RETHINKING PUBLIC EDUCATION LITIGATION STRATEGY: A DUTY-BASED APPROACH TO REFORM

*Rebecca I. Yergin**

With a persistent and, in some places, increasing education achievement gap falling along lines of race and class, advocates have often turned to the courts to improve this nation's public schools. Public law litigation has historically helped to remove some of the most invidious barriers to improvement, but traditional desegregation and school-finance lawsuits have not gone far enough to close the gap. This Note thus seeks to propose a new approach to public law litigation directed at reforming school systems. It presents the principle of a "duty of responsible administration," which has emerged in other public contexts and requires administrators and officials to assess, monitor, and revise practices that appear to violate civil rights values. In order to explore the application of this duty in the public education context, this Note focuses on one state with a large achievement gap: Connecticut. It presents the state's education landscape and hypothesizes a lawsuit, following the approach proposed by the duty of responsible administration. In doing so, the Note argues for a reconceptualization of the role courts could play in reforming and improving this country's education system.

INTRODUCTION

Although officials across the United States recognize the importance of improving educational opportunities for minority and low-income groups, a wide achievement gap persists along lines of race and class.[1] The gap not only impedes students at its lower end from entering the workforce and participating as informed citizens;[2] it also imposes great

* J.D. Candidate 2016, Columbia Law School.

1. See The Nation's Report Card: Have Achievement Gaps Changed?, Nat'l Ctr. for Educ. Statistics, http://www.nationsreportcard.gov/reading_math_2013/#/achievement-gaps (use drop-down menus to see achievement-gap trends by student group) (on file with the *Columbia Law Review*) (last visited Aug. 31, 2015) (showing continued white–black and white–Hispanic reading and mathematics score gaps); see also The Condition of Education 2015, Nat'l Ctr. for Educ. Statistics 23 & fig.1 (2015), http://nces.ed.gov/pubs2015/2015144.pdf [http://perma.cc/QWN7-URQW] (presenting gap in high school completion rates by socioeconomic status); infra note 17 (defining "achievement gap").

2. See Joel I. Klein & Condoleeza Rice, U.S. Education Reform and National Security, Council on Foreign Relations 14 (2012), http://www.cfr.org/united-states/us-education-reform-national-security/p27618 (on file with the *Columbia Law Review*) (providing "too many schools are falling short in . . . preparing students for citizenship [and] . . . effectively participat[ing] in an increasingly fast-paced and interdependent global society").

social and economic costs on the nation as a whole.[3] Given the failure of legislative and public policy efforts to significantly reduce the vast disparities, public law litigation has emerged as an alternative vehicle for driving change.[4] In the past, lawsuits in this context have typically targeted singular obstructive conditions, including racial segregation and inequitable funding of schools.[5] These challenges helped end some of the most egregious obstacles to equal education opportunities, but they have failed to remedy the broader problem of the achievement gap.[6] More recent lawsuits seeking to define a minimum level of education[7] and those trying to tackle teacher tenure laws also appear to have fallen

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3. See The Economic Impact of the Achievement Gap in America's Schools, McKinsey & Co. 6 (2009), http://mckinseyonsociety.com/downloads/reports/Education/achievement_gap_ report.pdf [http://perma.cc/24SR-B544] (arguing persistent achievement gap in United States imposes "economic equivalent of a permanent national recession"); see also Klein & Rice, supra note 2, at 14 (contending weaknesses in K–12 system pose risks for national security because schools are not "producing a sufficiently skilled military or workforce").

4. For seminal discussions on the development of public law litigation, see, e.g., Abram Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281, 1284 (1976) (describing shift in federal civil litigation from traditional model of private rights disputes to model seeking "vindication of constitutional or statutory policies"); Charles F. Sabel & William H. Simon, Destabilization Rights: How Public Law Litigation Succeeds, 117 Harv. L. Rev. 1016, 1020 (2004) [hereinafter Sabel & Simon, Destabilization Rights] (describing "destabilization rights"—"claims to unsettle and open up public institutions that have chronically failed to meet their obligations and that are substantially insulated from the normal processes of political accountability"—as basis for public law litigation); Susan P. Sturm, A Normative Theory of Public Law Remedies, 79 Geo. L.J. 1355, 1361 (1991) [hereinafter Sturm, Public Law Remedies] (characterizing public law litigation as "concern[ing] ongoing violations of general aspirational norms grounded in statutes or the Constitution").

5. See infra section I.B.1 (discussing desegregation and school-funding litigation).

6. Opinions vary on the effectiveness of courts in traditional public law litigation to reform schools. See James S. Liebman & Charles F. Sabel, A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform, 28 N.Y.U. Rev. L. & Soc. Change 183, 192–93 (2003) [hereinafter, Liebman & Sabel, A Public Laboratory] (explaining "[a]ssessments of [courts'] impact diverge wildly"). The authors present the view that the courts were "single-handedly responsible" for school desegregation and "crucially responsible" for equalizing funding, but they also note the criticism that courts "didn't go far enough" or "disregard[ed] . . . their institutional competence as defined by . . . separation of powers." Id. For more general critiques of public law litigation, which may explain why courts have so far failed to remedy the broader problem of the achievement gap, see, e.g., Gerald N. Rosenberg, The Hollow Hope: Can Courts Bring About Social Change? 10 (2d ed. 2008) (providing view that courts are not "effective producers of significant social reform" because of "the limited nature of constitutional rights, the lack of judicial independence, and the judiciary's inability to develop appropriate policies and its lack of powers of implementation"); Ross Sandler & David Schoenbrod, Democracy by Decree: What Happens When Courts Run Government, at vi (2003) (arguing modern consent decrees allowing "[e]lected officials [to] invite judges to take charge of policy making in order to evade responsibility" are "antidemocratic").

7. See infra section II.A.3 (discussing challenges of lawsuits to set minimum, or adequate, levels of funding).

short.[8] With a multitude of laws, policies, and practices currently contributing to the persistent achievement gap, a central question remains: What role can courts play in actually improving student outcomes?

This Note addresses the question by examining the limitations of traditional litigation strategies and considering a new approach. Below, it presents a theory of liability and remedies under a proposed "duty of responsible administration," which requires government officials to articulate, follow, and reassess the "policies and principles that govern their work."[9] More specifically, the Note explores the hypothetical application of that duty in Connecticut, a state with significant achievement gaps[10] despite a long history of legislative, administrative, and judicial efforts to reform schools.[11] Because the duty obligates public officials to monitor, reflect, and evaluate practices that affect civil rights values, a lawsuit under this theory would not limit the court to identifying "intentionally harmful or egregiously irresponsible conduct."[12] Rather, such a lawsuit would seek to address "normatively ambiguous conduct that, although troubling, does not fit the psychological premises of classic [civil rights] doctrine."[13] As a complex set of factors perpetuates the achievement gap in Connecticut,[14] a legal theory based on the duty could

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8. See infra section II.B.1 (discussing limitations of recent teacher tenure suits).

9. See Charles F. Sabel & William H. Simon, The Duty of Responsible Administration and the Problem of Police Accountability, 33 Yale J. on Reg. (forthcoming 2016) (manuscript at 3) (on file with the *Columbia Law Review*) [hereinafter Sabel & Simon, Duty of Responsible Administration] (presenting emerging idea of duty and its potential as a basis for future lawsuits). The authors argue the duty derives from judicial "interpretations of constitutional due process" and "recent efforts to elaborate provisions of substantive civil rights law." Id.

10. See The Nation's Report Card: Are States Closing Racial/Ethnic Achievement Gaps?, Nat'l Ctr. for Educ. Statistics, http://www.nationsreportcard.gov/reading_math_g12_2013/#/state-gaps (use drop-down menus to see achievement gap for twelfth-grade students by subject and state) (on file with the *Columbia Law Review*) [hereinafter NCES, Twelfth-Grade State Gaps] (last visited Aug. 31, 2015) (presenting wide achievement gaps in several states including Connecticut); see also Jacqueline Rabe Thomas, Connecticut's Education System Ranked, Conn. Mirror (Jan. 9, 2015), http://ctmirror.org/connecticuts-education-system-ranked/ [http://perma.cc/TS9Y-LNY9] (providing Connecticut has "largest achievement gap in math and nearly the worst gap in reading" and, over past ten years, gap "in math has actually grown and barely budged in reading").

11. See infra section I.B.2 (describing desegregation and school-funding lawsuits in Connecticut where legislative and administrative efforts did not go far enough to protect minority students).

12. See Sabel & Simon, Duty of Responsible Administration, supra note 9 (manuscript at 3–4) (contrasting entailments of the "emerging duty" with the "discriminatory intent" or "deliberate indifference" involved in "[f]irst-generation [civil rights] problems"). For a discussion of changing civil rights doctrine, see infra notes 176–181 and accompanying text.

13. Sabel & Simon, Duty of Responsible Administration, supra note 9 (manuscript at 3) (associating "normatively ambiguous conduct" with "second-generation problems" in civil rights law).

14. See infra section I.A.2 (explaining achievement gap in Connecticut).

allow the courts to facilitate reform without needing to define and remedy each obstructive condition.

Part I of this Note provides background on the problem of educational inequity in the United States generally—and Connecticut specifically—and demonstrates how lawsuits employing traditional theories have attacked racial segregation and inequitable school-funding schemes.[15] In Part II, the Note examines the limitations of these earlier litigation strategies and presents the duty of responsible administration as an alternative approach. It explains how the "experimentalist"[16] remedies that the duty triggers have succeeded in other public litigation contexts. Part III then discusses how the duty of responsible administration might apply to public education litigation. It poses a hypothetical lawsuit focused on Connecticut, discusses its advantages, and addresses concerns around separation of powers and judicial control. Finally, while acknowledging that the courts alone cannot close the achievement gap, this Note concludes that such a lawsuit could enable the judiciary to play a promising role in reforming schools.

I. TRADITIONAL LITIGATION STRATEGIES TO IMPROVE EDUCATIONAL OUTCOMES

Disparate student outcomes are a pervasive problem in the United States, and advocates have frequently turned to the courts to solve it. Section I.A describes the problem, using Connecticut as an example to show that achievement gaps between poor and minority students and their more affluent peers have persisted over time despite official efforts to close them. Section I.B then explains the desegregation and funding-equity strategies that less economically and politically powerful groups in the state have employed in the past to improve their access to effective schools. Although this Part acknowledges the successes of traditional litigation strategies, it also identifies their limitations. In doing so, it demonstrates the need to rethink the role courts could play in addressing the most difficult challenges to improving public education.

A. *The Persistent Achievement Gap*

Disparities in the academic performance of students across racial and socioeconomic lines pervade the nation's public education system. Known as the "achievement gap,"[17] these differences in educational

15. See infra section I.B.1 (presenting traditional strategies of education reform).

16. See Michael C. Dorf & Charles F. Sabel, A Constitution of Democratic Experimentalism, 98 Colum. L. Rev. 267, 288 (1998) (defining "experimentalism" as "system of public problem solving" combining "learning" with "protection of interests").

17. See Achievement Gap, Educ. Wk. (July 7, 2011), http://www.edweek.org/ew/issues/achievement-gap/ (on file with the *Columbia Law Review*) (defining "achievement gap" in education as "disparity in academic performance between groups of students"). The gap "shows up in grades, standardized-test scores, course selection,

outcomes disadvantage poor and minority students in school and in life opportunities.[18] Data from the National Assessment of Education Progress (NAEP)[19] on twelfth-grade students in 2013 revealed that forty-seven percent of white students read at or above the "proficient" level, while only twenty-three percent of Hispanic and sixteen percent of black students scored at that level.[20] In mathematics the gap was slightly smaller, but absolute proficiency levels were even lower across the board.[21] According to the NAEP report, these numbers represent "no significant change" from the racial score gaps in 2009, and the white–black gap in reading is now wider than it was in 1992.[22] As the data suggest, the achievement gap not only persists, but it is actually increasing in some areas.

1. *Federal Efforts to Address the Gap.* — In recent years, federal legislation has attempted to tackle the achievement gap at a national level; however, these efforts have not significantly improved student achievement in public schools, which remain largely under the control of states.[23] In 2001, Congress passed the No Child Left Behind Act

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dropout rates, and college-completion rates, among other success measures." Id. The term is "often used to describe the troubling performance gaps between African American and Hispanic students, at the lower end of the performance scale, and their non-Hispanic white peers, and the similar academic disparity between students from low-income families and those who are better off." Id.

18. See supra notes 1–3 and accompanying text (describing achievement gap and its impact).

19. See NAEP Overview, Nat'l Ctr. for Educ. Statistics, http://nces.ed.gov/nationsreportcard/about/ [http://perma.cc/6X9S-QJEP] (last visited July 29, 2015) (explaining NAEP is "largest nationally representative and continuing assessment of what America's students know and can do in various subject areas"). While there are many ways to measure the achievement gap, NAEP is a prominent source for demonstrating performance levels. Id.

20. See The Nation's Report Card: What Proportions of Student Groups Are Reaching *Proficient*?, Nat'l Ctr. for Educ. Statistics, http://www.nationsreportcard.gov/reading_math_g12_2013/#/reaching-proficient (use drop-down menus to view proficiency data by subject and student race/ethnicity) (on file with the *Columbia Law Review*) (last visited Aug. 18, 2015) (presenting gaps in proficiency levels on mathematics and reading for students of various racial and ethnic groups).

21. See id. (providing twelve percent of Hispanic students and seven percent of black students scored as "proficient" or higher, while thirty-three percent of white students scored at that level).

22. See The Nation's Report Card: How Have Achievement Gaps Changed over Time?, Nat'l Ctr. For Educ. Statistics, http://www.nationsreportcard.gov/reading_math_g12_2013/#/changes-in-gaps [http://perma.cc/F2XQ-LL7A] (last visited July 29, 2015). But see Klein & Rice, supra note 2, at 15 (acknowledging "[s]elective improvements, innovations, and breakthrough transformations" even though "long-term trends in education are . . . disappointing").

