DRAFT – DO NOT CITE WITHOUT AUTHOR PERMISSION

International Alternatives to a Litigation-Centered Enforcement Model to Advance a Federal Right to Education in the United States

Kimberly J. Jenkins*

Our progress as a nation can be no swifter than our progress in education.
-- Former U.S. President, John F. Kennedy

I. Introduction

Since the mid-twentieth century, the international community has recognized a right to education as an essential component of human rights. The right to education was first established in the Universal Declaration of Human Rights of 1948 (UDHR), which is a non-binding resolution of the General Assembly of the United Nations (UN) that was adopted on December 10, 1948, to establish the human rights included in the United Nations Charter.[1] The UDHR states that "[e]veryone has the right to education" and establishes that this right must be free and compulsory at the elementary stages, that States are to make professional and technical education "generally available" and that "higher education shall be equally accessible to all on the basis of merit."[2] The UDHR defines the aim of education as "the full development of the human personality" as well as "the strengthening of respect for human rights and fundamental freedoms."[3]

Subsequent international covenants have embraced this right.[4] An important formulation of this right is included in the International Covenant on Economic, Social and Cultural Rights (ICESCR), which defines the right to education in terms that are similar to the UDHR.[5] The Convention on the Rights of the Child, the comprehensive treaty that defines the human rights of children and that has been ratified by all nations except for the United States and Somalia, also includes a right to education.[6] In addition, other international covenants, such as the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women, identify education and/or the right to education as an area that must be free from the discrimination that those conventions are designed to

---

* Assistant Professor of Law, Emory School of Law; J.D., Harvard Law School, *cum laude*, 1996; B.A., University of Virginia, 1992. I am grateful for the insightful comments provided by Goodwin Liu. My appreciation and thanks go to the contributions of my research assistants Susan Adams, Greg Sicilian, Andrea Avarias and Naeha Dixit. I also benefited from the invaluable library assistance of Vanessa King.

[1] *See* KLAUS DIETER BEITER, THE PROTECTION OF THE RIGHT TO EDUCATION BY INTERNATIONAL LAW 86, 90 (2006).

[2] Universal Declaration of Human Rights, Article 16 ¶ 1.

[3] *See id.* at Article 16 ¶ 2.

[4] *See* BEITER, *supra* note 1, at 8; Shaleeta Washington, Comment, *Transcending Rhetoric: Redressing Discrimination in Education in Bulgaria and Israel Through Affirmative Action*, 23 PENN ST. INT'L L. REV. 969, 974 (2005).

[5] *See* International Covenant on Economic, Social and Cultural Rights, Articles 13 and 14; BEITER, *supra* note 1, at 94-95.

[6] *See* Convention on the Rights of the Child, Articles 28 and 29; http://www.ohchr.org/english/countries/ratification/11.htm (last visited Mar. 20, 2006) (listing signatories of the CRC).

eradicate.[7] Finally, numerous regional legal instruments also protect and guarantee a right to education.[8]

In contrast, while the United States has recognized the importance of education for the democratic, economic and moral future of the nation since its early history,[9] the United States has refused to guarantee a federal right to education. The United States has not ratified the ICESCR or the CRC, the principal human rights treaties that define the right to education, and its signature on the Universal Declaration of Human Rights is not binding. The United States Supreme Court was explicitly provided the opportunity to recognize education as a fundamental constitutional right in *San Antonio Independent School District v. Rodriguez* when poor, minority schoolchildren who resided in low property tax districts challenged the constitutionality of the Texas school financing system which allowed significant interdistrict expenditure disparities to persist that were attributable to differences in the districts' local property tax revenue.[10] The Court held that education was neither explicitly nor implicitly recognized as a fundamental right under the Constitution and that its importance and relationship to other rights, such as the right to speak and vote, were insufficient to transform it into a fundamental right.[11] In fact, the United States generally has eschewed recognition of all economic, social and cultural rights despite their widespread international acceptance as a legitimate and necessary component of human rights.[12]

Unlike the centralized education systems in many nations, state and local governments in the United States possess the lion's share of authority over education.[13] Nevertheless, the federal government has played an influential role in education since the founding of the nation and this role has increased over time.[14] One of the primary roles the federal government has played in education since the middle of the 20th century is to assist the neediest and least powerful within American society, which consistently has

---

[7] *See* International Convention on the Elimination of All Forms of Racial Discrimination (CERD), Article 5; Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), Article 10.
[8] *See* BEITER, *supra* note 1, at 155-57 (listing regional agreements that recognize the right to education).
[9] DAVID TYACK ET Al, LAW AND THE SHAPING OF PUBLIC EDUCATION 1785-1954 20, 23-25, 28(1987) ("If the 'diffusion of knowledge' was to be the key to building character and virtue, which in turn would preserve individual rights and liberties, then the means must be potent, universal, and predictable in their effect."); Center on Education Policy, *A Brief History of the Federal Role in Education: Why It Began and Why Its Still Needed* 9 (19XX) ("The founders of our nation recognized that an educated, well-informed citizenry is fundamental to a democratic form of government.").
[10] 411 U.S. 1, 5 (1973).
[11] *See id.* at 35-36.
[12] Philip Alston, *U.S. Ratification of the Covenant on Economic, Social, and Cultural Rights: The Need For an Entirely New Strategy*, 84 AMERICAN J. OF INT'L L. 365, 372-77 (1990) (noting that economic, social and cultural rights are embraced by the Commission on Human Rights as part of human rights and that "with the sole exception of the United States, all the Western democracies have accepted the validity and equal importance of economic, social and cultural human rights, at least in principle"). Alston notes a couple of instances in which the United States has accepted nonbinding agreements to promote economic, social and cultural rights; however, the position of the United States has been to reject such rights. *See id.* at 385-86.
[13] *See* JENNIFER HOCHSCHILD & NATHAN SCOVRONICK, THE AMERICAN DREAM AND THE PUBLIC SCHOOLS 4 (2003); Milliken v. Bradley, 418 U.S. 717, 741 (1974); Rodriguez, 411 U.S. at 39.
[14] *See* Erik W. Robelen, *The Evolving Federal Role*, *in* LESSONS OF A CENTURY: A NATION'S SCHOOLS COME OF AGE 240, 240-41 (2000).

included minorities and low-income individuals.[15] The No Child Left Behind Act of 2001 (NCLB) continues this traditional federal focus by directing federal financial assistance to districts with substantial percentages of low-income students and by drawing national attention to the persistent achievement gap between minority and white students and between low-income and other students.[16] NCLB represents the high watermark of federal involvement in education with, among others, provisions that condition federal financial assistance on states developing specific accountability and testing requirements, establishing remedial actions that must be implemented when schools or subgroups within schools do not make adequate yearly progress and increasing qualifications for new teachers while verifying those of current teachers.[17]

Unfortunately, it remains clear that the plight of too many of the nation's schoolchildren, particularly urban, minority and poor schoolchildren remains bleak. While federal efforts have improved their lot since the Supreme Court's decision in *Brown v. Board of Education* and passage of the Elementary and Secondary Education Act of 1965, there remains substantial room for improvement as discussed below in section IIIC. Scholars have proposed a variety of ways to address this concern, including school finance litigation.[18] A number of efforts have been undertaken, including school finance litigation in all 50 states,[19] but these efforts have been piecemeal and thus this country still lacks a national approach to the deeply-entrenched national problem of inferior educational opportunities for low-income and minority students.

This essay explores how this nation could move forward on its unfinished agenda to ensure equal educational opportunity by proposing a shift away from the current scholarly focus on the courts to a legislative approach that would recognize a federal right to education. While numerous scholars have argued that the United States should recognize a federal right to education,[20] those arguments envision a right that is defined by the judiciary and enforced through the courts. In contrast, this Article contends that the federal government should recognize a right to education through legislation, but that the enforcement mechanism for this right should be a collaborative approach between the federal, state and local government to improve educational opportunities rather than a private right of action against states or districts. The implementation and enforcement mechanisms for this right to education would be modeled after the enforcement

---

[15] *See id.* at 240.

[16] The No Child Left Behind Act, Pub. L. No. 107-110, §§ 1001, 1111.

[17] *See* Elizabeth H. DeBray et al, *Introduction to the Special Issue on Federalism Reconsidered: The Case of the No Child Left Behind Act*, PEABODY J. OF EDUC., 80(2), 1,7 (2005) ("Although NCLB is in one sense simply an extension of earlier versions of ESEA, it is also true that the law attaches more 'strings' or conditions to federal education aid than ever before"); Center on Education Policy, *A New Federal Role in Education* 1 (Sept. 2002).

[18] *See* Jay P. Heubert, *Six Law-Driven School Reforms: Developments, Lessons, and Prospects, in* LAW & SCHOOL REFORM: SIX STRATEGIES FOR PROMOTING EDUCATIONAL EQUITY 1, 10-13 (Jay P. Heubert ed. 1999).

[19] *See* John Dayton & Anne Dupre, *School Funding Litigation: Who's Winning the War?*, 57 VAND. L. REV. 2351, 2377 (2004).

[20] *See, e.g.*, Erwin Chemerinsky, *The Deconstitutionlization of Education*, 36 LOY. U. CHI. L.J. 111, __ (2004); Thomas J. Walsh, *Education as a Fundamental Right under the United States Constitution*, 29 WILLAMETTE L. REV. 279, 294-96 (1993); Susan H. Bitensky, *Theoretical Foundations for a Right to Education under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 NW. U. L. REV. 550, ___ (1992).

mechanisms included in the ICESCR and the CRC, which adopt a reporting, public accountability and technical assistance approach, rather than a litigation-centered approach.

This article presents this thesis in five parts. Part II explains how the right to education is defined in the ICESCR and the CRC and how these articles are interpreted and enforced.[21] Part II also describes an additional enforcement mechanism that is included in the International Covenant on Civil and Political Rights that will be relevant to the recommendations included in Part IV. Part III briefly considers the United States' refusal to recognize the right to education, how scholars have suggested this refusal should be remedied and why such a right is needed in the United States. Part IV presents this Article's proposal for a right to education that incorporates a collaborative enforcement mechanism rather than a judicially-enforceable private right of action. Part V then explores some of the key strengths and weaknesses of the proposed approach.

II. The Right to Education in International Law

A. The Right to Education in the ICESCR

1. The ICESCR's Definition and Interpretation of the Right to Education

The right to education included in the ICESCR[22] "may arguably be viewed as the most important formulation of the right to education in an international agreement."[23] The ICESR defines the right to education in Articles 13 and 14. Article 13 "recognize[s] the right of everyone to education." [24] The goal of education includes the "full development of the human personality and the sense of its dignity . . ." as well as enabling individuals to be effective participants in society. [25] In addition, Article 13 specifically obligates States Parties to ensure that education promotes the foundational principles of the United Nations, such as "understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups" and that education advances the United Nations' activities that promote world peace.[26]

Article 13 then further defines the right to education by level of education which States Parties must recognize "with a view to achieving the full realization of this right."[27] It provides that "primary education shall be compulsory and available free to all;" that "secondary education . . . , including technical and vocational secondary

---

[21] A later draft could include another international instrument if that would be helpful.
[22] The ICESCR opened for signature in 1966 and entered into force in 1976. *See* Liz Heffernan, *A Comparative View of Individual Petition Procedures under the European Convention on Human Rights and the International Covenant on Civil and Political Rights*, 19 HUM. RTS. Q. 78, 83 (1997).
[23] BEITER, *supra* note 1, at 341.
[24] ICESCR, Article 13, ¶ 1. The CESCR embraces as its definition of the right to education not only the text of the Covenant but also the definition of the right to education that has been included in subsequent human rights agreements, such as the Convention on the Rights of the Child. General Comment No. 13, ¶ 5, E/C.12/1999/10 (Dec. 8, 1999).
[25] *See id.*
[26] *See id.*
[27] ICESCR, Article 13, ¶ 2.

education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education." [28] Finally, for postsecondary education, the Covenant requires states to ensure that it is provided in a manner that is "equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education." [29] Article 13 further protects the ability of parents to choose a private school for their children. [30]

Article 14 solely addresses primary education by requiring any State party that does not offer "compulsory primary education, free of charge" when it becomes a party to the Covenant to prepare within two years of becoming a party a detailed plan for providing such an education "within a reasonable number of years." [31] The Committee on Economic, Social and Cultural Rights (CESCR), which is responsible for monitoring implementation of the ICESCR,[32] issues General Comments that assist state parties in interpreting the obligations under the Covenant. [33] The General Comment on Article 14 emphasizes that the obligation cannot be avoided on the basis of inadequate resources.[34]

The CESCR's General Comments on Articles 13 and 14 emphasize the importance of the right to education as not only an end in itself but also a means to achieve other rights.[35] A denial of education often results in children being victims of other violations of their human rights.[36] Consequently, the Committee notes that an investment in education has been recognized as "one of the best financial investments States can make." [37]

In explaining the requirements of Article 13, the CESCR has noted that a state party's educational system must serve the aims and objectives in Article 13(1), including the full development of the human personality, and the state must monitor its system to ensure that it serves these objectives.[38] The CESCR identifies four dimensions of the right to education: availability, education must be available in sufficient quantity for the students in the states; accessibility, education must be accessible to everyone without discrimination as well as be economically and physically accessible; acceptability, the substantive provision of education must be "relevant, culturally appropriate and of good quality;" and adaptability, it must be sufficiently flexible to adjust to the evolving needs of society. [39] Violations of Article 13 may occur through both action and inaction to address impediments to realization of the Covenant's rights.[40]

The right to education must be understood within the context of several other articles within the Covenant that determine how the right to education must be provided. One of the most important requirements among these is the ICESCR's protection against

---

[28] *See id.*
[29] *See id.*
[30] ICESCR, Article 13, ¶ 3.
[31] ICESCR, Article 14.
[32] *See* William F. Felice, *The Viability of the United Nations Approach to Economic and Social Human Rights in a Globalized Economy*, 75 INT'L AFFAIRS 563, 569 (1999)
[33] *See* UN Doc. E/1988/14, ¶ 367; Beiter, *supra* note 1, at 365.
[34] General Comment 11, ¶¶ 2, 9 (1999), E/C.12/1999/4 (May 10, 1999).
[35] General Comment No. 13, ¶ 1, E/C.12/1999/10 (Dec 8, 1999).
[36] General Comment 11, ¶ 4 (1999), E/C.12/1999/4 (May 10, 1999).
[37] General Comment No. 13, ¶ 1, E/C.12/1999/10 (Dec. 8, 1999).
[38] *Id.* at ¶ 5.
[39] *See id* at ¶ 6.
[40] General Comment No. 13, ¶ 58, E/C.12/1999/10 (Dec. 8, 1999).

discrimination in the provision of Covenant rights.[41] Under Article 2(2), a state party agrees "to guarantee that the rights enunciated . . . will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[42] The Covenant is not solely aimed at eliminating intentional discrimination, but also specifically directs state parties to monitor their education system "so as to identify and take measures to redress any de facto discrimination."[43] To further the identification and redress of de facto discrimination, the CESCR notes that data on educational outcomes "should be disaggregated by the prohibited grounds of discrimination."[44] Regarding substantial financial disparities in funding education within a state, the CESCR has stated that "[s]harp disparities in spending policies that result in different qualities of education for persons residing in differing geographic locations may constitute discrimination under the Covenant."[45]

In contrast to the immediate prohibition against discrimination in the provision of Covenant rights, the ICESCR also acknowledges that some state parties may not be able to provide the full scope of economic, social and cultural rights upon ratification.[46] The Covenant allows for progressive realization of its rights by obligating states parties "to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."[47] This requires States that do not yet fully recognize the rights in the Covenant to engage in an ongoing process both domestically and in partnership with other nations as well as international organizations to achieve full protection of the rights in the Covenant.

