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The Evolving Role of the Courts in School Reform Twenty Years After *Rose*

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ABSTRACT

Kentucky's storied Rose decision is known not only for ushering in a new wave of "adequacy" school finance litigation in the state courts, but it has also been pivotal in the evolution of the courts' role in educational governance and reform. Since the Kentucky Supreme Court's decision to strike down the Commonwealth's entire system of public education, courts have become more engaged with educational policy and reform. While some have labeled the recent trend toward judicial intervention in educational governance unwelcome "activism," others have begun to recognize the potentially productive role that courts can play in coordinating reform in our schools. This Article specifically discusses the emerging model of the "experimentalist" governance of schools and the evolving judicial role in that governance described by Charles Sabel, James Liebman, and William Simon. Under that framework, the court acts as a destabilizing and disentrenching agent to permit key stakeholders to construct a new constitutional (or statutory) order. This Article suggests that the experimentalist model may well address three primary objections leveled at court intervention in educational policy-making: the separation of powers problem, the conceptual indeterminacy (or standards) problem, and the implementation problem. To elaborate on the experimentalist model, the Article provides a legal and historical exploration of how judicial experimentalism may have furthered efforts to use an on-going class-action lawsuit to systemically reform the special education service delivery system in a single school district. Though the experimentalist approach of the court in that case has improved the district's special education service delivery system in certain respects, the Article concludes with several observations regarding the possible limitations of the experimentalist model.

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INTRODUCTION

IN the five decades since the *Brown v. Board of Education* Court abolished state-imposed segregation in schools, the role of courts in educational policy-making and reform of complex institutions like schools has been subjected to much debate and spilled ink. From the imposition of desegregation decrees, to the striking-down of educational finance systems, to the restructuring of special education service delivery systems, the judiciary has left its mark on educational policy and schools alike. Court critics have decried the “imperialist” judiciary’s policy mandates, chastised the courts for wandering into political and educational realms with which they are unfamiliar, and lamented the judicial affront to our hallowed principles of democracy, separation of powers, and local control.² Court advocates, however, have lauded judicial intervention as the only means to craft educational policy that respects the rights of the politically powerless.³

The storied *Rose v. Council for Better Education, Inc.*, decision in Kentucky has played a central role in this ongoing debate.⁴ While *Rose* is often cited as the school finance litigation that ushered in an era of “adequacy” finance cases (in lieu of the reputedly less successful “equity” litigations),⁵ the

² See, e.g., DAVID J. ARMOR, *FORCED JUSTICE: SCHOOL DESEGREGATION AND THE LAW* (1995) (questioning the efficacy of judicial remedies in desegregation cases); RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 2-3 (1977); LINO A. GRAGLIA, *DISASTER BY DECREE: THE SUPREME COURT DECISIONS ON RACE AND THE SCHOOLS* 13 (1976) (claiming that court-ordered busing to achieve racial balance in public schools “may well have a potential for social disruption and dissolution unequalled by the Vietnam war at its height”); Nathan Glazer, *Towards an Imperial Judiciary?*, PUB. INT. Fall 1975, at 41,104-23.

³ See, e.g., Michael A. Rebell, *Fiscal Equity Litigation and the Democratic Imperative*, in *STUDIES IN JUDICIAL REMEDIES AND PUBLIC ENGAGEMENT* 1 (1998) (arguing that a “democratic imperative” has been driving courts to intervene in educational finance policies to ensure a more equitable and adequate distribution of resources); JENNIFER L. HOCHSCHILD, *THE NEW AMERICAN DILEMMA: LIBERAL DEMOCRACY AND SCHOOL DESEGREGATION* 134 (1984) (“[W]ere it not for the courts, there would be little reduction in racial isolation [in public schooling]. . . .”); Frank M. Johnson, Jr., *The Role of the Federal Courts in Institutional Litigation*, 32 ALA. L. REV. 271, 274 (1981).

⁴ *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186 (Ky. 1989).

⁵ See, e.g., William H. Clune, *The Shift From Equity to Adequacy in School Finance*, 8 EDUC. POL’Y 376, 378 (1994); Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101, 108-09 (1995); Michael Heise, *State Constitutions, School Finance Litigation, and the “Third Wave”*: *From Equity to Adequacy*, 68 TEMP. L. REV. 1151, 1163 (1995); Gail F. Levine, *Meeting the Third Wave: Legislative Approaches to Recent Judicial School Finance Rulings*, 28 HARV. J. ON LEGIS. 507, 507 (1991); William E. Thro, *Judicial Analysis During the Third Wave of School Finance Litigation: The Massachusetts Decision as a Model*, 35 B.C. L. REV. 597, 604 (1994); William E. Thro, *The Third Wave: The Impact of the Montana, Kentucky, and Texas Decisions on the Future of Public School Finance Reform Litigation*, 19 J.L. & EDUC. 219, 222 (1990); William E. Thro, Note, *To Render Them Safe: The Analysis of State Constitutional Provisions in Public School Finance Reform Litigation*, 75 VA. L. REV. 1639, 1644 (1989).

case's enduring impact may be its success in restructuring the governance of education in Kentucky and catalyzing comprehensive school reform.⁶ Indeed, *Rose* was not the first case to pronounce an adequacy standard for judicial intervention in educational finance,⁷ but it is unquestionably the first case in which a state's court of last resort declared an entire educational system unconstitutional, demanded that the legislative and executive branches overhaul the system to achieve certain goals, and thereby reordered the governance of education in the state to provide the courts with a new and decidedly more engaged role. Since that 1989 Kentucky decision, it has become clear that the state courts have been more willing to strike down educational finance schemes they deemed violative of their respective state constitution's education article.⁸ Perhaps more interesting, while some courts have been timid in their efforts to reform state school finance and accountability systems (indeed, some have intervened only to retreat after a few years),⁹ many courts have become actively engaged in not

6 See, e.g., Jacob E. Adams, Jr., *School Finance Reform and Systematic School Change: Reconstituting Kentucky's Public Schools*, 18 J. EDUC. FIN. 318, 321 (1993); Kern Alexander, *The Common School Ideal and the Limits of Legislative Authority: The Kentucky Case*, 28 HARV. J. ON LEGIS. 341, 341-42 (1991); Bert T. Combs, *Creative Constitutional Law: The Kentucky School Reform Law*, 28 HARV. J. ON LEGIS. 367, 367 (1991); Ronald G. Dove, Jr., *Acorns in a Mountain Pool: The Role of Litigation, Law and Lawyers in Kentucky Education Reform*, 17 J. EDUC. FIN. 83, 85 (1991); C. Scott Trimble & Andrew C. Forsaith, *Achieving Equity and Excellence in Kentucky Education*, 28 U. MICH. J.L. REFORM 599, 600 (1995); D. Frank Vinik, *The Contrasting Politics of Remedy: The Alabama and Kentucky School Equity Funding Suits*, 22 J. EDUC. FIN. 60, 60 (1996).

7 See, e.g., *Pauley v. Kelly*, 255 S.E.2d 859, 877 (W.Va. 1979). According to the court,

Legally recognized elements in this definition are development in every child to his or her capacity of (1) literacy; (2) ability to add, subtract, multiply and divide numbers; (3) knowledge of government to the extent that the child will be equipped as a citizen to make informed choices among persons and issues that affect his own governance; (4) self-knowledge and knowledge of his or her total environment to allow the child to intelligently choose life work to know his or her options; (5) work-training and advanced academic training as the child may intelligently choose; (6) recreational pursuits; (7) interests in all creative arts, such as music, theatre, literature, and the visual arts; (8) social ethics, both behavioral and abstract, to facilitate compatibility with others in this society.

Id.; see also William S. Koski, *Of Fuzzy Standards and Institutional Constraints: A Re-Examination of the Jurisprudential History Of Educational Finance Reform Litigation*, 43 SANTA CLARA L. REV. 1185, 1251-52 (noting that the adequacy concept had been employed by courts prior to the *Rose* decision).

8 See MICHAEL A. REBELL, COURTS AND KIDS: PURSUING EDUCATIONAL EQUITY THROUGH THE STATE COURTS 15 (2009) (“[C]onstitutional challenges to the inequitable and inadequate funding of public education have been litigated in the state courts of forty-five of the fifty states since 1973, and, in recent years, plaintiffs have won almost 70 percent of them.”).

9 In their recent book, Eric Hanushek and Alfred Lindseth argue that “in the last several years . . . courts [have] begun to take a more deferential attitude and to uphold appropriation

only restructuring educational finance schemes but entering into a dialectic with the political branches of state government in an effort to insist upon recognition of constitutional principles and reasoned justifications for the distribution of and accountability for educational resources.¹⁰ *Rose*, in other words, was a pivotal moment in the ongoing evolution of the judicial role in state educational governance.

But the *Rose* case, coupled with litigation in New Jersey,¹¹ Texas,¹² and

levels set by state legislatures.” ERIC A. HANUSHEK & ALFRED A. LINDSETH, *SCHOOLHOUSES, COURTHOUSES, AND STATEHOUSES: SOLVING THE FUNDING-ACHIEVEMENT PUZZLE IN AMERICA'S PUBLIC SCHOOLS* 4 (2009). See also Eric A. Hanushek et al., *Many Schools Are Still Inadequate: Now What?*, EDUC. NEXT, Fall 2009, at 39, 41 (Hanushek and Lindseth stating that “[a]lthough judicial remedies have played a significant role in school finance in the past, that era is drawing to a close”); John Dinan, *School Finance Litigation: The Third Wave Recedes*, in FROM SCHOOLHOUSE TO COURTHOUSE: THE JUDICIARY'S ROLE IN AMERICAN EDUCATION 96 (Joshua M. Dunn & Martin R. West eds., 2009) [hereinafter FROM SCHOOLHOUSE TO COURTHOUSE] (“Numerous state court rulings of the past several years indicate, however, that the school finance litigation movement may have peaked, in that many judges are now disinclined to undertake continuing supervision of school finance policies.”). While there can be no doubt that the pace of plaintiff victories in educational finance litigation has slowed in the last four years or so, see HANUSHEK & LINDSETH, *supra* at 97-107, it may be too early to discern any long term trend in judicial willingness to participate in educational finance litigation and certainly too early to declare the demise of adequacy litigation. Indeed, as Michael Rebell has argued, the judiciary may be in a period of cautious reflection in which it is contemplating what effective role it may play in reforming failing schools and school systems. Hanushek et al., *supra*, at 44. In Rebell's words:

[T]here has been no diminution in the willingness of state supreme courts to issue strong rulings on students' basic constitutional right to an adequate education. What has changed in recent years is that more cases have reached the remedy stage and more courts are experiencing difficulty in seeing constitutional compliance through to a successful conclusion. . . .

In other words, the adequacy movement has matured, and the courts are now grappling with many of the same implementation and compliance issues that have stymied governors and legislatures for years.

Id. I do not, however, predict the future. As I have written elsewhere, William S. Koski & Jesse Hahnel, *The Past, Present, and Possible Futures of Educational Finance Reform Litigation*, in HANDBOOK OF RESEARCH IN EDUCATION FINANCE AND POLICY 42, 54-55 (Helen F. Ladd & Edward B. Fiske eds., 2008), the future role of the courts in educational finance policy is uncertain, as advocates of judicial intervention can point to a two-decade trend since *Rose* toward greater judicial involvement in educational policy-making, while proponents can point to a more recent cluster of cases in which courts have either refused to intervene or have relinquished jurisdiction after initially engaging with the political branches.

10 See, e.g., George D. Brown, *Binding Advisory Opinions: A Federal Courts Perspective on the State School Finance Decisions*, 35 B.C. L. REV. 543, 556-63 (1994); Mark Jaffe & Kenneth Kersch, *Guaranteeing a State Right to a Quality Education: The Judicial-Political Dialogue in New Jersey*, 20 J.L. & EDUC. 271, 277 (1991).

11 See *Abbott v. Burke*, 575 A.2d 359 (N.J. 1990).

12 See *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989).

Wyoming,¹³ among others, has reignited the debate over “judicial activism” in educational reform and policy-making. Indeed, in the last three years alone, four full volumes have been published that take a decidedly skeptical, if not outright hostile, view of court intervention in public schooling.¹⁴ Not to be outdone, advocates for a judicial role in school reform have begun a counter-offensive.¹⁵

This Article enters that rekindled debate over judicial involvement in school reform. I take as my point of departure, however, that the debate over judicial activism, while theoretically significant, often lacks the nuance to evaluate the complex role that courts can and do play in school governance, in the reform of educational policy, and in the restructuring of public institutions such as schools and school districts. Understanding that judicial involvement in educational policy-making will remain for the foreseeable future, to a greater or lesser degree, the better question to ask is: given their recognized institutional limitations, when and how can courts be effective in the public project of reforming schools and school systems? One emerging response to that question is that, in the context of institutional reform litigation, like school reform litigation, some courts are evolving toward a model of judicial “experimentalism” in which they first destabilize the institutional status quo (that has not served the needs and interests of disadvantaged children) and work toward reform through ongoing stakeholder negotiation, evolving measures of performance to address dynamic “conditions on the ground,” and transparency to the stakeholders and the public.¹⁶

My objectives here are threefold. After discussing the “separation of powers” objection to judicial involvement, I first outline the two primary additional arguments that court critics appear to advance against judicial intervention in schools: (1) that conceptual indeterminacy dooms efforts

13 See *Campbell County Sch. Dist. v. State*, 907 P.2d 1238 (Wyo. 1995).

14 See FROM SCHOOLHOUSE TO COURTHOUSE, *supra* note 9; HANUSHEK & LINDSETH, *supra* note 9, at 3-4; SCHOOL MONEY TRIALS: THE LEGAL PURSUIT OF EDUCATIONAL ADEQUACY (Martin R. West & Paul E. Peterson eds., 2007); COURTING FAILURE: HOW SCHOOL FINANCE LAWSUITS EXPLOIT JUDGES' GOOD INTENTIONS AND HARM OUR CHILDREN (Eric A. Hanushek ed., 2006).

15 See, e.g., REBELL, *supra* note 8, at 5; Michael A. Rebell, *Poverty, “Meaningful” Educational Opportunity, and the Necessary Role of the Courts*, 85 N.C. L. REV. 1467, 1467 (2007).