23. See Martin A. Kurzweil, Disciplined Devolution and the New Education Federalism, 103 Calif. L. Rev. 565, 592–602 (2015) (providing history of federal education legislative efforts and challenges since 1965); see also Damon T. Hewitt, Reauthorize, Revise, and Remember: Refocusing the No Child Left Behind Act to Fulfill *Brown*'s

(NCLB)[24] to try to close the gap by tying federal funding to state-developed performance standards.[25] Proponents argue that the law has been successful in shining "a bright light" on educational inequities and in increasing school accountability for high-need students.[26] They applaud NCLB's focus on student achievement and believe its requirements for disaggregation of student data by demographics has been crucial in exposing previously hidden disparities.[27] Moreover, proponents see the law as empowering policy makers to experiment with new reforms that improve the level of education students receive.[28]

Despite NCLB's positive effects, many criticize the law's standards-based approach as either "too far-reaching" or "woefully insufficient."[29] NCLB's one-size-fits-all approach has made it difficult for states to meet federal requirements, and its focus on outcomes has resulted in a compliance-based system that creates perverse incentives for states to lower standards.[30] Post–NCLB data reveal the law's limitations by demonstrating "slowing improvement or stagnation"[31] in achievement scores and other metrics like high-school graduation rates. Indeed, both the U.S. Department of Education and Congress have taken steps to undo NCLB. Recognizing that "NCLB requirements have unintentionally become barriers to state and local implementation of forward-looking reforms,"[32] the U.S. Department of Education allowed forty-three states to "waive" out of the law's provisions by early 2015 in exchange for deve-

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Promise, 30 Yale L. & Pol'y Rev. 169, 171–78 (2011) (discussing state and local resistance to federal education legislation).

24. 20 U.S.C. §§ 6301–6578 (2012).

25. Id. § 6311 (requiring states to develop standards, set targets for adequate yearly progress (AYP), develop assessments, and create systems for monitoring and improving outcomes); see also Kurzweil, supra note 23, at 595 (explaining "core of NCLB is a set of requirements for states to receive funding under [the Elementary and Secondary Education Act] related to testing, school and district accountability, interventions in struggling schools, and teacher qualifications"). For more information on NCLB's approach, see generally James S. Liebman & Charles F. Sabel, The Federal No Child Left Behind Act and the Post–Desegregation Civil Rights Agenda, 81 N.C. L. Rev. 1703, 1708–20 (2003) [hereinafter, Liebman & Sabel, NCLB] (discussing standards-based approach as part of "New Accountability" movement, an "innovative system of publicly monitored decentralization of school governance").

26. Hewitt, supra note 23, at 174 (presenting promises of NCLB).

27. See Kurzweil, supra note 23, at 597 (presenting "distinctly positive effects" of NCLB).

28. See id. (describing NCLB as giving "local policy entrepreneurs political cover to pursue bold reforms").

29. Hewitt, supra note 23, at 174 (presenting criticisms of NCLB).

30. See Kurzweil, supra note 23, at 597–601 (presenting reasons why NCLB requirements are problematic).

31. See Hewitt, supra note 23, at 177 (providing post–NCLB data to show continuing crisis in U.S. schools).

32. U.S. Dep't of Educ., Letters from the Education Secretary or Deputy Secretary (Sept. 23, 2011), http://www2.ed.gov/policy/gen/guid/secletter/110923.html [http://perma.cc/9SUK-F4BF] (recognizing law's limitations).

loping "rigorous and comprehensive" plans.[33] Additionally, the House of Representatives and the Senate passed bills in the summer of 2015 to overhaul NCLB; although the bills differ in some key provisions, they both maintain some testing requirements while giving more power to the states to decide how to use their results.[34]

2. *Connecticut's Efforts to Address the Gap.* — Connecticut is one state that has tried to develop mechanisms for raising achievement, but it maintains one of the widest gaps in student outcomes. On an absolute level, many public school students in Connecticut's affluent suburbs perform at a high level. Yet that level is substantially above the level of their peers in Hartford, Bridgeport, and New Haven.[35] Recent NAEP data reveal that, between 2009 and 2013, the white–black gap for twelfth-grade public school students in reading closed slightly, while the gap in mathematics for the same population stayed the same.[36] Historical data from fourth- and eighth- grade students also reflect that the gap has not significantly changed in twenty years.[37] Moreover, the data demonstrate that the gap between white and black students is wider than the national gap.[38]

Although the state has adopted legislation and developed policies that target the achievement gap over the last few decades, significant populations of minority and low-income students have not been able to benefit from these initiatives. For example, in 1996, the Connecticut

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33. U.S. Dep't of Educ., ESEA Flexibility, http://www2.ed.gov/policy/elsec/guid/esea-flexibility/index.html [http://perma.cc/ND6N-PR63] (last modified Feb. 25, 2015) (describing flexibility waivers).

34. See Jennifer Steinhauer, Senate Approves a Bill to Revamp "No Child Left Behind," N.Y. Times (July 16, 2015), http://www.nytimes.com/2015/07/17/us/politics/senate-education-revamp-no-child-left-behind.html?_r=0 (on file with the *Columbia Law Review*) (providing summaries of House and Senate bills).

35. See Press Release, Conn. State Dep't of Educ., CSDE Releases School and District Performance Reports for All Connecticut Schools (Dec. 5, 2013), http://www.sde.ct.gov/sde/lib/sde/pdf/pressroom/2013_School_and_District_Performance_Reports.pdf [http://perma.cc/RM2H-Y3MM] (using data from Connecticut's new accountability system to measure gaps between districts).

36. See NCES, Twelfth-Grade State Gaps, supra note 10 (providing assessment results by state).

37. See The Nation's Report Card: What States Are Closing Achievement Gaps?, Nat'l Ctr. for Educ. Statistics, http://www.nationsreportcard.gov/reading_math_2013/#/state-gaps (use drop-down menus to see score gap by subject/grade, race/ethnicity, and comparison year) (on file with the *Columbia Law Review*) (last visited Aug. 31, 2015) (showing white–black and white–Hispanic score gaps not significantly changing over twenty-three years).

38. See id. (presenting score gaps for fourth- and eighth-grade students in Connecticut as wider than nation's gap, especially in math); see also Press Release, ConnCAN, ConnCAN: Connecticut Maintains Worst-in-Nation Achievement Gap (Nov. 8, 2013), http://www.conncan.org/Community/press-releases/2013-11-conncan-connecticut-maintains-worst-in-the-nation-ac [http://perma.cc/5KED-YQ62] (using NAEP data to find Connecticut maintains "worst-in-the-nation achievement gap").

legislature enacted a law to allow charter schools[39]—a sector that has since "demonstrated an ability to work towards closing the achievement gap."[40] As of the 2013–2014 school year, however, only eighteen charter schools had opened, serving only about one percent of the state's public school students.[41] In an effort to remedy racial isolation,[42] Connecticut also operates eighty-six magnet schools,[43] which outperform other public schools.[44] As with charter schools, however, demand for magnet schools is

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39. Conn. Gen. Stat. § 10-66aa–ff (2015), https://www.cga.ct.gov/current/pub/chap_164.htm#sec_10-66 [https://perma.cc/F7UR-U8VG]; see also Conn. State Dep't of Educ., Connecticut State Department of Education Biennial Report on the Operation of Charter Schools in Connecticut 1 (2014) [hereinafter SDE, Biennial Report], http://www.sde.ct.gov/sde/lib/sde/pdf/equity/charter/report_on_the_operation_of_charter_schools.pdf [http://perma.cc/U3TT-FMDG] (explaining history of state charter school legislation).

40. SDE, Biennial Report, at 1; see also id. at 11 ("City resident students who attend charter schools outperform students in the city public schools in reading and mathematics, and have achieved at or above proficiency at a greater rate than city public school students between 2009 and 2012 in both subject areas.").

41. See Nat'l All. for Pub. Charter Sch., The Health of the Public Charter School Movement: A State-by-State Analysis 34–35 (2014), http://www.publiccharters.org/wp-content/uploads/2014/09/health-of-the-movement-2014.pdf [http://perma.cc/U4RP-WUDH] (providing information on Connecticut charter sector). At the time this Note was published, there has been some progress in increasing the number of charter schools, but it is still small compared to the total population. See Linda Conner Lambeck, Bridgeport, Stamford Add to Charter School Enrollment Jump, Conn. Post (Aug. 4, 2015), http://www.ctpost.com/news/article/Bridgeport-Stamford-add-to-charter-school-6421771.php [http://perma.cc/33VF-WU4J] (explaining new law enabling over 1,000 new seats in charter schools and a total of twenty-three charter schools planning to operate in 2015–2016). This Note largely uses the 2013–2014 charter school numbers because of the comprehensive studies on the sector at that time.

For a discussion of debates over expansion of charter schools in Connecticut, compare Maria Pereira, Charters Not the Answer, Conn. Post (Sept. 24, 2014), http://www.ctpost.com/default/article/Charters-not-the-answer-5775906.php [http://perma.cc/KK87-F8C6] ("[C]harter schools are [not] the best and only option for our children . . . [because t]he facts show otherwise."), with Bruce Ravage, Different Take on Charters, Conn. Post (Oct. 2, 2014), http://www.ctpost.com/news/article/Different-take-on-charters-5797272.php [http://perma.cc/A4WJ-EUVS] ("Denying students an opportunity to attend a school with a proven track record of success is neither sensible nor ethical.").

42. See Conn. State Dep't of Educ., Interdistrict Magnet Schools [Q & A], http://www.sde.ct.gov/sde/lib/sde/MagnetQandA.pdf [http://perma.cc/M82R-67FN] (last visited July 29, 2015) (explaining interdistrict magnet schools exist "[t]o assist the state in meeting the goals of the 2008 stipulation and order for [*Sheff v. O'Neill*]"). For a discussion of the *Sheff* lawsuit, see infra notes 96–105 and accompanying text (explaining lawsuit).

43. See Martha Deeds, Connecticut Magnet Schools Work Together to Ask Legislators to Sustain the Promise, Hartford Courant (Aug. 10, 2015), http://www.courant.com/community/hc-ugc-article-connecticut-magnet-schools-work-together-to-a-2015-08-10-story.html [http://perma.cc/64LQ-U6EB] (providing number of magnet schools in 2015).

44. Connecticut does not have as extensive data on magnet schools, but existing data shows promise. See id. (explaining Hartford students in magnet schools perform higher than peers in Hartford public schools); Brittany Beth, Connecticut Magnets Offer High-Quality Education, U.S. Dep't of Educ., http://www.ed.gov/edblogs/oii/2014/06/

much greater than supply. Charter schools maintain waitlists of up to 4,000 students yearly for fewer than 8,000 spots,[45] while nearly 20,000 students file applications for 5,500 interdistrict magnet seats.[46]

Despite knowing the benefits of these school sectors and putting forth legislative proposals to increase access to them, public officials maintain significant obstacles to their expansion.[47] The state does not formally cap the number of charter schools,[48] but the legislature has functionally limited the sector by passing student-enrollment caps,[49] funding schemes that limit resources for charter schools,[50] and other preclusive conditions for granting charters.[51] In the magnet school context, the state has been slow to investigate effectiveness and to consider increasing the number of schools.[52] A recent study, however, demonstrates their promising results,[53] and advocates continue to try to

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connecticut-magnets-offer-high-quality-education/ [http://perma.cc/87DW-7CY9] (last visited July 29, 2015) (describing features of magnet schools that "offer the promise of educational equity").

45. See SDE, Biennial Report, supra note 39, at 9 (providing information on charter waitlists).

46. See Kathleen Megan, Parents, Activists Rally for More Seats in High Quality Schools, Hartford Courant (July 14, 2014), http://articles.courant.com/2014-07-14/news/hc-waiting-list-kids-0711-20140714_1_achieve-hartford-open-choice-hartford-students [http://perma.cc/J82C-EDX6] (describing magnet waitlists).

47. See Jacqueline Rabe Thomas, State Education Board Wants to Open Eight New Charter Schools, Conn. Mirror (Nov. 7, 2014), http://ctmirror.org/state-education-board-wants-to-open-eight-new-charter-schools/ [http://perma.cc/TKL2-SZQS] [hereinafter Thomas, New Charters] (discussing difficulty of getting more funding for charters even after State Board of Education approves plan for increase).

48. See Nat'l All. for Pub. Charter Sch., Measuring Up: Connecticut, http://www.publiccharters.org/get-the-facts/law-database/states/ct/ [http://perma.cc/QZL9-994F] (last visited July 29, 2015)(explaining no statutory caps on total number of charter schools).

49. See Conn. Gen. Stat. § 10-66bb(c)(1) (2015), https://www.cga.ct.gov/current/pub/chap_164.htm#sec_10-66 [https://perma.cc/F7UR-U8VG] (providing numbers and alternatives for student-enrollment caps).

50. See, e.g., Conn. State Dep't of Educ., Charter School Questions and Answers 6, http://www.sde.ct.gov/sde/lib/sde/pdf/equity/charter/FAQs.pdf [http://perma.cc/SL85-KR97] (last visited July 29, 2015) (explaining financing of charter schools in 2012); see also SDE, Biennial Report, supra note 39, at 1 (providing allocations per pupil to state charters from 2001 to 2014).

51. See § 10-66bb(c)(3) (describing limits on new charter schools based on location and service to English Language Learners).

52. See Jacqueline Rabe Thomas, School Choice: Future of New Magnet Schools Uncertain, Conn. Mirror (Jan. 6, 2015), http://ctmirror.org/school-choice-future-of-new-magnet-schools-uncertain/ [http://perma.cc/TE7X-MLK2] [hereinafter Thomas, School Choice] (reviewing debate over magnet expansion and highlighting limited data on sector's effectiveness).

53. Conn. State Dep't of Educ., Evaluating the Academic Performance of Choice Programs in Connecticut: A Pretest-Posttest Evaluation of Using Matched Multiple Quasi-Control Comparison Groups (2015), http://www.sde.ct.gov/sde/lib/sde/pdf/evalresearch/evaluating_the_academic_performance_of_choice_programs_in_connecticut.pdf [http://perma.cc/99M6-AVSY] (providing positive study results). But cf. Jacqueline

engage officials in replicating successes and improving access to magnet schools. But thus far, the positive results have been limited.[54]

B. *Litigation Strategies in Public Education*

For the past several decades, public law litigation has provided a vehicle for populations with less economic and political power to engage public officials in eliminating systemic barriers to improved outcomes. Unlike traditional adversarial lawsuits, public law litigation does not involve "a dispute between private individuals about private rights," but rather "a grievance about the operation of public policy."[55] The party structure is not "rigidly bilateral," and judges "organiz[e] and shap[e] the litigation to ensure a just and viable outcome."[56] Furthermore, remedies are "not imposed but negotiated."[57] This model of litigation has been effective in several contexts,[58] including some early public education lawsuits.

