

## Fiscal Equity Litigation and the Democratic Imperative

BY MICHAEL A. REBELL

It is a scandal of American democracy that ever since statewide public education systems were established in the nineteenth century, virtually all of them have been financed in a manner that deprives poor school districts and poor children of basic educational resources. Ironically, the root cause of these inequities is the aspect of the American educational system that is often cited as its crowning achievement: local citizen control.

Schools in America originated in colonial times as local municipal and church institutions. In the nineteenth century, these local schools were consolidated into statewide educational systems. Although state education departments began to regulate teacher certification, graduation requirements and other curriculum areas, the established local mechanisms for school governance remained in place, as did the link between education finance and local property tax revenues. This meant that students living in school districts with high-priced residential or commercial property continued to have substantially greater resources available to support their education—sometimes five or ten times as many resources—than students living in poorer districts.

In the twentieth century, state governments have tried to offset these funding inequities by supplementing local revenues with state funds through a variety of equalizing measures. Although these measures mitigate local inequities, they rarely offset them. Not surprisingly, therefore, disgruntled residents of property-poor districts have sought remedies from the courts. Over the past thirty years, major constitutional challenges have been lodged in the federal courts and in the courts of more than 40 states.

Although plaintiffs lost most of the initial fiscal equity litigations in the seventies and eighties, a striking counter trend has emerged in recent years: since 1989, plaintiffs have won 15 of 22

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major state court decisions. Perhaps even more astonishing, about half of these plaintiff victories involve reversals or reconsiderations of earlier cases by the same courts.

The widespread willingness of state courts—which rarely interfere with the policy making prerogatives of the legislative and executive branches—to enter repeatedly into the complexities of fiscal equity reform is an extraordinary phenomenon, one which cannot be explained solely in terms of legal doctrines. Rather, what appears to be at play here is the resurgence of a powerful “democratic imperative” at the core of the American political tradition. This democratic imperative proclaims that the nation cannot permanently abide a situation in which large numbers of children are denied an adequate education, and in which those with the greatest educational needs systematically receive the fewest educational resources.

This article will explore the implications of the democratic imperative for fiscal equity reform. It will begin with an overview of the development of legal doctrines and trends in federal and state fiscal equity and educational adequacy litigations over the past three decades. It will then examine the ideological roots of the commitment to an adequate education for all students in America’s liberal, egalitarian and republican traditions, as well as the reasons why this historic commitment to adequate education has fueled a dynamic democratic imperative in recent years, one that has led most state courts—even those that previously rejected fiscal equity claims—to issue orders favorable to the plaintiffs. The article will conclude by proposing a new “public engagement” approach for devising meaningful reforms that can satisfy the democratic imperative.

#### THE LEGAL TRENDS

Judicial reform of state education finance systems began with the California Supreme Court’s 1971 decision in *Serrano v. Priest*.<sup>1</sup> After noting that citizens of Baldwin Park, who paid a school tax of \$5.48 per \$100 of assessed valuation, were able to spend only half as much on their children’s education as residents of Beverly Hills, who were taxed only \$2.38 per \$100, the court held that “as a practical matter districts with small tax bases simply cannot levy taxes at a rate sufficient to produce the revenue that more affluent dis-

1. 487 P.2d 1241 (Cal.1971).

tricts reap with minimal tax efforts.”<sup>2</sup> The Court held that this pattern violated the equal protection clauses of both the federal and the California state constitutions by denying the plaintiff students a fundamental right to education, “a major determinant of an individual’s chances for economic and social success in our competitive society.”<sup>3</sup>

Two years later, the United States Supreme Court faced similar issues in *San Antonio Independent School District v. Rodriguez*.<sup>4</sup> That case was brought by a group of Mexican-American parents from Texas who had shown that their schools were only able to spend 60 percent of the amount spent by a neighboring Anglo district, even though their local property tax rate was approximately 25 percent higher. Although the Supreme Court acknowledged these disparities, it held that wealth discrimination does not constitute a violation of the equal protection clause of the United States Constitution and that education is not among the rights explicitly protected by the federal Constitution. “The key to discovering whether education is ‘fundamental,’” the High Court stated, “is not to be found in comparisons of the relative societal significance of education . . . but in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution . . . .”<sup>5</sup>

The Supreme Court’s ruling in *Rodriguez* largely precluded the possibility of obtaining fiscal equity relief from the federal courts. Normally, such a result would also discourage reformers from continuing to pursue judicial remedies in the state courts, which tend to be more conservative on constitutional issues than the federal courts. Nevertheless, armed with the California Supreme Court’s favorable precedent—and seeing a fertile legal argument in the Supreme Court’s distinction between the role of education in the federal and state constitutions—legal advocates persevered and filed suits in a number of state courts.

Because American education has historically been the province

2. *Ibid.*, 1250.

3. *Ibid.*, 1255-56.

4. 411 U.S. 1 (1973). The Court had previously affirmed, without decision, federal district court decisions that denied relief to plaintiffs challenging education finance systems in Illinois and Virginia. *McIntire v. Ogilvie*, 394 U.S. 322 (1969); *Burruss v. Wilkerson*, 397 U.S. 44 (1970). Other early federal district court cases had held for plaintiffs: *Van Dusanitz v. Haifield*, 334 F. Supp. 870 (D. Minn. 1971); *Hargrave v. Kirk*, 313 F. Supp. 944 (M.D. Fla. 1970), vacated and remanded on other grounds *sub nom. Askev v. Hargrave*, 401 U.S. 476 (1971).

5. *San Antonio v. Rodriguez*, 33.

of state governments, most state constitutions, in contrast to the federal constitution, do contain substantive provisions regarding education. These education clauses require the legislatures to establish a "uniform system of public schools" or to provide a "thorough and efficient," "ample" or "adequate" education. Plaintiffs in the post-Rodriguez state cases, therefore, referred to these education clauses and argued that education should be considered a "fundamental interest" under the equal protection clauses of their state constitutions.

The California Supreme Court responded favorably to such an argument when the *Serrano* case came back for reconsideration in light of the Supreme Court's ruling in *Rodriguez*. The Court unequivocally held that even if education was not a fundamental right under the federal constitution, it clearly was so under the California equal protection clause.<sup>6</sup> Most of the other state courts that considered this issue after *Rodriguez*, however, went the other way. Despite the explicit inclusion of education clauses in the state constitutions, they still would not deem education a "fundamental interest" for equal protection purposes. They offered various rationales for this outcome, stating that state constitutions, which do not involve limited powers and delegated authority, "pay less attention to any hierarchy of values,"<sup>7</sup> or that the framers of the state constitutions recognized and accepted disparities in local educational funding at the time their constitutions were enacted.<sup>8</sup>

Whatever the reasons, after an initial round of predominantly plaintiff victories in California and a few other states in the 1970's, the momentum of reform litigations ground to a halt in the 1980's. By 1988, fifteen years after *Rodriguez*, defendants were in the ascendency. They had won victories in 15 states, compared to seven in which plaintiffs had prevailed.<sup>9</sup>

6. *Serrano v. Priest*, 557 P.2d 929, 949-952 (Cal. 1977).

7. *Board of Educ. Levittown v. Nyquist*, 439 N.E.2d 358, 366 n. 5 (N.Y. 1982). See also *Lujan v. Colorado*, 649 P.2d 1005, 1017 (Colo. 1982); *Olsen v. State*, 554 P.2d 139, 144 (Or. 1976).

8. *McDaniel v. Thomas*, 285 S.E.2d 156, 163-64 (Ga. 1981). Another often unstated factor was that the equal protection clauses of most state constitutions were lifted directly from the federal constitution, and there is little independent state history or previous case authority to rely on in their interpretation. See Note, "Developments in the Law: The Interpretation of State Constitutional Rights," *Harvard Law Review* 95 (1982): 1324-1502. See also Robert F. Utter and Sanford E. Pflter, "Presenting a State Constitutional Argument: Comment on Theory and Technique," *Indiana Law Review* (1987) 20: 635-677.

