Adequacy Litigations: A New Path to Equity?

By
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In its famous 1954 decision in *Brown v. Board of Education,* the United States Supreme Court held that each state, in providing the opportunity for education, must make it available "to all on equal terms." At the time, Thurgood Marshall, the lead attorney for the black plaintiffs in this case, predicted that racial segregation in the schools would be eliminated within five years: "The basic postulate of our strategy and theory in *Brown* was that the elimination of enforced, segregated education would necessarily result in equal education" ("N.A.A.C.P. Sets Advanced Goals," 1954, p.16; *see also* Carter, 1979).

Today, 50 years later, *Brown*'s vision of equal educational opportunity is far from being realized. More than 70% of African-American and Latino public school students in the United States currently attend predominantly minority schools — a greater percentage than attended such segregated schools a decade ago (Orfield, 1999, 2001). Moreover, despite the greater educational needs of most poor and minority students, the inner city schools many of these students attend receive less funding and have fewer qualified teachers, larger classes, and inferior facilities than schools attended by more affluent white students in the surrounding suburbs (*CFE II*, 2003; Council of the Great City Schools, 2001).

Earlier chapters in this volume have described the impact of the failure to fully implement *Brown*'s vision and the shift from "equity" to "excellence" in the education reform efforts of recent decades. These trends have led some skeptics to conclude that

Brown's vision of equal educational opportunity is a chimera, or, worse, an opiate to lull the disadvantaged into accepting the inherent inequalities of our capitalist society (see, for instance, Delgado & Stefanic, 1997). This chapter takes a more optimistic perspective. I focus on the spate of recent state court decisions that have invalidated state funding systems denying adequate education to poor and minority students. In fact, I argue that these "adequacy" litigations are a harbinger of a new wave of reform initiatives that may merge equity and excellence by procuring the major resource commitments necessary to ensure that "at-risk" minority students have a meaningful opportunity to meet challenging educational standards.

The success of these state court adequacy decisions reflects an underlying egalitarian dynamic in America's political and legal culture, which I have previously described in terms of a "democratic imperative" (Rebell, 1998). Drawing on Myrdal's (1962) notion of an unresolved "American dilemma" – or the conflict between American democratic ideals and on-going prejudices against African Americans in particular – I define the "democratic imperative" as a periodic eruption of moral fervor that presses to eliminate the gap between the real and the ideal by implementing extensive political reforms that put into practice America's historic egalitarian ideals.

Viewed in historical perspective, therefore, what is significant about *Brown* is the way it has remade the political landscape[1] by activating a continuing progressive legal dynamic which—although it sometimes takes one step backwards before taking two steps forward—over time chips away at the huge underlying problems of racism, unequal funding, and economic disadvantage that constitute the major barriers to equal educational opportunity. As Yale Law Professor Jack M. Balkin (2001) has noted, *Brown* exemplifies

"the Constitution reflect[ing] America's deepest ideals, which are gradually realized through historical struggle and acts of great political courage" (p. 5). Thus, while the era of federal court desegregation mandates seems to be drawing to a close, a new era of state court education adequacy litigation is now advancing the equal educational opportunity vision – and thus the democratic imperative -- in new ways and in new directions.

From this long-range historical perspective, I believe that our society is moving toward fulfilling *Brown's* vision of equal educational opportunity. Yet, the extent to which equity actually advances at any point in time or in any particular place will depend largely on the effectiveness of the legal, political, and educational efforts to link these underlying egalitarian trends with immediate needs and possibilities. For example, during the desegregation era of the 1970s and 1980s, orders of the federal district courts resulted in stable racial integration and improved student achievement in some school districts, while in other places white flight and stagnant student scores were the courts' legacies (see, e.g., Stone, 1998). Similarly, although funding disparities among school districts have been dramatically reduced in some states where courts have invalidated state educational funding systems, elsewhere such court decrees have actually resulted in educational setbacks. In Kentucky, for example, issuance of a court order calling for fiscal equity and education adequacy resulted in a new funding system that narrowed the gap between spending per pupil in high-wealth and low-wealth districts by 59% and in dramatic reforms of the entire educational system (Hunter, 1999). On the other hand, following the California Supreme Court's 1997 decision in *Serrano v. Priest*, funding for education was substantially equalized, but at a relatively low level. Ranked fifth in the nation in per-pupil

spending for education in 1964-65, California fell to forty-second in 1992-93 ("'Protecting' School Funding," 1993).

As is clear in the story of reform and top-down legal mandates discussed in Chapter 4 of this volume, active community involvement in reform efforts has been a major determinant of success in both the desegregation and education adequacy cases (Rebell & Hughes, 1996). Indeed, in the 1970s, the United States Commission on Civil Rights (1976, 1977a, 1977b, and 1977c) found, based on a series of case studies and school superintendents surveys, that the support of a broad array of community participants substantially promoted public acceptance of desegregation plans. Similarly, the successful implementation in the early 1990s of the Kentucky Supreme Court's education adequacy order was facilitated in no small part by the extensive statewide dialogues that had been initiated in previous years by the Prichard Committee, a non-partisan school reform group composed of political and business leaders, civic activists, parents, and professionals (Hunter, 1999). In this chapter, I present an overview of how similar constituency building efforts are hopefully going to work in the implementation phase of a recent New York state court ruling in an important finance equity case there.

Thus, I begin with a brief overview of finance equity litigation that emphasizes the remarkable pattern of plaintiff victories in recent education adequacy cases. This striking trend is usually explained in terms of plaintiff lawyers' strategic shift from "equity" to "adequacy" claims in their litigations ---- in other words from a focus on equalizing all resources to a focus on providing the specific resources needed to provide all children the opportunity for a basic education. But that explanation does not go far enough. The significant questions to be addressed are:

1. Why do almost all state constitutions contain an education adequacy clause?
2. Why have lawyers invoked them for the first time in the past decade or so, even though they have been embedded in most constitutions for a century or more?
3. And, most importantly, why are judges upholding these adequacy claims in the vast majority of cases that come before them?

In the second section of this chapter I attempt to answer these questions by exploring the historical roots of the education adequacy clauses in the Revolutionary War and nineteenth century common school eras, and in the framers' understanding that in a democratic society *all* citizens must be well-educated. Although these clauses remained largely unenforced for a century or more, the continuing imperative of *Brown's* vision of equal educational opportunity and the underlying premise of the modern standards-based reform movement that all children can learn at cognitively demanding levels have together revitalized the historical link between democracy and education in a manner that may eventually have profound egalitarian implications. Accordingly, the third section of this chapter argues that excellence and equity should be seen as complementary rather than competing concepts and illustrates this argument by describing how courts in the adequacy litigations are beginning to articulate the specific high level skills that *all* students actually need in order to be capable civic participants.

Yet, as I noted above, realization of the full potential of these legal advances require sustained constituency building and effective political action. The courts cannot be the only venue of reform. Accordingly, the section of this chapter will describe the extensive statewide public engagement process that the Campaign for Fiscal Equity ("CFE") -- of which I am the Executive Director and Counsel -- has undertaken in

conjunction with the major education adequacy litigation it has mounted in the State of New York over the past decade. CFE has fought for an adequate level of state funding for students in the New York City Public Schools, more than 80% of whom are poor and minority students, and for students in other high need, under funded school districts. From the outset of the filing of the litigation, CFE has involved thousands of citizens throughout the state in an extensive deliberative process to help develop the positions that the plaintiffs presented to the Court in the trial and to prepare the ground for successful implementation of a final court order. Now that the plaintiffs have prevailed in that case, the role of constituency building and public engagement has become even more critical, as the legal ruling can provide an important impetus, but cannot in and of itself ensure a fair and adequate education for the children of New York State.

