This arbitrariness analysis is a constitutionalized, but otherwise only rhetorically distinct, version of the mandamus theory discussed above:²³⁹ If the state has promised to provide all children with access to certain educational outcomes, it may not legitimately withhold those outcomes from some children but not others on the basis of competing state interests that it presumedly considered but rejected when it legislated the promise. Accordingly, the likelihood-of-success and policy caveats discussed in the mandamus section above apply as well to this legal theory.

²³⁷ Thus, whether or not equal protection analysis should invalidate legislation that cannot be shown to serve purposes the state expressly has articulated, compare Gunther, *supra* note 216, at 21, 44-45, 46-47 (advocating requirement that legislative purposes be articulated) with J. Ely, *supra* note 56, at 124-31 (doubting practicality of legislative-articulation requirement), equal protection analysis surely should invalidate legislation justified exclusively on the basis that it serves purposes that the state expressly has foresworn.

²³⁸ Decisions concluding that tuition charges for public school students are unconstitutional use something like this analysis. See, e.g., *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 15 n.60 (1973) (*dicta*) (judicial intervention possibly appropriate to remedy state's use of tuition to exclude poor students); *McMillan v. Board of Educ.*, 430 F.2d 1145 (2d Cir. 1970) (reversing dismissal of plaintiff's claim that school board had violated equal protection clause by placing ceiling on private school tuition grants for handicapped children at level lower than cost the school board would incur to maintain the child in a public school classroom); *Kruse v. Campbell*, 431 F. Supp. 180 (E.D. Va.) (insufficient tuition grants to handicapped students unconstitutional), vacated on other grounds, 434 U.S. 808 (1977); *Halderman v. Pittinger*, 391 F. Supp. 872 (E.D. Pa. 1975) (finding that insufficient tuition grants may violate equal protection clause even though insufficient funding to operate entire school system may not). Thus, the escape available to the Supreme Court in *Rodriguez* and similarly unsuccessful finance-equity cases—namely, that the state legitimately and nonarbitrarily could treat some children worse than others as long as it provided all children with the “teacher, book, and a bus” level of education that state law then defined as minimally adequate, see *supra* note 220 and accompanying text—is not available once the state redefines minimal adequacy in terms of quantitative performance standards that substantial numbers of its children in identifiable schools and districts persistently fail to attain.

²³⁹ See *supra* notes 176-85 and accompanying text.

c. *Important or Fundamental Interest*

*San Antonio Independent School District v. Rodriguez*²⁴⁰ long has been understood to reject the notion that education is a "fundamental" interest that states must distribute to citizens equally, absent a compelling state justification for doing otherwise. The decision actually concedes, however, both that state action "occasion[ing] an absolute denial of educational opportunities to any of its children" might violate the equal protection clause²⁴¹ and that there may be "some identifiable quantum of education [that] is . . . constitutionally protected."²⁴² In its 1982 decision in *Plyler v. Doe*,²⁴³ the Court implemented the former concession, holding unconstitutional a Texas statute that did indeed absolutely deny children not "legally admitted" into the country the right to attend public schools. Noting that Texas's denial of an education to illegal-alien children marked them with the "stigma of illiteracy . . . for the rest of their lives," denied "them the ability to live within the structure of our civic institutions," and "foreclose[d] any realistic possibility that they will contribute in even the smallest way to the progress of our Nation," the Court ruled the educational interest at stake sufficiently important—if not actually "fundamental"—that Texas could not absolutely withhold it from illegal aliens absent a "substantial," more-than-merely-fiscal, interest served by the discrimination.²⁴⁴ Then, in *Papasan v. Allain*²⁴⁵ in 1986, the Court reinvigorated the second *Rodriguez* concession, identifying as unsettled the question "whether a minimally adequate education is a fundamental right" of the sort that a state may not "discriminatorily infringe" without engendering "heightened equal protection

²⁴⁰ 411 U.S. 1 (1973) (discussed *supra* notes 219-20 and 222).

²⁴¹ *Rodriguez*, 411 U.S. at 37.

²⁴² *Id.* at 36.

²⁴³ 457 U.S. 202 (1982).

²⁴⁴ *Id.* at 223-24, 227; see *id.* at 221 (stating that education is not "merely some governmental 'benefit' indistinguishable from other forms of social welfare"). *Plyler* also, it should be noted, relied on the discreteness of the class of illegal-alien children against whom the state discriminated. *Id.* at 223. Absolute governmental deprivations of important benefits are particularly likely to engage the courts' exacting attention when the state—as in the sphere of education—exercises more or less of a monopoly over the benefit in question. See, e.g., *Boddie v. Connecticut*, 401 U.S. 371 (1971) (concluding that because state has monopoly on means for dissolving marriages and because marriage has an important place in our society's scheme of values, denying indigents access to a divorce because of their inability to afford the \$60 filing fee violates Constitution).