16 See James S. Liebman & Charles F. Sabel, *A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform*, 28 N.Y.U. REV. L. & SOC. CHANGE 183, 207 (2003); Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1016-28 (2003); see also Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 465-66 (1998); Kathleen G. Noonan, Charles F. Sabel, & William H. Simon, *Legal Accountability in the Service-Based Welfare State: Lessons from Child Welfare Reform*, 34 L. & SOC. INQUIRY 523, 559-61 (2009). To date, although the literature surrounding the judicial role in experimentalist governance is modest, it has drawn significant criticism. See David A. Super, *Laboratories of Destitution: Democratic Experimentalism and the Failure of Antipoverty Law*, 157 U. PA. L. REV. 541, 546-48 (2008).

of courts to intervene in educational policy-making, that is, because the constitutional and statutory language that courts interpret in educational reform matters is vague and because courts cannot craft clear standards for reform, government officials and other stakeholders are left with little guidance to bring about efficacious reform; and (2) that courts lack the institutional capacity to design and implement effective school reform.¹⁷ While these objections are no doubt forceful, I first note that courts have developed new processes (e.g., bifurcation of trials into liability and remedial phases, maintenance of jurisdiction during the remedial phase, and ongoing monitoring) and new organizational structures (special masters, magistrates, and monitors) to address these concerns to some extent. Beyond those court-centric fixes, however, the experimentalist model goes further to address those problems by crafting a facilitative role that permits the political branches and other key stakeholders to develop the standards of reform consistent with broad judicial mandates and permits the implementation of those standards through policies and programs that necessarily change as schools and school systems learn from their own implementation efforts.

Second, I elaborate on the evolving role of the courts toward a more “experimentalist” role in the reform and crafting of educational governance and policy. That experimentalist role is not that of the much-maligned “command-and-control” model of judicial intervention in which courts unilaterally hand down burdensome school reform decrees. Rather, the experimentalist role recognizes the court’s institutional limitations by acting as a “destabilizing” agent that “disentrenches” the political status quo,

17 There is a third objection to judicial intervention: that it does not “work.” See HANUSHEK & LINDSETH, *supra* note 9, at 145-70. *But see* REBELL, *supra* note 8, at 30-41. I will not join that debate here, but have discussed the impact of judicial intervention in educational finance reform elsewhere. See William S. Koski & Henry M. Levin, *Twenty-Five Years After Rodriguez: What Have We Learned?* 102 *TCHRS. C. REC.* 480 (2000). Put simply, due to the complexity of establishing appropriate metrics for whether judicial intervention “works,” the knotty methodological problems in isolating the effects of courts, and the unclear causal paths through which judicial intervention and the threat of judicial intervention operate, the literature on judicial impact in educational policy reform remains largely inconclusive and only tentatively conclusive in regard to specific outcomes. See generally DOUGLAS S. REED, *ON EQUAL TERMS: THE CONSTITUTIONAL POLITICS OF EDUCATIONAL OPPORTUNITY* (2001); John Dayton, *Examining the Efficacy of Judicial Involvement in Public School Funding Reform*, 22 *J. EDUC. FIN.* 1 (1996); William N. Evans et al., *The Impact of Court-Mandated School Finance Reform*, in *EQUITY AND ADEQUACY IN EDUCATION FINANCE: ISSUES AND PERSPECTIVES* 72, 74-75 (Helen F. Ladd et al. eds., 1999); William N. Evans et al., *Schoolhouses, Courthouses, and Statehouses After Serrano*, 16 *J. POLY ANALYSIS & MGMT.* 10 (1997) [hereinafter *Schoolhouses, Courthouses*]; Michael Heise, *The Effect of Constitutional Litigation on Education Finance: More Preliminary Analyses and Modeling*, 21 *J. EDUC. FIN.* 195 (1995); G. Alan Hickrod et al., *The Effect of Constitutional Litigation on Education Finance: A Preliminary Analysis*, 18 *J. EDUC. FIN.* 180 (1992); Bradley W. Joondeph, *The Good, the Bad and the Ugly: An Empirical Analysis of Litigation-Prompted School Finance Reform*, 35 *SANTA CLARA L. REV.* 763, 793-97 (1995); Sheila E. Murray et al., *Education-Finance Reform and the Distribution of Education Resources*, 88 *AM. ECON. REV.* 789 (1998).

thereby facilitating and permitting key stakeholders—including aggrieved plaintiffs and their allies—to enter into a dynamic dialogue and restructure schools and school policies to recognize the statutory and constitutional principles involved.

Finally, I provide a brief exploration of how experimentalism is faring in a specific litigation aimed at restructuring the special education service delivery system in a single California school district—the *Emma C. v. Eastin* litigation in the Ravenswood City School District (“Ravenswood”) in East Palo Alto, California.¹⁸ Though the litigation sought to effect wide-ranging reform of the special education system in the district, I focus primarily on how the court has been able to facilitate the design and implementation of a pathbreaking inclusive education model through experimentalism. There, the court has deployed experimentalism under favorable conditions for complex school reform: a narrow goal of ensuring that all children with disabilities in the district are to be educated “to the maximum extent appropriate”¹⁹ with their non-disabled peers; the engagement of all key local stakeholders, including teachers and other street-level bureaucrats; and continuous assessment of the program based on selected key performance indicators followed by ongoing adjustments to policy and practice. Despite that relative success, I also discuss the challenges that have arisen during the remedial phase of the thirteen-year-old litigation and conclude with some observations on the limitations of the experimentalist model.

I. OBJECTIONS TO JUDICIAL INTERVENTION IN EDUCATIONAL POLICY

A. *Separation of Powers*

Commenting on the Wyoming Supreme Court’s “judicial excursion” into educational finance policy, Professor Michael Heise cautions that the court “risks upsetting the precarious and delicate system of checks and balances between and among [the] legislative, executive, and judicial branches.”²⁰ In apparent agreement, former Judge and now President of Baylor University, Kenneth Starr opined:

For sound, familiar reasons, the structure of education systems and the

18 *Emma C. v. Eastin*, 985 F. Supp. 940 (N.D. Cal. 1997). Although dozens of orders and opinions have been issued in the case, only one opinion has been published in the federal reporters. *Id.*

19 Under the Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. §§ 1400-1482 (2006), children with disabilities are to be educated with their non-disabled peers “[t]o the maximum extent appropriate.” 20 U.S.C. § 1412(a)(5)(A). This is the least restrictive environment (“LRE”) mandate. *Id.*

20 Michael Heise, *Schoolhouses, Courthouses, and Statehouses: Educational Finance, Constitutional Structure, and the Separation of Powers Doctrine*, 33 LAND & WATER L. REV. 281, 284 (1998).

allocation of resources have historically been an issue reserved exclusively for the legislature. The fundamental importance of honoring the democratic process is too obvious to require extended comment. Suffice it to say that the people are given their strongest voice when they can petition their local representatives, instead of seeking redress from a relatively remote court system.²¹

The primary thrust of the court critics' normative argument against judicial involvement in school reform appears to be, in overly simplified terms, that complex educational policy decisions are best left to the legislatures because courts cannot (and do not) engage in the delicate trade-offs among competing priorities that the legislature can (and must) engage in and that individuals and groups, acting through the majoritarian political process, are best and properly suited to addressing complex social and educational policy issues. Thus, separation of powers in our constitutional democracy and the related "political question" doctrine require the courts to restrain themselves from educational reform work.²²

Contrast this suspicion of court intervention with the views of those who advocate judicial oversight when the "political" branches fail to protect minority interests. Because courts do not need to be responsive to majoritarian politics and because their decision-making is based on

21 Kenneth W. Starr, *The Uncertain Future of Adequacy Remedies*, in *SCHOOL MONEY TRIALS: THE LEGAL PURSUIT OF EDUCATIONAL ADEQUACY* 307, 314 (Martin R. West & Paul E. Peterson eds., 2007); see also Alfred A. Lindseth, *The Legal Backdrop to Adequacy*, in *COURT FAILURE: HOW SCHOOL FINANCE LAW SUITS EXPLOIT JUDGES' GOOD INTENTIONS AND HARM OUR CHILDREN* 33, 36 (Eric Hanushek ed., 2006) ("Ignoring separation of powers considerations, [courts] have approached adequacy lawsuits in such a way as to substantially usurp the power of the legislature.").

22 The political question doctrine was articulated in the Supreme Court decision *Baker v. Carr*. *Baker v. Carr*, 369 U.S. 186 (1962). There the Court identified six criteria for analyzing whether a case presented a "political question" and should therefore be resolved by the political branches: (1) "a textually demonstrable constitutional commitment of the issue to a coordinate political department;" (2) "a lack of judicially discoverable and manageable standards for resolving it;" (3) "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion;" (4) "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government;" (5) "an unusual need for unquestioning adherence to a political decision already made;" and (6) "the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Id.* at 217.

Exemplary of the objection to judicial intervention in educational finance policy-making based on the separation of powers and the political question doctrine is the argument advanced by Eric Hanushek and Alfred Lindseth. HANUSHEK & LINDSETH, *supra* note 9, at 97-103. Others have noted that the political question doctrine lacks analytic rigor, is not normatively defensible, has only been rarely applied by the Supreme Court, and is inapplicable in state constitutional litigation. See REBELL, *supra* note 8, at 23-29. I will not address the political question doctrine objection to judicial intervention in educational policy-making because Rebell has effectively done so and because my response to both the separation of powers and judicial standards objections addresses the primary thrust of the political question concerns.

constitutional text and values, supporters of judicial intervention argue court participation in social policy-making through judicial review is not only legitimate, it is necessary to ensure the just treatment of all individuals and groups in a democracy.²³

This debate between stylized versions of our tripartite government is, in a sense, fundamentally irresolvable. At stake is nothing less than opposing views of judicial review and decision-making in a democratic state. Arguments grounded in political and moral philosophy, history, and institutional capacity can be advanced for both sides.²⁴ For purposes of this Article, that conflict need not be resolved. Rather, like Michael Rebell,²⁵ I view the normative debate over judicial activism as somewhat anachronistic as courts have become a necessary part of the modern, complex administrative state.²⁶ Nowhere is this more apparent, for example, than in

23 See JENNIFER L. HOCHSCHILD, *THE NEW AMERICAN DILEMMA: LIBERAL DEMOCRACY AND SCHOOL DESEGREGATION* 134 (1984) (“[W]ere it not for [the] courts, there would be little reduction in racial isolation [in public schooling]. . . .”); Michael A. Rebell, *Fiscal Equity Litigation and the Democratic Imperative*, 24 J. EDUC. FIN. 23, 23-34 (1998) (arguing that a “democratic imperative” has been driving courts to intervene in educational finance policies to ensure a more equitable and adequate distribution of resources). For the classic defense of the court’s role as a counter-majoritarian check on the political branches, see JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980).

24 Charles Sabel and William Simon make a similar point:

Neither the federal Constitution nor state constitutions specifically delineate the spheres of the branches of government, and they do not appear to intend any rigid segregation of activities among them. Separation of powers is an implied constraint, and it has to be given meaning in terms of traditional governmental practice or some principled understanding of democracy.

Sabel & Simon, *supra* note 16, at 1090.

25 Rebell, *supra* note 15, at 1529-39.

26 See MARK KOZLOWSKI, *THE MYTH OF THE IMPERIAL JUDICIARY: WHY THE RIGHT IS WRONG ABOUT THE COURTS* 217-18 (2003). Kozlowski finds claims of judicial activism ungrounded because

the popular branches of government have conferred tremendous powers upon the courts, in terms of both oversight of the administrative state and adjudication of claims arising from the numerous statutes that Congress has passed over the past several decades that allow citizens to seek court relief for a range of injuries, from racial discrimination to securities fraud. Grant Gilmore writes that, at the dawn of the modern administrative state in the 1930s, conventional wisdom among legal thinkers held that “judicial power was a relic of the dead past” that would eventually yield to adjudication and problem solving by bureaucratic expertise alone, unaided by generalist judges. Gilmore continues: “What happened, as is frequently the case, is the opposite of what the conventional wisdom assumed.”

Id.; see also Sabel & Simon, *supra* note 16 at 1091. Sabel and Simon support the argument that

the arena of special education in which Congress specifically authorized private remedies through an administrative fair hearing process with the right to appeal to the federal courts whenever a dispute arises between parents and school officials over the meaning and content of a child's free and appropriate public education.²⁷ Moreover, parties both "liberal" and "conservative" now freely enlist the courts when their grievances go unredressed in the political arena.²⁸ Put simply, courts have become part of the social and educational policy-making landscape.

That said, at least in regard to those judges who are not held electorally accountable to the public, court critics stand on firmer ground. It is the fear of concentrating power in the hands of a few unelected public officials that may ignite the separation of powers concerns. When unaccountable judges venture into educational policy-making, what is at stake is not necessarily the violation of some principled division of labor embodied in the vague "separation of powers" notion; rather, courts must always be aware of the public's view of the legitimacy of their decisions or run the risk of being ignored and becoming ineffective. The focus, then, should not be on the development of some abstract division of labor, but a better understanding of the conditions under which judicial intervention is necessary, is potentially effective, and does not threaten judicial legitimacy. Naturally, such a determination can only be made in the context of actual cases and controversies, not in the abstract.²⁹

courts have become an integral part of the administrative state:

To portray the judicial activity in structural reform litigation as encroaching on the executive and legislative discretion ignores the complexity of the relations among the branches in many of these cases. Sometimes, as in housing and mental health cases, the legislature has authorized structural relief. . . .

Moreover, the remedial regimes that emerge from public law cases sometimes involve elaborate and creative legislation.

Id.; see also MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS 3 (1998).

²⁷ 20 U.S.C. §§ 1415(a), 1415(f)(1)(A), 1415(i)(2)(A) (2006).

²⁸ Scott L. Cummings & Deborah L. Rhode, *Public Interest Litigation: Insights from Theory and Practice*, 36 FORDHAM URB. L.J. 603, 604 (2009) ("Even as liberal critics have disparaged reliance on courts, conservative activists have enlisted them in efforts to block or roll back progressive change.").

