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## *The Supreme Court as School Board Revisited*

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In 1948 Justice Robert H. Jackson warned his colleagues on the U.S. Supreme Court against establishing themselves as a “super board of education for every school district in the nation.”<sup>1</sup> Clearly troubled by the Court’s invalidation of a Champaign, Illinois, program allowing students to attend religious classes in public school buildings, he worried that the decision lacked constitutional grounding and would spawn a steady stream of complaints challenging established practices nationwide. Oddly, however, Jackson could not bring himself to follow his own advice: he concurred with the Court’s judgment in the case. His evident ambivalence in doing so foreshadowed, in microcosm, debates about the propriety of judicial involvement in American education that persist to this day.

That involvement has, by any measure, grown exponentially over the past sixty years. Seemingly no aspect of education policy has been too insignificant to escape judicial oversight. Schools and districts now regularly face lawsuits over discipline policies, personnel decisions, holiday celebrations, and more. Even in areas where formal complaints are rare, the threat lingers. And a single decision, by establishing new legal principles, can have far-reaching ramifications. It comes as no surprise, then, that a national survey conducted in 2004 by Public Agenda found that 82 percent of public school teachers and 77 percent of principals practiced “defensive teaching” in order “to avoid legal challenges.”<sup>2</sup>

Both conservatives and liberals on the current Supreme Court have voiced concern over the extent of judicial involvement in education. In the 2006 case *Morse v. Frederick*, Justice Clarence Thomas bemoaned the passing of *in loco parentis*, the doctrine that assigned to school officials the authority of parents and made courts “reluctant to interfere in the routine business of school administration.” While hardly arguing for a return to *in loco parentis*, Justice Stephen G. Breyer nonetheless worried that “the more detailed the Court’s supervision becomes, the more likely its law will engender further disputes among teachers and students. Consequently, larger numbers of those disputes will likely make their way from the schoolhouse to the courthouse. Yet no one wishes to substitute courts for school boards, or to turn the judge’s chambers into the principal’s office.”<sup>3</sup>

The path from schoolhouse to courthouse is already well traveled. This volume considers the implications of this development through fresh analyses of the areas of education policy in which the judiciary has been and remains most active. In this introduction, we review the causes of increased education litigation, the forms it now takes, and the scholarly debates it has provoked. While dogmatism would be unjustified, we conclude that the courtroom is rarely the optimal venue for education policymaking. The problematic incentives of adversarial litigation and the judiciary’s own institutional limitations are aggravated in the context of K–12 schooling by the difficulty of monitoring educators’ behavior and their tendency to tread cautiously so as to avoid legal challenges. In short, Justices Thomas and Breyer have good reason to worry about the judicialization of American education.

## The Causes of Education Litigation

Widespread education litigation is, for all intents and purposes, a phenomenon of the second half of the twentieth century. After trending slowly upward through the Depression era, the average number of education cases decided each year in state and federal courts swelled from 1,552 in the 1940s to 6,788 in the 1970s and has fluctuated about that new level since.<sup>4</sup> As the pace of decisions accelerated, their content also changed. The bulk of pre-1950 cases involved narrow disputes over tax policies, bond offerings, and the alteration of school district boundaries—important matters, to be sure, but ones far removed from the core educational tasks of teaching and learning. Post-1950 litigation, in contrast, encompassed not only the high-profile issues of segregation and the separation of church and state, but also such aspects of day-to-day school management as discipline policies and the due process rights of teachers facing dismissal.<sup>5</sup>

Of course, education was not alone in this regard. The judiciary’s role in social policymaking expanded broadly in the course of the rights revolution of

the 1960s, as the public's thirst for "total justice" combined with novel legal doctrines, increasingly long and complicated federal statutes, and the emergence of well-funded advocacy organizations to generate a surge of litigation across policy domains.<sup>6</sup> Federal courts came to supervise nearly all of the core functions of state and local government: police, prisons and mental hospitals, for example, in addition to schools.<sup>7</sup> With education, the increase in judicial involvement and changes in litigation practices coincided with a growing ferment over the performance of the nation's schools and an urgent—at times seemingly frenetic—search for solutions. Competing reform movements with bases of support in universities, foundations, and civil rights organizations advanced proposals for more spending, greater accountability, and expanded parental choice, to mention only the most prominent. These efforts invariably provided occasion for litigation and, as in the case of school finance reform, sometimes worked primarily through it.

