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A Dialogic Approach to Education Reform**

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Schools, Communities, and the Courts: A Dialogic Approach to Education Reform

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Dissatisfaction with student achievement, problems of educational governance, and value clashes in schools have embroiled students, parents, and educators in controversy and confrontation in recent decades. Many of these conflicts have been brought before the courts, and some have resulted in extensive judicial intervention in educational affairs. This intervention has had mixed results because courts often cannot provide effective, long-lasting solutions to deep-rooted educational controversies.

The difficulties that afflict schools today stem in large part from the lack of a commonly held vision of public education's purpose and mission. A critical preliminary task for school reform, therefore, is to reconstitute schools as effective communities. Such communities must accept the diverse cultures of their constituents, while simultaneously promoting a core of common educational values.

Adopting the creation of effective school communities as an overarching goal, this Article proposes the adoption of a community oriented consensual dispute resolution procedure, the community engagement dialogic model (CED) for resolving major educational policy and values controversies. The CED model can either avoid altogether the need for judicial intervention in many situations, or where such intervention is necessary, its adoption as a judicial remedy can enhance the likelihood of a successful resolution of the underlying controversy.

Part I of this Article discusses the need for education reform, the difficulties in achieving it, and the reasons why many past court interventions have not proven successful. Part II sets forth the proposed CED model, which seeks to unite all the relevant stakeholders in a principled process of discussion, deliberation, and reevaluation of fundamental policies and values. Part III discusses specific examples of how the model can be applied in the areas of sex

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education, special education, and fiscal equity reform. The concluding Section reconsiders the CED model in light of these examples and questions posed by a panel of judges, educators, and parents who participated in a symposium at the Yale Law School in April, 1995.

I. THE PROBLEM

A. *The Need for Educational Reform*

In the early 1980s, a slew of commission reports warned of a "rising tide of mediocrity"¹ in American education which was undermining the nation's ability to compete in the global economy. One commission estimated that 23 million Americans, including forty percent of all minority students, were functionally illiterate.² Comparative international assessments have repeatedly revealed poor performance by American students in science and math,³ and the United States Department of Education's National Assessment of Educational Progress surveys have indicated that few American students "show the capacity for complex reasoning and problem solving"⁴

These concerns about the declining level of academic excellence in America's schools are paralleled by a growing awareness of the academic impact of the inequitable resources available to many minority and low-income students.⁵ The current sense of crisis in American education is also heightened by Americans' belief that schools can solve a host of social problems created

1. THE NAT. COMM. ON EXCELLENCE IN EDUCATION, *A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM* (1983) [hereinafter *NATION AT RISK*]; see also CARNEGIE FORUM ON EDUCATION AND THE ECONOMY, *TASK FORCE ON TEACHING AS A PROFESSION, A NATION PREPARED: TEACHERS FOR THE 21ST CENTURY* (1986); THEODORE SIZER, *HORACE'S COMPROMISE: THE DILEMMA OF THE AMERICAN HIGH SCHOOL* (1989); TWENTIETH CENTURY TASK FORCE ON FEDERAL ELEMENTARY AND SECONDARY EDUCATION POLICY, *MAKING THE GRADE* (1983).

2. *NATION AT RISK*, *supra* note 1, at 8. According to former Secretary of Education William Bennett, fewer than 40% of young people can read well enough to understand a newspaper article. WILLIAM J. BENNETT, *AMERICAN EDUCATION* 10 (1988).

3. See NATIONAL ASSESSMENT OF EDUCATION PROGRAMS, *AMERICA'S CHALLENGE: ACCELERATED ACADEMIC ACHIEVEMENT* (1990); see also Robert L. Linn & Stephen B. Dunbar, *The Nation's Report Card Goes Home: Good News and Bad About Trends in Achievement*, 72 *PHI DELTA KAPPAN* 127, 131 (1990).

4. INA V.S. MULLIS ET AL., *NAEP 1992 TRENDS IN ACADEMIC PROGRESS 4-5* (1994); see also U.S. DEPARTMENT OF EDUCATION, *AMERICA 2000: AN EDUCATION STRATEGY* (1991) (finding that America's Schools are not developing the skills and knowledge that today's students need to compete in a globally competitive economy).

5. See, e.g., JONATHAN KOZOL, *SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS* (1991). For example, in New York City in 1992, 40% of third grade pupils scored below the state reference point (SRP) for reading, compared to 11% in the rest of the state, and 19% of the City's third-graders scored below the math SRP, compared to 2% for the rest of the state. Nevertheless, New York City's per capita student spending is less than half of that of Great Neck, Scarsdale, and other nearby affluent suburbs and the amount of state aid received by New York City's public schools is more than 12% below the state average. Michael A. Rebell, *Fiscal Equity in Education: Deconstructing the Reigning Myths*, 21 *N.Y.U. REV. L. & SOC. CHANGE* 691, 695, 713 (1995).

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by disintegrating families and communal institutions, even though the schools themselves seem overwhelmed by the magnitude of this task.⁶

As a result of these concerns, the nation has been engaged for the past decade and a half in an incessant and often contradictory process of school reform. In the "first wave" of reform, most states enacted extensive reform laws which have imposed more rigorous academic requirements on students and higher certification standards on teachers. For example, between 1980 and 1986, forty-five states increased their requirements for earning a standard high school diploma, and most states now require teachers to pass a competency examination before certification.⁷ Paralleling the trend toward more pervasive state requirements has been the enactment of the federal "Goals 2000: Educate America Act"⁸ which codified eight national educational goals and created a new federal agency, the National Education Standards and Improvement Council (NESIC). NESIC's dual responsibilities are to establish voluntary national performance and opportunity-to-learn standards, and to certify, for federal funding eligibility purposes, that state standards are consistent with the national criteria.

These regulatory reforms have reduced the discretionary decision-making authority of local school boards and administrators, and some believe that it has led to an unacceptable degree of "mechanization and routinization of teaching."⁹ Many states have responded to this criticism by adopting a "second wave" of reform which emphasizes more decision-making at the local level,

6. See, e.g., Larry Cuban, *Reforming Again, Again, and Again*, 19 EDUC. RESEARCHER, Jan-Feb. 1990, at 3. Cuban notes that schools tend to be the focal point of reform efforts in times of turmoil for two main reasons: a) focus on slow improvement through the schools districts, attention from the deeply rooted structural ills in terms of poverty, racism, drug addiction, and environmental destruction which, if addressed directly, would lead to grave economic, social, and political upheavals; and b) the enduring faith that Americans have placed on schools as engines of social and individual improvement. *Id.* at 8.

7. Charles F. Faber, *Is Local Control of the Schools Still a Viable Option?*, 14 HARV. J. L. & PUB. POL'Y 447, 450 (1991). These reforms appear to have led to more students taking rigorous courses like math, science, and foreign languages, higher teacher salaries, and a slight increase in state achievement tests and SAT scores. Michael W. Kirst, *Recent State Education Reform in the United States*, 24 EDU. ADMIN. Q. 319, 321 (1988). Recent data on these trends is summarized in JEFFREY R. HENIG, *RETHINKING SCHOOL CHOICE: LIMITS OF THE MARKET METAPHOR* 26-52 (1994); DIANE RAVITCH, *NATIONAL STANDARDS IN AMERICAN EDUCATION: A CITIZEN'S GUIDE* 98-134 (1995). The degree of progress has not, however, been considered commensurate with the huge increases in spending on education over the past two decades or to have brought most American schools to a level that parents and citizens at large consider satisfactory. See Deborah A. Verstegen, *Efficiency and Equity in the Provision and Reform of American-Schooling*, 20 J. EDUC. FIN. 107, 108 (1994) (finding that school aid from all sources increased ninety percent in real dollar terms in the 1960s, 12% in the 1970s and 28% in the 1980s).

8. 20 U.S.C. §§ 5801-5871 (1994). For differing assessments of the movement toward national education standards, see RAVITCH, *supra* note 7; Harold Howe, *Uncle Sam is in the Classroom*, 76 PHI DELTA KAPPAN 374 (1995). Although NESIC has come under strong attack from many members of the 104th Congress and funds for its operation may not be appropriated, the larger national standards movement seems well-entrenched. See Anne C. Lewis, *Washington Commentary: Of Rhetoric and Standards*, 77 PHI DELTA KAPPAN 332 (1996).

9. Willis D. Hawley, *Missing Pieces of the Educational Reform Agenda: Or Why the First and Second Waves May Miss the Boat*, 24 EDUC. ADMIN. Q. 416, 419 (1988).

greater professionalism for teachers, and more accountability for improvements in student learning.¹⁰

As part of these second wave "restructuring" reforms, many states have adopted school-based management (SBM) initiatives. Under SBM plans, decision-making authority in areas such as budget, personnel, and curriculum, traditionally the domain of the local school board, is delegated to councils of teachers, parents, and administrators at the local school level.¹¹ The basic principle behind this system is that empowering parents and teachers with greater control and influence over their own affairs will motivate them to create stronger educational programs to improve student performance and provide greater satisfaction among school personnel and constituents.¹² This movement is said to represent a "paradigm shift" away from hierarchal, bureaucratic control and toward partnerships between parents and teachers.¹³

The present system of local governance of education has been challenged in other ways as well. There have been calls for: (1) broad-based use of vouchers which would allow parents to obtain public funding to enroll their children in private schools;¹⁴ (2) public "charter schools" that operate independent of many state regulations and generally report directly to state authorities;¹⁵ (3) privatization contracts in which local school boards turn the

10. The variety of "second wave" restructuring approaches is discussed in detail in *RESTRUCTURING SCHOOLS: THE NEXT GENERATION OF EDUCATIONAL REFORM* (Richard F. Elmore & Associates eds., 1990) [hereinafter *RESTRUCTURING SCHOOLS: THE NEXT GENERATION*]. For an overview of the results to date and implications of both the first wave of centralized state level reforms and the "second wave" of decentralization reforms, see William L. Boyd, *Local Role in Education*, in *ENCYCLOPEDIA OF EDUCATIONAL RESEARCH* 753 (M.C. Alkin ed., 1992).

11. Under the SBM scheme in Kentucky, for example, each school must, by July 1, 1996, establish a council generally consisting of the principal, three teachers, and two parents. The councils are authorized to select principals from those persons recommended by the superintendent, and make decisions on curriculum, instructional, student assignment, and discipline policies. KY. REV. STAT. ANN. § 160.345 (Michie/Bobbs-Merrill 1994). As of 1994, 805 of 1375 schools in the state had state-approved councils. KENTUCKY GENERAL ASSEMBLY, OFFICE OF ACCOUNTABILITY, ANNUAL REPORT 233 (1994).

12. Joseph Murphy, *Restructuring America's Schools: An Overview*, in *EDUCATION REFORM IN THE '90s* 3, 3 (Chester E. Finn, Jr. & Theodore Rebarber, eds., 1992).

13. Joanna Richardson, *Next Generation of Effective Schools Looks to Districts for Lasting Change*, *EDUC. WEEK*, Apr. 12, 1995, at 8; see also David S. Seeley, *A New Paradigm for Parent Involvement*, *EDUC. LEADERSHIP* (Oct. 1989), at 46 (arguing for a new paradigm of emphasis on parent involvement, consistent with enhanced teacher professionalism).

14. See, e.g., JOHN E. CHUBB & TERRY M. MOE, *POLITICS, MARKETS AND AMERICA'S SCHOOLS* 217-18 (1990).

15. For a discussion of the history and contemporary functioning of charter schools, see Patricia Wohlstetter, *Education by Charter*, in *SCHOOL-BASED MANAGEMENT: ORGANIZING FOR HIGH PERFORMANCE* 139, 139-64 (Susan Albers Mohrman et al. eds., 1994). In the past three years, twelve states have passed laws authorizing such schools and 96 charter schools have opened nationwide. Colorado has enrolled the most students in charter schools, over 3500. Peter Applebome, *Some Educators See Experimental Hybrids as Country's Best Hope for Public Education*, *N.Y. TIMES*, Oct. 12, 1994, at B7. Massachusetts in 1993 adopted the most extensive charter law to date under which the Secretary of Education is authorized to approve charter applications from businesses, parents, teachers, and colleges, bypassing local school boards. MASS. GEN. LAWS ANN. ch. 71, § 89 (West 1994).

