

1994

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Michael M. Heise, *Goals 2000: Educate America Act: The Federalization and Legalization of Educational Policy*, 63 Fordham L. Rev. 345 (1994).

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Goals 2000: Educate America Act: The Federalization and Legalization of Educational Policy

Cover Page Footnote

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ARTICLES

GOALS 2000: EDUCATE AMERICA ACT: THE FEDERALIZATION AND LEGALIZATION OF EDUCATIONAL POLICY

MICHAEL HEISE*

INTRODUCTION

MANY American elementary and secondary school systems continue to confront serious challenges in educating students. Despite what many people—particularly parents—wish to believe, well-meaning educational reform efforts designed to improve student achievement have largely failed to attain their goals.¹ The publication in 1983 of *A Nation At Risk: The Imperative For Educational Reform*² alerted many Americans to the crisis facing the nation's educational system. The *Nation At Risk* report notes that while the American economy and society underwent dramatic changes during the past few decades, schools continue to educate students in largely the same way.³ The report argued that a static educational system in an increasingly dynamic economy and society creates profound risks for the United States.⁴ The authors of the *Nation At Risk* did not mince words: “[T]he educational foundations of our society are presently being eroded by a rising tide of mediocrity that threatens our very future as a Nation and a people.”⁵

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1. See, e.g., Chester E. Finn, Jr., *We Must Take Charge: Our Schools and Our Future* 235-37 (1991) (arguing that all reform efforts to date have amounted to mere “Band-Aids” and that it is necessary to fundamentally restructure how educational services are delivered in the United States); *id.* at xv (“[M]illions of . . . young Americans[] have been nurtured on a diet of educational junk food.”); Jonathan Kozol, *Illiterate America* (1985) (documenting illiteracy and its social and economic costs); Joseph Murphy, *The Educational Reform Movement of the 1980s: A Comprehensive Analysis, in The Educational Reform Movement of the 1980s, Perspectives and Cases* (Joseph Murphy ed., 1990) [hereinafter *Perspectives & Cases*] (noting the inability of public schools to properly educate students and introducing the various reforms instituted during the 1980s).

2. The National Comm’n on Excellence in Educ., *A Nation At Risk: The Imperative For Educational Reform* (1983) [hereinafter *Nation At Risk*] (examining the quality of education in the United States and offering practical recommendations for educational improvement).

3. *Id.* at 6-8.

4. *Id.*

5. *Id.* at 5.

The *Nation At Risk* report helped alert the public to the need for educational reform and provided initiative for federal leadership.⁶ Furious reactions swiftly followed the report. Since 1983, many parents, educators, civic and business groups, foundations, policymakers, and researchers have focused on educational reform efforts.⁷ Because the need for educational reform galvanized the public, it was not surprising to find local, state, and federal public officials preoccupied with educational reform plans. Numerous reports and analyses, many published after the *Nation At Risk* report,⁸ focused on the condition of the nation's educational system. Most of the reports and analyses reached the same conclusion: our schools are failing both our students and our society.⁹ Many of these reports provided the impetus for a flurry of educational reforms, particularly at the state level.¹⁰ Unfortunately, American student achievement remains stubbornly mediocre despite these numerous, well-meaning reform efforts. As Professors Finn and Walberg note, "[B]y most indicators, the problems pointed out by the National Commission on Excellence in

6. See generally Diane Massell & Susan Fuhrman, *Ten Years of State Education Reform, 1983-1993: Overview with Four Case Studies* (1994) (analyzing educational reform and policymaking during the 10 years following publication of the landmark *Nation At Risk* report).

7. Finn, *supra* note 1, at 9-11 (highlighting the problems and widespread dissatisfaction with the American educational system that prompted educational reformers to focus anew on basic skills and minimum competency tests).

8. See, e.g., Carnegie Forum on Educ. and the Economy, *A Nation Prepared: Teachers for the Twenty-first Century* (1986) (proposing a National Board for Professional Teaching Standards to establish national teacher competence standards and award board certificates to teachers who meet those standards); Education Comm'n of the States, *Action For Excellence* (1983) (bemoaning the academic performance of American students and recommending higher standards and attention to results); Joslyn Green, Education Comm'n of the States, *The Next Wave: A Synopsis of Recent Education Reform Reports* (1987) (surveying several recent reports, all of which concluded that the United States faces imminent economic decline unless the educational system makes students better prepared to enter the workforce). For a review of these reports and others, see Murphy, *The Education Reform Movement of the 1980s: A Comprehensive Analysis, in Perspectives & Cases*, *supra* note 1, at 3-55 (discussing the significant, diverse educational reform efforts initiated during the 1980s and their results, comparing them with earlier reform efforts, and noting the factors precipitating the reform efforts of the 1980s).

9. See *supra* note 8.

10. See generally Massell & Fuhrman, *supra* note 6 (discussing how state legislators and governors promoted the objectives highlighted in the reports). The 1980s witnessed reforms in several jurisdictions. For example, South Carolina enacted a comprehensive Education Improvement Act in 1983, and New Jersey instituted a number of educational reforms. The city of Chelsea, Massachusetts signed a 10 year contract with Boston University to revamp its troubled school system. Finn, *supra* note 1, at 52-62. See *infra* notes 57-65 and accompanying text (discussing reforms in California, Kentucky, North Carolina, Chicago, San Diego, Minnesota, Wisconsin, and Vermont).

Education remain essentially unsolved.”¹¹ From an educational perspective, our nation remains vulnerable.¹² As a result, educational reform endures as an important item on the social policy agenda.

In response to the sustained need to reverse a rising tide of mediocrity in American education, President Clinton signed into law the *Goals 2000: Educate America Act*.¹³ In so doing, the President ended a five-year process that began in 1989 when President Bush met with the nation’s governors—including then-governor Clinton—at the 1989 Education Summit at the University of Virginia.¹⁴ The Education Summit can be described fairly as historic, because at no other time in this country’s history have the president and governors met to establish a set of national educational goals and to reallocate educational policy responsibilities among the federal, state, and local governments.¹⁵ Since the 1989 Summit, Congress and the White House have attempted to transform the broad outline forged at the Education Summit into legislation. Lawmakers spent years attempting to implement goals proposed at the Education Summit by translating them into statutory language acceptable to a varied constituency.¹⁶ This legislative effort culminated in *Goals 2000*, a comprehensive federal educational reform act which reflects the most recent reallocation of educational policymaking roles among federal, state, and local governments. Because the federal government initiated this most recent reordering of educational policymaking responsibilities, it will surprise few that *Goals 2000* dramatically increases the federal government’s educational policymaking role.

While *Goals 2000* marks the end of one five-year process, it signals the beginning of another process that likely will span several decades. The educational reform activities generated by *Goals 2000* will have at

11. Chester E. Finn, Jr. & Herbert J. Walberg, *Preface, in Radical Education Reforms ix* (Chester E. Finn, Jr. & Herbert J. Walberg eds., 1994) [hereinafter *Radical Education Reforms*].

12. The National Commission on Excellence in Education’s report in 1983 suggests that the weakness of our schools presents a national security risk:

If an unfriendly foreign power had attempted to impose on America the mediocre educational performance that exists today, we might well have viewed it as an act of war. As it stands, we have allowed this to happen to ourselves. . . . We have, in effect, been committing an act of unthinking, unilateral educational disarmament.

Nation At Risk, *supra* note 2, at 5.

13. Pub. L. No. 103-227, 108 Stat. 125 (to be codified at 20 U.S.C. § 5801 (Supp. 1994)) [hereinafter *Goals 2000*]. President Clinton signed the *Goals 2000* legislation into law at the end of March, 1994. William Celis III, *New Education Legislation Defines Federal Role in Nation’s Classrooms*, N.Y. Times, Mar. 30, 1994, at B10.

14. At the summit, the 51 chief executives set out six ambitious educational goals. See *infra* text accompanying note 70.

15. The National Education Goals: A Report to the Nation’s Governors (1990) [hereinafter *Summit Report*]. See also H.R. Rep. No. 168, 103d Cong., 2d Sess. 40 (1994), reprinted in 1994 U.S.C.C.A.N. 63, 67 (citation omitted).

16. See *infra* part II.B.

least two important consequences. Specifically, *Goals 2000* will increase the federalization—shift in control from state and local governments to the federal government—of American educational policy. The duties assigned to the newly created National Education Standards and Improvement Council¹⁷ (“NESIC”) will increase federal authority over educational policy, thereby diminishing state and local control. Such increased federalization of educational policy encroaches upon this country’s tradition of state and local educational policymaking.

Goals 2000 also will further legalization—a shift in supervision from representative bodies to the judiciary—of educational policymaking and implementation. Educational reformers who are partial to public law litigation will quickly seize upon newly implemented *Goals 2000* “content”¹⁸ and “opportunity-to-learn”¹⁹ standards to transform them into costly legal entitlements. Courts finding that funding increases are necessary to vitalize content and opportunity-to-learn standards will likely look to states and local school boards to provide the necessary financing. Therefore, *Goals 2000* provides an unusual opportunity for the federal government: it can increase its influence over educational policymaking, yet pass associated costs on to states and local school boards. The likely consequences of *Goals 2000*—the increased federalization and legalization of educational policymaking—distinguish this Act from past federal educational reform efforts.²⁰

Because *Goals 2000* is the product of Congress’—indeed society’s—growing concerns over the condition of education in this country, part I of this Article assesses the current condition of the educational system. To better place key components of the Act and their development into a broader legal and policy context, part II discusses traditional educational reform efforts, the 1989 Education Summit, and then introduces the crucial components of *Goals 2000*. Part III discusses how *Goals 2000* will further federalize educational policymaking. Part IV argues that *Goals 2000* will inject the judiciary further into the development and implementation of educational policies. This Article concludes that, although the Act serves as yet another important reminder of the problems that continue to plague American

17. Pub. L. No. 103-227, § 212, 108 Stat. 125, 139-42. See *infra* text accompanying notes 107-09 & part III.C (discussing the structure, functions, and influence of NESIC).

18. Content standards are a means of structuring a uniform national curriculum. Pub. L. No. 103-227, § 213(a), 108 Stat. 125, 142-43. See *infra* text accompanying notes 100-03.

19. Opportunity-to-learn standards provide a yardstick to evaluate school conditions necessary for a successful working environment for students. Pub. L. No. 103-227, § 213(c), 108 Stat. 125, 143-45. See *infra* text accompanying notes 104-06.

20. Whereas *Goals 2000* contemplates a systemic, national, uniform approach to educational standards, prior federal educational “reforms” traditionally stayed within narrowly defined areas. See *infra* part III.B; H.R. Rep. No. 168, 103d Cong., 2d Sess. 38 (1994), reprinted in 1994 U.S.C.C.A.N. 63, 65-66.

elementary and secondary education, it is unlikely that *Goals 2000* will make schools more effective for more students. Unfortunately, the Act's probable consequences—increased federalization and legalization of educational policymaking—are less favorable and have escaped serious consideration.

I. PROBLEMS CONFRONTING AMERICAN EDUCATION TODAY

Numerous recent educational reform efforts reflect increasingly sober concerns about the state of American education. Although more than a decade has passed since the *Nation At Risk* report was published, uneasiness with student achievement levels persists throughout the nation.²¹ Despite continuous, expensive, and well-meaning reform efforts, the performance of American teenagers in core academic subjects has declined steadily.²² In fact, the average SAT score dropped by forty-five points from the 1960s to the 1980s.²³ Performance of American students also fell in comparison with that of their foreign counterparts. In a 1990 assessment of student achievement involving fifteen industrialized nations, American thirteen year-olds ranked thirteenth in mathematics and science.²⁴

One troubling consequence of the educational system's problems is the erosion of the nation's economic competitiveness. Those who fail to learn fundamental skills as students usually become underskilled or illiterate adults. A substantial percentage of America's school age population fails to acquire even the basic knowledge and skills needed to survive in the workforce.²⁵ Indeed, many corporate executives have discovered that the labor pool is too poorly educated to provide qualified candidates for entry-level jobs.²⁶

In many instances, the underskilled lack a high school diploma.²⁷ Dropout rates are alarmingly high in many urban schools. As illustrated below, the dropout rate in 1991 was at least twenty-five percent

21. Albert Shanker, *National Standards, in Radical Education Reforms*, *supra* note 11, at 3.

22. Lewis D. Solomon, *The Role of For-Profit Corporations In Revitalizing Public Education: A Legal and Policy Analysis*, 24 U. Tol. L. Rev. 883, 886-87 (1993).

23. *Id.* at 887; *Nation At Risk*, *supra* note 2, at 8-9.