The starting point for any systematic explanation of this change in the governance of public education would have to be the announcement by courts of novel doctrines that effectively invited new types of litigation.<sup>8</sup> For instance, when the Supreme Court in 1947 interpreted the First Amendment's establishment clause as requiring a "wall of separation" between church and state, it created unending opportunities for claims that this barrier had been breached.<sup>9</sup> Likewise, when a trio of state courts in 1989 found in their states' constitutions a right to an "adequate" education and ordered that state spending on education increase, copycat lawsuits proliferated nationwide.<sup>10</sup> By 2008 courts in seventeen other states had ruled their school finance systems unconstitutional on similar grounds.<sup>11</sup>

The steady expansion of federal involvement in education after the passage of the Elementary and Secondary Education Act in 1965 also generated its share of legal disputes. As Congress took on greater statutory obligations and imposed still more on states and school districts, conflict inevitably arose over the government's performance of those new duties. Congress often invited litigation by creating "private rights of action" that empower individuals to file suit if they dislike how a statute is being enforced. Private rights of action in turn facilitated the adoption of new regulations by outsourcing their enforcement to the courts. Title IX of the 1972 Education Amendments, for example, prohibited federal aid for entities engaging in gender-based discrimination but failed to define that crucial term. Though the statute did not explicitly grant a private right of action, the Supreme Court inferred that one was implied. Naturally, as disagreements developed over the scope and meaning of discrimination, federal courts were enlisted to fill in the details.

In areas in which the federal government lacked the license or capacity to shape education policy directly, officials used government-sponsored litigation to advance reform. The 1967 creation of the Legal Services Program within the

Office of Economic Opportunity marked a shift in federal policy away from subsidizing legal advice for the poor and toward filing test cases intended to alter policy nationwide. Education cases supported by Legal Services included *Serrano v. Priest*, the landmark school finance equity claim decided by the California Supreme Court in 1971, and *Goss v. Lopez*, in which the U.S. Supreme Court in 1975 extended “rudimentary” due process rights to students facing short-term suspensions.<sup>12</sup>

While private rights of action opened up the courts to new types of statutory claims, the rise of modern class-action litigation in the late 1960s allowed for an even wider range of disputes.<sup>13</sup> Class actions allow all “similarly situated” individuals to pursue a claim in a single lawsuit, dramatically lowering the cost of litigation and thereby increasing the consumption of it. Particularly in education, a class action often begins with an attorney seeking out plaintiffs rather than plaintiffs seeking an attorney. A striking example is *Missouri v. Jenkins*, a long-running Kansas City desegregation case initially filed in 1977.<sup>14</sup> This case, which culminated in the Supreme Court’s approval of judicially imposed tax increases to support over \$2 billion in school improvements, was instigated not by local parents or traditional civil rights organizations. Instead, a local attorney found a handful of parents willing to let their children serve as plaintiffs and went on to be recognized by the court as the representative for every student in the district.<sup>15</sup>

Finally, the rewards for going to court increased. Modern education litigation pays—sometimes literally. The Civil Rights Attorney’s Fees Award Act of 1976 empowered judges to award fees to lawyers prevailing in civil rights cases. Thus attorneys working in such areas as religion, free speech, desegregation, and school discipline, who previously donated their services or relied on charitable contributions, could reasonably expect an independent source of funding in successful cases. In other contexts, the payoff from litigation comes in the form of changed policy. A legal victory may be part of a larger political effort, with the courts serving to accentuate pressure for statutory changes. A series of appellate-level decisions in federal court, for example, provided the impetus for the landmark 1975 Education for All Handicapped Children Act (EAHCA), as advocates for the disabled pressed Congress to codify the judicially announced right to a “free appropriate public education” in the “least restrictive environment” into law. But often the payoff is immediate and direct—as when a judge requires a school to provide a religious student group with access to its facilities.