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operation of public schools over to management consultant firms;¹⁶ and (4) the total elimination of local school boards.¹⁷

The contemporary maelstrom of educational reform appears to reflect an historical pattern of oscillation between centralizing and decentralizing governance reforms in American education.¹⁸ Reform initiatives like SBM often amount to "symbolic responses" that resolve the immediate political pressure, but not the underlying substantive problems. A recent analysis of SBM describes this pattern:

. . . when systems are confronted by multiple, complex and competing demands, they naturally and necessarily seek responses that can quell conflict and restore confidence, responses that can foster stability and establish legitimacy Under these conditions, responses are kept ambiguous so that they can embrace diverse and competing interests and absorb concerns regarding a variety of pressing problems. An available response is often selected not so much because there is evidence that it can solve any of the problems to which it has been attached, but because there is reason to believe it will enable the system to survive the stress.

. . .¹⁹

The authors reached this conclusion after undertaking an exhaustive review of the literature on SBM which suggested that "[t]here is little evidence that school-based management alters influence relationships, renews school organizations, or develops the qualities of academically effective schools."²⁰ They viewed SBM practices, therefore, as prime examples of "symbolic responses" which have great economic and ideological appeal because "they can foster stability and reestablish legitimacy without imposing new financial burdens on the system."²¹ Most of the other recent research on the implementation of SBM confirms that "the political rhetoric is running far ahead of the evidence" of successful accomplishment.²²

16. In recent years, both the Minneapolis and Baltimore school boards have signed agreements that have turned over management of some or all of their schools to private consulting firms. Six more school systems, including Milwaukee, San Diego, and Washington, D.C., are reportedly investigating the possibility of doing the same. *More Districts Explore Privatizing Schools*, SCHOOL BOARD NEWS, Feb. 1, 1994, at 1.

17. See, e.g., MYRON LIEBERMAN, *THE FUTURE OF PUBLIC EDUCATION* 34 (1960); Chester E. Finn, Jr., *Reinventing Local Control*, EDUC. WEEK, Jan. 23, 1991, at 40.

18. See Cuban, *supra* note 6, at 3.

19. Betty Malen et al., *What Do We Know About School-Based Management?*, in 2 CHOICE AND CONTROL IN AMERICAN EDUCATION 325 (William H. Clune & John F. Witte eds., 1990).

20. *Id.* at 289.

21. *Id.*, at 326; see also DALE T. SNAUWAERT, *DEMOCRACY, EDUCATION, & GOVERNANCE: A DEVELOPMENTAL CONCEPTION* 102 (1993) (asserting that SBM involves "illusion of power" and "democratic veneer").

22. JOSEPH MURPHY, *RESTRUCTURING SCHOOLS: CAPTURING AND ASSESSING THE PHENOMENA* 74 (1991); see also HARRY P. HATRY, ET AL., *IMPLEMENTING SCHOOL-BASED MANAGEMENT* 58, 148 (1994) (concluding through study of SBM in 19 schools in 12 districts that SBM has not significantly affected parent involvement and has not been shown to be linked to any student outcomes); Jane L. David, *School-Based Decision-Making: Kentucky's Test of Decentralization*, 75 PHIDELTA KAPPAN 706,

B. Citizen Participation

Seymour Sarason, in a book which he has aptly entitled *The Predictable Failure of Educational Reform*,²³ argues that not only SBM, but all current attempts at school reform, are superficial and not likely to result in meaningful change because they do not alter power relationships and fundamentally change the schools' "accustomed practice and organization."²⁴ Sarason believes that significant change can occur only if the entire school culture is transformed in a manner which responds to the felt needs of its constituents and focuses on the individual learning needs of all students.²⁵ Meaningful parental participation in school governance is critical to this type of transformation because:

[W]hen a process makes people feel they have a voice in matters that affect them, they will have a greater commitment to the overall enterprise and take greater responsibility for what happens to the enterprise. Second, the absence of such a process ensures that no one feels responsible, that blame will always be directed externally, that adversarialism will be a notable feature of school life.²⁶

This emphasis on broad, extensive citizen participation in educational governance is, of course, not new. Sarason's call for new, radical approaches to parental participation, like the emphasis on grassroots participation in many

708 (1994) (finding low voter turnout, small numbers of parents running for councils, poor training and problematic teacher participation in initial phase of implementation of Kentucky SBM plan); Michelle Fine, *[A]parent Involvement: Reflections on Parents, Power and Urban Public Schools*, 94 TEACHERS COLL. REC. 682, 694-96 (1993) (noting that in Philadelphia's SBM schools, parents find their "input is trivialized," and that "school-based councils feel 'empowered' only to determine what will be cut"); cf. Jane L. David, *Restructuring in Progress: Lessons from Pioneering Districts*, in RESTRUCTURING SCHOOLS: THE NEXT GENERATION, *supra* note 10, at 209, 222 (describing initial positive developments in three school districts); Jane L. David, *Synthesis of Research on School-Based Management*, EDUC. LEADERSHIP, May 1989, at 50-51 (claiming that "research studies find a range of positive effects from increased teacher satisfaction and professionalism to new arrangements and practices within schools," but noting that such studies "apply to districts with decentralized systems whether or not they carry the [SBM] label").

23. SEYMOUR B. SARASON, *THE PREDICTABLE FAILURE OF EDUCATIONAL REFORM: CAN WE CHANGE COURSE BEFORE IT'S TOO LATE* (1990) [hereinafter PREDICTABLE FAILURE]. Sarason reported as follows on a series of conversations regarding educational reform that he had with numerous people at all levels of the educational hierarchy and university faculties:

. . . what many of these people were saying in private, face-to-face interchange was different from what they were saying publicly. (That was as true for me as it was for them.) And these people were saying clearly that the efforts to improve educational outcomes had been and would be failures. Their reasons were by no means uniform; the only thing on which they agreed was that none of the efforts of which they had been part to improve education generally had any positive effects. Several of them had spent decades spearheading educational reforms.

Id. at 11.

24. *Id.* at 70.

25. SEYMOUR B. SARASON, *PARENTAL INVOLVEMENT AND THE POLITICAL PRINCIPLE* (1995) [hereinafter PARENTAL INVOLVEMENT]. The degree of parent participation that Sarason contemplates goes beyond that permitted by most SBM schemes, which limit the decision-making authority of school-based councils and tend to weigh participation heavily in favor of teachers and other school personnel.

26. PREDICTABLE FAILURE, *supra* note 23, at 61.

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SBM schemes,²⁷ constitutes an attempt to revitalize citizen involvement in educational decision-making at the local level. This is an approach that has always been a central aspect of the American educational system, which emerged out of the participatory democracy practices of the early colonies.²⁸ In modern times, American schools, despite increasing state and federal control are still perceived as largely locally governed and subject to extensive citizen control.²⁹ In reality, however, little effective citizen participation appears to occur. Both the "quantity and quality of citizen participation are low" as few Americans avail themselves of the opportunity to influence local school district agendas.³⁰

How can this disparity between the rhetoric and the practice of citizen participation be explained? One answer is that the image of local school governance is overly historical and nostalgic: it overlooks significant centralizing developments implemented by reformers to promote higher quality education,³¹ such as the consolidation of small school districts into larger central school districts which began in the nineteenth century,³² the profes-

27. The need for extensive organizational changes that permit stakeholders at the local level to have "power to influence decisions about work processes, organizational practices, policies and strategies" is emphasized in Susan A. Mohrman, *High Involvement Management in the Private Sector*, in *SCHOOL BASED MANAGEMENT: ORGANIZING FOR HIGH PERFORMANCE* 30 (Susan A. Mohrman & Priscilla Wohlstetter & Associates eds., 1994). Arguing for the application of high involvement management techniques from private industry such as "quality circles" and other types of participation groups, the editors stress that SBM must be seen as a challenge of "organizational design for high performance," and not merely an issue of governance. *Id.* at 4.

28. In colonial New England, committees of selectmen were appointed by colonial town meetings to study and supervise the town schools. In time, these communities separated out from the town government and became distinct governing bodies. Other states adopted this system of educational governance which eventually became the predominant pattern throughout the United States, except for in the South where the basic unit of school governance, being closely tied to the organization of the church, was the county. Faber, *supra* note 7, at 448. For discussions of the early history of local school boards, see RONALD F. CAMPBELL ET AL., *THE ORGANIZATION AND CONTROL OF AMERICAN SCHOOLS* 110-24 (1990); EDWIN G. DEXTER, *A HISTORY OF EDUCATION IN THE UNITED STATES* 182-206 (1904).

29. The United States Supreme Court has noted in this regard that: "In an era that has witnessed a consistent trend toward centralization of the functions of government, local sharing of responsibility for public education has survived . . . direct control over decisions vitally affecting the education of one's children is a need that is strongly felt in our society." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 49 (1973).

30. HARVEY J. TUCKER & L. HARMON ZEIGLER, *PROFESSIONALS VERSUS THE PUBLIC: ATTITUDES, COMMUNICATION, AND RESPONSE IN SCHOOL DISTRICTS* 229 (1980) (noting that only a "small minority of citizens vote in school district elections and attend public meetings"). Tucker and Zeigler's conclusions were based on extensive analyses of the functioning of twelve school districts of various size and from various geographic areas in the country. See also John M. Evans, *Let Our Parents Run: Removing the Judicial Barriers for Parental Governance of Local Schools*, 19 *HASTINGS CONST. L.Q.* 963, 964 (1992) ("[L]ocal school reform does not empower those who have the most important stake in improving education—the parents.").

31. See generally PAUL E. PETERSON, *THE POLITICS OF SCHOOL REFORM 1870-1940* (1985); DIANE RAVITCH, *THE GREAT SCHOOL WARS: NEW YORK CITY, 1805-1973* (1974); DAVID B. TYACK, *THE ONE BEST SYSTEM: A HISTORY OF AMERICAN URBAN EDUCATION* (1974).

32. Consolidation of school districts has reduced the number of school districts in the continental United States from 127,531 in 1930 to 12,000 in 1993, and the estimated number of school board members from 765,186 to 72,000 during that time. R. FLINCHBAUGH, *THE 21ST CENTURY BOARD OF EDUCATION* 1-2 (1993).

nalization reforms that took hold at the beginning of the twentieth century,³³ and the growth of teacher unions in the 1960s.³⁴

On the other hand, these centralizing and bureaucratizing trends have repeatedly been countered by renewed citizen participation initiatives. Thus, the professionalization movement of the early twentieth century was followed by the progressive movement of the 1930s and 1940s led by John Dewey and his followers, which sought to promote "democracy in the schools" and relate life in the schools "to the life in the community around it."³⁵ An even more explicit call for a return to full participatory democracy was made by political activists in the 1960s and 1970s, who advocated community control and school decentralization,³⁶ and dramatically changed the educational governance structure in cities like New York and Detroit in their wake.³⁷ More generally, the "Great Society" initiatives of the Johnson Administration promoted the active involvement of community organizations in the management of its anti-poverty and education programs. Statutes such as Title I of the 1965 Elementary and Secondary Education Act required extensive consultation by educational planners with parent committees, and the proliferation of requirements for public hearings and open meetings.³⁸

These statutory initiatives did not, however, result in a lasting increase in meaningful citizen participation in education. Generally speaking, the statutory requirements were implemented in narrowly procedural or technical ways—as a means of complying with the law or of granting necessary concessions to organized interests, rather than as an expression of fundamental democratic values.³⁹ Mandated councils have tended to be run by small, self-perpetuating

33. The professionalization reforms were initiated by the academic leaders who had established new teacher training institutions such as Teachers' College at Columbia University.

34. See Raymond E. Callahan, *The American Board of Education, 1789-1960*, in UNDERSTANDING SCHOOL BOARDS 19, 20 (Peter J. Cistone ed., 1975) (noting the link between New York City teacher strikes of the 1960s and loss of power by school boards).

35. DIANE RAVITCH, *THE TROUBLED CRUSADE: AMERICAN EDUCATION, 1945-1980*, at 44 (1983); see also JOHN DEWEY, *DEMOCRACY AND EDUCATION: AN INTRODUCTION TO THE PHILOSOPHY OF EDUCATION* (1968); JOHN DEWEY, *THE SCHOOL AND SOCIETY* (1980).