The CESCR's General Comment on implementation of the Covenant explains that the recognition that implementation may be influenced by the resources available to a State does not relieve the State of its obligations to implement the Covenant.[48] To the contrary, while recognizing the flexibility given to State parties, the CESCR unequivocally rejects the contention that progressive realization tolerates inaction but rather emphasizes that state parties have "specific and continuing obligations 'to move as expeditiously and effectively as possible' towards the full realization of Article 13."[49] Thus, the requirement that States "take steps" to implement the Covenant means that these steps "should be deliberate, concrete and targeted as clearly as possible towards

---

[41] *See* Jessica Schultz, *Economic and Social Rights in the United States: An Overview of the Domestic Legal Framework*, 11 HUMAN RTS. BRIEF 1, 1 (2003) (noting that non-discrimination is one of the overarching principles that guides fulfillment of the obligations in human rights treaties).
[42] ICESCR, Article 2, ¶ 1.
[43] General Comment No. 13, ¶ 6, E/C.12/1999/10 (Dec. 8, 1999).
[44] General Comment No. 13, ¶ 37, E/C.12/1999/10 (Dec. 8, 1999).
[45] General Comment No. 13, ¶ 6, E/C.12/1999/10 (Dec. 8, 1999).
[46] ICESCR, Article 2, ¶ 2.
[47] ICESCR, Article 2, ¶ 1.
[48] General Comment No. 3, ¶ 1, E/1991/23 (Dec. 14, 1990). *See also* Alston, *supra* note 12, at 379 (noting that allowing progressive implementation does not relieve state parties of an obligation to immediately begin to work toward full implementation).
[49] General Comment No. 13, ¶ 44, E/C.12/1999/10 (Dec. 1999) (quoting General Comment No. 3, ¶ 9).

meeting the obligations recognized in the Covenant." [50] It also explains that legislation alone may be insufficient to discharge a State's obligation to achieve full realization of the Covenant's rights "by all appropriate means" and instead additional action, such as recognition of judicially-enforceable rights, may be necessary. [51] In addition to justiciable rights, additional educational, financial, social and administrative action may be required to effectuate the Covenant's rights. [52]

2. The Enforcement of the Right to Education in the ICESCR

Like other major international human rights agreements, the ICESCR enforcement process requires state parties to submit reports to a monitoring committee.[53] The reports should identify the steps the state party has taken to implement the ICESCR, difficulties encountered in implementation and its achievements in observing the rights in the Covenant within one year of the Covenant entering into force and every 5 years thereafter.[54] The Covenant identifies the Secretary-General of the United Nations as the recipient of the reports and then specifies that the Secretary-General transmits the reports to the Economic and Social Council (ECOSOC) which may transmit to the UN General Assembly reports on the information received in state reports along with its recommendations for future action.[55] In practice, ECOSOC created CESCR in 1985 to support ECOSOC in its responsibilities under the Covenant to examine the initial and periodic state reports.[56] Eighteen human rights experts serve on the CESCR and it meets at least twice a year and sometimes three times a year when its workload so requires. [57]

The state reporting process also enables the state to assess its implementation progress and any shortcomings that are impeding its progress. [58] The CESCR has explained that the state party reports are designed to make certain that the state has conducted a review of its national legislation and administrative rules "to ensure the fullest possible conformity with the Covenant" and "[e]nsure that the State party monitors the actual situation with respect to each of the rights on a regular basis and is thus aware of the extent to which the various rights are, or are not, being enjoyed by individuals within its territory or under its jurisdiction."[59] To help state parties understand their reporting obligations, the CESCR has issued reporting guidelines that identify the information that must be included in state reports.[60] For the right to education, such information includes disaggregated data on literacy, graduation and drop out rates at each of the levels of education, and any difficulties or failures in implementing the covenant rights.[61] The guidelines also ask the state to identify whether any disadvantaged groups

---

[50] General Comment No. 3, ¶ 2, E/1991/23 (Dec. 14, 1990).
[51] General Comment No. 3, ¶¶ 4, 5, E/1991/23 (Dec. 14, 1990).
[52] *Id.* at ¶ 7.
[53] *See* Audrey R. Chapman, *A "Violations Approach" for Monitoring the International Covenant on Economic, Social and Cultural Rights*, 18 HUMAN RTS. Q. 23, 23-24 (1996)
[54] *See* Article 16, ¶ 2, Article 17, ¶ 2; BEITER, *supra* note 1, at 346; Alston, *supra* note 12, at 370.
[55] ICESCR, Article 23.
[56] *See* BEITER, *supra* note 1, at 348-49; Alston, *supra* note 12, at 368, 370.
[57] *See* BEITER, *supra* note 1, at 348, 349.
[58] General Comment No. 1 (3d Session, 1989), ¶¶ 6, 8, UN Doc. E/1989/22.
[59] General Comment No. 1 (3d Session, 1989), ¶¶ 2-3, UN Doc. E/1989/22.
[60] *See* UN Doc. E/C.12/1991/1; BEITER, *supra* note 1, at 351-53.
[61] *See* UN Doc. E/C.12/1991/1; BEITER, *supra* note 1, at 351-53.

are not enjoying equal access to education and what ratios of men and women participate in each of the levels of education. [62]

After a state submits a report, it will appear before the CESCR to discuss the report and answer the CESCR's questions. [63] The CESCR is authorized to invite representatives from UN agencies that have expertise on the topics to participate as well. [64] After the CESCR reviews a state's report, the CESCR adopts official "Concluding Observations" that assess the state's fulfillment or lack of fulfillment of its obligations under the Covenant. [65] The CESCR's monitoring approach has focused on whether states have met the "minimum core content" in the Covenant while also encouraging states to develop benchmarks to measure their progress. [66] The Concluding Observations include recommendations on how the state may continue to take steps to realize the rights in the Covenant. [67] The CESCR's Observations serve an important role in encouraging public dialogue about a state's compliance with the Covenant and "are meant to be widely publicized in states parties and to serve as the basis for a national debate on how to improve the enforcement of the provisions in the Covenant." [68] Thus, the Covenant contemplates that the citizens of the state party will serve as an important impetus for state action to conform to the Covenant.

The CESCR also has adopted a number of procedures to follow up on its recommendations, including asking states to identify the steps the state has undertaken in response to its recommendations in subsequent reports and requesting information from states before the next report is due. [69] If the CESCR has not received adequate information to assess compliance with the Covenant from the state, it will ask the state to receive one or two CESCR members who will gather the required information. [70]

A review of the CESCR's Concluding Observations to state reports in recent years (1997-2005) reveals that it has focused on a number of education issues, such as the denial of education to refugees and non-nationals;[71] lack of access to education based on nationality or race;[72] and the lack of compulsory, free primary education for all

---

[62] *See* UN Doc. E/C.12/1991/1; BEITER, *supra* note 1, at 352.
[63] BEITER, *supra* note 1, at 356.
[64] *See id.*
[65] *See id.* at 342, 359.
[66] *See* HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW POLITICS MORALS 305 (2d ed. 2000).
[67] *See* BEITER, *supra* note 1, at 359.
[68] *See id.*
[69] *See id.* at 357.
[70] *See id.* at 357-58.
[71] *See* CESCR, Report on the Thirty-fourth Session, ¶ 89, UN Doc. E/C.12/1/Add.107 (May 13, 2005) (finding insufficient the People's Republic of China's efforts to facilitate the enrollment in local school of children of foreign migrant workers who do not have the right to remain in Hong Kong Special Administrative Region are insufficient); CESCR, Report on the Thirty-third Session, ¶ 33, UN Doc. E/C.12/1/Add.104 (Dec. 14, 2004) (finding that Azerbaijan does not provide free compulsory education to non-Azerbaijani children); CESCR, Report on the Thirty-second Session, ¶ 26, UN Doc. E/C.12/1/Add.98 (Jun. 7, 2004) (finding that Kuwait does not provide free compulsory education to non-Kuwaiti children); CESCR, Report on the Nineteenth Session, ¶ 39, UN Doc. E/C.12/1/Add.31 (Dec. 10, 1998), (finding that refugees who do not have residence status, as well as asylum seekers, in Canada do not have access to loan programs for post-secondary education).
[72] *See* CESCR, Report on the Thirtieth Session, U.N. CESCR, ¶ 20, UN Doc. E/C.12/1/Add.88 (May 23, 2003) (finding that there are persistent inequalities between the Maori and non-Maori people in access to

children.[73] The CESCR also has commented on a number of education concerns that the United States has not adequately addressed, such as substantial illiteracy rates[74] and school drop-out rates;[75] disparities in educational quality along lines of nationality or race;[76] inferior educational opportunities for the poor;[77] inadequate facilities;[78] and,

---

education in New Zealand); CESCR, Report on the Twenty-first Session, ¶ 18, UN Doc. E/C.12/1/Add.41 (Dec. 8, 1999) (finding that Mexico's indigenous populations, particularly those of Chiapas, Guerrero, Veracruz and Oaxaca, have limited access to education); CESCR, Report on the Eighteenth Session, ¶ 8, UN Doc. E/C.12/1/Add. 24 (June 16, 1998) (finding that 85,000 Tamils of Indian Origin living in Ski Lanka have no access to education); CESCR, Report on the Sixteenth Session, ¶ 15, UN Doc. E/C.12/1/Add.14 (May 16, 1997) (finding that the indigenous and black populations of Peru have little to no access to education).

[73] *See* CESCR, Report on the Twenty-fifth Session, ¶ 25, UN Doc. E/C.12/1/Add.60 (May 21, 2001) (finding that 70 percent of children in Bolivia under 9 years of age do not attend school); CESCR, Report on the Twenty-fourth Session, ¶ 32, UN Doc. E/C.12/1/Add.55 (Dec. 1, 2000) (finding that Morocco has low levels of primary school attendance, with less than 50 percent of children of both sexes currently being regularly educated); CESCR, Report on the Twentieth Session, ¶ 19, UN Doc. E/C.12/1/Add.33 (May 14, 1999) (finding that the Solomon Islands do not have compulsory primary education, with merely 60 percent of school age children having access to primary education); CESCR, Report on the Sixteenth Session, ¶ 14, UN Doc. E/C.12/1/Add.12 (May 20, 1997) (finding that Zimbabwe does not provide free compulsory primary education).

[74] *See* CESCR, Report on the Twenty-third Session, ¶ 28, UN Doc. E/C.12/1/Add.48 (Sept. 1, 2000) (finding that Sudan has a high illiteracy rate, especially among rural women); CESCR, Report on the Twenty-second Session, ¶ 24, UN Doc. E/C.12/1/Add.44 (May 23, 2000) (finding that Egypt has high illiteracy rates among adults, particularly women); CESCR, Report on the Twentieth Session, ¶ 17, UN Doc. E/C.12/1/Add.36 (May 14, 1999) (finding that illiteracy still affects one third of Tunisia, 42 percent of women and 23 percent of men); CESCR, Report on the Twentieth Session, ¶ 16, UN Doc. E/C.12/1/Add.35 (May 14, 1999) (finding that Ireland has a high rate of illiteracy at various levels of society, especially among adults, youth, poor children, children of the traveler community and those in rural areas); CESCR, Report on the Seventeenth Session, ¶ 23, UN Doc. E/C.12/1/Add.17 (Dec. 12, 1997) (finding that 54 percent of the Iraq population, especially women, are illiterate); CESCR, Report on the Sixteenth Session, ¶ 25, UN Doc. E/C.12/1/Add.14 (May 16, 1997) (finding that Peru has high levels of illiteracy).

[75] *See* CESCR, Report on the Twentieth Session, ¶ 17, UN Doc. E/C.12/1/Add.32 (May 12, 1999) (finding that Iceland has a high rate of school drop-outs); CESCR, Report on the Twentieth Session, ¶ 19, UN Doc. E/C.12/1/Add.34 (May 14, 1999) (finding that Denmark's school drop-out rate has increased); CESCR, Report on the Eighteenth Session, ¶ 24, UN Doc. E/C.12/1/Add. 23 (May 13, 1998) (finding that the rate of school drop-outs at the primary school age in Nigeria is over 20 percent); CESCR, Report on the Seventeenth Session, ¶ 17, UN Doc. E/C.12/1/Add.22 (Dec. 12, 1997) (finding high drop-out rates in Luxembourg's youth of secondary school age); CESCR, Report on the Sixteenth Session, ¶ 29, UN Doc. E/C.12/1/Add.13 (May 20, 1997) (finding that the education system of the Russian Federation has deteriorated leading to higher drop-out rates at all levels of the system); CESCR, Report on the Sixteenth Session, ¶ 25, UN Doc. E/C.12/1/Add.14 (May 16, 1997) (finding that Peru has high levels of truancy).

[76] *See* CESCR, Report on the Thirtieth Session, ¶ 16, UN Doc. E/C.12/1/Add.90 (May 23, 2003) (finding that Israel does not provide equal education to non-Jews, in particular Arab and Bedouin communities); CESCR, Report on the Twenty-first Session, ¶ 11, UN Doc. E/C.12/1/Add.37 (Dec. 8, 1999) (finding that Bulgaria's Roma minority is afforded a poor quality of education in contrast to the rest of the population); CESCR, Report on the Twenty-first Session, ¶ 21, UN Doc. E/C.12/1/Add.37 (Dec. 8, 1999) (finding that Bulgaria's introduction of fees in higher education represents a serious obstacle for disadvantaged groups of society seeking such an education); CESCR, Report on the Nineteenth Session, ¶ 29, UN Doc. E/C.12/1/Add.27 (Dec. 4, 1998) (finding that Israel has a gap in educational expenditure per capita for the Arab sector which is substantially less than the Jewish sector).

[77] *See* CESCR, Report on the Eighteenth Session, ¶ 19, UN Doc. E/C.12/1/Add.25 (June 16, 1998) (finding that the Tuition Act of the Netherlands has led to the constant increase in the cost of education, contrary to the principle of equality of opportunities between children of rich families and children of poor families);

disparities in the quality of education between rural and urban areas[79] although the concerns identified by the CESCR oftentimes typically are more severe in scope in other countries than in the United States.

The CESCR often recommends that the state party seek technical assistance from an agency, such as the UN Educational, Social and Cultural Organization (UNESCO), to assist it in remedying these concerns and violations.[80] The CESCR also sometimes recommends establishing a national plan.[81] Beyond these suggestions, the CESCR typically does not make any specific recommendations to resolve these issues. Instead, it recommends that states parties pay due attention to the obligations of the ICESCR and allocate the necessary and appropriate funds to their education system.

In addition to receiving information through the reporting process, the CESCR also may receive information from nongovernmental organizations (NGOs) that submit

---

CESCR, Report on the Seventeenth Session, ¶ 38, UN Doc. E/C.12/1/Add.20 (Dec. 22, 1997) (finding that the weakening of the Azerbaijan' educational system is having disproportionate effects on the poor).