## The Categories of Education Litigation

These developments spawned a vast array of education cases argued on widely varying grounds and at all levels of the American judicial system. Whether a

claim is constitutional or statutory and whether it is filed in federal or state court matter greatly for the character of the judicial involvement that results. But the fact that specific cases can be placed into distinct boxes does not mean that advocates for a particular cause must choose only one. Just as America's famously fragmented political institutions provide multiple points of access for citizens and interest groups, so does its legal system. If a constitutional claim fails, a variety of statutory claims may yet be available. Likewise, if the Supreme Court forecloses federal litigation on an issue, state courts are often willing to entertain a similar complaint on the basis of their own constitutions. As a result, education litigation is often hydra-headed: when one legal avenue closes, others remain open.

### *Constitutional versus Statutory Litigation*

Because Supreme Court rulings are binding across all fifty states and offer the last word on constitutional questions, winning a federal constitutional claim is the most definitive kind of legal victory. In fact, modern education litigation arose largely out of constitutional disputes over religion and segregation. It was an establishment clause decision that caused Justice Jackson's consternation in 1948. And the battle to desegregate America's schools, based on the Fourteenth Amendment's equal protection clause, became the Court's signature venture into education oversight.

Yet both areas of litigation illustrate the difficulty with staking education reform on constitutional guarantees. The Court's invocation of the principle of strict separation on religious matters sounded straightforward but proved devilishly complex to apply in a consistent and coherent manner. The end result, as Justice Jackson feared, was a "legal 'wall of separation between church and state' as winding as the famous serpentine wall designed by Mr. Jefferson for the University he founded."<sup>16</sup> Likewise, desegregation cases began with a claim for simple justice but over time drew courts into profoundly complicated remedial plans governing the minutest details of school district operations. It is also noteworthy that the Court's interventions in these areas were met with significant resistance. Its 1963 proscription of school prayer was for years routinely ignored throughout much of the country—and undoubtedly is still ignored in some places.<sup>17</sup> And massive resistance to *Brown v. Board of Education* prevented virtually any progress toward the end of de jure segregation in the South until the passage of the Civil Rights Act of 1964.<sup>18</sup>

A different dynamic is evident when courts engage in statutory interpretation. If a clear majority in Congress disagrees with the judiciary's reading of a law, that majority can amend it. When the Supreme Court in 1984 ruled that plaintiffs in successful special education cases could not collect attorneys' fees,

for example, Congress effectively overturned the Court's decision within two years.<sup>19</sup> Of course, revising a law in response to a judicial decision is not always as simple as it sounds. By endorsing a particular reading of a law, courts alter the status quo and create new beneficiaries who can be expected to oppose subsequent changes. But it is ultimately the legislature that has the last word.

Legislatures can, if they so choose, limit the pace of statutory litigation on even controversial measures—and therefore the extent of judicial involvement in their implementation. For example, although the courts articulated the principles underlying EAHCA and its successor, the Individuals with Disabilities Education Act, the total volume of litigation generated by these laws is much lower than one might expect (see chapter 6). The No Child Left Behind Act, too, has led to surprisingly little litigation given its vast scope and complexity (see chapter 10). With both, one reason for the relatively low levels of litigation was the creation of quasi-judicial administrative procedures to channel disputes. No Child Left Behind also does not include a private right of action, and over the past decade the courts have grown reluctant to infer that such rights are implied.

### *Federal versus State Courts*

Despite growing federal regulation, primary responsibility for public education continues to rest with state and local governments. When federal courts order changes in education policy, they therefore speak as a superior to an inferior and are more likely to see their orders put into action. In *Missouri v. Jenkins*, for example, a federal judge successfully ordered tax increases to support an ambitious plan of facilities improvement with little backing in the local community required to foot the bill. In contrast, state courts hearing education cases are asked to command a coequal branch of government, better positioning the legislature or governor to offer effective resistance. Moreover, most state judges are either initially elected to their positions or subject to retention elections and can therefore be expected to assess the political winds carefully before issuing new mandates. The federal judiciary therefore is ordinarily the more attractive route for those trying to engage the courts in education reform.