36. David K. Wiles, *Community Control, Decentralization, and School Consolidation: The Impact on the School Board*, in UNDERSTANDING SCHOOL BOARDS, *supra* note 34, at 221.

37. *Id.*

38. It has been estimated that 80% of federal grant programs adopted during that era had citizen participation requirements. ROBERT W. KWEIT & MARY G. KWEIT, *IMPLEMENTING CITIZEN PARTICIPATION IN A BUREAUCRATIC SOCIETY: A CONTINGENCY APPROACH* 6 (1981). Kweit and Kweit related the growth of citizens' participation initiatives at this time to the demise in the role of political parties, the increased influence of special interest groups and "a consistent increase in concern with the policy implementation agencies of government." *Id.* at 2.

39. Daniel J. Fiorino, *Environmental Risk and Democratic Process: A Critical Review*, 14 COLO. J. ENVTL. L. 501, 539 (1989); see also SUSAN S. FAINSTEIN & NORMAN I. FAINSTEIN, *Citizen Participation in Local Government*, in PUBLIC POLICY ACROSS STATES AND COMMUNITIES 234 (Dennis R. Judd ed., 1985) (arguing that in the late 1970s citizen participation mechanisms "became part of the standard operating procedures whereby municipal governments routinely gained information and engineered consent").

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groups which are not representative of the full parent body;⁴⁰ agendas tend to be defined by school professionals;⁴¹ and pursuit of particular interests, rather than broad communal decision-making, seems to occur at most meetings.⁴²

The lack of effective citizen participation is related to a marked change in the role of elected school boards. In contrast to their traditional image as representative bodies that formulate policies reflective of broad community concerns, school boards today are seen as being "factious and increasingly politicized,"⁴³ suffering from a lack of consistent leadership resulting from tremendous board member and superintendent turnover,⁴⁴ and tending to concern themselves with "trivia."⁴⁵ Boards appear to have abandoned their role as community trustees and now organize around narrow interests which compete to influence policy and try to deflect initiatives adverse to their special interests.

In sum, despite its origins in the civil right movement and its ideological resonance with the mythology of American education, the contemporary citizens' participation movement has not altered power relations in a way that gives citizens meaningful involvement. On the contrary, the operation of statutorily mandated parent councils and of the elected school boards

40. There has been a clear tendency for higher socioeconomic groups to dominate the citizen advisory councils and other forums for citizen participation. See Edward P. Morgan, *Technocratic Versus Democratic Options for Educational Policy*, in *CITIZEN PARTICIPATION IN PUBLIC DECISION-MAKING* 177, 187 (Jack Desario & Stuart Langton eds., 1987); see also LESTER W. MILBRATH, *POLITICAL PARTICIPATION* (1965); SIDNEY VERBA & NORMAN H. NIE, *PARTICIPATION IN AMERICA: POLITICAL DEMOCRACY AND SOCIAL EQUALITY* (1972).

41. MARILYN GITTELL, *LIMITS TO CITIZEN PARTICIPATION: THE DECLINE OF COMMUNITY ORGANIZATIONS* 242 (1980). Gittell also notes: "This dependent relationship with the schools deters organizations from becoming involved with substantive school issues. Mandated organizations legitimate official school policy. . . . Contact with this type of organization for most people does not provide an exercise in the democratic practice of decision-making."

42. "While many groups may be represented, each is usually playing an advocacy role, and trade-offs between groups are usually not considered." KWEIT & KWEIT, *supra* note 38, at 30.

43. Lynn Olson, *School-Chief Woes Spur Call for Change in Big-City Boards*, *EDUC. WEEK*, Jan. 30, 1991, at 1. Olson attributes much of the shift to a trend toward ward-based, rather than at-large elections — often stirred by demands of minority or unrepresented groups. The result is that board members see themselves as being responsible only for "their particular group or constituency," and consensus-building and conflict resolution do not occur. See also TWENTIETH CENTURY FUND TASK FORCE ON SCHOOL GOVERNANCE, *FACING THE CHALLENGE* (1992) (calling for creation of local educational policy boards that would limit their role to broad, district-wide policy concerns rather than day-to-day administrative and political matters); Oliver S. Brown et al., *Urban C.E.O.'s Untangling the Governance Knot*, *EDUC. WEEK*, Mar. 13, 1991, at 38 (advocating corporate model in which the board sets broad comprehensive educational strategy and appoints superintendent as C.E.O. to carry it out); Jacqueline P. Danzberger, *Governing the Nation's Schools: The Case for Restructuring Local School Boards*, 75 *PHI DELTA KAPPAN* 367 (1994); Phillip C. Schlechty, *Deciding the Fate of Local Control*, *AM. SCH. BOARD J.*, Nov. 1992, at 27 (arguing that interest group politics and bureaucratic strictures cause system gridlock).

44. Lewis W. Finch, *A Need for Consistent Leadership*, *SCH. ADMIN.*, Feb. 1993, at 12. According to Michael D. Usdan, President of the Institute for Educational Leadership, "the turnover rate for board members nationwide is now approaching 25%, with many members only serving one term." Olson, *supra* note 43, at 16.

45. Anne C. Lewis, *Presidential Politics and the Schools*, 69 *PHI DELTA KAPPAN* 324 (1988).

themselves indicate that the goal of effective communal decision-making focused on an articulated and accepted sense of the common good remains elusive.

C. *Values Confrontations*

A major reason for the impasse in achieving meaningful education reform is that in recent decades the values consensus which many local American public school communities arguably forged in the nineteenth century has disintegrated.⁴⁶ Schools today have difficulty addressing substantive values issues because modern school districts bring together a range of diversity in ideas and in student populations that did not exist in—or were excluded from⁴⁷—nineteenth-century American schools. In contrast to the values consensus reflected in nineteenth-century school curricula, twentieth-century schools are marked by pervasive values clashes, resulting from an ethic of rights-based individualism and ethnic group assertiveness:

An old consensus which established non-denominational and non-dogmatic Protestantism as the country's dominant value system, has broken down under the weight of real social diversity Classroom teachers feel these conflicts keenly in their efforts to deal with questions of value and moral choice in this pluralistic context. Even those who teach in relatively homogeneous classrooms . . . must ask how they can treat the variety of cultural heritages, values and moral expectations encountered in daily experience without encouraging either amoral indifference or aggressive zeal.⁴⁸

Values clashes are behind many of the power conflicts that inhibit effective school reform.⁴⁹ A recent study of educational reform conducted by the Public Agenda Foundation in four "average to good" school districts in various parts of the country concluded that:

In each district, what started as a good-faith effort to work together on school reforms became a tug of war over turf. We observed poor communication,

46. For an historical overview of the socialization function of American schools and the values consensus achieved by the nineteenth-century common school movement, see Michael A. Rebell, *Schools, Values, and the Courts*, 7 YALE L. & POL'Y REV. 275, 278-82 (1989) [hereinafter *Schools, Values, and the Courts*].

47. Although the leaders of the common school movement thought that their "natural theology" approach to religious values would satisfy all sects, both Orthodox Protestants and Catholics strongly objected. When attempts to negotiate methods that would allow public schools with Catholic majorities to assert their own religious perspectives failed, Catholic leaders decided to establish a separate parochial school system. See RAVITCH, *THE GREAT SCHOOL WARS*, *supra* note 31, at 27-28; DAVID B. TYACK, *TURNING POINTS IN AMERICAN HISTORY* 90-91 (1967).

48. Robin W. Lovin, *The School and the Articulation of Values*, 96 AM. J. OF EDUC. 143 (1988).

49. See PARENTAL INVOLVEMENT, *supra* note 25, at 28 (suggesting that power conflicts are often undiscussed or dealt with gingerly); Larry Cuban, *Why Do Some Reforms Persist?*, 24 EDUC. ADMIN. Q. 329 (1988) (arguing that repetition of educational reforms reflects persistent dilemmas involving hard choices between conflicting values).

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widespread suspicion and outright anger among the factions. Parochialism prevailed. Because this pattern of behavior was so consistent in all four of these diverse school districts we can only conclude that it was not the individuals but something about the system itself that encouraged conflict, not cooperation.⁵⁰

Apprehension about conflict resulting from values clashes induces many schools to avoid taking stands on controversial issues. As one principal put it: "Schools cannot impose duties on the students. Students come from different backgrounds."⁵¹ The result of this value-neutral approach to education, according to some critics, is that the schools have become "bland, homogenized, ethically numb In this marketplace of ideas, the shelves are stocked mostly with pabulum."⁵²

Aware of the difficulty of teaching values in a heterogeneous setting, but recognizing nonetheless that "schools cannot be ethical bystanders at a time when our society is in deep moral trouble,"⁵³ educators in recent years have brought a number of new approaches to values education into the classroom. The three primary techniques implemented to date have been values clarification,⁵⁴ cognitive moral development,⁵⁵ and character education.⁵⁶ Each of these approaches has spawned extensive controversies among educators.⁵⁷ The first two have been questioned on pedagogic grounds because of their failure to articulate a clear set of values beyond individual preferences. Character education does attempt to inculcate substantive societal values, and in many situations it succeeds in strengthening adherence to broadly accepted values like honesty, tolerance, industry, and respect. Character educators do not generally, however, probe the deeper, often controversial dimensions of these seemingly universal values, nor do they tend to consider how to address situations of value conflict.⁵⁸ All three of these approaches fail to address directly the issue

50. PUBLIC AGENDA FOUNDATION, *DIVIDED WITHIN, BESIEGED WITHOUT: THE POLITICS OF EDUCATION IN FOUR AMERICAN SCHOOL DISTRICTS* iv (1993).

51. Kathleen K. Townsend, *Not Just Read and Write, but Right and Wrong*, WASH. MONTHLY, Jan. 1990, at 30.

52. Stephen Arons, *The Myths of Value-Neutral Schooling*, EDUC. WEEK, Nov. 7, 1984, at 24.

53. THOMAS LICKONA, *EDUCATING FOR CHARACTER: HOW OUR SCHOOLS CAN TEACH RESPECT AND RESPONSIBILITY* 5 (1991).

54. See, e.g., LOUIS E. RATHS ET AL., *VALUES AND TEACHING: WORKING WITH VALUES IN THE CLASSROOM* (1966).

55. See, e.g., LAWRENCE KOHLBERG, *THE PSYCHOLOGY OF MORAL DEVELOPMENT* (1984).

56. See, e.g., Edward A. Wynne, *The Great Tradition in Education: Transmitting Moral Values*, EDUC. LEADERSHIP, Dec. 1985/Jan. 1986, at 4; WILLIAM KILPATRICK, *WHY JOHNNY CAN'T TELL RIGHT FROM WRONG* (1992).

57. A more detailed discussion of these three techniques and the controversies they have engendered is contained in Rebell, *Schools, Values, and the Courts*, *supra* note 46, at 284-89.

58. Some character education programs do, however, include community involvement techniques similar to the dialogic approaches being advocated in this Article in initiating projects in new communities. See, e.g., AMITAI ETZIONI ET AL., *CHARACTER BUILDING FOR A DEMOCRATIC, CIVIL SOCIETY: A COMMUNITARIAN POSITION PAPER* (1994). See also BALTIMORE COUNTY PUBLIC SCHOOLS TASK FORCE ON VALUES EDUCATION AND ETHICAL BEHAVIOR, *HOW TO ESTABLISH A VALUE EDUCATION PROGRAM IN YOUR SCHOOL: A HANDBOOK FOR SCHOOL ADMINISTRATORS* (1991).

of how common values can be articulated and transmitted in a diverse, heterogeneous society which appears to be a fundamental barrier to effective school reform.

