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NOTES

DISESTABLISHING LOCAL SCHOOL DISTRICTS AS A REMEDY FOR EDUCATIONAL INADEQUACY

Aaron Saiger

Most state constitutions recognize a right to education, but courts have been hard pressed to respond to violations of that right. Some state courts have imposed financial and substantive reforms, only to see their implementation miscarry as educational deficiencies stubbornly persist. Other state courts, fearing such outcomes, instead treat education claims as nonjusticiable political questions; in these states, public education is a right with no remedy. This Note argues that courts should instead base remedies on state statutes that permit states to disestablish—i.e., to withdraw authority from—deficient school districts. Disestablishment, like other structural remedies, is largely self-implementing and avoids judicial entanglement in day-to-day administration. It is firmly rooted in statutory authority and legislatively-defined standards. Most important, disestablishment creates incentives salutary to educational improvement. Intergovernmental, rather than market, competition over control of schools offers accountability while preserving a thoroughly public approach to educational governance.

INTRODUCTION

The failings of America's public schools are legion. American education generally is swamped by a "rising tide of mediocrity," labeled and lamented as such since the early days of the Reagan Administration. But a minority of American schools face a more desperate crisis. A relative handful of wretched schools, disproportionately concentrated in poor minority areas, constitute an educational and social disaster for the children and communities that they are supposed to serve.

While confronting mediocrity remains the province of politicians, educators, and reformers, problems of total educational meltdown quickly found their way to the courts. The ensuing litigation now spans more than three decades. However, while some dramatic victories have been won in courtrooms, the situation in far too many classrooms remains dire. This is less because it is hard to identify disastrously failing schools than because it has been difficult for courts to craft remedies for failures to educate. The two major categories of remedies that courts

2. See, e.g., Jeffrey R. Henig et al., The Color of School Reform: Race, Politics, and the Challenge of Urban Education 11 (1999); see also Edward A. Zelinsky, Metropolitanism, Progressivism, and Race, 98 Colum. L. Rev. 665, 692 (1998) (book review) (arguing that correcting the ills of urban schools is also the best available strategy for addressing problems of joblessness, crime, and racial division).

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have ordered to date—increases in state spending on underperforming schools and requirements that such schools provide particular educational services—have yet to see much success. Moreover, many courts have been understandably reluctant to order even these remedies, due to concerns about judicial meddling in what is perhaps the central question of American state and local politics: how to fund and manage public education.3

This Note argues that courts would do well to turn to a third type of remedy. Rather than ordering particular types of educational change, courts should seek to improve school officials' incentives to improve educational performance. Several incentive-based proposals, notably school choice, have gained currency in recent years. Courts are, however, understandably and correctly reluctant to invent new institutional structures for educational governance. This Note advocates instead that judges deploy existing organizational provisions in education codes to improve the incentives of educational officials. In particular, the Note argues that in states where legislatures have authorized the practice, courts should require states to disestablish school districts—i.e., to rescind the grant of authority to school district officials—upon determination that a district is educationally inadequate.4

With its attention to incentives, court-ordered disestablishment of districts avoids the problems of financial and substantive remedies while creating substantial potential to improve education. By making the jobs of local administrators contingent on their performance, enabling wholesale changes in school management, and catalyzing political circumstances favorable to state-level interest in educational improvement, the remedy creates incentives that can benefit poorly performing schools. At the same time, by relying on state legislation to determine the nature of change, retaining the public character and basic institutional framework of American education, and offering a politically feasible reform, district disestablishment, unlike school choice and similar proposals, avoids imposing substantial doctrinal or educational costs of its own. These reasons also make disestablishment more likely to appeal to courts in a wide range of states, including those that have rejected more far-reaching remedies.

The Note has four parts. The first Part discusses contemporary efforts to secure judicial remedies for educationally deficient schools. It argues that courts must respect the limits of their judicial competence without abdicating their responsibility to give content to the right to education. This can best be done, it argues, by using state education codes to craft remedies that depend on structural incentives rather than on the good faith of school authorities for their implementation. The second

3. See, e.g., Brown v. Board of Educ., 347 U.S. 483, 493 (1954) ("[E]ducation is perhaps the most important function of state and local governments.").
Part sets out a proposal for the remedial use of disestablishment, with particular attention to state laws that provide the statutory background for such a remedy. The third Part argues that school district disestablishment would create incentives for school district and state officials that would benefit children now being inadequately educated. The final Part critiques the argument that court-ordered dissolution of deficient school districts is undesirable because it interferes with local control over education, especially in minority communities.

I. The Search for Remedies for Academic Deficiency

The contemporary struggle to use the courts to improve inadequate schools is ending its third decade. Commentators generally divide this period into three roughly chronological "waves" of litigation, each based on a different theory of what constitutes an individual's legal rights to education. The first "wave," litigated in federal court, ended with the United States Supreme Court's 1973 decision in San Antonio Independent School District v. Rodriguez that substantial inequities in per-pupil spending between poor and rich school districts do not violate the Equal Protection Clause. Attention then shifted to the state courts, where a second "wave" of plaintiffs claimed that such interdistrict inequities violated state constitutional guarantees of equal protection. The third "wave," still ongoing, focuses on claims that the education clauses found in many state constitutions guarantee a right to adequate education which low-performing districts fail to meet.


6. 411 U.S. 1, 55 (1973). The Rodriguez court declined to apply strict scrutiny to the Texas system of financing schools with an ad valorem property tax, holding that "wealth discrimination" does not evoke strict scrutiny under the Fourteenth Amendment, id. at 28–29, and that education is not a fundamental right under the U.S. Constitution, see id. at 37–39.

7. The second "wave" is generally dated from 1973 to 1989, although equal protection arguments appear in later cases. See, e.g., Kevin Randall McMillan, Note, The Turning Tide: The Emerging Fourth Wave of School Finance Reform Litigation and the Courts' Lingering Institutional Concerns, 58 Ohio St. L.J. 1867, 1871–74 (1998). The leading second-wave case was Serrano v. Priest, 557 P.2d 929, 951 (Cal. 1976), which held, unlike Rodriguez, that "discrimination in educational opportunity on the basis of district wealth involves a suspect classification" and that "education is a fundamental interest" under the California Constitution, and therefore that California's property-tax-based school finance scheme violated the state constitutional guarantee of equal protection. For a list of second-wave cases, including Serrano, and summaries of their holdings, see McMillan, supra, at 1875 nn.27–28.

8. Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 215–16 (Ky. 1989), is generally regarded as dating the beginning of the third wave and as the leading third-wave
The "wave" metaphor is apt. It nicely evokes the ebb and flow of right-to-education litigation, where theories crest amid high hopes only to recede as their weaknesses are revealed. It also captures the general failure of such litigation to advance educational practice in distressed schools. Like breakers raised by a thunderstorm, which churn the surf but whose passing leaves the essential contours of the beach unchanged, litigation has spawned some spectacular educational change but very little educational improvement. Lawsuits have induced many state legislatures to adopt new financing formulas that seek to equalize per-pupil spending; as a result, many once-poor school districts, like Hartford, Connecticut and Newark, New Jersey, now provide per-pupil resources at or above their state average.9 In Kentucky, the declaration in *Rose v. Council for Better Education* that the state's entire system of public education was unconstitutional10 led to a complete rewriting of that state's education code.11 But notwithstanding all this effort, twenty-five years after *Rodriguez*, the beachhead of America's educational status quo remains largely as it ever was: Numerous schools in the vast suburban heartland, generally adequate or better (though surely offering plenty of room for improvement), coexist with a smaller number of schools—in inner cities, in some first-generation suburbs, and in a few rural areas—that are catastrophically inadequate and devastatingly unequal.12

This should not be surprising. Beaches are shaped not by individual waves—even spectacular ones—but by climate, erosion, and time. This Part argues that no single substantive theory—no wave—offers a solution case. For a comprehensive list of third-wave cases through February 1997 and their holdings, see The Courts and Equity: A State-by-State Overview, in Strategies for School Equity: Creating Productive Schools in a Just Society 70–83 (Marilyn Gittell ed., 1998).


10. 790 S.W.2d at 215.


12. See generally McUsic, The Law's Role, supra note 9, at 105 ("[S]uccessful school finance cases have failed to . . . translate success in the courtroom to success in the classroom."). For the classic contemporary jeremiad mourning the gross inequities and inadequacies of America's most distressed school districts, see generally Jonathan Kozol, *Savage Inequalities: Children in America's Schools* (1991).
to the problems of educational inadequacy. Even if courts could identify the particular educational practices that state constitutions require—itself a doubtful proposition—they lack the capacity of the political branches to apply sustained creativity, flexibility, and political will to the implementation of those practices effectively over a long term. This does not mean, however, that courts should abandon the effort to give content to constitutional rights to education. Instead, judges must reconceptualize the ways they shape remedies when they determine that children are being cheated of the education to which they are entitled. Courts must focus not on how best to fix failing schools, but on how to catalyze the work of legislatures, executives, and bureaucracies so as to induce them to embark on sustained educational reform.

A. Educational Adequacy as a Positive Political Question

Many state courts, eschewing picturesque language of sand and surf, instead express concern over adjudicating right-to-education claims in terms of political questions and the separation of powers. "[I]t is no part of the duty of the courts of the State," wrote the Illinois Supreme Court in Committee for Educational Rights v. Edgar, to define the content of adequate education by judicial construction. . . . That may be and doubtless is a proper question for the determination of the legislature. . . . To hold that the question of educational quality is subject to judicial determination would largely deprive the members of the general public of a voice in a matter which is close to the hearts of all individuals in Illinois.

In City of Pawtucket v. Sundlun, the Supreme Court of Rhode Island based its rejection of a challenge to Rhode Island's method for funding public schools on a refusal to "scal[e] the walls that separate law making from judging," supporting its decision with extensive citations from the United States Supreme Court's political-question and separation-of-powers jurisprudence. Other state courts have held similarly that judicial involvement in educational spending decisions encroaches impermissibly

13. For other views, see Jay P. Heubert, Six Law-Driven School Reforms: Developments, Lessons, and Prospects, in Law and School Reform: Six Strategies for Promoting Educational Equity, supra note 9, at 3 ("[L]aw-driven school reform efforts, while falling short of their full potential, have produced important educational improvements."); McMillan, supra note 7, at 1896–1902 (arguing that the failures of adequacy arguments in various state courts led to the development of a "fourth wave" theory).


15. 672 N.E.2d 1178, 1190–91 (IlI. 1996) (citation and internal quotation marks omitted); see also id. at 1196 ("[R]eform must be undertaken in a legislative forum rather than in the courts.").


on the prerogatives of their respective states’ legislative\(^\text{18}\) and executive\(^\text{19}\) branches.

Other courts and commentators reject such deference. In *James v. Alabama Coalition for Equity, Inc.*, the Alabama Supreme Court insisted that it has “the power—as well as the duty— . . . to review, and, if necessary, nullify, acts of the legislature it deem[s] to be inconsistent with the fundamental law of the land.”\(^\text{20}\) The Supreme Court of Wyoming went even farther, holding that the judicial “duty to protect individual rights includes compelling legislative action required by the constitution.”\(^\text{21}\) Other states’ high courts, while acknowledging the deference due to the executive and legislature,\(^\text{22}\) have agreed with these courts that the constitutional right to education is justiciable and remediable.\(^\text{23}\)

In addition, some commentators have argued that cases like *Committee for Educational Rights* and *Pawtucket* err in borrowing political-question and separation-of-powers theories from federal jurisprudence, since these doctrines, developed in the context of limited national government and the federal system, are inapposite in the context of state courts and legislatures of general jurisdiction.\(^\text{24}\) More broadly, Professor


\(^\text{19}\) See, e.g., McDaniel v. Thomas, 285 S.E.2d 156, 163–64 (Ga. 1981) (finding that the Framers of the Education Clause in the Georgia Constitution intended to leave educational finance in the hands of the “tax authorities”).