Nonetheless, state courts often provide an alternative when federal litigation is not viable. In 1977 Justice William Brennan of the Supreme Court famously advised civil rights attorneys to pursue litigation in the states should the federal courts become inhospitable to their goals. State constitutions, he said, offered independent grounds for judicial action and could serve as “fonts of individual liberties, their protection often extending beyond those required by the Supreme Court’s interpretation of federal law.”<sup>20</sup> In the case of school finance litigation, the process Brennan described was already under way. When the

Supreme Court's 1973 decision in *San Antonio v. Rodriguez* effectively ended federal litigation over school finance, plaintiffs simply shifted their focus to the states, waging a state-by-state campaign that continues today.

State-level litigation also offers plaintiffs the advantage of a wider variety of constitutional clauses from which to choose. Teachers unions and other opponents of private school choice had to rely on the establishment clause when challenging school voucher programs in federal courts, a strategy that proved unsuccessful when the Supreme Court in 2002 issued its *Zelman v. Simmons-Harris* decision upholding a Cleveland program.<sup>21</sup> Even before that decision was issued, however, the general counsel of the National Education Association said that his organization would use whatever "Mickey Mouse" provisions it could find in state constitutions to fight private school choice programs in the states.<sup>22</sup> In the years since *Zelman*, opponents have challenged voucher programs on the basis of state constitutional language prohibiting the use of public funds to support religious schools (commonly known as Blaine amendments), mandating "uniformity" within the state school system, and guaranteeing local control over public schools. The smorgasbord of arguments advanced in a typical complaint allows judges to pick and choose which clauses to use when striking down a program. The Florida Supreme Court, for example, relied on its state's uniformity mandate rather than its Blaine amendment to strike down that state's Opportunity Scholarship Program in 2006.<sup>23</sup> Doing so foreclosed an appeal of its decision to the U.S. Supreme Court testing whether Blaine amendments, if interpreted as prohibiting neutral school choice programs, violate the federal Constitution's guarantee of the free exercise of religion (see chapter 8).

## The Debate over Education Litigation

As in other areas of American public policy, the advent of "adversarial legalism" in education has occasioned fierce scholarly debate.<sup>24</sup> Critics of judicial policymaking contend that courts are ill-equipped to resolve the sorts of "polycentric" problems in which education reformers have sought to involve them. Judges are generalists by training, and many lack the skills and institutional knowledge needed to process specialized information central to policy debates. Instead they must rely on partisan expert witnesses who may be inclined to simplify and mislead in order to persuade. Moreover, the legal process tends to force complex issues onto a procrustean bed of rights, making compromise or consideration of opportunity costs all but impossible. Because courts can properly address only the legal question before them, they cannot consider related issues that may nonetheless be essential in order to craft an effective remedy.<sup>25</sup>

In contrast, defenders of judicial capacity, who gained prominence in the 1970s, emphasize the courts' advantages over other institutions. At the heart of

their case is the courts' relative insulation from electoral pressures, which they suggest allows judges to pursue what is best rather than what is politically convenient. Moreover, they contend that the adversarial nature of the legal process produces powerful incentives for the parties to produce sufficient information for judges to make informed decisions.<sup>26</sup>

It is now hard to find scholars so sanguine about judicial capacity. Most contemporary proponents of judicial policymaking do not defend the courts at all. They instead accept the criticisms leveled at the judiciary but go on to question the capacity of other institutions. All forms of social regulation are problematic: markets have transaction costs, legislatures and executives can be swayed by an uninformed public or captured by special interests, and litigation is costly and time-consuming. As a result, the courts in some instances might represent the "least-imperfect" alternative. Evaluating judicial policymaking therefore requires an issue-specific consideration of which venue offers the best prospects for desirable reform.<sup>27</sup>