9. Between 1973 and 1988, plaintiffs prevailed in New Jersey (1973), California (1977), Connecticut (1977), Washington (1978), West Virginia (1979), Wyoming (1980) and Arkansas (1983), and defendants prevailed in 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).

Although almost all of the state courts expressed sympathy for the plaintiffs' plight, most of them declined to issue remedial orders because of a core institutional concern—expressed in a variety of specific doctrinal rationales such as "judicial manageability," separation of powers, or the courts' inability to devise appropriate remedies for complex social problems—that state courts should not intervene in the politically-charged area of fiscal equity reform. Overall, it was clear at this time that the state courts would "exercise great circumspection before declaring public school legislation unconstitutional . . ."<sup>10</sup>

This conservative instinct also seemed to be validated by the results of the court orders in the few states where the courts had struck down the state educational finance systems. In the 1980s, these orders appeared to result in little actual reform. Thus, in New Jersey, the state Supreme Court had issued six separate compliance orders by 1988, but the legislature continued to resist making major changes. In West Virginia, the court's extensive reform order was essentially ignored;<sup>11</sup> in Connecticut, the court's mandate appeared to have resulted in lower taxes rather than increased school expenditures in the poorer districts;<sup>12</sup> and in California, although the spending gap among districts had narrowed, total spending for education, in relative terms, had plummeted.<sup>13</sup>

Rather dramatically, however, the pendulum swung back in the plaintiffs' direction beginning in 1989. Over the next eight years, plaintiffs prevailed in final decisions or major procedural pronouncements of the highest courts in 15 states, while defendants could claim victory in only seven.<sup>14</sup>

10. *Board of Education v. Walter*, 390 N.E.2d 813, 824 (Ohio 1979).

11. See Jack L. Flanigan, "West Virginia's Financial Dilemma: The Ideal School System in the Real World," *Journal of Education Finance* 15 (1989): 229-243; Margaret D. Smith and Perry A. Zirkel, "Pauley v. Kelly: School Finances and Facilities in West Virginia," *Journal of Education Finance* 13 (1988): 264-273.

12. George P. Richardson and Robert E. Lamite, "Improving Connecticut School Aid: A Case Study with Model-Based Policy Analysis," *Journal of Education Finance* 15 (1989): 169-188.

13. Apparently as a combined result of *Serrano* and the severe tax limitations imposed by Proposition 13, California ranked fifth in the nation in per-pupil spending in 1964-65 but fell to forty-second in 1992-93. Mark Schauer and Steve Durbin, "Protecting School Funding," *Sacramento Bee*, 28 June 1993.

14. Plaintiffs prevailed in Kentucky (1989), Montana (1989), Texas (1989), Alabama (1993), Idaho (1993), Massachusetts (1993), Tennessee (1993), Arizona (1994), Kansas (1994), Missouri (1994), New York (1995), Vermont (1997), North Carolina (1997), Ohio (1997) and New Hampshire (1997); defendants prevailed in Wisconsin (1989), Minnesota (1993), Nebraska (1993), Virginia (1994), Maine (1995), Rhode Island (1995) and Illinois (1996). The 1994 decision of the North Dakota Supreme Court held the state's education finance system unconstitutional, but not by the requisite "super majority" vote.

A number of commentators described the initial indications of this remarkable turn of events in terms of changing "waves" in the outcome of school finance cases.<sup>15</sup> This "wave" theory noted that most of the cases in the first (1971-73) and second (1973-1989) waves of fiscal equity cases focused on interpretations of equal protection clauses,<sup>16</sup> whereas the third wave of post-1989 cases was marked by a stronger reliance on the specific education provisions in state constitutions.<sup>17</sup> The strategic advantage for plaintiffs in relying on the state education clauses, which was emphasized by the wave theorists,<sup>18</sup> did not, however, really explain the dramatic shift toward plaintiff victories after 1989. The fact is that plaintiffs in virtually every one of the pre-1989 cases cited their state's education clause, but courts in only three of the early plaintiff victories (New Jersey, Washington and West Virginia) accepted these arguments.

Thus, the critical question is not why state education clauses may provide a more fertile field for justifying judicial intervention in fiscal equity cases, but why this always-available route had been ignored or rejected by the overwhelming majority of state courts in the early waves of cases, then suddenly "found" by the courts in the recent round of decisions. This question takes on added significance in light of the fact that fully half of the recent pro-plaintiff decisions were written by the same courts that had ruled in favor of defendants a few years earlier. In order to answer this question, we need to shift the discussion for a time from the realm of legal doctrine to the realm of political theory.

15. See William E. Thro, "The Third Wave: The Implications of the Montana, Kentucky and Texas Decisions for the Future of Public School Finance Reform Litigation," *Journal of Law and Education* 19 (1990): 219-250; Gail F. Levine, "Meeting the Third Wave: Legislative Approaches to Recent School Finance Rulings," *Harvard Journal on Legislation* 28 (1991): 507-542; Julie K. Underwood and William E. Sparkman, "School Finance Litigation: A New Wave of Reform," *Harvard Journal of Law and Public Policy* 14 (1991): 520-35.

16. Most state equal protection clauses contain identical or similar language to the Fourteenth Amendment to the federal Constitution, which provides "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

17. For an overview and discussion of state education clauses, see Molly McUisic, "The Use of Education Clauses in School Finance Reform Litigation," *Harvard Journal on Legislation* 28 (1991): 307-340, and Thro.

18. The wave theorists sometimes categorized states in terms of the strength of the language in their constitutions and made predictions on this basis that were often invalidated by later events. For example, based on Thro's categorization of the relative strength of state education clauses, plaintiffs should have won the recent cases in Maine, Rhode Island and Illinois (which they lost) and lost the recent decisions in New York, North Carolina and Vermont (which they won).

### THE DEMOCRATIC IMPERATIVE

Democratic values are deeply rooted in American society. "Innumerable studies have itemized them in various ways, but the same core political values appear in virtually all analyses: liberty, equality, individualism, democracy . . ." <sup>19</sup> These values often are mutually reinforcing, as in the assertions of the Bill of Rights against governmental power, but they also at times result in ideological clashes, as when individualism and egalitarianism confront each other in the contemporary affirmative action debates.

American society sometimes lives up to the ideals of its democratic creed, but at other times it does not. A gap between the real and the ideal is usually tolerated by the body politic. This tolerance is, however, fragile, and at times it results in the eruption of a "democratic imperative" fueled by a moral passion for reform.<sup>20</sup> Such a democratic imperative appears to be at work in contemporary education reform movements and in the trends in fiscal equity litigations related to them. In order to understand these educational and judicial developments, we need to further explore the three key components of the American democratic creed: liberalism, republicanism and egalitarianism.

John Locke, the father of classical liberalism, found the inspiration for the "state of nature," the theoretical construct around which he built his theory of individual rights, in the *tabula rasa* environment of colonial America. "Thus, in the beginning, all the world was America," Locke declared.<sup>21</sup> The early American colonists brought with them a strong commitment to Lockean liberalism, which emphasized the dignity of each individual, his equal role in the establishment of the political state out of the "state of nature" and the corresponding obligation of that state to allow each individual substantial liberty. This liberal ideal was able to take root and thrive in the virgin American soil, free from the ideological competition of the feudal political heritage of England and other

19. Samuel P. Huntington, *American Politics: The Promise of Disharmony* (Cambridge, Mass.: The Belknap Press, 1981), 14.

20. Both Huntington and Gunnar Myrdal in *An American Dilemma* (New York: McGraw Hill, 1964) have discussed the reasons for such eruptions at various points in American history, most recently in the civil rights movement of the 1960s.