\(^\text{20}\) 713 So. 2d at 879 (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)).


\(^\text{22}\) This deference can be illusory. Courts that have ordered reform of school finance, for example, generally insist in doing so that the legislature, rather than the courts, must create and shape the state’s school finance system. These courts claim that they are limiting their own role to declaring an existing system unconstitutional. But their decisions can be quite directive regarding the form that school finance must take to pass constitutional muster. See, e.g., Hull v. Albrecht, 950 P.2d 1141, 1145–46 (Ariz. 1997) (stating that “[w]hich approach to take [to school finance], of course, is up to the legislature,” but noting that any approach must rely much more heavily on statewide taxation and less on local property taxes than the system then in place); Claremont Sch. Dist. v. Governor, 703 A.2d 1353, 1359 (N.H. 1997) (“Without intending to intrude upon prerogatives of other branches of government, we anticipate that they will promptly develop and adopt specific criteria implementing these guidelines . . . .” (citation omitted)).


Helen Hershkoff has advocated an expansive conception of state-court judicial review, arguing that "[w]hen a state constitution creates a right to a government-provided social service," like education or welfare, "the relevant judicial question should be whether a challenged law achieves, or is at least likely to achieve, the constitutionally prescribed end, and not, as federal rationality review would have it, whether the law is within the bounds of state legislative power."\(^{25}\) This "consequentialist"\(^{26}\) view straightforwardly excludes the "extreme deference" to legislatures\(^{27}\) found in the political-question and separation-of-powers arguments in cases like *Committee for Educational Rights and Pawtucket*.

These courts and commentators, however, do not sufficiently recognize that judicial power is subject to positive as well as normative constraints. While the normative import of separation of powers, federalism, and judicial activism may well differ in state and federal contexts, state courts as much as federal must confront a positive question: Is it possible to identify judicial remedies for educational failure that are at once effective and judicially enforceable? The elusiveness of "judicially discoverable and manageable standards"\(^{28}\) is the best argument for state courts' reluctance to engage in the redesign of educational policies.\(^{29}\)

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\(^{26}\) Id. at 1184.

\(^{27}\) Id. at 1137.


\(^{29}\) Hershkoff's argument that manageable standards are available for rights like education is a good example of emphasizing the normative at the expense of the positive. See Hershkoff, supra note 25, at 1180–82. While she insists that courts are capable of formulating standards to govern these difficult areas, she shortchanges the empirical question of whether these standards are judicially enforceable, making only brief allusion to hortatory and "learning by monitoring" benefits associated with judicial rule. Id. at 1182. Her claim that the implementation of school finance decisions, "while arduous, has been somewhat effective in terms of improving educational conditions," id. at 1189, is both undersupported, see id. at 1189 n.348 (citing only Hershkoff's own manuscript and an unpublished interview with partisan attorneys), and hedged, see id. at 1190 ("Social reform always involves a long and incremental process."). Courts should pay attention to, not ignore, a probability that the long process they set in motion will founder during implementation. See infra notes 54–62 and accompanying text. Nevertheless, Hershkoff is right to argue that "[j]udicial review... must serve to ensure that the government is doing
That educational reform is a positive political question is most evident from the experience of those state courts that have forged ahead and imposed judicial remedies for educational inadequacy. The first question that faced these courts, of course, was what was to be remedied. During the “second wave” of educational litigation, equal protection arguments based on state constitutions forced state courts to face the unpalatable question (unpalatable because there is no good answer) of what should be equal across districts: expenditures per pupil, the ability to raise funds through property taxes at a given level of tax effort, actual services provided to students, actual services at a given level of student “need,” or academic performance. In practice, however, no one seemed able to imagine how courts might rectify differences in academic performance or even measure actual student services or student “need.” Second-wave lawsuits therefore quickly defaulted to the only easily measurable variable, focusing almost exclusively on whether school finance systems that equalize per-pupil spending in rich and poor districts were constitutionally required.

The costs of this default were quickly revealed: School finance reform is very dubious medicine. The question of whether additional spending in poor districts improves education is a topic of sustained debate. Whatever this debate ultimately concludes, it seems virtually cer-
tain that such increases are insufficient to effect educational change of the breadth and scope that poorly performing districts so desperately need. Inadequate districts given substantial additional resources generally continue to founder.\(^5\)

The shortcomings of financial remedies, and the unwillingness of many courts to provide even those, led plaintiffs and advocates to search for other solutions.\(^3\)\(^6\) The "third wave" theory that poorly performing schools violate states' constitutional duties to educate all children adequately soon led litigants and courts to consider substantive educational remedies.\(^3\)\(^8\) Courts imposing such remedies would dictate not how much


Scholars in both camps agree that the particular school a child attends can have a substantial and significant impact on her educational achievement. See Hanushek, supra, at 19. This finding—that, holding characteristics of students and families constant, some schools produce consistently higher educational achievement than others—is often described as the "effective schools" principle. However, debate rages about what characteristics of a school make it effective, and particularly about whether these traits can be strengthened by school budget increases. Compare Hanushek, supra, at 23 (arguing that increasing school spending "would be fine if policymakers could reliably identify programs that do and do not work" but that "their judgments have not been accurate in the past"), with Gershon M. Ratner, A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills, 63 Tex. L. Rev. 777, 800-01 (1985) (arguing that "scholars . . . generally agree" on a list of characteristics of "successful schools").

The difficulty of assessing this complex and often technical scholarly debate is vastly compounded by the rhetorical and even polemical uses to which courts, litigants, and advocates have put the school finance scholarship. See Michael Heise, State Constitutional Litigation, Educational Finance, and Legal Impact: An Empirical Analysis, 63 U. Cin. L. Rev. 1735, 1747-49 (1995). Some arguments allow the effective schools principle to trump the finding that marginal increases in school funding may have little impact, as if the possibility that additional resources could be used to improve education means that mandated additional resources will, on average, improve education. Other advocates make equally weak arguments in reverse, as if the absence of demonstrated correlation between existing variation in school resources and educational performance implies that there exists no effective educational reform whose efficacy might depend on more resources.

A full treatment of the effective schools and educational resources literature, and of their use by courts, litigants, and advocates, is beyond the scope of this Note.


36. Advocates of such solutions are generally careful to note that substantive remedies often need to be accompanied by resource increases. See, e.g., McUsic, The Law's Role, supra note 9, at 135.

37. See supra note 8 and accompanying text.

38. Third-wave cases often incorporate equal-protection as well as adequacy arguments.
money school districts must spend, but what school districts must do in order to meet the demands of adequacy.

But adequacy is no easier for courts to manage than equality. The itemized lists produced by courts struggling to define adequacy exemplify judicial limitations. The bellwether New Jersey Supreme Court, while continuing to insist that an "interim remedy" of "increased funding" is the only way to discharge "the judicial obligation to vindicate constitutional rights," has also held that the right to a "thorough and efficient" education under the New Jersey Constitution requires the state to ensure that low-performing districts "implement whole-school reform; implement full-day kindergarten and a half-day pre-school program for three- and four-year olds as expeditiously as possible; [and] implement [particular] technology, alternative school, accountability, and school-to-work and college-transition programs." This list is preposterous in its specificity: It is easy to imagine constitutionally adequate schools that lack these elements, and even easier to imagine inadequate schools that have them all.

Vagueness, rather than specificity, was the order of the day in the leading case of Rose v. Council for Better Education, which invalidated the Kentucky education code in its entirety. Rose lists seven "essential" and "minimal" characteristics of constitutionally acceptable education. This list, subsequently adopted by some other states, is uncontroversial only because it is entirely hortatory. Adequate education, said the Kentucky court, provides students with sufficient abilities in a range of disciplines to allow them to function in a "complex and rapidly changing civilization," to "make informed choices" in their personal and civic lives, and to compete successfully in higher education and employment markets. At the same time, Rose emphatically declined to describe the specific programs necessary to a constitutionally adequate education, insisting that this determination was the duty of the legislature. The legislature, with no direction to speak of, passed a new education code; whether education has improved in Kentucky remains unknown.

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40. N.J. Const. art. VIII, § 4(1).
42. 790 S.W.2d 186, 215 (Ky. 1989).
43. Id. at 212.
45. Rose, 790 S.W.2d at 212. The North Carolina Supreme Court took the Rose approach a step further, providing a laundry list of critical disciplines, including economics, geography, and vocational skills as well as English, mathematics, history, and physical science, but offering no priorities or achievement benchmarks. See Leandro, 488 S.E.2d at 255.
46. See Rose, 790 S.W.2d at 212.
47. See generally Trimble & Forsaith, supra note 11 (describing the Kentucky school code passed after Rose, the new code's early implementation, and the substantial implementation problems that remained).
Variations on the New Jersey and Kentucky approaches proliferate, with commentators pressing various proposals under which courts would order school officials to alter substantively the kind of education they offer to students.\textsuperscript{48} Professor Molly McUsic, for example, urges courts faced with widespread educational inadequacy to adopt the model of \textit{Rose} and mandate whole-state, system-wide reforms.\textsuperscript{49} Other proposals for substantive remedies partake of New Jersey’s impulse toward the directive. Professor Paul Weckstein cites several academic studies to argue that courts should impose a particular “standards-based” model founded on a “schoolwide teacher professional community” committed to “authentic pedagogy.”\textsuperscript{50} Professor James Liebman cites different studies to advocate judicial imposition of “‘[s]chool-based management’” and “‘[e]ffective schools’” programs on “persistently unsuccessful schools.”\textsuperscript{51}

These proposals exemplify the difficulty that courts (and commentators) face in defining adequacy. But difficulties do not end with definition. Courts must also determine how much must be spent in order to achieve adequacy.\textsuperscript{52} In addition, recognizing the insufficiency of all strictly financial remedies, proponents of such proposals soon find themselves flirting with, if not neck-deep in, substantive, nuts-and-bolts intervention in the details of curriculum, teaching, and school-level governance.\textsuperscript{53} Such interventions leave courts out of their depth, both

\textsuperscript{48} McUsic categorizes such reforms as “[s]tructural [s]hifts,” a category that includes both judicial specification of how educational services are to be improved and judicial efforts to change how educational institutions are organized. McUsic, The Law’s Role, supra note 9, at 119. This Note argues that the distinction between these two types of reform is important. See infra note 63 and accompanying text. This Note therefore uses the term “substantive” to refer to remedies ordering changes in the content of educational services, as distinguished from remedies that seek to alter the institutional “incentive systems” that affect schooling. The latter term is due to Michael R. Kremer, Research on Schooling: What We Know and What We Don’t, 10 World Bank Res. Observer 247, 247 (1995).

\textsuperscript{49} See McUsic, The Law’s Role, supra note 9, at 134–36.

\textsuperscript{50} Paul Weckstein, School Reform and Enforceable Rights to Quality Education, in Law and School Reform: Six Strategies for Promoting Educational Equity, supra note 9, at 306, 309, 311; see id. at 366 nn.12–13.

\textsuperscript{51} Liebman, Implementing \textit{Brown}, supra note 35, at 393 n.148, 394 & nn.149–50 (quoting research supportive of these approaches published by the RAND Corporation and the Center for Policy Research in Education). Liebman notes that these approaches are “not yet proven . . . sufficiently to justify imposing on schools a common law duty to adopt them,” and advocates their judicial imposition only in the absence of effective legislative action. Id. at 394.


\textsuperscript{53} See Enrich, supra note 18, at 171–72; McUsic, The Law’s Role, supra note 9, at 116–17; McMillan, supra note 7, at 1893–95. But see Abbott IV, 693 A.2d at 429 (insisting on the logical priority of fiscal remedies over the specification of substantive standards).
substantively—because courts have no particular pedagogical expertise—and institutionally—because courts lack access to the political processes of policy development and bargaining that allow such contested decisions to be made.

In short, the problem with judicially-crafted interventions in educational services has been less that courts feel constrained to avoid doing good and more that courts feel—or should feel—unable to determine what is good. Judges treat educational adequacy as a political question not because they have a policy of abstention but because they feel incompetent to act.