America's experience with education litigation, however, offers ample reason to doubt the judiciary's claim on the title of the least-imperfect branch. Courts often explicitly announce their goals and, in many areas, it is obvious that they have fallen well short of reaching them. Indeed, the judiciary's attempt to desegregate the public schools has become the leading example for scholars bemoaning the limits of court-led reform.<sup>28</sup> While the broader effects of *Brown* and its progeny on American race relations are debated, it is clear that few de jure segregated school systems were eliminated before 1964. With new backing from Congress and the executive branch, the Supreme Court in 1968 required previously segregated school districts to adopt a remedial plan that "promises realistically to work now" to produce racially balanced schools.<sup>29</sup> This renewed effort yielded considerable progress, particularly in the South, but soon provoked hostility not only from white parents but also from blacks, many of whom lost faith in the potential of busing programs to enhance their children's educational opportunities. In the pivotal 1974 case, *Milliken v. Bradley*, the Court limited the scope of desegregation remedies to districts found to have engaged in de jure segregation. It proceeded to muddle through until the 1990s, when, despite continued racial imbalance, it directed lower courts to begin withdrawing from the supervision of school districts.<sup>30</sup>

Similarly, there is scant evidence that the numerous school finance judgments issued by state courts since the 1970s have measurably improved student outcomes, and recent decisions indicate that state courts are increasingly doubtful that judicially manageable standards exist that would ensure better results.<sup>31</sup> Both equity- and adequacy-based claims effectively reduce education policy choices to the deceptively simple metric of money, which years of experience and voluminous research suggest is unlikely on its own to improve the quality of



education. Yet when courts have delved into the details of reform, the results have not been encouraging. Peter Schrag, a longtime proponent of school finance litigation, regretfully concludes “that the courts are rarely great places to make educational policy. . . . Where they try to detail specific remedies . . . the courts may soon find themselves deeper in the business of imposing across-the-board educational programs . . . than they are equipped to manage.”<sup>32</sup>

Why have judicial interventions in education policy so often yielded disappointing results? Perhaps the most important reason is that schools, as Shep Melnick explains in chapter 2, are a quintessential example of what political scientist James Q. Wilson termed “coping organizations.” This simply means that it is difficult both to monitor what the organization does and to measure how well it has done it. Students’ academic outcomes reflect not only the quality of their schools, but also a host of factors outside of those schools’ control. Those directly responsible for managing public education, such as principals, school board members, and superintendents, struggle to know how well teachers are doing their job. The courts, which only engage educational institutions intermittently, have even more difficulty in determining whether their reforms have been successful—or even if they have been implemented at all.

The informational problems confronting courts are also exacerbated in education cases. The legal process, Nathan Glazer has pointed out, tends to “exaggerate theoretical considerations and reduce practical considerations.” For example, he notes, “in a school desegregation case, it is not a teacher or principal who will testify, but experts and administrators from distant universities on both sides of the argument.”<sup>33</sup> Education research is notoriously inconsistent in quality and often so narrowly focused as to provide only limited guidance for policy, yet it is precisely this research that courts must use to order reforms. The strongest evidence for the benefits of early childhood education, for instance, comes from small-scale, intensive interventions for highly disadvantaged students and may not apply to other types of programs and populations. In a similar way, experimental evidence suggests that smaller class sizes in the early grades can raise student achievement, but it is not at all clear that broad class-size reductions represent the most effective use of funds. Nonetheless, these two reforms have proven popular with judges responding to school finance adequacy claims.<sup>34</sup>

Furthermore, the absence of strong performance incentives in public education increases the likelihood that court decisions will produce unintended consequences. Under *Wood v. Strickland*, all public school employees are personally liable for disciplinary actions that violate student rights.<sup>35</sup> In a condition of legal uncertainty, teachers and school administrators can therefore be expected to behave defensively even when doing so conflicts with educational goals. Such goal displacement seems to occur even when the legal position of schools is strong: since the 1970s courts have increasingly adopted a “pro-school” position

in school discipline cases, yet conflict-averse school officials go out of their way to accommodate exceptionally disruptive behavior (see chapter 11). Leaving aside the time and disruption of a lawsuit, the personal costs to officials of defending themselves can be significant if they are unable to obtain free legal counsel, insurance, or indemnification. And access to free counsel raises its own set of concerns as officials can be understandably anxious about the quality of representation provided by government attorneys of uncertain skill and motivation.<sup>36</sup>

Each of these judicial imperfections is most apparent when courts are asked to play the leading role in ambitious reform efforts. In such circumstances, courts must create an ongoing enforcement regime despite unstable doctrine and a lack of judicially manageable standards. They seem to founder or succumb to exhaustion as a result.