²⁴⁵ 478 U.S. 263 (1986).

review."²⁴⁶

As noted, scores of states now explicitly rely on minimum-performance standards to measure "functional literacy" and the capacity to participate productively in modern society.²⁴⁷ Taken together with the dictum in *Papasan* regarding the "right to a minimally adequate education" and the two interests identified as constitutionally "important" in *Plyler*—literacy and the ability to live within and contribute to our civic institutions—the states' minimum-standards enactments seem well calculated to "identif[y] the] quantum of education [that] is . . . constitutionally protected."²⁴⁸ If the standards *do* demarcate an "important" or "fundamental" educational interest, moreover, a state's distribution of the wherewithal to meet the standards to the children assigned to some schools but not to the children assigned elsewhere, then the fiscal interest served by the disparity, which arguably is barely rational at best, would not rise to the constitutionally necessary level of a "substantial" or "compelling" interest, and an equal protection violation would be established.

The difficulty with fundamental-interest equal protection analysis always has been how to identify a basis other than the judge's own drnthers for designating particular interests as fundamental.²⁴⁹ One might try to locate such a basis in liberal theory, which arguably forms a "penumbra" around the federal Constitution as a whole²⁵⁰ and which, as I argue above, strongly suggests that education is more fundamental than other governmental services.²⁵¹ One also might try to locate such a basis in the acknowledgments of a right to an educa-

²⁴⁶ *Id.* at 285.

²⁴⁷ See *Debra P.*, 644 F.2d at 400 n.1 (Florida minimum competency tests designed to measure functional literacy and capacity for productive participation in modern life); Regents Action Plan, *supra* note 95, at 1 (New York's minimum standards reflect "what our children must know and be able to do in their 21st Century lifetime" and assess their development of a "stake in the meaning of life, liberty, and the pursuit of happiness").

²⁴⁸ *Rodriguez*, 411 U.S. at 36-37.

²⁴⁹ See, e.g., J. Ely, *supra* note 56, at 43-72.

²⁵⁰ E.g., B. Ackerman, *supra* note 87, at 273-324; J. Mashaw, *supra* note 121, at 172-221; D. Richards, *Moral Criticism of Law* 44-56 (1977); Brest, *State Action and Liberal Theory: A Casenote on Flagg Bros. v. Brooks*, 130 U. Pa. L. Rev. 1296 (1982); Dworkin, *Neutrality, Equality, and Liberalism*, in *Liberalism Reconsidered* 1 (D. MacLean & C. Mills eds. 1983); see also *The Federalist* No. 52, at 324 (J. Madison) (C. Rossiter ed. 1961) (republican form of government instrumental to preserving liberty); J. Ely, *supra* note 56, at 100-01 (offering democratically based theory of Constitution but acknowledging that democracy is instrumental to liberal ends).

²⁵¹ See *supra* notes 79-89 and accompanying text.

tion found in the fundamental positive law of nearly all fifty states.²⁵² After being presented in *Rodriguez* with analogous indicia of education's fundamentality, however, the Supreme Court demurred, refusing to locate a "fundamentality" conclusion in sources less tangible than even the "penumbras" of specific clauses of the Constitution.²⁵³

The relative strength of two competing trends in modern constitutional law will have an important impact on whether litigants can convince the Court to change its mind about the fundamentality of education based on the Court's post-*Rodriguez* precedents and on the legislative consensus that recently has formed around elevated and objectively measurable educational outcomes: the decreasing willingness of the Court to identify fundamental values in the process of constitutional interpretation,²⁵⁴ and the Court's increasing reliance upon majoritarian decisionmaking as the single source of constitutionally important values.²⁵⁵ Because most of the other legal theories dis-

²⁵² See *supra* note 82 and accompanying text.

²⁵³ See *Rodriguez*, 411 U.S. at 29-39. Education thus has presented the Court with a more difficult question than such penumbraally located interests as voting, avoiding unfair criminal conviction, and even interstate travel. Cf. *Shapiro v. Thompson*, 394 U.S. 618 (1969) (changing residence from one state to another a constitutional right); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) (poll tax violates equal protection clause because of disparate impact on fundamental interest in voting); *Douglas v. California*, 372 U.S. 353 (1963) (deciding merits of indigent defendants' one appeal of right without benefit of counsel violates equal protection clause).

²⁵⁴ See authority cited *supra* note 109.