Moreover, substantive judicial interventions suffer from another problem already associated with financial remedies: Ordering reform is very different from implementing it. The pitfalls of implementation are well-known; they justify in no small part doctrines like the political-question and separation-of-powers rules that discourage judicial involvement in delivery of domestic services. The pitfalls of implementation in schools are especially dramatic, particularly because the party ordered to reform is the state, while the party that must carry out reforms is the local school district. Intergovernmental implementation lends itself well to delay, confusion, conflict, and “token compliance,” which one scholar has described as “meeting the terms of the rules without conforming with their goals.”

Nevertheless, those who advocate substantive remedies typically ignore implementation problems. They argue as if the fact that effective

54. See Heise, supra note 34, at 1761–63 (arguing that court-ordered reform of school finance systems often fails to result in reductions in interdistrict fiscal inequities).
56. See, e.g., Pawtucket, 662 A.2d at 59 (arguing that “chilling example” of the New Jersey Supreme Court’s involvement in education, notwithstanding what the Rhode Island court describes as “the absence of justiciable standards,” led to a “morass” in which the “New Jersey Supreme Court has struggled in its self-appointed role as overseer of education for more than twenty-one years, consuming significant funds, fees, time, effort, and court attention”); Gerald N. Rosenberg, The Hollow Hope 15–16 (1991).
59. Donald F. Kettl, The Regulation of American Federalism 8 (2d ed. 1987); see id. at 10–14.
60. See, e.g., Abbott v. Burke (Abbott V), 710 A.2d 450, 474 (1998) (after noting that whether ordered remedies will have desired results “depends . . . on the extent to which
methods for educating poor students are known—itself a dubious proposition, notwithstanding the authors' (varying) citations to the education scholarship—means that all courts need to do is order schools to adopt those methods.\textsuperscript{61} Would that it were so easy.\textsuperscript{62}

So long as litigants continue to request, and courts continue to impose, remedies that tell states what to spend and schools what, how, when, and whom to teach, the courts are likely to continue to generate no visible improvement in deficient school districts. Courts must recognize their own incapacity to define such remedies fairly and to impose them in ways that will stick.

B. Incentive-Based Judicial Remedies

Awareness of judicial limits, however, does not justify judicial inaction. Courts need not renounce any role in enforcing constitutionally-guaranteed rights to education because effective control over educational services is beyond their grasp. Instead, courts should redirect their attention towards remedies that target not the funding and content of educational programs but the incentives and circumstances of those who control them: legislatures, governors, and state and local educational bureaucracies. Such remedies do more than self-consciously respect judicial limitations. They explicitly seek to harness capabilities unique to the political branches: creativity over time, sustained commitment and flexibility in public management, and political responsiveness to popular preferences. This approach may induce desirable educational change in circumstances where a simple order or mandate to change would quickly founder during implementation.\textsuperscript{63}

Attention to incentives is now a well-established feature of public debate over education reform; this is particularly evident in the burgeoning

there is a top-to-bottom commitment to ensuring that the reforms are conscientiously undertaken and vigorously carried forward," applauding the commitment at the “top” by the Commissioner of Education and the Legislature, but saying nothing about any commitment at the “bottom”).

61. See Weckstein, supra note 50, at 307 (arguing that there exists “professional knowledge about . . . some key elements of high-quality education and what it takes to provide it”). It is hard to see how Weckstein imagines that “schoolwide teacher professional communit[i]es,” id. at 311, will arise and begin to engage in authentic pedagogy because a court tells them to. See also Ratner, supra note 34, at 780 (contending that “effective schools do share common educational characteristics”).

62. Incentive-based reforms like takeover and others discussed below, see infra Part I.B, also may face implementation problems. See Christopher D. Pixley, The Next Frontier in Public School Finance Reform: A Policy and Constitutional Analysis of School Choice Legislation, 24 J. Legis. 21, 45–47 (1998) (describing ways that bureaucratic recalcitrance and other obstacles can stymie market-based reforms). But implementation is a far more substantial barrier to the successful enactment of substantive reforms.

63. Such proposals are very different from Weckstein’s proposals for standards-based learning, supra note 50 and accompanying text, or Abbott’s for “site-based management,” Abbott V, 710 A.2d app. at 486. These proposals ask schools to run themselves differently, but provide no reason to expect that schools that have run themselves badly under old paradigms will suddenly reinvent themselves under the new.
school choice and charter school movements (though neither of these is commonly thought of as a judicial remedy). Choice and charter proposals are based on the idea that directive, top-down management of low-quality schools, however well-intentioned, will usually fail, because it cannot alter the institutional realities that produce inadequate schools in the first place. By contrast, new approaches to governance, whether based on market models (as in most school choice proposals) or models of bureaucratic entrepreneurship (as in the charter school movement), seek to create incentives that will foster success. Incentive-based proposals are also self-implementing; a legislature (or a court) that alters institutional structures need only issue a relatively easily enforceable order and then assess outcomes, while avoiding indefinite entanglement in administration.

Moreover, the logic of incentives extends beyond market-based proposals. Professor McUsic suggests an intriguing structural reform, which

64. See Kathryn M. Doherty, Changing Urban Education: Defining the Issues, in Changing Urban Education 225, 231 (Clarence N. Stone ed., 1998) ("With bureaucracy as a target, public support for structural education reforms such as school privatization, charter schools, and vouchers has grown in strength in the last decade."). See generally Learning from School Choice (Paul E. Peterson & Bryan C. Hassel eds., 1998).

65. While much legal commentary on school choice has focused on its constitutionality, see, e.g., Joseph P. Viteritti, School Choice and State Constitutional Law, in Learning from School Choice, supra note 64, at 409–27 (discussing school choice and the Establishment Clause); Pisley, supra note 54, at 47–64 (same); Suzanne H. Bauknight, The Search for Constitutional School Choice, 27 J.L. & Educ. 525, 542–50 (1998) (assessing the constitutionality of voucher programs in Ohio and Wisconsin), there have been surprisingly few suggestions that choice could be an effective judicial remedy for educational inadequacy, even though it requires changes in principle no more radical than those suggested by Professors McUsic or Weckstein. See supra notes 49–51 and accompanying text. But see Jenkins v. Leininger, 659 N.E.2d 1366, 1376–77 (Ill. 1995) (declining to reach the validity of a plaintiff’s request for a voucher-based remedy, but intimating that such a remedy would be disfavored in the Illinois courts); James E. Ryan, Sheff, Segregation, and School Finance Litigation, 74 N.Y.U. L. Rev. 529, 560–62 (1999) (suggesting that school choice is an appropriate remedy for denial of rights to equal or adequate education); Greg D. Andres, Comment, Private School Voucher Remedies in Education Cases, 62 U. Chi. L. Rev. 795, 808–12 (1995) (urging the adoption of voucher remedies, at least on a limited basis, for students in deficient schools). The lack of interest in choice as a remedy may be because school choice is not just a policy proposal but a "pennant in the culture wars" hoisted by combatants generally hostile to judicial intervention in education. Marshall J. Breger, School Vouchers—A Sympathetic View, in Vouchers for School Choice: Challenge or Opportunity? 1, 1 (Marshall J. Breger & David M. Gordis eds., 1998).

66. See, e.g., Jonathan B. Cleveland, School Choice: American Elementary and Secondary Education Enter the "Adapt or Die" Environment of a Competitive Marketplace, 29 J. Marshall L. Rev. 75, 86–88 (1995) (urging school choice on the grounds that publicly managed education operates under a "flawed incentive system," similar to that of the failed Soviet economy, that "fails to reward outstanding performance, innovation, or production"); cf. James A. Peyser, School Choice: When, Not If, 35 B.C. L. Rev. 619, 628 (1994) (arguing that because competition among schools is vital to the success of choice programs, some "market-making act," such as the establishment of charter schools, is necessary in order to give choice a fair trial).
she dubs “class integration,” for cases in which there are pockets of low-performing school districts in a sea of relatively well-performing ones.\textsuperscript{67} (This is the situation, for example, of a distressed inner-city district surrounded by prosperous suburban districts.) McUsic proposes that courts respond to such circumstances by redrawing school district boundaries so that all districts serve families with a range of economic resources.\textsuperscript{68} McUsic argues that this improves education for poorer students without harming wealthier ones by making it more probable that all districts will serve parents likely to take an active role in their children’s education.\textsuperscript{69} Structural reforms like McUsic’s are attractive in their reliance on institutional incentives. Redrawn districts would remain subject to political, rather than judicial, authority; what would change would be the demands parents place on district officials.

Of course, McUsic’s proposal, like school choice, raises its own problems. One wonders whether suburban parents drafted into new mixed districts would provide all schools with incentives for effectiveness, as McUsic suggests, or would begin to lose interest in their schools and seek private alternatives.\textsuperscript{70} A more basic problem with McUsic’s proposal is its political inviability. McUsic amazingly calls her proposal “a path of less resistance” than that of mandating financial remedies.\textsuperscript{71} Her analysis, though thorough, seems wildly optimistic;\textsuperscript{72} more likely, the political maelstrom that would emerge from an attempt to redraw suburban school district lines to include urban students would make the battles over financial equalization look like a summer squall.\textsuperscript{73}

Thus, despite the attractiveness of these proposals’ dependence on incentives, as judicial remedies they are decidedly unappealing. Posi-

\begin{itemize}
  \item \textsuperscript{67} McUsic, The Law’s Role, supra note 9, at 128.
  \item \textsuperscript{68} See id. at 131.
  \item \textsuperscript{69} See id. at 129–30; see also James S. Liebman, Voice, Not Choice, 101 Yale L.J. 259, 294–95 (1991) (reviewing John E. Chubb & Terry M. Moe, Politics, Markets, and America’s Schools (1990)).
  \item \textsuperscript{70} Declining support for public education appears to be associated with financial remedies that redistribute school taxes to poorer school districts. See Heise, supra note 34, at 1761; McUsic, The Law’s Role, supra note 9, at 112–114.
  \item \textsuperscript{71} McUsic, The Law’s Role, supra note 9, at 120.
  \item \textsuperscript{72} See id. at 131–34.
  \item \textsuperscript{73} See Lillian B. Rubin, Busing and Backlash: White Against Black in a California School District 22, 121 (1972) (describing furious community opposition to mixing students by race and social class within a unified school district that had been created from several smaller prosperous districts and one inner-city district). While the racial context of the late 1960s was undoubtedly more openly polarized than that of today, and while school district unifications in the late 1960s were motivated more by efficiency than by the virtues of parental participation, see id. at 22, parents of students in well-performing schools will probably still actively resist-redrawing their district lines in ways that include poorly-performing schools. See Thomas Corcoran & Nathan Scovronick, More Than Equal: New Jersey’s Quality Education Act, in Strategies for School Equity: Creating Productive Schools in a Just Society, supra note 8, at 53, 63–65 (documenting dramatic political backlash against efforts to equalize school funding in New Jersey’s legislative, gubernatorial, and senatorial elections in the early 1990s).
\end{itemize}
tively, few courts, no matter what their view on the prudent range of judicial activism in education, would be willing to take sides in the highly charged and often partisan political battles associated with vouchers or even class integration. Normatively, while these proposals' reliance on incentives offers a partial solution to problems of judicial implementation, they seem to do so at the price of exacerbating problems of judicial competence. The vulnerability of judicial specifications of the content of educational services to charges of arbitrariness and incompetence would be magnified tenfold were judges to seek radical redesign of the political institutions that undergird American education.

One promising solution to this dilemma, however, lies in the recently developed argument that the arbitrariness of judicially-determined standards of educational adequacy can be ameliorated by using standards articulated in existing state law—standards which exist in the education codes of virtually every state. The Idaho Supreme Court has noted that "the political difficult[y]" of "defin[ing] the meaning of the [state constitution's adequacy provision] . . . has been made simpler . . . because the executive branch of the government has already promulgated educational standards pursuant to the legislature's directive . . . ." Such an approach, Professor McUsic contends, is effective because "explicit standards for education" defined by "an elected branch of government, either the legislature or the state department of education[,] . . . provide a voter-validated definition of minimum educational standards, which can provide a basis for an effective adequacy claim." 