1. *Desegregation and School-Funding Litigation.* — Over the past few decades, public law litigation strategies have focused on individual features of the status quo that impede disadvantaged groups from accessing services and achieving outcomes that are more readily available to peers from other demographics. In the public education context, the litigation typically targets one of two distinct structures—racial segregation or school finance. Racial segregation lawsuits exclusively pursue integration as a means of producing better educational opportunities for disadvantaged groups, while school-finance suits focus

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Rabe Thomas, Are Students Better Off in Charter Schools? State Says It's Unsure, Conn. Mirror (June 4, 2015), http://ctmirror.org/2015/06/04/are-students-better-off-in-charter-schools-state-says-its-unsure/ [http://perma.cc/56BK-WP7T] (explaining results are "mixed bag").

54. There is some hope for future success: At the end of the Connecticut General Assembly's 2015 session, Governor Daniel P. Malloy signed a bill that requires an "overdue" magnet study and a comprehensive plan by October 2016. See Elizabeth Regan, Malloy Signs 286 Bills, Vetoes 9 (July 13, 2015, 3:31 PM), http://www.ctnewsjunkie.com/archives/entry/malloy_signs_268_bills_vetoes_9/ [http://perma.cc/X6XH-9YEF] (explaining bill). The impact of this action, however, remains unknown.

55. See Chayes, supra note 4, at 1302–04 (describing characteristics of public law litigation model). Chayes contrasts the public law litigation with the bipolar and retrospective model of traditional "disputes between private parties about private rights." Id. at 1282–84. Chayes also notably accepts the active role of the judiciary. See id. at 1284 (stating "judge is the dominant figure in organizing and guiding the case").

56. Id. at 1302.

57. Id.

58. Id. at 1284 (offering employment discrimination and prisoners' rights as "avatars" of "this new form of litigation" in 1976). For more recent accounts of effective public law litigation, see, e.g., Sabel & Simon, Destabilization Rights, supra note 4, at 1021–22 (finding "promising shift" to public law litigation in education, mental health, prisons, police, and housing); Susan Sturm, Second Generation Employment Discrimination: A Structural Approach, 101 Colum. L. Rev. 458, 463 (2001) [hereinafter Sturm, Employment Discrimination] (describing shift in employment context).

on improving schools via equalized per-pupil funding. These cases have helped remove some of the most blatant barriers to equality of outcomes, but they have been less successful in preventing the achievement gap's expansion.[59]

Brown v. Board of Education[60] is the landmark desegregation suit. In 1954, the U.S. Supreme Court held that "separate but equal" violated the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution,[61] and it ordered the integration of schools. *Brown* established the Court as an important forum for protecting the rights of African Americans and other minority groups.[62] Whereas many members of minority groups perceived the President and Congress as constrained by local politics and values—especially in the South—the judiciary potentially offered a "powerful and independent political institution."[63] The remedies that *Brown* and its successors contemplated relied on orders and consent decrees, involving "extensive oversight of school administration" by the courts.[64] Desegregation plans "often took the form of highly detailed regulatory codes embracing vast provinces of administration."[65] They dismantled official systems of school segregation, which, particularly in the rural South, resulted in improved educational achievement for many African American students.[66]

In the decades following *Brown*, school-finance lawsuits emerged as another strategy for improving schools by equalizing or guaranteeing a minimal level for their per-pupil funding. The conception of school finance as "the vehicle through which society makes its critical decisions about investments in education"[67] animates this line of cases. Early cases

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59. For a recent discussion of the two main waves of education litigation and where they have fallen short, see, e.g., Note, Education Policy Litigation as Devolution, 128 Harv. L. Rev. 929, 930–31 (2015) (explaining "both [waves] have won victories but stumbled against . . . categories of judicial concern"). That note discusses the promise of litigation that seeks to devolve issues of teacher tenure and dismissal to the district level. Id. at 930. The specifics of such litigation are beyond the scope of this Note.

60. 347 U.S. 483 (1954).

61. Id. at 495.

62. See David S. Meyer & Steven A. Boutcher, *Brown v. Board of Education* and Other Social Movements, 5 Persp. on Pol. 81, 82–84 (2007) (pointing to *Brown* as watershed case in civil rights movement and "signal for [later] social movements").

63. Id. at 84.

64. Sabel & Simon, Destabilization Rights, supra note 4, at 1024.

65. Id.

66. See Liebman & Sabel, A Public Laboratory, supra note 6, at 195–96 (explaining "almost instantaneous integration of schools" in 1960s and 1970s, and "longer-term result [of] rising SAT scores of black children who entered desegregated schools during this period . . . substantially narrowed" white–black achievement gap by 1980s).

67. William H. Clune, New Answers to Hard Questions Posed by *Rodriguez*: Ending the Separation of School Finance and Educational Policy by Bridging the Gap Between Wrong and Remedy, 24 Conn. L. Rev. 721, 755 (1992).

relied on federal constitutional protections,[68] but after the Supreme Court declined to find a federal right to education in *San Antonio v. Rodriguez*,[69] the focus of school-finance litigation shifted to state constitutional provisions.[70] Indeed, thereafter, the Supreme Court rarely intervened in education, except, for example, in *Plyler v. Doe* when plaintiffs challenged an absolute denial.[71] In the funding context, thus, plaintiffs began focusing on state equal protection clauses and provisions that seemed to guarantee students an adequate education.

The equality and adequacy waves of education litigation have resulted in some important victories, but they have also not gone far enough in closing the achievement gap. The initial equality wave argued that state equal protection provisions required the same level of per-pupil funding across districts.[72] Later lawsuits, advancing an adequacy theory, sought to provide all districts with sufficient—even if not equal—levels of funding.[73] As in the desegregation context,[74] school-finance

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68. See Serrano v. Priest, 487 P.2d 1241, 1244 (Cal. 1971) (invalidating financing scheme that "fail[ed] to meet the requirements of the equal protection clause of the Fourteenth Amendment of the United States Constitution").

69. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 18 (1973) (declining to invalidate Texas school financing system under federal Equal Protection Clause). The case explicitly denied the existence of a "fundamental right to education" that could "neatly fit[] into the conventional mosaic of constitutional analysis under the Equal Protection Clause." Id.

70. For a discussion of the evolution of school-finance litigation, see, e.g., Helen Hershkoff, Positive Rights and State Constitutions: The Limits of Federal Rationality Review, 112 Harv. L. Rev. 1131, 1187 (1999) (describing "later generation of school reform lawsuits [that] turned from equal protection . . . to state constitution education clauses"). Some of these cases relied on state constitutional provisions for equal protection, while others depended on states' rights to an adequate education. See Liebman & Sabel, A Public Laboratory, supra note 6, at 202 (outlining state equal protection provisions and adequacy provisions as bases for waves of school-finance litigation); see also Note, supra note 59, at 935–37 (describing general evolution of state school-funding litigation).

Although most public law litigation in the education context has shifted to the state level, some scholars still make an argument for federal guarantees of education. See, e.g., Goodwin Liu, Education, Equality, and National Citizenship, 116 Yale L.J. 330, 348–49 (2006) (arguing guarantee of citizenship after Fourteenth Amendment "required a substantial federal role in supporting public education and narrowing interstate disparities").

71. 457 U.S. 202, 230 (1982) (holding state could not "deny a discrete group of innocent children the free public education that it offers to other children residing within its borders" without providing justification of furthering "some substantial state interest"). In *Plyler* the Court struck down a law that allowed the state to withhold funding from school districts that educated children of illegal immigrants. Id.

72. See, e.g., Robinson v. Cahill, 303 A.2d 273, 276 (N.J. 1973) (striking down state system of funding schools because it relied heavily on local property tax and resulted in large disparity in per-pupil funding).

73. See, e.g., Rose v. Council for Better Educ., 790 S.W.2d 186, 212–13 (Ky. 1989) (invalidating state school system after interpreting state constitutional mandate for "'efficient' system of common schools" as requiring "adequate education").

lawsuits were most likely to be successful when judges believed there was "a straightforward remedy," such as striking down one egregious law.[75] But suits met less success where courts recognized that a complex set of laws and policies contributed to the inequities.[76] In the adequacy context, judges have been especially reluctant to define a minimal level of education.[77] Because improving today's complex education system requires something more than a "straightforward remedy," reformers in this judicial landscape must identify a different strategy to achieve success.

2. *Examples from Connecticut.* — The history of public education lawsuits in Connecticut exemplifies the strategies that dominated older forms of public law litigation.[78] Three major cases have established Connecticut's "fundamental guarantee" to a "substantially equal educational opportunity" and "constitutionally adequate education."[79] Under that guarantee, the Connecticut Supreme Court has struck down school-funding[80] and student-distribution[81] systems that appeared to deny access to the requisite level of education. All of these lawsuits relied on the theory that the challenged system violated the state constitutional guarantee to "free public elementary and secondary schools in the state" that the general assembly must "implement . . . by appropriate

74. See infra notes 120–126 and accompanying text (discussing challenges of desegregation suits outside of rural South, where segregation has not been mandated by law).

75. Liebman & Sabel, A Public Laboratory, supra note 6, at 202 ("Judges . . . advanced confidently as long as there appeared to be a straightforward remedy for any offensive disparity in the deployment of public resources.").

76. See id. (providing judges "broke stride" when "further analysis revealed unexpected complexities in goals and remedies").

77. See Note, supra note 59, at 936 (explaining prudential concerns in adequacy context).

78. Although desegregation lawsuits emerged before school-finance lawsuits, see infra section I.B.1, Connecticut's first major suit involved funding equity. Horton v. Meskill, 376 A.2d 359, 361 (Conn. 1977) (considering whether Connecticut's educational finance system is unconstitutional).

79. Conn. Coal. for Justice in Educ. Funding, Inc. v. Rell, 990 A.2d 206, 210, 254 (Conn. 2010) (internal quotation marks omitted) (citations omitted); see also Sheff v. O'Neill, 678 A.2d 1267, 1289 (Conn. 1996) (finding "severe racial and ethnic disparities" in school districting system violated "right to a substantially equal education opportunity"); *Horton*, 376 A.2d at 374 (establishing education as "fundamental right" in Connecticut).

80. See infra notes 85–94 (discussing *Horton* case, which invalidated state's school-funding scheme).

81. See infra notes 95–106 (discussing *Sheff* case, which struck down state districting scheme).

legislation."[82] They also assumed that the courts could play a decisive role in structuring public education reforms.[83]

Horton v. Meskill[84] followed the model of the early school-finance cases, which focused on resource redistribution.[85] In 1974, students from the City of Canton, Connecticut, sued several Connecticut public officials to challenge the state's funding of public education under the state constitution's education provision.[86] As the system existed in 1974, seventy percent of funding for public school districts like Canton came from local funds, whereas twenty to twenty-five percent came from the state.[87] The heavy reliance on local property taxes resulted in "wide disparities" in per-pupil expenditures, and the plaintiffs argued that such discrepancies enabled students in towns with large tax bases to receive significantly higher quality instruction.[88] For remedies, the plaintiffs sought a declaratory judgment that the finance system was unconstitutional, an order to cease implementing the current system, and court oversight of a transition to a more equitable funding scheme.[89]

The Connecticut Supreme Court held for the plaintiffs in 1977 and struck down the state's school-funding system.[90] The court concluded that "in Connecticut the right to education is so basic and fundamental that any infringement on that right must be strictly scrutinized."[91] Moreover, the court ruled unconstitutional the "great disparity in the ability of local communities to finance local education . . . [giving] rise to a consequent significant disparity in the quality of education available to the youth of the state."[92] Yet, it "stay[ed] its hand to give the legislative department an opportunity to act."[93] The case established education as a

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82. Conn. Const. art. VIII, § 1.

83. See, e.g., *Conn. Coal. for Justice in Educ. Funding*, 990 A.2d at 210 (arguing court "has a role in ensuring" students in Connecticut public schools receive "fundamental guarantee" (citing *Sheff*, 678 A.2d at 1290)).

84. 376 A.2d 359 (Conn. 1977).

85. See supra note 70 and accompanying text (discussing school-finance litigation).

86. *Horton*, 376 A.2d at 361. Although the plaintiffs also sued under the federal Constitution, the Connecticut Supreme Court followed *San Antonio v. Rodriguez* and decided whether the funding system was unconstitutional under state provisions. Id. at 371–72.

87. Id. at 366 (explaining remaining five percent came from federal funds). At the time, the national averages for percentage contributions were fifty-one percent local, forty-one percent state, and eight percent federal. Id.

88. Id. at 370.

89. Id. at 361 (describing remedies plaintiffs sought).

90. Id. at 374 ("[I]n Connecticut . . . education is a fundamental right, . . . pupils in the public schools are entitled to the equal enjoyment of that right, and . . . the [current] state system of financing public elementary and secondary education . . . cannot pass the test of 'strict judicial scrutiny' as to its constitutionality.").

91. Id. at 373.

92. Id. at 374.

93. Id. at 375.

fundamental right in Connecticut and represents the kind of legislative deference that characterizes much of the fiscal-equity case law.[94]

The Connecticut Supreme Court took a similar approach two decades later when it decided *Sheff v. O'Neill*,[95] a desegregation lawsuit. Although *Horton* had resulted in a revised school-funding scheme, the increased per-pupil spending in some of Connecticut's poorest neighborhoods did not sufficiently close the gap in outcomes.[96] In response, eighteen students in Hartford filed *Sheff* in 1989,[97] arguing that the state had failed to fulfill its constitutional duty by allowing "severe educational disadvantages arising out of . . . [students'] racial and ethnic isolation and their socioeconomic deprivation."[98] Unlike the earliest segregation cases, which challenged legally mandated segregation in the South, *Sheff* sought to invalidate a system of de facto segregation.[99] The plaintiffs' argument relied on language from *Horton* holding that Connecticut recognizes a right to a "substantially equal educational opportunity."[100]

Applying the strict scrutiny standard of *Horton* in its 1996 decision in *Sheff*, the Supreme Court of Connecticut struck down the school-districting scheme.[101] The court found that the state's "affirmative obligation to monitor and to equalize educational opportunity" required the state to remedy the racial isolation.[102] As in *Horton*, the court directed

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94. See Michael A. Rebell & Robert L. Hughes, Schools, Communities, and the Courts: A Dialogic Approach to Education Reform, 14 Yale L. & Pol'y Rev. 99, 158 (1996) [hereinafter Rebell & Hughes, Dialogic Approach] (citing *Horton* as example of state courts being "highly deferential to the legislatures" in fiscal-equity cases).