EDUCATION ADEQUACY: A LITIGATION OVERVIEW

In the early 1990s, after overseeing almost four decades of implementation of school desegregation decrees by federal district courts, the U.S. Supreme Court began to focus on the question of when remedial decrees in long- standing desegregation cases should be terminated (Rebell & Block, 1985). In a series of such decisions, the Court determined that school boards which had "complied in good faith with the desegregation decree since it was entered" and had eliminated "the vestiges of past discrimination . . . to the extent practicable" (*Oklahoma City Public Schools v. Dowell*, 1991), would be freed from further judicial oversight, even if their schools remained substantially segregated and/or a significant achievement gap between students of different races remained (*Missouri v. Jenkins*, 1995). These developments led many civil rights advocates to

conclude that the federal courts were abandoning any serious efforts to implement *Brown*'s vision of equal educational opportunity:

> Developments in federal school desegregation jurisprudence in the early 1990s . . . suggest that the litigation era reaching back to *Brown v. Board of Education* is now drawing to a close . . . curtailing continuing federal court jurisdiction over a district that had once acted illegally opens the way for the district also to abandon some of the special efforts that had been imposed on it – both programs aimed explicitly at achieving racially balanced student bodies and those aimed more at improving the educational opportunities offered in the often heavily minority schools (Minorini & Sugarman, 1999, p. 187).[2]

But at about the same time that the Supreme Court's insistence on effective remedies in desegregation was beginning to lag, civil rights advocates initiated new legal challenges to the systems that most states had used to finance public education. Many of these suits resulted from a growing awareness among civil rights lawyers that substantial resources would be needed to overcome the accumulated vestiges of segregation and that most minority students attended school in poor urban or rural school districts that were substantially under funded in comparison to schools in affluent, largely white suburban districts (see Reed, 2001).[3] The root cause of this inequity was that state education finance systems historically have been based on local property taxes, a pattern that inherently disadvantages students who attend schools in areas with low property wealth.

The initial attempt to induce the courts to invalidate state education finance systems began in the federal courts. A case involving the impact of financial disparities on poor and minority students in Texas, *Rodriguez v. San Antonio Independent School District*, reached the United States Supreme Court in 1973. The *Rodriguez* plaintiffs lived in Edgewood, a district in the San Antonio metropolitan area whose students were approximately 90% Mexican-American and 6% African-American. The district's property values were so low that even though its residents taxed themselves at a substantially higher rate than did the residents of the neighboring largely Anglo district, they were able to provide their schools only about half the funds, on a per-student basis, that were available to their more affluent neighbors. The Supreme Court agreed that Texas' school finance system was inequitable, but, nevertheless, it denied the plaintiffs' claim, primarily because it held that education is not a "fundamental interest" under the federal constitution (411 U. S. 1 at 32, 35-37, 49; for a detailed discussion of the Supreme Court's decision in Rodriguez, see Rebell, 2002).

The Supreme Court's ruling in *Rodriguez* precluded the possibility of obtaining fiscal equity relief from the federal courts. Surprisingly, however, the state courts, which historically had not been innovators in constitutional civil rights issues, picked up the baton. Shortly after the U.S. Supreme Court issued its decision in *Rodriguez*, the California Supreme Court held that even if education was not a fundamental right under the federal constitution, it clearly was so under the California constitution (*Serrano v. Priest*, 1976). Soon thereafter, courts in a number of other states also declared their state education finance systems unconstitutional.

The practical problems of untangling the complexities of local property tax systems and surmounting legislative machinations to preserve the status quo tended, however, to

strain judicial capabilities. Difficulties in actually achieving equal education opportunity in the initial fiscal equity cases, therefore, seemed to dissuade other state courts from venturing down this path (see Rebell, 2002). Despite an initial flurry of pro-plaintiff decisions in the mid-1970's, by the mid-1980's, the pendulum had decisively swung the other way: plaintiffs won only two decisions in the early '80s, and, as of 1988, 15 years after *Rodriguez,* 15 of the state supreme courts had denied any relief to the plaintiffs, compared to the seven states in which plaintiffs had prevailed.[4]

The U.S. Supreme Court's rejection of plaintiffs' claims in *Rodriguez*, together with the difficulties experienced by the state courts that issued remedial decrees in the early years, presumably should have sounded a death knell for the fiscal equity movement. Despite these setbacks, however, advocates and state court judges continued to seek new ways to assure fair funding and meaningful educational opportunities for poor and minority students. Even more extraordinary is the fact that in the last decade or so there has been a strong reversal in the outcomes of state court litigations: plaintiffs have, in fact, prevailed in the vast majority (18 of 29) of the major decisions of the state highest courts since 1989.[5]

What is the explanation for the newfound willingness of state courts—which have historically been reluctant to innovate in areas of constitutional adjudication—to uphold challenges to state education finance systems? And, further, how can it be that one-third of the recent pro-plaintiff decisions, that is, those in Montana (1989), Idaho (1993), Arizona (1994), New York (1995, 2003), Ohio (1997), and North Carolina (1997), have been written by the same courts that had ruled in favor of defendants only a few years before?[6]

The explanation for the marked increase in plaintiff victories since 1989 and the dramatic re-considerations by an increasing number of state supreme courts is undoubtedly related to a new legal strategy many plaintiff attorneys adopted. This shift was from equal protection claims based on disparities in the level of educational funding among school districts to claims based on opportunities for an adequate education guaranteed by the applicable state constitution – so-called "adequacy considerations". Specifically, 16 of the 18 plaintiff victories in the past 14 years have involved substantial or partial adequacy considerations.[7]

The shift from equity to adequacy in legal pleadings, however, reflects more than a clever legal strategy by plaintiff attorneys. Judges have tended to uphold claims of denials of basic levels of adequate education to poor and minority children in recent years because concrete demonstrations of deprivation have dramatically highlighted, in a way that abstract discussions of property tax inequities never could, the extent to which children are being denied critical opportunities that are at the core of America's democratic promise. The adequacy cases, therefore, are the latest chapter in the continued unfolding of the democratic imperative in American history. They further illustrate how America's underlying egalitarian dynamic, after meeting resistance in one direction, will reassert itself with renewed vigor in another.

To understand precisely how the democratic imperative has emerged in the education adequacy cases and the full significance of this still-unfolding resurgence of the egalitarian ideal, we must reach back into history, beyond *Brown* and the modern civil rights era, to analyze the historical origins of the constitutional clauses upon which most of the recent adequacy rulings are based.