In contrast, courts asked to command elected officials to stop a program or action face a far simpler task. Recent decisions striking down school voucher programs in Arizona, Colorado, and Florida eliminated those programs. And when a school denies access to a gay/straight alliance in violation of free speech doctrine and the Federal Equal Access Act, it is easy for courts to craft an effective remedy and see that it is enforced. When courts create durable change, it therefore tends to be on issues requiring comparatively simple proscriptions, like lifting restrictions on student speech, or when legal mobilization is combined with political action, as was the case with the exclusion of students in need of special education. It is for this reason that the volume of litigation in a particular area can be a misleading indicator of the extent of judicial influence. Where the courts establish clear and enforceable standards, the number of cases filed will fall as compliance increases. Moreover, if legislatures or agencies incorporate judicial standards, the role of the courts will be camouflaged.

Durable change, though, does not necessarily mean successful reform. As the following chapters illustrate, there is often disagreement about the merits of judicial policymaking in education precisely because court decisions have been effectual. That *Goss v. Lopez* had an effect on school discipline policies is obvious.<sup>37</sup> It is whether the effects were positive or negative that is in dispute. Likewise, when courts strike down school choice programs, the question of whether those programs would have expanded educational opportunities remains. Considering the policymaking limitations of courts, deferring to representative branches would seem to be the more prudent course of action—particularly, as with school choice, when the constitutional texts in question are at best unclear.

## The Organization of the Volume

In surveying the areas of education policy in which courts have been most active, it seems clear that the most intensive period of judicial policymaking has

passed. Recent decisions make it difficult to envision dramatic new developments involving desegregation, school finance, and special education. Tinkering at the doctrinal edges seems more likely in these areas.

This does not ensure that judicial influence will fade, however, nor even that the total volume of education litigation will decline. In areas such as school choice, religion, free speech, and school discipline, courts are being called upon to resolve controversies at an increasing rate. These areas are distinguished by the combination of ambiguous legal doctrine and constituencies eager to exploit that ambiguity to pursue their objectives. The Supreme Court's notoriously indeterminate reading of the establishment clause, for example, entices both the American Civil Liberties Union and its religious counterparts to litigate perceived violations. In much the same way, the legal standards for school discipline are sufficiently vague to generate an increasing number of cases challenging the decisions of school officials, despite the fact that judges have grown more reluctant to second-guess those decisions. In 1988 the Supreme Court said that "the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges."<sup>38</sup> And in a recent case challenging the use of timeouts to control an emotionally disturbed and violent student, the Tenth Circuit said that federal courts should not "displace educational authorities regarding the formulation and enforcement of pedagogical norms."<sup>39</sup> Even so, it is more likely now than ever that a school official will face a lawsuit.

This admittedly imprecise division—between areas where judicial activity has tapered off and those where it appears to be holding steady or increasing—guides the organization of the essays that follow. The remainder of part 1 examines the judicialization of American education broadly from the perspective of courts and school district officials. In chapter 2, Shep Melnick analyzes the remedial strategies courts have developed in recent decades to help manage public agencies, arguing that each of them suffers from infirmities that are particularly acute when applied to schools. In chapter 3, Frederick Hess and Lance Fusarelli explore how (often exaggerated) legal concerns affect the behavior of district superintendents. They suggest that by training and socialization most superintendents seek to avoid conflict and that they have few professional incentives to defend school districts vigorously in court even when they are likely to succeed. Superintendents from nontraditional backgrounds with strong political backing, however, appear more inclined to push legal boundaries to advance an agenda of reform.