This approach would do very little to address the problems of managerial inflexibility, political insensitivity, and fractured implementation associated with substantive judicial remedies. State education codes, however, do not only—or even primarily—address the substantive content of education; instead, they focus on defining and organizing institutions that deliver education. The structural provisions of state education codes offer courts a way to counteract incentives that perpetuate inertia and inadequacy. The statutory foundation of a state's educational institutions should, therefore, be the first resort for courts interested in inducing politicians and bureaucrats to exert themselves to assure a decent education for the children in their charge.

74. See McUsic, The Law's Role, supra note 9, at 117.
76. McUsic, The Law's Role, supra note 9, at 117; see also Liebman, Implementing Brown, supra note 35, at 380; Dietz, supra note 52, at 1212–18.
77. See supra notes 39–62 and accompanying text.
The remainder of this Note assesses one incentive-based reform that takes this approach. It argues that courts, faced with inadequately performing school districts, should turn first to state statutes that authorize the disestablishment of—i.e., the withdrawal of authority from—such districts. Courts in states that have passed such statutes should order states to invoke them, and either to run the districts directly or to transfer their authority to a third party. The next Part describes this remedy, and its state law background, in detail.

II. THE DISESTABLISHMENT OF DEFICIENT SCHOOL DISTRICTS

This Part outlines the major features of a proposal that judges order states to disestablish school districts that fail to provide adequate education in states whose school codes permit state officials to order such disestablishment. It has two sections. The first section reviews the state-law background of disestablishment, which would provide the legal foundation for the remedy. The second section describes approaches courts might take to disestablishment, and argues that disestablishment orders fall within the limits of judicial competence and implementability.

A. Disestablishment under State Law

As we have seen, the right to an education is guaranteed by state constitutions and is the responsibility of state authorities. Local school districts, by contrast, typically have no constitutional status. Even the very few state constitutions that require local governance for public schools do not define particular powers for local school boards. Most state constitutions, moreover, speak of a state responsibility to educate but are silent as to local participation; in such states, school districts need not exist at all. The universal American practice of local school governance.

78. See Kan. Const. art. VI, § 5 ("Local public schools under the general supervision of the state board of education shall be maintained, developed and operated by locally elected boards"); Me. Const. art. VIII, pt. 1, § 1 ("the Legislature are authorized, and it shall be their duty to require, the several towns to make suitable provision, at their own expense, for the support and maintenance of public schools"); Wis. Const. art. X, § 3 (requiring the legislature to "provide... for the establishment of district schools"); see also Denise Howard, Rewarding and Sanctioning School District Performance by Decreasing or Increasing the Level of State Control, Kan. J.L. & Pub. Pol'y, Spring 1996, at 187, 191 (discussing the Kansas requirements); cf. Okla. Const. art. XIII, § 1a (funds shall be allocated to the "various school districts"). Disestablishment might or might not violate the Wisconsin provision, since, for example, a taken-over district is still a "district school." Cf. Buse v. Smith, 247 N.W.2d 141, 151-52 (Wis. 1976) (holding that Wisconsin's constitutional requirements imply a protected local interest in school administration and funding); Richard Briffault, The Role of Local Control in School Finance Reform, 24 Conn. L. Rev. 773, 782 (1992) (discussing Buse).


80. Hawaii is often noted as an exception to this "universal" pattern, since, unlike any other state, it has a single statewide school district. See, e.g., David K. Cohen & James P.
then, is not a matter of constitutional requirement but of "state policy": States have chosen to discharge their obligation to educate by delegating their power and responsibility over education to local school districts.\textsuperscript{81}

Such local delegation is extensive. Despite their subordinate doctrinal status as "political subdivisions"\textsuperscript{82} of the state and the quotidian reality of state oversight, typically by a state department of education,\textsuperscript{83} school districts generally enjoy wide discretion over educational services.\textsuperscript{84} The range of powers delegated to local school authorities in the United States contrasts strongly with European and other educational systems, which are more highly centralized.\textsuperscript{85}

Notwithstanding the policy of local delegation, however, school district authority is contingent on a state grant of power. Therefore, a district's authority to direct education in a locality can be made contingent on its performance. Just as a state should withdraw a contract from an underperforming contractor, or freeze a grant not being used to provide the services the grant was to support, it ought to act similarly vis-à-vis a school district.

In the wake of the Reagan Administration's 1983 \textit{Nation at Risk} report,\textsuperscript{86} which called on states to address America's educational crisis,\textsuperscript{87} states began to integrate this principle into their educational ac-

\textsuperscript{81} See, e.g., Tex. Educ. Code Ann. § 11.002 (West 1996) ("The school districts . . . created in accordance with the laws of this state have the primary responsibility for implementing the state's system of public education . . . ."); Carrolton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist., 826 S.W.2d 489, 511 (Tex. 1992) (Texas legislature has a "free hand" to establish school districts as it sees fit); Briffault, supra note 78, at 781 (arguing that "local control is state policy," which in large part resolves the "apparent paradox" of simultaneous norms of state supremacy and local control).


\textsuperscript{83} See Briffault, supra note 78, at 780–81.

\textsuperscript{84} Cohen & Spillane, supra note 80, at 38–39. Such discretion is not absolute. Certain functions, such as textbook selection, are typically retained by states. See, e.g., Ga. Code Ann. § 20-2-1010 (1996) ("The State Board of Education is authorized to prescribe . . . the textbooks to be used in . . . the public schools of this state . . . ."); Tex. Educ. Code Ann. §§ 31.023, 31.101 (West 1996 & Supp. 1999) (districts limited to state-approved textbooks for subjects within the "foundation curriculum"). See generally Briffault, supra note 78, at 780–83.

\textsuperscript{85} Cohen & Spillane, supra note 80, at 39–40.

\textsuperscript{86} National Comm'n on Excellence in Educ., supra note 1.

creditation and local governance statutes as a way to create “accountability” for school districts. While these statutes vary in detail, a majority of the states that have passed such laws follow the general approach of the pioneering New Jersey takeover legislation. Upon determination that a district is inadequate, the chief state education officer appoints a state district school superintendent, responsible to the state education department, who replaces (or at least exercises the powers of) the local superintendent and elected school board. Other states give their education officials the discretion to decide whether to take over or dissolve stubbornly deficient districts, with their territory, schools, students, and teach-

90. See Ala. Code § 16-6B-3(c) (3) (1995) (state superintendent of education to “assume the direct management and day-to-day operation of the local board of education [in deficient district] for such period as may be necessary for student achievement to improve”); Ga. Code Ann. § 20-2-283(d)(3) (1996) (state board given right of action against local school officials it believes to be blocking successful implementation of corrective plans in deficient district, and court empowered to remove such officials and appoint replacements); Ky. Rev. Stat. Ann. §§ 158.780, 158.785 (Michie 1996) (chief state school officer or her designee to exercise all powers of local school board and superintendent if state finds local management critically inefficient or ineffective); Mass. Ann. Laws ch. 69, § 1K (LEXIS L. Pub. 1999) (state board to designate a receiver for a chronically under-performing district “with all the powers of the superintendent and school committee”; receiver to report to the state Commissioner of Education); N.C. Gen. Stat. § 115C-105.39 (1997) (requiring State Board of Education to replace the principal in deficient district, and allowing board to appoint an “interim superintendent” to whom it “may assign any of the powers and duties of the local superintendent and the local finance officer,” and to suspend the local school board if it fails to cooperate with the interim superintendent); W. Va. Code § 18-2E-5(k) (Supp. 1998) (state authorities may limit powers of local authorities or “declare that the office of the county superintendent is vacant”); infra note 91; cf. 1999 Cal. Legis. Serv. 1st Ex. Sess. ch. 3 § 1 (S.B. 1) (West) (to be codified at Cal. Educ. Code §§ 52053, 52055.5) (authorizing individual schools with below-average academic performance to apply for state grant funds to improve that performance; if grantee schools then fail to meet state performance standards or to show significant performance improvements within two years, “the Superintendent of Public Instruction shall assume all the legal rights, duties, and powers of the [district] governing board with respect to that school”); Mo. Ann. Stat. § 160.538.2–3 (West Supp. 1999) (authorizing state authorities to initiate a “recall election for each member of the district school board” when any school in the district is found to be academically deficient, but allowing voters to decide to retain any member); Tenn. Code Ann. § 49-1-602(c) (Supp. 1998) (state commissioner may “restrict the discretionary powers of the director of schools or of the local board of education [in a deficient district] to ensure implementation” of the recommendations produced by a study of the district); Ohio Rev. Code Ann. § 3302.06(B) (West 1995) (repealed 1998) (state board may appoint a “monitor” to implement a remedial plan in deficient district); Shook v. District of Columbia Fin. Responsibility & Management Assistance Auth., 132 F.3d 775, 781 (D.C. Cir. 1998) (holding that the District of Columbia Financial Responsibility and Management Assistance Authority [hereinafter D.C. Control Board] has the authority to take control from the District’s Board of Education under the District of Columbia Financial Responsibility and Management Assistance Act of 1995, Pub. L. No. 104-8, § 207(d) (1995), as amended by Pub. L. No. 104-208, § 5203(f) (1996)).
ers absorbed by neighboring districts.\textsuperscript{91} Still other states have transferred the power to select local school boards and to appoint superintendents in troubled big-city school districts from local electorates to city mayors.\textsuperscript{92} And in 1999, Florida innovatively merged disestablishment and school choice ideas to offer students attending schools determined by the state to be "failing" a state voucher that can be used to attend a public or private school of the family's choice.\textsuperscript{93}

\textsuperscript{91} See 105 Ill. Comp. Stat. Ann. 5/2-3.25f(b)(2) (West 1998) (state superintendent may reassign pupils and administrative staff of a failing district or "nonrecognize" that district; nonrecognized districts are merged into adjoining districts at the end of the school year); Iowa Code Ann. § 256.11(12) (West 1996) (school accreditation committee faced with a deficient district may choose among taking "temporary oversight authority," placing district in receivership, or merging district with neighboring districts, with the choice to be based on the "best interests of the students, parents, residents of the community, teachers, administrators, and board members of the district"); Miss. Code Ann. § 37-17-6(11) (1999) (state education authorities may declare "state of emergency" in deficient district and choose to override particular decisions of the local school board, appoint a conservator for the local board, or consolidate the district with its neighbors); Okla. Stat. Ann. tit. 70, § 1210.541B (West 1998) (state board, at its option, may intervene in a number of ways in deficient districts, including "operation of the school by personnel employed by the State Department of Education; mandatory annexation of all or part of the local school district; and placing operation of the school with an institution of higher learning [under certain conditions]"); Tex. Educ. Code Ann. § 39.151(a) (West 1996) (state board may assign monitor or master, suspend the local board of trustees and local commissioner and replace them with a new board of managers, or, after two years in which problems are not remedied, annex the district to another district). Arkansas recently repealed a statute requiring dissolution and merger for persistently inadequate districts. See Ark. Code Ann. § 6-15-418(a) (Michie 1993) (repealed 1999).

\textsuperscript{92} See, e.g., Md. Code Ann., Educ. §§ 4-302-303 (Supp. 1997) (Mayor of Baltimore given power to replace Baltimore school superintendent and Baltimore Board of School Commissioners); Ohio Rev. Code Ann. § 3311.71(B) (West 1999) (providing for mayoral appointment of a school board "[w]henever any municipal school district is released by a federal court from an order requiring . . . management of the district by the state superintendent"); cf. 1999 Mich. Pub. Acts 10 (allowing for mayoral appointment of "school reform boards" in first-class school districts and making such boards subject to voter approval only after five years); Tenn. Code Ann. § 49-1-602(c) (Supp. 1998) (The state board of education may remove some or all of the members of a local school board. If only some members are removed, they are replaced by the "local legislative body" until the next general election; if the entire board is dismissed, the state education commissioner appoints replacements.). Note that in many places, the background procedure is mayoral appointment of school board members; disestablishment in such cases consists precisely in unseating and replacing mayoral appointees. The school board in Jersey City, New Jersey, for example, was appointed by the Jersey City mayor until it was taken over in 1989. See Kenneth J. Tewel, The New Jersey Takeover Legislation: Help or Hindrance to Improvement in Troubled School Districts, 23 Urb. Rev. 217, 220 (1991).