[78] *See* CESCR, Report on the Twenty-sixth Session, ¶ 17, UN Doc. E/C.12/1/Add.65 (Sept. 24, 2001) (finding that Ukraine provides obsolete teaching materials and equipment to schools and colleges); CESCR, Report on the Twenty-sixth Session, ¶ 34, UN Doc. E/C.12/1/Add.62 (Sept. 24, 2001) (finding that Senegal is no longer always hiring trained teachers, but employs at lower wages unskilled teachers as volunteers); CESCR, Report on the Twenty-first Session, ¶ 28, UN Doc. E/C.12/1/Add.40 (Dec. 8, 1999) (finding that Cameroon has inadequate salaries for its teachers, lacks school buildings and other infrastructure and services, particularly in rural areas, and there is an imbalance in the distribution of education resources between its ten providences); CESCR, Report on the Eighteenth Session, ¶ 31, UN Doc. E/C.12/1/Add. 23 (May 13, 1998) (finding that school children in Nigeria often have to carry with them their desks and chairs from their homes to the school, and that poor teacher salaries have led to incessant strikes and school closures); CESCR, Report on the Seventeenth Session, ¶ 27, UN Doc. E/C.12/1/Add.21 (Dec. 2, 1997) (finding that Saint Vincent and the Grenadines schools lack teachers and teaching materials at the primary level and have insufficient facilities at the post-secondary level).

[79] *See* CESCR, Report on the Thirty-fourth Session, ¶ 37, UN Doc. E/C.12/1/Add.107 (May 13, 2005) (finding that the State Party in the People's Republic of China irregular provision of education has negatively affected rural areas); CESCR, Report on the Thirty-first Session, ¶¶ 24, 27, UN Doc. E/C.12/1/Add.93 (Dec. 12, 2003) (finding that Guatemala continues to distribute unevenly its services, affecting rural populations, and hence only 30 percent of children living in rural communities complete the primary level of education); CESCR, Report on the Twenty-fifth Session, ¶ 22, UN Doc. E/C.12/1/Add.59 (May 21, 2001) (finding that the Republic of Korea's educational programs have been developed in urban areas, ignoring the situation of persons living in rural areas).

[80] *See* CESCR, Report on the Twenty-ninth Session, ¶ 28, UN Doc. E/C.12/1/Add.84 (Nov. 29, 2002) (recommending that the Solomon Islands seek the assistance of UNESCO ensure all children have the right to free and compulsory primary education); CESCR, Report on the Twenty-eighth Session, ¶ 46, UN Doc. E/C.12/1/Add.78 (June 5, 2002) (recommending that Benin seek UNECSO assistance to formulate and adopt a national education plan); CESCR, Report on the Twenty-seventh Session, ¶ 32, UN Doc. E/C.12/1/Add.75 (Nov. 30, 2001) (recommending that Jamaica seek assistance from UNESCO regarding their declining quality of education); CESCR, Report on the Twenty-seventh Session, ¶ 42, UN Doc. E/C.12/1/Add.71 (Nov. 30, 2001) (recommending that Algeria seek advice and assistance from UNESCO regarding its national plan for education for all); CESCR, Report on the Twenty-sixth Session, ¶ 58, UN Doc. E/C.12/1/Add.66 (Sept. 24, 2001) (recommending that Nepal seek technical advice and assistance from UNESCO in relation to both the formulation and implementation of its National Education for All Plan).

[81] *See* CESCR, Report on the Twenty-fifth Session, ¶ 44, UN Doc. E/C.12/1/Add.60 (May 21, 2001) (recommending that Bolivia's State party should implement a comprehensive national plan for education for all); CESCR, Report on the Twenty-second Session, ¶ 33, UN Doc. E/C.12/1/Add.43 (May 23, 2000) (recommending that Italy's State party draw up a national strategy and plan of action to address the significant problems of school drop-outs).

information about a state party's noncompliance with the Covenant, including identifying key issues on which the CESCR should focus before the CESCR orally examines the state party's representative. [82] In light of the unwillingness of states to admit violations of human rights, oftentimes the participation of NGOs in supplying additional information on what is happening within countries is critical for successful of an effective monitoring process.[83]

The reporting process is the sole enforcement mechanism for the ICESCR.[84] The theory behind adopting a reporting enforcement mechanism, according to Philip Alston, who is a former Chair of the CESCR, a human rights expert and Professor of Law at New York University, is that "a constructive dialogue between the CESCR and the state party, in a nonadversarial, cooperative spirit, is the most productive means of prompting the government concerned to take the requisite action."[85] The CESCR and the state party "undertake a mutually beneficial discussion regarding the degree to which states have realized the rights of the Covenant."[86] Such a system places the primary responsibility for enforcement of the ICESCR on the state party itself. [87] As a result, domestic pressure to assess government compliance and to ensure that the rights are protected may serve as the more effective aspect of the enforcement process rather than the formal reporting process.[88]

To assist states in fulfilling their Covenant obligations, state parties are directed to draw upon international economic and technical assistance in their efforts to achieve full realization of the rights in the Covenant.[89] The CESCR has instructed States to take advantage of the potential for receiving technical assistance by identifying in their reports any needs they have for technical assistance or international cooperation.[90] The CESCR's Concluding Observations sometimes include recommendations that a state party obtain technical assistance from an appropriate UN agency.[91]

Implementation and enforcement of the ICESCR has been hampered by the limited attention to economic, social and cultural rights as compared to civil and political rights.[92] Therefore, while the ICESCR has been ratified by 153 countries,[93] most

---

[82] *See* Beiter, *supra* note 1, at 358; Chapman, *supra* note 53, at 41.
[83] *See* Maastricht Guidelines on Violations of Economic, Social and Cultural Rights ¶32 (January 22-26, 1997), (hereinafter Maastricht Guidelines) available at http:///www1.umn.edu/humanrts/instree/Maastrichtguidelines_.html and at Human Rights Quarterly, vol. 20, issue 3, 1998, pp. 691-704; Chapman, *supra* note 53, at 28.
[84] *See* BEITER, *supra* note 1, at 345 (noting that this is the sole enforcement procedure); Alston, *supra* note 12, at 370 (same).
[85] Alston, *supra* note 12, at 370.
[86] *See* BEITER, *supra* note 1, at 348; Alston, *supra* note 12, at 370.
[87] Alston, *supra* note 12, at 370.
[88] *See id.* at 371.
[89] ICESCR, Article 2, ¶ 1.
[90] General Comment No. 2, ¶ 10, E/1990/23 (Feb. 2, 1990).
[91] *See* BEITER, *supra* note 1, at 361. Potential technical assistance providers that have specifically been identified by the CESCR include the Commission on Human Rights, UNESCO and UNICEF although the CESCR has previously admonished the UN agencies to take greater interest in its work, with the exception of a handful of organizations that included UNESCO who had regularly attended its sessions. General Comment No. 2, ¶¶ 2, 4, E/1990/23 (Feb. 2, 1990).
[92] *See* STEINER & ALSTON, *supra* note 66, at 237-38; Chapman, *supra* note 53, at 26 ("Despite a rhetorical commitment to the indivisibility and interdependence of human rights, the international community . . . has consistently treated civil and political rights as more significant, while consistently neglecting economic,

countries have acknowledged the existence of such rights but have "fail[ed] to take steps to entrench those rights constitutionally, to adopt legislative or administrative provisions based explicitly on the recognition of specific economic and social rights as international human rights, or to provide effective means of redress to individuals or groups alleging violations of those rights."[94] One cause of this problem is that the CESCR has not adequately defined standards for assessing compliance with some of the Covenant's provisions and this ambiguity hinders its assessment of implementation. [95]

In addition, the sole inclusion of a state reporting enforcement mechanism has been criticized as "the weakest form of supervision available in international human rights law, to ensure that human rights are properly implemented."[96] One weakness of the reporting mechanism is that not all state parties take their reporting obligations seriously and thus their reports are oftentimes late or non-existent. [97] When reports are submitted, many reports lack the detail needed to assess compliance[98] and focus on achievements rather than admit implementation obstacles or shortcomings. [99] In addition, state reports oftentimes focus on statutes or other legal provisions that support implementation but ignore the reality of how those legal provisions and other policies interact with the exercise of rights by individuals, particularly disadvantaged groups. [100] In addition, the CESCR typically bases its Concluding Observations on state reports that represent the official position of the state on Covenant implementation rather than a full assessment of implementation. [101]

Nevertheless, the reporting obligations of the ICESCR do facilitate implementation in several important ways. The preparation of the reports requires an assessment of the state party's progress in implementing the Covenant and the periodic nature of the reports facilitates an ongoing assessment rather than a solitary review of

---

social and cultural rights"). *But see* Alston, *supra* note 12, at 375 ("[W]ith the sole exception of the United Sates, all the Western democracies have accepted the validity and equal importance of economic, social and cultural human rights, at least in principle.")

[93] *See* http://www.ohchr.org/english/bodies/cescr/index.htm.

[94] STEINER & ALTSON, *supra* note 66, at 237-38. *See also* Chapman, *supra* note 53, at 27 ("Although the Covenant has been ratified by 130 countries, few states parties take their responsibilities seriously enough to attempt to comply with the standards of the Covenant in a deliberate and carefully structured way.").

[95] *See* Chapman, *supra* note 53, at 31-32. Furthermore, substantial amounts of complex statistical data of reliable quality is needed to measure the progressive implementation of some Covenant provisions and, in the infrequent instances when that data is produced, members of the CESCR and their staff as well as NGOs oftentimes lack the expertise to assess such data. *See id.* at 33-34.

[96] BEITER, *supra* note 1, at 345.

[97] *See* BEITER, *supra* note 1, at 622-23; Chapman, *supra* note 53, at 28.

[98] *See* BEITER, *supra* note 1, at 623; Chapman, *supra* note 53, at 28.

[99] *See* BEITER, *supra* note 1, at 623; Chapman, *supra* note 53, at 28. For example, the Committee has noted a lack of candor in the state reports for the following countries: Cameroon, Italy and Australia. *See* CESCR, Report on the Twenty-first Session, ¶ 20, UN Doc. E/C.12/1/Add.40 (Dec. 8, 1999) (finding a lack of specific information in the written replies from the Cameroon party concerning education); CESCR, Report on the Twenty-second Session, ¶ 11, UN Doc. E/C.12/1/Add.43 (May 23, 2000) (finding that Italy did not have a clear answer to the Committee's question regarding high drop-out rates and illiteracy); CESCR, Report on the Twenty-third Session, ¶ 23, UN Doc. E/C.12/1/Add.50 (Sept. 1, 2000) (finding that Australia has not provided sufficient information on the difference in quality of school available to students in pubic and private schools).

[100] *See* BEITER, *supra* note 1, at 623.

[101] *See* BEITER, *supra* note 1, at 635.

implementation.[102] This assessment also provides an opportunity for a state to identify the policies that it will implement to improve realization of the rights in the Covenant.[103] The CESCR's independent assessment along with its recommendations on how to improve implementation also encourages states to undertake implementation measures.[104]

Rather than abandon the reporting system, some scholars have suggested ways to improve it, such as encouraging increased participation of NGOs, requiring a full description of implementation measures beyond legal requirements, including candid information about impediments to implementation and statistical information regarding vulnerable populations and their enjoyment of Covenant rights.[105] It also has been suggested that the CESCR should establish indicators that facilitate an accurate assessment of progress by providing information on the extent that individuals within the state enjoy Covenant rights.[106] Philip Alston has suggested that governments should establish qualitative and quantitative benchmarks or targets that include specific time frames by which the goals in the benchmarks will be achieved.[107] Additional ongoing involvement of the UN bodies that assist the CESCR in assessing state implementation also could enhance the effectiveness of the reporting system.[108] Similarly, scholars have contended that identifying violations of economic, social and cultural rights also may be the best way to ensure effective monitoring of these rights because the label of human rights violator would encourage state parties to develop ways to remedy the violations.[109]

In light of criticisms of the state reporting system, in 1990 the CESCR began considering the development of an optional protocol that would allow for a group or individual whose rights under the Covenant have been violated to submit information on that violation to the CESCR.[110] Scholars and others have suggested that this would strengthen the monitoring and implementation of the ICESCR.[111] The CESCR drafted a

---

[102] *See id.* at 622.
[103] *See id.*
[104] *See id.*
[105] *See id.* at 624.
[106] *See* BEITER, *supra* note 1, at 625-29; STEINER & ALSTON, *supra* note 66, at 316.
[107] STEINER & ALSTON, *supra* note 1, at 317 (excerpting Philip Alston, International Governance in the Normative Areas, in UNDP, Background Papers: Human Development Report 1999, at 15-18).
[108] *See* BEITER, *supra* note 1, at 629-34.
[109] *See* Beiter, *supra* note 1, at 635-53; Chapman, *supra* note 72, at 36-38 (arguing that there needs to be more effective monitoring of the progressive implementation of ICESCR).
[110] *See* UN Doc. E/CV.4/1997/105 Draft optional protocol to the International Covenant on Economic, Social and Cultural Rights ; BEITER, *supra* note 1, at 636-37.
[111] *See* BEITER, *supra* note 1, at 342; Chapman, *supra* note 53, at 39. An NGO Coalition for an Optional Protocol to the ICESCR, an organization that advocates for the adoption of an individual complaint mechanism, has identified seven reasons why the optional protocol is needed:

1. To provide an international remedial mechanism for the infringement of ICESCR.
2. To assist States parties in protecting and promoting ICESCR enshrined rights.
3. To further identify and clarify State party obligations under ICESCR.
4. To encourage the further development of domestic jurisprudence.
5. To strengthen international enforcement of economic, social and cultural rights.
6. To reinforce the universality, indivisibility, interrelatedness & interdependence of human rights.
7. To increase public awareness of economic, social and cultural rights.