24. Solomon, *supra* note 22, at 886. American students also spend far less time in school than their foreign counterparts: the average school year is 180 days in the United States, 220 days in the United Kingdom, and 243 days in Japan. *Id.* at 887.

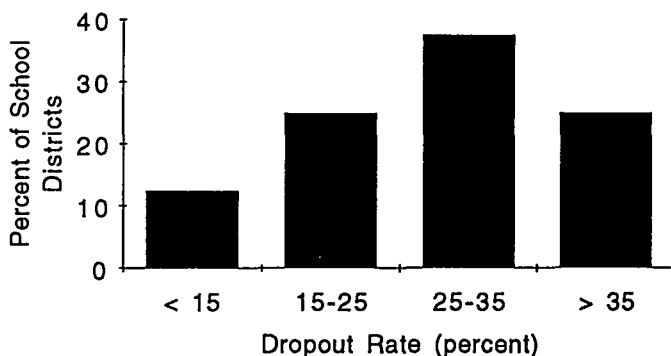
25. *Nation At Risk*, *supra* note 2, at 8-10. *See also* Solomon, *supra* note 22, at 886-88 (citing a study indicating that 13% of American 17 year-old students are illiterate and 40% of minority teens are illiterate).

26. *See, e.g.*, Finn, *supra* note 1, at 10 (noting that a poorly qualified workforce increases unemployment by forcing employers to move jobs offshore); David T. Kearns & Denis P. Doyle, *Winning the Brain Race: A Bold Plan to Make Our Schools Competitive* 136-37 (1991) (noting that business cannot succeed in the long run without effective public education).

27. In 1992, 13.2% of all 21 and 22 year-olds had not completed high school. National Ctr. For Educ. Statistics, U.S. Dep't of Educ., *Dropout Rates in the United States: 1992*, at 46 (1993).

for more than sixty-two percent of the schools in the country's largest urban school systems.

TABLE 1
URBAN SCHOOL DISTRICTS' DROPOUT RATES²⁸



Further, even high-school graduates are not necessarily prepared for today's increasingly knowledge-driven workplace.²⁹ In 1987, forty percent of those who entered the armed forces with reading skills at or below the ninth grade level were high school graduates.³⁰

Equally troubling is that student academic underachievement endures despite significant, ever increasing educational expenditures by federal, state, and local governments. The United States spent more than \$200 billion on public elementary and secondary education during the 1990-91 school year.³¹ This expenditure accounted for 3.8% of the 1991 United States Gross Domestic Product.³² In comparison, Japan spent 2.8% of its GDP on elementary and secondary education.³³ Indeed, one unifying theme in the history of modern American education is the consistent rise in inflation-adjusted spending.

28. Council of the Great City Schools, *National Urban Education Goals: Baseline Indicators 1990-91*, at 30 (1992) [hereinafter *Baseline Indicators*].

29. Green, *supra* note 8, at 6 (noting that today's economy creates an increased demand for workers with intellectual skills and that there is a consensus that the educational system does not adequately prepare students for the workforce).

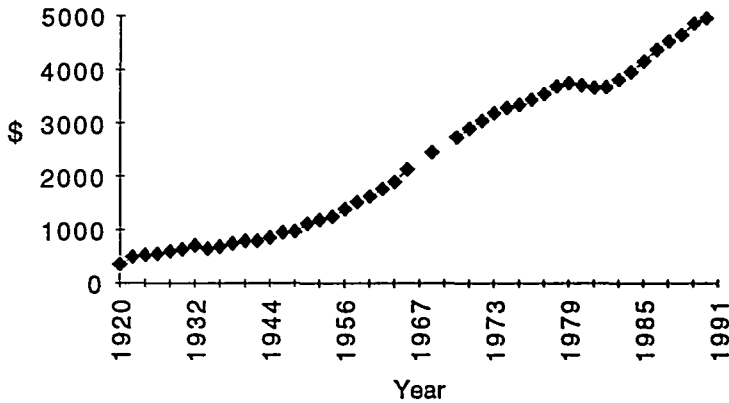
30. William J. Bennett, *American Education: Making It Work 10* (1988).

31. U.S. Dep't of Educ., *Digest of Education Statistics 1993*, at 155 (1993) [hereinafter *Educational Statistics*].

32. Organisation for Eco. Co-operation and Dev., *Education at a Glance: OECD Indicators 66* (1993) [hereinafter *OECD Indicators*]. Gross Domestic Product is one common measure of the total output of goods and services produced within a given country in a particular time period. *Dictionary of Economics 198* (Donald Rutherford ed., 1992).

33. *OECD Indicators*, *supra* note 32, at 66.

TABLE 2
ANNUAL PER-PUPIL EXPENDITURES (1992 \$S)³⁴



International comparisons of per-pupil spending data are particularly interesting in light of American students' relatively poor performance on achievement tests.³⁵ The United States' 1991 per-pupil expenditure for elementary and secondary school students (\$5,780) exceeded that of Belgium (\$1,768), Ireland (\$1,982), Spain (\$2,405), the United Kingdom (\$3,559), and France (\$3,785).³⁶ When examined together, student achievement and educational spending data suggest that educational funds are not effectively spent in the United States. Academic achievement levels remain stubbornly immune to past efforts to improve them.

II. THE FEDERAL GOVERNMENT RESPONDS TO CHRONIC MEDIOCRITY IN AMERICAN EDUCATION

Congress passed and President Clinton signed *Goals 2000* in March 1994.³⁷ The Act endeavors to promote "coherent, nationwide, systemic education reform,"³⁸ to improve the quality of learning and teaching in the classroom and workplace,³⁹ and to define "appropriate and coherent Federal, State, and local roles and responsibilities for education reform."⁴⁰

34. National Ctr. for Educ. Statistics, U.S. Dep't of Educ., 120 Years of American Education: A Statistical Portrait 33 (1993) [hereinafter *Statistical Portrait*].

35. See *supra* text accompanying notes 22-24.

36. OECD Indicators, *supra* note 32, at 92.

37. Act of Mar. 31, 1994, Pub. L. No. 103-227, 108 Stat. 125.

38. *Id.* § 2(1), 108 Stat. at 128.

39. *Id.* § 2(2), 108 Stat. at 128.

40. *Id.* § 2(3), 108 Stat. at 128.

A. *Background: From Incrementalism to Post-Incremental Reform*

Attempts to reform America's educational system are almost as old as the educational system itself.⁴¹ Perhaps reflecting the gravity of the challenges confronting the nation's educational system, America's appetite for educational reform appears limitless. In many ways, one can view the history of modern American education as a history of reforms, or rather, recurring cycles of incremental reform, each with a distinctive theme, each influenced by a complex interaction of political, social, and economic interests.⁴² Although federal educational reform acts typically receive more public attention than their state and local counterparts, the latter form the bulk of reform efforts in the history of American education.⁴³

States began to grant local districts power to fund school budgets through taxation as early as the end of the eighteenth century.⁴⁴ Beginning in 1803 with Ohio, Congress required that all newly-admitted states constitutionally guarantee free public education.⁴⁵ From World War II until the late 1970s, universal access to primary and secondary education was the dominant theme of educational policy.⁴⁶ Notions about accessibility expanded to include college and university education, embracing the proposition that higher education should be available to all interested students.⁴⁷ Responding to Sputnik,⁴⁸ educational

41. See generally Richard F. Elmore & Milbrey W. McLaughlin, *Steady Work: Policy, Practice, and the Reform of American Education* (1988) (analyzing the relationship between educational policymaking and educational practice in schools). See *id.* at 1 (noting that American educational reform dates back to the origin of publicly-funded education in late 17th century colonial America).

42. *Id.*

43. Finn, *supra* note 1, at 68 (noting that "local control" of education is deeply embedded in the American social fabric). See also Charles F. Faber, *Is Local Control of the Schools Still a Viable Option?*, 14 Harv. J.L. & Pub. Pol'y 447, 448 (1991) (noting that the local educational systems originating in New England colonies were built upon "a belief in the value of local control and opposition to centralized authority"); Kearns & Doyle, *supra* note 26, at 112-13 (noting that the relationship between the federal government and state educational agencies is primarily based upon money).

44. Faber, *supra* note 43, at 447-48.

45. Gerald Unks, *The Illusion of Intrusion: A Chronicle of Federal Aid to Public Education*, 49 Educ. F. 133, 136 (1985).

46. Finn, *supra* note 1, at 5-6 (noting that state compulsory attendance laws increased the number of years' attendance required of students from the 1930s-era statutes).

47. *Id.* at 6.

48. Sputnik was a Soviet communications satellite launched in October 1957. A triumph of Soviet technology, it convinced many Americans that the Soviets had achieved scientific superiority over the United States. The incident gave momentum to claims that first arose in the mid-1950s suggesting that Americans were lagging far behind their Soviet counterparts in science education. Cries for educational reform led to the National Defense Education Act of 1958, signed by President Eisenhower. Pub. L. No. 85-864, 72 Stat. 1580 (codified in scattered sections of 20 & 42 U.S.C. (1988)). See generally Peter B. Dow, *Schoolhouse Politics: Lessons From the Sputnik Era* (1991) (documenting the impact of the Sputnik incident on American scientific education); Dow argues that "decisions about educational reform are driven far more

reformers in the 1950s focused on science, mathematics, and foreign language curricula.⁴⁹ Reform efforts during the 1960s and 1970s emphasized civil rights and compensatory and equity programs.⁵⁰

By the mid-1970s there was an emerging recognition that students were exiting the educational system without adequately developing basic skills.⁵¹ Consequently, educational reform shifted its focus from universal access to an emphasis on basic skills.⁵² The 1983 *Nation At Risk* report also emphasized a return to a basic, core curriculum and the need for a well-trained teaching profession.⁵³ Recent state and local reform efforts resulted in higher teacher salaries and per-student expenditures, tougher academic requirements, more rigorous teacher certification and testing, and more demanding student competency examinations.⁵⁴

Departures from localized, incremental educational reform have long been considered anathema to many Americans.⁵⁵ In the late 1980s, however, prevailing attitudes began to change. The American public became more amenable to sweeping educational reforms after the *Nation At Risk* report raised awareness "that our students were leaving our public schools ill-prepared for the world as citizens and as workers."⁵⁶ Consequently, some states instituted reforms characterized as "intellectual revolution[s]."⁵⁷ For example, California, a state that had traditionally promoted local control of educational practices, moved toward statewide standards.⁵⁸ The Kentucky Education Reform Act increased state control of curriculum and redesigned the

by political considerations, such as the prevailing public mood, than they are by any systematic effort to improve instruction." *Id.* at 5.

49. National Defense Education Act of 1958, Pub. L. No. 85-864, 72 Stat. 1580 (codified in scattered sections of 20 & 42 U.S.C. (1988)); Dow, *supra* note 48, at 2 (noting that the 1958 Act directed federal funds to local schools, fostering innovation in all areas of the curriculum); Elmore & McLaughlin, *supra* note 41, at 1; Finn, *supra* note 1, at 7 ("Among the anxieties triggered by that feat was the fear that American education had become inferior, especially in math, science, and technology.").

50. See *infra* notes 166-70 and accompanying text.

51. Finn, *supra* note 1, at 9-10.

52. *Id.*

53. *Nation at Risk*, *supra* note 2, at 24 (recommending that minimum high school graduation requirements include (1) four years of English, (2) three years of mathematics, (3) three years of science, (4) three years of social studies, and (5) one-half year of computer science). The report also recommended heavier homework assignments, *id.* at 29, and improved training for teachers. *Id.* at 30.

54. Solomon, *supra* note 22, at 889.

55. See *supra* note 43.

56. Saul Cooperman, *The New American Schools Development Corporation, in* Radical Education Reforms, *supra* note 11, at 21 (discussing the formation in 1991 of a think tank led by business executives to engineer new approaches to educational reform). Their goals were to (1) underwrite and monitor new designs for schools, (2) demonstrate that their designs would lead to improvement in student performance, and (3) assist communities nationwide in implementing their ideas. *Id.* at 23.

57. Francie Alexander, *What I Saw at the California Education Revolution, in* Radical Education Reforms, *supra* note 11, at 29.