Clearly, a great deal rests upon how states determine that districts are subject to these provisions—i.e., how they identify inadequate districts. In a few cases, state legislatures have statutorily identified particular districts as inadequate and provided for their takeover or dissolution; this is more common when states seek to turn school districts over to city mayors, but has also been used for state takeovers. More commonly, the state codes set out criteria which, if unmet, trigger a monitoring and improvement process. Typically, triggers for the initial round of monitoring are objective, incorporating measures such as test scores and attendance. Such triggers generally lead to state/local cooperation in the development of a remedial plan. Actual disestablishment of a district usually requires not only objectively measured educational inadequacy but the subjective decision of state education officials that a district is failing to implement its remedial plan adequately.

The relatively lengthy period during which districts are allowed to attempt to remedy their deficiencies not only gives districts every oppor-
tunity for reform but also works to blunt political opposition to district disestablishment. The disestablishment statutes also incorporate other devices that are likely to dampen political resistance. Disestablishment provisions are designed to be revenue-neutral; state expenses are to result in a dollar-for-dollar reduction in state aid to the district, presumably resulting in a wash.\textsuperscript{100} Some states have also sought to mute the political opposition of organized labor with severe limitations on the ability of newly-appointed school officials to remove teachers or violate collective bargaining agreements.\textsuperscript{101}

Notwithstanding the lengthy probationary periods, most states that have passed statutes allowing them to disestablish school districts have used them. Kentucky initiated the contemporary trend in school takeovers when it took over two county school systems in 1989.\textsuperscript{102} The same year, immediately upon passage of its takeover law, New Jersey invoked it.

\textsuperscript{100} See, e.g., N.J. Stat. Ann. § 18A:7A-35(c) (West Supp. 1999); Ohio Rev. Code Ann. § 3302.06(B) (West 1995) (repealed). This reduction is putatively reasonable because displaced local officials no longer need to be paid.


to take over the Jersey City schools.\footnote{103} Since that time, at least fifteen states have taken over one or more school districts.\footnote{104} Recent years have also seen the consolidation of deficient districts,\footnote{105} the transfer of authority to big-city mayors,\footnote{106} and other sorts of disestablishment.\footnote{107}

Courts that have assessed the legality of disestablishment statutes and associated administrative actions have held them to be well within constitutional requirements and the licit discretion of state education authorities.\footnote{108} Courts also occasionally refer to the fact of takeover as evidence of educational adequacy or inadequacy without commenting on the desirability of takeover or its availability as a potential remedy.\footnote{109}


\footnote{105} See Jim Killackey, First School Closed for Low Marks, Daily Oklahoman, Aug. 28, 1992, at 1 (consolidation of schools into neighboring districts in Alluwe, Oklahoma).

\footnote{106} See Bryk et al., supra note 101, at 187–89 (mayoral takeover in Chicago); Reinhard, supra note 94, at 14 (partial mayoral takeover in Baltimore); Pete Waldmeir, Archer Hits Ground Running in Reforming Detroit Schools, Detroit News, May 29, 1999, at D1 (describing first steps in the mayoral takeover in Detroit).


B. Disestablishment as Remedy

The particular form of court-ordered disestablishment will depend both on the specific language of the state's disestablishment statute and on the nature of the educational deficiencies before the court. Courts could order state education officials to undertake a variety of actions, from listing a district as a potential takeover target, thus initiating the planning, audit, and oversight requirements associated with such a listing, to invoking their discretion to disestablish a particular district that met statutory criteria, to simply implementing a general accountability monitoring regime, including the disestablishment sanction, without targeting any particular district.

Questions of judicial competence aside, courts sitting in equity clearly may, and sometimes do, issue disestablishment orders. In 1992, an inferior state court in California required state officials to take over a bankrupt school district so that its students could complete the school year. The California Supreme Court, in upholding that order, held that "takeover . . . was within [the courts'] inherent equitable power to enforce the State's constitutional obligations" under emergency conditions. In the court's view, takeover was not only "tailored to the harm at issue," i.e., inadequate education, but met the requirements that equitable remedies be "the least disruptive" possible and "respect the separate constitutional roles of the Executive and the Legislature." Similar views were presumably held by the federal district court in Ohio that ordered a state takeover of the Cleveland school system when district officials failed to implement court-ordered school desegregation adequately.

Indeed, disestablishment is probably within judicial power even in states that lack disestablishment statutes. Neither the California nor Ohio orders made reference to statutory authority. Disestablishment might thus be justified solely on the basis of the principle that it is the responsi-

110. For variation in state statutes, see supra notes 89–101.
112. Id. at 1258.
113. Id.; see id. at 1258–60.
114. See Reed v. Rhodes, 954 F. Supp. 1533, 1537–38 & n.1, 1558–61 (N.D. Ohio 1996) (referring to an unpublished order requiring the Ohio State Board of Education to take over management of the Cleveland schools from the Cleveland school district, and characterizing the district's administration of a desegregation order as " politicized fiscal and administrative mismanagement . . . without fiscal . . . accountability or direction, and incapable of implementing the Court's extant remedial orders"); cf. Jenkins v. Missouri, 959 F. Supp. 1151, 1178 (W.D. Mo. 1997) (Clark, J.) (urging, though not ordering, state oversight of the Kansas City School District's operations as the district moves towards unitary status, on the grounds that district leadership is "not up to th[e] task"). Courts have also insisted on state oversight of narrower sectors of district educational policy. See, e.g., Hull v. Albrecht, 950 P.2d 1141, 1145 (Ariz. 1997) ("Local control does not include the freedom of a district to go below the state system by choosing not to finance adequate capital facilities.").
ability of the state, not of school districts, to educate children.\textsuperscript{115} Courts need no statutory sanction to see in disestablishment a straightforward and necessary remedy where the state has delegated its own constitutional responsibilities to demonstrably incompetent agents with no independent constitutional status.\textsuperscript{116}

A disestablishment remedy also offers courts an opportunity to avoid implementation problems.\textsuperscript{117} It requires a single order and no ongoing involvement in educational administration by the court.\textsuperscript{118} Educational administration remains the responsibility of a political branch of government.\textsuperscript{119} The remedy also offers courts political advantages: Because its intervention in troubled districts leaves most other districts unaffected—a characteristic emphatically not shared by financial or substantive remedies—potential political fallout is mitigated, and judicial concerns about overinvolvement in education are addressed.\textsuperscript{120}

\textsuperscript{115} See, e.g., Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 211 (Ky. 1989) ("The sole responsibility for providing the system of common schools is that of our General Assembly. It is a duty . . . . This obligation cannot be shifted to local counties and local school districts."); McDuffy v. Secretary of the Executive Office of Educ., 615 N.E.2d 516, 548 (Mass. 1993) ("While it is clearly within the power of the Commonwealth to delegate some of the implementation of the duty [to educate] to local governments, such power does not include a right to abdicate the obligation imposed on [state] magistrates and Legislatures placed on them by the Constitution."); Abbott v. Burke (Abbott IV), 693 A.2d 417, 435 (N.J. 1997) ("The State . . . cannot shirk its constitutional obligation under the guise of local autonomy."); Campbell County Sch. Dist. v. State, 907 P.2d 1238, 1272 (Wyo. 1995) ("The problems associated with local control were known to the framers [of the Wyoming Constitution], and they addressed them by vesting authority, responsibility, and control in the state legislature, effectively ensuring that the state would establish the education system.") (emphasis omitted).


\textsuperscript{117} See supra notes 54–62 and accompanying text.

\textsuperscript{118} The argument that disestablishment offers a solution to problems of judicial implementability was made, quite presciently, with regard to the New Jersey courts immediately upon the passage of that state’s disestablishment statute. See F. Clinton Broden, Note, Litigating State Constitutional Rights to an Adequate Education and the Remedy of State Operated School Districts, 42 Rutgers L. Rev. 779, 809–13 (1990). Broden notes that court-ordered state takeover would "remov[e] the trial court judge from the political fray and the non-legal, polycentric problems of managing a school district" and would allow the courts to "avoid making political policy judgments surrounding educational decisions." Id. at 812. Although Broden does not distinguish between positive and normative aspects of political-question and separation-of-powers doctrines, these arguments remain apt.

\textsuperscript{119} Broden also notes, correctly, that court-ordered disestablishment respects the separation of powers by keeping control of services in the hands of the legislature. See id. at 813.

\textsuperscript{120} One of the earliest statements of the third-wave strategy noted that "[o]nly when a school district chronically failed to meet the [minimum adequacy] standard would the state intervene in the administration of that district, while other districts would remain
While statutory authority is not necessary for judges to order disestablishment, and while advantages related to implementation do not depend on a disestablishment statute, courts should be very reluctant to redesign a state's political institutions without statutory sanction. Proper political organization of education, even more than proper curriculum or class size, is a paradigmatic "political question"—in both the positive and normative senses. No court that has declined to order financial or substantive remedies in order to respect political-question or separation-of-powers limitations would find it more acceptable to wrest control over political institutions from the legislature. And those courts that have been willing to order financial or substantive remedies would still likely refuse to intrude on a function so essentially legislative as the delegation of authority to school districts, just as, for example, they would be unwilling to order a school choice regime without legislative authority.\textsuperscript{121}

Given a disestablishment statute, however, this reluctance should evaporate. Courts ordering disestablishment with statutory sanction are merely ordering that bureaucratic reality be made consistent with legislative policy.\textsuperscript{122} Indeed, a disestablishment remedy may be particularly attractive to those state courts that have recognized the paramount obligation of the state legislature vis-à-vis local school districts but have been unwilling to invalidate interdistrict financial inequities.\textsuperscript{123} While the first plaintiffs to request the remedial disestablishment of a failing school district in a state supreme court were recently turned away, the resulting unaffected." McUsic, The Use of Education Clauses, supra note 32, at 928. While this has not been true of third-wave remedies advocated to date, it does apply to disestablishment.\textsuperscript{121}

Here Broden's argument falls apart. Although Broden writes in the wake of New Jersey's pioneering takeover statute, he never suggests that the statute is a necessary or even desirable prerequisite to the use of takeover as a judicial remedy. Indeed, in arguing that disestablishment comports with "judicial competence or legitimacy," Broden, supra note 118, at 813, Broden praises open-ended judicial standards on the grounds that "judicial discretion may be a necessary and therefore legitimate substitute for political discretion." Id. at 810 (quoting William A. Fletcher, The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy, 91 Yale L.J. 635, 637 (1982)). It seems unlikely that many courts would agree.\textsuperscript{122}

Of course, state education codes make disestablishment a function not only of the failure to meet objective criteria but of a discretionary administrative determination as well. See supra note 98 and accompanying text. Review of such discretion, however, is routine for courts.\textsuperscript{123}

See, e.g., Committee for Educ. Rights v. Edgar, 672 N.E.2d 1178, 1186, 1196 (Ill. 1996) (noting the Illinois constitutional requirement that "[t]he State has the primary responsibility for financing ... education," but declining to order financial remedies); Fair Sch. Fin. Council v. State, 746 P.2d 1135, 1138, 1143 (Okla. 1987) (holding that the Oklahoma Constitution places responsibility for public education on the legislature, but refusing to order financial remedies because of the simultaneous inclusion in the constitution of provisions authorizing an \textit{ad valorem} property tax for education-related purposes). But see City of Pawtucket v. Sundlun, 662 A.2d 40, 55 (R.I. 1995) (holding that the constitutional "duty of the general assembly to promote public schools ... and to adopt all means which it may deem necessary and proper to secure to the people the advantages and opportunities of education," R.I. Const. art. XII, § 1, confers no right to an "equal, adequate, and meaningful education").
decision suggested that a statutorily-based argument might eventually command its assent. If that suggestion bears fruit, statutorily-based disestablishment offers a remedy well matched to a violation of a statutorily-defined right.