The NGO Coalition for an Optional Protocol to the ICESCR, Economic, Social and Cultural Rights: Real Rights, Right Now (February 2004), available at http://www.escr-net.org/GeneralDocs/OPCBrochEng.pdf.

proposal that would enable complaints to be received.[112] The draft protocol requires complainants to exhaust all domestic remedies before filing a complaint and the alleged violation may not be under consideration through another international mechanism.[113] A violation of Covenant rights must be alleged and anonymous complaints are not permitted.[114] Once it receives a complaint, the CESCR's role would be to encourage a settlement between the parties in a manner that upholds the ICESCR.[115] The CESCR would prepare a report of any settlement reached.[116] If a settlement is not reached, the CESCR's views would be transmitted to the complainant and the state party along with the CESCR's recommendations on how the state party should remedy any violations.[117] A state party then would be required within six months to describe the remedial actions it has taken to address the violation.[118] The CESCR transmitted a draft proposal to the UN Commission on Human Rights in 1996; however, the Commission did not begin consideration of the proposal until 2001 and has not yet decided what action it will take.[119]

If an optional protocol is adopted for the ICESCR it will not be alone in its ability to receive information on violations of rights. The committees overseeing the implementation of the ICCPR, the Convention on the Elimination of Discrimination against Women, the Convention on the Elimination of All Forms of Racial Discrimination, the Convention against Torture and the Convention on Migrant Workers all have the ability to receive individual complaints of rights violations.[120] For example, an optional protocol that allows individuals who have had their rights violated under the ICCPR has been ratified by 105 of the 155 parties to the ICCPR.[121] Although the United States has ratified the ICCPR, it has not ratified the optional protocol. As of November 2005, the HRC had resolved 1,432 complaints since the Optional Protocol entered into force in 1976 and had 293 active cases.[122] Complaints typically will be resolved within

---

[112] *See* BEITER, *supra* note 1, at 636-37.
[113] Art. 3(3)(a) and (b) draft Optional Protocol.
[114] Art. 3(1) and 3(2)(a) draft Optional Protocol.
[115] Art. 6(3) draft Optional Protocol.
[116] Art. 6(4) draft Optional Protocol.
[117] Art. 7(5), 8(1) draft Optional Protocol. To identify violations, at least one scholar has suggested that the CESCR should look to guidelines that have been developed for interpreting economic, social and cultural rights entitled the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights and the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights.
[118] Art. 8(2) draft Optional Protocol.
[119] *See* Michael J. Dennis & David P. Stewart, *Justiciability of Economic, Social, and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?*, 98 A.J.I.L. 462, 463 (2004).
[120] See http://www.ohchr.org/english/bodies/petitions/index.htm#communcications.
[121] *See* Optional Protocol to the International Covenant on Civil and Political Rights, entered into force March 23, 1976 (hereinafter "Optional Protocol"); http://www.ohchr.org/english/countries/ratification/5.htm (listing state parties that have ratified the optional protocol).
[122] See Optional Protocol; http://www.ohchr.org/english/bodies/hrc/stat2.htm. The ICCPR itself also allows for states to complain that another state is not fulfilling its obligations under the ICCPR; however, this provision has never been utilized. *See* Article 41 of ICCPR; http://www.ohchr.org/english/bodies/petitions/index.htm#interstate.

three years.[123] The ICCPR also has a reporting obligation that is similar to the reporting obligation of the ICESCR and the reporting system has been described as the center of implementation for the ICCPR.[124]

In light of this Article's proposal that a right to education in the United States should include, *inter alia*, a mechanism for individual complaints similar to that included in the ICCPR and in the proposed optional protocol to the ICESCR, this Article briefly describes the ICCPR's complaint mechanism here. The complaint mechanism was included in an optional protocol because states were divided in opinion over the proper enforcement mechanism for the ICCPR.[125] The Optional Protocol authorizes individuals who claim to be victims of violations of the Covenant to file a written complaint or "communication" with the HRC and there is no time limitation for bringing a complaint.[126] The complainant must first exhaust all possible domestic remedies with the exception of "where the application of the remedies is unreasonably prolonged."[127] Anonymous complaints are not permitted.[128] The HRC also will not review a complaint that is being considered by another international procedure.[129] The HRC initially submits a complaint to a working group composed of "no more than five HRC members" who determine the complaint's conformance with these requirements and it gives the accused state party an initial opportunity to provide its observations about the communication.[130]

Once the communication is deemed admissible, the HRC submits the communication to the state party that is the subject of the complaint and the state party must clarify the issues raised and its remedy within six months.[131] The HRC sends the state party's response to the complainant who may respond to the state's submission.[132] The HRC does not receive oral testimony nor can it undertake independent fact-finding; instead, it considers complaints in closed meetings in light of the available written information.[133] The HRC resolves the complaint by sending its "views" to both the individual complainant and the state party and by publishing them.[134] One scholar has described the inability to receive oral testimony or to conduct fact-finding as "a significant limitation on the Human Rights Committee's scrutiny and, potentially, a clear disadvantage to the individual petitioner." [135] The HRC also does not have authority to negotiate a settlement between the complainant and the state party but the exchange of information that the petition process involves may result in a resolution of the dispute. [136]

---

[123] *See* Heffernan, *supra* note 22, at 111.
[124] *See* STEINER & ALSTON, supra note 66, at 305; Heffernan, *supra* note 22, at 87.
[125] *See* Heffernan, *supra* note 22, at 82.
[126] *See* Optional Protocol, Articles 1 and 2; Heffernan, *supra* note 22, at 107.
[127] *See* Optional Protocol, Article 5,¶ 2(b).
[128] *See* Optional Protocol, Article 3.
[129] *See* Optional Protocol, Article 5, ¶ 2(a).
[130] *See* Heffernan, *supra* note 22, at 100.
[131] *See* Optional Protocol, Article 6.
[132] *See* Heffernan, *supra* note 22, at 101.
[133] *See* Optional Protocol, Article 5, ¶¶ 1, 3; Makua wa Mutua, *Looking Past the Human Rights Committee: An Argument for De-Marginalizing Enforcement*, 4 BUFF. HUM. RTS. L. REV. 211, 233 (1998); Helfer & Slaughter, *supra* note 174, at 343.
[134] *See* Optional Protocol, Article 5, ¶ 4.
[135] *See* Heffernan, *supra* note 22, at 108.
[136] *See id.*

A working group or special rapporteur may be asked to review the available information which expedites the process.[137]

The HRC has recommended that a state party revise its laws or policies, adopt remedial measures, including statutory and administrative measures, and pay monetary compensation to victims. [138] The HRC also invites the state party to inform the HRC of actions it has taken in response to the HRC's views within 90 days from the date they are issued. [139] The HRC's views are not binding on the states parties and this has sometimes been noted as a weakness of the complaint process.[140] There appears to be a mixed record of compliance with their recommendations.[141] The strength of the HRC's views from the complaint process "lies in the international standing and moral authority of the Human Rights Committee and in the essence of the commitment assumed by states upon ratification of the Covenant and Protocol." [142]

This article now turns to the definition and right to education in the CRC because it provides additional insight into how a right to education might be defined and enforced in the United States.

[137] *See id.* at 101.
[138] *See id.* at 102.
[139] *See id.*.
[140] *See id.* at 102, 107; Mutua, *supra* note 133, at 233.
[141] *See* Heffernan, *supra* note 22, at 102; Mutua, *supra* note 133, at 233. A subsequent draft of this paper may examine more of the scholarly literature on whether the HRC's views on violations of the ICCPR and its recommendations for remedies have been followed. A very preliminary review suggests that the HRC appears to have a mixed success record regarding state party response to its views. Scholars have noted substantial noncompliance with the Committee's recommendations. *See* Heffernan, *supra* note 22, at 110 ("[T]he Committee continues to be troubled by noncompliance with its final views"); Mutua, *supra* note 133, at 235 (noting that "many states have chosen to ignore the Committee's recommendations"). However, the Committee has achieved some success in that "HRC decisions have directly caused States to alter their laws and/or practices so as to conform to the ICCPR." *See* Sarah Joseph, *A Rights Analysis of the Covenant on Civil and Political Rights*, 5 J. INT'L LEGAL STUD. 57, 66 (1999). In addition, some states parties have compensated victims in response to the Committee's recommendations to do so. *See* Heffernan, *supra* note 22, at 110. The desire to avoid negative publicity from an adverse finding also may act as an instrumental deterrent. *See* Joseph, *supra*, at 66-67.
[142] *See* Heffernan, *supra* note 22, at 102.

B. The Right to Education in the CRC

After almost ten years of debate over the substance of the CRC and the merits of adopting a child's rights treating, the General Assembly of the United Nations adopted the CRC in November 1989.[143] Less than one year later, it entered into force upon the ratification of 20 countries.[144] Only the United States and Somalia have failed to ratify the treaty. [145] Its widespread acceptance by the international community has elevated the CRC in a relatively short timeframe to become "the single most important international instrument on the rights of the child" and one that has heralded in a new focus on protecting children's rights. [146] The CRC education articles and the interpretive documents set an ambitious agenda for education rights as detailed below.

1. The CRC's Definition of the Right to Education

Article 28 begins with the acknowledgement that the "States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity." [147] Despite a variety of concerns about the education article during the drafting process, no State challenged the provision of the right to education "on the basis of equal opportunity." [148] Article 28 then defines the content for this right to education at the elementary, secondary and postsecondary education levels by requiring States parties to make "primary education compulsory and available free to all;" to encourage the development of various forms of secondary education that are accessible to every child, including introducing free secondary education and financial assistance when needed; and to offer higher education to all on the basis of capacity through appropriate means. States Parties also must promote and encourage cooperation between nations on educational matters with particular attention to the eradication of ignorance and illiteracy and the dissemination of scientific and technical knowledge as well as modern teaching methods.[149]

After defining the content of the right to education, Article 29 then establishes the goals of this right.[150] Article 29 embraces a holistic approach in its requirement that education be directed to develop the child's mental and physical abilities as well as the child's personality and talents and that all of these capacities of the child shall be developed "to their fullest potential." The original draft of Article 29 focused on protecting the child from practices which may foster racial, religious or any other form of discrimination" as well as bringing up children "in a spirit of understanding, tolerance . . .

---

[143] LAWRENCE J. LEBLANC, THE CONVENTION ON THE RIGHTS OF THE CHILD: UNITED NATIONS LAWMAKING ON HUMAN RIGHTS xi (1995).
[144] *See id.*
[145] *See* CYNTHIA P. COHEN, JURISPRUDENCE ON THE RIGHTS OF THE CHILD, VOLUME I xi (2005).
[146] *See* LeBlanc, *supra* note 143, at xii-xiii; General Comment Number 5, ¶ 9.
[147] CRC, Article 28.
[148] United Nations Centre for Human Rights, Legislative History of the Convention on the Rights of the Child (1978-1989), Article 29, at p. ___.
[149] CRC, Article 28.
[150] CRC, Article 29.

among peoples." [151] During the drafting process, the United States fundamentally changed the goal of the right to education in the CRC so that it embraced not just antidiscrimination but also its current focus on developing the child's mental and physical abilities to their fullest potential. [152]

Education also must be designed to prepare "the child for responsible life in a free society" that includes understanding, peace and tolerance among all peoples.[153] Other articles also address the obligations of States parties related to education, but those articles are beyond the scope of this Article.[154] This Article focuses on two issues: the recognition of the right to education on the basis of equal opportunity and the goal of this right to develop the child's abilities to their fullest potential.

Like the CESCR, the Committee that guides enforcement of the CRC, the Committee on the Rights of the Child ("the Committee"), issues general comments that help to illuminate the CRC's requirements. The centrality of education to the CRC is suggested by the fact that the Committee chose to issue its first general comment on the aims of education in Article 29. The Committee has only issued seven total general comments. [155] The first two sentences of the general comment on the aims of education reinforce the importance of education by stating that Article 29 of the CRC "is of far-reaching importance. The aims of education that it sets out . . . promote, support and protect the core value of the Convention: the human dignity innate in every child and his or her inalienable rights." [156] Thus, the Committee has highlighted the fact that each child has not only the right to access to education but also the right to a specific quality of education: *"Every child has the right to receive an education of good quality which in turn requires a focus on the quality of the learning environment, of teaching and learning processes and materials, and of learning outputs."* [157]

The Committee's guidelines for periodic reports reinforce the importance of a quality education by requiring states to identify the mechanisms they have developed to ensure the access of all children to a quality education and to achieve the aims of education in Article 29.[158] In addition, state parties must provide information on a number of quantitative and qualitative measures such as adequate educational facilities, funding for education, steps to ensure the competence and quality of school teachers as well as achievement data disaggregated on measures such as gender, age, national and ethnic origin and rural/urban area. [159] The Committee further explains that education

---

[151] United Nations Centre for Human Rights, Legislative History of the Convention on the Rights of the Child (1978-1989), Article 28, HR/1995/Ser.1.article.28.
[152] United Nations Centre for Human Rights, Legislative History of the Convention on the Rights of the Child (1978-1989), Article 28, HR/1995/Ser.1.article.28.
[153] CRC Article 29.
[154] For example, Article 23 establishes States Parties' responsibilities for disabled children, which requires States parties to provide education to disabled children free of charge "in a manner conducive to the child's achieving the fullest possible social integration and individual development." Article 31 also requires States Parties to respect and promote the child's involvement in recreational activities, cultural life and the arts.
[155] See http://www.ohchr.org/english/bodies/crc/comments.htm. Last visited January 13, 2006.
[156] General Comment No. 1, ¶¶ 2 and 3.
[157] *Id.* at ¶ 22.
[158] Guidelines on Periodic Reporting, ¶¶ 107, 113.
[159] *See id.* at ¶ 107.

should ensure that students do not leave school without the essential life skills for the challenges that he or she will confront in life.[160]

Similar to ICESCR, several articles and principles in the CRC guide the interpretation of the right to education and its goals. States parties must implement the CRC free of discrimination on the basis of such characteristics as the child or his or her parent's race, sex, language, religion, origin, disability, birth or other status.[161] While the Committee has explained that this does not require equal treatment,[162] a review of the Committee's observations and recommendations to states in response to state reports indicate that nondiscrimination under the CRC includes a commitment to eliminate de facto and societal discrimination.[163] The CRC has highlighted "the importance of taking special measures in order to diminish or eliminate conditions that cause discrimination."[164] The Committee further exhorts states parties to pay close attention to "marginalized and disadvantaged groups of children." [165]

Finally, under Article 4, State parties agree to implement the CRC by undertaking "all appropriate legislative, administrative, and other measures for the implementation of the rights" in the CRC.[166] Article 4 recognizes that resources affect how economic, social and cultural rights, such as the right to education, are implemented, by requiring States to "undertake such measures for these rights to the maximum extent of their available resources." [167] Education is considered an economic, social and cultural right; however, the Committee has commented that resource constraints will not justify a State Party's failure to undertake the required measures.[168] The Committee has explained that States have obligations to develop implementation measures that include "ensuring that all domestic legislation is fully compatible with the Convention and the Convention's principles and provisions can be directly applied and appropriately enforced."[169]

A review of the Concluding Comments of the Committee on the Rights of the Child in recent years (1993-2003) indicates that it has focused on a number of education issues, such as the lack of access to education based on nationality or race[170] and the denial of education to refugees and non-nationals.[171] Like the CESCR, the Committee also has

---

[160] *See id.* at ¶ 9.
[161] CRC, Article 2.
[162] CRC, General Comment No. 5, ¶ 12.
[163] CRC 37th Session, January 2005.
[164] CRC General Comment No. 5, ¶ 12.
[165] *Id.* at ¶ 30.
[166] CRC, Article 4.
[167] *Id.*
[168] General Comment No. 1, ¶ 28.
[169] General Comment No. 5, ¶ 1.
[170] *See* CRC, Report on the Fifteenth Session, ¶ 30, UN Doc. CRC/C/15/Add. 157 (July 9, 2001) (finding that Bhutan's children face de facto discrimination in access to education based on the fact that they belong to the Lohtshampas).
[171] *See* CRC, Report on the Fifteenth Session, ¶ 15, UN Doc. CRC/C/15/Add. 103 (August 24, 1999) (finding that Barbados has struggled to provide free education to all children, particularly children who are not citizens or permanent residents); CRC, Report on the Fifteenth Session, ¶ 21, UN Doc. CRC/C/15/Add. 215 (October 27, 2003) (finding that Canada excludes from the school system children of migrants with no status); CRC, Report on the Fifteenth Session, ¶ 22, UN Doc. CRC/C/15/Add. 150 (February 21, 2001) (finding that Dominican Republic children of Haitian origin have limited access to education); CRC, Report on the Fifteenth Session, ¶ 23, UN Doc. CRC/C/15/Add. 73 (June 18,1997) (finding that Ghana's refugee children encounter many difficulties in securing access to basic education).

noted several education concerns that the United States faces, such as substantial illiteracy rates[172] and school drop-out rates;[173] disparities in educational quality based on nationality, race or status;[174] inferior educational opportunities for the poor;[175] inadequate facilities;[176] and, disparities in the quality of education between rural and urban areas,[177] although the concerns identified by the Committee oftentimes are more severe in scope in other countries. When concerns are identified, the Committee recommends that the country's State Party seek technical assistance from an agency, such as UNICEF or

[172] *See* CRC, Report on the Fifteenth Session, ¶ 12, UN Doc. CRC/C/15/Add. 5 (February 18, 1993) (finding that there is a large gap in literacy rates in Egypt between the sexes and rural and urban areas); CRC, Report on the Fifteenth Session, ¶ 9, UN Doc. CRC/C/15/Add. 58 (June 7, 1996) (finding that Guatemala has high illiteracy rates).