58. *Id.* at 29-50.

state's assessment system.⁵⁹ In Charlotte, North Carolina, a panel of leading educational experts convened to plan a complete overhaul of the Charlotte-Mecklenburg public school system, the nation's twenty-ninth largest.⁶⁰ Equally comprehensive changes took place in Chicago,⁶¹ San Diego,⁶² Minnesota,⁶³ Milwaukee,⁶⁴ and Vermont.⁶⁵

The American public also became more amenable to a greater federal role in educational reform. A 1987 Gallup Poll of public attitudes toward public schools indicated that eighty-four percent of the American public thought the federal government should require state and local educational authorities to meet minimum federal standards.⁶⁶ A "growing receptivity to radical change"⁶⁷ set the tone for President Bush and the fifty state governors who convened for the Education Summit, in Charlottesville, Virginia in September 1989.⁶⁸

At the Summit, the President and governors agreed to produce, for the first time in the history of the nation, a set of educational goals for the entire country.⁶⁹ The shibboleth of local control was finally beginning to crumble.

B. *The 1989 Education Summit: The Advent of Federalization*

President Bush and the nation's governors forged six national educational goals at the Education Summit in 1989: (1) all students must arrive at school ready to learn; (2) the nation's high-school graduation rate must be at least ninety percent; (3) students must be competent in English, history, geography, foreign languages, and the arts; (4) Amer-

59. Betty E. Steffy & Fenwick W. English, *Wild Card Educational Reform in Kentucky*, in *Radical Education Reforms*, *supra* note 11, at 51-73.

60. John A. Murphy, *Raising Standards in Charlotte-Mecklenburg Schools*, in *Radical Education Reforms*, *supra* note 11, at 77-94.

61. Edgar G. Epps, *Radical School Reform in Chicago: How is it Working?*, in *Radical Education Reforms*, *supra* note 11, at 95-116 (shifting control to the community and involving the principal more in the day-to-day affairs of the school).

62. Thomas W. Payzant, *Comprehensive School Services in San Diego*, in *Radical Education Reforms*, *supra* note 11, at 117-36 (integrating welfare, health, housing, and other social service agencies into the school system to pool resources and provide collaborative, comprehensive attention to students' needs).

63. John A. Cairns, *Charter Schools in Minnesota*, in *Radical Education Reforms*, *supra* note 11, at 139-48 (deregulating schools, shifting control to teachers, and setting standards by contract with local school districts to increase accountability).

64. Joseph L. Blast & Herbert J. Walberg, *Free Market Choice: Can Education Be Privatized?*, in *Radical Education Reforms*, *supra* note 11, at 149-71 (discussing various forms of school privatization, including vouchers to parents to pay tuition at private schools or public schools in another locality).

65. *Id.*

66. Kearns & Doyle, *supra* note 26, at 115.

67. Finn, *supra* note 1, at 68.

68. Summit Report, *supra* note 15.

69. *Id.* See also Edward B. Fiske, *Remedial Work: Paying Attention to the Schools is a National Mission Now*, N.Y. Times, Oct. 1, 1989, § 4, at 1 (noting that the Education Summit highlighted a change of attitude by citizens and political leaders who had traditionally opposed a national educational curriculum).

ican students must lead the world in math and science; (5) all adults must be literate; and (6) all schools must be drug-free.⁷⁰ These goals were designed to guide state and local educational reform efforts.⁷¹ At the Summit the President and governors also announced their commitment to improve the quality and gathering of educational data.⁷² Moreover, they promised to issue annual reports on state progress toward the six national educational goals.⁷³ As expected, the Education Summit received significant attention from the media and policymakers.⁷⁴ The attention, however, reflected the gathering's novelty rather than any significant new change in the federal government's role in educational policymaking. Indeed, the Summit did not change the federal government's relatively minor educational policymaking role. Despite articulating national educational goals, as Professor Finn notes, "[N]obody said these [national educational goals] would be promulgated, much less enforced, by the federal government."⁷⁵ The most significant aspect of the Summit was not the statement of goals, but rather the strong message from fifty-one chief executives that the time had come for uniform national standards.⁷⁶

In the years following the Education Summit, the federal government assumed a greater role in educational policymaking. Two years after the Summit, Congress passed the Education Council Act of 1991.⁷⁷ Title IV of that Act established the National Council on Education Standards and Testing.⁷⁸ The Council advised Congress, the Secretary of Education, and the National Education Goals Panel⁷⁹ on issues relating to the desirability and feasibility of establishing national educational standards and a uniform system of student exami-

70. Summit Report, *supra* note 15, at 12-56.

71. Finn, *supra* note 1, at 140.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. Pub. L. No. 102-62, 105 Stat. 305 (codified in scattered sections of 20 U.S.C. (Supp. V 1993)). Title I of the Act established the National Education Commission on Time and Learning, a nine-member commission composed of governors, individuals from the business community, school administrators, state educational officials, and legislators. The Commission was charged with investigating how elementary and secondary school teachers and students spent time teaching and learning, and reviewed such issues as the length of the school day and year, time spent on homework, and continuing education for teachers. The statute required the Commission to issue a report to Congress in 1992. *See id.* §§ 101-02, 105 Stat. at 305-08. Title II of the Act authorized funds for the "National Writing Project," a network of university programs that instructed teachers on how to best teach writing. *Id.* §§ 201-02, 105 Stat. at 309-11.

78. *Id.* §§ 401-11, 105 Stat. at 314-18. The 32 member Council was composed of members of the administration, state legislators, state school officers, school administrators, teachers, and members of national teacher organizations. *Id.* § 406, 105 Stat. at 315-16.

79. *See infra* text accompanying notes 110-11.

nations.⁸⁰ In its 1992 report to Congress, NCEST recommended that states develop and implement "school delivery standards."⁸¹ School delivery standards, the progeny of opportunity-to-learn standards,⁸² were meant to ensure that students do not bear the entire burden of attaining academic standards and also to encourage school districts and states to make necessary resources available to students.⁸³

Although many states implemented various educational reforms during the 1980s,⁸⁴ variation among states was significant. Moreover, most of the reform efforts focused on discrete aspects of educational policy, such as school governance, organization, curricula, and teacher development.⁸⁵ The concern with discrete educational policy levers and attempts to isolate specific, troublesome policy components demonstrated reformers' preference for an "incrementalist approach" to educational reform.⁸⁶ Educational researchers recognized the need, however, for a sweeping new approach to educational reform when student achievement indicators failed to respond to incremental reform efforts.⁸⁷ Indeed, people grew frustrated with school systems perceived as ineffective, obsolete, and entrenched bureaucracies. By the end of the 1980s, a consensus emerged among business leaders, educators, and policymakers that sweeping changes in the educational system were necessary.⁸⁸

C. *Goals 2000: A Break From the Past*

Goals 2000 recognizes the overall failure of past, incremental educational reform efforts and embraces a new approach: systemic reform.⁸⁹ Systemic reform, as construed by the Act's drafters, involves establishing ambitious educational goals, and then comparing content standards, instructional goals, and periodic assessments of student performance with those goals.⁹⁰ Rather than casting aside past state reform efforts, Congress hopes to build on existing state efforts and to

80. Education Council Act of 1991, Pub. L. No. 102-62, § 404, 105 Stat. 305, 314-15 (codified in scattered sections of 20 U.S.C. (Supp. V 1993)).

81. H.R. Rep. No. 168, 103d Cong., 2d Sess. 40 (1994), *reprinted in* 1994 U.S.C.C.A.N. 63, 67.

82. *See infra* text accompanying notes 104-06 (discussing opportunity-to-learn standards).

83. H.R. Rep. No. 168, 103d Cong., 2d Sess. 40 (1994), *reprinted in* 1994 U.S.C.C.A.N. 63, 67.

84. Massell & Fuhrman, *supra* note 6; *see supra* notes 10, 57-65 and accompanying text (citing specific reform efforts in states and localities).

85. Massell & Fuhrman, *supra* note 6, at v.

86. Finn & Walberg, *supra* note 11, at x.

87. *Id.*; Solomon, *supra* note 22, at 889.

88. Finn, *supra* note 1, at 52-53.

89. H.R. Rep. No. 168, 103d Cong., 2d Sess. 38-40 (1994), *reprinted in* 1994 U.S.C.C.A.N. 63, 66-67 (noting a departure from the traditional federal role of concentrating educational assistance on specific student populations and specific categorical needs). *See infra* part III.B (reviewing earlier federal educational law).

90. Pub. L. No. 103-227, §§ 2, 102, 108 Stat. 125, 128-29, 130-33.

incorporate them into a broader, coherent, and comprehensive educational reform effort.⁹¹ Of course, the systemic approach to educational reform includes an enlarged policymaking role for the federal government.⁹²

Uniformity and efficiency underlie the Congressional approach to educational reform. According to Congress, the next step for the federal government is to "support efforts that will improve education across the board for all students."⁹³ *Goals 2000* "encourages States and local school districts to recognize the importance of linkages among the different aspects of their educational systems—especially the connections between curriculum and instructional materials, assessment practices, and professional development."⁹⁴

Congress gave several reasons for such a dramatic expansion of the federal government's role. First, Congress noted that career work for high-school graduates with general skills had become obsolete. An increasingly technology-driven workplace required students to "acquire higher order thinking and workforce related skills."⁹⁵ Second, Congress argued that an emerging consensus dictated the need for comprehensive reform involving the entire educational system.⁹⁶ In addition, Congress argued that the federal government can enable states and local school boards to reduce redundant school reform activities. Specifically, Congress asserted that the federal government can more efficiently assemble and disseminate information to states and local school boards about their counterparts' reform activities than if they continued to collect such information independently.⁹⁷

Goals 2000 adopts the principles that emerged from the 1989 Education Summit by amending and codifying the governors' educational goals.⁹⁸ Title I of the Act sets eight broad "national educational goals."⁹⁹ In addition, *Goals 2000* encourages state and local educational agencies to develop content and opportunity-to-learn standards

91. H.R. Rep. No. 168, 103d Cong., 2d Sess. 41 (1994), *reprinted in* 1994 U.S.C.A.N. 63, 69.

92. *Id.*

93. *Id.* at 67.

94. *Id.* at 69.

95. *Id.* at 67.

96. *Id.*

97. *Id.*

98. *Id.* at 70. *See supra* text accompanying note 70 (setting out these goals).

99. Pub. L. No. 103-227, § 102(1)-(8), 108 Stat. 125, 130-33. By the year 2000, Congress seeks to reach the following goals: (1) all children will begin school ready to learn; (2) the high-school graduation rate will rise to at least 90%; (3) all students will leave grades four, eight, and twelve having demonstrated competency in English, mathematics, science, foreign language, civics and government, economics, arts, history, and geography; (4) teacher access to development and continuing education will increase; (5) American students will lead the world in proficiency in mathematics and science; (6) every adult American will be literate; (7) every school in the United States will be free of alcohol, drugs, and violence; and (8) parental participation in the social, emotional, and academic growth of children will increase.

and to submit them to the federal government for certification. By delineating "Voluntary National Content Standards,"¹⁰⁰ Congress attempts to structure a uniform national curriculum, developed¹⁰¹ and approved¹⁰² by bipartisan groups consisting of members of Congress and state legislatures, professional educators, academics, representatives of business, industry, labor, universities, low-income and minority groups, and other civic leaders.¹⁰³

Whereas content standards focus on students, "Voluntary National Opportunity-To-Learn Standards"¹⁰⁴ focus on evaluating school conditions necessary to establish a successful working environment for students.¹⁰⁵ Stated another way, "[W]hen students are not learning at desired levels, opportunity to learn standards can help communities identify where the child is failing school or the school is failing the child."¹⁰⁶

Goals 2000 establishes the National Education Standards and Improvement Council ("NESIC"),¹⁰⁷ a committee of nineteen members appointed by the president. NESIC is charged with overseeing the development of national educational standards by identifying areas in which sets of standards need to be developed, establishing criteria to assess those standards, and certifying content and opportunity-to-learn standards submitted by states or other entities.¹⁰⁸ In developing the criteria it will use to certify standards voluntarily submitted by states and local agencies, NESIC will consider appropriate international standards, cognitive and pedagogical research, and the openness of the processes by which the standards were developed.¹⁰⁹

The National Education Goals Panel ("NEGP") is an independent agency created in 1989.¹¹⁰ *Goals 2000* delegates to NEGP the task of building a national consensus for educational improvement, reporting on the nation's progress in meeting the National Education Goals set

100. Pub. L. No. 103-227, § 213(a), 108 Stat. 125, 142.

101. A bipartisan 19 member National Education Standards and Improvement Council is responsible for developing national content standards, approving voluntary state content standards, and submitting them to the National Education Goals Panel for approval. Pub. L. No. 103-227, §§ 211-21, 108 Stat. 125, 139-51; *see infra* text accompanying notes 107-09.

102. A bipartisan 18 member National Education Goals Panel is responsible for building a national consensus for educational improvement by reviewing and approving national content standards. Pub. L. No. 103-227, §§ 201-07, 108 Stat. 125, 133-39; *see infra* text accompanying notes 110-11.