95. 678 A.2d 1267, 1283 (Conn. 1996) (requiring legislature to remedy racial segregation in public schools).

96. See James E. Ryan, *Sheff*, Segregation, and School Finance Litigation, 74 N.Y.U. L. Rev. 529, 536–37 (1999) ("As a result of the state's revised school finance scheme . . . students in Hartford received a disproportionate share of state educational resources . . . . [But] Hartford schools were not successful in bridging the academic gap between Hartford students and suburban students.").

97. Id. at 537 ("Plaintiffs . . . did not file *Sheff* because earlier school finance litigation had been unsuccessful in equalizing resources; rather, plaintiffs filed *Sheff* because equalizing resources was not enough.").

98. *Sheff*, 678 A.2d at 1271.

99. Id. at 1271–74 (detailing arguments for invalidating state districting scheme that resulted in high concentrations of racial and ethnic minorities in Hartford).

100. Id. at 1277 (citing Horton v. Meskill, 376 A.2d 359, 648–49 (Conn. 1977)).

101. Id. at 1289. The court argued that even though the state "did not intend to create or maintain . . . disparities," the continuing disparities "burden[ed] the education of the plaintiffs [and] infringe[d] upon their fundamental state constitutional right to a substantially equal educational opportunity." Id. The court located that right under a combination of Connecticut's education clause and in its provision against segregation. Id. at 1281; see also Conn. Const. art. VIII, § 1 (requiring free public elementary and secondary education); id. art. I, § 20 (establishing right to protection from segregation).

102. *Sheff*, 678 A.2d at 1282–83 ("[T]he state's awareness of existing and increasing severe racial and ethnic isolation imposes upon the state the responsibility to remedy segregation . . . ." (internal quotation marks omitted)).

the legislative and executive branches to determine the specific remedy.[103] Through several phases of settlements, the state developed a voluntary integration scheme, which, for the 2015–2016 school year, seeks to educate 47.5% of Hartford minority students in "reduced-isolation setting[s]."[104] The scheme involves interdistrict magnet schools, attracting suburban students into city schools, and an Open Choice program, which allows urban students to attend suburban public schools.[105] The state's scheme has contributed to the increase of innovative school sectors, such as charters and magnets.[106]

Reflecting limitations of the *Horton* and *Sheff* remedies, major litigation to improve Connecticut's public education system continues today with *Connecticut Coalition for Justice in Education Funding, Inc. v. Rell*.[107] A school-funding lawsuit based on an adequacy theory,[108] the case was filed in 2005 to challenge Connecticut's "arbitrary and inadequate funding system."[109] Plaintiffs claimed that the state failed to provide a variety of resources to children in cities like Hartford, New Haven, and Bridgeport.

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103. Id. at 1290 (explaining decision to "employ the methodology used in *Horton*"). The court stated that "the constitutional imperative of separation of powers persuades us to afford the legislature, with the assistance of the executive branch, the opportunity, in the first instance, to fashion the remedy . . . ." Id. at 1271.

104. See Stipulation and Order, Sheff v. O'Neill, No. HHD-X07-CV89-4026240-S 2 (Conn. Super. Ct. Feb. 23, 2015), http://www.sheffmovement.org/wp-content/uploads/2015/02/sheff-settlement-2.23.15.pdf [http://perma.cc/Z3WD-VVHD] (stating integration goals for 2015–2016 school year).

105. See Stipulation and Proposed Order, Sheff v. O'Neill, No. HHD-X07-CV89-4026240-S 3 (Conn. Super. Ct. Apr. 4, 2008), http://www.sheffmovement.org/wp-content/uploads/2014/05/2008_SheffPhaseIIStipandOrder.pdf [http://perma.cc/EAX9-2X47] (describing criteria for interdistrict magnet school and Open Choice school to qualify as "reduced isolation setting"). For a discussion of the debate over remedies in the wake of *Sheff*, see, e.g., Michael A. Rebell & Robert L. Hughes, Efficacy and Engagement: The Remedies Problem Posed by *Sheff v. O'Neill*—and a Proposed Solution, 29 Conn. L. Rev. 1115, 1173–74 (1997) (discussing school choice programs, magnet schools, charter schools, increased preschool programs, and additional state aid for poorest district in context of *Sheff* remedy). For a more recent discussion of the legacy of *Sheff*, see Jim Boucher & Elizabeth Horton Sheff, Op-Ed: State Must Do More to Assure Education Equity, Conn. Mirror (Oct. 16, 2014), http://ctmirror.org/2014/10/16/op-ed-state-must-do-more-to-assure-education-equity/ [http://perma.cc/7GP8-R5JB] (arguing ten years after *Sheff* there has been great success among students attending magnet schools and Open Choice schools, but "little more than 40 percent of Hartford children have access to these opportunities").

106. See supra notes 39–46 (discussing magnet and charter school landscape in relation to *Sheff*).

107. 990 A.2d 206 (Conn. 2010). Although the case has already reached the Connecticut Supreme Court, the case has been remanded and the parties are waiting for a trial date. See infra note 113 and accompanying text (explaining decision and purpose of remand).

108. See supra notes 70–77 and accompanying text (explaining adequacy theory as interpreting state constitutional provisions to require states provide students with a minimal level of education).

109. *Conn. Coal. for Justice in Educ. Funding*, 990 A.2d at 215.

They also argued that the state's failure to remedy inadequate resource allocation resulted in great disparities in performance outcomes and life opportunities between students in their home districts and those in wealthy districts.[110]

In 2010, the Connecticut Supreme Court reaffirmed the guarantees of *Horton* and *Sheff* and reasoned that the state constitution also requires "a particular minimum quality of education."[111] Citing a decision from the New York courts, a plurality opinion in Connecticut outlined "'essential' components" of an "adequate" education, including guidelines for physical facilities, learning materials, teaching materials, and personnel training.[112] The court remanded the case to the lower courts to determine whether Connecticut was providing an adequate education. The trial date was originally January 6, 2015, but has been postponed.[113] Although the scope of the right to an adequate education remains in flux,[114] the court has established such a guarantee and will likely use it as a framework for determining whether Connecticut's current funding system is unconstitutional.

The Connecticut cases, like many early desegregation and school-finance lawsuits, helped eliminate some of the most egregious barriers to educational opportunity, but a singular focus on segregation or school finance fails to address the myriad of other factors that perpetuate the achievement gap. At the national level, public law litigation helped eradicate overt segregation and grave funding disparities. In the South, laws no longer assign students based on their race to attend separate schools, and most states recognize that too great a reliance on local property taxes can result in significant differences in educational quality

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110. Id. at 214–15 (presenting plaintiffs' argument).

111. Id. at 210–11. Although Connecticut's constitution does not use the language of "adequacy," the court followed a six-factor test to establish the requirement. See id. at 227 (applying test from *State v. Geisler*, 610 A.2d 1225, 1231–32 (Conn. 1992)).

112. Id. at 254. The essential components include:

> (1) "[M]inimally adequate physical facilities and classrooms which provide enough light, space, heat, and air to permit children to learn"; (2) "minimally adequate instrumentalities of learning such as desks, chairs, pencils, and reasonably current textbooks"; (3) "minimally adequate teaching of reasonably up-to-date basic curricula such as reading, writing, mathematics, science, and social studies"; and (4) "sufficient personnel adequately trained to teach those subject areas."

Id. (quoting Campaign for Fiscal Equity, Inc. v. State, 655 N.E.2d 661, 666 (N.Y. 1995)).

113. See Jacqueline Rabe Thomas, School Funding Trial Delayed Indefinitely Over Emails, Conn. Mirror (Nov. 25, 2014), http://ctmirror.org/school-funding-trial-delayed-indefinitely-over-emails/ [http://perma.cc/GH6S-N6DM] (explaining missing evidence as reason for delay).

114. A plurality joined the finding that the Connecticut constitution must provide "minimally adequate" education opportunity, but the concurring judges expressed concerns over the scope of the right. See *Conn. Coal. for Justice in Educ. Funding*, 990 A.2d at 257 (Palmer, J., concurring in the judgment) (arguing for deference to legislature and executive with respect to determining scope of right).

and opportunities. Despite these initial successes, however, early waves of public law litigation have been limited in their ability to effect widespread change because of the focus on inputs instead of outcomes, as well as judicial incapacity to enforce effective education policy.[115] Thus, a new litigation strategy is necessary to tackle the achievement gap. Parts II and III of this Note examine the limitations of traditional approaches and the potential for a new strategy—as well as its application.

II. POTENTIAL FOR A NEW LITIGATION STRATEGY

Public law litigation in the K–12 education context has not prevented the achievement gap from persisting and increasing.[116] Section II.A describes how a singular focus on desegregation or school financing fails to address the complex and multifaceted structures that perpetuate the achievement gap. Section II.B then discusses a new version of public education litigation, which seeks to shift the focus away from racial distribution and financing and toward teacher effectiveness. Finally, section II.C presents a new principle—the "duty of responsible administration," which has emerged in other public law contexts. This Part concludes by suggesting that the duty of responsible administration flows from the educational adequacy theory as the logical next step in education litigation strategy.

A. *The Limitations of Earlier Strategies*

Public law litigation to reform schools has been most successful in removing singular invidious barriers to access,[117] but it has had a limited impact on problems that result from a combination of laws, public actions, and individual choices.[118] First, proving causation is easier in lawsuits that challenge one particularly egregious structure; it is more

115. For one perspective on the limitations, see Rebell & Hughes, Dialogic Approach, supra note 94, at 99 ("[Judicial] intervention has had mixed results because courts often cannot provide effective, long-lasting solutions to deep-rooted educational controversies.").

116. See supra section I.A (discussing persistent achievement gap).

117. See, e.g., Sabel & Simon, Destabilization Rights, supra note 4, at 1053 (describing success of desegregating schools in rural South where there were "clearly bad practices" that negative injunctions with mandatory terms could easily address).

118. See Sandler & Schoenbrod, supra note 6, at 10 ("Court processes aimed at eradicating clearly defined illegalities, such as separate school systems for whites and blacks, are ill-equipped to manage governmental programs which require choosing among lawful options, allocating limited resources, and dealing with unexpected circumstances and unwanted side effects."); see also Eric A. Hanushek, When School Finance "Reform" May Not Be Good Policy, 28 Harv. J. on Legis. 423, 425 (1991) ("School finance discussions have not been oblivious to the potential pitfalls of focusing exclusively on expenditures . . . [including] issues of efficiency along with an assertion that the research is ambiguous.").

difficult when several factors contribute to poor outcomes.[119] Moreover, determining an effective remedy is harder when the court cannot simply enjoin an existing practice or mandate a new one. For these reasons, although the traditional strategies of public education litigation succeeded in removing overt racial segregation and dismantling the most inequitable state-funding schemes, they have failed to close achievement gaps.

1. *Limitations of Desegregation Cases.* — The challenges presented by desegregation suits outside of the rural South shed light on this problem.[120] While suits were successful in areas where courts could strike down statutes that required racial segregation, the strategy was less effective in northern and western states such as Connecticut where discriminatory policies and the actors imposing them appeared less deliberate.[121] Developing theories of causation proved more difficult,[122] and consent decrees were inadequate remedies where segregation was not the direct result of a statutory scheme because judges were not sure what the "goal" of their orders should be.[123] As a result, the judicial mandates that came out of northern and western desegregation suits often failed to address important stakeholders, and they galvanized hostility toward the judiciary and desegregation itself, with limited impact on student achievement.[124] Connecticut's *Sheff v. O'Neill*[125] provides an

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119. See James S. Liebman, Desegregating Politics: "All-Out" School Desegregation Explained, 90 Colum. L. Rev. 1463, 1519 (1990) (discussing causation issues in desegregation).

120. See Liebman & Sabel, NCLB, supra note 25, at 1706 (explaining "limited success" of courts to enforce obligations of school officials after *Brown*). Liebman and Sabel argue that the enactment of NCLB "encourages the development of just the kind of locally, experientially, and consensually generated standards whose absence in the past has discouraged courts from carrying through with their initial commitments to desegregated, educationally effective schools." Id.

121. See Sabel & Simon, Destabilization Rights, supra note 4, at 1023 (explaining "[o]utside the rural South . . . desegregation was impeded by the combination of local school control and residential mobility" because liability was hard to establish "where officials did not express racist intentions, policies were facially neutral, and their consequences were ambiguous"); see also Sturm, Public Law Remedies, supra note 4, at 1362 ("Although a prohibition of particular forms of conduct may be sufficient to eliminate certain discrete and blatant illegalities, such as assigning schools by race . . . , negative injunctions are, as a practical matter, both difficult to obtain and inadequate as remedies for most ongoing public law violations.").

122. See Sabel & Simon, Destabilization Rights, supra note 4, at 1023 (explaining in North and West "[i]ssues of intention and causation were complex, the standards were vague and inconsistent, and the range of potentially relevant evidence was enormous").

123. See Liebman & Sabel, A Public Laboratory, supra note 6, at 197 ("Under . . . more complex conditions, the ambiguous goals of desegregation became more and more apparent, prompting concerns about the availability of corresponding remedies." (citations omitted)).

124. See Sandler & Schoenbrod, supra note 6, at 10 (arguing applying traditional desegregation approach to more complex governmental programs has resulted in decrees

example of such a northern desegregation lawsuit that has not significantly improved educational outcomes for students of racial minorities.[126]

2. *Limitations of School-Funding Cases Under the Equality Theory.* — Traditional funding-equity lawsuits have also failed to significantly improve student outcomes because of the difficulties in proving causation and identifying appropriate remedies. Financing schemes are complex, and research has failed to demonstrate a strong correlation between levels of per-pupil funding and disparate outcomes.[127] Indeed, funding is just one of many factors influencing student performance.[128] In some states like California, efforts to equalize expenditures through litigation led to a "leveling down" of funds: Contributions to relatively poorer districts increased, but support overall for the school system diminished or failed to grow at the same rate as in other states.[129] Furthermore, cases brought under state equal protection clauses that seek to alter the black-letter law may have unintended consequences on other social programs, including food, housing, and medical care.[130] Scholars and practitioners debate the extent to which financing affects achievement, but most agree that equalizing expenditures alone cannot close this country's achievement gap.[131] Connecticut's *Horton* provides an

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that "regularly fail despite the intelligence, expert advice, and good intentions that go into them").