[173] *See* CRC, Report on the Fifteenth Session, ¶ 15, UN Doc. CRC/C/15/Add. 15 (February 7, 1994) (finding that Columbia's high number of school drop-outs should be reduced); CRC, Report on the Fifteenth Session, ¶ 42, UN Doc. CRC/C/15/Add. 196 (March 17, 2003) (finding Estonia has high repetition and drop-out rates); CRC, Report on the Fifteenth Session, ¶ 32, UN Doc. CRC/C/15/Add. 115 (February 23, 2000) (finding that India has high drop-out rates).

[174] *See* CRC, Report on the Fifteenth Session, ¶ 17, UN Doc. CRC/C/15/Add. 76 (June 18, 1997) (finding that Algeria discriminates against children born out of wedlock in some groups within the population); CRC, Report on the Fifteenth Session, ¶ 32, UN Doc. CRC/C/15/Add. 79 (October 10, 1997) (finding that Australia's disadvantaged groups, particularly Aboriginals and Torres Strait Islanders have lower standards of education); CRC, Report on the Fifteenth Session, ¶ 15, UN Doc. CRC/C/15/Add. 221 (October 27, 2003) (finding that Bangladesh's refugee children and children belonging to tribal minorities suffer serious disparities in education); CRC, Report on the Fifteenth Session, ¶ 16, UN Doc. CRC/C/15/Add. 178 (June 13, 2002) (finding that Belgium's non-Belgian children suffer disparities in their educational experience); CRC, Report on the Fifteenth Session, ¶ 9, UN Doc. CRC/C/15/Add. 118 (February 18, 1993) (finding that Bolivia's children face discrimination as to education based on race, language, and ethnic or social origin); CRC, Report on the Fifteenth Session, ¶ 28 UN Doc. CRC/C/15/Add. 201 (March 18, 2003) (finding that Czech Republic continues to have discrimination in education against children belonging to the Roma minority).

[175] *See* CRC, Report on the Fifteenth Session, ¶ 28, UN Doc. CRC/C/15/Add. 180 (June 13, 2002) (finding that Belarus' economically disadvantaged children do not have adequate access to educational facilities); CRC, Report on the Fifteenth Session, ¶ 16, UN Doc. CRC/C/15/Add. 178 (June 13, 2002) (finding that Belgium's poor children suffer disparities in their educational experience); CRC, Report on the Fifteenth Session, ¶ 15, UN Doc. CRC/C/15/Add. 106 (August 24, 1999) (finding that Benin's children living in extreme poverty are not guaranteed access to education); CRC, Report on the Fifteenth Session, ¶ 26, UN Doc. CRC/C/15/Add. 173 (February 1, 2002) (finding that Chile's poor children do not have adequate access to educational facilities); CRC, Report on the Fifteenth Session, ¶ 31, UN Doc. CRC/C/15/Add. 145 (February 21, 2001) (finding that Egypt has large disparities in quality of education for children of regions lagging behind in socio-economic development).

[176] *See* CRC, Report on the Fifteenth Session, ¶ 26, UN Doc. CRC/C/15/Add. 173 (February 1, 2002) (finding that Chile's children with disabilities do not have adequate access to educational facilities); CRC, Report on the Fifteenth Session, ¶ 42, UN Doc. CRC/C/15/Add. 196 (March 17, 2003) (finding that Estonia has overcrowded schools and overburdened teachers).

[177] *See* CRC, Report on the Fifteenth Session, ¶ 32, UN Doc. CRC/C/15/Add. 79 (October 10, 1997) (finding that Australia's children living in rural and remote areas have lower quality of education); CRC, Report on the Fifteenth Session, ¶ 28, UN Doc. CRC/C/15/Add. 180 (June 13, 2002) (finding that Belarus' children living in rural areas do not have adequate access to educational facilities); CRC, Report on the Fifteenth Session, ¶ 15, UN Doc. CRC/C/15/Add. 106 (August 24, 1999) (finding that Benin's children living in rural areas are not guaranteed access to education); CRC, Report on the Fifteenth Session, ¶ 26, UN Doc. CRC/C/15/Add. 173 (February 1, 2002) (finding that Chile's children living in rural areas do not have adequate access to educational facilities); CRC, Report on the Fifteenth Session, ¶ 31, UN Doc. CRC/C/15/Add. 145 (February 21, 2001) (finding Egypt has large disparities in quality of education for children of regions lagging behind in socio-economic development).

OHCHR, to assist them in remedying these concerns and violations[178] or establish a national plan.[179]

B. The Enforcement of the Right to Education in the CRC

Articles 43 to 45 establish the implementation and enforcement mechanisms for the CRC.[180] Article 43 establishes that the Committee will examine whether States Parties are making progress in fulfilling their treaty obligations.[181] While the Committee originally was limited to 10 members, it now includes 18 members so that the Committee can better manage the workload of reviewing State reports.[182] Currently, the Committee convenes three times a year for four weeks a session.[183]

A state party must submit a report within two years of the CRC entering into force and every five years thereafter.[184] Once the Committee reviews a party's report, the Committee transmits questions to the state party that the state will answer when it is questioned orally by the Committee. [185] The State typically submits written responses as well. Its reporting mechanism is similar to the reporting obligations of the ICESCR in that the reports are designed to engage the state party in a "constructive dialogue." [186]

To supplement the information provided in state reports, the Committee may obtain information from other UN bodies as well as NGOs.[187] Certain UN bodies, such as UNICEF, have the right to be represented at the sessions at which the CRC is implemented[188] and they may be asked to submit reports or provide advice on implementation of the CRC.[189] The Committee has made substantial use of this mechanism and during the week before a session begins it oftentimes has met with NGOs who have knowledge of the country to be examined to assess the accuracy and completeness of the report.[190] The Committee then orally examines the State Party on the content of its report and prepares a report of the session that includes its recommendations for improvement in its concluding observations. [191]

In addition to being able to receive information from NGOs, the Committee is authorized by Article 45 to submit to a state a recommendation or request for technical

---

[178] *See* CRC, Report on the Fifteenth Session, ¶ 23, UN Doc. CRC/C/15/Add. 153 (July 9, 2001) (finding that Congo should seek the aid of UNICEF or OHCHR); CRC, Report on the Fifteenth Session, ¶ 31, UN Doc. CRC/C/15/Add. 144 (February 21, 2001) (finding that Ethiopia should seek the aid of UNICEF).
[179] *See* CRC, Report on the Fifteenth Session, ¶ 29, UN Doc. CRC/C/15/Add. 74 (June 18, 1997) (finding that Bangladesh should pursue its efforts to ensure full compatibility of its national legislation with the Convention, and develop a national policy on children and an integrated legal approach to children's rights).
[180] CRC, Articles 43-45; Cohen, *supra* note 192, at xiii.
[181] CRC, Article 43(1).
[182] *See* COHEN, *supra* note 145, at xiv.
[183] *See id.*
[184] CRC, Article 44(1).
[185] *See* COHEN, *supra* note 145, at xv.
[186] *See* BEITER, *supra* note 1, at 369.
[187] CRC, Article 45; Cohen, *supra* note 145, at xv n.14
[188] CRC, Article 45.
[189] *See* BEITER, *supra* note 1, at 370.
[190] *See* COHEN, *supra* note 145, at xv.
[191] *See id.*

advice or assistance along with the Committee's observations and suggestions.[192] The Committee also must submit information to certain UN bodies when a state report reveals a need for technical assistance or when a state requests technical assistance.[193]

Some scholars have criticized these enforcement mechanisms as weak because the enforcement tools are limited in nature.[194] However, other scholars have noted the legal reforms that countries have instituted to comply with the CRC as well as the influence that the CRC has on states by raising awareness of the issues in the CRC during the ratification and reporting process, highlighting the Committee's advice on how to come into compliance and creating a record for the international community.[195] For example, one such scholar has noted that "[i]t is encouraging to review the numerous initiatives that have emerged as a result of the Convention at the international, regional, national and local levels. Together they form an impressive record of achievements."[196] Some nations have revised their Constitution or passed a body of laws specifically about children to bring their laws in compliance with the CRC while others have revised existing laws, including Ireland, Nepal, New Zealand, Tunisia, Uganda and Vietnam.[197] Countries also have established national coordinating and monitoring mechanisms that guide national compliance with the CRC by monitoring children's rights.[198]

In addition, given almost universal ratification of the CRC, the treaty creates a moral obligation for nations to uphold its provisions.[199] The CRC has reinforced the right to education expressed in other international agreements such as the ICESCR.[200] Therefore, the absence of punitive enforcement mechanisms has not prevented the CRC from being an impetus for important changes. Instead, some countries have undertaken reforms that will bring their countries into conformance with the treaty.

III. U.S. Refusal to Recognize a Federal Right to Education and Scholarly Approaches to This Issue

Given the recognition of a right to education in human rights law, this part will examine the refusal of United States to recognize a right to education. This part also examines scholarly arguments that the United States should recognize a right to

---

[192] CRC, Article 45.
[193] *See id.*
[194] *See* Kathy Vandergrift, *Challenges in Implementing and Enforcing Children's Rights*, 37 CORNELL INT'L L.J. 547 (2004); James J. Silk, *Economic Exploitation of Children: Ending Child Labor: A Role for International Human Rights Law?*, 22 ST. LOUIS U. PUB. L. REV. 359 (2003); Michael Freeman, *The Future of Children's Rights*, 14 CHILDREN AND SOCIETY 277 (2000).
[195] *See* Rebeca Rios-Kohn, *The Convention on the Rights of the Child: Progress and Challenges*, 5 GEO. J. FIGHTING POVERTY 139, ___; Gerald Abraham, *Giannella Lecture: The Cry of the Children*, 41 VILL. L. REV. 1345 (1996).
[196] Rios-Kohn, *supra* note 195, at 147.
[197] *Id.* at 152.
[198] *Id.* at 153.
[199] *See id.* at 151; Cynthia P. Cohen & Hedwin Naimark, *United Nations Convention on the Rights of the Child: Individual Rights Concepts and Their Significance for Social Scientists*, 46 AMERICAN PSYCHOLOGIST 60 (1991).
[200] Thomas Hammarberg, *A School for Children with Rights: The Significance of the United Nations Convention on the Rights of the Child for Modern Education Policy*, SALA GIUNTA DELLA PRESIDENZA REGIONALE: INNOCENTI LECTURE SERIES 28 (1997).

education. Finally, this part ends with a discussion of why additional federal action is needed in American public education.

A. U.S. Refusal to Recognize a Federal Right to Education

As noted in Part I, the United States Supreme Court rejected an argument that education is a fundamental constitutional right in *San Antonio Independent School District v. Rodriguez*.[201] In considering the claims presented in *Rodriguez*, the Court noted the plaintiffs could not allege a total denial of educational services nor could a "charge . . . fairly be made that the system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process."[202] Upon subjecting the Texas school finance school to rational basis review, the Court found that the system rationally furthers a legitimate state interest in promoting local control of the public schools.[203]

In reaching this conclusion, the Court identified several reasons for its deferral to the legislative judgments that were captured in the school finance scheme. Among them, it raised concerns about the appropriate allocation of federal and state power at stake in the case. For example, the Court noted that given the similarities between the Texas system and the systems of other states, "it would be difficult to imagine a case having a greater potential impact on our federal system" than the case before it "in which we are urged to abrogate systems of financing public education presently in existence in virtually every State."[204] In addition to federalism concerns, the Court also indicated that it lacked the expertise to second-guess complex judgments about educational policy that remained the subject of vigorous debate among scholars, legislators and educational policymakers.[205] The judiciary simply was not the branch of government to determine the goals of education policy and how they could best be achieved.[206]

Since *Rodriguez*, the Court has been of two minds as to the meaning of its decision. While the Supreme Court repeatedly has reaffirmed its holding in *Rodriquez* that education is not a fundamental right,[207] it also claims that it has "not yet definitively settled the questions whether a minimally adequate education is a fundamental right and whether a statute alleged to discriminatorily infringe that rights should be accorded heightened equal protection review."[208] The later statement was made in *Papasan v. Allain* in which the plaintiffs' alleged that funding disparities deprived them of a minimally adequate education.[209] The Court found the plaintiffs' claims to be a legal conclusion rather than a factual allegation because plaintiffs failed to produce evidence

---

[201] 411 U.S. 1, 35-36 (1973).
[202] *Id.* at 37.
[203] *See id.* at 55.
[204] *Id.* at 44.
[205] *See id.* at 55.
[206] *See id.* at 36 ("Yet we have never presumed to possess either the ability or the authority to guarantee to the citizenry the most effective speech or the most informed electoral choice. . . . These are indeed goals to be pursued by a people whose thoughts and beliefs are freed from governmental interference. But they are not values to be implemented by judicial instruction into otherwise legitimate state activities.")
[207] *See* Kadrmas v. Dickinson Public Schools, 487 U.S. 450, 461-62 (1988); Plyler v. Doe, 457 U.S. 202, 221 (1982).
[208] Papasan v. Allain, 478 U.S. 265, 285 (1986).
[209] *See id.* at 286.

that students did not receive basic educational instruction on such skills as how to read and write.[210] Instead, the Court held that as long as a Mississippi plan to distribute public school land funds was rationally related to a legitimate state interest, the plan was consistent with the Equal Protection Clause.[211]

After *Rodriguez*, litigants challenging school finance schemes raised claims under state constitutions because all state constitutions define the state's role in public education.[212] Some litigants have brought successful challenges under these provisions to school funding inequities.[213] While the Supreme Court has not foreclosed the possibility of recognizing a federal right to a minimally adequate education in the future, not surprisingly, the Court has not establish any clear guidance on what such a right might require.[214] It is clear that solely a funding disparity between districts would not demonstrate that an education system is inadequate.[215] The Supreme Court's prior decisions noting the absence of allegations that the students were denied basic minimal skills on how to read and write suggests that the Court might only be willing to recognize a right to education that results in virtually a wholesale denial of education in which students are not being taught even the most fundamental skills, like reading, writing and basic arithmetic, and that it will not address disparities in educational opportunity beyond such wholesale failures.