III. THE MORNING AFTER: DISESTABLISHMENT AS A TOOL FOR POSITIVE EDUCATIONAL CHANGE

Doctrinal questions aside, the primary test of disestablishment, as of any other structural remedy, must be whether it is likely to help children attending inadequate schools. This Part, which consists of two sections, argues that it is. The first section presents theoretical and structural reasons that disestablishment should improve incentives in poor schools. The second discusses the relatively meager empirical record that disestablishment efforts associated with state takeovers have generated since 1989.

A. Disestablishment and Educational Incentives

1. Incentive-Based Critiques of Educational Governance. — Many critics of American schools, if asked to consider disestablishment as a potential remedy for academic deficiency, would be immediately dismissive. They would concede that disestablishment, unlike, for example, school finance reform, focuses on exactly the right problem: the management of schools. But these critics—whether on the left or the right—would also say that disestablishment is precisely the wrong solution. All it does is replace local school bureaucrats with state (or, in the less frequent case, mayoral) bureaucrats; it’s just more of the same, failed approach.

Such arguments cast some doubt on the remedy’s potential. In their famous brief for school choice, Professors John Chubb and Terry Moe claim poor school management is “inherent” in “institutions of democratic control.” Chubb and Moe argue that subjecting schools to popular government unavoidably opens them up to constituencies with inter-

124. See Lewis E. v. Spagnolo, 710 N.E.2d 798, 801–02, 814–15 (Ill. 1999). The suit was brought on behalf of students in East Saint Louis, Illinois, a school district infamous for its decrepitude, see Kozol, supra note 12, at 23–99, and one whose financial affairs had already been under state control since 1994, see Lewis E., 710 N.E.2d at 801; Berman, supra note 104, at 56 n.1. Lewis E. held that the plaintiff’s claim under the state constitution was “solely for the legislative branch to answer,” 710 N.E.2d at 802 (quoting Committee for Educ. Rights, 672 N.E.2d at 1189). The Lewis E. court thus suggested, erroneously in my view, that political-question and separation-of-powers arguments for nonintervention in educational matters do not depend on whether the requested remedy is financial or incentive-based. (The Lewis E. plaintiffs also requested financial support for remedial programs, see 710 N.E.2d at 802.) At the same time, the Lewis E. court suggested that where the constitutional claim failed, a well-pled mandamus action based on the Illinois school code might succeed. See id. at 814–15. Reliance on the code for the remedy as well as for the right might further increase the chances of success.

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ests other than the education of children. The failure to emphasize education "is not something that is temporary or the product of mistakes" but "is deeply anchored in the most fundamental properties of the system." Disestablished, publicly-run schools would presumably suffer no less from these deficiencies than those where local authority remained intact.

While Chubb and Moe have been thoroughly criticized on both methodological and policy grounds, more moderate versions of their claim that political and educational interests often diverge in public schools, typically to education's detriment, are quite widely accepted. Somewhat ironically, this view has even influenced current reform fashions in the educational establishment, where school-based decisionmaking and radical decentralization are now touted as solutions to America's educational woes. For Chubb and Moe, disestablishment is arguably pointless; but for advocates of decentralization, it is positively pernicious, since its emphasis on increased state control represents movement away from local governance. Decentralization advocates would likely find in state or mayoral school administrations the same (if not more) rigidity, hierarchy, and stifling of the life of the mind that they object to in standard schools.

126. See id. at 52 ("The schools are agencies of society as a whole, and everyone has a right to participate in their governance. Parents and students have a right to participate too. But they have no right to win. In the end, they have to take what society gives them.").
127. Id. at 188.
128. See id. at 30 (noting that states as well as school districts participate in school governance and are subject to the authors' critique).
130. See, e.g., Henig, supra note 57, at 7–25, passim; Liebman, Voice, Not Choice, supra note 69, at 277–293.
131. See, e.g., Susan H. Fuhrman, The Politics of Coherence, in Designing Coherent Education Policy: Improving the System, supra note 80, at 1, 6 (noting that "[e]ducators may believe it is in their self-interest to keep policymakers out of educational business," though urging them to moderate this belief); John E. Brandl, Governance and Educational Quality, in Learning from School Choice, supra note 64, at 55, 55–56.
These critics are right to focus on the ways that incentives lead education policies to diverge from educational needs. However, they often seem to forget that bureaucratic and political incentives are not fixed concomitants of institutional arrangements. They therefore attribute failures too quickly to overarching approaches to governance—central control for advocates of school-based governance, public management of any kind for choice proponents—rather than asking, more conservatively, how existing institutions might be modified to create more salutary incentives. Choice advocates like Chubb and Moe seem not even to contemplate the possibility that educational competition could be enhanced by way of political institutions rather than markets. Disestablishment, which alters the relationship between state and school district without abolishing either, does precisely that.

Disestablishment, therefore, should be imposed by courts—and, indeed, adopted by states—if it improves incentives. The remainder of this Part considers the incentives that are likely to flow from the operation (and the judicially-mandated enforcement) of disestablishment provisions that replace local school bureaucrats with state (or, in the rarer case, mayoral) appointees. It should be emphasized, however, that disestablishment is a differential policy that applies only to inadequate districts. Even absent systematic differences between state and local school bureaucrats, replacing local bureaucrats who have demonstrated their inadequacy is almost certain to be an improvement. Conversely, the incentives faced by clearly competent school districts shift almost imperceptibly under a disestablishment regime.

2. Incentives at the District Level. — There are several ways that disestablishment might improve institutional incentives for officials entrusted with failing schools. First, local school bureaucrats may be subject to particularly harmful incentives not shared by state bureaucrats. One reason for this is that school districts are often the largest employer in poor communities. District officials, dependent on and close to the local electorate,

134. Cf. Brandt, supra note 131, at 64–65 (“No one should . . . dismiss[] this argument as bureaucrat or teacher bashing. The argument presumes that government employees are similar in their proclivities and talents to everyone else.”).


136. See Wilbur C. Rich, Black Mayors and School Politics 4–5 (1996) (“Schools are one of the major linchpins of the urban economy. . . . School districts have big budgets, hiring thousands of local residents and purchasing a variety of products and services. . . . School districts generate millions of dollars for the local economy.”); Fry, supra note 135,
rate, but functioning with relatively little visibility or media attention, thus
face demands for employment, and sometimes for patronage and nepo-
tism, that can be at least as strong as demands for quality education.137
Temptations and opportunities for corruption may also be greater at the
district than at the state level.138

Second, state-appointed school superintendents need answer to no
one at the local level; they are responsible to only one government—the
state government—rather than two.139 State-appointed school officials
thus enjoy unusual freedom of action.140 More important, if disestablish-
ment is a realistic threat—either because states pursue it on their own
accord or because courts order them to do so—district personnel gain a
strong incentive to succeed: They fail at the price of their jobs.141 A well-
advertised disestablishment regime thus may deter nonfeasance and mal-
feasance by local school officials.142

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137. See Rich, supra note 136, at 5; Clarence N. Stone, Introduction: Urban
Education in Political Context, in Changing Urban Education, supra note 64, at 1, 9
("[T]he protection of jobs and career ladders is often at the heart of how education
politics is organized."); see, e.g., Peter Applebome, Failure Calls Illinois City Home Turf,
N.Y. Times, Oct. 30, 1994, at A15 (reporting "contracts and jobs apportioned to friends or
relatives of school board members" in East Saint Louis, Illinois); Caroline Hendrie, Calif.
District Takeover Faces Political Threat, Educ. Wk., June 11, 1997, at 5 (reporting
"nepotism, corruption, and graft that had really run the [Compton, California] district
into the ground"); Wayne King, Longer Year Is Advocated For Schools, N.Y. Times, Jan. 6,
1992, at B1 (reporting "[b]id-rigging, kickbacks, payoffs, nepotism and featherbedding" in
the Jersey City school system).

138. Corruption has been a motivating force behind many of the takeovers that states
have undertaken without court pressure. See, e.g., Caroline Hendrie, Ill Will Comes With
Territory in Takeovers, Educ. Wk., June 12, 1996, at 1 (charges of corruption and missing
funds leading to an IRS and FBI raid on school district headquarters in the Texas school
district of Wilmer-Hutchins).

139. See Laval S. Wilson, Takeover. The Paterson Story, Am. Sch. Board J., Dec. 1994,
at 22, 22.

140. See id. at 22, 25. Wilson, the state-appointed superintendent of the Paterson,
New Jersey, schools, writes: "I serve not only as superintendent but... as school board,
too... Being a chief school officer who has a school board's authority to make decisions
is every superintendent's dream... How long would it have taken to persuade the local
school board of the merits of various reforms?"

141. See Fuhrman & Elmore, supra note 135, at 27 (noting that takeover laws may
have "a deterrent effect on troubled districts and schools," but saying that deterrence was
outside the scope of their study).

142. Disestablishment is becoming a well-enough established feature of the political
landscape to appear in journalists' accounts of the perils facing school administrators. See,
e.g., Daniel McGinn, The Big Score, Newsweek, Sept. 6, 1999, at 47, 47 (noting that the
school accountability movement has meant that "[e]ducators can lose pay or be fired;
schools can face state takeover"); Sorting Out School Choice, The Economist, Sept. 4,
The critique of the current system of public school governance by advocates of school choice rests on the principle that school officials face no negative consequences for poor performance.\textsuperscript{143} Top-down substantive reforms, like those proposed by Professors McUsic, Weckstein, and others, do not alter these incentives.\textsuperscript{144} Choice would, in theory, provide such incentives, but only contingently: Even schools that educate poorly may succeed, or succeed for a while, depending on a host of factors, such as the extent of competition, the nature of the student population, levels of consumer information, and so on. By contrast, disestablishment laws—especially those being enforced under judicial mandate—deter incompetence much more directly.\textsuperscript{145} Indeed, the changes in policy and practice made in school districts that are sensitive enough to the threat of takeover to ultimately avoid its sanction may be the great successes of academic bankruptcy policy, while taken-over districts may represent its failures.\textsuperscript{146} A fully successful takeover policy would result in no takeovers.

Disestablishment thus offers an alternative both to hierarchical bureaucracy and to the market. It is a model of intergovernmental, rather than private, competition over control of schools. It responds to the institutional critique of those who advocate competitive markets for K–12 education; like school choice, it relies on the self-interest of district officials, rather than on top-down bureaucratic pronouncements, to produce results. At the same time, by harnessing the state/district intergovernmental structure of American education, the approach offers those who eschew private educational markets a thoroughly public approach to structural reform.\textsuperscript{147}

3. \textit{Incentives at the State Level}. — Potential incentives for state officials are less clear-cut. The critical problem with the operation of a disestablishment remedy at the state level is exactly the opposite of the problem with school finance reform or redrawing school district lines: It is likely

\textsuperscript{143} See Michael Cohen & Chester E. Finn, Jr., A Dialogue Between Two Educators, in \textit{School Choice: Examining the Evidence}, supra note 129, at 319 (views of Chester Finn).

\textsuperscript{144} See supra notes 49–51 and accompanying text.

\textsuperscript{145} Some of the legislators involved in passing the New Jersey takeover law viewed deterrence as a primary feature of the takeover regime. See Dolan-Dabrowski, supra note 135, at 12.

\textsuperscript{146} See \textit{Texas v. United States}, 523 U.S. 296, 300 (1998) ("Texas hopes that there will be no need to appoint a master or management team for any district" under its takeover legislation).