D. *Judicial Interventions*

The combination of strongly perceived needs for educational reform and extensive values clashes in the schools has caused parents and other citizens increasingly to look to the courts for solutions to educational controversies. In recent years, in addition to the desegregation initiatives spawned by *Brown v. Board of Education*,⁵⁹ the courts' docket of school cases has encompassed such matters as selection of library books,⁶⁰ student discipline,⁶¹ academic and athletic opportunities for female students,⁶² mainstreaming or inclusion programs for students with disabilities,⁶³ bilingual/bicultural programming,⁶⁴ equalization of state aid allocations,⁶⁵ meetings of religious clubs,⁶⁶ and the distribution of condoms in high schools.⁶⁷ The explosion in litigation involving children and schooling has been dramatic: during the decade from 1977 to 1986, there were 2605 education cases in the federal courts, compared with 729 in the decade from 1957 to 1966, and 67 in the decade from 1927 to 1936.⁶⁸

The courts' involvement has spawned substantial controversy. Initially, the main concern was with the legitimacy of the courts' taking on responsibilities which some critics thought belonged more properly to the legislative or executive branches.⁶⁹ In recent years, however, the courts' activist role has become widely accepted, as the concepts of legal entitlement and rights

59. 347 U.S. 483 (1954).

60. See, e.g., *Board of Educ., Island Trees Union Sch. Dist. No. 26, v. Pico*, 457 U.S. 853 (1982).

61. See, e.g., *Goss v. Lopez*, 419 U.S. 565 (1975).

62. See, e.g., *Vorcheimer v. Sch. Dist. of Philadelphia*, 532 F.2d 880 (3d Cir. 1976), *aff'd by an equally divided Court*, 430 U.S. 703 (1977); *Force v. Pierce City R-VI Sch. Dist.*, 570 F. Supp. 1020 (W.D. Mo. 1983).

63. See, e.g., *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036 (5th Cir. 1989); *Oberti v. Board of Educ.*, 995 F.2d 1204 (3d Cir. 1993).

64. See, e.g., *Castaneda v. Pickard*, 648 F.2d 989 (5th Cir. 1981).

65. See, e.g., *Abbott v. Burke*, 575 A.2d 359 (N.J. 1990); *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186 (Ky. 1989).

66. See, e.g., *Bender v. Williamsport Area Sch. Dist.*, 741 F.2d 538 (3d Cir. 1984), *vacated*, 475 U.S. 534 (1986).

67. See, e.g., *Alfonso v. Fernandez*, 606 N.Y.S.2d 259 (N.Y. App. Div. 1993).

68. Perry A. Zirkel & Sharon N. Richardson, *The Explosion in Educational Litigation*, 53 EDUC. L. RPT. 767 (1989).

69. See, e.g., Nathan A. Glazer, *Towards An Imperial Judiciary?*, PUB. INTEREST, Fall 1975, at 104; see also RAOUL BERGER, *GOVERNMENT BY JUDICIARY* (1977); Robert F. Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661 (1978). A detailed discussion of the views of critics and defenders of judicial activism is set forth in Chapter One of MICHAEL A. REBELL AND ARTHUR L. BLOCK, *EDUCATIONAL POLICY MAKING AND THE COURTS: AN EMPIRICAL STUDY OF JUDICIAL ACTIVISM* (1982) [hereinafter EPAC].

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assertion have become central to the American political culture.⁷⁰ Conservatives and liberals alike now look to the courts for endorsements of their educational reform agendas.⁷¹

Contemporary concerns about judicial intervention have tended to focus on the results of the courts' involvement. Simply stated, it is not clear that judicial intervention has resulted in meaningful reform. For example, in a recent survey, almost sixty percent of a group of attorneys involved in desegregation litigation expressed general dissatisfaction with the results of litigation, and almost half of the plaintiffs' attorneys expressed frustration with the results in their own cases.⁷² Some educators also claim that recent judicial involvement in educational affairs has become so extensive that it has "legalized the schools"⁷³ and is "frustrating the schools' educational goals."⁷⁴ Although

70. See, e.g., LAWRENCE M. FRIEDMAN, *TOTAL JUSTICE* (1985); JETHRO K. LIEBERMAN, *THE LITIGIOUS SOCIETY* 112-46 (1981). For a discussion of dramatic changes in the practices and procedures of the federal courts that have accompanied these trends in the political culture, see Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

71. Many mainstream educational organizations, some of whose members had in the past denounced judicial activism, now invoke legal rights and legal procedures as a matter of course. See, e.g., NATIONAL COUNCIL OF CHIEF STATE SCHOOL ADMINISTRATORS, *ELEMENTS OF A MODEL STATUTE TO PROVIDE EDUCATIONAL ENTITLEMENTS FOR AT RISK STUDENTS* (1987). Congress and the state legislatures also promote increasing court involvement in educational affairs by enacting statutes that establish judicially enforceable accountability standards or that explicitly require judicial oversight of administrative initiatives. See, e.g., The Individuals with Disabilities Education Act, 20 U.S.C. § 1415(e)(2) (1994) (providing choice of state or federal judicial review for evaluation or placement decisions affecting students with disabilities); KY. REV. STAT. ANN. § 158.685 (Michie/Bobbs-Merrill 1994); MASS. GEN. LAWS ANN. ch. 71 § 38G (West 1982) (promulgating statewide educational performance standards). cf. Goals 2000, Educate America Act, 20 U.S.C. § 5898 (1994) (requiring states to enact "Opportunity to Learn Standards," but stating that such standards may not be used to mandate equalized per pupil spending).

72. Paul L. Tractenberg, *The View from the Bar: An Examination of the Litigator's Role in Shaping Educational Remedies*, in *JUSTICE AND SCHOOL SYSTEMS* 390, 406-07 (Barbara Flicker ed., 1990); see also DORIS FINE, *WHEN LEADERSHIP FAILS: DESEGREGATION AND DEMORALIZATION IN THE SAN FRANCISCO SCHOOLS* 140 (1986) (concluding that three major judicial interventions into affairs of the San Francisco School District constituted "pyrrhic outcomes"). For other critical case study analyses of the courts' role, see, e.g., DONALD L. HOROWITZ, *THE COURTS AND SOCIAL POLICY* (1977); HOWARD I. KALODNER & JAMES J. FISHMAN, *LIMITS OF JUSTICE: THE COURTS' ROLE IN SCHOOL DESEGREGATION* (1978); JEREMY RABKIN, *JUDICIAL COMPULSIONS: HOW PUBLIC LAW DISTORTS PUBLIC POLICY* (1989).

73. ARTHUR E. WISE, *LEGISLATED LEARNING: THE BUREAUCRATIZATION OF THE AMERICAN CLASSROOM* 118 (1979). Some commentators take an opposite tack, arguing that even epochal Supreme Court decisions like *Brown v. Board of Education* have had little impact because the reforms they mandated were actually devised and implemented by the actions of other political institutions. See, e.g., GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991); see also CHARLES A. JOHNSON & BRADLEY C. CANON, *JUDICIAL POLICIES: IMPLEMENTATION AND IMPACT* (1984). Rosenberg's emphasis on the importance of legislative and executive follow-up to major Supreme Court decisions is insightful, but he neglects the critical values-setting role of major Supreme Court pronouncements, and the interplay of judicial, legislative, and executive actions in institutional reforms. See MICHAEL A. REBELL & ARTHUR R. BLOCK, *EQUALITY AND EDUCATION: FEDERAL CIVIL RIGHTS ENFORCEMENT IN THE NEW YORK CITY SCHOOL SYSTEM* (1985); Michael A. Rebell & Anne W. Murdaugh, *National Values and Community Values Part II: Equal Educational Opportunity for Limited English Proficient Students*, 21 J. L. & EDUC. 335 (1992).

74. JOEL HENNING ET AL., *MANDATE FOR CHANGE: THE IMPACT OF LAW ON EDUCATIONAL INNOVATION* 231 (1979); see also David Neal & David L. Kirp, *The Allure of Legalization*

many of these criticisms seem overstated,⁷⁵ especially since they omit a comparative institutional perspective on the functioning of the executive and legislative branches at both the state and federal levels,⁷⁶ it is clear that court involvement rarely provides a fully satisfactory solution to complex educational controversies.

Courts can clarify principles, marshal resources, and compel compliance with stated goals, but they lack the educational expertise and the staff resources to monitor closely implementation of systemic reforms. In order to implement their remedial decrees, they frequently solicit the active participation and resources of the parties and other affected institutions and individuals.⁷⁷ The fact that judges understand the need to use the resources of the parties and other actors does not, however, mean that they are currently using these resources in the most appropriate and effective manner. Professor Susan Sturm, after analyzing judicial remedial actions in prison reform and other institutional contexts, concluded that "courts frequently adopt approaches that are not well-suited to . . . formulating and implementing a remedy."⁷⁸ Arguing that the unique demands of the remedial phase of institutional reform litigation require more attention, she posits a need for "a coherent normative theory of public

Reconsidered: The Case of Special Education, in *SCHOOL DAYS, RULE DAYS: THE LEGALIZATION AND REGULATION OF EDUCATION* 343, 344 (David L. Kirp & Donald N. Jensen eds., 1986).

75. Overall, it seems fair to conclude that the case studies "suggest a richer, more complicated picture, one that provides ammunition for all sides of the debate over judicial competence." ROBERT H. MNOOKIN, *IN THE INTEREST OF CHILDREN: ADVOCACY, LAW REFORM, AND PUBLIC POLICY* 517 (1985).

76. See REBELL & BLOCK, *EQUALITY AND EDUCATION*, *supra* note 73, ch. 9 (comparing the performance of courts, Congress, and the federal Office of Civil Rights in school based civil rights activities); see also Robert A. Kagan, *Regulating Business, Regulating Schools: The Problem of Regulatory Unreasonableness*, in *SCHOOL DAYS, RULE DAYS* 64, 65 (David L. Kirp & Donald N. Jensen eds., 1986) (arguing that a broad regulatory environment and not judicial activism causes "legalization"); Ann Swidler, *The Culture of Policy: Aggregate Versus Individualist Thinking about the Regulation of Education*, *SCHOOL DAYS, RULE DAYS* 91, 96 ("Legislators just want to know 'what works,' and few administrators have a mandate to think comprehensively about education.").

77. An empirical study of court intervention in 65 education cases, conducted by one of the present authors, concluded in regard to the implementation of remedies that

[i]n those cases where extensive reform decrees were issued, defendants or relevant public agencies participated substantially in the formulation of the policy content of the decree. We found only one clear instance of a judge, alone, drafting an extensive reform decree. As a practical matter, this participation meant that the staff resources and other implementation tools of the parties automatically became available to the court. . . .

EPAC, *supra* note 69, at 211. A recent survey of 29 judges who had been involved in desegregation cases largely confirmed these conclusions. When asked how the remedy was devised, 25% of the judges said they devised it alone, 46% worked with the attorneys for the parties, 29% with the parties, 18% with a Master, and 18% with a task force. Barbara Flicker, *The View from the Bench: Judges in Desegregation Cases*, in *JUSTICE AND SCHOOL SYSTEMS* 365, 377-78 (Barbara Flicker ed., 1990).

78. Susan P. Sturm, *Resolving the Remedial Dilemma: Strategies of Judicial Intervention in Prisons*, 138 U. PA. L. REV. 805, 809 (1990) [hereinafter Sturm, *Prisons*]; see also Barry Friedman, *When Rights Encounter Reality: Enforcing Federal Remedies*, 65 S. CAL. L. REV. 735 (1992) (discussing divergence between ideals and reality in implementation of remedies in institutional reform cases); Kent Roach, *The Limits of Corrective Justice and the Potential of Equity in Constitutional Remedies*, 33 ARIZ. L. REV. 859 (1991) (distinguishing between corrective and equitable remedial approaches and urging judges to enhance the "potential of equity").

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remedial process.”⁷⁹

As a first step in this direction, Sturm has proposed a specific model of public remedial decision-making built on three “general process norms”: participation, impartiality, and reasoned decision-making.⁸⁰ She notes, however, that these general process norms need to be shaped and given concrete content in specific settings, since each “particular institutional context presents special demands, limitations and potential for judicial intervention .

. . .”⁸¹

We agree with Sturm that meaningful remedies in complex social policy cases must involve courts in deliberative processes that include broad participation by all affected groups and individuals,⁸² and that fit the needs of the particular institutional context. A remedial decision-making model that is responsive to contemporary needs for education reform must respond to the problems of educational governance, lack of citizen participation, and values clashes. A decision-making process that could meet these needs must encompass institution-building mechanisms for school communities that go beyond resolving an immediate legal dispute. Indeed, an effective remedial model that promotes citizen participation and resolves values clashes would, in many cases, obviate the need for judicial intervention altogether.

79. Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 79 GEO. L.J. 1355, 1358 (1991) [hereinafter Sturm, *Normative Theory*].

80. *Id.*; see also Ralph Cavanagh & Austin Sarat, *Thinking About Courts: Toward and Beyond a Jurisprudence of Judicial Competence*, 14 LAW & SOC'Y REV. 371, 373 (1980) (“Thinking about competence in terms of the ability of courts to reach and enforce decisions misses perhaps their most important function: providing a framework within which parties negotiate and bargain.”); Robert D. Goldstein, *A Swann Song for Remedies: Equitable Relief in the Burger Court*, 13 HARV. C.R.-C.L. L. REV. 1, 72-78 (1978) (calling for emphasis on appropriate process in appellate review of district courts’ exercise of equitable power in fashioning remedies in institutional reform cases).

81. Sturm, *Prisons*, *supra* note 27, at 810; see also Susan P. Sturm, *The Legacy and Future of Corrections Litigation*, 142 U. PA. L. REV. 639, 645 (1993) (“[T]he potential and role of litigation varies in different organizational settings, and . . . it is a mistake to ignore these organizational differences in assessing and planning the future role of litigation.”).

82. Deliberative processes in many current institutional reform litigations involve a limited number of people who do not represent the full community and whose interest in promoting reform is questionable at best:

. . . [I]nstitutional powers of the judiciary usually limit the courts’ selection of who implements the judicial policy, how it is done, and with what resources. Thus, the judiciary is for the most part forced to work with existing implementation groups. To compound the problem, the groups that implement the policies are frequently parties to the decision. If the implementing group loses its case, then it must immediately execute a decision against which it fought for weeks, months or even years.

JOHNSON & CANON, *supra* note 73, at 79.

II. A PROPOSED SOLUTION: THE COMMUNITY ENGAGEMENT DIALOGIC (CED) MODEL

A. *Community and Public Dialogue*

A successful conflict resolution mechanism must involve a substantial degree of institution-building.⁸³ A concept of community that relates realistically to contemporary problems cannot, of course, replicate a nineteenth century consensus model.⁸⁴ Substantive values can only be harnessed to promote educational reform in an individualistic, multicultural society through a communal structure that embraces rights assertion and cultural diversity. This means that in promoting the common good, ways must also be found to respect important individual rights.

Many contemporary communitarian theorists believe that such a reconciliation of communal⁸⁵ and individual goals can be achieved through "public dialogue"⁸⁶ and a "dialogic community."⁸⁷ Empirical sociological research

83. "A very important—probably the most important—segment of a school's culture is the degree to which all its inhabitants . . . experience a sense of community." THOMAS B. GREGORY & GERALD R. SMITH, *HIGH SCHOOLS AS COMMUNITIES: THE SMALL SCHOOL RECONSIDERED* 50 (1987); see also HENIG, *supra* note 7, at 45 ("[S]ome of the public's receptivity to the claim that there is an education crisis similarly reflects undifferentiated concerns about unraveling social values.").

84. Historically, "community" connoted an organically interrelated social setting, marked by intimacy, social cohesion, and continuity, in which people shared their entire existence. See, e.g., CLARKE E. COCHRAN, *CHARACTER, COMMUNITY, AND POLITICS* 36-38 (1982); PHILIP SELZNICK, *THE MORAL COMMONWEALTH: SOCIAL THEORY AND THE PROMISE OF COMMUNITY* 358-59 (1992); FERDINAND TONNIES, *COMMUNITY AND SOCIETY* (Charles P. Loomis trans., 1957). Modern Western culture is to a large extent a reaction against the constraints that communal structures imposed on free-spirited intellectual exploration and wide-ranging economic activity. See generally CHRISTOPHER LASCH, *THE TRUE AND ONLY HEAVEN: PROGRESS AND ITS CRITICS* 120-67 (1991); ROBERT NISBET, *TWILIGHT OF AUTHORITY* (1975).

85. Contemporary sociologists have modified traditional definitions of community to include not only the traditional, all-encompassing communal structures, but also partial communities, layers of communities, and "crisscrossing" communities. These latter communities allow people to develop significant shared experiences with others, but on limited, variable, and intersecting bases. See ETZIONI, *supra* note 58, at 32; see also ROBERT B. FOWLER, *THE DANCE WITH COMMUNITY: THE CONTEMPORARY DEBATE IN AMERICAN POLITICAL THOUGHT* 142-61 (1991) (articulating notion of "existential community" which inspires individuals to work together in concrete ways at local level to achieve their ideals).

86. See ROBERT N. BELLAH ET AL., *HABITS OF THE HEART* 218 (1985). Civic Republicanism, which began as a movement to emphasize the importance of classical republican concepts, such as participatory democracy, to the drafters of the Constitution, see, e.g., GARRY WILLS, *INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE* (1978); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787* (1969), has recently developed into a broader political-legal perspective that "embraces an ongoing deliberative process . . . to arrive at the public good." Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1528 (1992); see also Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988) (arguing that civic republican constitutional theory can inspire stronger protection of individual rights than do competing theories); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988) (contending that republican ideas suggest reformation of various current areas of modern public law).

87. Amy Gutmann & Dennis Thompson, *Moral Conflict and Political Consensus*, 101 ETHICS 64, 86-87 (1990) (describing public deliberation processes); Joel F. Handler, *Dependent People, the State, and the Modern/Postmodern Search for the Dialogic Community*, 35 UCLA L. REV. 999 (1988);

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confirms that "when citizens are engaged in thinking about the whole, they find their conceptions of their interests broadened, and their commitment to the search for common good deepens."⁸⁸ Open, honest interchange leads to new understandings, not only of the opponent's position, but also of one's own.⁸⁹ People often discover that competing doctrines contain the same basic values, but differ only in the weights and priorities that they give to certain aspects of these values.⁹⁰ Even if a full consensus is not achieved, well-organized community dialogues often result in people finding that they agree on many more issues or aspects of issues than any of them had originally understood. Where disagreement remains, participants often formulate working positions that all can endorse, or at least accept, without feeling that they have abandoned their own basic beliefs.⁹¹

The critical question, therefore, seems to be how to create an institutional structure that will promote this potential. As Amitai Etzioni has suggested, the question is not only how rational people are, but also how rational are the social collectives in which they function.⁹² Few of the contemporary communitarian thinkers, however, confront the key question of how the kind of dialogic community processes which they advocate can be implemented and sustained in practice. We intend to do so by proposing a conflict resolution model that will promote public dialogue to resolve pressing educational controversies.

The local school district remains one of the few places in contemporary America where individual citizens can deliberate face-to-face on issues of profound public significance,⁹³ and thus provides a logical locus for the

Christopher Lasch, *The Communitarian Critique of Liberalism*, in *COMMUNITY IN AMERICA: THE CHALLENGE OF HABITS OF THE HEART* 173, 178 (Charles H. Reynolds & Ralph V. Norman eds., 1988) (stating that social solidarity "rests on public conversation").

88. ROBERT N. BELLAH ET AL., *THE GOOD SOCIETY* 135 (1991); see, e.g., JEFFREY M. BERRY ET AL., *THE REBIRTH OF URBAN DEMOCRACY* 210 (1993) (finding through study of community decision-making in five American cities that citizen participation builds consensus).

89. See Martha Minow, *Forward: Justice Engendered*, 101 HARV. L. REV. 10, 72 (1987) (discussing need to take perspective of person you have called "different").

90. ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 42 (2d ed. 1991) ("In many negotiations . . . a close examination of the underlying interests will reveal the existence of many more interests that are shared or compatible than ones that are opposed.").

91. See Seidenfeld, *supra* note 86, at 1539 ("The process of deliberation . . . frequently enables society to come close [to consensus] in the sense of arriving at a set of principles to which most citizens would agree. Moreover . . . [the] call for persuasion of others as the goal of the deliberative process is likely to discourage adoption of egregiously coercive principles."); SNAUWAERT, *supra* note 21, at 82 ("[D]ialogue is transformative for both the oppressed and the oppressor. Through genuine acts of communication . . . inherent differences between individuals can be bridged and used as a means to solidarity rather than exploitation.").

92. AMITAI ETZIONI, *THE MORAL DIMENSION: TOWARD A NEW ECONOMICS* 186 (1988).

93. "As neighborhoods, churches and even nuclear families have become more ephemeral and less significant in the lives of children in the United States, there are fewer and fewer places where the continuous and close relationships that characterize well-functioning communities can be encountered in our common life." Gregory A. Smith, *Introduction: Schools and the Maintenance of Community*, in *PUBLIC SCHOOLS THAT WORK: CREATING COMMUNITY* 1, 7 (Gregory A. Smith ed., 1993). On the importance of face-to-face interchanges for the functioning of participatory democracy, see BENJAMIN

balancing of individual rights and group decisions. The school setting is institutionally committed to rational discourse and promotes positive ideals.⁹⁴ The significant overlapping consensus⁹⁵ among teachers, parents, and other local citizens of diverse backgrounds on the importance of educating the community's children allows these parties to moderate their personal interests and political differences in the pursuit of transcendent common goals.

An example of the possibilities in this regard is provided by the experience of Curtis Berger, a Columbia Law Professor who served as a special master in a New York City desegregation litigation. Berger described how candid dialogue with concerned African-American parents changed his mind about the integration approach he had been pursuing:

This is one of the ironies about integration of which few whites seem aware. Too many assume that blacks welcome the chance to attend all-white schools and to reside in all-white neighborhoods and that those blacks who break the color barrier gain only benefit in doing so. We do not see the sacrifice involved in leaving congenial neighbors or the emotional trial that often accompanies minority status. In the name of racial desegregation, whites expect blacks to accept permanent minority status; yet few whites are willing to accept that same status for themselves or their children. . . . Social scientists may easily explain this white man's double standard, but it took this session [with black parents] to force me to see it through the black man's eyes.⁹⁶

The possibilities for community-building are being recognized by an increasing number of educators and school board members. The trend toward school-based management reflects new efforts to promote citizen participation by involving parents in policymaking and managerial decisions together with teachers and administrators. Proposals for turning school boards into "local education policy boards" also call for "strategies for improving school operations by convening community forums on major educational policy issues."⁹⁷

R. BARBER, *STRONG DEMOCRACY: PARTICIPATORY DEMOCRACY FOR A NEW AGE* 242-51 (1984); ROBERT N. BELLAH ET AL., *supra* note 86, at 262-63; JANE J. MANSBRIDGE, *BEYOND ADVERSARY DEMOCRACY* 8-22 (1980); Michael Walzer, *Civility and Civic Virtue in Contemporary America*, 41 *SOC. RESEARCH* 593, 610-11 (1974).

94. "Education is always cast as the means whereby citizens of a society learn to live with one another. It always reflects a society's views of what is excellent, worthy, and necessary." Jean Bethke Elshtain, *Democracy and the Politics of Difference*, *RESPONSIVE COMMUNITY*, Spring 1994, at 16.

95. JOHN RAWLS, *POLITICAL LIBERALISM* 133-72 (1993); *see also* MICHAEL J. PERRY, *LOVE AND POWER: THE ROLE OF RELIGION AND MORALITY IN AMERICAN POLITICS* 85 (1991) (arguing that prerequisite for community is "underlying grounds of political judgment . . . which citizens, *qua* members of a judging community, share, and which serve to unite them in dialogue, notwithstanding their (sometimes radical) disagreements").

96. Curtis J. Berger, *Away from the Court House and into the Field: The Odyssey of a Special Master*, 78 *COLUM. L. REV.* 707, 718 (1978); *see also* PARENTAL INVOLVEMENT, *supra* note 25, at 58-59 (recounting personal experiences of changing positions on critical tenure decisions based on departmental dialogues).

97. TWENTIETH CENTURY TASK FORCE REPORT, *supra* note 44, at 10.

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Recognition of the need for community and calls for structural changes in governance mechanisms will not, however, transform the culture of the schools. If deep-rooted value conflicts are to be confronted, and the contemporary culture's orientation to promote particular, rather than public, interests is to be overcome, a systemic mechanism for building a spirit of community in the schools must be put into place.