B. Scholarly Approaches to a U.S. Right to Education

In light of these Supreme Court decisions, while some contend that there should not be a federal right to education,[216] many scholars have suggested several potential legal avenues for recognizing a federal right to education in the United States. Some scholars and commentators have disagreed with the Court's opinion in *Rodriguez* and have contended that education is a fundamental right for a variety of reasons, particularly focusing on the fact that it is essential for the exercise of other rights and plays a foundational role in U.S. society.[217] At least one scholar has argued that education should be recognized as a judicially-enforceable right, but that it need not be a

---

[210] *See id.*
[211] *See id.* at 289.
[212] *See* Dayton & Dupre, *supra* note 19, at 2364, 2386.
[213] *See id.* at 2386.
[214] Kristen Safier, Comment, *The Question of a Fundamental Right to a Minimally Adequate Education*, 69 U. CINN. L. REV. 993, 1009 (2001).
[215] *See* Papasan v. Allain, 478 U.S. 265, 266 (1986) (allegations of a funding disparity alone would not be sufficient to show educational inadequacy").
[216] *See, e.g.*, William J. Michael, *When Originalism Fails*, 25 WHITTIER L. REV. 497, 518 (2004).
[217] *See* Chemerinsky, *supra* note 20, at __; Thomas J. Walsh, *Education as a Fundamental Right under the United States Constitution*, 29 WILLAMETTE L. REV. 279, 294-96 (1993); Brooke Wilkins, Note and Comment, Should Public Education Be a Federal Fundamental Right?, 2005 BYU Educ. & L.J. 261, 288-90 (2005); Nicholas A. Palumbo, Note, *Protecting Access to Extracurricular Activities: The Need to Recognize a Fundamental Right to a Minimally Adequate Education*, 2004 B.Y.U. EDUC. & L.J. 393, 397 (2004); Safier, *supra* note 214, at 1021 ("The federal judiciary should recognize a fundamental right to a minimally adequate education under the United States Constitution"); Timothy D. Lynch, Note, *Education as a Fundamental Right: Challenging the Supreme Court's Jurisprudence*, 26 HOFSTRA L. REV. 953, ___ (1998).

fundamental right.[218] Matthew Brunnell suggested that to recognize a federal right to education, the Court should follow the constitutional path that it followed in *Lawrence v. Texas*, [219] in which it held that it violated the Due Process Clause to criminalize two adults of the same sex from engaging in consensual sex but refrained from make this a fundamental right.[220] Those who argue for the recognition of such a right presume that it would be judicially recognized, defined and enforced.[221] Erwin Chemerinsky has gone further and stated that "the simple reality is that without judicial action equal educational opportunity will never exist."[222]

Most scholars who contend that the Court should recognize a federal right to education, fundamental or not, argue that it should encompass a right to a minimally adequate education.[223] This type of right to education typically would set a fairly law bar for a federal right and, for example, would require a plaintiff to show that she had been denied basic educational instruction, such as instruction on how to read or write.[224] Not surprisingly, this argument draws primarily on the Supreme Court's decisions that leave a door open for recognizing a right to education but seem to suggest that such a right might only be infringed if the system failed to provide even basic educational instruction.[225]

Others advocate for what they call a right to a "minimally adequate education," but appear to be advocating for something beyond the rudimentary basics mentioned in *Rodriguez* and *Papasan*. For example, one commentator has suggested that such a federal right to education should ensure that schoolchildren have acquired the skills necessary for education to serve the essential functions of education that the Supreme Court has identified, such as transmitting societal values, preparing citizens to participate in the democratic system and teaching students to be financially productive.[226] Another commentator contended that this right should provide public schoolchildren with the following: (1) safe, functional buildings and "current instructional materials;" (2) "*basic* oral and written communication skills, as well as the ability to read and speak English;"

---

[218] *See* Matthew A. Brunnell, *What Lawrence Brought for Show and Tell: The Non-Fundamental Liberty Interest in a Minimally Adequate Education*, 25 B.C. THIRD WORLD L.J. 343, 366 (2005) *Cf.* Palumbo, *supra* note 217, at 402-03 (arguing that the Court's decision in *Lawrence* might signal a willingness to recognize other rights, including a right to education, as a fundamental right).

[219] 539 U.S. 558 (2003).

[220] *See* Brunnell, *supra* note 218, at 366 ("[I]f schoolchildren confined to grossly underperforming schools raised a Due Process Clause challenge, Justice Kennedy's reasoning in *Lawrence* suggests that the Court may be receptive to a non-fundamental liberty interest in a minimally adequate education").

[221] *See, e.g.*, Palumbo, *supra* note 217, at 408-09, 413-17 (noting the two possible bases on which the Supreme "Court could find a fundamental right to a minimally adequate education" and discussing how the Court may look to state courts and other Supreme Court decisions to define the scope of that right); Safier, *supra* note 214, at 1019 ("A minimally adequate education would need to be defined by the courts."). *See also* Eric Lerum et al, *Strengthening America's Foundation: Why Securing the Right to an Education at Home is Fudnamental to the United Sates' Efforts to Spread Democracy Abroad*, 12 HUM. RTS. BR. 13, 16 (2005) (arguing for a U.S. constitutional amendment for a right to education that is enforced in the courts).

[222] Chemerinsky, *supra* note 20, at 111.

[223] *See* Brunell, *supra* note 218, at ___ (arguing that the Court should recognize a right to a "minimally adequate education" that would benefit students in "grossly underperforming schools"); Walsh, *supra* note 217, at 296 (positing that ordinary citizens cannot participate in a democratic government with out a minimum, adequate education); Safier, *supra* note 214, at 1019-20.

[224] *See* Brunell, *supra* note 218, at ____.

[225] *See infra* at ___.

[226] *See* Palumbo, *supra* note 217, at 416-17.

and, (3) "*basic* knowledge in history, economics, politics, government processes, the sciences, mathematics, and logic, in order for students to be able to participate in the political process."[227] While these standards would provide a right to education beyond the minimal requirements that the Supreme Court's noted had not been denied to the plaintiffs in *Rodriguez* and *Papasan*, they still seek to establish a relatively low standard for a federal right to education.

Given widespread school funding litigation, it is no surprise that some have suggested that the Supreme Court should look to state adequacy cases to define a federal right to education.[228] In an area such as education in which experts differ widely on how education systems should be structured, state courts have embraced a substantial variety of definitions to define a right to education that typically describe an array of outcomes, inputs or a combination of both for education systems.[229] A few states have adopted relatively high standards for students in which adequacy requires "that each school district must have adequate resources, given its circumstances and the nature of its pupils, to be able to offer an educational program that reasonably promises to teach at least most of them to reasonably high standards."[230] One example is the now-famous 1989 decision in *Rose v. Council for Better Education* in which the Kentucky Supreme Court embraced the following seven capacities or skills that students must have the opportunity to obtain through the state's education system:

> (i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization; (ii) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices; (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation; (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness; (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage; (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and (vii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market. [231]

More recently, the New York City schoolchildren won a major victory in *Campaign for Fiscal Equity v. State of New York* in which the New York Court of Appeals rejected a lower court ruling that an eighth grade education provided a "sound, basic education" and embraced a high standard that required students to be prepared to be "civic participants

---

[227] Safier, *supra* note 214, at 1020 (emphasis added).
[228] *See, e.g.*, Palumbo, *supra* note 217, at 416.
[229] *See* ANNA LUKEMEYER, COURTS AS POLICYMAKERS: SCHOOL FINANCE REFORM LITIGATION ___ (2003); Paul A. Minorini & Stephen D. Sugarman, *School Finance Litigation in the Name of Educational Equity: Its Evolution, Impact, and Future*, *in* EQUITY AND ADEQUACY IN EDUCATION FINANCE: ISSUES AND PERSPECTIVES 63 (Helen F. Ladd et al eds, 1999); Safier, *supra* note 214, at 1012-15.
[230] Minorini & Sugarman, *supra* note 229, at 63.
[231] 790 S.W.2d 186, 212 (Ky. 1989).

capable of voting and serving on a jury."[232] The Court further held that this standard required students to receive a complete high school education, which was essential for employment in modern society, and that the education should prepare students for higher education.[233]

Unfortunately, these high standards for education systems are typically an exception rather than the norm. A 2005 study of school finance litigation in all states revealed that definitions of adequacy often played a conservative role in litigation by setting fairly low standards for what state education systems must accomplish.[234] Thus, state finance litigation can and has established a high standard for the education system in some states; however, in many more states school finance litigation has failed to set a high bar for the education system. Moreover, the patchwork of wins and losses in school finance litigation creates disparate standards for education systems throughout the nation.

C. Why Federal Action Is Necessary

Before presenting this Article's proposal for how the United States should enforce a right to education, some undoubtedly may question whether there is a need for greater federal involvement in education in light of the fact that we are at the high watermark of federal involvement in education.[235] However, the federal government historically has acted to address national needs that local governments did not satisfy, including as early as the mid-1800s when federal programs helped to address the need for skilled workers in such areas as agricultural and vocational skills.[236] In addition, the federal government has oftentimes intervened with legislation to protect the rights of the least powerful in the nation, including minority, poor, female and disabled students by prohibiting discrimination on the basis of these characteristics.[237] Therefore, building upon the role of the government as the protector of the least advantaged represents a longstanding role for the federal government in education.

The United States should re-examine how it is providing educational opportunities, including whether the nation should recognize a federal right to education, because many children, particularly poor, minority and urban children, consistently receive low-quality educational opportunities and thus they lack the education that they need to thrive as human beings and productive contributors to American society. Scholars and commentators have consistently noted and documented the inferior educational opportunities provided to low-income, urban and minority schoolchildren as compared to their more affluent, suburban and/or white peers.[238]

---

[232] 801 N.E.2d 326, 331 (N.Y. 2003)
[233] *See id.* at 331, 352.
[234] *See* LUKEMEYER, *supra* note 229, at ___.
[235] The No Child Left Behind Act of 2001, Pub. L. No. 107-110. Jack Jennings & Nancy Kober, *Talk Tough, But . . . Put the Money Where Your Mouth Is*, WASHINGTON POST OUTLOOK, October 3, 2004, at B3 ("No Child Left Behind demands more of states and school districts than any previous federal education law.").
[236] *See* Center on Education Policy, *supra* note ___, at 13-14.
[237] *See id.* at 12-13.
[238] *See* SHERYLL CASHIN, THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM xvii (2004) ("Black and brown public school children are now more segregated than at any time in the past thirty years. Typically they are relegated to high-poverty, racially identifiable schools that offer a separate and unequal education."); Janice Petrovich, *The Shifting Terrain of Educational*

The provision of inferior educational opportunities for poor, urban and minority children is for too many an accepted part of the American educational landscape.[239] It is undeniable that "[t]ragically today, America has schools that are increasingly separate and unequal."[240] Even a casual comparison of the educational opportunities provided to inner city, low-income and non-white students typically reveals inferior facilities, fewer in-class educational resources and larger class sizes. Jonathan Kozol documents this troubling phenomenon in his recent book, *The Shame of the Nation: The Restoration of Apartheid Schooling in America*, in which he describes the current disparities in educational opportunity as a "national horror hidden in plain view."[241] In this book, he describes schools in the United States that are lacking in the basics, such as clean classrooms and bathrooms, current textbooks in good condition and necessary laboratory supplies.[242]

The inferior educational opportunities provided to many minority, urban and poor students may stem in large part from the inadequate and inequitable funding that is provided to these students in light of their greater educational needs.

Policy: Why We Must Bring Equity Back, in BRINGING EQUITY BACK: RESEARCH FOR A NEW ERA IN AMERICAN EDUCATIONAL POLICY 8 (Janice Petrovich & Amy Stuart Wells, eds., 2005) ("Minority children are concentrated in large, outdated, overcrowded schools that need repair and have large proportions of teachers who are not certified to teach in their subject areas.") (citations omitted); CHARLES J. OGLETREE, JR., ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF BROWN V. BOARD OF EDUCATION 260-61 (2004) ("[I]t remains overwhelmingly true that black and Latino children in central cities are educated in virtually all-minority schools with decidedly inferior facilities and educational opportunities."); *Editor's Introduction, in* LEGACIES OF BROWN: MULTIRACIAL EQUITY IN AMERICAN EDUCATION 3 (Dorinda J. Carter et al, eds., 2004) ("[S]tudents of color continue to have fewer qualified and effective teachers and less access to challenging and rigorous curricula.. Their schools, by and large, get less state and local money without legislative intervention, and public education, as represented by political will and financial support, invests fewer of its hopes, expectations, and aspirations in students of color.") (citations omitted); HOCHSCHILD & SCOVRONICK, *supra* note 13, at 54 ("[C]hildren in affluent (predominantly white) districts receive a better education than do children in poor (disproportionately minority) districts, and children in this country do not approach adulthood with anything like an equal chance to pursue their dream."); DOUGLAS S. REED, ON EQUAL TERMS: THE CONSTITUTIONAL POLITICS OF EDUCATIONAL OPPORTUNITY 182 (2001) ("The U.S. Supreme Court's directive in Brown that educational opportunity, where the state undertakes it, must be provided 'on equal terms,' has not been fully implemented."); Jay P. Heubert, *Six Law-Driven School Reforms: Developments, Lessons, and Prospects, in* LAW & SCHOOL REFORM: SIX STRATEGIES FOR PROMTING EDUCATIONAL EQUITY 1, 5 (Jay P. Heubert, ed., 1999) ("The gaps between 'haves' and 'have nots' seem to be increasing, despite strong evidence that such gaps produce highly undesirable educational consequences for the 'have nots'"); GARY ORFIELD ET AL, DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION xv (1996) ("The currently stratified opportunity structure denies economically disadvantaged minorities access to middle-class schools, and to the world beyond them.").

[239] *See* Carl F. Kaestle & Marshall S. Smith, *The Federal Role in Elementary and Secondary Education, 1940-1980*, HARV. EDUC. REV., Vol. 52, No. 4, 384, 404 (Nov. 1982) ("So long as the federal government does not take clear and substantive action to meet the needs of the inner cities, it forfeits any claim to being a nation with racial justice").

[240] Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: The Courts' Role*, 81 N.C. L. REV. 1597, 1622 (2003).

[241] JONOTHAN KOZOL, THE SHAME OF THE NATION: THE RESTORATION OF APARTHEID SCHOOLING IN AMERICA 237 (2005).

[242] *See id.* at ___.

[*Note to readers: While I have begun to examine the research on this issue, I have not yet completed my review and analysis of it. Therefore, I will add a discussion of this research into a later draft.*]

These national problems demand a national response.

IV. An Alternative Avenue for U.S. Implementation and Enforcement of a Federal Right to Education

This article agrees with scholars who argue that the United States should recognize a federal right to education. This article contends that the right to education should embrace a high standard as its definition. In addition, the right to education should be enforced through a collaborative approach that is designed to assist States in guaranteeing the right rather than a litigation-centered approach.

A. Defining a Federal Right to Education through Legislation

A U.S. right to education should include in its definition the aim of the right to education in the CRC, *i.e.*, that education should be directed to the development of the child's mental and physical abilities, personality and talents to her or his fullest potential. This recommendation stands in contrast to those of scholars noted above who suggest that the U.S. should recognize a right to a minimum adequate education that focuses on basic skills.[243] Setting such a low bar would be an unwise approach because it would not help the nation to fully develop the intellectual capacity of children or to acquire the societal benefits that come from providing all children a high-quality education. Students need not only to be prepared to speak and vote, but also to obtain employment in an economy in which the skills acquired in a high school education no longer result in a livable wage. In addition, the right to education should include a requirement that the right be provided on the basis of equal opportunity and should not permit policies that are intentionally discriminatory on the basis of race, color or nationality or that are discriminatory in effect on these bases.

This federal right to education could be accomplished through spending legislation which can be exercised to establish reasonable conditions on federal financial assistance for the general welfare.[244] In recognizing a right to education that embraces developing a child's mental and physical abilities to their fullest potential, States would be required to assess how best to achieve this goal and yet retain the liberty to adopt different approaches. Some States will have begun to develop expertise on these issues because school finance litigation has required States to determine what it would take to provide students an adequate education. By allowing flexibility in how the States achieve the aim of a right to education, this approach would respect the expertise of state and local governments in education while recognizing that federal action has become necessary to remedy the educational inequities that have become deeply entrenched in American society.

B. Collaborative Enforcement of the Federal Right to Education

[243] *See supra* at text accompanying notes 283-285 .
[244] *See* 483 U.S. 203, 207 (1987).

In contrast to other scholars, this Article contends that a more effective approach to a judicially-defined and enforced right to education would be for the United States to enact federal legislation that implements a collaborative approach to a federal right to education. The absence of individual suits against states and districts would encourage a collaborative approach between the federal, state and local government to improve educational opportunities. The implementation mechanism for this right to education would be modeled after the enforcement mechanisms for the right to education in international human rights agreements. [245] This article focuses on the implementation mechanisms in the CRC and the ICESCR as well as the individual complaints mechanism in the ICCPR. The implementation and enforcement mechanism for a federal right to education would include three components: a reporting obligation, technical and financial assistance and an individual complaint mechanism. After discussing these three components, this Article notes some of the ways that this proposal differs from NCLB.