21. John Locke, *Second Treatise of Civil Government* (Chicago: Gateway, 1962), 39.

European countries.<sup>22</sup>

The results of this Lockean heritage are clearly reflected in the core constitutional institutions of the American political system, which limit governmental authority, check and balance the powers of political institutions, and contain a strong Bill of Rights that assures individuals a broad sphere of independence and autonomy. The federal constitution generally avoids taking any positions on substantive morality, and it has created a political system which is "short on coercions and obligations, long on freedoms, opportunities, and incentives."<sup>23</sup>

The eighteenth century colonialists were also influenced by the democratic traditions of classical antiquity, "where the greatest republics in history had flourished."<sup>24</sup> There were two major aspects to classical republican political thought. First was the idea that individual interests should be subordinated to the greater good of the society as a whole. The ideal citizen was one who pursued the shared public life of civic duty, the "universal good," rather than his private interest, "the particular good."<sup>25</sup> Second was the notion of "virtue," a quality of moral excellence that involved that "mastery, the disciplining and the transformation of desires and feelings."<sup>26</sup> A virtuous life was desirable in and of itself; it was a prerequisite for rational judgment and a full life as an active citizen of the polity.

The third strand of America's democratic credo, its egalitarian

22. The centrality of Lockean liberalism in the political development of the early American political system is most extensively developed in Louis Hartz, *The Liberal Tradition in America* (New York: Harcourt, Brace & World, 1955). Although, as noted below, more recent scholarship has criticized Hartz' view that Lockean liberalism was virtually the only significant political influence on the founding fathers, it is still generally acknowledged that Locke's ideas were of major importance. See, e.g., Bernard Bailyn, *The Origins of American Politics* (Cambridge: Harvard University, 1967); John Diggins, *The Lost Soul of American Politics* (New York: Basic Books, 1984).

23. Theodore J. Lowi, *The End of the Republican Era* (Norman: University of Oklahoma Press, 1995), 8.

24. Gordon S. Wood, *The Creation of the American Republic, 1776-1787* (New York: Norton & Co., 1969), 49. For further discussions of the influence of classical republican political theory on eighteenth century English and American politics, see J.G.A. Pocock, *The Machiavellian Moment* (Princeton: Princeton University Press, 1975), and Gary Wills, *Inventing America, Jefferson's Declaration of Independence* (New York: Viking, 1978).

25. See generally, Aristotle, *The Politics*, bk. 3 (New York: Viking, 1957).

26. Alasdair MacIntyre, *Whose Justice? Which Rationality?* (Notre Dame, Indiana: Notre Dame Press, 1988), 109. See also Hannah Arendt, *The Human Condition* (Chicago: University of Chicago Press, 1958).

tradition, was announced more than 200 years ago in the oft-repeated insistence of the Declaration of Independence that "all men are created equal." The American republic established the concept of equality as a revolutionary, democratic principle in the eighteenth century, and egalitarianism has remained a significant thrust of American politics ever since.<sup>27</sup> Alexis de Toqueville, writing of his travels to America in the 1840s, noted the unprecedented degree of "equality of esteem"<sup>28</sup> in the United States and summarized this phenomenon as follows:

America, then, exhibits in her social state an extraordinary phenomenon. Men are there seen on a greater equality in point of fortune and intellect, or, in other words, more equal in their strength than in any other country of the world, or in any age of which history has preserved the remembrance.<sup>29</sup>

The radical potential of the egalitarian credo was reflected in the abolitionist movement, which ended slavery in the 19th century, and in the civil rights movement, which sought to actualize the promise of emancipation for African-American citizens in the 20th century.

Although the liberal, republican and egalitarian roots of American political thought are sometimes presented as alternative and inconsistent ways of interpreting the origins of America's political traditions, elements of all three perspectives have influenced on-going political developments in the United States for the past two centuries. American democracy emphasizes the right of each individual to maximize his or her individual opportunities. But for the political system to function successfully, most of its citizens must be schooled in a set of common civic virtues and feel themselves to be equal stakeholders in a common enterprise. The individual pursuit of life, liberty and property can fairly proceed only in a social and political environment that contains "built-in restraint derived from morals, religion, custom and education."<sup>30</sup>

Education is the sector of American society in which the liber-

27. See J.R. Pole, *The Pursuit of Equality in American History* (Berkeley: University of California Press, 1978).

28. *Ibid.*, 42.

29. Alexis de Toqueville, *Democracy in America* (New York: Vintage, 1945), 55.

30. Adam Smith, *The Theory of Moral Sentiments*, cited in Fred Hirsch, *Social Limits to Growth* (Cambridge: Harvard University Press, 1976), 137.

al, republican and egalitarian ideals have been most consistently and harmoniously expressed because schooling promises to provide all of the nation's children with an equal opportunity to gain the skills necessary to pursue individual advancement and the civic values required to participate actively in the democratic culture. The nation's schools, therefore, have been a focal point for the articulation of the American democratic creed and, at times, a battleground for assertion of the democratic imperative when these ideals fail to be realized.

The founding fathers of the American republic recognized that the rugged individualism of the new American character had to be tempered with republican civic virtues. Fashioning such virtues and ensuring their perpetuation from generation to generation was to be primarily the role of the schools. Thus, schools were expected 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."<sup>31</sup>

The concept of "republican schooling," developed by advocates such as Thomas Jefferson and Benjamin Rush, came to fruition in the mid-nineteenth century, when rapid industrialization, geographic expansion and growing immigration by peoples of diverse backgrounds led to the development of the common school movement. As its name implies, this movement was an attempt to educate in one setting all the children living in a particular geographic area, whatever their class or ethnic background. The trio of democratic values would be integrated and enhanced by bringing together, under one roof, and inculcating with one common patriotic creed, the rich and the poor, the long-settled and the immigrant.

The common schools' ideals and the egalitarian vision of the republican virtues they would implant were spelled out in the clauses that state after state added to their constitutions at this time. For example, 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

31. Lawrence Cremin, *American Education: The National Experience 1783-1876* (New York: Harper & Row, 1980), 3.

parts of the country, and among the different orders of the people, it shall be the duty of the 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.<sup>32</sup>

Similarly, the Minnesota constitution provides that: "[t]he stability of a republican form of government depending upon the intelligence of the people, it is the duty of the legislature to establish a general and uniform system of public schools."<sup>33</sup>

The interplay of these sometimes conflicting elements of the liberal, republican and egalitarian traditions has been a dynamic, complex intermingling of ideological strands. Generally speaking, the liberal tradition, expressed in terms of equality of opportunity, has been the dominant theme, but American political history has been influenced importantly by populist initiatives reflecting the republican and egalitarian traditions.<sup>34</sup> When the three strands coalesce, they create a powerful impetus for dramatic, democratic reforms that have, over the years, resulted in the extension of free public schooling to immigrants, the dramatic expansion of educational opportunities for girls and women, and the elimination of *de jure* racial segregation in the schools. The trends in fiscal equity litigations over the past thirty years also reflect the complex interplay of all three of these ideological elements, and eventually their combination in recent years as a democratic imperative for dramatic reform.

The first "wave" of fiscal equity litigations was based primarily on liberal concepts of equality of educational opportunity. Wide disparities in educational funding seemed to deny children the equal starting point from which the competitive race for individual advancement could fairly begin. As these liberal themes were

32. Mass Const., Part II, Chap V, § 2, originally enacted in 1780.

33. Minnesota Constitution, Art. VIII, § 2, originally enacted in 1857. See also, e.g., South Dakota Constitution, Art VIII § 1 ("The stability of a republican form of government depending on the morality and intelligence of the people, it shall be the duty of the Legislature to establish and maintain a general and uniform system of public schools"); North Carolina Constitution, Art IX, § 1 ("Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools, libraries, and the means of education shall forever be encouraged.")