103. Pub. L. No. 103-227, § 212, 108 Stat. 125, 139-42.

104. *Id.* § 213(c), 108 Stat. at 143.

105. *Id.* § 213(c), 108 Stat. at 143-45.

106. H.R. Rep. No. 168, 103d Cong., 2d Sess. 45 (1994), *reprinted in* 1994 U.S.C.C.A.N. 63, 72.

107. Pub. L. No. 103-227, §§ 211-21, 108 Stat. 125, 139-51.

108. *Id.* § 211, 108 Stat. at 139.

109. *Id.* § 213(a)(2), 108 Stat. at 143.

110. *Id.* §§ 201-07, 108 Stat. at 133-39; Michael W. Kirst & Allan Odden, *National Initiatives and State Education Policy*, 4 *Stan. L. & Pol'y Rev.* 99, 101 (1993).

out above, and reviewing and commenting on certification criteria and standards developed by the National Education Standards and Improvement Council.¹¹¹

Goals 2000 also provides grants for states that develop "state improvement plans" to meet the National Educational Goals by developing their own content standards, assessments, curriculum development, teacher training, and instructional materials.¹¹² In addition, the Act reauthorizes state allotments¹¹³ under the Elementary and Secondary Education Act of 1965.¹¹⁴ Title IV of *Goals 2000* awards grants to nonprofit organizations that provide training and support to parents of students.¹¹⁵ Title IV endeavors "to increase parents' knowledge of and confidence in child-rearing activities . . . and strengthen partnerships between parents and professionals in meeting the educational needs of children."¹¹⁶ Title V establishes a "National Skill Standards Board" to encourage the development of a national system of skill standards.¹¹⁷ Such skills standards are intended to ensure that the workforce is qualified enough to maintain the competitiveness of American industry in an increasingly globalized, high-technology economy.¹¹⁸

Further, *Goals 2000* establishes an international educational program to study the educational systems in foreign countries, exchange ideas with educators abroad, and engage in joint research.¹¹⁹ Title VII of the Act endeavors to purge schools of drugs and violence.¹²⁰ Title VIII,¹²¹ the "Minority-Focused Civics Education Act of 1994,"¹²² attempts to improve instruction for minorities and Native Americans in American government and civics.¹²³

Goals 2000 indeed is comprehensive. Accordingly, it will produce far-reaching results and significantly alter American educational policymaking in at least two notable ways. First, NESIC's role as the certifier of content and opportunity-to-learn standards will further federalize educational policymaking. Increased federalization of educational policymaking will centralize and homogenize educational pol-

111. Pub. L. No. 103-227, § 201, 108 Stat. 125, 134; H.R. Rep. No. 168, 103d Cong., 2d Sess. 43 (1994), reprinted in 1994 U.S.C.C.A.N. 63, 71. See *supra* text accompanying notes 107-09.

112. Pub. L. No. 103-227, §§ 301-19, 108 Stat. 125, 157-87.

113. *Id.* § 304(b), 108 Stat. at 158-59.

114. Pub. L. No. 89-10, 79 Stat. 27 (codified as amended at 20 U.S.C. §§ 2701-3386 (1988 & Supp. V 1993)).

115. Pub. L. No. 103-227, §§ 401-08, 108 Stat. 125, 187-91.

116. *Id.* § 401(a), 108 Stat. at 187.

117. *Id.* §§ 501-09, 108 Stat. at 191-200.

118. *Id.* § 502, 108 Stat. at 191.

119. *Id.* § 601, 108 Stat. at 200-04.

120. *Id.* §§ 701-09, 108 Stat. at 204-09.

121. *Id.* §§ 801-05, 108 Stat. at 209-11.

122. *Id.* § 801, 108 Stat. at 209.

123. *Id.* § 802, 108 Stat. at 209.

icies designed to serve an increasingly heterogenous student population. Second, state and local agencies enticed into developing and implementing content and opportunity-to-learn standards will face an increase in litigation as those standards are transformed into legal entitlements. Increased legalization of educational policymaking will further inject the judiciary into the development and implementation of educational policies. Empirical evidence on the efficacy of such judicial involvement is mixed, at best.¹²⁴ Yet, the likelihood that the Act will achieve its primary desired benefit—improved student academic achievement—is dubious, particularly in light of these expected costs. Essentially, *Goals 2000* focuses on shifting the allocation of educational policymaking authority rather than on any particular substantive reform. Because it is the most significant and comprehensive Congressional effort to reform American education in the past few decades, the Act will certainly command significant public attention. Unfortunately, it may also deter efforts fundamentally to restructure the delivery of educational services.

III. THE INEVITABLE FEDERALIZATION OF EDUCATION

Traditionally, state and local governments, particularly local school boards, developed and implemented educational policies. After all, state and local governments bear the constitutional¹²⁵ duty to educate their citizens,¹²⁶ they provide most of the school funding, and presumably, state and local governments know more than Congress does about the specific needs of the students that they serve.¹²⁷ One reason that local—and to a lesser extent state—educational officials know more about their specific educational needs is their proximity to stu-

124. See *infra* text accompanying notes 246-54.

125. See *infra* note 210 (citing the educational guarantees in state constitutions).

126. The Constitution of the United States provides that powers not delegated to the federal government nor prohibited to the states are reserved to the states or the people. U.S. Const. art. X. Because the Constitution does not mention education, it is, by implication, a responsibility of the states and localities. Faber, *supra* note 43, at 447. Hence the voluntary aspect of state compliance with federal educational programs: because of the Tenth Amendment, the federal government cannot compel states to participate in federal educational programs unless they involve some federal aspect, for example, civil rights, which is a function of the Fifth and Fourteenth Amendments. Kearns & Doyle, *supra* note 26, at 112. See also *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973) (noting that the Constitution does not explicitly include a federal right to education); Unks, *supra* note 45, at 134 (noting that there is a constitutional argument for federal jurisdiction over education stemming from the Preamble's call "to promote the general Welfare").

127. See, e.g., David K. Cohen, *Governance and Instruction: The Promise of Decentralization and Choice*, in I Choice and Control in American Education 337, 361 (William H. Clune & John F. Witte eds., 1990) [hereinafter *Choice & Control*] (noting that advocates of decentralization view local control as a way to exert more vigorous leadership and focus on improved teaching and learning); Kearns & Doyle, *supra* note 26, at 112-13 (noting that local control makes "pedagogical, as well as political, sense," because smaller school districts under local control foster community participation).

dents. During the 1992 school year, more than forty-two million students attended public elementary and secondary schools in the United States.¹²⁸ As Professors Doyle and Finn note, many school principals find it difficult enough to have more than a passing acquaintance with individual students and to know what actually transpires in individual teachers' classrooms.¹²⁹ It is demonstrably more difficult for school district superintendents and board of education members to do so.¹³⁰ Thus, as one moves progressively further away from classrooms, schools, and communities, and toward Congress and federal officials, familiarity with students and specific educational conditions and circumstances decreases exponentially. Even the Supreme Court has endorsed local control of public schools.¹³¹

Not surprisingly, the federal government traditionally contributed relatively little to educational policymaking. Although state and local governments retain their customary legal and financial responsibilities, *Goals 2000* reallocates educational policymaking roles among the federal, state, and local governments by expanding the federal government's role.

A. *Traditional Basis For State and Local Control of Educational Policy*

The Constitution does not mention education. Responsibility for education therefore lies with the states, which have the authority to determine the scope and organization of their educational systems.¹³² In every state but Hawaii, legislatures have delegated responsibility for schooling to local school districts,¹³³ which are governed by local school boards.¹³⁴ In 1992, more than 15,000 local school boards operated public schools.¹³⁵ The number of Local Educational Agencies ("LEAs"),¹³⁶ which includes special educational and other non-tradi-

128. Educational Statistics, *supra* note 31, at 55.

129. Denis P. Doyle & Chester E. Finn, Jr., *American Schools and the Future of Local Control*, 77 *Pub. Interest* 77, 87 (1984) (arguing that the 1980s witnessed a shift in the center of school governance and policymaking, from localities to state capitals).

130. *Id.*

131. *Board of Educ. v. Dowell*, 498 U.S. 237, 248 (1991) ("Local control over the education of children allows citizens to participate in decisionmaking, and allows innovation so that school programs can fit local needs.") (citing *Milliken v. Bradley*, 418 U.S. 717, 742 (1974) & *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 50 (1973)); *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 410 (1977) ("[L]ocal autonomy of school districts is a vital national tradition."). See also Unks, *supra* note 45, at 133 (noting that the American public views education as a local concern).

132. See *supra* note 126.

133. Kearns & Doyle, *supra* note 26, at 112.

134. Lewis B. Kaden, *Courts and Legislatures in a Federal System: The Case of School Finance*, 11 *Hofstra L. Rev.* 1205, 1210 (1983).

135. Educational Statistics, *supra* note 31, at 96.

136. The local educational agency is the bureaucratic layer that exists in some cases between state departments of education and local school boards. 20 U.S.C. § 2891(12) (1988).

tional school jurisdictions, exceeded 16,000 that year.¹³⁷ Local school board and LEA jurisdictions range from the minuscule district with a single school and a handful of students to the vast educational empires in New York City, Chicago, and Los Angeles.¹³⁸

Most discussions about the "deep-seated conviction"¹³⁹ of local control focus on policies relating to the length of school year, funding, and the selection of teachers, administrators, and curricula.¹⁴⁰ Despite delegations of educational policymaking authority to local school boards, most states retain broad control over key areas such as student attendance, curricula, and teacher certification.¹⁴¹ The *Nation At Risk* report led many states to exert even greater control over educational policy. Over the past decade, many states enacted substantial educational reform legislation, increased funding for schools, lengthened the school day and the school year, increased homework assignments, introduced more rigorous teacher competency testing, and strengthened and modified teacher certification and training.¹⁴²

In addition to state constitutional language, school funding provides another source of state and local control over educational policy. Simply put, states and local school districts wield significant control over educational policy partly because state and local funds contribute more than ninety percent of the revenue in most school districts. Traditionally, the federal government's financial contribution to school districts' budgets was relatively small.

137. Educational Statistics, *supra* note 31, at 97.

138. Kearns & Doyle, *supra* note 26, at 117 (noting that there are 1,000,000 students enrolled in New York public schools, more than the total enrollees of 37 states, and that the total enrollment in Los Angeles public schools, over 500,000 students, exceeds that of 26 states).

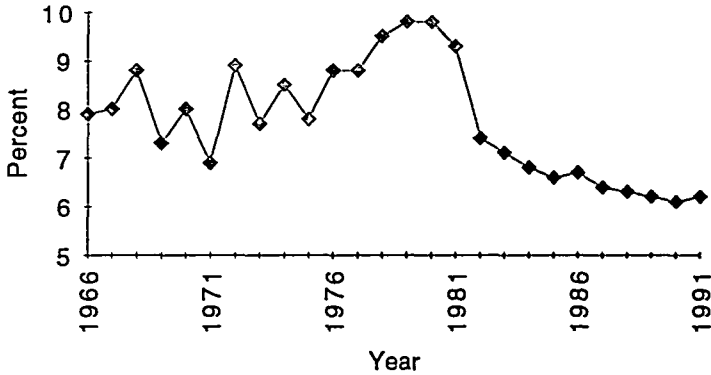
139. Kern Alexander, *Equitable Financing, Local Control, and Self-Interest, in The Impacts of Litigation and Legislation on Public School Finance: Adequacy, Equity, and Excellence* 299 (Julie K. Underwood & Deborah A. Verstegen eds., 1990).

140. *Id.*

141. Faber, *supra* note 43, at 449-50.

142. *Id.*; Radical Education Reforms, *supra* note 11 (collecting several works that present a diverse set of significant departures from traditional approaches to American educational reform); Solomon, *supra* note 22, at 889. See *supra* text accompanying notes 57-65 (discussing sweeping state educational reforms during the 1980s).