1. Reporting Obligation

States would submit periodic reports to the federal government that provide a detailed analysis of whether the state is providing its children a right to education "progressively and on the basis of equal opportunity." Reporting guidelines would have to be developed that specified the information to be provided in state reports. For example, states could be required to provide disaggregated state data to ensure that adequate scrutiny of disparities in opportunity are identified. The reporting required to implement this recommendation would build on the requirements under the No Child Left Behind Act (NCLB).[246] NCLB currently requires States to develop "challenging" standards for academic achievement and to assess students on a regular basis to determine that students are making appropriate progress. [247] NCLB also requires States and districts to work toward reducing the achievement gap and to prepare and disseminate report cards on achievement on state assessments disaggregated along lines of poverty, race, ethnicity, disability and limited-English proficiency.[248]

The reporting obligation would then proceed in a similar manner to the mechanisms in international treaties such as the ICESCR and the CRC. The reports would be submitted to either a federal panel of experts or to an independent panel of experts that is supported by federal funding. (The first draft of this article assumes that the panel is a part of the federal government.) The expert panel would be authorized to review state reports, assess whether states are providing the right to education, identify

---

[245] This collaborative approach is consistent with the theoretical framework presented by Richard Elmore and Paul Berman in which the federal government "does not impose any rules and regulations. Instead, broad goals (such as the education of disadvantaged children) are articulated by the outside agency; more precise goals are worked out jointly through discussion and experimentation; and the role of outside agency is to provide financial, technical, organizational and professional assistance." William H. Clune, *The Deregulation Critique of the Federal Role in Education*, *in* SCHOOL DAYS, RULE DAYS: THE LEGALIZATION AND REGULATION OF EDUCATION 187, 195 (David L. Kirp & Donald N. Jensen, eds. 1986) (hereinafter SCHOOL DAYS, RULE DAYS).

[246] No Child Left Behind Act of 2001, 20 U.S.C. § 6301, Pub. L. No. 107-110.

[247] § 6311.

[248] § 6311.

any shortcomings and recommend how the states can improve protection of the right to education. [249] Non-profit organizations also would be entitled and encouraged to submit additional information for the panel's consideration. Reports by states and the panel would be publicized and the identification of a state as in violation of this right would encourage states to take remedial action.[250] The recommendations, however, would be merely suggestions and states would be encouraged to develop their own solutions and approaches to identified concerns.

In addition to reviewing state reports, additional details of the enforcement mechanism could be determined by the expert panel, executive order or the U.S. Department of Education so that necessary changes would not require congressional action.

2. Technical and Financial Assistance

In addition to a state reporting mechanism, the focus of the federal government in response to these reports would be to guide states toward assistance and support that could help them remedy their shortcomings and encourage states to identify effective solutions.[251] For example, the federal government could connect States with organizations such as the National Research Council as well as universities that have expertise on the challenges confronting States and foster partnerships that would help address identified concerns. An additional possibility is that the federal government could build on its role as a repository of data and information on educational best practices to develop expertise on how to overcome obstacles to the provision of the right to education on the basis of equal opportunity. It would eschew a one size fits all approach, but instead would provide information on possible approaches that have proved successful in other States and facilitate direct collaboration between the States. For more than 100 years, the federal government has collected data on education to help the nation determine the current state of education.[252] The Department of Education also historically has frequently disseminated reports on education success stories.[253] Therefore, the Department could use its past experience in this area to assist States in providing a right to education or, if necessary, an alternative entity could be created to administer this legislation.

In addition to technical assistance, such a federal right to education should be accompanied by substantial federal financial assistance. The assistance could be provided to reward those states that are making good faith efforts to ensure that the right to education is provided on the basis of equal educational opportunity and that are

---

[249] *See* Chapman, *supra* note 53, at 35 (arguing that there needs to be more effective monitoring of the progressive implementation of ICESCR).

[250] *See id.* at 36-38 (arguing that identifying violations of economic, social and cultural rights is the best way to ensure effective monitoring of these rights because the label of human rights violator would encourage state parties to develop ways to remedy identified rights violations).

[251] *Cf.* Clune, *supra* note 245, at 205 (David L. Kirp & Donald N. Jensen, eds. 1986) (hereinafter SCHOOL DAYS, RULE DAYS) (noting that "many school districts do not know how to comply with mandates requiring technical and organizational change").

[252] *See* Center on Education Policy, *A Brief History of the Federal Role in Education: Why It Began & Why It's Still Needed* 17 (1999).

[253] Add citation.

enabling children to develop their intellectual, interpersonal and physical abilities to their fullest potential. The availability of this assistance should foster reform and innovation in contrast to a litigation approach which oftentimes fosters resentment, resistance and evasion. Financial assistance also could be provided to those states who are encountering obstacles to ensuring the right to education but who are making progress toward this goal. Additional federal financial assistance for States would address one of the primary criticisms of NCLB, i.e., the lack of adequate funding to achieve its comprehensive approach.[254]

States that are unwilling to continuously take steps toward full implementation of the right to education could have a percentage of federal financial assistance withheld. This would need to be a substantial amount of financial assistance to encourage state participation but it should not require withholding of all education funding. However, this withholding would not be premised upon the state following the recommendations of the expert panel as those recommendations would represent only one possible solution to identified concerns. Rather, financial assistance would only be withheld from those states who fail to take steps to remedy those concerns.

3. Complaint Mechanism

Finally, like the complaint mechanism in the ICCPR and that has been proposed for the ICESCR, [255] a complaint mechanism would be established where groups or individuals could submit complaints about a violation of the right to education after the complainant had exhausted its state remedies. Like the complaint mechanism for the ICCPR, the exhaustion requirement should be waived if the complainant has encountered substantial delays in receiving a remedy. [256] The panel of experts would review the complaint, receive a response from the state and develop findings and recommendations for the state. Unlike the committee's that enforce the CRC and ICESCR, the expert panel also should have the capacity to conduct independent fact finding and to receive oral testimony.[257] The recommendations of the panel should be publicized widely and could be highlighted by top federal officials, including the President, through use of the bully pulpit. While states should be given latitude to choose amongst effective options, failure to institute remedial measures should constitute a basis for withholding a percentage of federal education funding to the state. Failure would be defined as a lack of action by the state to take steps in addressing the identified shortcomings. Thus, while the panel could not order a state to take action, it would have a strong stick to encourage compliance.

4. Moving Beyond NCLB

The proposal presented here would build on some of the NCLB requirements mentioned above but also differ from NCLB in several important ways. The proposed

---

[254] William J. Mathis, *No Child Left Behind: Costs and Benefits*, 84 PHI DELTA KAPPAN 679, 685 (2003); Jennings & Kober, *supra* note 235, at B3. Check citation.
[255] Rios-Kohn, *supra* note 195, at 155. Check citation.
[256] *See* Optional Protocol to ICCPR, Article 5, ¶ 2(b).
[257] *See* Heffernan, *supra* note 22, at 108 (arguing that this is a weakness in the enforcement mechanism for the ICCPR).

statute would identify as its goal eliminating the inferior educational opportunities for minority, urban and low-income students that contribute to the achievement gap. Thus, the statute would acknowledge the longstanding need for reform of the American educational system and establish reform as a national goal that is long overdue.

Second, existing reporting obligations would have to be supplemented to require States to identify disparities in educational opportunities along lines of race, poverty and other measures to demonstrate whether the State is providing its students a right to education on the basis of equal opportunity in light of the typically greater needs of poor, minority and urban students. This additional requirement should operate to lay bare some of the causes of the achievement gap and encourage state and local action to address these disparities.

Finally, and most importantly, NCLB currently directs states to educate students to high standards while providing little support on how to get there. However, addressing these longstanding educational disparities and other impediments that hinder academic achievement is a difficult task that will require the development of innovative approaches to these concerns. The statute proposed here would acknowledge that States need assistance to reform their education systems and include mechanisms to deliver that assistance. It is not clear that the nation knows the most effective way to implement education reform that addresses the inequities in the nation's education system. Thus, the statute would foster the development of the expertise that is needed to answer these difficult questions. In addition, the panel's review of state reports would allow them to identify states that are facing similar obstacles and encourage collaboration between states on the development of successful reform efforts.

V. Strengths and Weaknesses of a Collaborative Approach to a Federal Right to Education

This final section considers some of the principal weaknesses and strengths of this proposal. It first examines the federalism implications for this proposal. This section then discusses some of the political and policy considerations of this proposal.

A. Federalism Implications

The first concern that may be raised to the proposed approach is that it may violate longstanding federalism principles in which education is principally the control of state and local governments.[258] Local control traditionally has been viewed as instrumental to ensuring community support of education as well educational excellence through local experimentation.[259]

However, the adoption of the enforcement mechanism for a right to education through spending legislation also helps to minimize federalism objections to the proposal.

---

[258] *See* Milliken v. Bradley, 418 U.S. 717, 741 (1974) ("No single tradition in public education is more deply rooted than local control over the operation of schools."); San Antonio Independent Sch. Dist. v. Rodriguez, 411 U.S. 1, 39 (1973) (noting that its review of the Texas school finding scheme must be "scrutinized under judicial principles sensitive to the nature of the State's efforts and to the rights reserved to the States under the Constitution").

[259] *See* Milliken, 418 U.S. at 741-42; Rodriguez, 411 U.S. at 50.

The Supreme Court has set very limited requirements for spending legislation by requiring that such action must be "in pursuit of the general welfare;" unambiguous; relate "to the federal interest in particular national projects or programs;" not violate other constitutional provisions; and must not be "so coercive as to pass the point at which pressure turns into compulsion."[260] These limitations consistently have been viewed as rather weak limitations on the spending power and scholarly suggestions on revising the Court's current approach to this issue are commonplace.[261] "The rise in conditional aid is largely due to the fact that the federal courts set few limits on Congress's authority to spend money."[262] While scholars have noted that the Court could apply these factors in a more rigorous fashion in the future, it has not yet chosen to do so.[263]

In *South Dakota v. Dole*, the Supreme Court applied these requirements when it upheld the constitutionality of a statute that conditioned five percent of federal highway funds on establishment of a minimum drinking age of 21.[264] The court determined that the statute furthered the general welfare by addressing the dangerous situation of young people traveling to states with a lower drinking age to drink. [265] Furthermore Congress shapes what is or is not within the general welfare and "courts should defer substantially to the judgment of Congress" on this issue.[266] The terms Congress set were unambiguous and related to the federal interest in highway safety. [267] The statute did not violate any "independent constitutional bar" because that limitation merely demands that "the power not be used to induce the States to engage in activities that would themselves be unconstitutional." [268] Finally, the statute did not exceed the boundaries of coercion and become compulsion because Congress merely conditioned a small percentage of highway funds upon establishment of a minimum drinking age of 21.[269]

If the current lenient standards for spending legislation remain in place, this Article's proposal could be shaped in a manner that is consistent with these requirements. Given the substantial deference to Congress on defining the general welfare, the need for spending legislation to advance the general welfare would easily be satisfied as a strong

---

[260] *See* South Dakota v. Dole, 483 U.S. 203, 207-208, 211 (1987) (internal quotations omitted).
[261] *See, e.g.*, Robert A Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 256 n. 48 (2005) (describing the standards in South Dakota v. Dole as "lenient"); Richard W. Garnett, *The New Federalism, the Spending Power, and Federal Criminal Law*, 89 CORNELL L. REV. 1, 33 (2003) ("Congress's essentially unquestioned power to spend money, with regulatory strings attached, continues to provide practically limitless opportunities for the national government indirectly to shape policy at the state and local levels of society and government"); Lynn A. Baker & Mitchell N. Berman, *Getting Off the Dole: Why the Court Should Abandon Its Spending Doctrine, and How a Too Clever Congress Could Provoke It to Do So*, 78 IND. L.J. 459, 539-41 (2003) (recommending revisions to the Court's current spending doctrine)
[262] Kathryn A. McDermott & Laura S. Jensen, *Dubious Sovereignty: Federal Conditions of Aid and the No Child Left Behind Act*, PEABODY J. OF EDUC., 80(2), 39, 41 (2005).
[263] *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 274 (2d ed. 2002) ("It is possible that as the Supreme Court narrows the scope of other congressional powers and revives the Tenth Amendment as a limit on Congress's powers, the Court might impose greater restrictions on conditional spending"); Baker & Berman, *supra* note 261, at ___.
[264] *See* Dole, 483 U.S. at 208-12.
[265] *See id.* at 208.
[266] *Id.* at 208.
[267] *See id.* at 208.
[268] *Id.* at 210.
[269] *See id.* at 211.

education system has consistently been viewed as an important pillar for the foundation of the nation.[270] "There is no avoiding a national interest in education; citizenship and education are inextricable."[271] Similarly, the federal government's interest in education, including improving the quality of education and encouraging equal educational opportunity, has been demonstrated repeatedly through past education legislation that has not been successfully challenged, including the Elementary and Secondary Education Act of 1965 and its recent reauthorization NCLB. [272] The unambiguous requirement is easily satisfied by establishing clear conditions in the statute. Also, the statute would not encourage states to take unconstitutional actions. [273]

The limitation on spending authority that would likely be most troublesome for this proposal is the requirement that the legislation may be coercive but not compulsory. However, even this requirement could be satisfied by two principal features of the proposal. First, the legislation should focus on offering funding as incentives and rewards rather than withholding it. Any funding that would be withheld, while significant in dollar amount, should be limited to a relatively small percentage of education funding overall. The Supreme Court approved limiting five percent of federal highway funding in *Dole* and thus limiting the condition of funds to only a fraction of federal funding for education could prevent the program from becoming compulsory while still encouraging state action in furtherance of the right to education. Second, the expert panel's recommendations would only be advisory and states would be encouraged to develop their own approaches to identified concerns or violations. The focus should be on the state taking action with complete discretion left to the states to choose amongst a myriad of solutions to these complex problems.[274] Therefore, it seems likely that this proposal would be upheld along with other exercises of congressional spending authority in recent decades that have "increased the extent to which [Congress] places conditions on recipients of federal aid."[275]

The state response to congressional conditions to financial assistance has typically been acquiescence rather than opting out,[276] and thus the states similarly may choose to work with the federal government rather than forego the financial assistance. In this regard, it is noteworthy that "[s]tates are responding to federal policy [in NCLB] in a way not seen since the mid-1970s, when they rose to the challenge of implementing the

---

[270] *See* Jack Jennings, A Brief History of the Federal Role in Education: Why It Began and Why It's Still Needed 3 (1999) ("The founders of our nation recognized that an education, well-informed citizenry is fundamental to a democratic form of government").

[271] Richard F. Elmore, *Education and Federalism: Doctrinal, Functional, and Strategic Views*, *in* SCHOOL DAYS, RULE DAYS: THE LEGALIZATION AND REGULATION OF EDUCATION 166, 175 (David L. Kirp & Donald N. Jensen, eds. 1986).

[272] *See* Jennings, *supra* note 270, at 3 (noting that the role of the federal government in education has served "to propose democracy; to ensure equality of educational opportunity; to enhance national productivity and to strengthen national defense"); Chester E. Finn, *Alternative Conceptions of the Federal Role in Education: Thinking Anew about What to Aid, and How*, Peabody Journal of Education, Vol. 60, No. 1, 103 (1982) ("[F]ederal aid was – and today remains – a significant weapon in the arsenal of those who hold that the foremost responsibility of the national government in the field of education, indeed perhaps its only Constitutional responsibility, is to provide equal opportunity to every citizen.").