34. See generally James A. Morone, *The Democratic Wish: Popular Participation and the Limits of American Government* (Basic Books: New York, 1990).

played out, however, they tended to be enveloped by more far-reaching egalitarian concepts that called either for equality of inputs (equal per-capita expenditures for all students) or equality of outputs (equal levels of achievement by all students). The ideological conflict between the liberal and egalitarian strands slowed the momentum for reform in this area.

The U.S. Supreme Court's equal protection analysis in *Rodriguez*—which most state courts tended to follow during the second "wave"—adopted a classical liberal stance and rejected the egalitarian strand it saw in the plaintiffs' call for fiscal equity reform. The Court held that "the Equal Protection Clause does not require absolute equality or precisely equal advantages."<sup>35</sup> In rejecting the plaintiffs' argument that the claims of the poor, like those of racial minorities, should be given heightened scrutiny for equal protection purposes, the Court alluded to the radical precedential implications of such a stance for other social policy areas such as welfare and housing, and made clear that it would not accept such a far-reaching egalitarian perspective.<sup>36</sup> The Supreme Court and most of the state courts that ruled for defendants found a justification for the status quo, despite its acknowledged inequities, in the tradition of local control of education, a tradition rooted in both the liberal and republican strands of the American political tradition.

At the same time, however, the courts were troubled by the extent of the funding inequities and the possibility that they deprived some students of the minimally adequate education necessary to prepare them for competitive employment and civic participation. Thus, the U.S. Supreme Court, although rejecting the republican argument that education is essential to the effective exercise of important federal constitutional rights such as freedom of speech and the exercise of the voting franchise, did so in a manner which hinted that it might reconsider this issue if, in a future case, it could be shown that school children were not receiving a

35. *San Antonio v. Rodriguez*, 24.

36. *Ibid.*, 32-33.

37. "Even if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either right, we have no indication that the present levels of educational expenditures in Texas provide an education that falls short . . . ." *San Antonio v. Rodriguez*, 36-37. See also *Papasian v. Allain*, 478 U.S. 265, 287 (1986), which states that "*Rodriguez* did not, however, purport to validate all funding variations that might result from a state's public school funding decision."

minimally adequate education in the civic virtues.<sup>37</sup> Several state courts made similar statements.<sup>38</sup>

The notable turnaround that began in 1989 in the outcome of the state fiscal equity decisions occurred essentially because this underlying concern for minimum adequate education metamorphosed into a full-blown insistence that all children receive an adequate basic education that will prepare them to be participants in the civic life of the community. The resurgence of this classical republican theme occurred in a manner that combined the classical liberal and egalitarian strands under its mantle and resulted in a powerful democratic imperative for fiscal equity reform.

This dramatic turn of events appears to have resulted from four interrelated educational developments. First was the widespread sentiment that the American education system was in serious trouble which permeated the national psyche in the mid-80s. A slew of commission reports warned of a "rising tide of mediocrity"<sup>39</sup> in American education that was undermining the nation's ability to compete in the global economy.<sup>40</sup> The courts' assumption in the early cases that virtually all students were receiving a minimally adequate education was now turned on its head: it appeared that a large number—and maybe even a majority—of American students were not receiving an education adequate to meet contemporary needs.

Second, there was a growing awareness that the heady desegregation victories in the 50s and 60s had not resulted in sufficient improvement in the educational achievement of minority students. Since the Supreme Court's invalidation of racial segregation in 1954, there has been a major increase in the percentage of Americans who live in suburbs, and the population that has remained in the urban centers has been largely poor and minority. The growing income gap between affluent suburbs and poor urban

38. See cases discussed below at p. 40.

39. National Commission on Excellence in Education, *A Nation at Risk: The Imperative for Educational Reform* (Washington, D.C., 1983), 5; see also Carnegie Forum on Education and the Economy, *Task Force on Teaching as a Profession, A Nation Prepared: Teachers for the 21st Century* (New York, 1986); Theodore Sizer, *Horace's Compromise: The Dilemma of the American High School* (Boston: Houghton Mifflin, 1989).

40. National Assessment of Education Programs, *America's Challenge: Accelerated Academic Achievement* (Washington, D.C., 1990); see also Robert L. Linn and Stephen B. Dunbar, "The Nation's Report Card Goes Home: Good News and Bad About Trends in Achievement," *Phi Delta Kappan* 72 (October 1990): 127.

areas,<sup>41</sup> and the "savage inequalities"<sup>42</sup> it imposed on African-American and Latino children in the inner cities, made it clear that large numbers of minority students were still being deprived of the equal educational opportunities and inclusion in the civic life of the society that were promised by the American democratic creed.

Third, solutions to these pressing educational problems now seemed possible. The gap between the ideal and the real becomes significantly less tolerable when the ideal suddenly seems attainable. In the educational arena, the advent of standards-based reform—premised on research indicating that given appropriate support and resources, virtually all students can learn at relatively high cognitive levels—made the ideal of universal educational achievement seem practical and attainable. By the early 1990s, the overwhelming majority of states had made a commitment to establish thorough-going statewide standards that identify the content of the material students need to learn, expect that teachers will be properly trained to provide instruction aligned with those expectations, and promise to provide the books, facilities and other resources necessary for proper instruction in accordance with the standards.<sup>43</sup>

Finally, despite the growing perception of their shortcomings in some areas, the nation's school systems were nevertheless increasingly being asked to take on a significant new institutional role in transmitting the values necessary to perpetuate the democratic political system. The demise of families and of communal and religious institutions put a new premium on the schools' role both as "the only pervasive social agency left within our society,"<sup>44</sup> and as our central values-creating institution.<sup>45</sup> As the California Supreme

41. "As late as 1960, urban incomes were higher than suburban incomes. Today . . . [t]he median suburban income is approximately \$42,000 - \$10,000 higher than the median urban income." Mickey Kaus, *The End of Equality* (New York: Basic Books, 1992), 53.

42. For a compelling portrayal of the impact of fiscal inequities on minority children in poor urban areas, see Jonathan Kozol, *Savage Inequalities: Children in America's Schools* (New York: Crown, 1991).

43. See, e.g., Robert Rothman, *Measuring Up: Standards Assessment and School Reform* (San Francisco: Jossey-Boss, 1995); 1996 *National Education Summit Briefing Materials* (Armonk, NY: International Business Machines, 1996).

44. R. Craig Wood and David C. Thompson, *Educational Finance Law: Constitutional Challenge to State Aid Plans—An Analysis of Strategies*, 2nd ed. (Topeka, Kansas: National Organization on Legal Problems in Education, 1996).

45. Michael A. Rebell, "Schools, Values and the Courts," *Yale Law & Policy Review* 7 (1989): 275-342.

Court stated in *Serrano*, "education is unmatched in the extent to which it molds the personality of the youth of society."<sup>46</sup>

In short, at the end of the last decade, the growing perception of the competitive shortcomings of America's schools, their failure to provide equal educational opportunities to minority students, the advent of statewide standards-based reforms, and the schools' enhanced role as the central societal institution in shaping the civic values of the young, brought together in dynamic combination the liberal, egalitarian and republican strands of the American political tradition. These developments added fuel to the moral passions engendered by the growing perception of the critical gap between the educational system's promise and its reality, and resulted in the emergence of the democratic imperative. The New York State Board of Regents articulated the democratic imperative when it proclaimed in promulgating their plan for standards-based reform that:

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. For the sake of the children themselves, for the health of our society and our economy, we must. Such an education is a requirement for the world in which they will live; and in a democratic society, it is their entitlement.<sup>47</sup>

The courts' inclination to respond to this democratic imperative was also undoubtedly influenced by the fact that the legislatures in many states had failed to heed the courts' earlier implicit directives to correct blatant funding inequities. In 1982, for example, the New York Court of Appeals reversed a lower court decision that would have invalidated the state education finance system, but pointedly noted that "the urgings of those who would alleviate the existing disparities of educational opportunity . . . are properly to be addressed to the Legislature . . ."<sup>48</sup> Shortly after that decision was

46. *Serrano v. Priest* (1971), 1259.