THE HISTORICAL ROOTS OF EDUCATION ADEQUACY

Plaintiffs' success in the recent wave of education adequacy litigations reflects both a renewed attempt to implement *Brown's* vision of equal educational opportunity and also a flowering of egalitarian seeds that had been planted long ago in eighteenth- and nineteenth-century concepts of education reform. The founding fathers of the American Republic expected the schools to assist in building the new nation by "the deliberate fashioning of a new republican character, rooted in the American soil . . . and committed to the promise of an American culture" (Cremin, 1980, p. 3; also see Pangle & Pangle, 2000). This "new republican character" was to have two primary components. First was the implanting of "virtue," as defined by the classical notion that citizenship required a commitment to a shared public life of civic duty (Wood, 1969; see also Pocock, 1975; Willis, 1978). Second was a radical egalitarian notion that all citizens must obtain the knowledge and skills needed to make intelligent decisions. As John Adams put it:

> A memorable change must be made in the system of education and knowledge must become so general as to raise the lower ranks of society nearer to the higher. The education of a nation instead of being confined to a few schools and universities for the instruction of the few, must become the national care and expense for the formation of the many. (cited in McCullough, 2001, p. 364)

The civic republican and egalitarian ideals of the founding fathers were clearly spelled out in the education clauses of most of the New England state constitutions, which

were originally written in the eighteenth century and have been largely unchanged since. Thus, the Constitution of the Commonwealth of Massachusetts proclaims:

> Wisdom and knowledge, as well as virtue, diffused generally among the body of the people, being necessary for the preservation of their rights and liberties; and as these depend on spreading the opportunities and advantages of education in the various parts of the country, and among the different orders of the people, it shall be the duty of legislators and magistrates, in all future periods of this commonwealth, to cherish the interests of literature and the sciences, and all seminaries of them; especially the. . . public schools and grammar schools in the towns. (1780, part II, ch. V, § 2)

A link between the development of "civic virtue" and education also appears in the constitutions of Vermont (1793, ch. II, § 68), New Hampshire (1784, Part II, article 83), and Rhode Island (1842, Article XII, § 1). As Vermont's Supreme Court noted in interpreting the somewhat archaic "civic virtue" language, "The amalgamation was perfectly consistent with the commonly held view of the framers that virtue was essential to self-government, and that education was the primary source of virtue" (*Brigham v. State of Vermont*, 1997; p. 393).

The education clauses of state constitutions in most other parts of the country were written during the nineteenth century, and they were generally inspired by the common school movement that was the major education reform initiative of that era (Cremin, 1980). The common school movement, in essence, represented a delayed implementation of the

egalitarian education ideals of the founding fathers, which had not effectively been implemented immediately after the Revolution largely because of the state legislatures' unwillingness to vote the taxes necessary to fund systemic schooling. As its name implies, the common school movement was an attempt to educate in one setting all the children, whatever their class or ethnic background, living in a particular geographic area. These schools would replace the prior patchwork pattern of town schools partially supported by parental contributions, church schools, "pauper schools," and private schools with a new form of democratic schooling. The common school "would be open to all and supported by tax funds. It would be for rich and poor alike, the equal of any private institution" (Cremin, 1980, p. 138). This dynamic egalitarian ethic was driven by those who had faith in the power of education to "promote the well-being of the individual, the intelligent use of the franchise, and the welfare and stability of the state." At the same time, the common schools were strongly opposed by those who believed that "education gave rise, on the part of those born to inferior positions, to futile aspirations; that class distinctions made for social cohesion . . . [and] that no state could long withstand the financial strain involved in maintaining free schools . . ." (Edwards & Richey, 1963, p. 299).

In the latter half of the nineteenth century, the fierce political battle to implement these common schools reforms culminated in the incorporation in dozens of state constitutions of provisions that guaranteed the establishment of "a system of free common schools in which all the children in the state may be educated" (New York Constitution, 1894, Article XI, §1).[8] Some states further emphasized the importance of fully educating all citizens by calling for a "*thorough and efficient* system of common schools throughout the state" [emphasis added] (Ohio Constitution, 1851, Article VI, §2).[9]

By the end of the nineteenth century, then, the vast majority of state constitutions included education clauses that reflected the strong democratic imperatives of the common school movement. Ironically, however, shortly after the common school movement had achieved this constitutional triumph, much of its dynamic egalitarian thrust seemed to have been spent. As public school systems expanded at the end of the nineteenth century through compulsory education laws and the absorption of large numbers of immigrants in the urban centers, the original common school vision tended to atrophy, and the public schools increasingly became mechanisms for political acculturation and occupational sorting (see Katz, 2001). Tyack (1974), for instance, describes bureaucratic structures for schooling created at the beginning of the twentieth century to educate masses of students in urban areas as undermining common school ideals. This blunting of the original egalitarian ideal particularly affected the descendants of the African-American slaves. African-Americans had, for the most part, been excluded from the original common schools, and by the time they legally gained access to public school systems, those systems had become heavily stratified within and across district lines (see Glenn, Jr., 1988; Rippa, 1984; Tyack, 1974).

As the fervor of the original common school movement waned, the substantive guarantees to equal educational opportunity contained in the state constitution common school clauses tended to become rhetorical flourishes, often honored more in the breach than in actuality. The adequacy movement of recent years, has, in essence, focused judicial attention on this long-neglected language in the state constitutional clauses, and in doing so, it has revitalized their original underlying civic republican and common school ideals. Many of these cases have now tied these historic ideals to contemporary educational and

legal mandates that seek to implement in practical ways the original intent of the eighteenth- and nineteenth-century constitutional guarantees of an adequate education for all.

For example, the Supreme Court of Ohio, after closely studying the intent of the framers of its state constitution's education clause, emphasized its ideological origins in the common school movement and expressed an awareness of the far-reaching democratic implications of that ideology:

> The delegates to the 1850-1851 Constitutional Convention recognized that it was the state's duty to both present and future generations of Ohioans to establish a framework for a "full, complete and efficient system of public education". . . Thus, throughout their discussions, the delegates stressed the importance of education and reaffirmed the policy that education shall be afforded to every child in the state regardless of race or economic standing.... Furthermore, the delegates were concerned that the education to be provided to our youth not be mediocre but be as perfect as could humanly be devised . . . These debates reveal the delegates' strong belief that it is the state's obligation, through the General Assembly, to provide for the full education of all children within the state. (*DeRolph v. State of Ohio*, 1997, p. 740-741)

Similarly, the Kentucky Supreme Court, in *Rose v. Council for Better Education, Inc*. (1989) stated that the intent of the delegates to the 1891 constitutional convention was

to ensure that "the boys of the humble mountain home stand equally high with those from the mansions of the city. There are no distinctions in the common schools, *but all stand upon one level*" (p. 206; emphasis in original).

The courts in the recent adequacy cases have also emphasized that the democratic ethic reflected in the education clauses must be applied in a manner that relates directly to contemporary needs. As the Supreme Court of New Hampshire put it, "Given the complexities of our society today, the State's constitutional duty extends beyond mere reading, writing and arithmetic. It also includes broad educational opportunities needed in today's society to prepare citizens for their role as participants and as potential competitors in today's marketplace of ideas" (*Claremont School District v. State of New Hampshire*, 1993; p. 1381).

The committee that drafted New York State's education clause in 1894 seemed to be consciously communicating across the ages when it wrote:

> Whatever may have been their [i.e. the common schools'] value heretofore . . .their importance for the future cannot be overestimated. The public problems confronting the rising generation will demand accurate knowledge and the highest development of reasoning power more than ever before.(Constitutional Convention of 1894, 1906; p. 555)

In 2003, the New York Court of Appeals responded directly to this call from the past by specifically citing this nineteenth century committee report and establishing a process to determine "what the 'rising generation' needs [today] in order to function productively as civic participants." (*CFE II*, 2003, p. 905). It concluded that although " a

sound basic education back in 1894, …. may well have consisted of an eighth or ninth grade education, …. a high school level education is now all but indispensable" (p. 906). Similarly, the New Jersey Supreme Court held that although a high school education was not an attribute of a thorough and efficient education in 1895, it clearly is today (*Robinson v. Cahill,* 1973).

These state court interpretations, therefore, have created a direct link between contemporary school funding reform needs and the historical sources of this country's democratic traditions in the eighteenth and nineteenth centuries. These connections are re-invigorating the democratic imperative and providing a basis for accelerating progress toward realizing *Brown's* vision of equal educational opportunity. Especially significant in this regard is the contemporary courts' focus on the schools' responsibility to prepare students to be capable citizens in the modern world, a topic that will be explored in the next section.