²⁵⁵ See, e.g., Chemerinsky, *supra* note 108, at 56-74. Illustrating both trends is the Court's and particularly Justice White's progression in interpreting the eighth amendment's "cruel and unusual punishment clause" from *Coker v. Georgia*, 433 U.S. 584, 592-600 & nn.5-12 (1977) (plurality opinion of White, J.) (acknowledging Court's responsibility to exercise its "own judgment . . . on the acceptability of the death penalty [for rape] under the Eighth Amendment" and relying on a number of national and international statutory and academic sources, including but not limited to the recent views of state legislatures in the United States to inform that judgment) and *Enmund v. Florida*, 458 U.S. 782, 788-801 & nn.18-24 (1982) (majority opinion of White, J.) (concluding that, "[a]lthough the judgments of legislatures, juries, and prosecutors weigh heavily in the balance, it is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty on one . . . who does not himself kill, attempt to kill, or intend that a killing take place," and relying upon various sources to inform that judgment) to *Stanford v. Kentucky*, 109 S. Ct. 2969, 2979 (1989) (plurality opinion of Scalia, J., joined, *inter alia*, by White, J.) ("emphatically reject[ing]" view that Court may exercise its "own informed judgment" in regard to whether the eighth amendment permits imposition of the death penalty on 16- and 17-year olds and arguing that the Court's analysis should be limited to determining whether "[a] revised national consensus" against executing juveniles "appear[s] in the operative acts (laws and the application of laws) that the people have approved"). I realize that the two trends delineated in text are contradictory in one

cussed here have a reasonable chance of taking advantage of the latter, majoritarian trend without implicating the former, "interpretive" trend, those theories are likely to fare better than the fundamental-rights theory, which cannot avoid implicating the "interpretive" trend.²⁵⁶

Nonetheless, if plaintiffs decide to bring lawsuits based upon the other theories discussed here, they might reasonably decide to include a fundamental-interest equal protection claim as well, based on one of the following three possibilities: (1) The Court, prompted by lower court adjudication exploring the openings left by *Rodriguez*, *Plyler*, and *Papasan*, or by changes in its own personnel (in which our self-proclaimed Education President may play an important role), might be convinced to revise its ruling in *Rodriguez*; (2) a state supreme court, presented with a suit brought under the state's equal protection clause, might be more persuaded than the United States Supreme Court by the indicia of fundamentality present in the state's positive law; or (3) the state's high court, as already has occurred in a few states, might free the state's equal protection provision of the doctrinal tether that *Rodriguez* imposes.²⁵⁷ The latter two possibilities suggest a preference for litigation of fundamental-rights claims in the state courts and particularly in those courts that have uncoupled state and federal equal protection analysis or have recognized a state constitutional basis for identifying education as fundamentally important.

2. State Constitutional Public Education Theories

The public education provisions found in most state constitutions provide the final legal strategy sketched here for enforcing the new legislative standards on behalf of poor and minority children.²⁵⁸ Typ-

sense: The second trend identifies democratic decisionmaking as just the sort of fundamental value that the first trend says the Court ought not to have any role in identifying.

²⁵⁶ See J. Ely, *supra* note 56, at 1 (introducing the term "interpretivism" and defining it as the view that judges deciding constitutional issues should confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution). A civil rights lawyer might decide that a federal fundamental-rights theory is more likely to succeed than the other theories discussed here if she first concluded that the directive impact of the minimum-standards laws enacted nationwide, taken as a whole, is considerably greater than the directive impact of the minimum-standards laws of the state in which her clients attend school.

²⁵⁷ E.g., decisions cited in Briffault, *supra* note 172, at 35 n.128.

²⁵⁸ See Ratner, *supra* note 82, at 814-15 (48 of 50 state constitutions contain public education provisions).

ical of these provisions are ones that require the state to provide a system of "free public schools" or a "thorough and efficient" educational system.²⁵⁹ Already, the high courts of a number of states have interpreted their constitutional public education clauses in the context of finance-equity litigation to impose a legally enforceable duty upon state education officials to provide an adequate education to children in their states—and most of those courts relied heavily upon state statutory requirements as the measure of the constitutionally required education.²⁶⁰ Conversely, a number of courts in the past *denied* children relief under constitutional public education provisions by interpreting those provisions *in pari materia* with the states' then rather toothless *statutory* education requirements, which the plaintiffs did not or could not allege were being violated.²⁶¹

The courts' frequent equation of state constitutional and statutory definitions of "a public" or "a thorough and efficient education" implies that if a legislature adopts minimum-standards laws that implicitly or explicitly add muscle to the statutory concept of an adequate education, then state courts may well interpret or reinterpret then enforce the state's constitutional public education provisions consistently with the recently strengthened statutory provisions. The likelihood that courts will do so increases as proof amasses that the

²⁵⁹ See *id.*; *supra* note 82 and accompanying text.