²⁹ Sabel and Simon provide a different response to the separation-of-powers problem of removing policy reform from public accountability through the ballot box:

Experimentalist intervention serves . . . accountability in another, less traditional way. It opens up the underperforming institution to the influence of and participation by dissatisfied citizens through stakeholder negotiation. The stakeholder process[.]. . . when it works, . . . enhances accountability to those with the greatest interest in the institutions. As a form of direct rather than representative democracy and as

From this pragmatist's perspective (that is, the perspective that courts will intervene in educational policy-making), the better critique of judicial intervention in and supervision over educational policy-making and school reform is twofold. First, given the vagueness of the constitutional textual bases for judicial intervention in educational policy, courts are left without clear principles to guide the development of equity-minded school reform.³⁰ As Frank Michelman famously argued, such conceptual indeterminacy can stymie judicial intervention because reform proceeds without coherence or clear objectives.³¹ The second capacity problem is more mundane. Courts do not possess the technical or street-level knowledge to develop policies that can be faithfully implemented to produce desired results. Nor do they enjoy the power of the purse to fund their remedies or the power of the

an informal process without fixed criteria of standing or operation, the stakeholder process departs from the traditional premises of American constitutionalism. But it is potentially a valuable elaboration, one that serves the broader values of fragmentation and accountability in circumstances in which, by themselves, traditional political processes would be unable to do so effectively.

. . . The stakeholder process permits a more informal and ad hoc kind of power-sharing and accountability to those who are most strongly concerned.

Sabel & Simon, *supra* note 16, at 1094.

³⁰ There can be no doubt that the evolving meaning of equal protection and arcane phrases such as "an efficient system of common schools" in state constitutions provide little purchase for constitutional claims. KY. CONST. § 183. Constitutional text has neither systematically guided nor constrained judicial decision-making in educational finance reform cases. Courts have used vague and fuzzy constitutional language to serve their interventionist or non-interventionist desires. See Koski, *supra* note 7, at 1186-88.

³¹ Frank I. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 57-58 (1969); see also JOHN E. COONS ET AL., PRIVATE WEALTH AND PUBLIC EDUCATION 290-91 (1970). Coons, Clune, and Sugarman frame the coherence and clear objectives issue as follows:

The standards problem is essentially one of achieving intelligibility. If the present state financing systems are condemned, it is not enough simply to declare them invalid. If the court hopes to generate the consensus necessary to meaningful change it must identify with reasonable clarity the locus and nature of the constitutional defect. Society cannot or will not respond to canons incapable of communication. . . . Unless the court can find an effable essence, its judgments tend to be ad hoc and unpredictable, qualities which in the school finance case will evoke nothing but criticism of the court and evasion by the legislatures.

sword to enforce performance.³² Thus, judicial policy will suffer design and implementation failures.

B. *The Standards Problem*

To address Michelman's concern about conceptual indeterminacy, one might adopt a cohesive and coherent theory of affirmative constitutional welfare rights that courts could deploy.³³ In the context of reforming educational policy to ensure a more equitable distribution of educational resources, the quest for a coherent principle to guide reform has bedeviled scholars and lawyers at least since the publication of Jack Coons, William Clune, and Steven Sugarman's classic *Private Wealth and Public Education*,³⁴ Arthur Wise's *Rich Schools, Poor Schools*,³⁵ and David Kirp's "The Poor, the Schools, and Equal Protection."³⁶ Recognizing that the U.S. Constitution

Id.; see also Martin R. West & Joshua M. Dunn, *The Supreme Court as School Board Revisited, in FROM SCHOOLHOUSE TO COURTHOUSE*, *supra* note 9, at 3, 15 ("And when courts do engage in education policymaking, they should strive to contain the pernicious effects of litigation by offering clear standards that minimize legal uncertainty.").

³² See GERALD N. ROSENBERG, *THE HOLLOW HOPE* 10-21 (1991) (providing an oft-cited discussion of the constraints courts face in designing and implementing reform decrees that aim to restructure institutions and social policy).

³³ There is an established scholarly pedigree to such an enterprise that was recently reinvigorated by Professor Goodwin Liu's provocative and pragmatic argument for what he calls an interpretive role for judges who seek to tie welfare rights to society's shared understanding of those rights. Goodwin Liu, *Rethinking Constitutional Welfare Rights*, 61 *STAN. L. REV.* 203, 227 (2008). Liu argues for an eminently pragmatic approach to the justiciability of welfare rights:

[J]udicial recognition of welfare rights need not be thoroughgoing in the way that the logical principles of a comprehensive moral theory would suggest. Societal norms, traditions, and understandings vary over time and across social goods, and a constitutional doctrine of welfare rights should be sensitive to such variation. . . . [T]he judicial role is best understood as part of an ongoing dialectical process by which legislative judgments are brought into harmony not with transcendent moral principles, but with the values our society declares its own.

Id. at 211.

While I do not take-up the issue of whether a coherent concept of educational rights can or ought to be developed, I find Liu's approach to such a project compatible with the pragmatic role of experimentalist judicial intervention in educational policy and school reform. Put simply, just as shared norms can be used to construct a constitutional welfare rights regime, shared beliefs as to effective equity-minded reform can be used to craft effective educational policy reforms under the supervision of a court.

³⁴ COONS ET AL., *supra* note 31.

³⁵ ARTHUR E. WISE, *RICH SCHOOLS, POOR SCHOOLS: THE PROMISE OF EQUAL EDUCATIONAL OPPORTUNITY* (1967).

³⁶ David L. Kirp, *The Poor, the Schools, and Equal Protection*, 38 *HARV. EDUC. REV.* 635

might well support a claim that the Equal Protection Clause requires the state to provide equality of educational opportunity to children, early scholarship struggled to provide a coherent and workable principle of equality. The varying definitions of equal opportunity proffered by those scholars still resonate today. Although Wise recognized that no single formulation of equality of educational opportunity would be without flaw, he concluded that courts might well opt for strict democratic (horizontal) equality, that is “one student, one dollar” as the most manageable standard.³⁷ Recognizing that such a resource distribution would not do enough for those students who needed more, that is, those who were not equally situated, Kirp proposed a distribution of educational resources that would help students overcome inequalities in prior training and background.³⁸ Coons, Clune, and Sugarman disagreed and proposed the principle of fiscal neutrality which held that the quality of public education may not be a function of wealth other than the wealth of the state as a whole, an elegant and workable theory of resource distribution that propelled the first two decades of educational finance reform litigation.³⁹ The fate of school finance litigation in federal and state courts need not be repeated here, but it should at least be noted that all of these theories of equality of educational opportunity fell into disfavor as courts either found them unmanageable as distributive principles or feared the political backlash from the redistribution that would occur to honor the principles.

Enter *Rose* and adequacy. Adequacy was supposed to bring conceptual determinacy to guide courts and policy-makers in ensuring that all children will receive the resources necessary for them to ensure that they develop the minimum skills and capacities required of all citizens. Despite the promise of adequacy, both courts and scholars alike have questioned whether the adequacy standard is any clearer than equity and whether adequacy is the morally just method to distribute educational resources.⁴⁰ After all, where should the bar for “adequacy” be set—at bare minimums or at world-class levels? Is it ethical just to allow some children to be provided with greater opportunities so long as all children have an opportunity to achieve whatever is deemed adequate? What needs to be emphasized is that this quest for conceptual determinacy does not only plague school finance litigation, it

(1968).

37 WISE, *supra* note 35, at 159.

38 Kirp, *supra* note 36, at 636.

39 COONS ET AL., *supra* note 31, at 2.

40 HANUSHEK & LINDSETH, *supra* note 9, at 118-28; Koski & Levin, *supra* note 17, at 489-95; Paul A. Minorini & Stephen D. Sugarman, *Educational Adequacy and the Courts: The Promise and Problems of Moving to a New Paradigm*, in EQUITY AND ADEQUACY IN EDUCATION FINANCE: ISSUES AND PERSPECTIVES 175 (Helen Ladd et al. eds., 1999); William S. Koski & Rob Reich, *When “Adequate” Isn’t: The Retreat from Equity in Educational Law and Policy and Why It Matters*, 56 EMORY L.J. 545 (2006).

pervades all equity-minded educational policy-making, including policies for English language learners, students with disabilities, and garden-variety underperforming students.

Although this quest for sound conceptual principles on which courts may intervene has serious implications for the continued legitimacy of judicial intervention in educational policy-making, I will not attempt to resolve that matter here. Rather, the experimentalist model of judicial intervention emerging in the school reform context and discussed further below, appears to have developed without the articulation of clear, measurable, and enforceable constitutional standards. Rather, judicial intervention in modern adequacy litigation requires only that the court hang its decision-making on the (admittedly vague) constitutional language to declare the legislative, bureaucratic, or school district policies and practices unlawful, and then proceed to the remedial phase of institutional litigation. In some instances, the court may articulate the broad goals embodied in the vague constitutional standard,⁴¹ but such broad goals are hardly a blueprint for reform. This experimentalist approach side-steps the standards problem by permitting the new publics, that is, the actors themselves, to learn from each other and craft the remedial schemes to address the underlying educational grievance without reference to clear and detailed standards. I readily concede that such a pragmatic approach lacks the much sought-after unified theory of equality of educational opportunity and may even subtly undermine the legitimacy of courts that are supposed to base their decisions on firmly articulated principles. That being said, our experience with educational finance jurisprudence has been that courts will, at most, articulate “fuzzy” standards of constitutionality, declare the state’s

⁴¹ The Kentucky Supreme Court did just that in *Rose*, requiring that the remedial legislation provide the following:

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

Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 212 (Ky. 1989).

educational finance scheme unconstitutional, and embark upon the arduous task of designing and implementing a remedial scheme.⁴² Though one cannot with any precision gauge the effect this flexible-standards approach has had on the public's view of judicial legitimacy, it is nonetheless the case that we have not witnessed rampant disregard of judicial decrees. Perhaps state legislatures, departments of education, and school districts have come to realize that the real battle is not over the meaning of vague constitutional texts or the articulation of clear rights; rather, the salient philosophical, political, and economic trade-offs, and therefore the actual battleground, has moved to the remedial phase.

C. The Remedial Design and Implementation Problem

Regarding the second challenge to judicial intervention in matters of educational policy—that of the court's capacity to craft and implement effective remedial policies—there can be no doubt that generalist judges alone lack the subject-matter expertise to devise educational policies that will enhance educational opportunities for disadvantaged children. And, more important, cloistered so far from the school and classroom, judges likely lack the knowledge to understand how street-level bureaucrats such as school administrators and classroom teachers will respond to judicial mandates in their own contexts. Courts cannot be there to police implementation of their decrees or to understand how teachers will integrate those decrees into their already overly busy workaday lives. The result may be either outright disregard for unpopular and unworkable judicial reforms or perverse and unintended consequences when compliance-minded teachers and administrators hew too closely to ill-designed policies.

One response to the charge that courts are ill-equipped as fact-finders to understand complex social and organizational problems and insufficiently expert to develop workable remedies to those problems is, to be glib, “compared to what?” As Michael Rebell persuasively argues, courts are accustomed to developing as complete an evidentiary record as possible regarding problems placed before them and then analyzing that evidence in a systematic way that influences their decision-making, unlike their legislative counterparts who tend to treat fact gathering as “‘window dressing’ occasions organized to justify political decisions that had already been made.”⁴³ More important, experienced with years of public law

⁴² See HANUSHEK & LINDSETH, *supra* note 9, at 136.

⁴³ Rebell, *supra* note 15, at 1532. Hanushek and Lindseth seem to have the opposite view of the relative institutional strengths of courts and legislatures: “[C]ourts are not policymaking bodies, and neither their makeup nor the processes they follow lend themselves to the task of making policy.” HANUSHEK & LINDSETH, *supra* note 9, at 139. They go on to argue that courts lack the expertise, staffing, access to information, and appropriate information-gathering processes to develop workable educational reform schemes. *Id.* at 139–40.

litigation, courts have developed processes and organizations to both formulate and administer complex reform decrees.⁴⁴ Rarely is the crafting of remedial orders done by clerks and judges squirreled-away in chambers. Rather, through consent-decree bargaining and/or the presentation of partisan expert opinions and reports, courts rely heavily on the parties themselves to develop appropriate remedial plans. Indeed, coupled with the access to information parties enjoy during the discovery phase, two scholars have argued that judicial investigation into complex educational finance issues may, at times, exceed the investigations of researchers.⁴⁵ Even after the remedial decree is handed down (whether by consent or judicial fiat), courts employ numerous administrative structures to monitor and enforce those decrees, including monitoring committees that may include party representatives, magistrates and masters who may be charged with resolving disputes or tweaking remedial schemes, and monitors who evaluate progress toward compliance with those decrees.⁴⁶

Put simply, courts inherently possess or have developed both the fact-finding and the analysis expertise, as well as monitoring and implementation tools that the other branches may or may not themselves possess. That courts do not always achieve complete success in restructuring failing organizations or redressing minority rights is not in itself reason to object to judicial intervention.⁴⁷ Again, one must ask, "compared to what?" As Rebell points out, none of the court critics "have even claimed that the other branches of government have been more effective than the courts in ensuring the productive use of educational funding, or in targeting the

44 See David L. Kirp & Gary Babcock, *Judge and Company: Court-Appointed Masters, School Desegregation, and Institutional Reform*, 32 ALA. L. REV. 313 (1981); see also FED. R. CIV. P. 53 (providing for the appointment of special masters to perform certain judicial functions).

45 Clive R. Belfield & Henry M. Levin, *The Economics of Education on Judgment Day*, 28 J. EDUC. FIN. 183, 198 (2002).

46 See, e.g., *Emma C. v. Eastin*, No. C-96-4179 (N.D. Cal. Mar. 12, 2003) (order entering first amended consent decree) (providing for a Court Monitor to collect information regarding the defendant school district's compliance with the consent decree, evaluate such compliance, and report to the parties regarding such compliance); *Smith v. Berkeley Unified Sch. Dist.*, No. C-04-3306 WDB (N.D. Cal. May 15, 2007) (order entering consent decree) (providing for the appointment of a Monitoring Committee to oversee the implementation of the consent decree).