LINKING EXCELLENCE AND EQUITY: THE SKILLS NEEDED FOR CIVIC PARTICIPATION

In the mid-1980's a slew of commission reports warned of a "rising tide of mediocrity" in American education that was undermining the nation's ability to compete in the global economy (see Carnegie Forum on Education and the Economy, 1986; National Commission on Excellence in Education, 1983; Twentieth Century Task Force, 1983;). Comparative international assessments revealed poor performance by American students, especially in science and mathematics (Linn & Dunbar, 1990; National Assessment of Educational Programs, 1990;). These concerns culminated in the 1989 National Education Summit, convened by President George H. W. Bush and attended by all 50 of the nation's

governors and a cadre of major corporate CEOs, where a new educational reform movement was launched to articulate national educational goals and to establish explicit standards for educational achievement in each of the states (Ravitch, 1995;Tucker & Codding, 1998;).

Standards-based reform, which is now being implemented in 49 of the 50 states, is built around substantive content standards in English, mathematics, social studies and other major subject areas. These content standards are usually set at sufficiently high cognitive levels to meet the competitive standards of the global economy. In theory, once the content standards have been established, every other aspect of the education system—including teacher training, teacher certification, curriculum frameworks, textbooks and other instructional materials, and student assessments—must be revamped to conform to these standards. The aim is to create a seamless web of teacher preparation, curriculum implementation, and student testing, all coming together to create a coherent system which will result in significant improvements in achievement for all students (Fuhrman, 1993).

Standards-based reform emerged from concerns about America's ability to compete in the global economy, and its focus on outcomes and accountability has seemingly moved education policy from an emphasis on equity to an emphasis on "excellence" (see Chapters 1 and 9, this volume). But inherent in the standards movement is also a powerful equity element, namely its philosophical premise that *all* students can learn at high cognitive levels and that society has an obligation to provide them the opportunity to do so. As the New York State Board of Regents (1993) have put it, "All children can learn; and we can change our system of public elementary, middle, and secondary education to ensure that all children do learn at world-class levels" (p. 1; see also Liebman & Sabel, 2003). This

philosophical premise has also now become the core of federal education policy with the enactment in 2002 of the No Child Left Behind Act (20 U.S.C. §§ 6301 et seq.). This law requires Title I schools to ensure that all students meet state standards within 12 years and that adequate yearly progress toward this goal – examined by racial, economic and other groupings of student demographics -- be demonstrated on an annual basis.

It is not a coincidence that the implementation of standards-based reforms and the accelerating plaintiff successes in the education adequacy litigations have occurred almost simultaneously since 1989. Standards-based reform has aided adequacy litigations in two major ways. First, the new state standards for defining and assessing educational achievement have provided courts with judicially manageable criteria for implementing workable remedies in cases where the courts have invalidated state education finance systems (Rebell, 2002). Second, the focus on standards has sparked intensive consideration of the basic goals of education in a democratic society and motivated contemporary courts to continue, update – and vastly expand – the analysis of the specific skills citizens in a democratic society need to carry out their civic responsibilities which the founding fathers had initiated more than two centuries ago. Thus, many of the state courts that have ruled on adequacy cases in recent years have expressly considered the purposes of public education in explicating the education clauses of their state constitutions. In doing so, they have agreed that "The original rationale for public schooling in the United States was the preparation of democratic citizens who could preserve individual freedom and engage in responsible self-government" (McDonnell, 2000; p. 1; see also, Robinson v. Cahill, 1973; Claremont School District v. Governor, 1993; Campbell School District v. State, 1995; *CFE II*, 2003). The United States' Supreme Court's statement that our democracy

"depends on an informed electorate: a voter cannot cast his ballot intelligently unless his reading skills and thought processes have been adequately developed" further supports this rationale for public school education (*Rodriguez v. San Antonio*, 1973).[10]

The focus of the contemporary standards-based reform movement on identifying and then actually developing in all children the specific skills that they will need to function productively as effective citizens in a democratic society has profound implications for education and for citizenship. The founding fathers and the leaders of the common school movement spoke eloquently of the need to equip all of the nation's future citizens with the intellectual skills they would need to be intelligent voters and civic participants, but the schools in their day did not seriously attempt to implement these ideals. Spurred by the standards-based reform movement and the adequacy litigations, schools today are attempting to put into practice this democratic ideal.

Benjamin Franklin epitomized the educational ideals of the nation's founders when he argued that a new republican curriculum must develop in students critical analytic skills in reading, writing, and oral rhetoric; "he urged that students be required to read newspapers and journals of opinion on a regular basis, and that they be incited to debate and argue over . . . the . . . major controversies of the day" (Pangle & Pangle, 2000). Similarly, Thomas Jefferson thought each citizen would need "To know his rights; to exercise with order and justice those he retains; to choose with discretion the fiduciary of those he delegates; and to notice their conduct with diligence, with candor and with judgment" (Padover, 1943, p. 1097). Horace Mann (1855), the founder of the common school movement, put it even more strongly:

> Education must be universal...With us, the qualification of voters is as important as the qualification of governors, and even comes first, in the natural order...The theory of our government is, — not that all men, however, unfit, shall be voters, — but that every man, by the power of reason and the sense of duty, shall become fit to be a voter. Education must bring the practice as nearly as possible to the theory. As the children now are, so will the sovereigns soon be. (p. vii)

Ironically, of course, when Franklin and Mann recognized democracy's critical need for an educated electorate, both the franchise and access to education were greatly restricted. In their eras, and throughout much of America's history, blacks and other minorities, as well as women and white men who did not own property could not vote, serve on juries, or engage in other civic activities (Smith, 1997; *Thiel v. Southern Pacific County*, 1946; and *Taylor v. Louisiana*, 1975). During the nineteenth century, the franchise was slowly extended to working-class men, then to the newly-freed black citizens, and early in the twentieth century, to women (Keyssar, 2000). Yet stratagems like overly technical registration rules, poll taxes, and literacy tests effectively precluded many of the newly-eligible citizens from actually voting (Keyssar, 2000). It has only been in the past few decades, since the enactment of the twenty-fourth Amendment to the federal Constitution in 1964, and the passage of the Voting Rights Act in 1965 (42 U.S.C.S. §1971 et seq., 2003), that substantial numbers of African-American and Latino citizens actually have begun to vote.

Thus, the fact that throughout most of our history adequate education was not being made available to all citizens was not of immediate political relevance because most of those who were uneducated were also not permitted to function fully in their civic roles anyway. Today, however, as full access to the ballot and to other forms of political participation has been extended to virtually all citizens, the basic premise of democratic theory that all citizens in a democracy must be well-educated has taken on urgent practical significance. This reality was dramatically illustrated during the 2000 Presidential election when it became clear that every vote really did count—certainly in the state of Florida—and that the inability of certain voters to understand specific ballot instructions may have changed the outcome of the Presidential contest.

Furthermore, the need to actually provide an adequate education to all citizens has become even more urgent today when the information demands of the computer era have heightened the level of cognitive skills needed to be an "informed citizen." Civic participation now requires not only the ability to understand one's political interests and how various political issues relate to them, but also the capacity to sort and analyze the continuing stream of information that confronts all of us daily, in order to make sense of an ever-changing world.

In probing the purposes of education for a 21st Century society, the standards-based reform movement has begun to take seriously the need to provide all students the actual skills that they will need to function in a competitive economy and to carry out their civic responsibilities. The critical link between education and democracy, historically applicable only to an elite citizenship class in an age of limited information, is now being seen as also extending to all citizens. In this way, the concepts of "excellence" and

"equity" are increasingly becoming merged, since the society requires all students to learn to function at high cognitive skill levels.