²⁶⁰ See *Horton v. Meskill*, 172 Conn. 615, 647-48, 376 A.2d 359, 373-74 (1977) (concluding that education is a fundamental right, the contours of which are defined by the state's equal-educational-opportunity and compulsory-attendance statutes); *Robinson v. Cahill*, 62 N.J. 475, 513, 303 A.2d 273, 294 (1973) (holding that state constitution's "thorough and efficient education" clause requires state legislature to define and ensure provision of ample and equal opportunity for all children); *Robinson v. Cahill*, 69 N.J. 449, 456, 355 A.2d 129, 132-34 (1976) (in subsequent litigation, upholding on its face statute assuring all children in state "educational opportunity which will prepare them to function politically, economically and socially in a democratic society" and providing for system of prescribed tests to monitor and evaluate compliance with the requirement (quoting N.J. Stat. Ann. § 18A:7A-4 (West 1989))); *Edgewood Indep. School Dist. v. Kirby*, 777 S.W.2d 391, 397 (Tex. 1989) (existing state statute used as measure of constitutionally required level of education); *Pauley v. Kelly*, 162 W. Va. 672, 705-508, 255 S.E.2d 859, 877-78 (1979) (holding that state's "thorough and efficient" clause requires schooling that "develops, as best the state of education expertise allows, the minds, bodies and social morality of its charges to prepare them for useful and happy occupations, recreation and citizenship" and that contours of adequate-education mandate are left principally to state legislature); see also *Seattle School Dist. No. 1 v. Washington*, 90 Wash. 2d 476, 518, 585 P.2d 71, 94-95 (1978) (holding that state constitution assures children a level of education sufficient to enable them to "compete adequately in our open political system, in the labor market, or in the marketplace of ideas").

²⁶¹ See *supra* note 220.

education available in identifiable schools and districts in the state fails to conform to the statutory provisions. As illustrated by a lawsuit recently filed in Connecticut, which relies in part on the minimum-standards rationale proposed here,²⁶² this enforcement technique is useful outside the context of—or even in the aftermath of *successful*²⁶³—finance-equity litigation. This strategy, that is, enables litigants to seek court orders requiring school officials to take whatever steps are necessary and appropriate—whether fiscal or, if fiscal efforts have not sufficed, otherwise—to enable failing schools and districts to supply the statutorily defined and quantitatively measurable level of education that the state constitution requires.

Above, I argued that minimum-standards-based procedural due process theories present the claims of individual children to a specified level of education in a relatively attractive light from the perspectives both of the plaintiff children and of democratic policy.²⁶⁴ Analogously, the public education theory discussed here presents the claims of the public at large to a specified level of educational services in an especially attractive light from the same two perspectives.

State constitutions oblige legislators to provide few public benefits.²⁶⁵ The inclusion in a state constitution of a clause requiring the state to provide a “free” or “thorough and efficient” public education²⁶⁶ accordingly creates expectations with regard to public educational benefits that are not likely to arise in regard to other benefits that legislatures might choose to provide. Moreover, once the courts of a state cede to the state legislature the principal authority to construe, as well as to carry out, a constitutional “public education” provision,²⁶⁷ the expectations that the constitutional provision creates are likely to coalesce around the laws the legislature enacts regarding public education and to invest with special importance any educational outcomes those laws identify as desirable. If, therefore, legisla-

²⁶² Scheff v. O'Neill (Hartford/New Britain Super. Ct. filed Apr. 26, 1989). Similar lawsuits are being prepared for filing in the near future in Louisiana, New York, and North Carolina. Interview with Helen Herschkoff, Associate Legal Director of the American Civil Liberties Union (Feb. 27, 1990).

²⁶³ See Horton v. Meskill, 172 Conn. 615, 376 A.2d 359 (1977) (Connecticut's legally successful finance-equity litigation, discussed supra notes 144-46 and accompanying text).

²⁶⁴ See supra notes 209-16 and accompanying text.

²⁶⁵ See supra notes 79-81 and accompanying text.

²⁶⁶ See supra notes 82, 258 and accompanying text.

²⁶⁷ See authority cited supra notes 260-61.

tors ever will and ever ought to be held to have constitutionally created duties to the public that the public may enforce through means other than elections, it will and ought to be when the following two circumstances, which characterize the enforcement strategy proposed here, are present: first, when the state's fundamental law commits future generations of legislators to prescribing, then providing, benefits of a particular type; and second, when, thereafter, a particular legislature, in the due democratic course of its business, throws its prescriptive weight behind a particular, objectively measurable description of that benefit.