47. New York State Board of Regents, *All Children Can Learn: A Plan for Reform of State Aid to Schools* (Albany, N.Y., 1993): 1.

48. *Levitown v. Nyquist*, 369, n. 9. Similarly, the U.S. Supreme Court had noted in *Rodriguez* that "[t]he need is apparent for reform in tax systems which may well have relied too long and too heavily on the local property tax . . . the ultimate solutions must come from the lawmakers and from the democratic pressures of those who elect them." *San Antonio v. Rodriguez*, 58.

issued, however, a legislative commission established to respond to the lower court's order was disbanded, its recommendations were totally ignored, and the inequities in the state funding system continued unabated.<sup>49</sup>

Although courts are, by and large, conservative institutions that are reluctant to embroil themselves in controversial areas of social policy, when major constitutional values are clearly at stake it is their responsibility to articulate and elaborate on the meaning of these values.<sup>50</sup> Despite the initial reluctance of many state courts to articulate and enforce egalitarian and republican values in fiscal equity cases, the clarity of the democratic imperative which came to the fore in the past decade caused them to consider more closely the underlying values and implications of their state constitution education clauses. Once they did, many of these state educational systems could no longer pass muster.

#### THE RECENT ADEQUACY DECISIONS

The relationship between the democratic imperative and the recent state court decisions is well-illustrated by the ruling of the Supreme Court of Kentucky in *Rose v. Council for Better Education*,<sup>51</sup> one of the three oft-cited 1989 rulings that were said to have initiated the new wave of affirmative state court decisions. Although the case had been brought on behalf of poor school districts seeking more equitable funding for their students, the Kentucky Supreme Court went further and invalidated the entire

49. Michael A. Rebell, Robert L. Hughes and Lisa Grumet, *Fiscal Equity in Education: A Proposal for a Dialogic Remedy* (New York: Campaign for Fiscal Equity, Inc., 1995), 71-72. The courts' apprehensions about the efficacy of judicial remedies in fiscal equity cases may also have been mollified by an awareness that remedies adopted in early fiscal equity cases had begun to show demonstrable positive results. For example, a recent survey of legislative and court-ordered reforms from 1972-1992 found that court-ordered reform resulted in significant reductions in funding disparities between districts and in an increased state share of overall educational expenditures. The study also found that "finance reform that was not initiated by court decisions has been largely ineffective." William N. Evans et al., "Schoolhouses, Courthouses and Statehouses After Serrano," *Journal of Policy Analysis and Management* 16 (1997), 12-13.

50. See, e.g., Owen Fiss, "Forward: The Forms of Justice," *Harvard Law Review* 93 (1979): 51 ("The rightful place of courts in our political system turns on the existence of public values and on the promise of those institutions—because they are independent and because they must engage in a special dialogue—to articulate and elaborate the true meaning of those values"); and Gordon L. Clark, *Judges and the Cities: Interpreting Local Autonomy* (Chicago, University of Chicago Press, 1985), 40 ("Courts provide a necessary degree of social cohesion in a world of conflicting values and differing world views").

51. 790 S.W.2d 186 (Ky. 1989).

state system of education, concluding that Kentucky's overall educational effort was "inadequate and well below the national effort."<sup>52</sup> In considering the meaning of the state's constitutional requirement that the legislature provide "an efficient system of common schools," the court discussed at length the intent of the drafters of the constitution's education clause. It cited their conviction that education was "the most vital question" that came before them, their recognition that students "cannot hope to succeed, unless their intellectual powers be properly developed" and their emphasis on the fact that "[t]here are no distinctions in the common schools, but all stand upon one level."<sup>53</sup>

In order to ensure that all students in the commonwealth received the educational opportunities intended by the framers, the court not only ordered adequate funding, but it also defined the key elements of the adequate education to which each child has a fundamental constitutional right. This definition cogently blended the liberal perspective that students must learn the skills required to "function [and compete favorably with their counterparts in surrounding states . . . in the job market] in a complex and rapidly changing civilization" with classical republican concerns that students obtain "sufficient knowledge of economic, social, and political systems to enable the student to make informed choices . . . [and to] understand the issues that affect his or her community, state, and nation."<sup>54</sup>

As noted above, of the 15 highest state court or unappealed trial court decisions favorable to plaintiffs issued since 1989, seven were written by state courts that overruled or distinguished their own prior pro-defendant rulings.<sup>55</sup> An overview discussion of these decisions will further demonstrate the relationship between the democratic imperative and the outcome of the recent cases.

Those states in which courts reversed or reconsidered their prior fiscal equity rulings represented all sections of the country and a

52. *Ibid.*, 197.

53. *Ibid.*, 205-206.

54. *Ibid.*, 212. The Kentucky Court's definition of an adequate education has been adopted by a number of other state courts, including those of Massachusetts, New Hampshire, and North Carolina.

55. Similar litigations seeking to reverse or distinguish earlier decisions won by defendants are also currently pending in Minnesota, Pennsylvania, South Carolina and Wisconsin. In recent years, the Supreme Courts of New Jersey and Wyoming have also issued strong remedial orders to ensure that state legislative and executive officials fully comply with earlier rulings that had declared the state's education finance system unconstitutional.

diverse range of urban, suburban and rural funding patterns. These were: Montana (1989), Idaho (1993), Arizona (1994), New York (1995), Maryland (1996), Ohio (1997), and North Carolina (1997).<sup>56</sup> The common thread that runs through all these cases is a profound concern that all children receive an education adequate to meet contemporary needs. When these courts first considered the issue of fiscal inequities a decade or two earlier, their focus was on equal protection doctrine and abstract discussions of funding disparities. In the recent decisions, the focus was on the plight of specific children who were being denied concrete educational services.

The shift in the approach of the Montana Supreme Court well illustrates this point. When it first considered a constitutional challenge to its state education finance system in 1974, the Montana Supreme Court analyzed the foundation program and budget limitations "on their face and not as applied,"<sup>57</sup> and found no problem with them. Fifteen years later, the court returned to the issue—but this time, it reviewed in concrete detail differences in the quality of instructional equipment, textbooks, physical plant and curricula offerings in rich and poor districts. It noted that the state's Foundation Funding program "falls short of even meeting the costs of complying with Montana's minimum accreditation standards" and held that the state had failed to provide "the basic system of free quality public elementary and secondary schools" guaranteed by the education clause of the state constitution.<sup>58</sup>

56. *Helena Elementary Sch. Dist. No. 1 v. State*, 769 P.2d 684 (Mont. 1989), modified, 784 P.2d 412 (Mont. 1990), reversing *Woodahl v. Straub*, 520 P.2d 776 (Mont. 1974); *Idaho Schools for Equal Educ. Opportunity v. Evans*, 850 P.2d 636 (Idaho 1993), distinguishing *Thompson v. Engelking*, 537 P.2d 635 (Idaho 1975); *Roosevelt Elementary Sch. Dist. No. 66 v. Bishop*, 877 P.2d 806 (Ariz. 1994), distinguishing *Shofstall v. Holins*, 515 P.2d 590 (Ariz. 1973); *Campaign for Fiscal Equity v. State of New York*, 655 N.E.2d 661 (N.Y. 1995), distinguishing *Levitown v. Nyquist*, 439 N.E.2d 359 (N.Y. 1982); *Bradford v. Maryland Bd. of Educ.*, Case No. 94300058/CE 189672 (Cir. Ct. Oct 18, 1996 [unreported]), distinguishing *Hornbeck v. Somerset County Bd. of Educ.*, 458 A.2d 758 (Md. 1983); *De Rolph v. State of Ohio*, 677 N.E.2d 733 (Ohio 1997), distinguishing *Board of Educ. City Sch. Dist. of Cincinnati v. Walter*, 39 N.E.2d 813 (Ohio 1979); *Leandro v. State of North Carolina*, 488 S.E.2d 219 (N.C. 1997), distinguishing *Britt v. North Carolina State Bd. of Educ.*, 357 S.E.2d 432, aff'd mem. 361 S.E.2d 71 (N.C. 1987).