Recognizing this link, lawyers, activists, and plaintiffs in education adequacy cases have begun to articulate demanding concepts of "adequacy" in the educational opportunities they expect to be extended to historically disadvantaged minority populations. Although some people had anticipated that the concept of educational adequacy that the courts would develop in this new wave of litigation would be defined in very minimal terms, in fact, there has been a clear trend toward establishing a "high minimum," which

> focuses on what would be needed to assure that all children have access to those educational opportunities that are necessary to gain a level of learning and skills that are now required, say, to obtain a good job in our increasingly technologically complex society and to participate effectively in our ever more complicated political process (Minorini & Sugarman, 1999, p. 188; also see Clune, 1994).

Brief Overview of the New York Adequacy Case

The most extensive judicial analysis of the specific skills students need to be effective citizens in our modern democratic society has been undertaken over the past decade by the New York State courts in the series of Campaign for Fiscal Equity (CFE) litigations. In 1995, in the first phase of this case, the Court of Appeals, New York's highest court, issued a tentative definition of the constitutional concept of a "sound basic education," which emphasized that students need to "function productively as civic

participants capable of voting and serving on a jury" (*CFE I,* 1995, p. 666), and then directed the trial court to gather evidence and further probe the meaning of these concepts. Responding to the Court of Appeals' directive, the trial judge, Leland DeGrasse, adopted an innovative, empirically grounded approach. He instructed the parties to have their expert witnesses analyze a charter referendum proposal that was on the actual ballot in New York City at the time the trial was in progress. The specific question posed was whether graduates of New York City high schools would have the skills needed to comprehend that document. The witnesses were also asked to conduct a similar analysis of the jury charges and of certain documents put into evidence in two complex civil cases that had recently been tried in the local state and federal courts.

Plaintiffs' experts identified the specific reading and analytic skills, as well as the historical and scientific knowledge that students would need to comprehend these documents. In doing so, they related these specific skills to the standards for high school graduation set forth in the Regents' Learning Standards in English language arts, social studies, mathematics and sciences. The defendants' expert undertook a computerized "readability analysis" of various newspaper articles dealing with electoral issues and of some of the jury documents that had been put into evidence. This computerized reading analysis focused on sentence length and other mechanical factors, rather than on the cognitive level of the materials being reviewed. He concluded that only a seventh or eighth grade level of reading skills was needed to comprehend these materials. Defendants' experts also introduced polling data, which showed that the vast majority of American voters obtain their information on electoral issues from radio and television news, implying that they do not require the analytical skills needed to comprehend complex documents.

The trial court first concluded, generally, that "Productive citizenship means more than just being *qualified* to vote or serve as a juror, but to do so capably and knowledgeably" (*CFE v. State*, 2001). It then held that:

> An engaged, capable voter needs the intellectual tools to evaluate complex issues, such as campaign finance reform, tax policy, and global warming, to name only a few. Ballot propositions in New York City, such as the charter reform proposal that was on the ballot in November 1999, can require a close reading and a familiarity with the structure of local government…. Similarly . . . jurors may be called on to decide complex matters that require the verbal, reasoning, math, science, and socialization skills that should be imparted in public schools. Jurors today must determine questions of fact concerning DNA evidence, statistical analyses, and convoluted financial fraud, to name only three topics. (p. 485)

In June 2002, an intermediate appeals court reversed the trial court decision, holding that the constitutional mandate regarding sound basic education required only eighth or ninth grade level reading skills.[11] The Court of Appeals, however, soundly rejected the notion that middle school level skills suffice for the 21st century. As stated above, it decisively equated "sound basic education" with a "meaningful high school education" and upheld the trial court's ruling that "productive citizenship means more

than just being *qualified* to vote or serve as a juror, but to do so capably and knowledgeably"(*CFE II*, 2003, p. 906).

The New York Court of Appeals' holding that students must be prepared to be *capable* citizens and the trial court's detailed analysis of the specific skills and the level of cognitive functioning that students need to function in that manner are likely to inspire similar analyses and analogous holdings by other courts. The CFE courts' concept of a capable voter or juror does not mean that such an individual would be expected to know the details of campaign finance laws or how to scientifically analyze DNA. It does mean, however, that voters should have the cognitive skills and the level of knowledge necessary as voters to be able to identify their own political interests, to find information relevant to those interests, and to assess this information, as well as arguments made by candidates, in light of those interests (see, Lupia & McCubbins, 1998; Nie, Junn, & Stehlik-Barry, 1996).

Although the schools' responsibility to provide all students with high-level cognitive skills has now become an integral aspect of the adequacy movement and will have wide-ranging egalitarian implications, the extent to which this piece of the democratic imperative will advance at a given time in any particular place will depend on the local political context and how each group of litigants and advocates responds to it. As I noted above, CFE has attempted to advance the democratic imperative in New York State by linking its litigation strategies and activities with an on-going constituency-building and statewide public engagement process. A discussion of this still on-going political and deliberative process will be the subject of the next and concluding section of this chapter.

PUBLIC ENGAGEMENT AND LITIGATION: CFE'S NEW YORK EXPERIENCE

In 1993, responding to devastating cutbacks in education funding, a coalition of education advocacy organizations, parent groups, civic organizations, and community school boards formed a new not-for-profit organization, the Campaign for Fiscal Equity, Inc., in order to mount a legal challenge to New York State's arcane system for funding public education. The state's highest court had, a decade earlier, rejected an attempt by a group of property-poor Long Island school districts to invalidate the state's education aid formulae (*Levittown v. Nyquist*, 1982) on the basis of an "equity" claim, which argued that under the state and federal equal protection clauses, all school districts should receive essentially equal per capita funding. CFE advocates were hopeful that this time, the combination of the legislature's continued failure to correct the gross under-funding of many high-need school districts and a new legal initiative based on the education adequacy approach described earlier in this chapter would allow a constitutional claim to succeed.[12]

Although over the previous two decades, similar suits had been filed in many other states, CFE was the first plaintiff organization to make an explicit decision — even before drafting our first legal papers — to mount an extensive statewide public engagement campaign to complement the lawsuit. This early commitment to public engagement resulted from our concerns about the unsatisfactory outcomes of the remedial stages in many of the early fiscal equity litigations, as well other education reform class action litigations. Too often, judicial intervention in cases in which plaintiffs had won dramatic legal victories did not result in effective, lasting solutions to deep-rooted education controversies. After considering this issue at length, we concluded that significant, long-lasting reform could best be achieved by involving the broad range of diverse stakeholders

who are affected by education policy reforms in both the development and the implementation of judicial remedies (see Rebell & Hughes, 1996). Our initial analysis of the outcome of the first two decades of fiscal equity litigation supported this thesis, as it indicated that reforms appeared to be most successful in those states where a broad-based, grassroots movement had supported the reforms sought in the litigation (Rebell, Hughes & Grumet, 1995; Campaign for Fiscal Equity, 1997, 1998, 1999, 2000, and 2001).

CFE's commitment to public engagement meant that principles for reforming the funding problems raised by the lawsuit would be developed early and would guide the legal strategies during the trial and appeals. It also meant that critical remedial concepts and legal strategies would be decided not just by lawyers and experts, but also by the broad group of stakeholders who would be drawn into the public engagement process—and that these stakeholders would likely then form a strong core of supporters who could help implement the remedies if the Court ultimately should adopt them.