TABLE 3
FEDERAL CONTRIBUTION TO EDUCATION REVENUES¹⁴³



Although the 1980s witnessed a dramatic increase in state educational reform initiatives,¹⁴⁴ state leadership in educational policy waned in the 1990s. Several factors account for the relative decline in state educational policy initiatives.¹⁴⁵ First, budget constraints have limited educational reforms in the 1990s; today's state coffers are no longer as flush as they were in the early and mid-1980s.¹⁴⁶ Second, changes to the makeup of state legislatures reduced state educational reform activity.¹⁴⁷ Many of the state politicians who provided crucial leadership on educational reform matters no longer serve or have moved off of education-related committees.¹⁴⁸ The third reason relates to earlier legislative work at the state level.¹⁴⁹ Prior work on state educational statutes established a capacity to incorporate new reforms without substantial changes to state laws. As a result, standard-based reform, including many of the systemic reforms proposed in *Goals 2000*, can be accommodated without the need for legislative change. Yet, state legislators often distrust state departments of education, viewing them as creatures of the "educational establishment." "This distrust, as well as the fact that political benefit comes from placing scarce dollars in local schools rather than in state agencies, has led to a vicious cycle of underfunding [of state educational agencies] and failure to keep up with reform demands."¹⁵⁰

143. Statistical Portrait, *supra* note 34, at 57-58.

144. Kirst & Odden, *supra* note 110, at 99; see *supra* text accompanying notes 57-65.

145. Massell & Fuhrman, *supra* note 6, at 18-21.

146. *Id.* at 19-20.

147. *Id.* at 20.

148. *Id.*

149. *Id.* at 20-21.

150. *Id.* at 21.

B. *Traditionally Modest Federal Role in Educational Policymaking Increases in the 1990s*

The federal government has always had a role in educational policymaking, albeit a relatively limited one. Traditionally, the federal government's limited influence on educational policy focused on discrete classes of students: the economically disadvantaged,¹⁵¹ the handicapped,¹⁵² and other groups of "at-risk" students.¹⁵³ The federal government rapidly expanded its educational policymaking role, and by 1980 it administered approximately 500 educational programs.¹⁵⁴ Accordingly, despite the absence of educational guarantees in the Constitution,¹⁵⁵ there is substantial, well-documented Congressional influence on educational policymaking.¹⁵⁶

Federal involvement in education is not a recent phenomenon. Even before the ratification of the Constitution, the Land Ordinance Act of 1785 and the Northwest Ordinance of 1787 linked the drawing of property lines and the creation of schools.¹⁵⁷ Beginning with the admission of Ohio as a state, Congress required that all subsequent states provide for education in their state constitutions as a condition for admission to statehood.¹⁵⁸ In the nineteenth century, the federal government provided land grants to establish schools,¹⁵⁹ and in the early twentieth century it began to fund vocational programs.¹⁶⁰

Although early federal involvement focused on higher education,¹⁶¹ federal attention turned to elementary and secondary schooling in the early twentieth century. The Smith-Hughes Vocational Education Act of 1917¹⁶² marks the emergence of the federal government's attention

151. See *infra* note 167 and accompanying text.

152. See *infra* note 170 and accompanying text.

153. See *infra* notes 166 & 169 and accompanying text.

154. Deborah A. Verstegen, *Two Hundred Years of Federalism: A Perspective on National Fiscal Policy in Education*, 12 J. Educ. Fin. 516, 535-36 (1987).

155. See *supra* note 126 and accompanying text.

156. See, e.g., Augustus F. Hawkins, *Becoming Preeminent in Education: America's Greatest Challenge*, 14 Harv. J.L. & Pub. Pol'y 367, 372-76 (1991) (noting that Congress required states, upon entering the Union, to provide for education in their constitutions, and that Congress provided land grants for colleges, financed construction of new schools, and passed the G.I. Bill of Rights); Christopher P. Lu, *Liberator or Captor: Defining the Role of the Federal Government in School Finance Reform*, 28 Harv. J. on Legis. 543, 558 (1991) (discussing Congressional attempts at equalizing local school aid by bypassing state controls).

157. Unks, *supra* note 45, at 135 (1985) (citing Fletcher H. Swift, *Federal and State Policies in Public School Finance in the United States* 12 (1931)).

158. *Id.* at 136.

159. Faber, *supra* note 43, at 453 (citing Act of July 2, 1862, ch. 130, § 1, 12 Stat. 503 (codified as amended at 7 U.S.C. §§ 301-08 (1988))); see Kearns & Doyle, *supra* note 26, at 113 (noting that many state universities have their roots in federal land grants).

160. Faber, *supra* note 43, at 453 (citing Act of Feb. 23, 1917, Pub. L. No. 64-347, ch. 114, 39 Stat. 929 (codified as amended at 20 U.S.C. §§ 11-28 (1988))).

161. Hawkins, *supra* note 156, at 373.

162. Pub. L. No. 64-347, ch. 114, 39 Stat. 929 (codified at 20 U.S.C. §§ 11-28 (1988)).

to elementary and secondary education, directing federal funds to high schools for vocational and home economics training.¹⁶³ Following World War II, Congress enacted the G.I. Bill of Rights, which provided billions of federal dollars in education, job training, and loan benefits.¹⁶⁴

Beginning in 1954, the federal courts endeavored to eliminate racial and ethnic barriers to education "with all deliberate speed."¹⁶⁵ The Civil Rights Act of 1964¹⁶⁶ cemented the federal government's commitment to equal opportunity in education. Educationally and economically disadvantaged children also received particular Congressional attention. In 1965, Congress passed the Elementary and Secondary Education Act,¹⁶⁷ targeted at children from low income families. The Act sought to increase basic educational skills for at-risk and economically impoverished students.¹⁶⁸ Other minorities and protected classes are the subject of other federal protection. The Education Amendments of 1972,¹⁶⁹ for example, prohibit gender discrimination in federally-assisted educational programs. The Education of the Handicapped Act of 1975¹⁷⁰ increases disabled children's access to schools.

Not all of these federal statutes reduce state and local control over school districts. In many instances states and local school districts are free to accept or reject federal funds. Acceptance of federal funds, however, is contingent upon acceptance of the accompanying federal laws and regulations. Despite the voluntary nature of these federal programs, as a practical matter, most states and local school districts cannot afford to decline federal funds.¹⁷¹ Consequently, there has been a relative decline in local discretion over educational policymaking.

163. Unks, *supra* note 45, at 141.

164. Serviceman's Readjustment Act of 1944, ch. 268, 58 Stat. 284-301 (codified as amended in scattered sections of the U.S. Code). The G.I. Bill has been characterized as "the single most important element of the stunning post-war recovery . . . It was the domestic counterpart of the Marshall Plan." Kearns & Doyle, *supra* note 26, at 113.

165. *Brown v. Board of Educ.*, 349 U.S. 294, 301 (1955) ("Brown II"). See also *Brown v. Board of Educ.*, 347 U.S. 483, 495 (1954) ("Brown I") (holding that segregation of children in public schools by race violated the Equal Protection clause of the Fourteenth Amendment and overruling the "separate but equal" doctrine, which posited that equality of treatment is afforded when individuals of different races are provided comparable facilities and curricula, though the facilities may be separate).

166. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. § 2000a-2000h-6 (1988 & Supp. V 1993)).

167. Pub. L. No. 89-10, 79 Stat. 27 (codified as amended at 20 U.S.C. §§ 2701-3386 (1988 & Supp. V 1993)).

168. *Id.*

169. Pub. L. No. 92-318, §§ 901-07, 86 Stat. 235, 373-75 (codified as amended at 20 U.S.C. §§ 1651-88 (1988)).

170. Pub. L. No. 94-142, 89 Stat. 773 (codified as amended at 20 U.S.C. §§ 1400-53 (1988 & Supp. V 1993)).

171. Faber, *supra* note 43, at 453.

In other instances, federal judicial or legislative activity requires state and local school boards to cede local control. For example, judicial oversight of civil rights in public schools increased markedly after the Supreme Court's seminal *Brown v. Board of Education*¹⁷² decision in 1954.¹⁷³ Congress also passed legislation prohibiting discrimination on the basis of race, gender, religion, sex, age, national origin, and handicap.¹⁷⁴ For example, the Education of the Handicapped Act requires local school boards to provide free public education to handicapped children. The Act emphasizes special education and related services designed to meet the unique needs of these children.¹⁷⁵ Local

172. 347 U.S. 483, 495 (1954) ("Brown I"); 349 U.S. 294, 301 (1955) ("Brown II").

173. See, e.g., *Freeman v. Pitts*, 112 S. Ct. 1430, 1443-46 (1992) (permitting district court to partially withdraw supervision over desegregation plan before full compliance has been achieved); *Board of Educ. v. Dowell*, 498 U.S. 237, 247-48 (1991) (emphasizing that federal judicial supervision of desegregation efforts was intended to be a temporary measure and holding that district court should consider whether school district has acted in good faith with desegregation decree and whether vestiges of past discrimination have been eliminated in deciding whether to dissolve desegregation decree); *Missouri v. Jenkins*, 495 U.S. 33, 50-52 (1990) (holding that lower court order to school district to increase property taxes to insure funding for school desegregation plan violated principles of federal-state comity); *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 455-56 (1979) (holding that record supported a finding that school board purposefully took actions having a foreseeably disparate impact, thereby creating a duty to disestablish the dual school system); *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526, 537-40 (1979) (holding that once a system is found to have intentionally segregated students in the past, merely discontinuing an intentionally segregative policy is insufficient and that affirmative steps to integrate students are required); *Milliken v. Bradley*, 433 U.S. 267, 281-88 (1977) (holding that the district court may order compensatory or remedial educational programs for students who have been subjected to intentional segregation in the past); *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 434-36 (1976) (holding that district court exceeded its remedial powers in requiring annual readjustment of school attendance zones when changes in the racial makeup of the schools were caused by demographic shifts "not attributed to any segregative acts on the part of the [school district]"); *Keyes v. School Dist. No. 1*, 413 U.S. 189, 200-03 (1973) (holding that a finding of racial segregation in one part of a school district supports a finding that the entire system is segregated); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 22-32 (1971) (granting district courts broad equity discretion to remedy discrimination in public schools, once there is proof that segregation has been maintained intentionally); *Green v. County Sch. Bd.*, 391 U.S. 430, 439 (1968) (requiring school boards to "come forward with a plan that promises realistically to work . . . now . . . until it is clear that state-imposed segregation has been completely removed"). As of 1988, more than 100 school desegregation cases were being actively litigated in the federal courts. Chip Jones, Comment, *Freeman v. Pitts: Congress Can (and Should) Limit Federal Court Jurisdiction in School Desegregation Cases*, 47 SMU L. Rev. 1889, 1902 n.93 (1994) (citing *Current Status of Federal School-Desegregation Lawsuits*, Educ. Wk., June 1, 1988, at 18-19).

174. See, e.g., Education of the Handicapped Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (codified as amended at 20 U.S.C. §§ 1400-53 (1988 & Supp. V 1993)); Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. § 2000a-2000h-6 (1988 & Supp. V 1993)); Education Amendments of 1972, Pub. L. No. 92-318, §§ 901-07, 86 Stat. 235, 373-75 (codified as amended at 20 U.S.C. §§ 1651-88 (1988)).

175. Pub. L. No. 94-142, 89 Stat. 773 (codified as amended at 20 U.S.C. §§ 1400-53 (1988 & Supp. V 1993)).

school jurisdictions must abide by many of these requirements even if they do not receive federal funds.

In addition to the more traditional activities, the federal government supports a growing number of organizations involved in research and development, reporting student academic achievement, and developing national educational goals.¹⁷⁶ The National Education Goals Panel established a list of national educational goals to be attained by the year 2000. *Goals 2000* modifies and incorporates NEGP's prior work by adding two additional goals.¹⁷⁷ In part to help assess progress toward the national educational goals, the National Council on Education Standards and Testing¹⁷⁸ was designed to oversee the establishment of national standards and assessment instruments by professional groups such as the National Council of Teachers of Mathematics.¹⁷⁹ To improve the quality of classroom teachers and to enhance professional development, the National Board for Professional Teaching Standards was created to develop a national certification program for teachers who attained an objective level of demonstrated competence.¹⁸⁰ The New American Schools Development Corporation, a private nonprofit corporation composed primarily of businesspeople, funds award-winning school system designs.¹⁸¹ NASDC's request for proposals attracted 686 entrants in 1992, and eleven educational reform design teams received initial grants in 1992.¹⁸² The National Assessment of Educational Progress conducts, along with the Educational Testing Service, national assessments of student performance.¹⁸³ This federally funded project has monitored achievement trends in most key skills and subject areas since its inception in 1969.¹⁸⁴ According to one commentator, NAEP data are "far and away our best barometer of student performance in the United States as a whole."¹⁸⁵ Because of the concern in the business community with the relative lack of skills possessed by American students, the Secretary's Commission on Acquiring Necessary Skills examined an

176. Kirst & Odden, *supra* note 110, at 99.

177. See text accompanying note 70 (listing the six goals announced at the Education Summit). The initial list of six national educational goals articulated by NEGP grew to eight by 1994. See *supra* note 99.