In its 1978 ruling in *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71, the Washington Supreme Court, responding to claims of a large city school district that the current education finance system did not allow it to provide a "basic" education to its students, declared the system unconstitutional and overruled its prior decision in *Norfolkshire Sch. Dist. v. Kinnear*, 530 P.2d 178 (1974). Because this decision preceded by more than a decade the educational developments and judicial trends being analyzed in this article, the Washington case will not be included with the seven cases discussed in the main text.

57. *Woodahl v. Straub*, 782.

58. *Helena v. State*, 690; see also *Roosevelt v. Bishop* and *DeRolph v. State*.

In their earlier decisions, many of these courts, like the U.S. Supreme Court in *Rodriguez*, noted in passing that there was no indication that "the right to an adequate education . . . [is] being denied to any child in this state."<sup>59</sup> In their more recent decisions, these courts have analyzed more extensively the quality of the education actually being received by students in the poorer districts and expressed deep concern about allegations that substantial numbers of students are being denied a basic educational opportunity. In New York, for example, the Court of Appeals allowed the current case brought by the Campaign for Fiscal Equity, Inc. to proceed to trial because:

Plaintiffs advance the very claim we specifically stated was not before us in *Levitown*, i.e., that minimally acceptable educational services are not being provided to plaintiffs' school districts. *Levitown* does not foreclose plaintiffs' Education Article claim. Rather, a fair, contextual reading of that case compels the contrary conclusion. The Court there manifestly left room for a conclusion that a system which failed to provide for a sound basic education would violate the education article . . . .<sup>60</sup>

A concern for the plight of urban minorities was the major thrust of the New York and Maryland cases, which were brought on behalf of cities with predominantly minority student populations. It was also undoubtedly a major factor in the willingness of the courts in other states to reconsider prior fiscal equity rulings.<sup>61</sup> In North

59. *Hornbeck v. Somerset Co.*, 787. See also, *Woodahl v. Straub*, 782 ("In this case, no assertion of substandard programs are made."); *Board of Education v. Walter*, 825 (a system in which "students were effectively being deprived of educational opportunity . . . would clearly not be thorough and efficient").

60. *Campaign for Fiscal Equity v. State of New York*, 665. The author was counsel for plaintiffs in this case.

Significantly, several of the post-1989 cases in which state courts which upheld the defendants' positions explicitly stated that their rulings might have been different if the plaintiffs had alleged that students were not receiving an adequate education. Thus, the Minnesota Supreme Court specifically noted in *Skeen v. State*, 505 N.W.2d 297, 303 (Minn. 1993) that "unlike many cases in other states, this case never involved a challenge to the adequacy of education in Minnesota. In fact, the parties conceded that all plaintiff districts met or exceeded the educational requirements of the state." See also *Kukor v. Grover*, 436 N.W.2d 568, 578 (Wis. 1989) ("The appellants have not asserted that due to the distribution of school aid . . . their districts are unable to meet these [legislative] standards. . . ."); *Scott v. Commonwealth of Virginia* 443 S.E.2d 138, 142 (Va. 1994) (" . . . the students do not contend that the manner of funding prevents their schools from meeting the standards of quality . . .").

61. In *Campaign for Fiscal Equity v. State of New York*, the New York Court of Appeals, in addition to allowing plaintiffs to proceed to trial on their education clause claim, also refused to dismiss their allegations that the state education finance system violates Title VI of the 1964 federal Civil Rights Act and its implementing regulations. The Title VI claim is based on the allegation that since 74 percent of the minority students in the state are enrolled in New York City's public schools, a state education system which denies fair funding to the city has a detrimental and disproportionate impact on minority students.

Carolina, the plaintiffs were students and parents from a number of poor, rural counties; they were joined by representatives of the large city school districts, who asserted the needs of districts which must "serve a disproportionate number of students who due to poverty, language barriers or other handicaps require special resources."<sup>62</sup> Pending cases in Minnesota, Pennsylvania and Wisconsin also emphasize the inadequacy of resources provided to urban minority students.<sup>63</sup>

Many of the post-1989 decisions wrestled hard with the legal doctrine of *stare decisis*, which demands strong respect for precedent, and the courts were clearly troubled by the prospect of overruling or reconsidering relatively recent constitutional rulings. Much of the discussion in the Idaho case, for example, concerned the court's attempt to reconcile its current decision to allow the case to proceed to trial with its 1975 ruling, which had dismissed both the plaintiffs' equal protection and education clause claims. The court's ultimate rationale was to dissect the "uniform and thorough clause" and claim that its earlier decision had analyzed only the "uniform" aspect of education, leaving for another day the "thorough" part. Although this holding was strained and somewhat unconvincing, the fact that the court would go to such lengths to reconcile its past precedent with its present holding demonstrates the extent of its current concern for students' right to an adequate education.

The Ohio court also discussed at length its reason for distinguishing the current case from its earlier pro-defendant ruling. Among other things, it noted that in the earlier situation a legislative committee had found the foundation amount in the funding formula sufficient to provide a high quality education, a situation which the Court held no longer applied to the current formula. Other courts had less trouble in setting aside precedent. The Arizona Supreme Court, in its 1994 decision, bluntly stated that the analysis of the state education clause in its 1973 decision had been limited and erroneous.

The main way that most of the state courts did in fact reconcile *stare decisis* and the democratic imperative was to reiterate their

62. *Leandro v. State*, 252.

63. *Minneapolis NAACP v. State*, No. 95-14200 (Hennepin Co. Dist. Ct.) and *St. Paul Independent Sch. Dist. 625 v. State*, (Ramsey Co. Dist. Ct.) will go to trial in 1998; *Pennsylvania Association of Rural and Small Schools v. Ridge School District of Philadelphia v. Commonwealth*, (Pa. Commw. Ct.), *Vincent v. Voight*, No. 95CV2586 (Dane County Cir. Ct., Wisc.).

prior equal protection holding and make clear that the current state aid formula would be set aside only to the extent that plaintiffs could show that a substantial number of students were not receiving an adequate education. In other words, although they would reconsider those aspects of their prior rulings that related to their constitutions' education clause, they would not re-open their past equal protection rulings. The New York Court of Appeals was most explicit in this regard. It specifically stated that current disparities in the resources available to the various school districts, even if they were "gross and glaring" and exceeded the disparities that existed at the time of its earlier decision, would not cause it to reconsider its prior conclusion that the state education finance system did not violate the equal protection clause.<sup>64</sup> The North Carolina court also forcefully distinguished its present decision to let an education clause claim proceed from an equal protection precedent by emphasizing its view that "substantial equality" in educational funding is not achievable.<sup>65</sup>

Overall, it was also clear that a profound concern with the schools' republican mission to instill civic values was combined with liberal and egalitarian concerns that all children be provided the opportunity for an adequate education. The language of most of the decisions emphatically proclaimed classical republican ideals. Thus, the Ohio Supreme Court declared that children must be "educated adequately so that they are able to participate fully in society."<sup>66</sup> Similarly, the Arizona Court proclaimed that "an enlightened citizenry is critical to the existence of free institutions."<sup>67</sup> The New York Court of Appeals defined the "sound basic education" guaranteed by the state constitution partially in terms of the basic skills "necessary to enable children to eventually function as civic participants capable of voting and serving on a jury."<sup>68</sup> And the North Carolina court, following the Kentucky Supreme Court's precedent, defined a "sound basic education" as one which would enable a student "to function in a complex and rapidly changing

64. This holding was made in *Reform Educational Financing Inequities Today (R.E.F.I.T.) v. Cuomo*, 655 N.E. 2d 647 (N.Y. 1995), a companion case to *Campaign for Fiscal Equity v. State*, in which it allowed an education clause claim and a Title VI claim to proceed.