47 Measuring the success of judicial intervention is, in itself, a contested enterprise. Analyzing primarily the effects of judicial intervention on student achievement in the aftermath of judicial intervention, Hanushek and Lindseth offer one perspective:

We can only conclude then, that, while court-ordered dollars have bought a host of services and facilities for schools—programs for at-risk students and preschoolers, smaller class sizes, additional support staff and other personnel, better school buildings, extended day programs, and full-day kindergarten, to name only some—these appear not to have generally bought the improved student performance so long sought and so urgently needed.

funds in a manner that would benefit students most in need.”⁴⁸ Indeed, the courts may possess certain institutional strengths that would allow them, under certain circumstances, to be more effective change agents than legislatures or executive agencies.⁴⁹ Precisely because courts need not be responsive to majoritarian politics and must instead base decisions on constitutional or statutory principle, they are better suited to vindicating the rights of minority children not only at the liability phase, but also at the remedial phase.

Although it is likely true that the charge of judicial incapacity to gather facts and develop effective remedial policies is overblown, that legislatures and executives have failed to address effectively the educational needs of minority students and some of the most intractable instances of school failure, and that courts may possess certain advantages as equity-minded school reformers, the experimentalist model of judicial intervention discussed here need not rely on these comparative institutional advantages to justify a role for the courts in school reform. The argument here is that the experimentalist model, in appropriate circumstances, need only destabilize a status quo that does not ensure the educational rights of disadvantaged children and then supervise a process toward school reform that is largely given content by a restructured dialogue among the parties.

II. COURTS AND EXPERIMENTALIST SCHOOL REFORM

To elaborate on this evolving role for courts in educational reform, I rely on the model of judicial intervention described by William Simon, James Liebman, and Charles Sabel.⁵⁰ Courts in certain modern educational

HANUSHEK & LINDSETH, *supra* note 9, at 170. Rebell offers a contrasting perspective:

[S]uccess in sound basic education cases cannot be measured solely by initial progress in reducing funding inequities, increasing spending on education, or raising test scores. All of these outcome indicators are important, but they are also limited in their scope and in their accuracy. . . . But ultimately the measure of success for constitutional purposes—and indeed for all purposes—must be whether the state has succeeded in establishing and maintaining an educational system that provides meaningful educational opportunities to all students and graduates [sic] students who have the knowledge and skills needed to function as capable citizens and productive workers.

REBELL, *supra* note 8, at 37.

⁴⁸ Rebell, *supra* note 15, at 1538.

⁴⁹ *Id.* at 1539–40.

⁵⁰ Liebman and Sabel specifically label the court’s role in experimentalist governance as “non-court-centric judicial review.” Liebman & Sabel, *supra* note 16, at 281. Here, I will not use that term because some might believe that this term separates courts from experimentalist reform. In my view, the courts are an integral part of the dialectic among key stakeholders

reform litigations appear to be playing a coordinating role among reformers, policy-makers, and educational insiders, as states work to develop an adequate educational service delivery system.⁵¹ Rather than dictating command-and-control remedial schemes or even acting as mere bystanders during traditional consent decree bargaining, Liebman and Sabel argue the courts express the broad outlines for the remedial goals and then oversee the process by which schools, the interests affected by schooling, and communities in general collaborate in devising specific objectives and school reform measures to achieve those objectives.⁵² Central to this formula is the disentanglement of established political interests replaced by diverse “new publics” with disconnected interests (community groups, business leaders, civic and professional organizations) who coalesce around the reform of education.⁵³ Often with the court’s assistance, these stakeholders periodically correct those measures and the interventions designed to achieve success on those measures based on empirical reality.⁵⁴

As specified by Sabel and Simon, this experimentalist approach proceeds in two distinct phases: the prima facie finding of liability and the development of the remedy.⁵⁵ First is the court’s initial finding of a violation of the law (constitutional or otherwise). The judicial finding of liability is a familiar and comfortable role for courts. As I discussed above, given the often vague legal performance standards for public schools, there is much room, no doubt, for judicial attitudes and other influences to play a role in judicial decision-making,⁵⁶ but the methods of evidentiary and legal analysis are quite conventional. An additional important, if not explicitly stated, condition for a finding of liability under the experimentalist approach is the plaintiffs’ inability to use traditional political fora to remedy the public institution’s (read: school system’s) failure to meet legal standards. This failure may be due to the fact that violations of minority rights go unredressed in a majoritarian political process (such as school board governance), that the political process is captured by concentrated interests, or that the political process is essentially gridlocked, but could be moved toward a solution beneficial to all parties if the gridlock could be overcome and the competing interests coordinated. In other words, courts ought to intervene only when plaintiffs have identified a failure of schools to adhere to constitutional or statutory standards and when plaintiffs have

who may be in the judiciary, the legislature, the executive branch, community leadership, etc.

⁵¹ *Id.* at 206-07.

⁵² *Id.* at 191-92.

⁵³ *Id.* at 266-78.

⁵⁴ *Id.* at 278-83.

⁵⁵ Sabel & Simon, *supra* note 16, at 1062-73.

⁵⁶ See William S. Koski, *The Politics of Judicial Decision-Making in Educational Policy Reform Litigation*, 55 HASTINGS L.J. 1077, 1227-30 (2004).

been unsuccessful in pursuing reform through the political process.

Having found that judicial intervention may be necessary, courts are called upon, at the remedial phase, to ensure remedies for the violation of rights. It is at the remedial phase where the right is given meaning and operationalized through school reform. Here the courts need to engage the new publics in a contextual and iterative process of working toward the remedial goals. Most often the development of remedies will be through direct negotiation among the parties to the litigation and, sometimes, other key community stakeholders. That deliberative process may be supervised indirectly by the court through the appointment of mediators, magistrates, or masters, but often is not. The goal is to find remedial consensus within the broad parameters of the liability finding. This remedial bargaining is not a one-shot affair. As Sabel and Simon put it, the remedy takes the form of a “rolling-rule regime.”⁵⁷ The two argue, “The rules that emerge from the remedial negotiation are provisional. They incorporate a process of reassessment and revision with continuing stakeholder participation.”⁵⁸ School reform is an uncertain business, and the construction of performance standards and the means to achieve those standards must be iterative and responsive to actual implementation realities. The result, of course, will be the sustained involvement of not only the new public, but also the court itself. As a matter of legal (constitutional or otherwise) principle, then, key stakeholders ascribe systemic meaning to the “right to an education” or “equality of educational opportunity” or “free, appropriate education” through an iterative process and with a focus on providing the resources and conditions necessary for all children in their communities—particularly “at-risk” children—to succeed.

Having coordinated this deliberative process, the ongoing role of the court is to monitor and referee. Once it has approved the agreed upon performance standards established through the negotiation process (such approval is not necessarily a given), the court would fall into the role of monitoring the defendants’ performance and resolving any disputes that arise. The monitoring role is becoming commonplace. Courts in structural reform litigation may employ court monitors or monitoring committees who require reporting from the defendants, who may engage in their own data collection and analysis, and who are required to make their findings of compliance or non-compliance known to the parties and public. This monitoring process provides both transparency and accountability: accountability to the court, to the plaintiff stakeholders, and to the public at large. Should the school system persistently fail to meet the agreed-upon performance standards, the court may require the parties to go back to the bargaining table to craft more effective policies and practices to achieve

⁵⁷ Sabel & Simon, *supra* note 16, at 1069.

⁵⁸ *Id.*

compliance or, in extreme cases, use the threat of contempt sanctions to cajole compliance.

But “compliance” may not be so black-and-white. There may well be disagreement over the interpretation of the compliance standards, over the analysis of the evidence, or the feasibility of performance at all given unforeseen conditions on the ground.⁵⁹ Here the court may employ its magistrates or may step in directly to resolve such disputes. What is important to note is that such an ongoing dispute resolution role is again becoming quite familiar to the judiciary.

Simon, Sabel, and Liebman have specifically identified aspects of the *Rose* litigation as exemplary of the judicial role in experimentalist reform. In describing the sometimes robust response of legislatures to judicial liability findings in adequacy cases, Sabel and Simon point out that “[t]hese

59 It should be noted that a recent U.S. Supreme Court decision appears to have softened the standard for modifying or lifting a court-ordered remedial decree, thus making the question of compliance even more difficult and potentially providing a wider set of circumstances under which defendants could be relieved of long-term, judicially-ordered experimentalist decrees. *Horne v. Flores*, 129 S. Ct. 2579, 2593-95 (2009). In *Horne*, the Court held that the Ninth Circuit Court of Appeals had not applied the appropriate standard for relief from a judgment under Federal Rule of Civil Procedure 60(b)(5), which allows a party to seek modification of a judicial order if “a significant change either in factual conditions or in law” renders continued enforcement “detrimental to the public interest.” *Id.* at 2593 (quoting *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 384 (1992)). In interpreting that standard, the Court emphasized the “sensitive federalism concerns” raised by long-term decrees that “dictate state or local budget priorities” and that “bind state and local officials to the policy preferences of their predecessors.” *Id.* at 2593-94. Prior to this decision, such concerns were not central to the Rule 60(b)(5) analysis. *Horne* appears to have rebalanced the analysis to disfavor the long-term work of institutional reform. More telling is that the Court also raised concerns about federal court decrees exceeding their appropriate limits when they are “aimed at eliminating a condition that does not violate [federal law] or does not flow from such a violation.” *Id.* at 2594-95 (quoting *Milliken v. Bradley*, 433 U.S. 267, 282 (1977)). Again, such a refocus of the analysis would seem to render vulnerable remedial schemes that do not directly address the specific legal violation, but would be necessary or useful to remedying the underlying violation. The Court emphasized that the Rule 60(b)(5) analysis should ascertain whether the specific directives of the remedial decree are supported by an ongoing violation of the law. *Id.* at 2597. In other words, there appears to be the possibility that modification or dissolution of a remedial decree could be warranted at any time that it can be proven that there is no longer a legal violation, irrespective of whether the defendants complied with the remedial decree that they may even have agreed to implement in exchange for avoiding further litigation. That government defendants will seize upon this language to seek relief from structural reform decrees is no idle concern. Just recently, the Attorney General for the District of Columbia announced plans to seek relief from the systemic special education reform decree in the *Blackmon-Jones* litigation in the District of Columbia’s schools in part on the strength of the *Horne* Court’s analysis. See Bill Turque, *D.C. to Ask Judge to Dismiss Special Education Court Order*, WASH. POST, Sept. 16, 2009, at B4; see also Tricia Bishop, *Bid to End Foster Care Edict Fails: City, State Dispute Extension of 1988 Oversight Agreement*, THE SUN (Balt., Md.), Oct. 10, 2009, at 1A (reporting on a federal district court’s refusal to relinquish oversight of Baltimore’s foster care system, despite the city’s argument that the *Horne* opinion required the liquidation of the judicial decree in light of progress made by Baltimore officials).

judicial efforts have sometimes converged with extensive civic activity around educational reform. In Kentucky and Texas, for example, lawsuits drew on the activities of politically appointed commissions of business, professional, and civic leaders.”⁶⁰ Liebman and Sabel describe at length the process of civic engagement that both preceded the litigation through the work of the Pritchard Committee and the coalescence of the Kentucky school reform movement and legislative commitment during and following the *Rose* litigation.⁶¹ They conclude that

in amassing expertise and continuously monitoring the behavior of the primary reform actors, the Kentucky legislature might be coming to resemble nothing so much as the ideal activist court, transforming American institutions, schools included, through the dictates of the Constitution in the manner imagined by litigation-minded reformers since *Brown v. Board of Education*. Indeed, by identifying itself so thoroughly with the *Rose* court’s goals that it has itself become a court with respect to administering the remedy, the legislature might be in the midst of developing an innovative solution to the classic American Legal process question: Which branch decides?⁶²

It should be noted that the experimentalist model possesses certain similarities to the “colloquy” model of judicial intervention advocated by Michael Rebell.⁶³ For example, both contemplate a more engaged role for the court working toward broad reform goals through a deliberative process. But there is a significant difference. Rebell’s “colloquy” model contemplates a dialogue among the three formal branches of government. His “colloquy”

60 Sabel & Simon, *supra* note 16, at 1025.

61 Liebman & Sabel, *supra* note 16, at 250-66.

62 *Id.* at 263. It should be noted that Liebman and Sabel also offer a far less rosy interpretation of the legislative response and the efficacy of reform in the wake of the *Rose* decision, noting the fact that further litigation has been brought due to the perceived failings of the Kentucky Education Reform Act. *Id.* at 251-66. They conclude, however, that the more recent “reorientation of the Pritchard Commission from state-level actor interested in local affairs mainly to generate support for legislative reform to a catalyst of truly local attempts at thoroughgoing reorganization may be a harbinger of a fundamental redirection of the Kentucky model of reform from the outside in.” *Id.* at 266. To be clear, I am not suggesting that the *Rose* litigation exemplifies the experimentalist approach to governance. To the contrary, the *Rose* court issued only one decision that catalyzed the educational reform process in Kentucky and the passage of the Kentucky Educational Reform Act (which bore many of the hallmarks of experimentalist regulation such as outcomes-based standards and public reporting), but it did not continue to monitor the development of the remedial legislation or in any way provide an ongoing forum for party deliberations during the implementation phase. That said, *Rose* was significant in the evolution of judicial involvement in educational policy-making in that it showed how the court can play a role in coordinating comprehensive school reform efforts and providing the impetus and/or cover for other stakeholders to act.

63 Rebell, *supra* note 15, at 1540.

model recognizes “that each of the three branches has specific institutional strengths and weaknesses in regard to social policymaking and remedial problem-solving. The focus, therefore, should be on how the strengths of each of the branches can best be jointly brought to bear on solving critical social problems.”⁶⁴ The Simon-Sabel-Liebman model is not necessarily focused on those state-level institutions to bring meaning to educational rights and craft remedial reforms; it also seems to apply to school reform at the local level with locally affected communities and stakeholders to be among the new publics.⁶⁵

When dealing with large-scale, state-level policy reforms (think reformation of educational finance and accountability systems) the remedy and its effects are felt by nearly all involved in the education enterprise. Accordingly, a dialogue among the judiciary and the policy elites may be the most manageable and appropriate for a court, as the court will need to make delicate trade-offs between the limits of its legitimacy and the need to veto or shape what is ultimately a legislative reform scheme. Contrast that type of policy reform with the restructuring of failed schools or districts. Despite protestations to the contrary by some, education is still very much a local matter. Parents, community leaders, teachers, administrators and those with a meaningful and immediate stake in school reform are best suited to, and indeed must be included in, any equity-minded reform process. Accordingly, the experimentalist approach contemplated here, with its call for broad stakeholder participation, may well be optimally suited to the reform of local schools and districts.