178. Education Council Act of 1991, Pub. L. No. 102-62, §§ 401-11, 105 Stat. 305 (codified in scattered sections of 20 U.S.C. (Supp. V 1993)). See Kirst & Odden, *supra* note 110, at 101.

179. Kirst & Odden, *supra* note 110, at 101.

180. *Id.* at 102.

181. *Id.*; see *supra* note 56.

182. Cooperman, *supra* note 56, at 25.

183. Kirst & Odden, *supra* note 110, at 101. The Department of Education oversees the activities of NAEP, which is funded by the federal government. NAEP contracts with the Educational Testing Service to supply information on changes in achievement in core subjects. *Id.*

184. Finn, *supra* note 1, at 173.

185. *Id.*

array of workforce preparedness issues.¹⁸⁶ The Commission's report outlines those skills needed by employees to effectively participate in an increasingly technology-driven economy.¹⁸⁷ These and other federal and national educational reform initiatives will continue to influence educational policy for years to come.

The enormous and persistent difficulties that confront America's school systems and the unsatisfactory results from a significant public investment led to a realignment of educational policymaking responsibilities. Although perhaps inevitable, the increased federalization of educational policy is not without risks. The precise extent to which *Goals 2000* will realign the existing balance among the federal, state, and local governments and increase federal influence over educational policy remains unclear. Unlike previous formal and informal federal educational reform initiatives, however, *Goals 2000* is a mechanism and framework that enables the federal government to influence every public school student and every public school.

C. Goals 2000: *Risks and Consequences*

One risk posed by *Goals 2000* is that its top-down orientation and centralizing tendencies conflict with two discrete trends initiated during the 1980s, both involving the location of educational policymaking authority. One trend is the consolidation of educational policymaking authority by state governments.¹⁸⁸ Financial concerns partially account for this trend. While the percentage of the state contribution to school districts varies, during the past decade state contributions to local school budgets increased in both relative and absolute terms.¹⁸⁹ Moreover, "the velocity of change was often dramatic."¹⁹⁰ One legacy of the 1980s is that states are regarded as the senior partners in educational financing and policymaking, rather than as supplements to predominately local structures. At the same time that states were asserting educational policymaking authority, many school districts began decentralizing educational policymaking authority.¹⁹¹ For more than ten years, school districts across the country have developed and implemented various educational policies designed to shift decision-

186. Kirst & Odden, *supra* note 110, at 101.

187. See, e.g., U.S. Labor Secretary's Commission on Achieving Necessary Skills, *Teaching the SCANS Competencies* (1993) (describing competency as possession of basic verbal, writing, and reasoning skills, as well as personal qualities, including integrity and responsibility and emphasizing the need to use information and technology efficiently).

188. See Massell & Fuhrman, *supra* note 6, at 16-24.

189. Doyle & Finn, *supra* note 129, at 79-80.

190. *Id.* at 80.

191. For a recent discussion of the school decentralization literature, see generally Choice & Control, *supra* note 127 (discussing theoretical issues relating to school choice, decentralization, and governance as well as descriptions of innovative practices in a number of school districts, particularly urban districts, throughout the United States).

making authority from centralized bureaucracies to local schools and school-based management structures.¹⁹² Large urban school districts encumbered with substantial bureaucracies and facing difficult educational problems have been particularly partial to school decentralization policies.¹⁹³ On the heels of reallocation of educational policymaking at the state and local school levels, *Goals 2000* proposes to reallocate significant policymaking authority to the federal government. Such reallocation is consistent with neither school decentralization efforts nor consolidation at the state level. It is ironic that, as states and localities seek to further localize educational policymaking, the federal government's educational reform initiative seeks the opposite.

Second, *Goals 2000*, through NESIC, now the nation's educational standards certifier, threatens to homogenize the development of educational standards. NESIC's potential to increase the federal government's influence over educational reform efforts cannot be easily overstated. As the certifier of content and opportunity-to-learn standards, NESIC will influence the educational reform efforts of all states that choose to engage in *Goals 2000* reform activities. Though nothing in the Act requires the establishment of a "one best system" of standards, criticized by some commentators,¹⁹⁴ a centralized, federal certification council exerts pressure toward uniform content and opportunity-to-learn standards. Of course, state and local agencies willing to participate in *Goals 2000* activities also will be eager to receive NESIC certification for their educational standards. The initial sets of content and opportunity-to-learn standards to receive formal NESIC certification will influence the development of later standards. States and local school boards developing educational standards and desirous of NESIC approval may look first to those that have already received NESIC approval for guidance rather than to the particular educational needs of their schools and students. By inducing local school authorities to focus on NESIC approval as well as local educational needs, *Goals 2000* encourages the development of homogenous content and opportunity-to-learn standards. The resulting homogeneity erodes the array of benefits produced by more than 15,000 local school boards' "laboratories of democracy."¹⁹⁵ While it is painfully

192. Two notable examples include the Chicago Public Schools, see Chicago School Reform Act, 1988 Ill. Legis. Serv. P.A. 85-1418 (West), and the Dade County (Florida) Public Schools, see Joseph A. Fernandez, *Dade County Public Schools' Blueprint for Restructured Schools*, in II Choice & Control, *supra* note 127, at 223.

193. See, e.g., Chicago School Reform Act, 1988 Ill. Legis. Serv. P.A. 85-1418 (West) (governing school reform in Illinois cities with populations greater than 500,000).

194. See David B. Tyack, *The One Best System: A History of American Urban Education* (1974) (providing a socio-historical account of the American educational system's attempt to assimilate an increasingly varied student population).

195. See *New State Ice Company v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single

clear that existing educational policies, largely the product of the nation's local school boards, have not improved student achievement, it is equally clear that NESIC and its activities will not adequately address the array of educational problems facing the nation. As a single, centralized certifier of standards submitted by states and local school boards, NESIC will instead chill imaginative thinking about much-needed educational reforms.

A third risk presented by *Goals 2000* is that it will divert educational reform attention away from state and local school boards and toward the federal government. By dramatically increasing the federal government's educational policymaking role, *Goals 2000* implicitly assumes that certain educational reform functions—notably, though not exclusively, certification of content and opportunity-to-learn standards—are best administered by the federal government. Not only do the assumptions implicit in *Goals 2000* lack support in comparative institutional analysis, but such a shifting of focus to the federal government will only allow states and localities to avoid accountability for shortcomings in their educational systems.¹⁹⁶

Fourth, though the federal government is able to offer technical expertise and disseminate educational reform information to states and local school boards, individual states and even local agencies are also capable of performing such tasks.¹⁹⁷ A great deal of self-generated educational reform information is available to state and local agencies,¹⁹⁸ and it is in their self-interest to accumulate and distribute relevant information. State and local governmental units deliver and pay for most educational services so they have incentives to duplicate successful educational policies and avoid unsuccessful and costly ones.¹⁹⁹

Indeed, a few elements of the Act will certainly give states pause and perhaps deter some from participating. Participation in the development of *Goals 2000* content or opportunity-to-learn standards is

courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

196. See generally Neil K. Komesar, *In Search of a General Approach to Legal Analysis: A Comparative Institutional Alternative*, 79 Mich. L. Rev. 1350 (1981) (reasoning that all legal decisions involve a choice among imperfect alternative decision-making institutions and that ideally, legal decisionmakers should choose “the best, or least imperfect, institution to implement a given societal goal”). For a discussion of the application of comparative institutional analysis to educational policy, see William H. Clune, *Institutional Choice as a Theoretical Framework for Research on Educational Policy*, 9 Educ. Evaluation & Pol’y Analysis 117 (1987).

197. See generally Clune, *supra* note 196 (proposing a theoretical framework, “institutional choice,” to clarify educational policy issues, particularly recent state educational reforms).

198. *Id.*

199. *Id.*

voluntary,²⁰⁰ which mitigates NESIC's immediate impact on American educational policy.

Financial concerns will deter states. The standards development processes, outlined in Title III of the Act,²⁰¹ are cumbersome, lengthy, and potentially expensive. It is not clear from the text of the Act whether the federal funds allocated for participating state and local agencies will cover all the costs associated with standards development.²⁰²

States also will have federalism concerns. Traditionally, states and local school boards have resisted ceding too much authority to the federal government.²⁰³ Those states and local school boards that decide to participate in *Goals 2000* activities, develop educational standards, and seek certification for those standards, will need to submit those standards to NESIC for review and approval.²⁰⁴

Despite these deterrents, the Act will likely attract state participation, thereby increasing federal influence over educational policy. Like other federal educational programs, states have financial incentives to participate in the Act.²⁰⁵ For the 1994 fiscal year alone, Congress appropriated \$105 million for *Goals 2000*.²⁰⁶ Federal funds targeted to such efforts will ensure some level of participation even if these funds do not entirely cover the costs associated with *Goals 2000* activities.

States currently engaged in similar reform efforts will be even more amenable to participation.²⁰⁷ Such states may only need to tailor existing, ongoing educational reform efforts to meet the Act's requirements. Also, political and public pressure to engage in a major educational reform will encourage additional participation. As one study explains, one of the most significant functions of the federal government is its ability to provide a "bully pulpit" on matters of federal interest.²⁰⁸

200. See *supra* note 126 (noting that the federal constitution is silent on education, and by implication, education is a state responsibility); see *infra* note 210 (setting out state constitutional provisions requiring that states provide some form of free public education).

201. Pub. L. No. 103-227, §§ 301-19, 108 Stat. 125, 157-87.

202. *Id.*

203. See *supra* note 43.

204. Pub. L. No. 103-227, § 211, 108 Stat. 125, 139.

205. Kearns & Doyle, *supra* note 26, at 112.

206. Office of Mgmt. & Budget, Executive Office of the President of the U.S., Budget of the U.S. Government, Fiscal Year 1995, app. at 361 (1994).

207. The House Report cites the reform plans in Kentucky, California, and Vermont as examples of productive educational reform. H.R. Rep. No. 168, 103d Cong., 1st Sess. 46 (1994), reprinted in 1994 U.S.C.C.A.N. 63, 74.

208. Kearns & Doyle, *supra* note 26, at 116.

Yet, increased federal activity will not provide any long-term solutions to the pressing problems confronting America's schools.²⁰⁹ Notwithstanding *Goals 2000*, constitutional and legal authority to provide education remains firmly rooted at the state and local government levels.²¹⁰ Also, despite creating new federal educational funds, *Goals 2000* will not significantly alter the relative financial contributions from governments to school districts. As Table III illustrates above, the primary source of revenue for elementary and secondary education is state and local taxes. Nothing contained in *Goals 2000* upsets this balance. Through *Goals 2000*, the federal government shapes educational policy, and the states and localities fund the federal educational policy goals.

IV. LEGALIZATION: *GOALS 2000* WILL ENCOURAGE EDUCATIONAL LITIGATION

States that opt to develop and implement *Goals 2000* standards will expose themselves to potentially significant future costs on two fronts. One front is political: pressure will build on state legislatures for additional educational spending. Traditionally, elected officials sought to improve student academic achievement by increasing educational resources.²¹¹ States that develop content and opportunity-to-learn standards will find it difficult to deny to students and schools the resources deemed necessary to implement these standards. Yet, as previously discussed, the United States already spends a greater portion of GDP on education than do countries where students attain higher achievement scores.²¹²

209. Lu, *supra* note 156, at 564 ("A more active federal role can spur school finance reform in the 1990s, but federal action will be effective only with greater federal spending for education.")

210. Educational clauses, existing in all state constitutions except that of Mississippi, require that some system of public education be maintained. See Ala. Const. art. XIV, § 256; Alaska Const. art. VII, § 1; Ariz. Const. art. XI, § 1; Ark. Const. art. XIV, § 1; Cal. Const. art. IX, §§ 1, 5; Colo. Const. art. IX, § 2; Conn. Const. art. VIII, § 1; Del. Const. art. X, § 1; Fla. Const. art. IX, § 1; Ga. Const. art. VIII, § 2, ¶ 1; Haw. Const. art. X, § 1; Idaho Const. art. IX, § 1; Ill. Const. art. X, § 1; Ind. Const. art. VIII, § 1; Iowa Const. art. 9, § 3; Kan. Const. art. VI, §§ 1, 6; Ky. Const. §§ 183-84; La. Const. art. VIII, §§ 1, 13; Me. Const. art. 8, pt. 1, § 1; Md. Const. art. VIII, § 1; Mass. Const. ch. 5, § 2; Mich. Const. art. VIII, § 2; Minn. Const. art. XIII, § 1; Mo. Const. art. 9, § 1(a); Mont. Const. art. X, § 1(3); Neb. Const. art. VII, § 1; Nev. Const. art. XI, § 2; N.H. Const. pt. 2, art. 83; N.J. Const. art. VIII, § 4; N.M. Const. art. XII, § 1; N.Y. Const. art. XI, § 1; N.C. Const. art. IX, § 2; N.D. Const. art. VIII, § 2; Ohio Const. art. VI, § 2; Okla. Const. art. XIII, § 1; Or. Const. art. VIII, § 3; Pa. Const. art. III, § 14; R.I. Const. art. XII, § 1; S.C. Const. art. XI, § 3; S.D. Const. art. VIII, § 1; Tenn. Const. art. XI, § 12; Tex. Const. art. VII, § 1; Utah Const. art. X, § 1; Vt. Const. ch. II, § 68; Va. Const. art. VIII, § 1; Wash. Const. art. IX, § 2; W. Va. Const. art. XII, § 1; Wis. Const. art. X, § 3; Wyo. Const. art. VII, § 1.

