

# Sleepless After Seattle?

## There's Still Hope for Equal Educational Opportunity

By **Michael A. Rebell**

**B**rown v. Board of Education, the U.S. Supreme Court's landmark ruling in 1954, accomplished both less and more than the desegregation of American public schools.

Less, in that after the initial wave of school desegregation in the South in the late 1960s, subsequent court rulings exempted segregated schooling caused by housing patterns rather than explicit state policies ("de facto" segregation), and banned most urban-suburban desegregation remedies. The result: Since 1970, American schools have actually been re-segregating. But it accomplished more, in that what Brown also did, beyond setting desegregation in motion, was to usher in a new era in American jurisprudence in which courts would play a major role in formulating and implementing public policy.

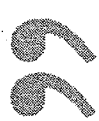
Last June, when the high court struck down plans by school systems in Seattle and Jefferson County, Ky., to ensure

racial balance in their classrooms, it was heard by many as the death knell not only for Brown, but also for broader judicial involvement in promoting institutional reform. Or, as Justice Clarence Thomas wrote of the court in his concurring opinion: "We are not social engineers."

The court's decision in *Parents Involved in Community Schools v. Seattle School District No. 1* and *Meredith v. Jefferson County Board of Education* is rightly read as a setback for the cause of equal educational opportunity. But I believe it spells the end only for the language and legal techniques for implementing Brown that have been in effect since the 1960s, and not for that decision's ultimate vision of equal educational opportunity. Further, I would argue that the judicial branch will remain critical to protecting that vision, though with one important twist: For the foreseeable future, it will be the state courts, rather than the federal ones, that take on this role.

In fact, this changeover has been in the works for the past 30

years, the period during which the federal courts have steadily retreated from an active stance in integrating schools. Meanwhile, school finance suits have been litigated in the state courts of 45 states since 1973, with



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plaintiffs prevailing in 60 percent of these cases. Plaintiffs have won 20 of 28 "adequacy" cases since 1989. The money awarded through these litigations, when spent wisely, has repeatedly translated into more resources for poorer districts and improved results for schools and students.

Virtually all studies have concluded that the litigations have resulted in a narrowing of in-

terdistrict expenditure disparities and an increase in educational spending. In Kentucky, in the decade after the court ruling there, school spending increased by 57 percent, compared with a 15 percent increase nationally, and the huge gaps between the richest and the poorest districts were closed. In New Jersey, as a result of the *Abbott v. Burke* litigation,

almost halving the achievement gaps between these districts and the rest of the state. In Massachusetts, the failure rate of 10th graders taking the highly challenging Massachusetts Comprehensive Assessment System exams has dropped dramatically, from 45 percent to 15 percent in math and from 34 percent to 11 percent in English language arts.

Perhaps in partial testimony to its success, the education adequacy movement now has come under fire from critics who argue that courts are not competent to drive broad remedial activities in state school systems, and that in doing so they are violating the separation of powers.

These critics ignore the emphasis by the framers of the U.S. Constitution on a *blended* concept of separation of powers. The framers' central concern was not a tight compartmentalization of responsibilities, but rather the avoidance of excessive concentration of power in one of the political branches. Consistent with that view, education adequacy litigation has proved most successful in states where a colloquy has developed among the three government branches, with each branch playing the role for which it is best suited.

Within that colloquy, legislatures are better equipped to develop specific reform policies, and executive agencies are most effective in undertaking day-to-

day implementation tasks, while the courts, with their principled approach to issues and their long-term staying power, are essential for providing continuing guidance on constitutional requirements and sustained commitment to meeting constitutional goals. Yet, too often, the courts have bowed to criticism that they are playing too "activist" a role, leaving oversight and implementation of their rulings in the hands of the other branches. It is in these instances that backsliding has occurred, or that reforms simply failed to get off the ground in the first place.

**W**ith that in mind, I propose what I call the Adequate Education Remedial Oversight, or AERO, model. This approach adopts and regularizes the best practices that many state courts have already put into practice, and combines them with the insights of comparative institutional analysis to promote effective cooperation among the three branches of government. These best practices include the following:

**Challenging standards.** The courts' prime responsibility in an education adequacy case is to articulate the constitutional parameters for an adequate education in a principled manner that will guide legislative and executive efforts to develop specific policies and structures

that comply with constitutional requirements.

**Adequate funding.** Courts must order states to, first, undertake detailed costing-out studies of the resources required to provide all students the opportunity to meet state standards, and, second, revise the state's education finance system to ensure that this amount is actually made available to all school districts.

**Effective program implementation and accountability systems.** The policy decisions about educational programming and spending oversight should be the domain of the legislative and executive branches, but it is the courts' responsibility to make sure that these decisions are in fact made and properly implemented.

**A supportive political culture.** Ongoing public engagement is important, to prevent a return to an "inequitable equilibrium" typically resulting from the suburban majorities that tend to dominate legislatures. The courts can help by clearly articulating the public values of the Constitution and promoting ongoing public dialogues both within and without the courtroom on how to implement these values.

**Improved student performance.** Few adequacy cases in actuality review student performance, because generally courts terminate their jurisdiction long before the funding and accountability mea-

asures have fully taken effect. Courts should maintain some degree of oversight for a decade or longer as necessary, to ensure a sensitive weighing of constitutional principles and factual evidence regarding actual rates of student progress and student proficiency after adequate funding and accountability systems have been put in place.

Critics of educational adequacy litigation have cast the movement as a "Robin Hood" effort to take from the rich and give to the poor, but, in truth, something quite different has typically occurred. Where an AERO-like approach has been adopted, these cases have often brought together the public and politicians alike, and created an educational culture that better serves all students.

If we are serious about our stated national policy of eliminating achievement gaps, what we need in the future is more, not less, judicial involvement to prod the other branches to take seriously their constitutional responsibilities to get this important job done. ■

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