There are other advantages to an experimentalist involvement of courts in the school reform process. First, experimentalism is consistent with the past two decades of focus on outcomes-based educational reform schemes. Indeed, it is no coincidence that much school reform litigation has drifted away from command-and-control, inputs-oriented remedies as educational policy has drifted towards the establishment of outcomes standards for children and schools, while leaving much discretion to local education agencies to achieve those standards.⁶⁶

⁶⁴ *Id.*

⁶⁵ It should be noted that the process of policy reform advocated by Rebell, like the experimentalist model, also includes the engagement of relevant stakeholders outside of the legislature and executive branch. REBELL, *supra* note 8, at 97-101 (describing the “public engagement” process employed in the New York educational finance litigation).

⁶⁶ *See id.* at 59-64. Commenting on this focus on standards, Rebell maintains:

The result of this colloquy [among the branches] has been that standards-based reforms have been reconceptualized “as a form of governance bound to a state’s greater constitutional duty to provide students with an adequate education” and consequently there has been greater precision and a higher level of validity in regard to both constitutional concepts and legislatively enacted state academic standards.

Second, the “bottom-up” development of remedial objectives, policies, and practices by the new publics is consistent with what has been learned about the implementation of educational reforms. Since the alarmed discovery of the policy “implementation problem,”⁶⁷ educational policy-makers, at a minimum, have been more sensitive to the realities of street-level bureaucrats (like administrators and teachers) and how they might transform top-down policies, and in many instances, they have devised ways to develop policy in a bottom-up fashion.⁶⁸ The experimentalist model similarly holds the promise of including all key stakeholders in remedial design.

Third, the experimentalist perspective explicitly accounts for the organizational learning that must occur as implementation realities are faced. Fixed-rule regimes are ill-suited to the complexities of restructuring schools. Some amount of trial-and-error is necessary and the flexibility of the experimentalist model can accommodate such organizational learning.⁶⁹

Despite my optimism for the experimentalist model, there is room for caution. Recall that Liebman and Sabel are confident that the “new publics” constituted by traditionally diverse interests (business and community activists, for instance) will disentrench established political interests when it is “discovered” that local schools are failing.⁷⁰ Others are somewhat less sanguine.⁷¹ For many families in low-income communities,

Id. at 64 (quoting BENJAMIN MICHAEL SUPERFINE, *THE COURTS AND STANDARDS-BASED EDUCATION REFORM* 162 (2008)).

⁶⁷ See R. A. Weatherly & Martin Lipsky, *Street-Level Bureaucrats and Institutional Innovation: Implementing Special Education Reform*, 47 *HARV. EDUC. REV.* 171, 176-79 (1977).

⁶⁸ Liebman and Sabel discuss at length the bottom-up reform strategy of the venerable Anthony Alvarado in New York’s District 2—a strategy that brought academic success to this mostly poor and working class neighborhood school district. See Liebman & Sabel, *supra* note 16, at 217-27; see also MILBREY W. McLAUGHLIN & JOAN E. TALBERT, *BUILDING SCHOOL-BASED TEACHER LEARNING COMMUNITIES: PROFESSIONAL STRATEGIES TO IMPROVE STUDENT ACHIEVEMENT* 92-98 (2006); Joseph Kretovics et al., *Reform from the Bottom-Up: Empowering Teachers to Transform Schools*, 73 *PHI DELTA KAPPAN* 295, 295-99 (1991).

⁶⁹ See generally, DAVID TYACK & LARRY CUBAN, *TINKERING TOWARD UTOPIA: A CENTURY OF PUBLIC SCHOOL REFORM* 134-40 (1995) (arguing that educational policies should be treated as working goals that ought to be modified to meet local conditions and the experience of practice).

⁷⁰ Liebman & Sabel, *supra* note 16, at 266-78. Indeed some, such as Jeannie Oakes and John Rogers, insist that traditional policy reform that is driven by technocrats without constituent “voice” will do little to further the cause of educational equality. JEANNIE OAKES & JOHN ROGERS, *LEARNING POWER: ORGANIZING FOR EDUCATION AND JUSTICE* 107-09 (2006). Rather, meaningful equity-minded reform can only occur through grassroots organizing and political mobilization aimed at changing the powerful norms or “logics” that work to maintain the inequitable status quo. *Id.*

⁷¹ See, e.g., Helen Herschkoff & Benedict Kingsbury, *Crisis, Community, and Courts in Network Governance: A Response to Liebman and Sabel’s Approach to Reform of Public Education*, 28 *N.Y.U. REV. L. & SOC. CHANGE* 319, 324 (2003). Herschkoff and Kingsbury question the

group political mobilization is not their day job. They may not possess the time and technical expertise to participate in sustained dialogue and school reform efforts. This leaves the very real possibility that the disentranced interests will retrench as traditional political power-brokers (read: middle- and upper-middle-class whites and suburbanites) and educational technocrats will garner control over the “new publics.” Moreover, even if educational “rights” were well-defined, the prospect of using litigation to enforce those rights is dicey given the costs and time associated with such an effort. The collective action problem plaguing such efforts to secure a public good such as an adequate public education may hinder even the most resolute efforts of individuals and small groups.

More generally, Professor David Super has argued that the entire enterprise of deliberative experimentalism has failed and will fail to achieve meaningful welfare reform:

The decentralized, participatory, and deliberative approach the United States has relied upon to design antipoverty policies over the past four decades has prevented it from developing, and mobilizing supporters around, a coherent, plausible proposal. We have grossly overestimated the value of deliberation and underestimated the importance of achieving a meaningful consensus about the substantive principles of antipoverty law. Indeed, all substantial advances in antipoverty law that we have achieved are attributable to a second track of centralized, substantive, pragmatic policymaking on low-salience issues.⁷²

While I will not detail and address Super’s argument that the deliberative

foundation of Liebman and Sabel:

Absent . . . formal protection, it is not clear that the stakeholder networks on which [Liebman and Sabel] base their strategy will be able to take root as progenitors of reform, particularly among the most disadvantaged.

Indeed, we fear that the forms of action that Liebman and Sabel offer may provide only illusory protection for those students who are left behind.

Id.; see also Martha Minow, *School Reform Outside Laboratory Conditions*, 28 N.Y.U. REV. L. & SOC. CHANGE 333, 336 (2003) (“Although Liebman and Sabel acknowledge that a vital role remains for grassroots and community advocacy, nothing in their theory will equip parents and other community members to develop the expertise and options necessary for them to hold the other actors to account.”); John A. Powell & Marguerite L. Spencer, *Brown Is Not Brown and Educational Reform Is Not Reform if Integration Is Not a Goal*, 28 N.Y.U. REV. L. & SOC. CHANGE 343, 347 (2003) (“The dissatisfying hierarchies collectively destabilized by ‘new publics’ are being replaced by new hierarchies that continue to marginalize and stigmatize impoverished persons of color.”).

⁷² Super, *supra* note 16, at 545.

approach to antipoverty law has obstructed resolution of normative disagreements about society's responsibility to low-income people (suffice it to say, that the experimentalist approach consciously avoids the necessity of complete agreement on normative "first principles," such as the meaning of equality of educational opportunity), it is worth describing Super's concern that because the deliberative process of experimentalism requires continuous engagement over a long period of time, thus taxing the expertise and time of low-income persons and their advocates, the process is subject to distortion in favor of those with resources and "[i]deologues seeking to make expressive points on both the Right and the Left [who] may have those resources."⁷³ This critique is similar to the preceding concern that, lacking the expertise and resources, disadvantaged persons and their communities will, over time, become marginalized in the experimentalist process and elite interests and players will retrench. The added gloss provided by Super is that ideologically-driven parties will likely have more staying power and will influence the debate in ways that may or may not benefit the disadvantaged children and their communities who stand to win or lose from reform. The difficulty with Super's critique seems to be the implicit assumption that, at least for localized efforts to reform local institutions, there are viable alternatives to judicially induced experimentalism and that, even with some distortion from ideologues, disadvantaged communities would be better off with the status quo. Indeed, a condition for court engagement in institutional reform is that other avenues of redress are unavailable. The salient question is whether "expressive ideologues" will, over time, make conditions worse for disadvantaged children in an experimentalist regime.

Apart from the concern that the plaintiffs' (read: those adversely affected by the failure of the school system) inability to organize and sustain attention to the iterative remedial process, there is an open question as to the court's capacity to sustain attention over an extended period of time. Even under the best of circumstances, school reform is arduous and requires a longer time horizon. The ability to "stick to it" provides a comparative advantage to courts in the long-term enterprise of school reform. Yet, over long periods of time, significant questions arise regarding the judiciary's capacity. Can a single judge maintain such a case on her docket for many years? Can the system as a whole manage the number of cases that might be brought when the political avenues of redress are closed? It is far too early for me to make any judgments in this regard.

But such questions do prompt a final question: what happens if judicial experimentalism persistently fails to bring about the desired (legally required) outcome? Continued supervision of the deliberations of new publics negotiating further remedial policies may be fruitless. Contempt sanctions—which may have the perverse effect of punishing the children

73 *Id.* at 547.

who ought to be the beneficiaries of judicial intervention—may be pointless. Reversion to traditional command-and-control remedial plans may be similarly ineffective. While I am not so pessimistic to believe that these conclusions will be reached in many (any?) experimentalist interventions, one must be concerned about the limits of judicial legitimacy in this new, engaged role.

With these lessons and the experimentalist framework in mind, I turn to the litigation that has occupied a substantial portion of the last eleven or so years of my life, *Emma C. v. Eastin*. In the next section, I will describe the efforts of the *Emma C.* plaintiffs and other key stakeholders to systemically reform the special education service delivery system and the state monitoring and oversight system in the Ravenswood City School District in East Palo Alto, California. While I will briefly discuss the liability phase of the litigation (a full treatment of which is deserved, but must wait for another day), I will focus on specific aspects of the remedial phase that display both a more traditional role for the courts in institutional reform cases and a more experimentalist approach to judicial oversight of school reform. I conclude with thoughts on the strengths and limitations of the experimentalism in *Emma C.*

III. JUDICIAL EXPERIMENTALISM IN THE RAVENSWOOD SPECIAL EDUCATION LITIGATION

In the heart of California's Silicon Valley, among some of the wealthiest bedroom suburbs in the country, lies the City of East Palo Alto, a community that possesses a rich agrarian history (still evident in the chicken coops, gardens, and greenhouses nestled among the homes), a proud group of long-time residents who fought for municipal incorporation and self-governance of this overwhelmingly African-American, Latino, and Pacific Islander community, and, unfortunately, a reputation of being a focal point for crime, poverty, and (until recently) economic under-development. East Palo Alto is also home of the Ravenswood City School District ("District") (which also includes the mostly minority community of the Belle Haven neighborhood of Menlo Park). Ravenswood serves a student population that is predominantly "minority"⁷⁴—Hispanic (70%) African American (20%), Pacific Islander (9%) and other 1%.⁷⁵ Ravenswood is an elementary

74 I place quotation marks around "minority" because not only is the Ravenswood District almost 100% non-white, white students make up only 28% of the public school population in California with Latinos being the largest single ethnic group and on the verge of becoming the majority of California students. CAL. DEP'T OF EDUC., EDUC. DEMOGRAPHICS UNIT, STATEWIDE ENROLLMENT BY ETHNICITY: 2008-09 (Jul. 7, 2009), <http://dq.cde.ca.gov/data-quest/EnrollEthState.asp?Level=State&TheYear=2008-09&cChoice=EnrollEth1&p=2>.

75 Welcome to the Ravenswood City School District—Ravenswood City School District, <http://www.ravenswood.k12.ca.us/> (last visited Feb. 26, 2010).

(kindergarten through eighth grade) district with some 4500 students in its elementary schools, child development center, and one of the few single-gender public schools in the country.⁷⁶ Five charter schools operate within the District's jurisdiction, including one charter high school.⁷⁷

Ravenswood has the dubious distinction of being among the worst-performing school districts in California. In terms of student achievement on assessments mandated by the state's Public School Accountability Act and the federal No Child Left Behind Act, some 78.3% of Ravenswood's students were assessed "below proficient" in English-Language Arts, while 71.7% were deemed "below proficient" in mathematics.⁷⁸ A staggering 90.9% of students with disabilities were assessed "below proficient" in English-Language Arts and 85.4% of such students were "below proficient" in Math.⁷⁹ English language learners ("ELL"), who make up 81.2% of the student population in the District,⁸⁰ fared little better, as 80.1% were below proficient in English-Language Arts and 71.6% were below proficient in Math.⁸¹ While Ravenswood, like most California school districts, has only been systematically assessing student performance and reporting that performance for the last decade, the failure of Ravenswood to prepare its students for high school had long been known to parents and community activists. For instance, Latino parents banded together to form *Padres Unidos* to advocate on behalf of their children in the mid-1990s. They participated in school board meetings, filed compliance complaints with the California Department of Education ("CDE") and with the U.S. Department of Education's Office for Civil Rights. Their primary concerns were Ravenswood's failure to provide Spanish-speaking children access to the curriculum and the failure to provide an opportunity for such children's parents to participate in their children's education. Ravenswood was repeatedly found non-compliant with its legal obligations to its ELL children.

ELLs were not the only group of Ravenswood children whose rights were being systematically violated. Throughout the early 1990s, attorneys at the

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ CAL. DEP'T OF EDUC., 2007-2008 ACCOUNTABILITY PROGRESS REPORTING, LOCAL EDUCATION AGENCY (LEA) REPORT, RAVENSWOOD CITY ELEMENTARY (2009), <http://ayp.cde.ca.gov/reports/AcntRpt2008/2008APRdstAYPReport.aspx?allcds=4168999> [hereinafter LEA—RAVENSWOOD].