The courts in this situation still have to confront a number of difficult questions, including: (1) whether any judicial enforcement role exists at all or whether, on the other hand, a political-question or standing bar applies; (2) whether, if a judicial role exists, the legislature can be said to have thrown its "prescriptive" weight behind a particular vision of the benefit it is constitutionally required to provide;²⁶⁸ and (3) whether in this, unlike the procedural due process, context,²⁶⁹ the bitter (for example, insufficient state funds and weak enforcement mechanisms) accompanies the sweet (for example, a commitment to the public to achieve certain educational outcomes). In answering these questions, however, state courts may and arguably ought to be disposed to treat the conjunction of the expectations arising out of the constitutional provision itself and the expectations arising out of the laws that the branch of government primarily responsible for interpreting that provision has enacted as shifting the burden of proof. Once plaintiffs in this situation have identified a less-than-explicitly-directive but clearly outcome-specifying law, that is, the burden justifiably might be shifted from the party claiming that a duty to provide the specified outcome exists to the party claiming that no such duty exists.

Put another way, there are two kinds of incentives that might facilitate the political process envisioned by a state constitution that devolves substantial responsibility upon the legislature to define, as well as to provide, a particular type of benefit: incentives that encourage the legislature, when it legislates in regard to that benefit,

²⁶⁸ A legislature, that is, surely ought to be able to say, for example, that "full 'cultural literacy' is desirable, but that for now something less will have to do."

²⁶⁹ See *supra* note 213.

to say forthrightly how it defines the benefit; and incentives that discourage legislators from appearing to give benefits of that type with one hand that the legislators cynically or carelessly withdraw with the other hand. That preferred incentive structure is achieved, moreover, by imposing on the legislature the burden—either in the course of minimum-standards litigation or, failing there, in responsive legislation—to establish that outcome-specifying educational enactments that could lead the public to expect state education officials to achieve those outcomes in fact were not designed or intended to do so.

Public education theories thus have two consequences. First, they force courts directly to confront the question of how much education the state is obliged to supply under a constitution promising citizens a “free” or “thorough and efficient public education.” Second, they invite courts to use as a benchmark for resolving that question the objectively measurable amount of education that the democratic branch of government with principal responsibility for interpreting the constitution has identified as desirable. As such, the public education claim seems to provide plaintiff schoolchildren with as legally favorable and as politically legitimate an opportunity as is available to secure judicial censure of failing school policies.

There are several available legal theories based on which courts reasonably might hold that minimum-standards laws create judicially enforceable rights to objectively specified levels of educational services. Other things equal, two of those theories—federal procedural due process and state public education theories—appear to offer the greatest likelihood of litigative success without triggering adverse policy consequences or being susceptible to politically delegitimizing attacks. In the case of both preferred theories, analysis of whether the statutory language creates enforceable duties focuses not only on the legislators’ intentions but also on the expectations that school children and other concerned members of the public legitimately have formed with regard to the level of education the state is obliged to provide. Moreover, both theories premise the legitimacy of those expectations on an important factor in *addition* to the terms of the minimum-standards laws themselves—the state’s compulsory attendance and diploma laws in the case of due process theory and the state’s constitutional “free public education” provision in the case of public education theory.

Earlier, I concluded that the legal doctrine and plaintiffs' incentives are such that the proposed strategy's policy hazards are likely to be minimized and its policy prospects are likely to be maximized in situations in which plaintiffs have a reasonable likelihood of succeeding on the legal merits.²⁷⁰ My conclusions with regard to the strategy's likelihood of legal success are more guarded: First, a litigation strategy of the sort proposed here potentially *could* succeed under existing doctrine. Second, other things equal, the strategy is somewhat more likely to succeed when plaintiffs rely on federal procedural due process doctrine and state public education clauses than when they rely on the other theories delineated above. Third, the strategy is sufficiently viable to warrant experimentation with it when such instance-specific considerations as the following are favorable: the range and educational importance of the duties arguably created by the minimum-standards laws;²⁷¹ the strength of the indicia in the laws themselves and in their legislative history that they create public duties;²⁷² the strength of the expectations-creating features of the state's constitutional public education provision and in its compulsory-attendance and diploma laws; the support that can be derived from the relevant jurisdiction's legal precedents;²⁷³ the potency of the evidence that the plaintiffs' schools are pervasively failing in their educational mission;²⁷⁴ the presence or absence of procedural obstacles relating to timing, standing, class certification, exhaustion of administrative remedies, and the like; and the political, demographic, and technological availability of meaningful remedies.²⁷⁵

E. Identifying Beneficially Enforceable Standards

By enacting stricter and more comprehensive minimum educational standards, the states have absolved the courts of some of the difficult tasks that in the past have discouraged them from entering the adequate-education field and have afforded plaintiffs a doctrinally easier, if not yet easy, row to hoe. The enactments effect these changes by: (1) defining a "minimally adequate education"; (2) con-

²⁷⁰ See *supra* notes 127-35 and accompanying text.

²⁷¹ See *infra* notes 276-93 and accompanying text.

²⁷² See, e.g., *supra* notes 176-85 and accompanying text.