211. See, e.g., Finn, *supra* note 1, at 36 (noting that funds for education increased in the 1980s after performance of American students declined).

212. See *supra* text accompanying notes 31-33.

A second front is legal. The amenability of the Act's language to future litigation, particularly in light of recent "waves" of school finance litigation,²¹³ will contribute to the growing legalization of educational policy. The Act creates new and attractive reasons to sue school districts that choose to develop and implement content and opportunity-to-learn standards. Under the Act, NESIC identifies areas needing national content standards²¹⁴ and certifies²¹⁵ acceptable content standards.²¹⁶ A related section of the Act establishes similar processes for the development and certification of opportunity-to-learn standards.²¹⁷ Public law litigants who seek increases in public educational funding will quickly seize upon newly implemented content and opportunity-to-learn standards to transform these standards into legal entitlements. Further, courts will look to states and local school boards rather than to the federal government for the funding needed to meet these standards. This creates an unusual scenario: the federal government will shape educational policy, and the states and localities will supply the requisite funds.

A. *Opportunity-To-Learn Standards Encourage Litigation*

The Congressional rationale for promoting content standards is relatively straightforward. The development of content standards is aimed at forming a consensus on what students need to know and by when.²¹⁸ It is reasonable for a state, for example, to conclude that its students must know how to read, write, and master fundamental mathematical concepts to be promoted to the ninth grade. Developing a consensus on content standards—what constitutes an acceptable core curriculum—is plausible.

Any consensus on opportunity-to-learn standards is less probable. According to the Act's drafters, the development of opportunity-to-learn standards will "provide information on related factors that con-

213. See generally William E. Thro, *Judicial Analysis During the Third Wave of School Finance Litigation: The Massachusetts Decision as a Model*, 35 B.C. L. Rev. 597 (1994) (noting that recent school finance litigation has focused on the quality of education rather than on equal funding for all students). Thro reviews the three waves of school finance litigation, noting that the first wave involved federal equal protection claims that the Supreme Court dismissed in *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 50 (1973). Thro notes that the second wave emphasized equal protection claims in state constitutions, and that suits during the current third wave are based on educational clauses in state constitutions. See also Gail F. Levine, Note, *Meeting the Third Wave: Legislative Approaches to Recent Judicial School Finance Rulings*, 28 Harv. J. on Legis. 507 (1991) (explaining that school finance litigation exploded in 1989 and 1990).

214. Pub. L. No. 103-227, § 213(a)(1)(A), 108 Stat. 125, 142.

215. *Id.* § 213(a)(1)(B), 108 Stat. at 142.

216. *Id.* § 213(a)(2)(B), 108 Stat. at 143.

217. *Id.* § 213(c), 108 Stat. at 143-44.

218. H.R. Rep. No. 168, 103d Cong., 2d Sess. 40-41 (1994), *reprinted in* 1994 U.S.C.C.A.N. 63, 67-68.

tribute to a successful learning environment,"²¹⁹ and thereby ensure that schools and school districts provide students with the resources necessary to enable students to meet the content standards. It would be unfair to expect a student to master fundamentals of geometry if, for example, that student's school does not offer a geometry class, lacks relevant textbooks, or does not provide a competent geometry teacher. Similarly, it would be unfair to require a student to reach world-class achievement standards in science if the local school board or state does not provide the school or district with funding or resources for scientific or laboratory equipment. These extreme situations aside, however, debates surrounding opportunity-to-learn standards will uncover a vast area in which reasonable people can differ on what constitutes an adequate opportunity for students to meet specific educational standards. Because a consensus has not yet emerged on the determinants of student achievement,²²⁰ assessing whether appropriate or adequate learning facilities exist will prompt vigorous debates. Many of these debates will spill into the federal courts.

Goals 2000 invites states and local educational agencies to enter this vast and potentially costly gray area.

B. *Idealistic Goals v. Realistic Results: Opening the Floodgates*

In addition to the inevitable debate over what constitutes an adequate "opportunity-to-learn," two factors relating to *Goals 2000* will encourage public law litigation. First, a gap will emerge between existing student achievement and the idealistic achievement goals outlined in a state's content standards. Present achievement indicators suggest that American students remain far from attaining national educational goals enunciated in *Goals 2000*. For example, one stated goal establishes a six-year target date for American students to lead the world in science and mathematics achievement.²²¹ Yet, American students placed near the bottom in a recent international assessment

219. *Id.* at 72.

220. See, e.g., Nation At Risk, *supra* note 2, at 19-21 (summarizing findings from a variety of commissioned research papers, many of which examine factors contributing to student achievement); Margaret C. Wang et al., *What Influences Learning? A Content Analysis of Review Literature*, 84 J. Educ. Res. 30, 30 (1990) ("Educational research has identified a large number of variables related to school learning. Because such a multiplicity of distinct influences on achievement have been found, educators may be perplexed as to which items are most important."). For a discussion on the importance of educational expenditures for student achievement, see Larry V. Hedges et al., *Does Money Matter? A Meta-Analysis of the Effects of Differential School Inputs on Student Outcomes*, Educ. Res., April 1994, at 5-13; Eric A. Hanushek, *Money Might Matter Somewhere: A Response to Hedges, Laine, and Greenwald*, Educ. Res., May 1994, at 5-8.

221. Pub. L. No. 103-227, § 102(5), 108 Stat. 125, 132.

of science achievement.²²² Such a discrepancy will produce another gap, between a state's existing educational resources and the resources required to realize higher achievement goals. Once a state aspires to achieve national educational goals and establishes content and opportunity-to-learn standards, the state will expose itself to lawsuits seeking to force that state to provide the financial resources necessary to meet its educational ideals. Accordingly, *Goals 2000*-induced litigation will likely converge with the emerging "third" wave of school finance litigation.²²³ In fact, a few state court decisions have already overturned school financing systems and alluded to notions suggested by the content and opportunity-to-learn standards called for in *Goals 2000*.²²⁴ This third wave of school finance litigation decisions, relying on educational clauses in state constitutions, focuses on the quality of education provided rather than differences in per-pupil spending.²²⁵ *Goals 2000* will heighten this shift in emphasis from equality to quality in recent school finance lawsuits that, according to one commentator, "represents the future of school finance reform litigation."²²⁶

*Alabama Coalition for Equity v. Hunt*²²⁷ provides a recent glimpse of this new strain of educational litigation. The plaintiffs in *Hunt* argued that Alabama's public elementary and secondary schools did not offer equitable and adequate educational opportunities to all of Alabama's students. The trial court held for the plaintiffs,²²⁸ noting that Alabama's constitution provides for equal educational opportunity²²⁹

222. Office of Pol'y & Planning, U.S. Dep't of Educ., International Education Comparisons 5 (1992) (citation omitted).

223. See, e.g., William E. Thro, *The Third Wave: The Impact of the Montana, Kentucky, and Texas Decisions on the Future of Public School Finance Reform Litigation*, 19 J.L. & Educ. 219 (1990) (exploring the major changes in this area of litigation); Levine, *supra* note 213, at 507 (discussing judicial mandates that created a "third wave" of school finance litigation).

224. See, e.g., Bismark Pub. Sch. Dist. No. 1 v. State, 511 N.W.2d 247, 259-63 (N.D. 1994) (holding that public school financing system violated equal protection, though supermajority provision in constitution precluded court from holding system unconstitutional); Opinion of the Justices, 624 So. 2d 107 (Ala. 1993) (requiring legislature to provide students with equal educational opportunity); *McDuffy v. Secretary of the Executive Office of Educ.*, 615 N.E.2d 516, 548 (Mass. 1993) (concluding that there is a constitutional duty to provide all public high school students with adequate education); *Abbott v. Burke*, 575 A.2d 359, 384-92 (N.J. 1990) (finding public school educational act unconstitutional because it did not assure appropriate funding in poorer districts); *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 196-99 (Ky. 1989) (holding that current school system failed to satisfy constitutional requirement that legislature provide efficient system of common schools throughout state).

225. Thro, *supra* note 213, at 603.

226. *Id.* at 604.

227. Opinion of the Justices, 624 So. 2d 107 (Ala. 1993) (rendering an advisory opinion directing the state senate to follow the order of the trial court). In that case, the trial court's ruling was never appealed, and the Alabama Supreme Court did not pass on the merits.

228. *Id.* at 165-66.

229. *Id.*; Ala. Const. art. XIV, § 256, amended by Ala. Const. amend. No. 111.

as well as substantive content guarantees. The court noted that the Alabama constitution requires the state legislature to ensure that state constitutional guarantees, such as those involving education, are properly addressed through sufficient funding.²³⁰

The court in *Hunt* noted serious shortcomings in Alabama public schools—in curriculum, staffing, and with access to such resources as classrooms, textbooks, and school supplies.²³¹ The opinion requires Alabama to provide its students with the “opportunity to attain” oral, written, mathematic, and scientific skill levels commensurate with national and international levels.²³² The state court extracted these requirements for substantive educational content largely from the educational clause of the state’s constitution.²³³ In so ruling, the court dismissed the state’s claim that it could not afford to fund the schools to the extent that the plaintiffs demanded.²³⁴

Interestingly, the language in *Goals 2000* is strikingly similar to the language in the *Hunt* opinion. The criteria that NESIC will develop for assessing opportunity-to-learn standards will address such factors as the quality and availability of curricula, instructional materials, and instructional techniques.²³⁵ NESIC will also consider the extent to which school facilities have the requisite libraries, laboratories, and other educational resources.²³⁶ Finally, as NESIC formulates the criteria that it will use to certify content and opportunity-to-learn standards, NESIC will adopt a global frame of reference by addressing comparable international achievement levels.²³⁷

C. *Protracted Judicial Oversight: Lessons From the Past*

Judicial oversight of public schools has produced some vexing problems in the last forty years. The nation’s experience with school desegregation aptly illustrates the difficulties that courts sometimes face in ending judicial monitoring and supervision once they begin. Although more than forty years have passed since the Supreme Court’s *Brown v. Board of Education*²³⁸ decision, federal courts remain embroiled in the desegregation effort. As of 1988, more than

230. Opinion of the Justices, 624 So. 2d at 145-46.

231. *Id.* at 126-38.

232. *Id.* at 166.

233. The educational clause provides:

It is the policy of the state of Alabama to foster and promote the education of its citizens in a manner and extent consistent with its available resources, and the willingness and ability of the individual student, but nothing in this Constitution shall be construed as creating or recognizing any right to education or training at public expense

Ala. Const. art. XIV, § 256, amended by Ala. Const. amend. No. 111.

234. Opinion of the Justices, 624 So. 2d at 145-46.

235. Pub. L. No. 103-227, § 213(c)(2)(A)-(B), 108 Stat. 125, 144.

236. *Id.* § 213(c)(2)(E), 108 Stat. at 144.

237. *Id.* § 213(a)(2)(B)(i), 108 Stat. at 143.

238. 347 U.S. 483, 495 (1954) (“Brown I”); 349 U.S. 294, 301 (1955) (“Brown II”).

100 school desegregation cases were being actively litigated in the federal courts.²³⁹ One recent survey reports that 960 school districts attempted to desegregate between 1968 and 1986.²⁴⁰ In 1990 the Department of Education's Office for Civil Rights reported that 256 school districts, with a total combined student enrollment exceeding two million, operated under court supervision in school desegregation cases brought by the Department of Justice.²⁴¹ In addition, of the forty-four members of the Council of the Great City Schools, an organization of the nation's largest urban public school districts, only four had not implemented a school desegregation plan by the 1990-91 school year.²⁴² Courts and commentators are becoming increasingly embroiled in the debate as to when the judiciary may dissolve desegregation decrees and cease oversight.²⁴³ One reason that courts have struggled with ending oversight of school desegregation is that certain essential concepts, such as the definition of a fully integrated, or "unitary" school system, defy consensus.²⁴⁴ Unfortunately, courts will face the same definitional problems under *Goals 2000*, because, as previ-

239. Jones, *supra* note 173, at 1902 n.93.

240. Michael Heise, *An Empirical and Constitutional Analysis of Racial Ceilings and Public Schools*, 24 Seton Hall L. Rev. 921, 921 (1993) (citing Karl Tauber, *Resegregation of Public School Districts, 1968-1986* (1990) (University of Wisconsin-Madison, Center for Demography and Ecology, working paper no. 90-16)).