125. 678 A.2d 1267 (Conn. 1996).

126. See supra notes 95–105 (discussing *Sheff*).

127. See infra note 131 (discussing findings against correlation between funding and student outcomes).

128. See Liebman & Sabel, A Public Laboratory, supra note 6, at 187 ("Court-ordered redistribution of state financing mechanisms have seldom met the plaintiffs' expectations that more spending on education by itself produces better schools.").

129. See Sabel & Simon, Destabilization Rights, supra note 4, at 1023 (providing California as example of state where "implementation of school finance equity remedies has also met with difficulties and disappointments"); see also Michael A. Rebell, Safeguarding the Right to a Sound Basic Education in Times of Fiscal Constraint, 75 Alb. L. Rev. 1855, 1905 n.216 (2012) (attributing California's "substantially reduced educational expenditures" and "highly inadequate levels" of student services to "severe limits on local property taxes"). The limits on local property tax came from Proposition 13, which followed Serrano v. Priest, 557 P.2d 929 (Cal. 1976) (en banc). See supra note 68 and accompanying text (discussing *Serrano*). Several scholars have argued that *Serrano* caused Proposition 13. See, e.g., William A. Fischel, Did *Serrano* Cause Proposition 13?, 42 Nat'l Tax J. 465, 467 (1989) ("Proposition 13 was a rational response by voters who were faced with the implementation of *Serrano*.").

130. See William S. Koski & Rob Reich, When "Adequate" Isn't: The Retreat from Equity in Educational Law and Policy and Why It Matters, 56 Emory L.J. 545, 560 (2006) (arguing fewer "spillover effects on other areas of public policy" result from cases relying on education provisions of state constitutions).

131. For a prominent argument against focusing on funding levels to improve student outcomes, see Hanushek, supra note 118, at 442–43 ("The evidence on school performance indicates that variations in school expenditures are exceedingly poor measures of the variations in education provided to students."). Hanushek advocates

example of such a suit, which resulted in increased funding for students in Hartford without significantly raising achievement or closing the gap.[132]

3. *Limitations of School-Funding Cases Under the Adequacy Theory.* — Lawsuits under the adequacy theory have addressed some of the challenges of the equity suits, but they have fallen short where courts continue to focus on a minimum level of "educational inputs" instead of "desired students outcomes."[133] By relying on state constitutional provisions for education,[134] adequacy lawsuits, such as *Connecticut Coalition for Justice in Education Funding, Inc. v. Rell*,[135] do not impact other social policies and seem to be less politically contentious than lawsuits trying to define the scope of equity.[136] Nonetheless, adequacy suits have attracted criticism,[137] especially because of the challenges of defining "adequacy."[138] The focus on the inputs needed to provide "at a minimum, a meaningful education" rather than on "desired educational outcomes"[139] has resulted in questions of institutional competency and uncertainty about how to actually address identified inadequacies.[140] As this Note later explains, adequacy suits point in the direction of other, potentially more effective, alternatives but thus far have not been sufficient to engage the courts in public education reform.

As this discussion has demonstrated, the traditional public education litigation strategies have failed to address the complex problems in

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instead for a focus on "tangible incentives for improved decisionmaking." Id. at 450 (providing "hiring, promotion, curriculum, and student placement" as examples). But see Michael Paris, Framing Equal Opportunity: Law and Politics of School Finance Reform 48–49 (2010) (offering in response to Hanushek "spending more money alone does not guarantee success, but we also know that more money can help").

132. See supra notes 86–97 and accompanying text (discussing *Horton* and its limitations).

133. See Julie K. Underwood, School Finance Adequacy as Vertical Equity, 28 U. Mich. J.L. Reform 493, 519 (1994) (arguing focus on outputs may be more promising).

134. See Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 205–13 (Ky. 1989) (holding state constitutional mandate for "an efficient system of common schools" required standard of adequate education). New York is another example of a state that has found its state constitution to mandate an adequate education. See Campaign for Fiscal Equity, Inc. v. State, 655 N.E.2d 661, 665–66 (N.Y. 1995) (affirming mandate under language for "free common schools" (internal quotation marks omitted)).

135. 990 A.2d 206 (Conn. 2010).

136. See Koski & Reich, supra note 130, at 560–61 (describing potential advantages of adequacy theory).

137. See id. at 547 (describing shift from "equal educational opportunities" to "'adequate' quality of education" and calling for injection of "equality back into the policy conversation" because "'adequate' is not good enough in educational policy").

138. See id. at 561 (arguing "hidden pitfall . . . is that legislatures, and ultimately courts, are given absolutely no guidance as to what is an adequate education").

139. Underwood, supra note 133, at 519.

140. See Koski & Reich, supra note 130, at 562 ("Even if the legislature and courts were to craft those standards from whole cloth, how do we determine what resources will produce the desired outcomes?").

schools that lead to outcome disparities. In these cases, courts and parties have struggled to identify the multitude of causes that lead to the achievement gap. Moreover, courts have wavered between heavy-handed judicial intervention and total deference to legislators and other state officials. Accordingly, doubts about the effectiveness of established public law litigation strategies in the context of public education are prompting a search for new types of lawsuits. Some recent approaches have shown potential to create important changes. The next section of this Note looks to the new types of education lawsuits, and section II.C examines instructive lawsuits outside of the public education context.

B. *New Lawsuits, Same Concerns?*

Desegregation and school-finance suits have dominated the public education litigation landscape, but they have not been the only types of lawsuits to try to reform public schools. Very recently, a new version of public education litigation has emerged that focuses on equality of access to effective teachers.[141] The suits have received a lot of public attention, particularly through the media,[142] but concerns about a singular focus on one type of input (teachers), as well as remedies and institutional roles, remain.

1. *The Teacher Tenure Suit.* — In *Vergara v. California*, nine California public school students challenged five statutes relating to teacher tenure as violations of the equal protection provisions of the state constitution.[143] The statutes govern the award and effect of teacher tenure (Permanent Employment), due process protections affecting the ability to dismiss poorly performing teachers (Dismissal Statutes), and rules regarding reduction in force (Last-In-First-Out).[144] Like earlier education litigation, *Vergara* focused on a single type of barrier: laws that the plaintiffs argued expose minority and low-income students to "grossly ineffective teachers."[145] A sixteen-page decision from the Los Angeles Superior Court in June 2014 held for the plaintiffs and declared the

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141. See Vergara v. California Case Summary, Students Matter, http://studentsmatter.org/our-case/vergara-v-california-case-summary/ [http://perma.cc/G8KR-A5JP] (last visited July 29, 2015) (explaining suit to strike down teacher tenure laws in California); see also infra note 153 (discussing New York lawsuit).

142. See, e.g., About Students Matter, Students Matter (Apr. 18, 2012), http://studentsmatter.org/home/about-students-matter/ [http://perma.cc/WM6M-RJHR] (explaining efforts of nonprofit organization promoting case news).

143. No. BC484642, 2014 WL 2598719, at *3 (Cal. Super. Ct. June 10, 2014) (tentative decision) (presenting challenge). The original decision was "tentative" but became final in August 2014. See Court Rulings, Students Matter, http://studentsmatter.org/court-rulings/ [http://perma.cc/NAY7-UUFB] (last visited July 29, 2015) (providing decision made final in August 2014).

144. *Vergara v. California*, 2014 WL 2598719, at *2 (explaining statutes at issue).

145. Id. at *4.

statutes unconstitutional.[146] As in prior cases,[147] the opinion deferred to the legislature to craft new statutes that "pass[] constitutional muster."[148] The decision is currently on appeal.[149]

The lower court's opinion has received considerable praise and criticism for its bold argument.[150] Those who favor the plaintiff's case view the opinion as a significant victory in striking down some of the most egregious state laws that allow ineffective teachers to remain in schools with large populations of minority students.[151] They see the lawsuit as an important first step in reforming tenure laws and eventually collective bargaining, as well as a potential inspiration for similar challenges across the country.[152] In fact, New York is already facing a follow-on suit against its teacher tenure statutes.[153]

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146. Id. (holding challenged statutes violate equal protection clause of California constitution by keeping "grossly ineffective teachers" in classrooms of most disadvantaged students). The court followed *Brown* and *Serrano* in applying a strict scrutiny standard and recognizing education as a "fundamental right" in California. Id. at *2–3.

147. See supra notes 93–103 and accompanying text (providing examples from Connecticut where court has deferred to legislature).

148. *Vergara*, 2014 WL 2598719, at *16 ("Under California's separation of powers framework, it is not the function of this Court to dictate or even to advise the legislature as to how to replace the Challenged Statutes.").

149. See Adam Nagourney, California Governor Appeals Court Ruling Overturning Protections for Teachers, N.Y. Times (Aug. 30, 2014), http://www.nytimes.com/2014/08/31/us/california-governor-fights-decision-on-teacher-tenure.html?_r=0 (on file with the *Columbia Law Review*) (presenting Governor Jerry Brown's appeal to have higher court review "[c]hanges of this magnitude").

150. See, e.g., Stephen Sawchuk, For *Vergara* Ruling on Teachers, Big Questions Loom, Educ. Wk. (July 7, 2014), http://www.edweek.org/ew/articles/2014/07/09/36vergara-update.h33.html (on file with the *Columbia Law Review*) ("In the annals of education-equity cases, the decision in *Vergara v. California* was nothing less than a bombshell.").

151. Id. ("Proponents of the suit . . . declared the ruling a huge victory for low-income and minority students who have historically gotten weaker teaching than their wealthier and white peers."). For an explanation of how California's laws may disadvantage students and teachers more than the laws of other states, see *Vergara*, 2014 WL 2598719, at *10, 14 (providing California is "one of only five outlier states" with tenure decisions occurring within "period of two years or less" and one of ten states requiring "seniority [as] the sole factor, or one that must be considered," in termination).

152. See, e.g., Press Release, U.S. Dep't of Educ., Statement from U.S. Secretary of Education Arne Duncan Regarding the Decision in *Vergara v. California* (June 10, 2014), http://www.ed.gov/news/press-releases/statement-us-secretary-education-arne-duncan-regarding-decision-vergara-v-califo [http://perma.cc/2DSY-YGQH] ("My hope is that today's decision moves from the courtroom toward a collaborative process in California that is fair, thoughtful, practical and swift. Every state, every school district needs to have that kind of conversation.").

153. See New York Lawsuit, P'ship for Educ. Justice, http://www.edjustice.org/projects/new-york-lawsuit/ [http://perma.cc/P9J8-4JQ4] (last visited July 29, 2015) (explaining suit challenging New York teacher tenure laws); see also Complaint for Declaratory and Injunctive Relief at 3, Wright v. New York, No. A00641/2014 (N.Y. Sup. Ct. 2014), http://nylawyer.nylj.com/adgifs/decisions14/072914summons.pdf [http://perma.cc/R34S-62LG] (arguing laws violate right to "sound basic education" in New York).

Opponents of the *Vergara* decision include both those who defend the civil-service laws in question and those who disagree on principle with such judicial interventions. While teachers unions fear losing employment protections,[154] others worry about the competency of courts to regulate employment and education policies.[155] Moreover, it is not clear what the implications of the suit would be in the majority of states where practices are less protective, and the teaching force may be more effective.[156] Lessons from desegregation and finance-equity suits raise a more fundamental set of concerns, including that teacher tenure laws are only one of a myriad of economic, political, and administrative factors that disproportionately assign and keep ineffective teachers in classrooms with minority and low-income students. Furthermore, poor quality of teachers in those classrooms is only one of many factors contributing to students' poor outcomes. As the desegregation and funding-equity cases demonstrated, focusing on one factor may not make a significant difference and may divert attention from other possible paths to reform.[157]

2. *Remedial Issues.* — The remedial difficulties posed by *Vergara* are not unique to the teacher tenure context or to educational equity and adequacy suits more generally. These challenges also affect public law litigation in multiple sectors.[158] When lawsuits that challenge discrete laws or conditions succeed in demonstrating a causal link to poor

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154. See Jennifer Medina, Judge Rejects Teacher Tenure for California, N.Y. Times (June 10, 2014), http://www.nytimes.com/2014/06/11/us/california-teacher-tenure-laws-ruled-unconstitutional.html? (on file with the *Columbia Law Review*) (explaining overturning laws "would erode necessary protections" in eyes of unions).

155. See Erica E. Phillips, Teacher Tenure Dealt Legal Setback, Wall St. J. (June 10, 2014), http://www.wsj.com/articles/california-teacher-job-protections-struck-down-in-students-suit-1402422428 (on file with the *Columbia Law Review*) (citing law professor William Koski stating litigation in other states will "raise some pretty thorny issues about the role of courts and the judiciary in teacher employment [and] . . . education policies").

156. See id. (explaining California's practices relative to those of other states).

157. But see Note, supra note 59, at 938 (arguing new "form of remedy may allow . . . litigation [similar to *Vergara*] to evade the concerns that plagued its predecessors" by devolving policymaking to district level).