²⁷³ See, e.g., *id.*

²⁷⁴ See, e.g., *supra* notes 119-20 and accompanying text.

²⁷⁵ See *supra* notes 141-65 and accompanying text.

cluding that educational inputs can and do affect academic outcomes; (3) more clearly defining just what the necessary inputs are, hence providing more readily discernible and less intrusive judicial remedies; (4) divesting the tens of thousands of local school districts across the nation of exclusive control over education and investing greater control in the more judicially manageable hands of state education departments; (5) establishing a more objective measure of actionable disparities in the delivery of educational benefits; (6) depriving the states of any claim to a legitimate fiscal motive for maintaining most such disparities; (7) enhancing the constitutional importance of a rich set of educational services and outcomes; and (8) giving content to state constitutional clauses requiring the provision to students of a public education.

With all this doctrinal good comes a potential remedial evil: To the same degree that a statutory minimum standard's specificity increases the likelihood that the courts will interpret that standard as imposing an enforceable duty on school officials, that specificity also decreases the flexibility of the remedy, commensurate with the statute, that the courts can be expected to order. I consequently must confront the question whether minimum-standards statutes are worth enforcing—that is, whether the standards will contribute meaningfully to an enforceable and desirable educational entitlement.²⁷⁶

The chart on page 430 (chart) is designed to help me confront this question. On the vertical axis I have listed nine descriptive characteristics that any given minimum-standards provision might possess. Listed horizontally are three evaluative criteria that assess whether a given minimum-standards statute lends itself to beneficial enforcement. At the intersection of these lines of inquiry I have offered my (minimally adequately) educated guesses as to whether each characteristic makes a particular statute more or less worthy of enforcement.

Not surprisingly, the chart reveals a preference for enforcing minimum standards on which educational experts have reached consensus (line 9). Given the fact that minimum reading and arithmetic skills for children in elementary schools probably satisfy this criterion yet are not currently supplied in many of our urban schools,²⁷⁷ this

²⁷⁶ See authority cited *supra* notes 98-100 (suggesting that minimum standards are *not* educationally desirable).

²⁷⁷ See *supra* notes 94 and 119.

EVALUATIVE CRITERIA (M = more so; L = less so)

		Is statute worthy of enforcement?	Is statute enforceable?	Is violation detectable?
DESCRIPTIVE CRITERIA				
1. Statutory language is mandatory	L	(too inflexible)	M	M
2. Standard is specific	L	(too inflexible)	M	M
3. Statute specifies the officials with the duty	?	(depends on whether responsible officials control determinative resources)	M	M
4. Statute specifies beneficiaries of duty	?	(depends on whether class benefited is big enough that enforcement would not divert resources from "many" to "few")	M	M
5. Statute specifies remedial procedures for failing students/schools	?	(potentially too inflexible)	M	M
6. Standard mandates educational input	?	(depends on whether input affects outcomes)	M	M
7. Standard mandates educational outcome	?	(depends on whether outcome is desirable and measurable)	L (may not specify owner of duty, remedy)	? (showing causation requires proof of widespread educational failures)
8. Statute imposes harm on students who fall below standard	M	(absent enforcement, statute is likely to be especially harmful to plaintiffs)	L (may not specify beneficiary, owner of duty, remedy)	? (same causation caveat as above)
9. Standard generally accepted as valid by educational experts	M		M	M

apparently mundane conclusion has considerable practical bite. Likewise, the chart indicates that enforcement-minded advocates would do well—still drawing upon expert assistance—to look for standards with the following characteristics: (1) specified duty holders who, as a group, have the instructional and political clout needed to make meaningful changes in the educational environments of schools and districts (line 3);²⁷⁸ (2) a broad enough range of beneficiaries so that enforcement efforts will not rob many Peters to pay a few Paulas (line 4);²⁷⁹ (3) flexible remedies (line 5);²⁸⁰ and (4) inputs correlated with desirable outcomes (line 6).²⁸¹

Less encouraging is the pronounced tension the chart reveals (lines 1-7) between enforceability (which places a premium on specificity and mandatoriness) and worthiness (which requires a substantial degree of flexibility, lest teachers and students become test-giving and -taking automatons²⁸²). This tension goes to the heart of the proposed

²⁷⁸ Likely candidates are statutes that impose duties on district- and state- as well as school-level personnel. See *supra* notes 95, 102, 113, 122 and 170.

²⁷⁹ For instance, statutes assuring places in “gifted and talented” programs to children with IQ scores over 130 or requiring foreign language instruction might be less attractive enforcement targets than ones assuring that all third graders have basic reading and arithmetic skills.

²⁸⁰ See P. Hill, *supra* note 148 (case studies showing that mandated “school-improvement” remedies in some cities and states include desirable amounts of flexibility); *supra* notes 102, 140, 170, and *infra* note 292 (state-mandated “school-improvement” programs).