Alternative dispute resolution (ADR) techniques, which utilize neutral third parties to reach negotiated settlements, provide a useful starting point. ADR techniques are widely used in commercial disputes and, increasingly, with disputes in the public sector.⁹⁸ They seek to reorient relationships among individuals and groups "not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitude and disposition toward one another."⁹⁹

A variety of ADR techniques have also been used in recent years in school-based controversies. For example, one of the authors of this Article served for over six years as a Special Master in Boston's special education class action litigation, *Allen v. Parks*.¹⁰⁰ During that time, the parties negotiated an extensive series of substantial compliance standards and, later, a comprehensive educational plan for reforming the special education system endorsed by both sides. Large school districts such as those in Baltimore County, Maryland, Dayton, Ohio, and Washington, D.C. have brought diverse groups of students, parents, and other citizens together to agree on extensive values education and

98. ADR techniques have been used most extensively in labor/management and individual family disputes. In recent years, innovative ADR techniques have also been used to build consensus on public policy issues and to avoid lengthy, expensive litigation in other situations. The type of disputes which have been resolved range from the siting of public housing, to reducing the level of tensions in racial conflicts, to resolving controversies between governmental agencies. See generally JONATHAN B. MARKS ET AL., *DISPUTE RESOLUTION IN AMERICA: PROGRESS IN EVOLUTION* 36-37 (1984); LINDA R. SINGER, *SETTLING DISPUTES* 131-64 (1990). In addition, some statutes specifically encourage the use of ADR techniques to resolve public sector disputes. See, e.g., Americans with Disabilities Act, 42 U.S.C. § 12212 (West 1993) ("[T]he use of alternative means of dispute resolution . . . is encouraged to resolve disputes arising under this chapter.")

The most extensive public sector mediation efforts have been in the environmental field, where it has been reported that close to 80% of early disputes submitted to mediation resulted in a consensual resolution. SINGER, *supra*, at 142. See generally ALLAN R. TALBOT, *SETTLING THINGS: SIX CASE STUDIES IN ENVIRONMENTAL MEDIATION* (1983). The Environmental Protection Agency, the Federal Aviation Agency, and other federal agencies have also experimented with ADR-type rule-making procedures, in which groups with differing positions on proposed regulations attempt to reach agreement on their content before they are promulgated formally. *Id.* at 145-52.

99. Lon Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305, 325 (1971).

100. A history of the litigation and a discussion of some of the ADR techniques used are discussed in Michael A. Rebell, *Allen v. McDonough: Special Education Reform in Boston*, in *JUSTICE AND SCHOOL SYSTEMS* 70, 70-107 (Barbara Flicker ed., 1990).

school change programs.¹⁰¹ The school districts in Harpersville, New York and Bolivar-Richburg, New York have used ADR techniques to resolve sex education and school district consolidation controversies.¹⁰² In Alabama, plaintiffs, defendants, and representatives of non-party school boards and other interests reached consensus on a far-ranging plan to restructure the entire state educational system through an ADR process facilitated by a court-ordered mediator.¹⁰³

These school-related conflict resolution experiences have typically been *ad hoc* responses to an immediate political crisis or to a judicial mandate. They have utilized a range of techniques and have had varying degrees of success.¹⁰⁴ Those experiences which have proved successful have not, however, generally been replicated within the district or beyond. Thus, although these experiences illustrate the potential for successful use of conflict resolution techniques in education controversies, they also demonstrate the need for a systematic ADR model geared to the schooling context. To meet this need, we propose a school-based Community Engagement Dialogic model consisting of six basic stages: participation, agenda setting, discussion, notification, implementation, and evaluation.

While such a model cannot resolve all educational controversies, it can make a major difference in a wide range of disputes. A community which uses these techniques can both resolve certain immediate problems and create permanent community-building mechanisms that may avoid or limit future conflicts. Where community-generated processes do not succeed, or where a dispute has been brought before the courts for resolution, the CED model in modified form can be implemented by the judge to promote settlement or to devise a lasting, workable remedy.

101. See DAYTON PUBLIC SCHOOLS, THE CHOICE IS TRANSFORMATION: EDUCATION FOR A NEW GENERATION (James A. Williams ed., 1994); DISTRICT OF COLUMBIA PUBLIC SCHOOLS, TOWARD A VALUE-CENTERED COMMUNITY (1989); TASK FORCE ON VALUES EDUCATION AND ETHICAL BEHAVIOR OF THE BALTIMORE COUNTY PUBLIC SCHOOLS, 1984 AND BEYOND: A REAFFIRMATION OF VALUES (1983).

102. These were among the examples discussed by school district representatives participating in the session on Empowering Local Educational Communities conducted by the Center on Values, Education, and the Law at the 1994 Summer Academies of the New York State School Boards Association on July 17 and September 11, 1994.

103. See Alabama Coalition for Equity, Inc. v. Hunt, Nos. CV-90-883-R, CV-91-0117 (Ala. Cir. Ct. Montgomery County filed Apr. 1, 1993), reprinted in Opinion of the Justices No. 338, 624 So. 2d 107, 110 (Ala. 1993), Remedy Order, Alabama Coalition for Equity, Inc. v. Folsom, Nos. CV-90-883-R (Ala. Cir. Ct. Montgomery County, Oct. 22, 1993).

104. The highly-touted Alabama agreement, for example, appears to have broken down in political controversy as the newly-elected Governor has renounced his predecessor's consent to the accord and has even made a motion to the Alabama Supreme Court that claims that the Circuit Court has no subject matter jurisdiction over the issues. 23 SCHOOL LAW NEWS, Mar. 24, 1995, at 3.

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B. *The Voluntarily Initiated CED Model*

The CED model requires the active involvement of a skilled neutral individual to convene, organize, and promote the process. Typically, the third party convener in an ADR process is a facilitator who arranges meetings, moderates the discussion, and assists in the exchange of information. She can also be a mediator who carries out these tasks, and guides the discussion to help the parties develop clearer statements of their positions.¹⁰⁵ In order to be effective, a mediator must be aware of the dynamics of the process, take steps to reduce the level of emotion, and prevent loss of face by one or another party. The mediator may occasionally need to propose new options or new negotiating concepts.¹⁰⁶

Because of the sensitivity of this role, it is generally believed that mediators must act with strict neutrality. In order to retain the trust of the parties, especially when receiving confidential information regarding each side's "bottom line" concerns, the mediator must be perceived as having no preferred position or personal stake in the outcome.¹⁰⁷

Some commentators have argued, however, that the traditional notion of strict neutrality for mediators must be modified in certain public sector consensual dispute resolution situations. Lawrence Susskind, based on his extensive experience with mediation of environmental disputes, advocates a "non-neutral role" for environmental mediators. Instead of accepting as a given the parties' definition of the issues and decisions on who to invite as participants, an environmental mediator, according to Susskind, should ensure that unrepresented groups are included and that spill-over effects on the general public and long-term impacts upon future generations are taken into account.¹⁰⁸

105. See generally LAWRENCE SUSSKIND & JEFFREY CRUIKSHANK, *BREAKING THE IMPASSE: CONSENSUAL APPROACHES TO RESOLVING PUBLIC DISPUTES* 152 (1987); Lawrence Susskind & Connie Ozawa, *Mediated Negotiation in the Public Sector*, 27 AM. BEHAV. SCI. 255, 256 (1983). An arbitrator, the third category of alternate dispute resolution professional, acts in a quasi-judicial capacity. His or her responsibility is to hear the facts and positions of the parties and make a decision which usually is binding on the parties. The roles of the facilitator and arbitrator are often mixed in various forms and combinations in practice. See Howard Ralffa, *The Neutral Analyst: Helping Parties to Reach Better Solutions*, in *NEGOTIATION STRATEGIES FOR MUTUAL GAIN* 14-15 (Lavinia Hall ed., 1993) [hereinafter *NEGOTIATION STRATEGIES*].

106. Barbara Ashley Phillips & Anthony C. Piazza, *The Role of Mediation in Public Interest Disputes*, 34 HAST. L.J. 1231, 1237 (1983) ("The intermediary permits the parties to explore possible resolutions without either party giving up its litigating stance or revealing confidential information to other litigants.").

107. Sometimes, however, a mediator whose biases have been disclosed can still be accepted. See Christopher Honeyman, *Bias and Mediator Ethics*, in *NEGOTIATION THEORY AND PRACTICE* 429 (J. William Breslin & Jeffrey Z. Rubin eds., 1991).

108. Lawrence Susskind, *Environmental Mediation and the Accountability Problem*, 6 VT. L. REV. 1, 44-47 (1981); see also Susskind & Ozawa, *supra* note 105, at 257 (arguing that public sector disputes differ from conventional two-party disputes in that they involve choices with substantial spillover effects).

Critics deem Susskind's approach problematic because it abandons the ethic of strict neutrality and thereby risks undermining the trust that is essential for mediation to succeed.¹⁰⁹ Whatever the validity of these criticisms in the environmental context, they are of less relevance in the educational domain. The issues under consideration and the motivations of the groups and individuals involved in educational policy conflicts differ from the typical participants in environmental disputes.

Educational interest groups consist primarily of teachers, administrators, parents, and students. In collective bargaining and other contexts, each of these will assert vigorously their own personal, economic, or professional concerns.¹¹⁰ Beyond these private interests, however, they share a collective interest in the students' welfare that changes the nature of the discourse and requires "the argument that each participant offers on behalf of his or her favored interpretation of the common good [to] be framed not in terms of private interests, which may diverge from those of the community, but in terms of the interests of the community itself."¹¹¹ Thus, emphasis on public interest concerns by a non-neutral intermediary in the educational context stimulates acknowledgment of an underlying common interest which does not exist in most other public policy dispute settings.

An active, "non-neutral" intermediary is beneficial in school disputes for another reason. It is generally acknowledged that "win-win" dispute resolution situations are achievable when: (1) the stakes are high for producing a mutually satisfactory solution; (2) the interests of both parties are mutually interdependent; (3) the parties are free to cooperate and to engage in joint problem solving; (4) a future positive relationship is important; (5) both parties are

or externalities that often fall on hard-to-represent groups, such as future generations).

Many environmentalists believe that the mediation process promotes co-optation, and they become nervous when big industry embraces it. DOUGLAS J. AMY, *THE POLITICS OF ENVIRONMENTAL MEDIATION* 98 (1987). Others argue that mediation puts individual and minority interests at a substantial disadvantage and lacks the accountability of formal dispute resolution practices. See David Schoenbrod, *Limits and Dangers of Environmental Mediation: A Review Essay*, 58 N.Y.U. L. REV. 1453, 1466-71 (1983) (noting that environmental mediation may disserve the public interest because it bypasses regulatory processes in which the public interest is better aired).

109. Joseph B. Stulberg, *The Theory and Practice of Mediation: A Reply to Professor Susskind*, 6 VT. L. REV. 85 (1981).

110. A variety of business, civic, religious, and other groups should also participate in a CED process. These groups are less likely to have a direct economic or professional interest in the issues being considered. Although they will have differing substantive positions, they will tend to be open to public interest-oriented approaches to the issues. In addition, the broad range of participation in the CED process in-and-of-itself will help provide public interest perspectives.

111. ANTHONY T. KRONMAN, *THE LOST LAWYER* 33 (1993). Singer notes that there is "a community of interest between the disputants [in individual special education mediations]: the education of a child who has needs with which all the parties can sympathize." SINGER, *supra* note 98, at 159. According to Sheldon Hackney, Chairman of the National Endowment for the Humanities, "[t]wo things are required if each of us is to be willing to subordinate our individual self-interests on occasion to the good of the whole: we must feel a part of the whole, and we must see in that whole some moral purpose that is greater than the individual." Sheldon Hackney, *Toward a National Conversation*, RESPONSIVE COMMUNITY, Summer 1994, at 8.

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assertive problem solvers; and (6) the parties are not engaged in a power struggle.¹¹²

The first four of these conditions tend to prevail in most school-based disputes, but the last two typically do not. Not all school people are assertive problem solvers, and controversial values issues often precipitate or are linked to larger power struggles. An ADR model applicable to the school setting must respond to these realities and provide specific mechanisms to insure that all participants have sufficient training and resources to take assertive positions and to avoid power struggles. In many instances, a knowledgeable intermediary can undertake these critical functions.