[273] *See* Dole, 483 U.S. at 210.

[274] *See* San Antonio Independent Sch. Dist. v. Rodriguez, 411 U.S. 1, 42-43 (1972).

[275] *See* DeBray et al, *supra* note 17, at 10.

[276] *See id.*

Individuals with Disabilities Education Act and Title IX of the Education Amendments of 1972."[277] Therefore, the States may continue in this pattern of cooperation even if a more coercive federal education statute, such as the one proposed in this Article, is adopted.

B. The Political and Policy Considerations of the Proposal

On the political and policy side, the most strenuous objection to this thesis may be that Congress and the nation would never embrace establishing a federal right to education even if the state and local governments are given flexibility on how to achieve that right. Many scholars seem to believe that the judiciary is the only branch that can accomplish equal educational opportunity in the United States. For example, Erwin Chemerinsky has noted the lack of presidential attention to issues such as separate and unequal schools and has alleged that "[a]ny systematic attempt to deal with education would be highly unpopular; transferring money and students from wealthy areas to poorer areas is sure to engender enormous opposition."[278] The myriad judiciary-focused scholarly approaches to equal educational opportunities suggest that other scholars would agree that the judiciary branch would be the most likely branch to address this issue.

Although the United States Supreme Court sometimes has been the branch of the federal government that is most likely to assist the least powerful in the nation on issues of equal educational opportunity,[279] with the exception of the opinion in *Grutter v. Bollinger*,[280] the Court oftentimes has retreated from this role in the past two decades, most notably in its decisions on school desegregation.[281] In light of the conservative role of Bush and Reagan appointees on desegregation issues,[282] the ability of President Bush to appoint two justices to the Supreme Court also does not provide a realistic hope that the Court will take the type of progressive approach that would be required to recognize a federal right to education.[283]

While skepticism that Congress would take the proposed action is understandable, it can be answered by recognizing that in 2001 42 members of the Senate voted for a bill introduced by Connecticut Senator Christopher Dodd that would have required states to provide comparable educational services to all school districts and that included a federal court remedy for any parent or student who was injured by a failure to comply with the bill.[284] Congressman Chaka Fattah initiated such legislation in the House of Representatives in 2001, 2003 and 2005 although it was unsuccessful.[285] This fact along with the substantial changes and increased federal involvement in NCLB that were

---

[277] *Id.* at 11.
[278] Chemerinsky, *supra* note 20, at 111-12.
[279] *See* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 24 (1991) (noting that this is a common argument in favor of court-ordered reform).
[280] 539 U.S. 306 (2003).
[281] *See, e.g.*, Chemerinsky, *supra* note 240, at 1601-1619 (discussing two decades of decisions that contributed to resegregation of public schools).
[282] *See id.* at 1621.
[283] Adam Nagourney, *Glum Democrats Can't See Halting Bush on Courts*, N.Y. TIMES, January 15, 2006, at A1 (discussing how two Bush appointees will move the United States Supreme Court toward a more conservative judicial ideology).
[284] *See* Kozol, *supra* note 241, at 250-51.
[285] *See id.* at 250.

initiated and passed during a Republican presidency and Republican-controlled Congress indicates that "more than a few of our elected leaders are prepared to countenance the use of federal power to redress some of the consequences of *Rodriguez*."[286] Legislators may be waking up to the need for national action to address a national problem in light of state refusal to address this self-created crisis. In light of existing support for a more demanding bill, a less litigation-centered one might win even more support.

Such support could be generated if the nation experienced a wake up call similar to the one it experienced after the release of the 1983 report *A Nation at Risk*, which sounded a national alarm by declaring that "the educational foundations of our society are presently being eroded by a rising tide of mediocrity that threatens our very future as a nation and as a people" and thereby sparked new initiatives to increase student achievement.[287] Ultimately, a collaborative approach would require convincing the federal legislature and ultimately the public that educational inequities should be eradicated, not because they are forced to do so, but because such action is in the best interest of the nation and necessary for the nation to continue to prosper.[288] To persuade the public of this fact would require most citizens to be educated about the economic, moral and other interests that are undermined by the current system.[289]

In addition to contending that the judiciary branch is the most likely branch to take action, some will contend that the federal judiciary would be more effective at addressing equal educational opportunity. Many scholars have noted the primacy of the courts and litigation in efforts to improve equal educational opportunity.[290] By handling equal educational opportunity through the courts, the federal judiciary could approach these complex issues on a case by case basis, as it did with desegregation, and could develop remedies tailored to the facts before it. The judiciary also could order recalcitrant states to take action or hold them in contempt.

This article contends that the legislature is a superior branch to the judiciary to define and enforce a federal right to education on the basis of equal educational opportunity for several reasons. First, and perhaps most importantly, education is one of the most closely held functions of state and local governments and local control over education is viewed as an important virtue of the American education system. [291] Actions that interfere with state and local control over education typically meet with intense resistance[292] and a federal fundamental right to education is likely to meet similar resistance. Therefore, a collaborative approach that preserves the maximum possible local control over how to achieve national objectives would be more palatable and less threatening than a litigation-centered approach to federal involvement. As the federal

---

[286] *See id.* at 251.
[287] *See* T.H. Bell, *Renaissance in American Education: The New Role of the Federal Government*, 16 ST. MARY'S L.J., 771, 772 (1985); Jennings & Kober, *supra* note 235, at 11.
[288] *See* Dayton & Dupre, *supra* note 19, at 2410.
[289] Add citations to papers from social costs of an inadequate education conference at NYU.
[290] *See* Heubert, *supra* note 18, at 4 ("[L]awyers and litigation will continue to play a crucial role in efforts to improve educational opportunity in the United States.")
[291] HOCHSCHILD & SCOVRONICK, *supra* note 13, at 5 ("Americans want neighborhood schools, decentralized decision making, and democratic control . . . . They simply will not permit distant politicians or experts in a centralized civil service to make educational decisions.")
[292] *See* REED, *supra* note 238, at 121 ("Localism is paramount in American attitudes toward public education. Reforms that seek to diminish local control are much less likely to meet approval that those that do not.")

legislature also acts as an agent of the people just as the state legislatures do, this alternative expression of the citizenry may be the only effective counterbalance to local and state interests that would seek to maintain the status quo.[293]

Moreover, most judges lack the expertise to decide the complex issues of policy that implementing the right to education will require.[294] This was a key reason for the Court's hesitation to enter this highly contested arena in *Rodriguez* as the Court itself acknowledged that "[i]n addition to matters of fiscal policy, this case also involves the most persistent and difficult questions of educational policy, another area in which this Court's lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels."[295] While there have been many more school finance decisions since *Rodriguez*, the Court is not likely to believe that its expertise in this area has increased as the school finance decisions reflect a vast array of opinions on how to develop an effective and fair school finance system.

Instead, the enforcement and interpretation of a right to education may be best left to the legislative and executive branches of government rather than the judiciary which is trained to decide questions of law rather than policy. [296] For example, Gerald Rosenberg persuasively demonstrates the greater influence of Congress over the courts in desegregating the public schools. He notes that while 10 years after *Brown v. Board of Education*,[297] only 1.2 percent of black schoolchildren attended integrated schools, after the Civil Rights Act of 1964, 91.3 percent were in desegregated schools by 1972.[298] This contention does not deny the important impact that decisions such as *Brown v. Board of Education* had on this nation's civil rights landscape, but rather suggests that the next generation of civil rights action may not be focused in courtrooms. The nation's experience with desegregation accomplished much by the way of ending state-sponsored segregation, but ultimately many whites have fled the inner city schools to avoid integration and schools are resegregating.[299] A collaborative, legislative approach might avoid this backlash and thus be more likely to bring about lasting change.

Furthermore, school funding litigation also suggests that there are limitations to what courts can achieve when their decisions do not have political support and will

---

[293] Richard F. Elmore, *Education and Federalism: Doctrinal, Functional, and Strategic Views*, *in* SCHOOL DAYS, RULE DAYS: THE LEGALIZATION AND REGULATION OF EDUCATION 166, 175 (David L. Kirp & Donald N. Jensen, eds. 1986).

[294] *See* ROSENBERG, *supra* note 279, at 49. *But see generally* responses to Rosenberg such as Bradley C. Canon, *The Supreme Court and Policy Reform: The Hollow Hope Revisited*, *in* LEVERAGING THE LAW: USING THE COURTS TO ACHIEVE SOCIAL CHANGE 215 (David A. Schultzed., 1998) (hereinafter LEVERAGING THE LAW); David Schultz & Stephen E. Gottlieb, *Legal Functionalism and Social Change: A Reassessment of Rosenberg's the Hollow Hope*, *in* LEVERAGING THE LAW, at 169; Stuart A. Scheingold, *The Politics of Rights: Lawyers, Public Policy, and Political Change*, *in* LEVERAGING THE LAW, at 131. The debate over whether the courts or the legislature is the most effective agent for social change is one that I will expand upon in a subsequent draft.

[295] San Antonio Independent Sch. Dist. v. Rodriguez, 411 U.S. 1, 42 (1972).

[296] *See* Beiter, *supra* note 1, at 79; Rosenberg, *supra* note 279, at 52-53.

[297] 347 U.S. 483, 493 (1954).

[298] *See* Rosenberg, *supra* note 279, at 52-53. Check citation on this.

[299] *See* HOCHSCHILD & SCOVRONICK, *supra* note 13, at 29 ("[T]he effort to desegregate schools is largely over; mandatory desegregation was a political failure"); Dayton & Dupre, *supra* note 19, at 2406-07.

behind them.[300] John Dayton and Anne Dupre, two scholars who write on school finance issues among others, have captured the limited utility of school funding litigation well by stating that "[i]n many states, economically advantaged districts have retained or even increased their advantaged status, while disadvantaged districts have failed to generate sufficient legislative support to overcome the political influence of advantaged districts."[301] They persuasively contend that "[d]espite the persistence of school funding reformers, there is considerable evidence that the courts have not produced the desired reforms." [302] While litigation has been helpful in some instances, it has been insufficient for lasting reform of the inequities in funding that are commonplace in many states.[303] Instead, such reform requires political will and support so that those within the state will embrace and advance its goals rather than undermine and overturn the changes.[304]

Another fallacy of litigation, including school finance litigation, is that it places the state on the defensive and forces it to defend its education system. However, without the threat of a lawsuit acting as a Damocles over states, states would be encouraged to acknowledge problems and work together with local governments and the federal government to address them. Thus, this collaborative approach allows all policymakers to work toward the same goal without invoking a defensive posture from states that might otherwise be willing to concede the existence of substantial shortcomings within their state education system.

Additionally, the judiciary's decisions interpreting the right to education will be subject to the influence of federal judges who are likely to reach disparate results based on their jurisprudential leanings. Thus, the right to education on the basis of equal educational opportunity may not retain the same meaning throughout the nation. Moreover, the ability to have the expert panel itself or the executive branch determine the details of the enforcement mechanism also would allow the program to be modified as needed on a nationwide basis, but with less effort than congressional legislation or litigation would require.

The proposal in this Article also has the advantage of building on NCLB. In light of the substantial changes required by NCLB, an approach to a federal right to education that builds upon some of its features, rather than drastically deviates from them, is more likely to be accepted by state and local governments and the American public. While NCLB has met with substantial resistance,[305] this resistance must be placed in the context of other protests to federal involvement in education, including protests that federal laws guaranteeing the rights of girls and disabled children were too intrusive, burdensome and unnecessary. In other words, it is ultimately likely to give way to acceptance. Moreover, this proposal would counteract some of the current negative incentives of No Child Left Behind. James Ryan astutely captures these "perverse incentives" in contending that the

---

[300] *See* Dayton & Dupre, *supra* note 19, at 2406.
[301] *See id.* at 2409-10.
[302] *See id.* at 2409.
[303] *See id.* at 2412.
[304] *See id.*
[305] *See, e.g.*, Gail L. Sunderman et al, NCLB MEETS SCHOOL REALITIES: LESSONS FROM THE FIELD (2005); David J. Hoff, *Debate Grows on True Costs of School Law*, EDUC. WK., Feb. 4, 2004, at 1; Richard F. Elmore, *Testing Trap*, HARVARD MAGAZINE, Sept.-Oct. 2002, at 35, 97.

law "is at war with itself."[306] NCLB's requirements have encouraged states to lower once high achievement standards because its sanctions are determined by which students and schools do not meet adequate yearly progress.[307] In contrast to this regime, the collaborative approach proposed here would remove these adverse incentives by replacing such provisions with a collaborative approach in which each of the levels of government works together to foster the full development of the abilities of all students based upon high standards for all students.[308]

Ultimately, by focusing the federal government's attention on a collaborative approach through the spending clause, this Article places the government in a position that is consistent with the historical role of the federal government in education.[309] As education scholar Richard Elmore has explained, the federal government's role "has been to assert and reassert a national interest in education, using indirect, collaborative financing mechanisms and targeting of resources on curricula and on student populations, while at the same time deferring to states and localities on basic questions of finance and organization."[310] This proposal is consistent with that approach in leaving to state and local governments control to decide what changes to finance and organization are needed while encouraging the states to take action that will address unequal educational opportunities and poor quality schools. If the federal government's influence were directed at encouraging states to improve the quality of schools, reducing disparities in the quality of educational opportunities and developing expertise on how quality can be improved, such investments would reap substantial rewards for the nation.[311] Therefore, the federal role need not be litigation-focused, nor has it historically been so; instead, it typically has tried to foster change through other means.

V. Conclusion

Making equal educational opportunity a reality is not beyond the nation's grasp nor must we abandon federalism to achieve it. Some might challenge the idea that education is a right if states have the option of opting out of providing the right by declining federal funding. However, an innovative redefinition of rights and how they may be enforced may be necessary to institute a new approach to longstanding concerns about the quality of American education. For too long, low-income, urban and minority students as well as the overall quality of American education have been sacrificed on the

---

[306] James E. Ryan, *The Perverse Incentives of the No child Left Behind Act*, 79 N.Y.U. L. REV. 932, 932 (2004).

[307] *See id.* at 946-48; Robert Gordon, *The Federalism Debate: Why the Idea of National Education Standards is Crossing Party Lines*, EDUCATION WK., (Bethesda, Md.) Mar. 15, 2006, at 35, 48 ("States have maximized their scores by proficiency down. That foils the No Child Left Behind law's core goals of encouraging excellence and holding schools accountable for achieving it.").

[308] *Cf.* Ryan, *supra* note 306, at 935 (contending that "it is highly unlikely that the No Child Left Behind Act will remain in force, unchanged, for the next ten years").

[309] John F. Jennings, *Title I: It's Legislative History and Its Promise*, Phi Delta Kappan (March 2000) ("Over the course of two centuries of American history, the federal government has become involved in education when a national interest has been identified").

[310] Richard F. Elmore, *supra* note 293, at 175.

[311] Eric A. Hanushek, *Why Quality Matters in Education*, FINANCE AND DEVELOPMENT, June 2005, Volume 42, No. 2, at 15 ("Analysis of the costs and benefits of school reform clearly shows investments that improve the quality of schools offer exceptional rewards to society").

altar of local control. What is needed is a national recognition of the fact that, as President Kennedy so eloquently stated, "Our progress as a nation can be no swifter than our progress in education." A collaborative approach in which the United States recognizes a federal right to education that develops the child to her fullest potential on the basis of equal opportunity could help the United States address longstanding disparities in educational opportunity while advancing the quality of public education and the nation's economic future.