²⁸¹ The controversies over whether money and such interventions as desegregation and “effective schools” methodology positively affect desirable outcomes are well known. The authority cited *supra* notes 38-40, 148-51 exemplify the useful fund of expert knowledge that is available on these questions. Apart from the inflexibility problem discussed below, outcome standards (assuming that the standard used measures something like the outcome desired) might seem more worthy of enforcement than input standards both because the ultimate goal is improved outcomes and because input standards inevitably raise the difficult question of whether particular inputs affect outcomes. On the other hand, output standards tend to be less enforceable because they are less likely than input standards to reveal clearly the existence, scope, holders, and beneficiaries of educative duties and appropriate remedies for breaches of those duties, and because outcome standards present difficult causation questions with regard to why children fail to meet standards. But cf. *supra* notes 117-25, 176-91, 219-21 and accompanying text and *infra* note 289 (minimum standards enactments increase likelihood that courts will infer and enforce duties); *supra* notes 138-40 and accompanying text (arguing that the enforcement of minimum standards laws and the use of litigation strategies that focus on the performance of groups of children or of schools, as opposed to the performance of individual children, ameliorate causation problems). The proper resolution of this tension inevitably turns on a contextualized analysis of the worthiness of the particular input and the enforceability of the particular outcome standards under consideration.

²⁸² See *supra* note 99.

strategy's viability: If minimum-standard statutes add anything to the existence and enforceability of a meaningful "right to an adequate education," it is precisely because of their mandatory and specific nature, which for the first time gives potential agents of reform something tangible to enforce that need not be invented out of whole cloth. If those same characteristics inevitably destroy the educational desirability of the strategy, however, the strategy should not be pursued.

Although I cannot finally solve this critical problem—nor, probably, does a uniform solution exist, given the heterogeneity of situations enforcement-minded advocates are likely to confront—several potentially tension-relieving thoughts are in order. First, there are certain outcomes—the ability of elementary children to read, write, and cipher, for instance—as to which a fair amount of inflexible insistence probably is warranted. Second, other outcome measures—those assessing the level at which junior-high and high school students read, for example—might serve as a rough proxy for the general quality of education available to those students; hence, enforcement might have a broader beneficial impact than is suggested by the single attribute being measured.

Third, although the result of enforcing a given standard may not be perfect, appropriate circumstances might justify choosing the adequate enforcement of incomplete or second-best standards over non-enforcement of a better set of desiderata. Indeed, given the strong and swelling public consensus formed around minimum standards and the disinal educational circumstances in which poor and minority children now find themselves, the hypothesized choice seems to reflect the options that actually are available to disadvantaged children.²⁸³

Fourth, and perhaps most compelling, the strategy proposed here tries to take the sting out of the least worthy and most inflexible standards that, like it or not, already *are* being enforced—those that penalize failing students by depriving them of diplomas or other benefits without diagnosing their difficulties or availing them of remedial services (see chart, line 8). By enjoining state officials either to stop enforcing inflexible standards in an exclusionary fashion or to enforce them in that manner only after first diagnosing and diverting resources to children with exceptional needs, this strategy permits children placed at risk by minimum standards to neutralize the stan-

²⁸³ See *supra* notes 94, 100, 119 and accompanying text.

dards' exclusionary venom while incidentally extracting whatever educational nectar might be present.²⁸⁴

Extending my guesswork beyond the level of even minimally adequate education, let me offer the following very tentative conclusions about four common types of minimum-standards legislation and the desirability of efforts to enforce the duties they imply:

Minimum-curriculum requirements. Today, many states prescribe curricula in mandatory statutes that specify the officials obliged to provide and the children entitled to take certain courses.²⁸⁵ The specificity of minimum-curriculum standards makes them highly enforceable but may undermine their educational value because the input-benefits such standards confer may be narrow and only ambiguously related to desired outcomes; in addition, they deprive teachers and principals of needed programmatic and allocative flexibility. These circumstances probably render minimum-curriculum standards more attractive to advocacy groups concerned with moderating enforcement costs and serving the self-identified needs of individual clients than to groups concerned with maximizing the educational impact of their efforts—to use legal-profession paradigms, “legal services” as opposed to “public interest” groups.

Minimum competency tests. As noted above, the standards that minimum competency tests impose on children often are inflexible, hence unworthy of enforcement against children, while the standards they impose on officials often are only implicit, hence imperfectly enforceable against officials.²⁸⁶ On the other hand, precisely because competency-testing requirements so frequently are used punitively against children, they present a particularly attractive case for table-turning enforcement against officials. Enforcement of pure competency-testing provisions accordingly seems warranted if two conditions are met. First, school officials must in fact be using such tests punitively. Second, given the testing statute's terms and legislative history,²⁸⁷ its applicability to all children,²⁸⁸ the educational centrality

²⁸⁴ Likewise, if the strategy causes states to lower standards because school officials cannot enable certain groups of children to meet them, then at the least the strategy will have relieved those children of the a fortiori unfair requirement that they meet the standards or be punished.