241. David S. Tatel, *Desegregation Versus School Reform: Resolving the Conflict*, 4 Stan. L. & Pol'y Rev. 61, 63, 70 n.20 (1993) (citing Office of Civil Rights, U.S. Dep't of Educ., 1990 Elementary and Secondary School Civil Rights Survey: Court-Ordered School Districts).

242. Baseline Indicators, *supra* note 28, at 81.

243. See, e.g., *Freeman v. Pitts*, 112 S. Ct. 1430, 1443-46 (1992) (permitting district court to partially withdraw supervision over desegregation plan before full compliance has been achieved); *Board of Educ. v. Dowell*, 498 U.S. 237, 249-50 (1991) (emphasizing that federal judicial supervision of desegregation efforts was intended to be a temporary measure and holding that district court should consider whether school district has complied in good faith with desegregation decree and whether vestiges of past discrimination have been eliminated in deciding whether to dissolve desegregation decree); *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 436-37 (1976) (holding that district court exceeded its remedial powers in requiring annual readjustment of school attendance zones when changes in the racial makeup of the schools were caused by demographic shifts "not attributed to any segregative acts on the part of the [school district]"); John Dayton, *Desegregation: Is the Court Preparing to Say It Is Finished?*, 84 Ed. L. Rep. 897 (1993) (reviewing and analyzing *Freeman* and *Dowell* and arguing that the Supreme Court will soon discontinue judicial oversight of desegregation efforts); Jones, *supra* note 173, (arguing that Congress has the constitutional authority to limit federal court jurisdiction over desegregation cases and should do so).

244. *Freeman*, 112 S. Ct. at 1443-44 (noting that the term "unitary" has no fixed meaning). See also David Crump, *From Freeman to Brown and Back Again: Principle, Pragmatism, and Proximate Cause in the School Desegregation Decisions*, 68 Wash. L. Rev. 753 (1993) (arguing that most desegregation opinions have ordered remedies that are not easily understood or followed and arguing for greater clarity in upcoming termination-of-supervision decisions).

ously discussed, "opportunity-to-learn" standards do not lend themselves to consensus.²⁴⁵

The effectiveness of judicial involvement in educational policymaking is also questionable, and helpful empirical evidence is scarce.²⁴⁶ "Legal impact" issues are at the core of these questions. Professor Rosenberg recently made an important contribution to the legal impact debate. In *The Hollow Hope*,²⁴⁷ Rosenberg asks, "To what degree, and under what conditions, can judicial processes be used to produce political and social change?"²⁴⁸ Rosenberg's treatment of this question includes an assessment of the effect of *Brown v. Board of Education*²⁴⁹ on school integration. Employing empirical evidence, Rosenberg argues that the Court's ability to influence social change is limited and occurs only in conjunction with other non-judicial factors. For example, he notes that while *Brown* certainly endures as among the most important cases in the second half of the twentieth century, that decision, along with the constant judicial oversight that followed,²⁵⁰ failed to fully integrate schools, particularly in Southern school districts.²⁵¹ Rosenberg notes that the rate of school integration in the South did not begin to rise appreciably until after the passage of the Civil Rights Act of 1964, when the legislative and executive branches increased attention to civil rights.²⁵² Though not all commentators agree with Rosenberg,²⁵³ his conclusions will undoubtedly dishearten many "strong court" commentators.²⁵⁴

245. See *supra* part IV.A.

246. See, e.g., G. Alan Hickrod et al., *The Effect of Constitutional Litigation on Education Finance: A Preliminary Analysis*, 18 J. Educ. Fin. 180, 181 (1992) (noting that the effects of litigation on school finance are difficult to assess from a strictly empirical perspective). For possible explanations as to why many legal commentators typically avoid empirically-based research, see Peter H. Schuck, *Why Don't Law Professors Do Much Empirical Research?*, 39 J. Legal Educ. 323, 323-36 (1989) (discussing the reasons for the lack of such research by law professors and proposing a remedy).

247. Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (1991).

248. *Id.* at 1.

249. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) ("Brown I"); 349 U.S. 294, 301 (1955) ("Brown II").

250. See *supra* note 173.

251. Rosenberg, *supra* note 247, at 52 ("The statistics from the Southern states are truly amazing. For ten years, 1954-64, virtually *nothing happened.*").

252. *Id.* at 51; see also Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. § 2000a-2000h-6 (1988 & Supp. V 1993)).

253. After studying 65 randomly selected federal court opinions between 1970 and 1977, Rebell and Block find evidence rebutting criticism that "the judiciary lacks the resources, expertise, or comprehensive perspective needed to implement educational reform successfully." Michael A. Rebell & Arthur R. Block, *Educational Policymaking and the Courts: An Empirical Study of Judicial Activism* 210 (1982). Rebell and Block, however, did not study any federal court opinions involving school desegregation.

254. Professor Schuck identifies three schools of thought—"strong court," "court skeptics," and "court fatalists"—on whether courts are effective at implementing pub-

More fundamentally, protracted judicial involvement in educational policymaking has proved unmanageable,²⁵⁵ and courts generally are disinclined to issue orders requiring detailed judicial oversight over a long period of time.²⁵⁶ Federal courts also view supervision of public schools as temporary remedies,²⁵⁷ and desegregation cases have shown how difficult it is to keep judicial oversight of public schools from becoming a permanent phenomenon.²⁵⁸ At a time when the dockets of federal courts have become more crowded,²⁵⁹ the judiciary will not view favorably the prospect of additional judicial oversight of educational reform.

Much of the recent educational litigation follows a public law litigation tradition shaped in other areas of public policy,²⁶⁰ and produces detailed and extensive remedies. Proponents of public law litigation

lic policies. Peter H. Schuck, *Public Law Litigation and Social Reform*, 102 Yale L.J. 1763, 1769 (1993) (reviewing Gerald P. López, *Rebellious Lawyering: One Chicano's Vision of Progressive Law Practice* (1992) and Rosenberg, *supra* note 247). "Strong-court" commentators argue that courts effectively can implement reforms, emphasizing the courts' relative insulation from electoral politics. See Rebell & Block, *supra* note 253, at xi. "Court skeptics" are more sanguine about the ability of the judiciary to influence policy changes. These commentators emphasize institutional and political factors that limit courts' ability to make or shape policy. See, e.g., Donald L. Horowitz, *The Courts and Social Policy* (1977) (illustrating the difficulties that courts face in framing flexible solutions to public law disputes and in forecasting and controlling the effects of these decisions). Finally, "court fatalists" argue that the judiciary can only reinforce other extrajudicial factors contributing to public policy implementation. See, e.g., Rosenberg, *supra* note 247, at 3 (setting out the "Constrained Court" view, which builds on Hamilton's conception of the judiciary as the "least dangerous" branch of government, possessing "neither the power of the purse nor the sword").

255. See generally Dayton, *supra* note 243 (reviewing judicial involvement in desegregation efforts); see *supra* note 173 (reviewing significant Supreme Court desegregation cases).

256. 11 Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2942 (1973).

257. *Board of Educ. v. Dowell*, 498 U.S. 237, 247-48 (1991).

258. Federal judicial supervision of desegregation has lasted 40 years. Only recently has the Court been willing to consider termination of supervision over desegregation. See *Freeman v. Pitts*, 112 S. Ct. 1430, 1443-46 (1992) (permitting district court to partially withdraw supervision over desegregation plan before full compliance has been achieved); *Dowell*, 498 U.S. 237, 249-50 (1991) (emphasizing that federal judicial supervision of desegregation efforts was intended to be a temporary measure and holding that district court should consider whether school district has complied in good faith with desegregation decree and whether vestiges of past discrimination have been eliminated in deciding whether to dissolve desegregation decree); *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 436-37 (1976) (holding that district court exceeded its remedial powers in requiring annual readjustment of school attendance zones when changes in the racial makeup of the schools were caused by demographic shifts "not attributed to any segregative acts on the part of the [school district]").

259. Patrick Johnston, *Civil Justice Reform: Juggling Between Politics and Perfection*, 62 Fordham L. Rev. 833, 866-67 (1994) (citing a survey indicating that attorneys believed that "delays in reaching court, exacerbated by clogged dockets" remained the single most serious problem with the federal courts).

260. See generally, Nathan Glazer, *Towards an Imperial Judiciary?*, 41 The Pub. Interest 104 (1975) (discussing the public law decisions of the Warren and Burger Courts).

note that such judicial activity derives from a need to protect individual rights and liberties.²⁶¹ On the other hand, there are concerns about the judiciary's growing influence over public policy questions and the financial affairs of state and local governments. At issue are separation of powers, federalism, judicial capacity, and popular representation.²⁶²

Despite a notable lack of consensus on a point implicitly relied upon by *Goals 2000*—that courts can influence educational policy—the Act nonetheless invites legal activity. Although it is too early to speculate about whether content or opportunity-to-learn standards will result in improved student achievement, more certain is that the implementation of such standards will provide a foundation for another generation of educational litigation. States that follow the federal government's encouragement and develop opportunity-to-learn standards will, paradoxically, be creating another entitlement that appears to bear little on whether school children learn more. In addition to increasing spending, *Goals 2000* will direct attention away from efforts to alter more fundamentally the delivery of educational services. One such fundamental change involves the incentive structure surrounding public education. Currently, too many public schools lack adequate incentives to improve their services.

CONCLUSION

Many of the nation's elementary and secondary schools must become more effective for a greater number of students. The performance of American students lags behind that of their foreign counterparts, particularly in core academic subjects. Past school reform efforts largely have failed to meet their stated objectives. Improving such frustrating student achievement trends will require changing existing policies or developing and implementing new ones, and unsuccessful past educational reform efforts suggest that future efforts must consider fundamental changes to the current delivery of educational services.

Viewed in this context, *Goals 2000* is a timely reminder that problems with our educational system endure. Despite serving as an uncomfortable reminder of a persistent problem, however, the Act will produce at least two unfavorable consequences that have escaped

261. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281 (1976) (describing fully the model of public law litigation—litigation affecting both parties and nonparties and usually resulting in substantial judicial oversight—and noting that civil litigation increasingly involves matters of public law); Gerald E. Frug, *The Judicial Power of the Purse*, 126 U. Pa. L. Rev. 715 (1978) (exploring the nature of limits on courts in requiring government expenditures to remedy constitutional violations).

262. See generally Glazer, *supra* note 260 (arguing that the judiciary has become far too activist, leading to antidemocratic results often conflicting with public opinion and the public interest).

serious consideration to date. First, the Act cedes an unprecedented amount of control over educational policymaking to the federal government. This federalization of educational policy, though it endeavors to achieve systemic reforms, is unfortunate because it attempts to realize unlikely benefits in exchange for more likely costs. One important and desirable benefit—improved student achievement—will not follow from federal legislation that seeks, in part, to coordinate state and local reform efforts. The exact locus of educational policymaking authority and its distribution among federal, state, and local governments is less important than the nature and substance of the educational reforms produced. A more likely cost of *Goals 2000* is that it will further homogenize and centralize the development of educational policies designed to serve an increasingly heterogenous student population.

Second, *Goals 2000* will attract litigation and increase judicial involvement in educational policymaking as litigants struggle to transform content and opportunity-to-learn standards into legal entitlements. Despite its perceived convenience, the judiciary is not an appropriate vehicle for the development and implementation of educational policymaking. Moreover, the limited existing empirical studies cast doubt on the efficacy of the courts' ability to develop and implement educational policies. For example, forty years of judicial oversight of school desegregation efforts have produced mixed results and led to unanticipated consequences. In addition, many judges frown upon continued judicial oversight, viewing it as a course of last resort. Finally, judicial involvement inevitably leads to court-mandated spending. Although reasonable people can differ on whether a more appropriate educational policymaking balance struck among the federal, state, and local governments is important to increased student achievement, few argue that increased judicial involvement is the key to increased student achievement. A better approach is to focus instead on the substance and nature of educational policies and to address how best to restructure fundamentally the delivery of educational services.