⁷⁹ *Id.*

⁸⁰ CAL. DEP'T OF EDUC., EDUC. DEMOGRAPHICS OFFICE, RAVENSWOOD CITY ELEMENTARY, LANGUAGE GROUP DATA—DISTRICT WIDE FOR 2008–09 (2010), <http://dq.cde.ca.gov/data-quest/lc/DISTRICTLC.ASPX?cSELECT=4168999--4168999%2D%2DRAVENSWOOD+CITY+ELEMENTARY&cYEAR=2008-09>. It should be noted that 68.3% of Ravenswood's students are ELLs who have not yet been deemed "Fully English Proficient." *See id.*

⁸¹ *See* LEA—RAVENSWOOD, *supra* note 78.

East Palo Alto Community Law Project (“Law Project”),⁸² particularly David Giles, were inundated with requests from parents with children with disabilities to represent their children who were not being provided with appropriate educational services in Ravenswood. During that time period, Giles and his colleagues represented dozens of Ravenswood children who had been denied by the District a free appropriate public education (“FAPE”) in the least restrictive environment (“LRE”), a violation of the children’s rights under the Individuals with Disabilities Education Act (“IDEA”).⁸³ The families and Giles filed compliance complaints with the CDE, attended individual education plan (“IEP”) team meetings to advocate for children with special education needs, and even filed for due process hearings when Ravenswood failed or refused to serve children with disabilities. Despite frequent findings of non-compliance by the CDE, settlement agreements vindicating the children’s rights in individual cases, and even the occasional admission of malfeasance by the District, it had become clear to Giles and the families whom he represented that the failures of the District were not isolated; they were systemic failures and more comprehensive and systemic action had to be taken.

In 1996, over the course of several months, the families Giles represented began to meet with Giles and attorneys (including the late crusader for children with disabilities, Diane Lipton) from the national disability rights organization Disability Rights Education Defense Fund (“DREDF”) to discuss a potential class-action lawsuit against the District for its violations of the IDEA, Section 504 of the Rehabilitation Act, and various state special education laws. In compiling the grievances against Ravenswood, it became clear that the list of systemic failures pervaded the entire special education service delivery system and would require significant injunctive relief. These failures, each of which violated state and federal law, included: (1) failure to identify children with disabilities; (2) failure to assess children with disabilities; (3) discriminatory assessment practices (racial and linguistic bias); (4) failure to develop appropriate IEPs; (5) failure to implement agreed-upon IEPs; (6) segregating children with behavior problems into self-contained “emotionally disturbed” (“ED”) special day classes (“SDC”); (7) failure to educate children with disabilities in the LRE, that is, failure to educate them with their non-disabled peers to the maximum extent appropriate; and (8) instances of physical abuse of children with disabilities. That the families had identified these systemic failures should have been no surprise to Ravenswood officials. In the preceding months and years, Giles and the individual families had met

⁸² The Law Project was a non-profit legal services agency founded by Stanford Law students in 1984 to meet the legal service needs of the low-income communities of East Palo Alto and eastern Menlo Park. The Law Project also served as the primary clinical experience for Stanford Law students until it was shuttered in 2001.

⁸³ 20 U.S.C. §§ 1400-1482 (2006).

with district leadership to discuss the recurring problems. Giles even met with members of the District's Board of Trustees. What became clear to Giles and his clients was that Ravenswood was not going to undertake meaningful special education reform in response to the concerns of a single legal services lawyer and a relatively small group of parents of children with disabilities.

The failures were not Ravenswood's alone. Under the IDEA, the state education agency ("SEA"), in this case the CDE, has an obligation to monitor school districts' compliance with the IDEA and maintain an effective complaints management system that allows parents and children to file individualized complaints, provides for prompt investigation of those complaints and written findings of compliance or non-compliance with the IDEA, and, to the extent non-compliance is found, requires the CDE to issue effective corrective actions to the district.⁸⁴ CDE was deficient on both counts. Given the extensive systemic failures in special education service delivery, the CDE could not claim that it had an effective statewide monitoring system in place that would detect and remedy such widespread denial of FAPE in the district. Moreover, the parents and children in Ravenswood were able to point to many instances in which individual complaints had been filed with the CDE, and the CDE either did not act on the complaints or investigate and issue corrective actions, but rather it failed to ensure compliance with those corrective actions. As a result, the families believed that the state was out of compliance with the IDEA.

Having failed in their efforts to address the denial of services to their children through the IDEA's procedural routes, the traditional bureaucratic routes, and even the political routes, the families felt they had no alternative other than to seek the interventions of the federal courts who were obliged to enforce the IDEA. Eight children, led by the pseudonymous "Emma C." were chosen to represent a class of all past, present, and future children with disabilities who live in the jurisdiction of Ravenswood. On November

⁸⁴ The IDEA provides that each "State Education Agency is responsible for ensuring that (i) the requirements of this [Act] are met." *Id.* §1412(a)(11)(A); *see also* 34 C.F.R. §§ 300.600, 300.149 to .153 (2009). Moreover, the CDE bears the duty of providing special education services because the state of California is ultimately responsible for ensuring that the requirements of the IDEA are fulfilled. 34 C.F.R. § 300.149(a)(1) ("The SEA is responsible for ensuring [t]hat the requirements of this part are carried out . . ."); *see CAL. GOV'T CODE* § 7561 (West 2008) ("[T]here shall be a single line of responsibility with regard to the education of all handicapped children as required by [the Education for All Handicapped Children Act, now the IDEA]."); *Morgan v. Greenbrier County W. Va. Bd. of Educ.*, 83 Fed. App'x. 566, 568-69 (4th Cir. 2003) (explaining that "[s]tate eligibility for federal funding" is predicated on the state assuming ultimate responsibility for the IDEA); *Gadsby v. Grasmick*, 109 F.3d 940, 943-44 (4th Cir. 1997) (explaining that the IDEA "places the ultimate responsibility for the provision of a free appropriate public education to each student on the SEA"); *Kruelle v. New Castle County Sch. Dist.*, 642 F.2d 687, 697 (3d Cir. 1981) (explaining that Congress, in enacting the IDEA, desired a "central point of accountability" and "a single line of responsibility" with the SEA).

18, 1996, the *Emma C.* Plaintiffs filed their class action suit against the Ravenswood City School District and its Board of Trustees, the CDE, and the California State Board of Education.⁸⁵ The complaint detailed the systemic failures of the District and state, dramatically told the stories of the eight children who were denied a FAPE, and alleged violations of the IDEA, Section 504, the Americans with Disabilities Act, and even the Equal Protection Clause. The Plaintiffs drew Judge Thelton Henderson of the U.S. District Court for the Northern District of California. Judge Henderson, a Jimmy Carter appointee, had a deep knowledge of the East Palo Alto community, having served as one of the town's first legal services lawyers in the 1960s. Nobody was in a better position to understand the dynamics of that town.

Though filled with complexity and no small amount of drama and intrigue, I will only briefly discuss the liability phase of the litigation. Following the standard script, both defendants initially moved for dismissal of the litigation on the grounds of exhaustion. After initially agreeing with them, Judge Henderson reversed himself on reconsideration saying that exhausting the administrative channels would be futile for the Plaintiffs. He went further to certify the class of children with disabilities that included the future children in the district. At that point, the defendants took decidedly different approaches to the litigation. The CDE, recognizing the dismal state of the Ravenswood's special education system launched its own investigation into the Plaintiffs' allegations and concluded that virtually all allegations, including those against the CDE itself, were meritorious. Accordingly, in January 1998, CDE issued an extensive corrective action report that would pave the way for settlement negotiations with the Plaintiffs. Ravenswood, for its part, fought each and every allegation.⁸⁶

⁸⁵ The decision to sue the local school district was no small matter for the Law Project. After all, the district was a flagship community institution and the city's largest employer. Expensive litigation would effectively result in some members of the "community" being adverse to other members of the "community," thus challenging the very notion of who was the "Community" in "East Palo Alto Community Law Project."

⁸⁶ Plaintiffs' counsel was—and remains—puzzled by the aggressive resistance of the District at that time. The District's superintendent, Charlie Mae Knight, who had brought stability to the leadership of the District, but proved to be a controversial leader (who would later receive sanctions from Judge Henderson for causing falsified documents to be filed in the case and, in a separate matter, be indicted, tried, and acquitted on conflict-of-interest charges), refused to consider that a consensual remedy might be in all parties' interest. After all, had the district pursued consensual resolution of the matter, it would have been in a position to work with Plaintiffs and CDE to ensure that the state share in the costs of remedying the special education failures. As Hanushek and Lindseth charge, such "collusion" is not unheard of. HANUSHEK & LINDSETH, *supra* note 9, at 140. That said, it is not clear to me why this should pose a problem. Indeed "collusion" (or, as I would call it, "cooperation") among allies can be facilitated or coordinated in the context of the remedial phase of a litigation. All parties will advocate for their best interests and there is no reason that other key stakeholders, whose interests may differ from the formal parties, should not be at the table during the

At the behest of the CDE, two renowned special education academics, Drs. Alan Coulter and Kathy Gee, conducted a needs assessment for Ravenswood's special education program and, in July 1998, issued a report describing the District's failure to comply with the state laws. Based on the needs assessment, Gee and Coulter drafted an extensive (261 item) school reform plan that aimed to fundamentally restructure special education service delivery and bring the district into compliance with the IDEA. CDE, anxious to resolve the costly litigation, agreed that the plan, dubbed the Ravenswood Corrective Action Plan (RCAP), would be the appropriate remedy for the District's and state's failures. Ravenswood, however, refused to enter a comprehensive settlement agreement and instead entered a separate settlement agreement on the eve of trial that left many questions unanswered and was ultimately rejected by Judge Henderson, who scheduled the matter for trial, but invited the parties to enter a comprehensive agreement.

While trial preparation was re-ignited during the January to August 1999 time period, the parties nonetheless believed a deal was within reach and sought the assistance of a mediator to help them craft a three-way agreement. The centerpiece of the agreement remained the RCAP. While the RCAP was a very thoughtful workplan for a school district earnestly approaching self-reform, it suffered from the major flaw that Ravenswood had no hand in its crafting and therefore was unable to integrate the expertise of its own professionals and their understanding of conditions on the ground. More important, there was virtually no buy-in to the plan and it was never clear that the District's administration would embrace any corrective action plan, despite ongoing negotiations. Notwithstanding those concerns, the parties signed a proposed consent decree in September 1999. The primary components of that agreement were: (1) Ravenswood's agreement to implement the RCAP; (2) procedures for parents and students to file for and receive compensatory education services for the denial of FAPE that they had suffered; (3) the appointment of a Court Monitor to oversee the implementation of the Consent Decree and the RCAP, and to provide detailed quarterly reporting regarding the District's compliance; (4) appointment of a parents' advocacy organization to assist parents of special needs students in working with the District; and (5) continuing court jurisdiction until the Court determines, after a full hearing, that the District has in place a system to provide FAPE to all students with disabilities. In that same month, the Court appointed Mark Mlawer, a nationally recognized expert in state special education monitoring systems, to serve as Court Monitor (a position he holds to the date of this writing), and, in January 2000, Judge Henderson issued the RCAP and proposed Consent Decree as an order of the Court. Yet, despite assurances to the Court by

Ravenswood's superintendent, Plaintiffs' concerns about Ravenswood's commitment to implementing the RCAP proved well-founded.

As early as October 2000, Plaintiffs were compelled to send letters to the District about the continuing lack of appropriate services they were receiving, and by March 2001, Ravenswood had complied with less than thirty-three percent of requirements under the RCAP, despite the fact that they were to begin implementing the reforms in September 1999. Frustrated with Ravenswood's failure to meaningfully implement the RCAP and realizing that District leadership had no serious intention to perform, Plaintiffs filed a motion for the court to issue an order to show cause why the District should not be held in contempt, a dramatic move at a relatively early stage in the implementation process. This was dramatic because any sanction would likely include severe restrictions on the District's authority to administer special education services, including state takeover or judicial receivership.

As the parties prepared for the contempt hearing, media scrutiny of the case and the District became intense.⁸⁷ Equally intense was the litigation, as Ravenswood engaged two separate San Francisco law firms and eventually replaced them with an Atlanta-based law firm to litigate the contempt proceedings. But the data were clear. In August 2001, in a scathing opinion, Judge Henderson found the District in contempt, but refused to issue any draconian remedy.⁸⁸ Rather, in an October 4, 2001 order he gave the District until March 31, 2002 to comply with certain tasks—what came to be known as “the contempt assignment”—or face state takeover.⁸⁹ Remarkable about Henderson's opinion was his singling out of the superintendent and District leadership for their recalcitrance and failings. Yet, and maybe inevitably, on April 30, 2002, the Court Monitor reported that the District failed the contempt assignment.

Perhaps reluctant to become the *de facto* superintendent of schools in the District, recognizing the growing dissatisfaction with the District's

87 Throughout the contempt proceedings, reporters Sarah Neufeld and Fredric Tulsy were particularly keen to understand the district's special education failings. Sara Neufeld & Fredric Tulsy, *Despite Court Order, School District Fails Its Neediest Students: Friends of Superintendent Get Teaching, Consulting Jobs*, SAN JOSE MERCURY NEWS, June 29, 2001, at 1A. Neufeld and Tulsy would go on to report on the excessive fees that the district was paying to an Atlanta-based law firm in the case, Sara Neufeld, *Ravenswood Paid Lawyers' First-Class Travel, Food: Atlanta Firm Billed District \$2.1 Million*, SAN JOSE MERCURY NEWS, Mar. 9, 2003, at 1A; the use of district credit cards for personal expenses by members of the Board of Trustees, Sara Neufeld & Fredric Tulsy, *Schools Chief Benefits While Students Lag*, SAN JOSE MERCURY NEWS, June 28, 2001, at 1A; the personal use of district resources by the superintendent and the conflict of interest concerns raised by the use of district funds to provide housing loans to teachers who rented apartments in properties owned by the superintendent. *Id.*

88 *Emma C. v. Eastin*, No. C96-4179 TEH, 2001 WL 1180636, at *20 (N.D. Cal. Oct. 4, 2001) (contempt order), available at <http://www.law.stanford.edu/program/clinics/youtheducation/pdf/emmac-contempt.pdf>.