In sum, the intermediary in educational controversies is well-situated to play a dual role—maintaining strict neutrality in relation to the particular positions of the individual participants, while also taking responsibility to ensure that the public interest is given proper consideration throughout the proceedings. Because the traditional term “mediator” does not accurately describe this unique public-interest-oriented role, we suggest the use of a new name. “Community dialogue organizer” (CDO) describes the individual who plays the central organizing role in a Community Engagement Dialogic process. The individuals selected for this crucial assignment should be both experienced in conflict resolution techniques and knowledgeable about the substantive issues involved in the particular educational controversy.

1. *Participation*

In order to establish the degree of trust necessary to reach substantive decisions on controversial issues, a community dialogue process must be perceived as fair. It must consider and reflect the diverse views of all individuals and groups in the community and assure that majoritarian preferences will not dominate or stifle minority expression or important individual rights.

In the school setting, this means that not only traditional stakeholders (students, parents, teachers, administrators, and school board members), but also representatives of the civic, religious, and business life of the community-at-large should be represented on the panels, working groups, and other mechanisms that carry out the CED process.¹¹³ For example, in a dispute on school discipline codes, participation in a CED process should extend to include religious leaders, police representatives, advocacy groups like the ACLU, and older taxpayers without children. In other words, all individuals

112. See CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* 67 (1986).

113. “Our experience suggests . . . that perceived fairness depends on participation. Those who participate feel that they ‘own’ the agreement, and are therefore more likely to support its implementation.” SUSSKIND & CRUIKSHANK, *supra* note 105, at 27.

and groups who have a personal stake in, or opinions on, how schools should influence the behavior of adolescents should participate.

Assuring full participation by such a range of interested parties is not an easy task, especially in large school districts. The CDO must pro-actively identify the range of diverse views that need to be represented and assure that spokespersons for each of those views are included. Combinations of such techniques as demographic analysis, community surveys, outreach to identifiable organizations, and self-identification should be used. Limited inclusion strategies used in other contexts, such as inviting anyone who is powerful enough to block the agreement to participate,¹¹⁴ would not be sufficient here. In assuring full and fair representation, the CDO must also be sure that all racial, religious, and cultural groups in the school community are fairly represented, particularly those groups that have been excluded or felt excluded from educational policymaking in the past.¹¹⁵ In order to obtain the meaningful participation of all elements of the community, the outreach effort must be accompanied by a well-conceived training component providing participants with basic information about the issues to be discussed and the dialogic process that will be utilized.¹¹⁶

An obvious tension exists between the emphasis in the CED process on active participation by all interested groups and individuals, and the reality that productive discussion may not be possible if the group is too large.¹¹⁷ When dealing with large school districts or complex controversies, it may be necessary to develop representation schemes or to delegate the initial consideration of certain issues to subgroups.¹¹⁸ At an appropriate point each

114. AMY, *supra* note 108, at 134.

115. One method that has been used for undertaking these formidable tasks is to: (1) invite all the obvious, known groups to participate; (2) publicize the community dialogue process through in-school announcements and media ads; and (3) at an initial brainstorming session, ask the participants to identify other groups and individuals who may have been left out in the initial surveys. SUSSKIND & CRUIKSHANK, *supra* note 105, at 103.

116. Effective training may meet the problem for civic republicanism and the dialogic process posed by Anthony Kronman, who notes that the egalitarian thrust of contemporary republicanism overlooks the role in classical republicanism of "excellence of judgment," a trait of Athenian aristocrats difficult to reproduce in a mass democratic setting. See KRONMAN, *supra* note 111, at 35-36.

117. See generally Roger C. Crampton, *The Why, Where, and How of Broadened Public Participation in the Administrative Process*, 60 GEO. L.J. 525, 538 (1972). Indeed, one commentator has argued that fifteen participants is the practical limit for manageable negotiations. Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1, 46 (1982). There is some evidence, however, that having a larger number of parties does not affect the likelihood for successful outcome to a mediation process. G. BINGHAM, *RESOLVING ENVIRONMENTAL DISPUTES: A DECADE OF EXPERIENCE*, quoted in S. GOLDBERG ET AL., *DISPUTE RESOLUTION* 405, 411 (1985); see also *Natural Welfare Rights Org. v. Finch*, 429 F.2d 725, 738-39 (D.C. Cir. 1970) (holding that manageability of hearings with multiple participants should be achieved, not by excluding parties, but by properly controlling proceedings).

118. The representative must simultaneously abide by the group's general mandate and be empowered to negotiate and compromise:

... the delegate, while representing the constituents' mandate, must be given freedom to negotiate and possibly compromise. Negotiation, however, should be shaped by significant

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subgroup or its representatives would bring back to the larger plenary meeting its group's positions or recommendations.¹¹⁹ With extended controversies, provisions must be made to assure continuity in the process.

2. *Agenda Setting*

At the outset, procedural protocols must be established for a successful CED process. These include such matters as when and where meetings will take place, how long they will continue, the order in which participants will speak, whether time limits will be placed on comments, whether minutes will be kept, and whether the CDO will periodically conduct separate *ex parte* meetings with the various parties. Behavioral protocols such as proscribing name-calling or walking away from the table should also be considered. In order to maximize agreement on these issues, the CDO should consider making an initial proposal regarding the procedural protocols and then invite the participants to comment and help shape their final form.

Consideration should also be given at the outset to relationships with the press. Although publicity concerning the progress of the negotiations and the content of a final resolution can be of major significance, premature leaks or one-sided revelations can undermine the entire process. Generally speaking, it is best to establish an understanding that information will be conveyed to the press only with the group's official authorization and through an established process.

Once procedural protocols are established, the agenda should be outlined. The process should begin with issues sufficiently controversial that they engage the participants' attention, but not so highly charged that they cause excessive conflict or result in embedded positions. Meaningful communal dialogues must forthrightly confront the issues that concern people, but must do so in a principled manner that is perceived as being non-partisan.¹²⁰ The aim should not be to achieve an aggregation of all the private interests in the community,

input from constituents, allowing them to be party to the negotiation. If genuine representation is to exist without undermining negotiation, extensive lines of communication among constituents and delegates must be maintained.

SNAUWAERT, *supra* note 21, at 73.

119. In this regard, see the representational scheme being implemented by the Campaign for Fiscal Equity, Inc., discussed *infra* Section III.C.

120. Although uncabined conflict is disruptive of the learning environment, properly directed conflict can act "as a stimulus for establishing new rules, norms, and institutions, thus serving as an agent of socialization." L. COSER, *THE FUNCTIONS OF SOCIAL CONFLICT* 128 (1956). Coser also noted that "by setting free pent-up feelings of hostility, conflicts serve to maintain a relationship." *Id.* at 47-48; see also DEAN G. PRUITT & JEFFREY Z. RUBIN, *SOCIAL CONFLICT: ESCALATION, STALEMATE AND SETTLEMENT* 6 (1986) (arguing that conflict facilitates reconciliation of people's legitimate interests).

but to ensure that appropriate public values are the focus of the discussion.¹²¹

It has been argued that ADR techniques cannot be effective when fundamental values, rather than economic interests, are at stake.¹²² Although cost/benefit compromise is easier to achieve when only economic interests are at issue, more durable consensus-oriented compromises can be achieved in disputes involving values differences when particular values are subordinated to "superordinate goals."¹²³ Properly presented, the mutual desire to promote the educational welfare of the community's children can constitute such a superordinate goal.

After initially emphasizing broad areas of agreement,¹²⁴ the focus should then shift to a balanced discussion of the specific issues in controversy. Briefing papers, written in non-technical language, should set forth objectively the pro and con perspectives on each of the issues, objective research findings where available, and a range of solutions which other communities have adopted. Such background materials provide a common vocabulary and a starting point for the discussions. Because apprehension regarding legal liability often inhibits candid discussion of controversial schooling issues, the background briefing papers should also contain a discussion of the legal mandates applicable to the controversy. Although educators often assume otherwise, court decisions on most educational issues tend to maximize, within broadly stated parameters, the scope for local decision-making in school controversies.

Federal courts, in fact, tend to articulate basic national values related to rights, but leave most other community values to local discretion. On certain constitutional issues such as desegregation and school prayer, for example, the courts have established basic substantive precepts to which all communities must adhere. With other important values issues, such as defining the content of curriculum, supervising student journalism, choosing bilingual/bicultural educational programs, and methods for providing equal educational opportuni-

121. Cf. Cass R. Sunstein, *Deregulation and the Hard Look Doctrine*, 1983 SUP. CT. REV. 177, 183 (discussing tension between pluralistic aggregation of interest and public values perspectives in regard to private group representation in administrative agency decision-making processes); see also RONALD DWORKIN, *LAW'S EMPIRE* 199-201, 211 (1986) (arguing that genuine political community is governed by "common principles, not just by rules hammered out in political compromise").

122. See, e.g., Phillips & Piazza, *supra* note 106, at 1236 (arguing that many public interest disputes are "based on principles that are beyond negotiation").

123. MOORE, *supra* note 112, at 179; see also DEAN G. PRUITT & PETER J. CARNEVALE, *NEGOTIATION IN SOCIAL CONFLICT* 126 (1993) (setting forth various methods for overcoming "principle-based rigidity" such as involving equally or more valid alternative principles); DONALD A. SCHON AND MARTIN REIN, *FRAME REFLECTION: TOWARD THE RESOLUTION OF INTRACTABLE POLICY CONTROVERSIES* (1994) (describing how seemingly intractable policy controversies can be resolved by "reframing" the issues).

124. See PERRY, *LOVE AND POWER*, *supra* note 95, at 95 ("In thus grounding and focusing dialogic efforts aimed at diminishing conflict, the indeterminacy of shared moral premises serves an essential social function: It is an occasion of the *mediation of dissensus*.").

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ties to female students, the courts have essentially left the values preferences to local initiatives.¹²⁵ Consequently, the nature of the values in controversy and the scope of discretion left for local decision-making will affect the way that the agenda should be structured.

3. Discussion

Although the form that any particular discussion process may take will necessarily depend on its context, a successful principled discussion process will include four basic phases. First, the CDO should establish a welcoming environment by facilitating introductions. She should then provide (or involve participants in providing) an initial overview of the substantive issues to be considered.

The second stage of the discussion process is the brainstorming phase.¹²⁶ The participants should be encouraged to offer general reactions to the briefing materials and to identify the key issues. They should discuss their views on each issue, not only in terms of the ways in which the issue affects them or their particular constituencies, but also in terms of their views on how the issue affects the community as a whole. A primary aim of the brainstorming phase is to promote the flexible development of a range of ideas and solutions. The more options and potential solutions that can be created during this process, the less likely it is that a later impasse will occur. Brainstorming also tends to generate empathy and understanding for the views and needs of other participants.¹²⁷

In the third phase of the discussion process, options and directions for possible solutions need to be specified and articulated. Assuming that the earlier brainstorming stage has emphasized principled approaches respectful of the moral positions of all participants, the solutions which emerge from the discussion are likely to be integrative approaches that minimize social conflict

125. See, e.g., Rebell & Murdaugh, *supra* note 73, at 155; constitutional principles themselves often contain a measure of ambiguity concerning application or implementation which needs local discussion and clarification. See TONI M. MASSARO, CONSTITUTIONAL LITERACY: A CORE CURRICULUM FOR A MULTICULTURAL NATION 69-127 (1993) (discussing tension in constitutional decisions between assimilationist and pluralistic themes, and leaving their reconciliation primarily to local decision-makers); Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 668-70 (1993) (discussing role of courts as shapers or facilitators of constitutional debate in "synthesizing the views of society and then offering the synthesis to society for further discussion").

126. See FISHER & URY, *supra* note 90, at 61-62.

127. The CDO's function at this stage is to encourage all participants to express their views, and to ensure that focus is maintained on principled approaches to the issues. The CDO may need to float ideas on behalf of a party who is reluctant to publicly articulate a position, or she may need to assemble composite proposals from a number of abstract ideas. The CDO must also respond quickly to counterobstructionist tactics or inappropriate expressions of emotions, stereotypes, or any developing lack of trust. See generally LELAND P. BRADFORD, MAKING MEETINGS WORK: A GUIDE FOR LEADERS AND GROUP MEMBERS (1976).

and maximize consensus.¹²⁸ The aim of such an integrative consensus is a solution, or number of related solutions, with which all participants can live, and not one with which everyone is necessarily completely happy.¹²⁹ If an integrative solution is not forthcoming, a subcommittee should be formed to propose a range of alternate options to be brought back to the full group at a later time.