²⁸⁵ See supra note 95.

²⁸⁶ See supra notes 99, 181-85 and accompanying text. On the prevalence of these kinds of standards, see supra note 95.

²⁸⁷ See, e.g., supra notes 113, 122-23 and accompanying text.

or wide acceptability of the subject-matter it tests, the severity of the harm it inflicts on children who do not pass the test, and other circumstances, there are strong grounds for inferring a duty on the part of school officials to provide and a right of children to receive the educational resources necessary to enable willing children to pass the tests.²⁸⁹

Testing requirements that trigger remedial assistance. A number of states combine competency-testing programs with a requirement of remedial services for students falling below standard.²⁹⁰ Such provisions are likely candidates for enforcement. They clearly create duties to provide remedial services. They more clearly embody an underlying duty to educate, given their test-remedy-test-diploma format, than do statutes prescribing only diploma-determining tests. They usually permit substantial flexibility in designing "appropriate" remedial services that in fact improve outcomes. And, finally, they often afford occasions for enforcement well before graduation, when enforcement efforts actually can do some good.

Programs designed to identify failing schools and to generate plans to improve them. A growing number of states have adopted school-focused statutes using outcome measures to trigger some kind of "school-improvement" effort.²⁹¹ These statutes are attractive enforcement candidates for the same reasons listed in the preceding paragraph. Additionally, such statutes are attractive enforcement targets because they typically expand the class of duty holders beyond the school level to the district and state levels²⁹² and the class of benefi-

²⁸⁸ Exceptions for special-education and limited-English-proficiency students need not undermine the availability of this factor. See *supra* note 233.

²⁸⁹ To neutralize the defense that student motivation rather than school officials' violation of a duty to educate caused the students to fail, advocates should proceed on behalf of relatively large groups of failing students highly concentrated in specific classes, grades, schools, or school districts. See *supra* notes 138-40 and accompanying text.

²⁹⁰ See *supra* notes 102 and 122.

²⁹¹ See *supra* notes 102, 140 and 170.

²⁹² Among the duties such legislation creates are that of: (1) state officials to conduct annual reviews; (2) school officials to prepare (and to involve teachers and parents in preparing) improvement plans; (3) district and state level officials to review such plans and to provide the resources and technical assistance necessary to implement them; and (4) school-, district-, and state-level officials to implement and monitor implementation of the plans. For a report by the Comptroller of New York concluding that the New York State Department of Education has just these kinds of duties and has defaulted on them in regard to the New York City schools, see Office of the State Comptroller, The Board of Regents and the State Education Department: Oversight of New York City Schools (Report No. 88-S-182, July 1988).

ciaries to all students in a particular school.²⁹³

Without finally establishing whether existing minimum-standards legislation adds up to a "a minimally adequate education," much less one the courts are currently disposed to enforce intact, the foregoing analysis suggests that a sufficient package of educationally and judicially viable enforcement candidates can be identified to justify deploying them on behalf of children consigned to schools that, by the state's own criteria, are failing.

III. CONCLUSION

While looking forward to a wider range of strategies available for implementing *Brown* when it reaches middle age, I have operated here within the much more limited field of vision that our "thirtysomething" era philosophically, politically, and practically allows. Even with sights thus lowered, it is possible to identify methods for carrying forward the work the Court commenced thirty-five years ago. First, taking our era at its process-oriented word—that the primary purpose of the equal protection clause is not the equalization of distributive outcomes but rather the expulsion of racial motivations from the political process—it is possible to reorient school desegregation itself as an effective means of reconstructing the political process governing schools so that such motivations rationally cannot intervene. Second, it is possible to justify the modestly distributive impact of school desegregation reconstructively understood—and the even more forthrightly distributive character of different understandings of desegregation and other longstanding education-oriented strategies, such as finance-equity litigation—by recollecting to ourselves, our advocacy forums, and our adversaries the respected place that educational distributivism has in our own nation's history and in liberal polities generally. Finally, it is possible to identify a new education-oriented strategy that finds in current minimum-educational standards and related legislative reforms not only a new reflection of the special place educational distributivism has in our polity, but also the seeds of a democratically legitimated and judicially enforceable right to a minimally adequate education.

²⁹³ One caution: By presenting courts with so much responsibility for trouble-shooting entire educational systems, enforcement efforts premised on statutes creating this wealth of duties and beneficiaries might expand the demands placed on judges beyond the modest levels that the proposed strategy strives to maintain. See *supra* notes 219-21 and accompanying text.