89 *Id.*

leadership, and wanting to see whether the parties could work out a resolution on their own, Judge Henderson did not immediately order receivership of the District. During the Spring, Summer, and Autumn of 2002, no doubt prodded by the threat of receivership, Ravenswood agreed to participate in an overhaul of the RCAP that would provide stricter performance measures, a revised plan for integrating students with disabilities, and a more intensive monitoring system. More important, perhaps catalyzed by the threat of receivership, several community groups coalesced around the common goal of ousting the current Board majority and the superintendent. Among them were the *Emma C.* families (who continued to routinely meet with each other and their attorneys), the foundation-funded education reform group, One East Palo Alto, and *Padres Unidos*. With the focus on the November elections, the press also began to run stories critical of Ravenswood's superintendent.⁹⁰ And, in what would prove to be a critical player in the reform coalition, the Ravenswood Teachers Association, the District's teacher collective bargaining unit which had been working with an expired contract in the District, joined the Plaintiffs and the coalition in seeking the ouster of the superintendent.⁹¹

To almost all the community's and District-watchers' surprise, the slate of three candidates endorsed by the reform coalition won the three open Board seats, giving them a majority of the Board.⁹² The Board's first order of business at its first meeting was firing the Atlanta law firm and replacing them with San Mateo County Counsel, and the second was placing the superintendent on administrative leave and appointing an interim superintendent to serve until the current superintendent's contract expired

⁹⁰ See, e.g., T.S. Mills-Faraudo, *Ravenswood School District Candidates Want Knight Ousted*, SAN JOSE MERCURY NEWS, July 31, 2002, at 1A; T.S. Mills-Faraudo, *Judge Slams Knight For Hiring Official Despite Order*, SAN JOSE MERCURY NEWS, Sept. 5, 2002, at 1A; Sara Neufeld, *Lawyers for Students Accuse East P.A. Superintendent*, SAN JOSE MERCURY NEWS, Jan. 26, 2002, at 3B; Sara Neufeld, *Roles, Responsibilities of Schools Czar at Issue: Challenger Emerges for Superintendent in San Mateo County*, SAN JOSE MERCURY NEWS, Feb. 28, 2002, at 7B; Sara Neufeld, *County: East P.A. District Negligent: Investigation Calls Ravenswood Leaders' Work 'Unacceptable'*, SAN JOSE MERCURY NEWS, Mar. 5, 2002, at 1A; Sara Neufeld, *Teachers Show Their Might: Ravenswood Staff Members, Who Were Previously Silent for Fear of Being Fired, Join in the Call for a Change in District Leadership*, SAN JOSE MERCURY NEWS, May 2, 2002, at 1B; Sara Neufeld, *East P.A. Community Protests with 'Funeral' for Ravenswood: A Call for Change*, SAN JOSE MERCURY NEWS, May 30, 2002, at 1B; Sara Neufeld, *Put on Leave: Schools Chief Now Facing New Probe*, SAN JOSE MERCURY NEWS, Dec. 10, 2002, at 1A; Sara Neufeld, *First Day Goes Smoothly in Wake of District Strife*, SAN JOSE MERCURY NEWS, Dec. 11, 2002, at 1B; Sara Neufeld, *District at Risk of County Takeover*, SAN JOSE MERCURY NEWS, Dec. 24, 2002, at 1B; Joe Rodriguez, *Schools Chief Made the Grade on East Side*, SAN JOSE MERCURY NEWS, Dec. 14, 2002, at 1B ("A crook ran the Ravenswood district in East Palo Alto.")

⁹¹ Sara Neufeld, *Teachers Ask to be Part of Suit: Problems at Schools Described in Filing*, SAN JOSE MERCURY NEWS, May 18, 2002, at 1B.

⁹² See, e.g., Ryan Kim, *New School Board in East Palo Alto; Woods, Woodward Lead Council Race*, SAN FRANCISCO CHRONICLE, Nov. 6, 2002, at A28.

at the end of the school year.⁹³ It was this surprise election and the Board's activities that paved the way for the finalization of a truly collaboratively designed special education reform plan, what would henceforth be known as the Ravenswood Self-Improvement Plan ("RSIP").⁹⁴

The RSIP is an intentional hybrid between a traditional command-and-control remedial order and an outcomes-oriented, data-driven, experimentalist school reform plan. It is structured into 14 broad "Items."⁹⁵ Each "Item" targets a specific area in which the District's special education service delivery system needed reformation.⁹⁶ The "Items" range from those matters specifically delineated in the IDEA and its implementing regulations (e.g., assessments and development of IEPs) to reforms targeting the service delivery infrastructure (e.g., a policies and procedures manual and student tracking database) to reforms aimed at building parent and staff capacity for implementation (e.g., parent training, staff training, and staff recruitment and retention) to outcomes-oriented goals and targets (e.g., IEP implementation and integrated educational practices).⁹⁷ Each item contains a broadly worded "Expected Results" statement that serves to guide the work of the Item, followed by identification of "Persons Responsible" for implementation, and specific "Corrective Activities" that are broken-down into detailed and measurable "Requirements" that are met through specified "Evidence of Performance."⁹⁸

Wary of the District's past recalcitrance and recognizing the that the IDEA and its implementing regulations provide very clear and detailed substantive and procedural rules for certain activities, Plaintiffs insisted that certain Items track the strict requirements of the IDEA.⁹⁹ For instance,

93 See, e.g., Sara Neufeld, *Swift Action on Chief Vowed: Incoming Ravenswood Board to Seek Knight Ouster, End Suit*, SAN JOSE MERCURY NEWS, Nov. 7, 2002, at 1B.

94 Emma C. v. Eastin, No. C-96-4179 (N.D. Cal. Mar. 12, 2003) (Ravenswood Self Improvement Plan), available at <http://www.law.stanford.edu/program/clinics/youtheducation/pdf/emmac-rsip.pdf> [hereinafter Ravenswood Self Improvement Plan].

95 *Id.*

96 The "Items" are: (1) Description of Service Delivery, Policies and Procedures Manual, Student Tracking Database, Program Evaluation; (2) Parent Training; (3) Staff Training; (4) Early Childhood Find; (5) Student Success Teams; (6) Assessments; (7) Functional Analysis Assessments and Behavioral Intervention Plans; (8) Parent Participation in Child's IEPs and Education; (9) Development of IEPs; (10) Integrated Educational Practices; (11) Access to Extracurricular Activities; (12) Implementation of IEPs and Student Progress; (13) Staff Recruitment and Retention; and (14) Complaint Investigation and Resolution. *Id.*

97 *Id.*

98 *Id.*

99 One might wonder why an experimentalist approach would be necessary or whether experimentalism is even possible in those instances in which the statutory and regulatory regime provides detailed rules for compliance. After all, if the legal requirements are clear, why should there be any need for an evolving "rolling rule" regime? Why isn't the appropriate judicial role that of dictating compliance with the law? Even in those situations in which the legal requirements appear detailed and clear, however, the methods to achieve compli-

the IDEA provides clear requirements for the contents of a child's IEP. Accordingly, Item 9 tracks the IDEA's requirements of, for example, timing of the IEP, required IEP participants, required components of the IEP, etc.¹⁰⁰ Each Requirement in Item 9 tracks the language of the IDEA and calls for specific evidence of compliance that is gleaned from the Monitor's review of children's IEPs.¹⁰¹ While this approach to remediation does not dictate the specifics of how the District will ensure compliance, it does produce the oft-derided "compliance mentality" among District staff.

The parties also recognized, however, that the District lacked both the infrastructure and capacity to ensure the provision of a FAPE in the LRE. Consequently, several Items required the development of basic infrastructure. For instance, Item 1 required the development of compliant policies and procedures and a student tracking database.¹⁰² Remarkably, the District had neither an up-to-date procedures manual for staff, nor did it have an electronic database capable of tracking students, the relevant timelines for each student's educational planning, or the services each student was to receive. Naturally, the Evidence of Performance here was the end-product—a manual and a database.

Moreover, even with certain infrastructure in place, the parties also knew that Ravenswood's faculty and staff would require training in not only the implementation of the RSIP, but also the various "best practices" activities required by the RSIP such as the development of positive behavioral interventions for students whose behavior impeded their learning. Even with such capacity, however, there was the perennial concern that experienced teachers would leave the District for "easier" suburban assignments. As a result, the RSIP contains not only training components, but also specific goals for recruitment and retention of fully qualified personnel.¹⁰³

Finally, certain RSIP Items are consciously experimentalist in nature. Most obvious is Item 10's "Integrated Educational Practices," the goal of which is to ensure that all Ravenswood children are educated with their non-disabled peers to the "maximum extent appropriate."¹⁰⁴ While the over-

ance—which might include the establishment of complex policies, the provision of training, and the implementation of administrative practices—may be amenable to negotiation and stakeholder input. Moreover, where the parties agree that technical compliance itself is only the means to a more important end—e.g., the development of compliant IEPs is only a means to ensure that children with disabilities receive a FAPE—the parties may choose to achieve the provision of FAPE through more than just developing compliant IEPs; the parties in deliberations may go further to consider such matters as administrative oversight, staffing, and the revision of service delivery policies.

100 Ravenswood Self Improvement Plan, *supra* note 94, at 43-48.

101 *Id.*

102 *Id.* at 2-7.

103 *Id.* at 59-61.

104 *Id.* at 49-52.

arching goal of integration of children, or, stated differently, the removal of children with disabilities from general education under very limited circumstances, is easily stated, the parties realized that the development of a plan to achieve that goal would be difficult. General education teachers and site administrators would need to substantially change their practices to permit the integration of children with moderate to severe disabilities such as mental retardation, severe emotional disturbance, or severe mobility impairments. Schoolwide plans would need to be made, including the institution of positive behavioral intervention teams. And indicators of success would need to be developed. Consequently, Item 10 is in the form of a plan to plan. The parties agreed on certain parameters for an integration plan, including the “design [of] the critical features [and an] implementation and assessment system for the comprehensive least restrictive environment plan” and that such “critical features” ensure that “no student with an IEP . . . will spend more than 30% of his or her school week outside the regular class.”¹⁰⁵ The parties even agreed on a consultant to develop the plan, but they left the development and implementation up to the consultant and District office and site personnel. Dr. Wayne Sailor, a nationally recognized scholar in “integrated” educational practices, was the consensus choice for consultant and he was given free rein to work with District personnel to develop a plan to integrate the District’s children.

Since the 2003 court approval of the RSIP, on a quarterly basis, the Court Monitor and his consultants have reviewed the Evidence of Performance for each of the many requirements and corrective activities in the RSIP. He makes specific findings of compliance or non-compliance for each requirement and documents his findings in a detailed report to the Court, the parties, and any member of the public who would wish to review the District’s remedial activities. Such continuous monitoring and feedback has proven essential.

What became immediately apparent was that the District was quite capable of quickly fulfilling the requirements to establish policies, develop a database, and put in place a system for identifying young children with disabilities. Each of these tasks was quite discrete and relatively simple to accomplish through assignment to dedicated staff. The same was true for implementation of the teacher training components, which required only that teachers be trained, not that the training result in any specific performance outcomes.

Even more promising has been the District’s success in working with Dr. Sailor to develop a cutting-edge integrated educational practices plan and implementing that plan. The plan, known as the Schoolwide Applications Model (“SAM”) focuses on the individual school as the unit of analysis and requires that each neighborhood school develop systems and capacity

¹⁰⁵ *Id.*

to educate all children, irrespective of the severity of disability, in the neighborhood school.¹⁰⁶ The SAM model is driven by key performance indicators, i.e., specific and measurable critical features for each school site, such as (1) whether the school serves all students, (2) whether general education teachers assume responsibility for all students at the school, (3) whether the school has an active, schoolwide positive behavioral support program operating at all levels, and (4) whether the school is a data-driven, collective, decision-making learning organization with all major functions guided by team processes.¹⁰⁷ Each quarter, Dr. Sailor and his consultants visit the school site, collect data for each performance indicator, and rate the school as being in the “initiation,” “implementation,” or “sustainability” phase.¹⁰⁸ When a school achieves sustainability for two consecutive quarterly reporting phases, it is deemed to have “enculturated” the SAM process and be in compliance with Item 10. Equally important, Dr. Sailor works with school staff and administration to develop policies and practices around staffing, supports, and interventions that will permit achievement of sustainability. Each quarter, Dr. Sailor provides detailed recommendations to the school site and District as to how they can improve practice to meet the desired outcomes of Item 10. This has been an on-going process of data-driven learning among administration, teachers, and consultants. While there is much work to be done, many schools have moved quickly to full inclusion of all children with disabilities and many of the interventions designed for children with disabilities have also been used with underperforming children without disabilities. In SAM terms, as of June 2009, three schools have achieved “enculturation” with another three that achieved “sustainability” and are approaching “enculturation.”¹⁰⁹ Indeed, so successful is the SAM model in Ravenswood that the national organization committed to inclusive education, TASH, recently recognized Ravenswood and SAM as being exemplary among urban school districts.¹¹⁰

Now the not-so-good news. Less successful has been the District’s efforts to comply with the specific “command-and-control” oriented items that track the details of the IDEA. While the provision of FAPE under the

¹⁰⁶ See SAM Schools—Welcome to SAM Schools, <http://samschools.org/index.php/home.html> (last visited Feb. 26, 2010).

¹⁰⁷ See SAM Schools—Critical Features of SAM, <http://samschools.org/index.php/criticalfeatures.html> (last visited Feb. 26, 2010).

¹⁰⁸ WAYNE SAILOR, “INCLUSION EXPERT” REPORT #25, at 2-3 (2009) (on file with author).

¹⁰⁹ *Id.* at Appendix G.