The second part of the volume considers four areas in which courts have played a pivotal role in the past but now seem to be more marginal actors. Surveying the history of school desegregation litigation through the Supreme Court's 2006 invalidation of voluntary integration plans, James Ryan argues in

chapter 4 that these cases tell more about the courts' willingness to engage in broad social reform than about their capacity to do so effectively. School finance is among the education issues on which courts have most often sided with plaintiffs. As John Dinan explains in chapter 5, however, recent rulings from numerous states suggest that school finance litigation has lost momentum, with judges increasingly disinclined to undertake ongoing supervision of school finance systems. Another area in which active judicial involvement has waned is special education, which Samuel Bagenstos discusses in chapter 6. The judiciary, he explains, helped shape federal laws concerning special education but now plays a surprisingly limited role in their implementation. A similar trajectory is evident in the development of test-based accountability policies. In chapter 7, Michael Heise examines how early litigation worked to soften high-stakes testing regimes and why any additional challenges are unlikely to be consequential.

The final part of the volume covers areas where litigation retains the potential to shape education policy significantly in the near future. For advocates of private school choice, *Zelman v. Simmons-Harris* appeared to draw their long struggle to establish the constitutionality of voucher programs to a triumphant conclusion. As Martin West shows in chapter 8, however, ongoing litigation under state constitutions now threatens not only programs involving religious private schools but also measures to provide new schooling options within the public sector. The nexus of religion and education has always presented vexing legal issues. Indeed, a majority of the Supreme Court's decisions demarcating the lines between church and state have involved K–12 schooling. In chapter 9, Joshua Dunn explains how the strategy of religious litigants to bring claims on the grounds of free speech has clarified matters but argues that significant questions about the boundaries on religious speech in schools remain unresolved. One would expect legislation as broad and controversial as the No Child Left Behind Act to trigger an avalanche of litigation. Martha Derthick shows in chapter 10 that that has not happened—yet. This could easily change, however, if Congress yields to the demands of advocates urging that it be modified to include a private right of action. School discipline has followed a strange path since the Supreme Court's landmark decision in *Tinker v. Des Moines*, with the number of cases declining in the 1980s before commencing a steady increase over the past twenty years.<sup>40</sup> In chapter 11, Richard Arum and Doreet Preiss document the recent run-up in cases and misperceptions of the current legal environment on the part of students and school officials.

The collective import of these studies, in our view, is to urge courts to be cautious before wading into educational disputes. This is not a quixotic call for an end to litigation. There will always be, we believe, lawsuits and rumors of lawsuits. Nor is it a call for courts to ignore clear rights violations, which are as

inevitable as they are unfortunate. But courts should consider whether implementable and effective remedies exist for the alleged violations before launching into far-reaching reforms. And when courts do engage in education policymaking, they should strive to contain the pernicious effects of litigation by offering clear standards that minimize legal uncertainty.