Thus, since 1996, CFE has put into practice this commitment to public engagement as an integral aspect of its legal strategy. What follows is a description of how this has been done.

Defining a "Sound Basic Education"

The main goal of the CFE lawsuit has been to ensure that all of New York's students receive the "opportunity for a sound basic education" guaranteed by Article XI § 1 of the state constitution.[13] After the New York Court of Appeals distinguished the adequacy claims in this suit from its prior decision in the earlier "equity" case, *Levittown v. Nyquist, 1982*, and allowed the case to proceed to trial (*CFE I*, 1995), the key legal, political, and educational issue became precisely what constitutes "a sound basic

education." The constitution does not define this term, nor did the New York State Court of Appeals definitively do so in its first decision. Instead, in its preliminary 1995 ruling, the Court held that a final determination of this core constitutional issue should await an analysis of all the evidence developed at the trial. The state's high court did, however, set out a tentative definition as a "template" to guide the trial court in conducting the trial. The template described "a sound basic education" in terms of: "[T]he basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury." The Court of Appeals also held that a sound basic education requires the following essential resources:

- "Minimally adequate physical facilities . . .
- Minimally adequate instrumentalities of learning such as desks, chairs, pencils and reasonably current textbooks . . .
- Minimally adequate teaching of reasonably up-to-date basic curricula . .
- Sufficient personnel adequately trained to teach those subject areas" (*CFE I*, 1995).

The Court of Appeals' innovative method of issuing a tentative definition and then candidly committing itself to reevaluate that definition when the case would later return to it on appeal provided CFE an extraordinary opportunity for jump-starting the public engagement campaign we had been contemplating. Although the Court of Appeals probably intended that only the lawyers and expert witnesses would review their tentative definition, we decided to expand the dialogue to encompass the broad range of education stakeholders. Thus, the initial issue around which the statewide public engagement forums

were organized was how to define a "sound basic education." The realization that their input might help determine the outcome of this major constitutional issue intrigued and excited many of the education advocates, parents, teachers, administrators, school board members, and other community members that CFE sought to engage in this public dialogue.

A critical "defining moment" for CFE's commitment to public engagement occurred in the early stage of this process. The Court of Appeals' template had stressed preparation for civic participation, but it did not, like courts in many other states, also explicitly refer to preparing students for employment. The CFE legal team—which consisted of one other in-house lawyer and myself, as well as a dedicated complement of attorneys from the firm of Simpson Thacher & Bartlett which has provided extensive pro-bono assistance at the trial and with the appeals—were not inclined to second-guess the Court's stance. Parents and advocates at the initial public engagement sessions agreed with our strategy of relying on the New York Regents' Learning Standards to develop evidence on the specific skills students need for civic engagement, but vociferously rejected our intent to soft-pedal the employment issue. They insisted that, whatever the legal niceties involved, a definition of sound basic education that did not provide explicit assurances that their children would be prepared to get a decent job was unacceptable. Given this overwhelming public response, the CFE attorneys reconsidered our stance and decided to change our trial strategy and to press the employment issue in court. In order to do so, we needed to provide the Court of Appeals a strong evidentiary base that would establish the significance of this issue. Documenting the importance of preparing students to compete in

the global economy of the 21st century and delineating the specific skills they would need to meet these challenges probably added at least a month to the length of the trial

CFE's public engagement methodology sought to maximize consensus through ongoing discussion and refinement of initial positions. The emphasis was on finding positions that virtually all participants could support, or that, at the least, they could "live with." No actual votes are taken at public engagement forums, but active dissent is respected, and drafts are continually revised to respond to stated concerns of participants.

Thus, after three years of active statewide dialogue, a definition of "sound basic education" emerged that had widespread support throughout the state. The strongly supported public engagement position constituted the substance of the definition that CFE's attorneys asked the trial court to adopt when the trial began in the fall of 1999. The proposed definition was formally presented by Tom Sobol, the former State Commissioner of Education, who had agreed to be an expert witness for the plaintiffs; three other plaintiff witnesses also endorsed the definition. Dr. Sobol strongly supports public engagement, and he personally participated in a number of the forums.

The constitutional definition of a "sound basic education" that the trial court finally adopted contained almost all of the recommendations that had emerged from the public engagement process, including the key employment issue: "A sound basic education consists of the foundational skills that students need to become productive citizens capable of civic engagement and sustaining competitive employment" (*CFE v. State*, 2001).

The trial court also held that the template's original list of four essential resources should be expanded to the following seven-fold concept:

1. "Sufficient numbers of qualified teachers, principals and other personnel.
2. Appropriate class sizes.
3. Adequate and accessible school buildings with sufficient space to ensure appropriate class size and implementation of a sound curriculum.
4. Sufficient and up-to-date books, supplies, libraries, educational technology and laboratories.
5. Suitable curricula, including an expanded platform of programs to help at-risk students by giving them more "time on task."
6. Adequate resources for students with extraordinary needs.
7. A safe orderly environment."

Ultimately, the Court of Appeals upheld the strong emphasis on the development of employment skills upon which the public engagement participants had insisted, specifically holding that students need to develop "a higher level of knowledge, skills in communication and the use of information, and the capacity to learn over a lifetime" in order to obtain self-sustaining employment. (*CFE II*, 2003, p. 906). The Court also explicitly or implicitly upheld the other aspects of the trial court's delineation of the foundational skills and the essential resources, and, in order to emphatically reject the intermediate appeals' court's conclusion that low-level skills would suffice for these purposes, it emphasized that a sound basic education means a "meaningful high school education," not eighth or ninth grade level skills.[14]

Building a Statewide Coalition

The other major issue CFE included in its initial public engagement forums was the remedy question: How precisely should the education funding system be reformed? The first item that had to be addressed in this regard was whether the goal of the litigation should be strict dollar equity in spending, which could require substantial transfers of funds between rich and poor districts, or major resource infusions and educational improvements for students in New York City and other high need, underfunded districts, without regard for the level of expenditure elsewhere. CFE put this question to its core New York City constituents in a series of all-day conferences attended by representatives of approximately 100 education advocacy, parent, and community groups during the first year of public engagement. These individuals were aware that the per-pupil expenditure for New York City public school students was $1,200 below the state average and $4,000 below average expenditures in the neighboring suburbs, even though New York City students often have far greater educational needs.

A strict equalization remedy had great appeal to many New York City parents and educators who resented the fact that thousands more dollars were being spent on the education of suburban students than on their children's education. "Don't my kids deserve as much as kids in the suburbs?" many parents asked. This view tended to predominate in the early discussions. But as the series of conferences progressed, there was a growing realization that taking money from the rich districts to provide more for the poor would likely spark a heavy political backlash from the suburbs and lead to an upstate/downstate confrontation that could threaten any possibilities for real reform. By the end of the third session, it was clear that sentiment in favor of the pragmatic course to increase the total education funding pie was overwhelming—in excess of 90%. Based on this strong

sentiment, CFE has adopted a remedial position that seeks to "level up" the resources in New York City and other under-funded districts by expanding the pool of educational resources, rather than seeking a "Robin Hood" remedy that would take from rich districts to give to the poor.