\textsuperscript{147} Arguments against reliance on markets are extensive. Opponents worry that market forces will exacerbate inequity by multiplying the educational advantages already enjoyed by the rich, the educated, and the motivated. Moreover, opponents argue, such market inequity is less acceptable in education than in other areas, because public schools play a crucial social role in inculcating civic virtue and creating social mobility. See Henig, supra note 57, at 20–25, 188–95. For a more critical summary of these arguments, see Paul E. Peterson, \textit{School Choice: A Report Card}, in \textit{Learning from School Choice}, supra note 64, at 23–28.
to be too politically appealing to states. This is not to say that school disestablishment is not accompanied by fierce political resistance in districts subject to its sanction. Indeed, threatened local school district officials and their supporters fight tooth and nail to retain their jobs and their power. Disestablishment does not, however, engender statewide political resistance in the way that financial remedies have, since the policy has no direct impact on most of a state official’s constituency. States that have struggled under mandates to spend new money or to redistribute wealth—both of which states are loath to do—are likely to jump at a remedial regime that is not only revenue-neutral but also preserves the status quo in most suburban school districts.

Moreover, if districts are to be taken over, the states that will be given an enormous amount of discretion over the affairs of failing schools are the same states that have failed those schools so dramatically in the past. Veterans of educational litigation against the states are not unreasonably wary of a remedy that increases state power. Indeed, they might see in states’ widespread adoption of disestablishment laws an effort by legis-


149. See, e.g., Abbott v. Burke (Abbott I), 710 A.2d 450, 480 (N.J. 1998) (reporting a lower court conclusion that “it was ‘almost impossible’ to expect the Governor” to recommend the school funding levels required by the court); Abbott v. Burke (Abbott II), 575 A.2d 359, 410 (N.J. 1990) (reporting, but rejecting, the request of plaintiffs in a school finance case to “set forth the consequences of a legislative failure to act” on the grounds that “the political problems created by court-mandated school finance reform “are so severe that unless the Legislature understands the cost of failure to conform, it may be institutionally unable to take the steps required”); Kimberly J. McLarin, Trenton Committee Snags on School Spending Plans, N.Y. Times, Mar. 31, 1994, at B6 (reporting deadlock on the New Jersey committee charged with developing a finance plan in the wake of Abbott).

150. See Broden, supra note 118, at 784 (describing New Jersey’s adoption of a takeover law as part of a comprehensive education reform package as “[t]he result of the [New Jersey Supreme Court’s] ruling” that funding inequities between the state’s richest and poorest school districts violated the state constitution); Jeff Archer, New Chapters Written in Saga of Conn. Desegregation Case, Educ. Wk., June 11, 1997, at 17 (quoting Connecticut Senator Thomas P. Gaffey as saying that the state takeover of the Hartford schools was a response to the holding in the Sheff v. O’Neill desegregation case, 678 A.2d 1267 (Conn. 1996)).

151. Cf. Enrich, supra note 18, at 181–82 (expressing concerns that adequacy theories of the right to an education give away too much in the fight for equality of educational
tures and governors to appear responsive to their high courts' education jurisprudence without providing new resources to poorly financed schools. States might argue that they accept the judicially articulated principle that they remain responsible for education in deficient districts, but that they choose to meet that responsibility by disestablishment and other management reforms rather than by providing such schools with additional funds.

However, these political incentives cut both ways. The very political benefits that make disestablishment politically attractive to states may lead governors and legislators to pursue it seriously rather than to mount rear-guard resistance. The political visibility of disestablishment is also likely to lead to at least a good-faith effort to clean up districts once they are disestablished. Such efforts sometimes produce results.152

More basically, disestablishment creates political accountability in the same level of government that has legal accountability. When school districts, generally ignored by all but a tiny fraction of the electorate, do not stand between states and voters, voters are more able—and, it is to be hoped, more willing—to hold states directly accountable for educational failure. And this is as it should be: The judicial conclusion that states may not hide behind the delegation of their responsibilities to school districts ought to apply in politics as much as in courtrooms. A disestablishment remedy forces states to face head-on, in the political arena, their responsibility for the decisions they make about how best to provide the educational services that their constitutions—and constituents—require.

B. The Empirical Critique of Disestablishment

State takeovers over the past decade, and the more recent mayoral takeovers, have generated not only theoretical arguments about the incentives they produce, but some empirical evidence as well. Early, limited studies of state takeovers suggested that, whatever its theoretical potential, takeover was a failed policy in practice. However, more recent—if somewhat less systematic—evidence suggests that this conclusion was at best premature.

The only takeovers that have been the subjects of academic study—the 1989 state takeovers of Jersey City, New Jersey and Floyd and Whitley Counties in Kentucky154—were characterized thus in 1992:

opportunity, but nevertheless advocating them as the best available way to improve schooling).

152. See infra notes 161-162 and accompanying text.
153. See supra note 115.
154. The Kentucky takeover laws, which authorized the Floyd and Whitley County actions, were among the provisions declared unconstitutional by the wholesale rejection of the Kentucky Education Code in Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 215 (Ky. 1989); the takeovers were therefore aborted soon after they began. See supra note 102. Rose makes no specific mention of the takeover provision.
Takeover programs can have very little to do with long-term educational improvement. The Kentucky and New Jersey programs have operated to promote goals other than improvement.

...In neither Kentucky [n]or New Jersey, was state agency presence felt in the schools. No technical assistance seemed to filter down. The states sent messages about their priorities that were received by school personnel. Whether or not they intended it, state policymakers indicated that their interest did not really lie in school-level improvement.

In our opinion, if takeover fails to improve teaching and learning, it is not worth the stigma suffered by school personnel and communities.155

This study also reports that state takeover officials "focus[ed] almost entirely on administrative reorganization . . . , risking [their] credibility by failing to focus on educational problems."156 Nor did the state reach the more limited goals of improving state responsiveness to local circumstances or even of improving state oversight.157 Also, because takeover in these states did not include the power to dismiss the teaching staff and other local personnel,158 these employees engaged in a "politics of waiting" that reflected the conviction that they would outlast the state interlopers, and that had the effect of undermining state initiatives.159 At the same time, the management reforms of the state appeared to have no direct relationship to the practice of teaching or the academic performance of students. One can almost hear the critics of bureaucracy asking, what did you expect?

Nevertheless, there are reasons to distrust the empirical evidence against takeover. Its force is undermined by the fact that all of the available academic studies of takeover were conducted early in the takeover process. The studies therefore overemphasize short-term implementation problems and may miss longer-term effects. As Dr. Beverly Hall, the first state-appointed superintendent of schools in Newark, N.J., noted, "Increases in test scores are expected and should be expected . . . . What is unrealistic is the time frame that the public and others have for accomplishing it."160

The early academic studies have not been followed by longer-term scholarly analyses. However, journalists' and insiders' descriptions of

156. Id.
157. See id. at 30, 32.
159. Rettig, supra note 101, at 241; see id. at 241-44.
160. Mahtesian, supra note 103, at 38.
takeovers past their earliest years tend, if somewhat sketchily, to report management improvements in taken-over schools, suggesting that the policy's organizational costs are concentrated in the first years of implementation.\textsuperscript{161} At the same time, while early studies argued that there was no clear link between reform of school-district management and the practice of teaching or the success of learning, later accounts tend to report cases where taken-over districts begin to show improvement in educational performance after several years.\textsuperscript{162} It is of course difficult to assess these claims, which have yet to be confirmed by systematic study; still, the weaknesses of the early studies are apparent.

In addition, no empirical work has assessed whether district officials change their behavior if they face the real possibility of losing their jobs when their students fail to learn. While deterrence is difficult to study, ignoring it completely is the outstanding limitation of the empirical studies of takeover. If in fact the successes of disestablishment statutes are to be found in districts that reform themselves to avoid state sanctions,\textsuperscript{163} the exclusive focus of the empirical literature on early takeover implementation is positively contrarian.\textsuperscript{164}

\textsuperscript{161} Compare Tewel, supra note 92, at 228 (reporting "demoralization," "cynicism," and the "equivalent of war" in the monitoring process leading up to the Jersey City takeover, leading to the "brutalization of the education provided for the children of Jersey City"), and Lynn Olson, Veterans of State Takeover Battles Tell a Cautionary Tale, Educ. Wk., Feb. 12, 1997, at 25 (quoting state-appointed superintendent in Cleveland's complaint that "it is almost impossible for us to move quickly"), with David J. Hoff, W.Va. Leaves District Better Than It Found It, Educ. Wk., Sept. 18, 1996, at 17 ("West Virginia has relinquished the reins of a struggling school system [in Logan County], leaving behind a rare state-takeover success story: a state-hired superintendent in charge of a system with higher test scores and better management and buoyed by local acceptance."), and Mahtesian, supra note 103, at 38 (reporting findings of an independent evaluation, conducted four years into the Jersey City takeover, of "impressive" and "substantial" managerial and fiscal improvement).

\textsuperscript{162} Compare Berman, supra note 104, at 70 ("It is unclear just what linkage state school-administrators in New Jersey and elsewhere have seen between improved school management and student achievement.")}, with Dan Weissmann, State Takeovers Painful But Productive, Catalyst, Mar. 1993, at 7, 7 ("[Takeover] was a hell of an embarrassment to the kids as well as the community, ... [but] it gets results." (discussing state takeovers in South Carolina), and Andy Newman, Jersey City Schools Improve, N.Y. Times, Aug. 8, 1996, at B1 (New Jersey ed.) (state officials reporting "marked improvement" on standardized tests seven years into the Jersey City takeover).

\textsuperscript{163} See supra notes 141–146 and accompanying text.

\textsuperscript{164} Fuhrman & Elmore, see supra note 135, do seem to understand takeover as a policy that is designed to change intergovernmental incentives, since they consider academic bankruptcy policy in a study whose subtitle is "Working Models of New State and Local Regulatory Relationships." Nevertheless, they focus their attention exclusively on relationships that follow in the wake of takeover, ignoring those that precede takeover as well as those in districts that ultimately are not taken over.
IV. Disestablishment, Local Control, and Minority Political Participation

Professor Richard Elmore calls state takeover a policy that "effectively overrid[es] local governance structures in the interest of state policy objectives." Professor Paul Berman sees in it the possibility of "dismay for local officials." It is clear that disestablishment statutes, even as they leave most school districts untouched, shift power from local authorities to states. Disestablishment therefore troubles those who value local control over education independently of its utility as a technique of educational management. This Part argues that such concerns should not deter courts from imposing disestablishment remedies.

Although local school governments are generally not mandated by the texts of state constitutions, local control remains an important norm in American education. The United States Supreme Court has insisted that "[n]o single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to [the] quality of the educational process." Several states have joined the Court in treating local control as a quasi-constitutional norm, even though their state constitutions make only ambiguous references to—or, in some cases, no mention at all of—local school governance. Some state courts have also upheld funding disparities between poor and rich school districts by finding a state's interest in local control to be a rational basis for treating districts unequally.

Local control over schooling serves a range of values. Milliken itself claims that local control enhances "community concern" for, and the "quality" of, education. Professor Briffault adds that local control can serve the values of parental control over children, administrative and economic efficiency, accountability, and democratic participation. Echoing several of these points, Professor Elmore also argues that locally-based

166. Berman, supra note 104, at 70.
167. See supra notes 78–81 and accompanying text.
171. 418 U.S. at 741–42.
172. See Briffault, supra note 78, at 785–98.
school districts may help to counterbalance the redistributive tendencies of state politics by focusing on allocative, service-based concerns; they may also permit readier adaptation of federal and state policies to local circumstances. Judge Weinstein suggests as well that local school districts may “avoid[] the growth of bureaucracy that deadens local initiative” and provide more responsive government. Finally, urban school districts provide an environment that nurtures non-white political power.