65. *Leandro v. State*, 256.

66. *DeRolph v. State*, 745.

67. *Roosevelt v. Bishop*, 816.

68. *CFE v. State*, 666.

society" and to "make informed choices with regard to issues that affect . . . the student's community, state, and nation."<sup>69</sup>

Despite these ringing restatements of the American democratic creed, however, these decisions by and large have not described in detail how the common school ideal can actually be achieved in light of contemporary social, political and economic realities. Instead, they have tended to refer the remedial responsibilities back to the state legislatures with few guidelines or mandates. The Arizona Court, for example, issued a broad declaratory judgment in 1994 that required the legislature "to enact appropriate laws to finance education in a way that does not itself create substantial disparities among schools, communities or districts."<sup>70</sup> The North Carolina decision was especially striking in this regard. Its ruling was a preliminary clarification of the state of the law that required the case to be sent back for a trial. Although any discussion of an eventual remedy was, therefore, premature, the North Carolina Court went out of its way to announce in advance that it would be extremely deferential to the legislature at the remedial stage. It stated that "the legislative process provides a better forum than the courts for discussing and determining what educational programs and resources are most likely to ensure that each child of the state receive a sound basic education."<sup>71</sup>

Unfortunately—as the repeated legislative/judicial confrontations in New Jersey, Texas and a number of other states have indicated—legislatures on their own are not likely to come up with fair and effective solutions to the high stakes issues involved in these cases. The follow-up to the Arizona Supreme Court's 1994 remand to the legislature further illustrates this pattern of inadequate legislative response. There, after three years, the courts ruled that the

69. *Leandro v. State*, 255.

70. *Roosevelt v. Bishop*, 816. The Ohio Supreme Court was a partial exception. Although its decision stated that "we do not instruct the General Assembly as to the specifics of the legislation it should enact," it held that the financing system must "undergo a systematic overhaul" and that, among other things, the foundation program, the emphasis on the local property tax and the paucity of capital funding must be eliminated. *DeRolph v. State*, 747.

In Maryland, the court accepted a settlement negotiated by the parties on the eve of trial. Under the terms of that agreement, the state would provide approximately \$250 million in additional funds to the Baltimore school system over the ensuing five years and the administration of the city's school system would be substantially restructured and be subject to greater state oversight. See Diane W. Cipollone, *Gambling on a Settlement: The Baltimore City Schools Adequacy Litigations* (New York: Campaign for Fiscal Equity, Inc., November 1997).

71. *Leandro v. State*, 259.

legislature's response was inadequate and ordered it to "find a constitutional solution for school funding by June 30, 1998 or the state would be prohibited from distributing any money to schools."<sup>72</sup>

The reality is that the typical legislative process simply cannot deal appropriately with the deep-rooted ideological and moral issues posed by the democratic imperative in the context of fiscal equity reform—which is precisely why these issues were brought before the courts for a principled resolution in the first place. Legislatures tend to respond to entrenched interests, and, increasingly, affluent suburban districts control the politics of educational funding.

If the traditional legislative process has proved largely unresponsive to the formulation of effective remedies in fiscal equity cases, what, then, can be done? Should the courts develop and implement these complex remedies on their own? Such unalloyed judicial activism would be unwise and unwarranted. Instead, what is needed is an active colloquy between the courts, the legislature, and the public at large. Ultimately, the democratic imperative can only be realized through an open and extensive democratic process.

#### THE NEED FOR PUBLIC ENGAGEMENT

The North Carolina Supreme Court wrote that complex fiscal equity issues should be remanded to the legislature to "permit the full expression of all points of view as what curricula will best ensure that every child of the state has the opportunity to receive a sound basic education."<sup>73</sup> Clearly, "the full expression of all points of view" is vitally necessary if workable solutions to the very difficult educational, moral, political and economic issues posed by fiscal equity cases are to be resolved. But the legislative process on its own, for the reasons mentioned above, will not fairly consider and reconcile the difficult core issues at the heart of the fiscal equi-

72. *Roosevelt Elementary Sch. Dist. No. 66 v. Graham-Kregan*, No. 91-13087 (Maricopa County Sup. Ct., 20 August 1997). The Arizona Supreme Court affirmed in December 1997.

In Idaho, after the Supreme Court's 1993 decision had examined the rules of the state board of education and held them to be consistent with the constitutional standards of thoroughness, the legislature revoked them. The district court ruled that this legislative action, together with legislative changes in the aid distribution formula, rendered the case moot. In 1996, the Idaho Supreme Court vacated, holding that the case was not moot and remanding it for further proceedings. *Idaho Schools for Equal Educ. Opportunity v. Evans*, Dkt. No. 21818 (March 7, 1996).

73. *Leandro v. State*, 259.

ty debate.<sup>74</sup>

A full, fair and effective airing of such issues requires a broad-based civic dialogue that goes beyond traditional legislative practices. Broad-based civic dialogues can bring previously excluded voices into politics and create forums in which citizens are encouraged to take broader perspectives on questions of public policy. "[Through] the give-and-take of argument, citizens and their accountable representatives can learn from one another, come to recognize their individual and collective mistakes, and develop new views and politics that are more widely justifiable."<sup>75</sup> Clearly, this type of civic dialogue is relevant to fiscal equity concerns in education:

We cannot underestimate the power of public discourse in convincing the citizens of our states that major systemic changes need to take place to ensure the equal educational opportunity for all children for the future of our society. Public conversations can be a powerful device to arrive at social consensus.<sup>76</sup>

Such civic dialogue does not require consensus, and it does not imply that perfect solutions will be found for the hard problems that exist in an imperfect world. It does, however, require an honest attempt to consider the needs of the entire polity and to find a solution that a majority—and hopefully a large majority, cutting across class, race and geographic divisions—can accept. The significant potential for successful civic dialogue on the difficult issues involved in fiscal equity and adequacy reform is indicated by the

74. I discuss some of these core issues—namely 1) addressing the grossly inequitable educational opportunities currently being provided to millions of poor and minority students while at the same time 2) maintaining the educational level in districts that currently do provide a quality education; 3) recognizing the reality that fiscal resources are not unlimited; but 4) realizing that money, if properly and efficiently used, does make a difference—in more detail in Michael A. Rebell, "Fiscal Equity in Education: Deconstructing the Reigning Myths and Facing Reality," *New York University Review of Law and Social Change* 21 (1994-95): 714-718.

75. Amy Gutmann and Dennis Thompson, *Democracy and Disagreement* (Cambridge, Mass.: Harvard University Press, 1996), 43. See also Robert N. Bellah et al., *Habits of the Heart* (New York: Harper & Row, 1986), 218; Benjamin Barber, *Strong Democracy: Participatory Democracy for a New Age* (Berkeley: University of California Press, 1984); John S. Dryzek, *Discursive Democracy: Politics and Political Science* (Cambridge: Cambridge University Press, 1990).

76. James G. Ward, "Schools and the Struggle for Democracy," in *Who Pays for Student Diversity?*, eds. James G. Ward and Patricia Anthony (Newbury Park, CA: Corwin Press, 1992), 250. See also Kettering Foundation, *Meaningful Chaos: How People Form Relationships with Public Concerns* (Dayton, Ohio: 1993).

fact that judicial orders have encountered the least political opposition and brought about the most thorough change in states where broad-based citizen involvement preceded or dominated legislative action.