158. For general discussions of the challenges of public law remedies, see Sandler & Schoenbrod, supra note 6, at 9–10 ("Institutional reform litigation often fails because finding a violation of law to gain a legal hook for a lawsuit reveals little about what should be done to make the program run better."); Susan Sturm, Resolving the Remedial Dilemma: Strategies of Judicial Intervention in Prisons, 138 U. Pa. L. Rev. 805, 807 (1990) [hereinafter Sturm, Remedial Dilemma] (discussing courts facing "remedial dilemma" when "responsible parties either cannot or will not take the steps necessary" to remedy wrong); see also Chayes, supra note 4, at 1294 (explaining public law remedy as "not a terminal, compensatory transfer, but an effort to devise a program to contain future consequences in a way that accommodates the range of interests involved"); Sabel & Simon, Destabilization Rights, supra note 4, at 1021 (describing "issues that have preoccupied appellate doctrine [in public law litigation], including the relation between right and remedy, the separation of powers, respondeat superior, and the problem of interest representation").

outcomes, the remedies often have a singular focus, to the exclusion of other important and relevant factors. Traditionally, for instance, desegregation suits involved command-and-control consent decrees. These judge-ordered instruments developed highly complex regulations regarding the assignment of children and teachers to schools, but they failed to engage with the wider range of issues and stakeholders that impact student achievement.[159] Similarly, in the school-funding context, an exclusive focus on financial inputs ignores the variety of other factors and conditions that affect student performance.[160]

Full deference to the other branches of government has also garnered criticism.[161] In funding-equity cases, for instance, reliance on legislative activity has led to many misguided and ongoing efforts to develop a financing formula that improves schools.[162] The problems stem from lack of guidance to the legislature and the political tensions that hamper any effort to change existing laws and policies.[163] In the context of teacher tenure, striking down the statutes and then giving the legislature the freedom to revise them might result in productive changes. Alternatively, it could result in the same interest-group bargaining that supported the legislation in the first place.[164] Thus, the question remains whether public law litigation can prevent such a cycle and encourage measures that actually improve access for students from minority and low-income communities. If so, the judiciary will likely have to play a role that falls somewhere between too much prescription of one-dimensional educational policies and too much deference to interest-group politics.

C. *New Theories Could Prevent Old Problems*

A new approach to public law litigation that has emerged in fields outside education suggests a more fitting role for courts. It entails a "duty

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159. See supra notes 120–126 and accompanying text (discussing limitations in desegregation).

160. See supra notes 130–131 and accompanying text (discussing limitations in school funding).

161. See Sabel & Simon, Duty of Responsible Administration, supra note 9 (manuscript at 3) (arguing solving complex public problems today "requires more flexibility than rules permit but also more transparency than discretion typically affords" to administrative state).

162. See Clune, supra note 67, at 728 ("[G]etting a fair decision out of legislatures, and sometimes getting *any* decision, has been quite difficult and time-consuming. School finance litigation seems to go on forever . . . .").

163. See Rebell & Hughes, Dialogic Approach, supra note 94, at 158–59 ("The courts' decision to defer to the legislature . . . means that plaintiffs' proposals must be considered in an institutional setting where the relationship of the remedy to the specific constitutional violations found by the court may be tenuous.").

164. See id. (explaining in fiscal-equity context "legislative decisions tend to be skewed in favor of established power interests").

of responsible administration"[165] and a remedial scheme that follows an "experimentalist" model.[166] Instead of focusing on how a court can achieve systematic change by identifying a problematic distribution of students, teachers, or resources, the new approach focuses on the obligations of public officials. It utilizes evidence that they are not tracking and responding to many of the factors they know are linked to egregious but correctable disparities in outcomes. In doing so, the approach seeks to enforce a duty on officials to assess, revise, and monitor their own conduct.[167] The origins of this approach lie in other public contexts, including mental health and employment discrimination.[168] No education lawsuit has consciously applied it before, and current scholarship on the duty focuses on a remedial scheme instead of detailing what a finding of constitutional liability would actually entail. If applied to education, however—where years of litigation have helped define the right at issue, but the remedies have not gone far enough—application of the duty may propel the necessary educational reforms.

1. *The Duty.* — The proposal for a duty of responsible administration comes from a forthcoming paper by Charles Sabel and William Simon.[169] The duty, which the authors infer from a variety of public contexts including policing, mental health, and child welfare, has not yet appeared by name in case law or other scholarship. For the reasons set out below, however, it provides a useful framework for defining civil rights violations in fields where public officials have yet to address discernable and corrigible disparities in important outcomes.

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165. See Sabel & Simon, Duty of Responsible Administration, supra note 9 (manuscript at 3) (explaining duty).

166. See Dorf & Sabel, supra note 16, at 267 (defining democratic experimentalism). Dorf and Sabel describe "a new form of governance . . . in which power is decentralized to enable citizens and other actors to utilize their local knowledge to fit solutions to their individual circumstances, but in which regional and national coordinating bodies require actors to share their knowledge with others facing similar problems." Id. The authors also argue that experimentalism helps courts "avoid the worst features of oscillation between deference and intrusion." Id. at 395.

167. See Sabel & Simon, Duty of Responsible Administration, supra note 9 (manuscript at 3–4) (explaining approach).

168. For a discussion of legal innovations that have led to this approach in the mental health context, see Sabel & Simon, Destabilization Rights, supra note 4, at 1029–34 (explaining successes of decrees that "emphasize broad goals and leave defendants substantial latitude to determine how to achieve them; mandate precise measurement and reporting with respect to achievement; and institutionalize ongoing mechanisms of reassessment, discipline, and participation"). For case studies in the employment discrimination context, see Sturm, Employment Discrimination, supra note 58, at 463 (describing role of court in fostering shift toward regulatory approach "that encourages the development of institutions and processes to enact general norms in particular contexts").

169. Sabel & Simon, Duty of Responsible Administration, supra note 9.

The education context is well suited for application of the duty because the combination of adequacy litigation[170] and post–NCLB standards[171] has helped to define the kind of right that can trigger the duty. Sabel and Simon do not fully define a right that the duty seeks to protect; rather their proposal is broad and attaches a well-developed remedial scheme to an amorphous constitutional duty. This Note explores the use of the proposal in a way that is more concrete by providing a right from the education context.

According to Sabel and Simon, the duty of responsible administration "entails reflective and articulate elaboration of the policies and principles that govern [the] work [of public officials]."[172] It also requires officials to "monitor[] the activities of peers and subordinates to induce compliance with these policies and principles, and frequent[ly] reassess[] . . . the policies and principles in the light of experience and evidence."[173] Although its origins lie in constitutional, statutory, and common law, the duty also "arises from recent efforts to elaborate provisions of substantive civil rights law."[174] As courts struggle to solve complex problems with "specific substantive directives," they frequently "turn to regulation of the ways in which officials give content to their discretion."[175] The emphasis on process seeks to foster the kind of reflective practices that the duty necessitates.

Under the duty of responsible administration, the state would be responsible for unreflective practices that "although troubling, [do] not fit the psychological premises of classic [civil rights] doctrine."[176] This classic doctrine—known for targeting "[f]irst-generation problems"[177]—bases liability on "deliberate indifference" or "discriminatory intent," and mandates "bureaucratic-type rules" for remedies.[178] As courts have struck down many of the most invidious discriminatory laws and practices, they currently face more second-generation challenges.[179]

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170. See supra note 73 and accompanying text (presenting litigation based on theory that states must provide a minimum level of education).

171. See supra notes 24–25 and accompanying text (providing requirements of NCLB).

172. Sabel & Simon, Duty of Responsible Administration, supra note 9 (manuscript at 3) (explaining duty).

173. Id.

174. Id.

175. Id.

176. Id. (manuscript at 4). Sabel and Simon explain that the "underlying premise of much classical doctrine is that managerial inquiry and control are prerequisites of duty rather than entailments of it." Id. (manuscript at 12).

177. Id. (manuscript at 4).

178. Id.; see also supra notes 64–66 and accompanying text (providing example of bureaucratic remedies in desegregation context).

179. Sabel & Simon, Duty of Responsible Administration, supra note 9 (manuscript at 4) (describing "second generation cases"); see also Sturm, Employment Discrimination, supra note 58, at 465–68 (providing definitions of first- and second-generation cases in the

These latter problems involve "normatively ambiguous conduct" that is not easily remedied by "apply[ing] substantive rules."[180] Such second-generation challenges arise frequently in institutions that have taken "post–bureaucratic forms."[181]

Policing provides one example of a post–bureaucratic context[182] in which the judicial doctrine is beginning to reflect a duty of responsible administration—even if unconsciously.[183] Doctrine in the areas of antidiscrimination, search and seizure, attribution, and structural relief encourages an understanding of reasonableness, a system of monitoring, and a structure for reflective practice and learning.[184] In antidiscrimination, for instance, courts could find employers liable not because of "intent" to create a disparate impact, but rather because they do not "critically examine practices that disproportionately disadvantage protected groups."[185] As the idea behind such a finding is that employers would be "*irresponsible*" for not examining their practices, it appears that the duty of responsible administration incorporates the idea of nondiscrimination.[186]

The court's role in a suit about the duty of responsible administration, therefore, is not to prescribe top-down rules or completely defer to other branches of government. Instead, its role "is to

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employment context). First-generation discrimination involves "overt exclusion [and] segregation," while second generation claims involve "patterns of interaction among groups . . . that, over time, exclude nondominant groups"). Id.

180. Sabel & Simon, Duty of Responsible Administration, supra note 9 (manuscript at 3).

181. Id. (manuscript at 3–4). Sabel and Simon explain "post–bureaucratic organization" as "responsive to the difficulties of second-generation civil rights doctrine." Id. (manuscript at 41). They describe those "difficulties" as including the application of "the notion of intent to disparate harm that results from inattention and . . . the notion of reasonableness to conduct that is normatively ambiguous." Id. For further discussion of the interaction between courts and agencies in developing constitutional doctrine related to civil rights, see Gillian E. Metzger, Administrative Constitutionalism, 91 Tex. L. Rev. 1897, 1910 (2013) (discussing institutional issue of who is "developing new constitutional understandings").

182. See Sabel & Simon, Duty of Responsible Administration, supra note 9 (manuscript at 25) (describing shift in policing in 1980s from "stable top-down rules" to "more flexible norms—notably, plans and indicators").

183. See id. (manuscript at 15–16) (finding introduction of the "structural approach" in "key areas that bear on policing"). For examples of other institutions that are increasingly recognizing the duty, see id. (providing statutory language in juvenile justice, prison rape, and disabilities context).

184. See id. (manuscript at 16–23) (discussing doctrine in four contexts). Sabel and Simon also acknowledge that the four contexts are constrained by classical doctrine. See id. (manuscript at 16) ("Judicial doctrine continues to pay at least superficial homage to the organizational premises of classicism and is frequently seriously constrained by them.").

185. Id. (manuscript at 17).

186. See id. (arguing "duty of non-discrimination has become in substantial part a duty of responsible administration").

induce entities that have violated constitutional norms to undertake disciplined self-analysis of the extent and underlying causes of the harms they have caused and a painstaking search for less burdensome alternatives."[187] Examples from the policing context include the judicial role in both New York's Assertive Policing and Cincinnati's Problem-Oriented-Policing (POP).[188] Although neither of these forms is constitutionally mandatory—nor are they perfect solutions[189]—they demonstrate the potential for collaborative and more flexible structural reform to help institutions meet their constitutional duties.[190] Examples from the child welfare context are also instructive in showing this more innovative approach.[191]

2. *The Remedy.* — Experimentalist remediation[192] is a central feature of litigation that recognizes the duty of responsible administration. This form of remediation has been significant in improving a variety of public institutions, as it resists rigid rule-based orders in favor of more collaborative and flexible processes.[193] Instead of mandating a particular

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187. Id. (manuscript at 55).

188. Sabel and Simon present examples in New York and Cincinnati that "manifest [a] structural turn" by mandating "explicit but provisional policy-setting on matters previously left to tacit discretion, monitoring, and re-assessment in the light of experience and evidence." Id. (manuscript at 5). They use the example of New York's Assertive Policing Approach and Cincinnati's Problem-Oriented Policing to contrast more "conventional judicially-supervised reform" with a more "ambitious initiative" that "emphasizes varied, innovative, and localized responses, often developed in collaboration with stakeholders." Id. (manuscript at 5–6).

189. See id. (manuscript at 30–33, 41–42) (discussing limitations).

190. Cf. Rachel A. Harmon, Promoting Civil Rights Through Proactive Policing Reforms, 62 Stan. L. Rev. 1, 1–8 (2009) (demonstrating failures of traditional federal legal means of reforming police departments).

191. See supra notes 209–221 and accompanying text (discussing child welfare context).

192. See supra note 166 and accompanying text (discussing experimentalism).

193. For an account of experimentalism in the prison reform context, see Sabel & Simon, Destabilization Rights, supra note 4, at 1035–36 (discussing shift from courts "imposing comprehensive sets of specific rules [to] order[ing] the parties and their experts to formulate general performance standards and then to set up monitoring bodies with substantial accountability to the plaintiffs"). Susan Sturm has labeled the experimentalist regulation as "the catalyst." Sturm, Remedial Dilemma, supra note 158, at 856–59. She describes the catalyst:

> [It] creates processes and incentives in order to induce the parties to participate in a deliberative process to formulate and implement an effective remedy. The judge employs a two-prong approach combining a deliberative remedial formulation process with the use of traditional sanctions to induce the necessary parties to participate. The responsible parties must identify the conditions causing the constitutional violation, gather information and expertise required to formulate an effective remedy, and involve the actors essential to successful reform. The catalyst evaluates the resulting remedy by assessing both the adequacy of the process by which it was developed and its reasonableness in light of the information gathered.

Id. at 856–57.

distribution of resources, experimentalist remediation often requires parties and additional stakeholders to examine the practices that are causing inadequacies and to develop plans to improve them.[194] It includes a role for the court, but judicial intervention appears in more "indirect forms . . . that rely on stakeholder negotiation, rolling-rule regimes, and transparency."[195] The remedy is more "holistic," as it increasingly focuses on changing "core practices" instead of complying with existing systems and processes.[196]

The POP in Cincinnati exemplifies an experimentalist approach to addressing complex institutional problems that have disadvantaged minority populations.[197] In 2002, following a lawsuit alleging racially discriminatory enforcement practices by the Cincinnati Police Department,[198] the city entered into a Collaborative Agreement, which "address[ed] policing in a comprehensive and nuanced manner."[199] The agreement committed Cincinnati to implementing POP, which "treats crime and disorder as problems to be solved by government in cooperation with citizens, rather than merely as matters of law enforcement."[200] The agreement also required the city to develop "extensive data collection systems" to evaluate police practices, and it provided for "a system to resolve disputes arising under it," which terminates with the court.[201]

At the core of POP is a process that "begins with a precise definition of a problem, proceeds to look for well-configured interventions, implements them, assesses the results, and then if the problem persists, begins the cycle anew with a revised account of the problem in the light

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194. Sturm presents the reasoning for this type of engagement: "The information and expertise needed to develop the remedy are frequently held by actors who did not participate in the liability determination. Therefore, the court faces the task of crafting both the process and the substance of the remedy." Sturm, Public Law Remedies, supra note 4, at 1364.