Many of the values on this impressive list, however, lose their force when applied to district disestablishment, for the simple reason that disestablishment preserves local control except in a relatively narrow category of jurisdictions: those where local control is failing. Deficient local school districts are inefficient, surely in the administrative sense and almost as certainly in the economic one. They allocate resources poorly. They presumably express federal and state educational policy badly if at all. They are, by definition, of low quality. On the other hand, local school districts that are adequate remain unaffected by a disestablishment statute or associated judicial remedy. Moreover, because the vast majority of school systems fall into the latter category, efficiencies that arise from the system of local school districts, such as interdistrict competition among public school systems, are essentially unaffected by disestablishment.

One set of issues, however, remains: Even in inadequate school districts, local control offers citizens opportunities for political participation, catalyzes the growth of community-based political coalitions, and nurtures the careers of local political leaders. Moreover, since educational deficiency is concentrated in school districts that serve racially and economically heterogeneous populations, where opportunities for political voice have historically been limited, disestablishment is likely to reduce such opportunities particularly in minority communities, where voice is critical, while leaving most majority-dominated school districts firmly subject to local preferences.

173. See Elmore, supra note 165, at 106–09.
176. For a description of public school competition, and a too-enthusiastic endorsement of its virtues, see William A. Fischel, How Judges are Making Public Schools Worse, City J., Summer 1998, at 30, 40.
177. See Henig et al., supra note 2, at 11.
178. See Rufus P. Browning et al., Can Blacks and Latinos Achieve Power in City Government? The Setting and the Issues, in Racial Politics in American Cities 3, 5 (Rufus P. Browning et al. eds., 1990) (documenting growth in the number of blacks and Latinos holding major public offices, but noting that this does not mean that “blacks and Latinos [have] achieve[d] meaningful participation in city government”).
179. While no statistically rigorous study has been conducted, a survey of 21 school districts subjected to state or mayoral takeovers by legislative or administrative authorities found that “all but three have predominantly minority enrollments, and most are at least
dominated legislatures” determining the fate of minority school districts are hard to ignore. Ignoring race becomes impossible when legislatures and governors dependent on majority-white constituencies fire locally elected officials and appoint their own chosen boards and superintendents in their places. In short, disestablishment does seem to have discriminatory racial impact and to constrain the political incorporation of minorities, particularly of African Americans.

It is unsurprising, therefore, that many inner city communities characterize disestablishment as colonialist, racist, and worse. Courts contemplating invoking a disestablishment statute could not help but worry about opening themselves up to such accusations, nor could they but wonder whether such accusations contain a germ of truth. Ultimately, however, the charges against disestablishment are too glib. Disestablishment does not pose a binary choice between political voice and adequate

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80 percent nonwhite. Of eight districts that have been threatened with takeovers, all but two have populations that are predominantly minority, and three are at least 93 percent nonwhite.” Beth Reinhard, Racial Issues Cloud State Takeovers, Educ. Wk., Jan. 14, 1998, at 1.

180. Henig et al., supra note 2, at 267 (racial implications are “widely understood by those involved”).

181. See id. at 267–68.

182. A government policy’s disparate racial impact does not violate the Fourteenth Amendment unless it can be shown to have been developed or applied with explicit racial animus; therefore, even if statistically significant evidence of disparate racial impact were found, disestablishment policy would not violate federal equal protection guarantees. See Personnel Adm’r v. Feeney, 442 U.S. 256, 272 (1979). It has been argued, however, that disestablishment violates the Voting Rights Act, 42 U.S.C. § 1971 (1994), since it differentially deprives residents of particular minority communities of a right to vote for school officials that residents of other communities retain. The Assistant Attorney General for the Civil Rights Division of the U.S. Department of Justice suggested in 1997 that there might exist circumstances in which covered jurisdictions under the Voting Rights Act would have to secure Justice Department approval for takeover, see Texas v. United States, 523 U.S. 296, 299 (1998), but the United States Supreme Court declined to make such a ruling, instead holding the question unripe, see id. at 302. Since that time, a federal district court has held that the disestablishment of an elected school district with a transfer of power to mayoral appointees does not violate the Act because “the Voting Rights Act does not apply to appointed officials.” Spivey v. Ohio, 999 F. Supp. 987, 997 (N.D. Ohio 1998). The United States Department of Justice has also investigated whether the state takeover in Compton, California, violated the Voting Rights Act. See Laura Mecoy, State-Run Schools Get Mixed Marks, Sacramento Bee, June 15, 1997, at A1. A full analysis of the voting rights issue is beyond the scope of this Note.

183. See Rich, supra note 136, at 9 (“Recentralization and state receivership are real threats to [African Americans’] newly acquired political power over schools.”).

184. See, e.g., Henig et al., supra note 2, at 270 (quoting an African American opponent of state participation in Baltimore school reorganization as saying, “You want to know how [the state’s involvement] comes across? It comes across as racist. The undercurrent I see is, ‘These black people can’t learn, so why spend money on them?’”); Joseph Berger, Mixed Reviews for School Takeover Plan, N.Y. Times, June 8, 1995, at B4 (quoting charges by residents of Roosevelt, Long Island, that state takeover was “an insult to Roosevelt’s predominantly black community”).
education; rather, it offers educational improvement at some cost in political autonomy.

Courts, like legislatures, cannot and should not try to deny that tradeoff. To transfer authority for an urban, majority-black school district from local to state officials is to shift power over the lives of blacks from blacks to whites. A taken-over school district is an institution of local political life no longer available to a community and its political leaders. The likelihood that takeover will disproportionately be applied in non-white districts constitutes an additional setback to minority political incorporation and to the perception of equity in the political system.

In the few but visible cities where disestablishment statutes require the transfer of power from local school officials to city mayors rather than to state officials, the relationship between incorporation and disestablishment is more subtle but just as real.\textsuperscript{185} Even though leadership of schools remains at the local level, there are several reasons to think that disestablishment will nonetheless undermine minority political power. Mayoral disestablishment reduces the autonomy of the schools\textsuperscript{186} and destabilizes their administration,\textsuperscript{187} in an environment where minority influence over the schools may already be tenuous. Moreover, such destabilization is biased towards central authority: In large cities where elected school governments have been the norm, to shift to mayoral authority is to concentrate power. Such concentration not only reduces the number of opportunities for minority politicians to build coalitions and support, but, by moving education from the arena of the special election to that of the general, it reduces the political reach of a school-centered power base.\textsuperscript{188} Finally, as the number of independent minority politicians shrinks, concerns may grow about their allegiances. Mayors, who gain power when state officials award them control of the schools, may feel beholden to their benefactors in the statehouse. And any straightforward political quid pro quo is likely to be less problematic than the general tendency of urban mayoralities to serve downtown business interests, often to the ex-

\textsuperscript{185} Court involvement in ordering mayoral-based disestablishment is particularly unlikely. State legislation that authorizes the transfer of authority to mayors, though typically written as general legislation, nevertheless tends to apply only to one or a handful of large cities. See supra notes 92–94. Since such legislation is generally applied to the cities it targets without judicial intervention, see supra note 106, it is a limited tool for courts. Thus, the general association of disestablishment with state takeover will intensify when disestablishment is court-ordered.

\textsuperscript{186} See Michael N. Danielson & Jennifer Hochschild, Changing Urban Education: Lessons, Cautions, Prospects, in Changing Urban Education, supra note 64, at 277, 278.

\textsuperscript{187} See Henig et al., supra note 2, at 270 ("Shifting the decision-making venue sometimes destabilizes local-level coalitions.").

\textsuperscript{188} See, e.g., Marion Orr, The Challenge of School Reform in Baltimore: Race, Jobs and Politics, in Changing Urban Education, supra note 64, at 93, 98, 101 (documenting years of conflict between a white mayor and black school leadership in Baltimore and noting the mayor's relative lack of interest in educational issues).
clusion of other constituencies' demands for social services. It is thus unsurprising that community hostility to mayoral takeovers can be just as strong as resistance to direct state management.

But while there are real trade-offs between disestablishment and incorporation, neither the amount nor the quality of the political incorporation that independent local school governments offer minority communities should be exaggerated. Independent school boards, for example, are almost invisible players in the educational politics of big cities. Where education is an issue in city politics, it is unlikely to play out at the school board level.

More basically, the quality of political participation and voice offered by school districts is quite poor. The very pathologies of local control are what motivate the relocation of educational authority to the state level. Mayors may be fairly accused of being overly responsive to business interests, but school boards have long been just as thoroughly captured by elites. Boards in inadequate urban school districts may be particularly prone to capture. Professor Rich reports that school boards in the several urban school districts he studied were "cartel-like" organizations, co-opted by the white educational establishment and selected in elections biased toward incumbents, union-backed candidates, and middle-class professionals. Rich concludes that "the local district system, as it is now constituted, promotes racial and class apartheid" that can be ameliorated by state takeover. While not all scholars go as far as Rich,

189. See, e.g., Stephen L. Elkin, City and Regime in the American Republic 30–34 (1987) ("There is a strong tendency for public officials and local businessmen, particularly those with fixed assets, to regard each other with fond interest."); Richard Briffault, Our Localism (pt. 2), 90 Colum. L. Rev. 346, 409 (1990) ("Although the rise to power of black and Hispanic mayors in most of the nation’s largest cities . . . has increased the role of minority and neighborhood interests in urban government, the imperatives of protecting the local tax base and maintaining access to capital markets continue to structure urban politics.").

190. See, e.g., Brian Harmon, Protestors Rally Against Takeover, Detroit News, Feb. 17, 1999, at A3 (quoting African American opponents of Detroit’s mayoral takeover as accusing state government of "wearing a white sheet"); Reinhard, supra note 179, at 18 (quoting Rev. Michael DeBose, Cleveland school board candidate, as saying "When you've got black people in charge and a majority-black district, people think they don't know what they're doing . . . It's really insulting.").

191. See Danielson & Hochschild, supra note 186, at 278. This does not imply, of course, that school boards do not affect schools in important ways that are off of the political radar screen.

192. See Henig et al., supra note 2, at 50 ("Rather than occupying a separate political sphere, school politics in Atlanta, Baltimore, Detroit and D.C. became intertwined with city politics writ large.").

193. See supra notes 136–142 and accompanying text.

196. Id. at 208.
197. Id. at 207.
198. Id. at 211.
many observers have noted school boards’ focus on the employment and career needs of administrators and employees to the frequent detriment of the educational needs of broader constituencies.199

In short, disestablishment creates a trade-off but not a bad deal. Academically bankrupt school districts are far from ideal political institutions, and are clearly intolerable as educational institutions. Local control may be a quasi-constitutional value, but adequate education is in many states a black-letter constitutional right, and in all states a more important value than local control—especially since it is only the school district, and not general local government, that is losing power. Courts should therefore be willing, in the service of the right to decent education, to enforce the trade-off that the legislature has authorized.

As Professor Browning and his colleagues note, minority political incorporation involves not only the election of minority officials but the responsiveness of government to minority concerns.200 When minority-dominated school boards and superintendents privilege power and patronage while falling spectacularly short of providing minimal educational opportunity to black and other minority students, minority control cannot be characterized as incorporation. Indeed, when autonomy collapses, state paternalism may be more responsive than local control to the needs of minority communities. In any event, in a contest between local politicians and local students, state courts, along with state legislatures, are duty-bound to choose the children. They should not hesitate.

CONCLUSION

Courts, no matter what they do, are likely to continue to find themselves bit players in school reform. They cannot avoid this reality by pretending that their limits are not real. Thus, school district disestablishment is not a panacea. Indeed, perhaps its chief virtue as a judicial remedy is that it does not purport to be one. But no remedy will ever be fully adequate to solve a problem that rests so centrally in the hands of actors as autonomous and varied as teachers, local administrators, and parents. Courts can best help by inducing such people to make good decisions for the children in their charge. Disestablishment offers a way to restructure educational incentives so that people with the power to do so will improve the lot of children who today are being cheated by their schools, their school districts, and their states. Any partial progress towards that end—especially in states that have been reluctant to take larger steps—should be enthusiastically welcomed.

199. See, e.g., Stone, supra note 137, at 9 (describing typical urban school governance as guided by an “employment regime” rather than a “performance regime”).