This key strategic decision allowed the public engagement process to broaden into a full statewide dialogue the next year. Seeking to avoid the "upstate/downstate" splits that had stymied past efforts to reform the state funding formula, CFE worked to build coalitions with residents of urban, rural, and suburban districts throughout the state. This entailed promoting sustained conversations about directions for reform, not only with residents of poor urban and rural areas, who constituted CFE's natural allies, but also with residents of affluent communities whose political support (or at least attenuated opposition) was deemed an essential part of the political equation. By explicitly eschewing a Robin Hood remedy, CFE was able to appeal to the democratic ideals of the residents of affluent districts without threatening their immediate self-interests.[15]

The public engagement forums held in the suburbs fostered discussions that led residents of the affluent suburbs to identify with the plight of inhabitants of the inner cities. This allowed participants to focus on strategies for raising additional revenues and devising accountability mechanisms that would ensure that any such funds would actually result in demonstrable improvements in student learning. The significance of these discussions was described in an editorial published by the major newspaper of New York State's most affluent suburban county:

> This "public engagement process" is an exciting one. It includes hundreds of parents, teachers, administrators, advocates and representatives of civic, religious, business and labor groups from across the state exchanging ideas on critical issues, including how funding reform can dovetail with state Board of Regents' effort to raise academic standards…The plan . . . is to offer participants an opportunity to directly influence reform positions [CFE] will present to the court. That in itself is refreshing. After years of watching state officials . . . avoid this admittedly difficult but vital area of reform, it's high time the fiscal inequities of the education system were addressed. And the fact that the public isn't being bypassed is heartening. ("A School Funding Remedy After All?," 1998)

CFE's forums have been co-sponsored by many other statewide organizations, such as the League of Women Voters, the New York State School Boards Association, the New York State PTA, the teachers' unions, the Urban Leagues of New York State, the New York State Business Council, as well as numerous local education advocacy, business and civic organizations.[16] Not all of these groups support CFE's positions in the lawsuit, but they all agreed to participate in the public engagement process after it was made clear that the forums would promote candid, wide-ranging discussion of all issues and there would be no pre-conceived outcome for the deliberations.

The cooperative deliberations of the public engagement process has also evolved in many instances into more direct advocacy partnerships. CFE has formed particularly strong ties with three groups that were formed specifically to advocate and lobby for education finance reform, namely, the Alliance for Quality Education (AQE), a statewide education advocacy coalition of about 200 members organizations; the Mid-State School Finance Consortium, a group that has grown to represent almost 300 of the school districts in Central, Western, and Northern New York; and Reform Education Inequities Today (REFIT), a grouping of property-poor Long Island school districts.[17]

The fact that diverse constituencies from around the state participated in formulating many of the major positions that were adopted by the trial court meant that when the trial court's decision was issued in 2001, and the final Court of Appeals' decision was issued in 2003, they received broad statewide support from education stakeholders and newspapers and other media throughout the state (*see, e.g.*, "Changing School Funding Won't Solve Whole Problem," 2001; "Fix the school-aid formula," 2003; "Judge Orders Reform: Victory for School Equity," 2001; "Justice for schools: New York's highest court says students are being shortchanged," 2003"Schools here may gain from N.Y. City ruling," 2003). An Albany press conference held the day after the trial court issued its favorable decision dramatically illustrated the strength and significance of this support. The first reporter to pose a question asked, "Doesn't this victory for CFE mean that New York City schools will now receive more funding at the expense of the rest of the state?" I responded by turning the floor over to the spokesman for the Mid-states Consortium who told the assembled press corps that he represented 275 upstate small city and rural school districts (more than a third of all the school districts in the state), and that they firmly

support the CFE decision because of their conviction that it will benefit *all* children in the state.

This level of statewide support continued even in the wake of the fact that the final Court of Appeals ruling technically applied only to New York City and not to the rest of the state. Immediately after that decision was issued, CFE put out a press releases announcing that in practice the decision could only be implemented successfully on a statewide basis and that CFE was committed to continuing to press for statewide solutions. The statewide partners accepted those assurances, and another potential upstate/downstate confrontation was avoided.

In CFE II, the Court of Appeals issued a powerful 3-part remedial order that requires the state to

1. Determine the actual cost of providing a sound basic education
2. Reform the current funding system to ensure that the resources necessary to provide a sound basic education are available in every school
3. Provide a system of accountability to ensure that the reforms actually do provide all students the opportunity for a sound basic education.

Since each of these mandates reflects reform initiatives that CFE has been advocating and requested the Court to affirm, public engagement efforts are already underway in each of the areas to develop specific proposals that will be submitted to the Governor and Legislature for implementation within the 13-month time frame for compliance established by the Court. In addition to promoting important public dialogues regarding these remedy

issues, these conversations will also build an important political base ---32 statewide organizations have joined CFE in sponsoring a costing-out study which will incorporate broad public input. This effort will help ensure that the proposals which result from these deliberations strongly influence the reforms that are actually put into effect.

The New York State public engagement process, therefore, illustrates how broad-based public dialogues can promote effective reform in controversial public policy areas by inspiring diverse groups of people both to understand the critical importance of equity-based reforms and to participate in devising feasible mechanisms for implementing them. The dialogues provide the courts and the media with detailed information about the complex range of factual and political issues that need to be considered in framing specific reforms, while also helping to develop the broad-based political constituencies necessary to convince the legislature and governor to enact them (Sturm, 1993; Berry, Portney, &Thomson, 1993).

CONCLUSION

Many political and legal commentators lament the apparent signs that the current era is one of retrenchment, not reform, in regard to realizing *Brown*'s vision of equal educational opportunity. Often overlooked in these assessments, though, is the significance of the stunning trend of plaintiff victories in an increasing number of state court education adequacy litigations. These cases are constitutionally grounded in the notion that for a democracy to flourish, all of its citizens must be well-educated. The contemporary standards-based reform movement has given the courts effective tools for putting that theoretical ideal into actual practice. The overwhelming support, by Republicans and Democratic lawmakers alike, for the core proposition of the No Child Left Behind Act –

namely that *all* children can and must meet state educational standards -- is further evidence that the underlying democratic imperative in American's political culture is, despite periodic setbacks, continuing its steady progression (Liebman & Sabel, 2003).

The extent to which actual reforms will be implemented in particular states and particular school districts, and whether the positive potential of the federal law can be fully realized, will depend, however, on the effectiveness of advocacy efforts to engage the public at large and to build constituencies that can effectively press policy makers to fairly fund these initiatives and to strongly support public education. Equity and excellence are feasible joint goals—but their prompt attainment will require continued optimism, engagement, and investment.

Notes

[1] For discussions of how *Brown* has fueled momentous civil rights innovations in areas such as the rights of the disabled and gender equity, see, e.g. Rebell (1986); Salomone (1986). Perhaps the most significant impact of *Brown* has been its impact on public opinion. For instance, in 1942 only 2% of southern whites (and 40 % of northern whites) believed blacks and whites should attend the same schools. By the mid-1990s, 87% of Americans approved of the *Brown* decision (Kahlenberg, 2001).

[2] See also Hansen (1993), who argues that courts, becoming increasingly frustrated by their inability to achieve success, are simply "giving up" in desegregation cases; and Shaw (1992), arguing that once a school district is

relieved from court supervision, vestiges of segregation in areas like housing again become operative.

[3] See also Smith, 1993 (arguing that access to a decent education is a more important remedial goal than racial integration); Days, 1997 (describing ways that large numbers of blacks turned away from the integrative ideal because of ineffective implementation of Brown).

[4] The states in which defendants prevailed were Arizona (1973), Illinois. (1973), Michigan (1973), Montana (1974), Idaho (1975), Oregon. (1976), Pennsylvania (1979), Ohio (1979), Georgia (1981), New York (1982), Colorado (1982), Maryland (1983), Oklahoma (1987), North Carolina (1987), and South Carolina (1988). Plaintiff victories occurred during that period in California (1976), New Jersey (1973), Connecticut (1977),Washington (1978), West Virginia (1979), Wyoming (1980); and Arkansas (1983). For full legal citations to these cases and others cited in this article, see Rebell, (2002).