Kentucky is a prime case in point. Years before the Kentucky Supreme Court issued its decree in *Rose v. Council for Better Education*, the "Pritchard Committee" initiated statewide dialogues on education reform.<sup>77</sup> As a non-partisan school reform group composed of one hundred members, the Pritchard Committee included former governors, business leaders, civic activists and parents. On one occasion, this committee sponsored a televised statewide town meeting that brought together 20,000 Kentuckians on one evening to discuss public school reform. Similarly, in Washington State, the activities of Citizens for Fair School Funding and other advocates for reform contributed to the passage of the Washington Basic Education Act of 1977.<sup>78</sup> Their success led one commentator to call the 1977 legislative session "a consensus looking for a solution."<sup>79</sup>

These experiences demonstrate that a meaningful participatory process can lead to significant broad-based agreement on substantive reforms. Recent developments in the Alabama fiscal equity litigation,<sup>80</sup> however, indicate that wide-ranging citizen dialogues of this type are often difficult to sustain. There, an impressive consensus among the parties was achieved on an extensive remedial order after the trial judge had appointed a facilitator to work with the parties and a governor's task force heard testimony from school districts, civic and business groups, and others about a potential remedy.<sup>81</sup> The consensus plan, however, although adopted by the

77. Ronald G. Dove, Jr., "Acoms in a Mountain Pool: The Role of Litigation, Law and Lawyers in Kentucky Education Reform," *Journal of Education Finance* 17 (1991): 83-119; Jacob E. Adams, *The Pritchard Committee for Academic Excellence: Credible Advocacy for Kentucky Schools* (Philadelphia: University of Pennsylvania, The Consortium for Policy Research in Education, 1993).

78. 1977 Wash. Laws ch. 359.

79. Robert Palatch et al., *State Legislative Voting and Leadership: The Political Economy of School Finance* (Denver, CO: Education Commission of the States, 1983), 234. Passage of Washington's 1993 outcomes-oriented reform bill was also preceded by extensive discussions of educational issues by the Business Roundtable and the Governor's Council on Education Reform and Funding. Rebell, Hughes and Grumet, A-27 n. 74.

80. *Opinion of the Justices*, 624 S.2d 107 (Ala. 1993).

81. Helen Hershkoff, counsel for plaintiffs, letter to author, 4 November 1994. See also Martha Morgan et al., "Establishing Education Program Inadequacy: The Alabama Example," *Michigan Journal of Law Reform* 28 (1995): 559-598.

court, has not yet been implemented. The legislature refused to enact the detailed equalization plan or allocate the necessary funding, and the plan became a partisan, hotly-contested issue in the last gubernatorial election and in the election for seats on the state Board of Education.<sup>82</sup> The new governor asked the Alabama Supreme Court to reverse or reconsider the previously unappealed order. The Court, however, rejected his arguments and gave the legislature one year to formulate a plan for complying with the agreement before the trial court would enter a compliance order.<sup>83</sup>

What we need to do now is build on these community dialogue experiences. Their limitations can be overcome by expanding the deliberative process to include active participation by a much larger range of individuals and groups from all affected interests, and by having the court monitor the public engagement process and hold state officials accountable for mounting and sustaining an effective statewide civic dialogue.

Although it is often assumed that judicial involvement in policy issues "freez[es] out citizen debate,"<sup>84</sup> the courts, in fact, can play an essential role in promoting such a citizen dialogue in a manner consistent with their appropriate role in the constitutional separation of powers framework. An appropriate separation of powers perspective is one that respects the differing functional domains of the three branches of government and promotes among them a sustained colloquy on effective problem solving mechanisms. This colloquy would build on the insights of comparative institutional analyses which postulate that each of the three branches has specific strengths and weaknesses in regard to remedial problem solving. The courts' institutional strength lies in their principled orientation and their long-term staying power, the legislature's strong

82. Millicent Lawton, "G.O.P. Board Candidates Target Ala. Reform Plan," *Education Week* (19 October 1994): 11.

83. *Alabama Coalition for Equity v. Hunt*, 1997 WL 773 (Ala. Jan. 10, 1997). In June 1995, Arizona's Superintendent of Schools convened an "education finance summit" of parents, teachers, school board members, business leaders, legislators and others to initiate dialogue on how to respond to the state supreme court's recent fiscal equity order. Mike McCloy, "School Funding Remedy Sought," *Phoenix Gazette*, 6 June 1995, B1. As indicated above, however, that process did not lead to the development and implementation of a constitutionally acceptable remedy.

84. Jean Bethke Elshstain, *Democracy on Trial* (New York: Basic Books, 1995), 27; see also Dryzeck, *Discursive Democracy*, 83.

suit is its flexibility in establishing a social policy agenda and its comprehensive policy-making capacity, and the executive's comparative advantage lies in its range of resources and capacity to respond directly to practical implementation needs.<sup>85</sup>

In regard to the high-stakes issues raised by fiscal equity and educational adequacy cases, an appropriate colloquy among the branches would have the courts resolve the difficult issues of principle and then remand the matter—with appropriate guidelines and monitoring oversight—to the legislative and executive branches for detailed application and implementation. For example, the court might transcend previous understandings of local control by establishing guidelines that require the state to contribute a substantially larger share of educational funding, while at the same time assuring meaningful local participation in the implementation of the new educational standards. In order to resolve the difficult core issues that are at the heart of the fiscal equity debate, however, the courts need to develop new democratic mechanisms that will allow judges to understand the depth of the issues and the range of possible solutions, as well as their impact on society at large and on specific groups and individuals.

The logic of the situation is inescapable: if the courts are to achieve effective remedies in fiscal equity cases, they must first promote extensive civic dialogues on the issues that underlie the basic conflicts. This means that courts should encourage broad-based public discussion on remedial principles that, when incorporated into judicial orders, would guide the legislature's and the executive's development and implementation of new, constitutionally-acceptable education finance systems. Such a public engagement process can provide a court with detailed information on the complex range of factual and political issues that they need to consider in creating the remedial order, while at the same time educating the public on the significance of the constitutional values that the court seeks to uphold. Such a public engagement process can also promote the consensus-building that will ultimately lead to public acceptance of necessary reforms and help induce the legis-

85. For a detailed discussion of the comparative institutional strengths of the three branches of government, see Michael A. Rebell and Arthur R. Block, *Equality and Education*, ch. 9 (Princeton: Princeton University Press, 1985).

lature to enact those reforms.<sup>86</sup>

In short, since the democratic imperative is fueling the current judicial involvement in fiscal equity litigations, new forms of public engagement and citizen participation must be included in judicial remedial processes if effective and lasting funding and educational reforms are to be achieved. Broad-based civic dialogue is a necessary component of the reforms that must be created if American education—and indeed America's democratic political system—is to survive and thrive in the twenty-first century.

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86. A detailed discussion of how a court-initiated public engagement process can be implemented in the context of a major institutional reform litigation is set forth in Michael A. Rebell and Robert L. Hughes, "Efficacy and Engagement: The Remedies Problem Posed by *Sheff v. O'Neil*—and a Proposed Solution," *Connecticut Law Review* 29 (1997): 1115-1186.

The Campaign for Fiscal Equity, Inc., of which the author is the Executive Director, is currently spearheading an extensive public engagement process in New York State in connection with its pending litigation. In the first phase of that process, more than 125 diverse groups in New York City—education advocates, community groups, labor and business organizations, parents, students and teachers—came together in three major conferences and dozens of community meetings, local forums and focus groups to deliberate on the definition of a "sound basic education" and the content of a remedial proposal that should be presented to the court. The tentative working proposals that emerged from that process are being reviewed, debated and modified in a series of approximately two dozen regional forums that are being held throughout the state during the second phase of the public engagement process. The input received from these forums will be further considered at culminating city-wide and statewide conferences and through a statewide citizens survey.