## Notes

1. *McCollum v. Board of Education*, 333 U.S. 203 (1948).
2. See [commongood.org/schools-reading-cgpubs-polls-10.html](http://commongood.org/schools-reading-cgpubs-polls-10.html) (August 5, 2008).
3. 127 S. Ct. 2618 (2007).
4. Perry Zirkel, "The 'Explosion' in Educational Litigation: An Update," *Education Law Reporter* 114 (January 1997): 341–51.
5. David Tyack, Tom James, and Aaron Benavot, *Law and the Shaping of Public Education, 1785–1954* (University of Wisconsin Press, 1987).
6. Lawrence M. Friedman, *Total Justice* (New York: Russell Sage Foundation, 1985).
7. Phillip Cooper, *Hard Judicial Choices: Federal District Court Judges and State and Local Officials* (Oxford University Press, 1988).
8. For a thorough analysis of the causes of American litigiousness, see Thomas F. Burke, *Lawyers, Lawsuits, and Legal Rights: The Battle over Litigation in American Society* (University of California Press, 2002).
9. *Everson v. Board of Education*, 330 U.S. 1 (1947).
10. Martin R. West and Paul E. Peterson, eds., *School Money Trials: The Legal Pursuit of Educational Adequacy* (Brookings, 2006).
11. See [www.schoolfunding.info/litigation/AdequacyDecisions08.pdf](http://www.schoolfunding.info/litigation/AdequacyDecisions08.pdf) (December 8, 2008).
12. *Serrano v. Priest*, 5 Cal. 3d 584, 487 P2d 1241 (1971); *Goss v. Lopez*, 419 U.S. 565 (1975).
13. While representative actions involving numerous plaintiffs have always existed in American law, modern class actions date back only to the 1966 revisions to the Federal Rules of Civil Procedure.
14. *Missouri v. Jenkins*, 515 U.S. 70 (1995).
15. Joshua M. Dunn, *Complex Justice: The Case of Missouri v. Jenkins* (University of North Carolina Press, 2008).
16. *McCollum v. Board of Education*, 333 U.S. 203 (1948).
17. *Abington Township School District v. Schempp*, 374 U.S. 203 (1963). For evidence of sustained resistance, see Joseph Viteritti, *The Last Freedom: Religion from the Public School to the Public Square* (Princeton University Press, 2007) p. 107.
18. Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* 2nd ed. (University of Chicago Press, 2008).
19. *Smith v. Robinson*, 468 U.S. 992 (1984).
20. William J. Brennan, "State Constitutions and the Protection of Individual Rights," *Harvard Law Review* 90 (1977): 489.
21. 536 U.S. 639 (2002).
22. See Clint Bolick, *Voucher Wars: Waging the Legal Battle over School Choice* (Washington: Cato Institute Press, 2003), p. 156.

23. *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006).

24. Robert Kagan, *Adversarial Legalism: The American Way of Law* (Harvard University Press, 2001).

25. The starting point for this debate is Lon Fuller, "The Forms and Limits of Adjudication," *Harvard Law Review* 92 (1978): 354–409. While not published until 1978, this essay was written in the 1950s and was distributed in manuscript form among "legal process" scholars who were skeptical of judicial policymaking. The most comprehensive treatment remains Donald L. Horowitz, *The Courts and Social Policy* (Brookings, 1977).

26. See Abram Chayes, "The Role of the Judge in Public Law Litigation," *Harvard Law Review* 89 (1976): 1281–1316; and Owen M. Fiss, "Foreword: The Forms of Justice," *Harvard Law Review* 91 (1979): 1–58.

27. This movement has been called the "new legal process" school. For a thorough analysis, see Edward L. Rubin and Malcolm M. Feeley, "Velazquez and Beyond: Judicial Policymaking and Litigation against the Government," *University of Pennsylvania Journal of Constitutional Law* 5 (2003): 617–64.

28. Rosenberg, *Hollow Hope*.

29. *Green v. New Kent County School Board*, 391 U.S. 430 (1968).

30. 418 U.S. 717 (1974).

31. For the most recent analysis, see Eric A. Hanushek and Alfred A. Lindseth, *Schoolhouses, Courthouses, and Statehouses: Solving the Funding-Achievement Puzzle in America's Public Schools* (Princeton University Press, 2009).

32. Peter Schrag, *Final Test* (New York: New Press, 2003), p. 233.

33. Nathan Glazer, "Should Judges Administer Social Services?" *Public Interest* 50 (1978): 78.

34. Joshua M. Dunn and Martin R. West, "Calculated Justice: Education Research and the Courts," in *When Research Matters: How Scholarship Influences Education Policy*, edited by Frederick M. Hess (Harvard Education Press, 2008), pp. 155–76.

35. 420 U.S. 308 (1975).

36. For an analysis of the effect of personal liability on the behavior of government officials, see Peter Schuck, *Suing Government: Citizen Remedies for Official Wrongs* (Yale University Press, 1983).

37. 419 U.S. 565 (1975).

38. *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988).

39. *Couture v. Board of Education*, No. 07-2133 (10th Cir. 2008).

40. 393 U.S. 503 (1969).