In some areas, especially those relating to matters of ultimate moral authority, full agreement of all members of the community may not be achieved. If the dialogic process has been conducted in a manner that acknowledges the moral status of the dissenters' position, however, it may be possible to develop approaches that allow the majority's position to be implemented while nevertheless retaining the integrity of dissenting views. Benjamin Barber describes the outlook of a dissenter in such a situation:

I am part of the community, I participated in a talk and deliberation leading to the decision, and so I regard myself as bound; but let it be known that I do not think we have made the right decision," says the dissenter in a strong democracy. He means thus not to change the decision this time, for it has been taken, but to bear witness to another point of view (and thereby to keep the issue on the public agenda).¹³⁰

Mechanisms that effectively balance majoritarian and dissenting opinions in this matter may include procedures that allow a controversial program to go forward while permitting the children of dissenting parents to participate in an alternative program. Another approach might be to present the majoritarian position on a controversial issue in a manner which includes fair consideration of the dissenters' views. Presenting positions in this way may allow the community to take stands on controversial issues, while still emphasizing respect for thoughtful dissent. It also promotes the educational process by allowing each student to formulate his or her own position based on clear understandings of how the local community, including its dissenting members,

128. See PRUITT & RUBIN, *supra* note 120, at 143. At this point it may be necessary to obtain additional information to conduct surveys or hold open community meetings to gauge broader reactions to the particular solutions under consideration.

129. Lawrence Susskind tells of his experience reporting to a judge who had appointed him a special master in a complex sewage district dispute:

We returned to the judge and said 'Judge, you won't believe it, but we have an agreement.' The judge called a formal hearing, invited all the parties and their lawyers, held up the agreement, and said, as I cringed, 'Is everybody completely happy with this?' They responded no! The judge turned to us and said 'I thought you said there was an agreement.' We told him there was, but that he had asked the wrong question! He should have said, 'Can everybody live with the agreement?'

Susskind, *Resolving Public Disputes*, in NEGOTIATION STRATEGIES, *supra* note 105, at 61, 74-75.

130. BARBER, *supra* note 93, at 192.

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views the issues.¹³¹

Finally, after tentative agreement is reached on a solution or set of solutions for the issue at hand, the policy resolution should be set down in a written document. The draft version of the document should be circulated to all participants to ensure that it accurately reflects the overall group position. Circulation of a draft will also provide a further opportunity for any dissenters to reconsider their views and/or to propose modifications which the majority might be willing to accept in order to achieve a working consensus. The policy resolution document should also include monitoring and evaluation criteria to guide the implementation process.

4. Ratification

Because many of the individuals who participate in the dialogic process will be representatives of large groups, the policy resolution document will need to be ratified by these broader constituencies. In some cases, especially in large city school districts, the CDO and/or the subgroup having prime responsibility for the issue may decide to prepare explanatory materials describing the considerations that went into the final resolution. So that the full flavor of the range of perspectives that went into the decision can be conveyed, it may also be useful for the CDO or members of the plenary group to join constituency representatives in addressing the constituency group meeting. If the representatives kept the constituency group apprised of developments and considered their input as the dialogic process proceeded, ratification should be readily forthcoming. If, however, one or more of the constituency groups rejects the final resolution document, the plenary group may need to reconvene to consider and accommodate their objections.

Policy resolution documents involving basic legal or policy stances may require formal ratification by the local school board. The relationship between

131. The fact that effective dialogic processes can promote agreement among groups with strongly disparate value standards is illustrated by the recent joint endorsement of a statement of principles for addressing conflicts concerning religion in the public schools by the National Association of Evangelicals, the Christian Coalition, the Union of American Hebrew Congregations, People for the American Way, the National School Boards Association and the National Education Association, among other groups. THE FREEDOM FORUM FIRST AMENDMENT CENTER, FINDING COMMON GROUND: A FIRST AMENDMENT GUIDE TO RELIGION AND PUBLIC EDUCATION (Charles C. Haynes ed., 1994); see also Shelley Burt, *Religious Parents, Secular Schools: A Liberal Defense of an Illiberal Education*, 55 REV. POLITICS 51 (1994) (arguing for political benefits of granting maximum deference to religious parents' requests for accommodations by public school authorities).

There will be times where acceptable accommodations cannot be reached. See Neal Stolzenberg, *He Drew a Circle That Shut Me Out: Assimilation, Indoctrination and the Paradox of a Liberal Education*, 106 HARV. L. REV. 581 (1993). Where this occurs, concern for promoting the public schools' values-inculcating role argues for a rethinking of traditional prohibitions on public funding for religious education. A publicly-funded voucher scheme may be appropriate for the few conscientious religious believers whose views cannot be accommodated in a public school setting. See Michael A. Rebell, *Values Inculcation and the School: The Need for a New Pierce Compromise*, in PUBLIC VALUES, PRIVATE SCHOOLS 37 (Neal E. Devins ed., 1989).

the school board and the CED process should be considered at an early stage, and the extent of policy-making authority that will be delegated to the dialogic group should be made clear in advance. If the dialogic process is to motivate people to participate extensively and effectively, substantial policy-making authority should be delegated to the CED group. When such a delegation has occurred, the board ratification process is largely an occasion for assuring that the CED process has followed proper procedures and that the final resolution document fits within the policy parameters of the delegation. If for any reason, the board fails to ratify the document, it should not modify the document itself, but instead, reconvene the CED plenary group to reconsider the issue.

An additional benefit of the board ratification process is that it provides a culminating opportunity for community participation. Assuming that ratification takes place at a public meeting of the board, the ratification session will provide notice and a last opportunity for any members of the community to voice their views.

5. *Implementation*

Implementation of any complex social policy initiative is an organic, evolutionary process whose outcome rarely corresponds with original expectations.¹³² It is important, therefore, that the participants' policy resolution document set forth agreed assessment standards and specific procedures for ongoing monitoring.¹³³ Such monitoring mechanisms may range from periodic meetings of original dialogue participants to full-time oversight by a paid staff. Implementation guidelines may give discretion to the monitors to approve variations or modifications of the operative standards, within designated parameters. Where developments during implementation call for consideration of modifications of these limits, the monitors should be empowered to convene a meeting of the full plenary group to reconsider the basic standards.

6. *Evaluation/Reconsideration*

After the policy resolution document has been implemented for an agreed period—presumably somewhere between one and five years—the participants in the original dialogue process or others designated to take their place should reconvene to review the implementation process and to consider whether modifications of the original policy approach are appropriate. The original community dialogue organizer or a successor should facilitate the process.

132. See, e.g., JEFFREY L. PRESSMAN & AARON WILDAVSKY, *IMPLEMENTATION* (1979); EUGENE BARDACH, *THE IMPLEMENTATION GAME* (1977).

133. "If the stakeholders are truly involved in developing the assessment process, they are more likely to support the plan and make it work." Harold Patterson, *Don't Exclude the Stakeholders*, SCH. ADMIN. Feb. 13, 1993, at 14.

A Dialogic Approach to Education Reform

The reconvened dialogic meeting serves several important functions. First, it provides an opportunity to modify or improve the original policy based on new facts or unexpected developments. Second, it may rekindle and reinforce community spirit. Third, periodic reconvening adds to the legitimacy of the entire process. The knowledge that a policy resolution will be reviewed in the near future, based on evaluative data, will help promote a working consensus during the initial stage among parties who have reservations about the proposed policy.

A final advantage of the reconvened dialogic session is that successful experience with one controversial topic is likely to motivate the community to undertake further dialogues on other issues. As the CED process is extended to new issues, and periodic reevaluations of those issues are undertaken, a permanent CED process will be in place and a true dialogic school community will have been established.

C. *The Judicially Mandated CED Model*

In many situations, voluntary adoption of a CED process is not likely to occur either because of a general disinclination to confront difficult controversies until they reach crisis stages, or because of active opposition to such an approach by the school board or by parties who believe they can win a power struggle. If the controversy persists and reaches a level of high confrontation, litigation may ensue.

When such a controversy has been brought to court, we believe that the court should give serious consideration to adopting a CED approach. The CED process would normally take place at the remedial stage of a class action or other broad-based litigation, after the judge has determined that constitutional or statutory rights have been violated by an existing policy or practice and where a remedy is not easily crafted. In certain situations, however, the parties in a class action or other case raising systematic educational issues may be persuaded to enter into a CED process before liability has been determined.

A dialogic remedy has distinct advantages for institutional reform cases involving complex schooling issues. Remedial decrees drafted by a judge, even with input from the parties or a group of experts, often lack a clear understanding of the context of needed education reform or an understanding of how the remedy to a particular problem will affect other aspects of school district functioning. The CED approach can provide such an understanding, and it can also mobilize the energy and commitment of the entire community to provide

a lasting solution to the immediate problem, and avoid future conflicts.¹³⁴

The fact that most citizens perceive judges as being fair and not predisposed to a specific policy outcome establishes the atmosphere of trust necessary to encourage broad participation in a dialogic process, especially by groups historically excluded from power. In addition, the courts' inherent "staying power"¹³⁵ provides a necessary degree of assurance that the process will not be prematurely terminated because of political or personality changes. Those who sacrifice short-term benefits for long-term results in the negotiating process will not thereby come up short.¹³⁶

Judicial oversight of a CED dialogic process involves a focused but limited role for the court. It would promote community participation in the basic CED process through five specific judicial activities: (1) articulation of basic legal standards; (2) formal appointment of a community dialogue organizer; (3) convening of an initial community participation hearing; (4) holding a judicial ratification hearing and follow-up modification hearings; and (5) termination.

1. *Articulation of Basic Legal Standards*

Constitutional and statutory standards articulated by the federal courts tend to distinguish between basic national standards and parameters for local

134. The extensive use of citizen committees to help implement school desegregation decrees by courts in the initial stage of the desegregation process provides relevant precedent for adoption of CED remedies in contemporary education cases. These committees served as a mechanism of ensuring representation of black citizens in areas where the school boards were all white and had resisted desegregation. The function of these committees was to assist in developing desegregation plans, *see, e.g., United States v. Mississippi*, 622 F. Supp. 622, 624 (S.D. Miss. 1985), monitor implementation, *see, e.g., Pate v. Dade County Sch. Bd.*, 434 F.2d 1151, 1170 (5th Cir. 1970), improve community relations, *see, e.g., Morgan v. Nucci*, 612 F. Supp. 1060, 1065-66 (S.D. Mass. 1985), advise the judge, *see, e.g., Smiley v. Vollert*, 453 F. Supp. 463 (S.D. Tex. 1978), and even to serve as mediators in resolving disputes, *see, e.g., Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1*, 839 F.2d 1296, 1319 (8th Cir. 1988). The committees varied in size, but they tended to range from ten to forty members and included students, parents, administrators, and representatives of the community at large.

These committees provided an important new vehicle for citizen involvement in the major educational restructurings that accompanied the desegregation, but as the desegregation process matured, courts tended to dissolve the committees. Although the committee performed a valuable function in the early stages by "facilitating community acceptance of desegregation and providing minorities a meaningful participation in implementing desegregation," in the later stages, where "differences remained as to how school desegregation should be furthered and at what pace," these matters were viewed as being "for the court, not for a committee." *Tasby v. Wright*, 559 F. Supp. 9, 11 (N.D. Tex. 1982). The premise of the CED model is that a properly supervised dialogic process is the most appropriate mechanism for determining all remedial policies, not merely a mechanism for carrying out the court's decisions.

135. *See REBELL & BLOCK, EQUALITY AND EDUCATION, supra note 73, at 171-96* (finding the comparative institutional strength of courts, among other things, in their significant compliance-monitoring "staying power").

136. *Cf. Sturm, Normative Theory, supra note 79, at 1436* ("[T]he deliberative model avoids many of the hazards of informality by locating the interactions of the participants within a framework of judicially established standards and oversight.").