¹¹⁰ See, e.g., Press Release, Ravenswood City Sch. Dist., Ravenswood City School District Honored for Inclusive Educ. Practices: Dist. Commended as Nat’l Model of Transformation, (Nov. 27, 2007), <http://www.ravenswood.k12.ca.us/news-and-events/press-releases/ravenswood-city-school-district-honored-for-inclusive-education-practices>; Cal-TASH Awards, <http://www.tash.org/chapters/caltash/awards.htm> (last modified Nov. 16, 2005); see also Banks Albach, *Advocacy Group Lauds Ravenswood Schools*, SAN MATEO COUNTY TIMES, Dec. 1, 2007 at News.

IDEA might be the ultimate goal, the District's focus on compliance with the procedural aspects of the IDEA (embodied in the RSIP) has fostered the development of checklists, detailed databases, and other (arguably unnecessary and time-consuming) paperwork to demonstrate compliance. And, even with the obsessive attention paid to box-checking and protocols, the District has been unable to achieve compliance with the major process-oriented items of the RSIP (*e.g.*, assessments and IEPs).

More troubling is the District's recent backsliding on Item 12 which monitors whether District personnel are actually providing the services and implementing the accommodations and interventions specified in children's IEPs. It is worth noting that, in report after report, the Monitor has detailed the specific areas of non-compliance, yet the District has been unable to meet the requirements of the RSIP and law. During the 2007-08 school year, these problems reached a crescendo as the District coped with a staffing crisis that left open many school psychologist, speech and language therapist, and special education teacher positions. As a result, even more children went unserved during that period.

Judge Henderson has not been unaware of the District's failings, nor has the District's co-defendant, the CDE. On at least a semi-annual basis, Judge Henderson has been holding status conferences and requiring the parties to put before him issues of concern. On several occasions, portions of the RSIP have proven either unworkable or even inappropriate given evolving legal standards. As he has done through the entire Consent Decree and RSIP negotiation process, Judge Henderson has taken a decidedly hands-off, experimentalist approach to such issues, demanding that the parties meet-and-confer to reach resolution. If such negotiations fail, the Court Monitor would be required to make a recommendation and, only if disagreement persists, would the court intervene in the development of appropriate modifications. The court has employed the same process for those matters, usually identified by Plaintiffs, that ought to be added to the RSIP, thus creating additional legal requirements. Notably, despite many disagreements over these matters, only on rare occasions has Judge Henderson been called upon to rule.

More commonly, Plaintiffs and the Monitor have identified significant items of non-compliance, including assessments, IEPs, and IEP implementation. The court's response to those issues has similarly been that of expressing his broad goals and directing the parties to develop remedial plans through bargaining. No doubt the leverage Plaintiffs possess during this bargaining is greater than that which they would enjoy were the issue not before the court. Yet, the fact that the court requires the parties to reach a consensual resolution creates a collaborative (albeit occasionally tense) atmosphere in which compromise toward a common goal is necessary.

In the wake of the District's staffing crisis, the court directed the CDE

to take a more active role in assisting the District to implement the RSIP. While the Court ordered specific steps, such as the immediate placement of CDE staff on the ground to assist with IEP development, the Court also directed the CDE and parties to develop longer term plans to avoid future staffing difficulties and to address the major areas of non-compliance. Although that bargaining process did not achieve a resolution among all three parties, the proposal put forth by Plaintiffs, supported by the District, and opposed in only certain aspects by the CDE, resulted in a decidedly experimentalist court order. After each of the Monitor's reports, the parties now meet to discuss the specific, significant areas of non-compliance and develop specific remedial plans to address those areas. Consistent with the Court's directive, the CDE must play—and has played—an active role in developing the remedial plans and in committing resources to the remedial plans. While this process has only recently been employed, it has already resulted in modest improvement in IEP implementation, as the CDE and the District have developed a stronger accountability regime that tracks each service provider's work and seeks to ensure that services are being delivered.

IV. CONCLUDING OBSERVATIONS

Would the evolution toward experimentalist school reform and governance have proceeded without the *Rose* litigation? Probably. Would certain courts be moving away from command-and-control structural reform litigation to a non-court-centric model of judicial review and experimentalist remedial reform? Probably. For those judges who view their role as providing a check on the abuses of majoritarian politics, sitting on the sidelines would not be an option. Nor, however, would dictating remedies from the bench—the defining characteristic of early desegregation orders—be an option. A logical alternative—which has been evolving in a range of cases from school reform to prison reform to child welfare reform—would be that of destabilizing the status quo, disentanglement of certain elites, and the flowering of a new political bargaining under court supervision. In other words, experimentalism.

Yet *Rose* is a critical link in this evolution. *Rose* went beyond the typical school finance case dictate that the legislature should develop a more equitable funding scheme. *Rose* inserted the court into the governance of and policy-making for Kentucky's schools and gave voice to those who would improve the educational system, particularly for the most disadvantaged. *Rose* demonstrates that the judiciary can play a role in destabilizing the status quo and broadening the range of politically viable options. The court's "liability determination empowers the plaintiffs vis-à-vis the

defendants.”¹¹¹ This newly-found power is both symbolic and functional. “It provides official legitimation of their claims. The plaintiffs now have the power, simply by objecting to the defendant’s proposed remedy, to expose the defendant to further risk and uncertainty. Consequently, the defendant has stronger reason to deal with the plaintiffs.”¹¹² While *Rose* is recognized as an instance in which political elites on both sides were able to “take cover” behind a court order to do the politically unpopular, the fundamental idea is much the same: destabilize the status quo, compel the parties to deliberate over a remedial regime, and empower stakeholders whose voice was previously silenced. Two decades later, we are still experimenting with the experimentalist model in *Emma C.*

First let me be clear: the *Emma C.* case has gone on too long. No advocate for children would want to see such lengthy litigation followed by an even lengthier remedial phase. But that is the nature of school reform. It is, as Milbrey McLaughlin and Richard Elmore called it, “steady work.”¹¹³ Litigation for school reform is, then, necessarily “steady work,” requiring the steady persistence of a Judge Henderson. Indeed, Judge Henderson has hardly played the stereotypical role of command-and-control judge. At several crucial moments during the litigation, Judge Henderson has threatened draconian remedies for District non-compliance, e.g., state takeover, but first demanded that the parties try to work it out with a heavy thumb on the Plaintiffs’ side of the scale. Such threats have assisted in the disentanglement of the uncooperative leadership of the District and significantly altered the expectations of all stakeholders.

Indeed, throughout the remedial process, while reserving his contempt powers for egregious situations of non-compliance and recalcitrance, Judge Henderson has instead expressed his broad goals for the parties to pursue and deferred first to the parties, and then his Monitor, to revise the remedial scheme. Necessarily, that process has engaged not only the top administrators and lawyers from the parties, it has often called upon rank-and-file personnel such as technology personnel and teachers to play a role. Through on-going monitoring, learning, and revision of remedial plans, the District and CDE are moving toward compliance. As Simon, Sabel, and Liebman would say, this “rolling rule regime” has permitted organizational learning and incremental movement toward systems improvement. Yet, despite the forward progress and successes, several challenges with the experimentalist design are becoming apparent. Here are three emerging concerns with partial responses to those concerns.

First, the experimentalist approach requires time and expertise. And, as I discussed above, for most plaintiffs and their constituencies, school

¹¹¹ Sabel & Simon, *supra* note 16, at 1077.

¹¹² *Id.*

¹¹³ RICHARD F. ELMORE & MILBREY WALLIN MCLOUGHLIN, *STEADY WORK: POLICY, PRACTICE, AND THE REFORM OF AMERICAN EDUCATION* 4 (1988).

reform (or, institutional reform generally) is not their day job.¹¹⁴ My clients in the *Emma C.* case no longer actively participate in the (often tedious) deliberative remedial process that is the hallmark of the on-going experimentalist regime in the case. Indeed, “Emma C.” herself graduated from high school years ago and none of the original named plaintiffs or larger group of families that worked tirelessly with me during the crafting of the First Amended Consent Decree and RSIP are in the District any more. The result has been a much greater reliance on those who are paid to be a part of the process, such as the Monitor and his consultants, the CDE and District lawyers and administrators, my colleagues from the Disability Rights Education and Defense Fund and me, and those who have the time and have developed the legal and educational expertise to participate meaningfully in deliberations. This, of course, raises ethical concerns about client decision-making and representation for the plaintiffs’ lawyers who are obliged to represent the interests of the plaintiff class.¹¹⁵ In addition, from the perspective of the experimentalist this appears not to be the type of robust, bottom-up “new public” envisioned.

While I remain comfortable that I am representing my client constituency well in this process and continue to represent many individual children and families in the District, I do not have the space here to address the ethical concerns. For purposes of this Article, I am more concerned with whether a central assumption of the experimentalist ideal is undermined by the lack of active, day-to-day participation of the original plaintiffs or those similarly situated. Asked differently, is the “new public” properly composed of all relevant stakeholders? On this question, I would offer a tentative and highly-qualified “yes.” Though it is far from ideal, poverty lawyers, and those who would engage in school reform work generally and school reform litigation specifically, must come to grips with the reality that the demands of time and expertise are simply too great for most of our clients and client constituency over the lengthy time horizon necessary for this type of work. While we can (and should) attempt to continuously maintain and reconstitute our client group (and I certainly have done so in the event of any decision-making outside of the routine mechanics of monitoring, problem-spotting, and developing new “rolling rules”), we must leave the day-to-day monitoring, bargaining, and implementation of experimentalist decrees to appropriate surrogates for the plaintiff constituency whose day job *is* the ongoing work of school reform. That is, the plaintiffs’ lawyers—

114 See *supra* text accompanying notes 64-73.

115 See generally Derrick Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 512, 516 (1976); Lynn Mather, *What Do Clients Want? What Do Lawyers Do?*, 52 EMORY L.J. 1065 (2003); Ann Southworth, *Collective Representation for the Disadvantaged: Variations in Problems of Accountability*, 67 FORDHAM L. REV. 2249 (1999); Ann Southworth, *Lawyer-Client Decisionmaking in Civil Rights and Poverty Practice: An Empirical Study of Lawyers’ Norms*, 9 GEO. J. LEGAL ETHICS 1101, 1115-17, 1139-40 (1996).

who are duty-bound to represent their clients—and their consultants. The alternative is that this work will not be done, or at least only rarely so.

It is likely that I am reminding us of an uncomfortable truth about our work in an experimentalist regime. My view, however, is that it is better to identify, explain, and defend the necessity of this surrogate work, and, more important, to begin a conversation about how to ensure that we are appropriately and best representing the community. No doubt being involved in representing children and families on an ongoing basis has proved invaluable for us as plaintiffs' counsel. No doubt attendance at community and parent group meetings has been invaluable. No doubt episodic consultation with plaintiff class members is necessary. The question of what more can and should be done remains open for discussion.

Second, although endemic to all long-term school reform work, *Emma C.* exemplifies the difficulty of maintaining a culture of data-driven experimentalism and the organizational capacity to implement systems reform where there remains great difficulty in recruiting and retaining the street-level professionals and administrators to engage in such difficult work. This was not unanticipated. Item 3 of the RSIP specifically provides for staff training, while Item 13 outlines a plan and goals for staff recruitment and retention.¹¹⁶ Despite those provisions, the District continues to suffer from relatively large teacher and administrative turnover. The most obvious manifestation of that attrition was the staffing crisis of the 2007-08 school year and the resulting denial of services to children. But, from a long-term, deliberative process of school reform, the consequences of turnover are insidious: (1) the need to train junior teachers in not only their classroom craft, but also the specifics of the RSIP and SAM model; (2) the perpetual loss of institutional knowledge and culture around the systems reform work of the RSIP; and (3) the natural lack of buy-in among new teachers and administrators who had no hand in crafting the remedial plan. For this reason, *inter alia*, Ravenswood has been quite successful in putting in place the structural reforms necessary for RSIP implementation, such as a student tracking database, but has been much less effective in ensuring implementation of the RSIP and improving student outcomes.

To be sure, any long-term school reform project in a school district that has relatively undesirable working conditions suffers from these symptoms of teacher turnover. But the problem is exacerbated where there is a deliberative process model of school reform that requires long-term engagement among persons with dedication to and knowledge of the underlying ills and the attempted solutions. Perhaps this is the district's parallel difficulty to the plaintiffs' difficulty of maintaining a stable and engaged client constituency, but the difference is that the plaintiff children ultimately suffer the consequences for the district's inability to maintain

¹¹⁶ Ravenswood Self Improvement Plan, *supra* note 94, at 11-17, 59-61.

consistent personnel.

One way to address the turnover-and-loss-of-capacity issue is to build-in rigid processes that focus on the district tasks necessary for compliance, while requiring very little understanding of the overall project. This, of course, is anathema to the ideals of bottom-up school reform that changes the very core of teaching and learning in the service of children with disabilities. Yet, this is precisely what the parties have come to do over time—develop more paperwork, checklists, and bureaucratic oversight, essentially “teacher-proofing” the reform process. There are better solutions, including financial and other incentives, to undertake the hard work of reform and engage in that reform over time, but those incentives generally cost money that is not available in many ailing school districts. That said, I am increasingly of the mind that such performance incentives, particularly for the administrative leadership, need to be built into the fiber of consent decrees.

Third, in rare instances, some violations of legal rights simply require command-and-control remedies with the backing of significant threats of sanction. Recall the original corrective action plan in *Emma C.*, the RCAP. Though the plan was a model for collaborative school reform, it was useless in the hands of a recalcitrant administration. With Judge Henderson’s finding of contempt, the parties were compelled to negotiate a plan that was much more detailed in its requirements, so that there would be no question as to the tasks necessary for compliance and the evidence required to prove such compliance. Fortunately, with a new cast of characters leading the District, all parties felt comfortable with the inclusion of experimentalist reform in some components of the re-negotiated corrective action plan.

These are likely not the only challenges for the experimentalist approach to school reform litigation. One can imagine different problems arising where the target of the reform is legislative policy and the “new public” is composed of state legislators and the executive branch instead of local school district administrators and teachers. But any such shortcomings, in my view, should not condemn what has been a productive way for courts to engage stakeholders in equity-minded school reform. As I mentioned before, however, time will tell whether individual judges and the judiciary as a whole have the capacity and staying power to engage in such long-term reform projects.