195. Sabel & Simon, Destabilization Rights, supra note 4, at 1100.

196. See Sabel & Simon, Duty of Responsible Administration, supra note 9 (manuscript at 43) ("Comprehensive reform sometimes appears more efficient than specialized compliance procedures from the perspective of both civil rights and core crime-control goals.").

197. Id. (manuscript at 27 n.56) (describing POP as "resembl[ing] what [some] call 'experimentalism'"). Sabel and Simon contrast this form of policing with Assertive Policing in New York, which "focuses on identifying high-crime locales and rapidly mobilizing a limited set of conventional interventions within them." Id. (manuscript at 54).

198. See In Re Cincinnati Policing, 209 F.R.D. 395, 400 (S.D. Ohio 2002) (describing complaint alleging "Cincinnati Police Department employs policies and procedures that discriminate against African Americans on the basis of race and that the municipality is deliberately indifferent to the constitutional rights of African Americans").

199. Id. at 401.

200. Id.

201. Id. at 401–02.

of experience."[202] For example, in the context of retail drug markets—where police have found arrests "usually ineffective,"[203] and the Cincinnati POP team initially failed to decrease sales—the team engaged in an environmental survey and examination of calls for service. As a result, the city received recommendations for altering environmental spaces that ultimately led to a decrease in drug activity in targeted areas.[204] Other examples of problem-solving strategies that have resulted from the Collaborative Agreement include rerouting traffic to decrease prostitution and providing education programs to inform landlords of rental properties with high crime rates on how to screen prospective tenants and respond to illegal activity.[205]

POP provides an instructive example of an experimentalist approach to addressing socially complex issues, but it is not without limitations. Among its challenges are determining how to evaluate success and how to extend the model beyond the local level.[206] Moreover, tensions between police and minorities in Cincinnati have not disappeared, and efforts to include community members have often failed to engage residents of high-crime areas.[207] Still, the Cincinnati model offers an important lesson about how to structure experimentalist remedies: Continuous searches to find "less burdensome alternatives" to practices that appear to violate constitutional norms can be effective.[208] This lesson can apply in the education context where more reflective and inclusive strategies for improving the outcomes of historically disadvantaged populations may exist.

The same lesson emerges in the child welfare context, where protective services in certain states have benefited from experimentalist

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202. Sabel & Simon, Duty of Responsible Administration, supra note 9 (manuscript at 34).

203. Id. (manuscript at 33).

204. See Community Problem Oriented Policing: Collaborative Agreement Annual Problem Solving Report, City of Cincinnati 22 (2006), http://www.cincinnati-oh.gov/police/linkservid/CD735F67-9B19-48BE-B063A0D1D0F01BC0/showMeta/0/ (on file with the *Columbia Law Review*) (recounting success of POP team in reducing drug activity).

205. See Sabel & Simon, Duty of Responsible Administration, supra note 9 (manuscript at 36–37) (detailing use of environmental design and educational programs as problem-solving strategies).

206. Id. (manuscript at 41–42) (describing challenges in collecting useful data, allocating resources, and coordinating activities across jurisdictions).

207. See, e.g., Simone Weichselbaum, Cincinnati: Ferguson's Hope or Hype?, Marshall Project (Nov. 25, 2014, 2:10 PM) https://www.themarshallproject.org/2014/11/25/cincinnati-ferguson-s-hope-or-hype [http://perma.cc/7N2J-XK4W] (evaluating successes and challenges in Cincinnati as model for policing issues in Ferguson).

208. See Sabel & Simon, Duty of Responsible Administration, supra note 9 (manuscript at 55) ("The role of the court . . . is to induce entities that have violated constitutional norms to undertake disciplined self-analysis of the extent and underlying causes of the harms they have caused and a painstaking search for less burdensome alternatives.").

decrees.[209] Traditionally, lawsuits challenging states' child welfare systems sought injunctive relief in response to "massive noncompliance with federal requirements."[210] Although these lawsuits—which were based on claims under the Fourteenth Amendment Due Process Clause and other federal statutes[211]—fostered some change, their adherence to too-strict rules or too-loose standards limited success in remediation.[212] Neglect and abuse of children persisted.[213] Examples from Alabama[214] and Utah,[215] however, employed the experimentalist approach and resulted in systems that appear higher performing and more responsive to children's needs.[216]

The model from Alabama and Utah is unique in comparison to efforts of other states. Instead of prescribing rigid rules, which minimize the discretion of the people who actually run child services,[217] the newer approach encourages "diagnostic monitoring" as part of an accountability system and employs "judicially derived substantive standards" to build a state system's "capacity for self-assessment and self-correction."[218] The process-oriented approach emphasizes customization, collaboration, and monitoring, which requires more engagement from the community—especially social workers—than earlier command-and-

209. See Kathleen G. Noonan et al., Legal Accountability in the Service-Based Welfare State: Lessons from Child Welfare Reform, 34 Law & Soc. Inquiry 523, 524–25 (2009) (describing child welfare systems in several states as "so deeply broken that they have lent themselves to relatively radical experimentation").

210. Id. at 530 (describing "failure to take action in response to indications of abuse and neglect[,] arbitrary removal of children without reasonable reunification efforts[,] and placement of children in inappropriate, often dangerous, settings without substantial consideration or review").

211. See id. (providing legal bases for lawsuits).

212. See id. ("[B]oth rule-based and standards-based decrees have typically encountered problems.").

213. See id. (pointing to limited success of legal remedies in forcing states to meet federal requirements that would prevent child abuse and neglect).

214. R.C. v. Walley, 475 F. Supp. 2d 1118, 1122 (M.D. Ala. 2007) (terminating consent decree from lawsuit challenging "depraved conditions" of child welfare system because state "successfully . . . reformed [it] by developing a system of care").

215. Agreement to Terminate the Lawsuit [¶ 2] at 2, David C. v. Huntsman, No. 2:93-CV-00206TC (D. Utah May 11, 2007), http://youthlaw.org/wp-content/uploads/2014/11/David_C._final_exit_plan.pdf [http://perma.cc/9RDW-BAQY] (terminating lawsuit to improve child welfare system because state "made significant progress in improving case practices and ensuring strong system performance").

216. Noonan et al. note that their evidence is "impressionistic," but they see the Alabama and Utah model as "promising" because it affords entitlement to a "process" instead of a specific "outcome or benefit." Noonan et al., supra note 209, at 524–26.

217. See Marcia Lowry, Foster Care and Adoption Reform Legislation: Implementing the Adoption and Safe Families Act of 1997, 14 St. John's J. Legal Comment. 447, 453 (2000) (arguing "people who run child welfare systems cannot be left to their own devices").

218. Noonan et al., supra note 209, at 534 (highlighting "innovative" features of "Alabama-Utah model" (internal quotation marks omitted)).

control decrees.[219] Both states employed a monitoring system named Quality Service Review, which shifts evaluation of progress from a compliance focus to a team-based qualitative focus.[220] Like the Cincinnati example, successes in Alabama and Utah emphasize the benefits of crafting judicial remedies that focus on identifying and solving problems with input from those on the front lines instead of mandating inflexible rules or avoiding intervention.[221]

Such remedies could prove effective in the public education context where, thus far, reform litigation efforts have not led to a problem-solving approach, and widespread change has been limited. Part III explores the extension of the duty of responsible administration and the implementation of experimentalist remedies to public law litigation designed to improve schools.

III. THE APPLICATION OF NEW STRATEGIES TO PUBLIC EDUCATION LITIGATION

Although the duty of responsible administration has not yet entered public education litigation,[222] its extension to the school reform arena could motivate new lawsuits that more effectively target the many factors contributing to the achievement gap. Section III.A describes the application of the duty of responsible administration in the context of public education. Section III.B then considers such a lawsuit in Connecticut and the potential remedies. Finally, section III.C addresses concerns that such a lawsuit would end up following the more traditional forms of public education litigation. The Part concludes that there are challenges in extending the duty of responsible administration to public education, but, if structured well, such litigation could help to improve the quality of education that minority and low-income students receive.

A. *The Duty of Responsible Administration in Public Education*

The framework for understanding the duty of responsible administration can translate into the public education context. Under this approach, defendant state actors have "a duty to examine rigorously the effects of conduct on civil rights values and to resolve ambiguity by articulating provisionally but reflectively the organization's understanding of issues that have not been resolved externally."[223] Although Sabel and Simon do not explain how to identify those values

219. Id. at 535 (noting shift from law-based to social-work-based practice).

220. See id. at 542–48 (discussing benefits of Quality Service Review).

221. See Sabel & Simon, Duty of Responsible Administration, supra note 9 (manuscript at 51–53) (identifying successful elements of reform in response to litigation).

222. See supra section II.C.1 (describing duty of responsible administration as it has developed in police context).

223. Sabel & Simon, Duty of Responsible Administration, supra note 9 (manuscript at 43).

and issues, they seem clear in the education context: The relevant civil rights values are the educational and equal protection rights that each state has located in its constitution,[224] and the civil rights issues relate to the persistent and increasing achievement gap. On the whole, previous waves of litigation have not effectively tackled the achievement gap, but the fact that states now guarantee students some adequate level of education establishes a right that could trigger the duty.

The obligation of state actors "to investigate and assess the disproportionate costs [their] practices impose on protected groups and to consider ways in which these harms might be mitigated"[225] also seems fitting in the education context. Under the current NCLB waiver framework,[226] states have a duty to examine evidence of student performance, identify gaps among subgroups, investigate why the gaps exist, and consider reasonable practices that could alleviate the disparities without adding excessive burdens. These mandates provide a basis for finding a duty to monitor and problem-solve, using the ample amount of publicly available data that states are already collecting and analyzing.

A violation of the duty would thus occur when a state has not defined its minimal level of education or is not using the publicly available data to improve student outcomes—or both. According to Sabel and Simon, a violation of the duty occurs upon evidence of "extensive administrative neglect or incompetence with respect to policy-making, supervision, and monitoring of civil rights norms."[227] The violation is not simply the existence of inadequate monitoring practices that produce disparate outcomes; rather it is an awareness of the inadequacies with "no effort to revise [them]."[228] A state with a wide achievement gap, therefore, could be in violation of its duty when its accountability data reflect disparities, but public officials do not develop systems for reflecting on the data and leave obstructive gap-causing conditions intact. If this were the case, the state agency would have to "show that it has a strategy that explains its . . . practices" and "assess[es] the efficacy of these practices in the light of its own experiences."[229] If a state could

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224. See, e.g., Roger J.R. Levesque, The Right to Education in the United States: Beyond the Limits of the Lore and Lure of Law, 4 Ann. Surv. Int'l & Comp. L. 205, 218 (1997) ("All fifty state constitu[t]ions include provisions related to education."). For example, some state constitutions including language affirming that education is a "fundamental" right, while others require a "thorough and efficient" education system. Id.

225. Sabel & Simon, Duty of Responsible Administration, supra note 9 (manuscript at 46).

226. See supra note 33 and accompanying text (explaining waiver framework).

227. Sabel & Simon, Duty of Responsible Administration, supra note 9 (manuscript at 44).

228. Id. (manuscript at 43).

229. Id. (manuscript at 48) (explaining component of duty).

not articulate a strategy, the court's role would be to require a process of reflective inquiry.

B. *The Potential for Judicial Intervention*

A recognition of the duty would help mitigate some of the concerns that courts have had about engaging in public education—and it would allow them to play a more meaningful role in reform. As this Note has discussed, courts have frequently argued that they are not competent to determine the level and kind of education that states should be providing.[230] The Supreme Court refused to recognize a federal right to education and was only willing to strike down a law that denied a group of students access to public education when the barrier was absolute.[231] With data and standards that help define a minimally adequate education and an obligation from the federal government to use those metrics to improve schools, officials who cannot explain why they engage in practices that maintain achievement gaps could be held liable. Connecticut provides an example of where a court might find a violation of the duty and create a judicially monitored process to remedy it.

1. *Establishing Liability.* — Under the duty of responsible administration, Connecticut would have an obligation to define and provide a particular level of education—or else explain why not. This duty would logically follow from precedent: Not only is Connecticut's constitutional right to education "so basic and fundamental,"[232] but the state also has an "affirmative obligation" to ensure educational opportunities are "substantially equal"[233] and meet several criteria for being "minimally adequate."[234] Although the state court has struck down a school-funding system that relied heavily on property tax[235] and a school-districting scheme that led to severe racial and ethnic isolation as unconstitutional,[236] the state has yet to define the adequate education it guarantees.[237]

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230. See, e.g., supra note 138 and accompanying text (providing reluctance of courts to determine an adequate level of education).

231. See supra notes 69–71 and accompanying text (discussing case law of federal right to education).

232. Horton v. Meskill, 376 A.2d 359, 373 (Conn. 1977).

233. Sheff v. O'Neill, 678 A.2d 1267, 1282–83 (Conn. 1996).

234. Conn. Coal. for Justice in Educ. Funding v. Rell, 990 A.2d 206, 236, 253–54 (Conn. 2010) (internal quotation marks omitted).

235. See supra notes 86–94 and accompanying text (discussing *Horton* lawsuit).

236. See supra notes 95–106 and accompanying text (discussing *Sheff* lawsuit).

237. Because the current adequacy suit is still pending, there is some uncertainty around how Connecticut will interpret the adequate education it has required. See *Conn. Coal. for Justice in Educ. Funding*, 990 A.2d at 236 (establishing state guarantee of adequate education); see also supra note 113 and accompanying text (discussing postponement of trial).

The failure to define and pursue an adequate education could lead to a finding of liability under the duty, given that state officials know they are maintaining one of the country's widest achievement gaps[238]—and not taking appropriate steps to close it. Although public officials have been involved in the development of new school sectors that are improving outcomes for minority and low-income students,[239] they have erected and maintained several barriers that limit access. These obstacles include funding mechanisms that limit money for charters and magnets, enrollment caps, and limits on when and where new schools can exist.[240] While not every charter or magnet school outperforms its in-district counterparts,[241] long waitlists indicate the quality of education they provide is high enough to attract high demand.[242] A determination of what constitutes an adequate education could ensure that more children have access to the kind of education that these innovative school sectors offer.