[5] Specifically, plaintiffs have prevailed in major decisions of the highest state courts or final trial court actions in the following 18 states: Kentucky (1989), Montana (1989), Texas (1989), New Jersey (1990, 1994, 1998, 2000), Idaho (1993, 1998), Massachusetts (1993), Tennessee (1993, 2002), Arizona (1994, 1998), Kansas (1991, 2003), Missouri (1994), New York (1995, 2003); Wyoming (1995, 2001); Arkansas (1996, 2000, 2002); North Carolina (1997), Vermont (1997); New Hampshire (1997, 1999, 2002); Ohio (1997, 2000, 2002), and South Carolina (1999). During the same time period, defendants have prevailed in the following 11 states: Wisconsin (1989, 2000), Minnesota

(1993), Nebraska (1993), Virginia (1994), Maine (1995), Rhode Island (1995), Florida (1996), Illinois (1999), Louisiana (1998), Pennsylvania (1999), and Alabama (2002). The 1994 decision of the North Dakota Supreme Court, *Bismark Public Sch. Dist. No. 1 v. State*, held that the state's education finance system was unconstitutional but not by the requisite "super majority" vote.

[6] Reconsideration of pro-defendant court decisions may also come from sources other than the courts. In 1996, the Florida Supreme Court, in a close plurality decision, denied relief to the plaintiffs in a major education adequacy case, *Coalition for Adequacy and Fairness in School. Funding, Inc. v. Chiles*. Two years later, however, the voters, through a 71% favorable referendum vote, amended the state constitution to include a guarantee for a "high quality system of free public education," which was even stronger than the adequacy standard the plaintiffs had sought in the litigation (see Mills & McLendon, 2000).

[7] Adequacy concerns were major factors in the highest state court or final trial court decisions in Kentucky (1989), Idaho (1993), Massachusetts (1993), Tennessee (1993), Arizona (1994), New York (1995,2003), Wyoming (1995), North Carolina (1997), Ohio (1997), New Hampshire (1997), Vermont (1997), and South Carolina (1999). Adequacy considerations were also significant in the remedies ordered by the state Supreme Courts in Missouri (1993), New Jersey (1990, 1994, 1998), Texas (1995), and in the settlement entered into in Kansas in 1992.

[8] See also, e.g., Oklahoma's Constitution (Article XIII, §1) ("establish and maintain a system of free public schools wherein all the children of the State may be educated"); Tennesse's Constitution (Article XI, § 12) ("The General Assembly shall provide for the maintenance [and] support . . . of a system of free public schools"). The Tennessee Constitution's original language paralleled the "civic virtue/cherish literature" phrases of the Massachusetts constitution, but references to the funding of common schools were added in 1870 and strengthened in 1978 (*Tennessee Small School Systems v. McWherter*, 1993; Tennessee's Constitution, 1870, Article XI, § 12). The committee that drafted New York's constitutional clause in 1894 specifically rejected the Massachusetts language as being "archaic" (Constitutional Convention of 1894, Report Submitted by Committee on Education and Funds Pertaining Thereto, in Lincoln, 1906, p.555).

[9] Similar clauses calling for a "thorough and efficient" system of common schools or public schools are found in states such as New Jersey (Art VIII, § 4); Pennsylvania (Art III §14), and West Virginia (Art XII,§ 1). Language in other state constitutions requires the Legislature to support a "thorough and uniform system of free public schools" (Colorado, Art IX § 2); or to "provide for an efficient system of common schools throughout the state" (Kentucky, § 183). The Arizona Enabling Act of June 20, 1910 tied federal land grants in the Western territories to requirements that the lands or funds generated by them be used "for the support of common schools," The drafters of Arizona's constitution "believed that an educated citizenry was extraordinarily important to the new state . . . [that] these were more than mere words . . . [and] that a free society could not exist without educated participants" (*Roosevelt Elementary School District v. Bishop*, 1994).

[10] With industrialization, a focus on "instilling skills . . . useful in the workplace" also developed (McDonnell, 2000, p. 2); accordingly, the cases cited in the main text, as well as many others, have included preparation for the competitive workplace as the second major purpose of public education.

[11] Significantly, although the intermediate appeals court rejected the trial court finding that New York State's education finance system denies students the opportunity for a sound basic education, it upheld and endorsed its specific holding that students must be prepared to be *capable* voters and jurors, able to deal with complex issues like campaign finance reform, DNA evidence, and convoluted financial fraud (*CFE v. State*, 2002). At the same time, however, the intermediate appeals court inexplicably concluded that citizens could function at this high level with rudimentary (sixth-to-eighth-grade-level) reading and math skills (*CFE v. State*, 2002).

[12] The CFE litigation was initiated on behalf of students in the New York City public schools, but CFE's goal was later expanded to include appropriate remedies for all students throughout the state who were being denied the opportunity for a sound basic education. The Court of Appeals' ruling in *CFE II* technically applied only to New York City --- because the evidence of education inadequacy presented at trial only related to the city --- but the judges seemed to assume that in fact the mandated reforms would likely apply statewide, and CFE has explicitly called for statewide solutions.

[13] Article XI § 1 requires the state legislature to "provide for the maintenance and support of a system of free common schools wherein all the children of this state may be *educated.*" (emphasis added). The Court of Appeals has held that the term "educated" means receive the opportunity for a "sound basic education" (*Levittown v. Nyquist*, 1982).

[14] The intermediate appeals court's eighth grade is enough ruling led to massive public outcry from educators, civic groups and editorial boards through out the state. "Blaming the Victim," 2002; "Shortchanging Schools, 2002; "Court's Ruling Hurts Schools," 2002. The issue also became a major issue in the gubernatorial election, causing Governor George Pataki, the prime defendant whose attorneys had argued for the eighth grade standard in the courts, to publicly state: " I could not disagree more strongly with that logic and that decision." (Pace University, September 12, 2002).

[15] When their immediate self-interests are not threatened, most Americans express strong support for egalitarian ideals. For example, in a nationwide poll commissioned by the Public Education Network and *Education Week* and conducted by Lake Snell Perry & Associates, Inc. in January 2003 (Sack, 2003), 67% of the respondents said they would be willing to increase taxes if the increase were earmarked for public education, compared to 28% who were not willing; 64% expressed greater concern that education/healthcare would be cut than that their taxes might go up, compared to 31% who expressed greater concern about tax increases ("Demanding Quality Public Education in Tough Economic Times," 2003, pp. 7-8).

[16] The typical format for the public engagement forums that have been held in dozens of urban, suburban and rural settings over the past seven years is 3-hour evening event attended by 75-100 participants. The forums begin with an initial introductory background briefing that explains the significance of the *CFE* litigation but emphasizes that the public engagement forums have no pre-conceived outcomes and do not require any participants to support any party's position in the case. The bulk of the evening is then spent in small group discussions, led by trained facilitators, followed by a final plenary session that explores areas of possible consensus.

[17]CFE's lawsuit and public engagement activities have been important stimuli to the emergence and expansion of these organizations. AQE was formed in 1999 essentially to organize broad statewide support for funding reform in anticipation of a victory for plaintiffs in the CFE case; the Midstates Consortium was established in 1991 as a small association of school superintendents in Central New York which expanded rapidly in response to publicity about the CFE suit and the growing prospect that the Court might actually require funding reforms; REFIT's membership essentially consisted of the school districts that had brought the original Levittown litigation, who, after a second suit they had instituted in the 1990s had been dismissed, allied themselves with CFE.

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