Failure to use publicly available data to mitigate discrepancies in student outcomes and, accordingly, adjust practices could also constitute a violation of the duty. Under NCLB, the state collects student data and disaggregates it by demographics, revealing achievement gaps across race and class.[243] The data also, however, demonstrate the successes that low-income and minority students have achieved in particular school sectors,[244] raising questions about why the state has prevented the expansion of entities like charter schools. The obligation under the duty of using data to investigate and mitigate disparities would also lead to a finding of liability if the state continued to delay assessing magnet schools and adjusting practices as a result.[245] In the alternative, the state

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238. See supra notes 36–38, and accompanying text (presenting Connecticut's achievement gap).

239. See supra notes 104–105 and accompanying text (discussing creation of magnet and charter schools after *Sheff*). For evidence of state involvement and awareness in the strong outcomes of charter schools, see SDE, Biennial Report, supra note 39, at 11 ("[C]ity resident students who attend charter schools outperform students in the city public schools in reading and mathematics . . . .").

240. Conn. Gen. Stat. § 10-66bb(c) (2015), https://www.cga.ct.gov/current/pub/chap_164.htm [https://perma.cc/F7UR-U8VG]; see also supra note 51 and accompanying text (discussing legislatively enacted barriers).

241. See, e.g., SDE, Biennial Report, supra note 39, at 3 (acknowledging some charters have "struggled" and closed).

242. See id. at 11 ("[D]emand for charter schools emanates from positive academic outcomes."); see also supra notes 45–46 (providing information on long charter and magnet waitlists).

243. See supra notes 23–34 and accompanying text (discussing NCLB and "New Accountability").

244. See supra note 53 and accompanying results (providing data on success of students by demographic in charter and magnet schools).

245. See supra note 44 and accompanying text (discussing state's inaction so far regarding assessment of magnet programs).

would need to provide a justification for not engaging in such a comprehensive investigation.

Indeed, the state would not be found liable if it could "show that it has a strategy that explains its . . . practices . . . in the light of its own experience and those of comparable agencies."[246] Earlier cases have shown Connecticut's commitment to ensuring all students have access to a "substantially equal" and "minimally adequate" education, and they have demonstrated that the state has viewed racial isolation and vast funding disparities as violations of students' rights.[247] Because there is some data indicating that magnet and charter schools are providing low-income and minority students with a higher quality of education,[248] the state would need to explain how leaving barriers to accessing these sectors of schools comports with the state's emphasis on education as a fundamental right that must be strictly scrutinized.[249]

The arguments for budget cuts and skepticism about the effectiveness of charter and magnet schools[250] may not be sufficient to defeat the claim, especially since the state officials could reasonably use existing data to better understand the strengths of these sectors. The state would need to provide more compelling reasons for its recognition of denied access and why expanding the number of charter and magnet schools—or simply the educational strategies they provide—would impose additional burdens that outweigh the benefits of improving academic outcomes for minority and low-income students.

2. *A Different Kind of Remedy.* — If the court were to find Connecticut officials in violation of their duty of responsible administration, the most effective remedy would be one that takes a holistic approach[251] to solving problems and changing core practices within the state's public education system. Such an approach can be a more "effective way to vindicate civil rights values"[252] than implementing a compliance-based directive.[253]

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246. Sabel & Simon, Duty of Responsible Administration, supra note 9 (manuscript at 48).

247. See supra section I.B.2 (discussing precedents in Connecticut).

248. See supra notes 40–44 and accompanying text (describing some evidence of success).

249. See Horton v. Meskill, 376 A.2d 359, 373 (Conn. 1977) (establishing right to education in Connecticut "is so basic and fundamental that any infringement of that right might be strictly scrutinized"); see also supra section I.B.2 (discussing precedents in Connecticut).

250. See supra note 41 and accompanying text (discussing debate over success of charter schools).

251. See Sabel & Simon, Duty of Responsible Administration, supra note 9 (manuscript at 48–55) (discussing benefits of holistic approach to remediation in policing, manufacturing labor standards, special education, child welfare, and juvenile justice).

252. Id. (manuscript at 48).

253. Sabel and Simon contrast the holistic approach to a less effective and more compliance-based approach. See id. (manuscript at 43–48) (describing limitations of more traditional remediation approach in case of New York Assertive Policing).

Moreover, the holistic approach can also compel institutions "to undertake such far-reaching changes because they turn out to be less costly than peripheral ones."[254] In the case of Cincinnati policing, the holistic approach required the implementation of POP, which targeted crime more effectively and was less costly than a system based on arrests.[255] In the child welfare context, decrees in Alabama and Utah that shifted the systems from "law-based practices to a social-work based practice" have benefited children through the introduction of monitoring systems without a significantly greater cost.[256]

Given the precedents in Connecticut, as well as the state's current education landscape, a court order analogous to the Collaborative Agreement in Cincinnati[257] could be very effective. Instead of striking down a singular barrier, the court could oversee state actors as they implement a system for improving Connecticut's public schools. The first step would require the state to define the standards for a minimally adequate education and identify favorable conditions and obstacles.[258] Since the plurality in *Connecticut Coalition for Justice in Education Funding, Inc. v. Rell*[259] only provided the components of a minimally adequate education in "broad terms,"[260] an order encouraging state officials to define its scope would comport with precedent. The officials could use publicly available data from NCLB and state requirements[261] to determine the constitutionally required level of education in terms of inputs and outputs. They could also use the data in conjunction with opinions from experts, school personnel, and community members to understand where students are receiving this level of education—and where barriers exist.

An agreement could then require officials to develop "reasonable" interventions to spread good practices and remove obstacles.[262] State

254. Id. (manuscript at 48).

255. See supra notes 197–205 and accompanying text (discussing Cincinnati example).

256. See Noonan et al., supra note 209, at 535–37 (providing successful approaches in Alabama and Utah).

257. See In re Cincinnati Policing, 209 F.R.D. 395, 401 (S.D. Ohio 2002) (explaining agreement to implement POP).

258. This step is analogous to the first stage of POP, which analyzes crime occurrences and conditions that facilitate them. See Sabel & Simon, Duty of Responsible Administration, supra note 9 (manuscript at 26–27) (explaining process of POP).

259. 990 A.2d 206 (Conn. 2010).

260. Id. at 254 (recognizing "political branches' constitutional responsibilities, and indeed, greater expertise, with respect to the implementation of specific educational policies").

261. See supra notes 24–34 and accompanying text (discussing NCLB and state requirements).

262. See Sabel & Simon, Duty of Responsible Administration, supra note 9 (manuscript at 1) (providing duty of responsible administration requires officials "to make reasonable efforts to mitigate harm to protected groups").

officials could use student performance data to identify charter and magnet schools that are providing students with a higher quality of education than the traditional public schools in cities like Bridgeport, Hartford, or New Haven. They could then conduct further research to identify favorable conditions in these sectors, as well as barriers to accessing them. For instance, despite some promising data from magnet schools, the state has yet to comprehensively investigate the effective elements of magnet schools.[263] Although there is more data available on charter schools,[264] the state could benefit from further investigation of specific high-performing schools. Information on their pedagogical strategies, curriculum, and hiring practices could inform the state's understanding of how to improve schools. Similar data from other states could also be helpful. Intervention could thus involve rewriting laws around funding, student enrollment, or teacher tenure—but it might instead entail developing structures for spreading effective practices.

The role of the court would not be to dictate which intervention is most effective. Rather, it would oversee that state officials have undertaken a "disciplined self-analysis of the extent and underlying causes of the harms they have caused" and engaged in "a painstaking search for less burdensome alternatives."[265] The court would also supervise the officials in ensuring they develop an effective system for implementing interventions and monitoring their progress.[266] With student performance and accountability data already available, the state could develop mechanisms for effectively using that data, along with input from the community, to drive decisions about removing statutory barriers to accessing school sectors or facilitating processes of sharing beneficial methods. If state officials failed to remove obstructive conditions or take other measures to improve schools, they would need to explain to the court why such measures would be too burdensome and demonstrate they are searching for alternative strategies.[267] Ultimately, such a remedy would encourage reflective processes that allow officials to fulfill their constitutional obligations to the students of Connecticut public schools.

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263. See Thomas, School Choice, supra note 52 (discussing dearth of research on effectiveness of magnets).

264. See SDE, Biennial Report, supra note 39, at 6 (presenting research on charter performance overall).

265. Sabel & Simon, Duty of Responsible Administration, supra note 9 (manuscript at 55) ("The role of the court . . . under a duty of responsible administration is not to prescribe solutions.").

266. See supra section II.C.2 (discussing importance of monitoring in policing and child welfare).

267. See Sabel & Simon, Duty of Responsible Administration, supra note 9 (manuscript at 59) (explaining lesson from Cincinnati of commitment to search for effective, but "less burdensome" strategies).

C. *Avoiding the Pitfalls of Earlier Litigation*

There is a risk that a lawsuit focusing on the duty of responsible administration could end up following the same pattern as public education litigation—a pattern resulting in a command-and-control decree that focuses on one input or obstacle to improving student outcomes, or just a declaratory judgment.[268] But there is also reason to believe that this new approach could be different and more effective. First, remediation that takes a more experimentalist approach could require state actors to create new systems for identifying and removing obstacles that impede access to the minimally adequate level of education that it has defined. This departs from the judicially determined orders, which rest on rules that the court establishes and monitors.[269] Second, the remediation would compel the state to develop an innovative approach to solving problems that does not simply conform to preexisting practices. Instead of requiring a state to comply with a system that has historically underserved certain populations, the remediation would incentivize and inspire new solutions to persistent problems.

In the alternative, the state at least would need to be able to explain why barriers like decreased funding or student enrollment caps for charter schools are "reasonable." Although such an explanation would not necessarily alleviate burdens for students, it may induce the state to take a more reflective approach to its practices overall, which would end up benefiting populations of students across the state. Awareness of continued practices that impede access to higher quality education of some groups in the long-run will prove more effective at closing gaps than continued inattentiveness and disengagement with conditions that are obstructing access to the kind of education that the state guarantees.

As with much public law litigation, judicial intervention in education raises general concerns about institutional roles. Advocates of the early public litigation model commend the judicial decree as a mechanism for resolving public problems; they believe the courts can play an important role in crafting the content of the decrees and in facilitating the negotiations between parties.[270] Moreover, they favor "judge-mandated outcomes that . . . [are] more just, fair, and rational than the outcomes emanating from the political branches of government."[271] Concerned with the protection of minority groups, these advocates view judicial review of policy making as "necessary to ensure the just treatment of all

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268. See supra section II.A (discussing pitfalls of earlier litigation).

269. See id. (discussing difficulties with heavy judicial intervention).

270. See, e.g., Chayes, supra note 4, at 1298–302 (providing benefits of judge's role as overseeing decree negotiations).

271. Sandler & Schoenbrod, supra note 6, at 138 (criticizing Chayes's approval of new judicial role).

individuals and groups in a democracy."[272] In the education context, those who favor greater judicial intervention see it as essential to protecting disadvantaged groups where the legislature fails.

Critics of the traditional public law litigation model, however, view "judicial activism" as a problem for democratic society.[273] They believe judges lack legitimacy and capacity to "produce significant social reform."[274] In the public schools context, some believe judicial intervention risks upsetting the checks and balances between a state's branches of government.[275] They view issues related to public schools as "political questions," which are best left to the other branches of government.[276] Other critics are more concerned with the increased control that party lawyers, court officials, and low-level administrators have in shaping policy through the consent decree process.[277] Because they see traditional institutional reform decrees as "transfer[ring] power not from politicians to a judge but from one political process to another," they view the decrees as "antidemocratic."[278]

There is a middle ground for judges, however, between total deference and heavy-handed intrusion:[279] a lawsuit that produces an experimentalist remedy instead of one that seeks a rigid decree or just a declaratory judgment. In the experimentalism context, the "court seeks to give effect to important legal norms, without presuming to know their full implications for particular circumstances," and it "enlists the actors' particular projects in its elaboration of general norms."[280] In a lawsuit that focuses on the duty of responsible administration, a court that helps a state monitor performance, rethink the systems it uses to collect information on student outcomes, and adjust practices to reflect success and mitigate failures seems to offer considerable potential. Moreover, the court can play an instrumental role in promoting collaboration between

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272. William S. Koski, The Evolving Role of the Courts in School Reform, Twenty Years After *Rose*, 98 Ky. L.J. 789, 796–97 (2010) [hereinafter Koski, Evolving Role of Courts].

273. See Paris, supra note 131, at 49 (presenting general concerns over "judicial activism" in "complex matters of social policy").

274. See Rosenberg, supra note 6, at 10 (discussing criticisms).

275. See Michael Heise, Schoolhouses, Courthouses, and Statehouses: Educational Finance, Constitutional Structure, and the Separation of Powers Doctrine, 33 Land & Water L. Rev. 281, 284 (1998) (explaining risks that "judicial 'excursion[s]'" pose in upsetting "delicate" systems of checks and balances).

276. See Koski, Evolving Role of Courts, supra note 272, at 796 & n.22 (explaining view of education as "political question" (citing Baker v. Carr, 396 U.S. 186, 217 (1962))).

277. See Sandler & Schoenbrod, supra note 6, at 7 (defining *"controlling group*" that "works behind closed doors to draft and administer the complicated decrees").

278. Id. at vi, 7.

279. Some may even argue the tension between the two extremes is not as relevant: "[T]he normative debate over judicial activism [is] somewhat anachronistic as courts have become a necessary part of the modern, complex administrative state." Koski, Evolving Role of Courts, supra note 272, at 797.

280. Dorf & Sabel, supra note 16, at 398.

state officials, school professionals, and community members so they ultimately are the ones driving reform and improvement in a way that is consistent with the democratic process.

CONCLUSION

Although debate continues about whether or not there should be a role for the judiciary in public education litigation, one point is clear: If there is a role, it is time to rethink what form that role should take. The nation faces a significant achievement gap that has persisted—and in some cases increased—despite efforts by all three branches of government to close it. With pockets of innovation emerging across the country, there is hope for improving the outcomes of racial minority and low-income students who perform at the lower end of the gap. The emerging notion that government actors have a *responsibility* to develop systematic processes for reflecting on the gap and addressing it as a second generation civil rights issue is in line with the idea that all fifty states have guaranteed a right to education under their constitutions. The question then becomes: Whose role is it to define the duty and ensure actors are fulfilling it? Until state and local governments are able to facilitate this process on their own, the courts can play a role in engaging public officials and their communities in a process of problem-solving to increase educational opportunities for *all* students.