Stakes Fairness, Educational Adequacy, and Equal Opportunities in Education

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Introduction

Following the lead of philosophers since Aristotle, John Rawls always insisted that justice means “a proper balance between competing claims.” What determines the weight of competing claims? In the context of educational policy, what makes different claims morally urgent? What are the ingredients of just educational policy? There are two prevalent approaches to these questions in recent American jurisprudence and public policy. One approach holds that educational policy should aspire to realizing equal opportunities in education for all. The other approach holds that educational policy should aspire to realizing adequate opportunities in education for all. Despite some significant points of convergence in their policy recommendations, these two approaches reflect very different ways to think about just educational policy and practice.

Although the equal opportunities in education approach has deep roots in American culture and its jurisprudence, a common narrative is that in recent years this approach has been displaced by the educational adequacy approach, which is said both to have enjoyed much greater success in the courts as well as to be theoretically more

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defensible.\textsuperscript{4} Perhaps the best known statement of the equal opportunities approach is made by Chief Justice Warren of the United States Supreme Court in his opinion in \textit{Brown v. Board of Education of Topeka} against racial segregation in public schools in 1954: “In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.”\textsuperscript{5}

In the decade that followed, this approach was reflected in monumental legislation by the federal government, most notably, the Civil Rights Act of 1964 and the Elementary and Secondary Education Act of 1965, as well as government commissioned reports, in particular, the 1966 Coleman Report: \textit{Equality of Educational Opportunity}.\textsuperscript{6} The ultimate test for the equal opportunities approach came, however, in so-called school finance litigation cases that challenged the constitutionality of state funding systems for public schools that disadvantaged significantly students who lived in poor neighborhoods. In 1973, in its first major ruling on school finance since Brown, the United States Supreme Court ruled in a 5-4 split decision in \textit{San Antonio Independent School District v. Rodriquez} that there is no right to education guaranteed in the United States Constitution and limited the reach of Brown to disadvantages that stem from de jure racial segregation.\textsuperscript{7}

In subsequent school finance litigation, the attention shifted principally to education guarantee provisions in state constitutions. There has been litigation in 45 states since the early 1970s, 29 of these cases successfully challenging the existing state school

\textsuperscript{5} \textit{Brown v. Board of Education of Topeka} 347 U.S. 490 (1954) at p. 493.
funding system. The legal strategy that characterized many of these cases focused on the claim that the existing school finance scheme failed to ensure that all students received an education that met the minimal standard required by provisions in the state constitution. In effect, the funding provided for an inadequate education for some students and reform of the school funding system was necessary to meet the threshold of an adequate education for all. As one commentator recently put it, “In successful adequacy challenges, plaintiffs demonstrate a causal link between what a state currently provides (inputs) and the resulting “inadequate” student achievement (outputs). In contrast to equity challenges, which seeks equal inputs, adequacy challenges ask whether inputs are sufficient to achieve adequate student outputs.” This strategy has been successful in nineteen major cases since 1989.

The success of this adequacy legal strategy has engendered serious efforts to develop the theoretical framework that underpins it and differentiate the idea of educational adequacy from the equal opportunities approach. These efforts have principally involved connecting that idea to broader issues in the philosophical literature on distributive justice revolving around concepts such as noncomparative justice and threshold or sufficientarian standards as well as the critiques of equality of opportunity in education. Even more recently, proponents of the equal opportunities approach have

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8 http://www.schoolfunding.info/states/state_by_state.php3 (last accessed on September 21, 2008)
10 http://www.schoolfunding.info/states/state_by_state.php3 (last accessed on September 21, 2008)
begun to sharpen their own critiques of the adequacy approach and revive the case for equal opportunities in education. The present paper is designed to make a contribution to the retrieval of the equal opportunities approach. It does so by sketching out a theory of equal opportunities in education that can withstand the criticisms often made of that approach and by showing how that theory is better able than the educational adequacy approach to address the fairness of a more robust educational policy agenda that extends beyond school financing.

**Common Ground: Access and Opportunities**

Let me begin by putting aside some of the most common misunderstandings about the differences between equality of educational opportunities and educational adequacy. Sometimes the contrast is characterized in terms of either comparative versus noncomparative justice or opportunities versus results. In my view, neither of these contrasts accurately pinpoints the differences between the two approaches.

Principles of comparative justice essentially involve comparisons between persons. Distributional equality is the most familiar such general principle. Principles of noncomparative justice, on the other hand, are those principles of justice which do not require comparisons between persons. Appeals to dessert invoke principles of noncomparative justice, for instance. A criterion of non-comparative justice is generally presupposed when a teacher grades individual assignments; the basic idea is that a

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13 In “When ‘Adequacy’ isn’t”, Koski & Reich claim, “equality is by definition relational, concerned with comparisons, and adequacy is by contrast absolute, concerned with acceptable or high minimums” (p. 550).

particular paper counts as an ‘A’ paper regardless of how many other ‘A’ papers there might be in the class. Class ranking, in contrast, always reflects comparative justice; how a particular student is ranked is determined essentially through a comparison with his or her classmates.

Now, since educational adequacy focuses on a particular threshold for educational attainment such as for example a “sound, basic education”, it might appear to rely logically on a noncomparative principle of justice. This is not, however, necessarily the case. And indeed several proponents of educational adequacy have argued persuasively that a comparison between persons is integral to what is means for a student to have an adequate education. These arguments have been run in two related but distinct ways. One line of argument, made by both Michael Rebell and Deborah Satz, is that democratic equality is constitutive of educational adequacy. As Satz explains, “a certain type of equality – civic equality—is actually internal to the idea of educational adequacy for a democratic society…[It] is tied to the requirements of equal citizenship.”

Another line of argument is that diversity of persons within any educational setting in order to facilitate interpersonal comparisons and teach individuals about the viewpoints of others is an integral component of an adequate education. A third line of argument that could be made is that given the problem of scarcity is pervasive in any field of social policy that allocates scarce resources – education, health, housing, etc. – comparisons between persons are inevitable in any framework that invokes educational adequacy.

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15 Rebell, “Equal Opportunity and the Courts”
important upshot is that both the equal opportunities in education approach and the educational adequacy approach operate in the domain of comparative principles of justice.

Another contrast that is sometimes made is that because educational adequacy focuses on achieving educational outcomes – “a sound, solid education” or a “meaningful education” – it presupposes a results-oriented framework of distributive justice whereas an equal opportunities approach is concerned principally with inputs. Interestingly, seeing the educational adequacy approach as results-oriented seems in a certain sense attractive: don’t we care about inputs into the educational system – money, resources, social capital—because of their affect on educational outputs? Isn’t schooling valued because of the results? From the perspective of just educational policy, however, it is a consistent theme among defenders of educational adequacy that adequacy is measured by opportunities, not results. The reasoning is not difficult to discern. In effect, educational results stem from a combination of four factors, opportunities, motivation or effort, ability, and luck. Educational policy only has significant control over the first factor.

The emphasis here has been on opportunities as common ground between the equal opportunities and educational adequacy approaches. In the context of educational policy, access is the currency of opportunities. It is my view that through a more careful examination of the justice claims in education about access, it is possible to arrive at a

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19 See e.g. Rebell, “Educational Adequacy, Democracy, and the Courts,” pp. 242-243; & Anderson in “Fair Opportunity in Education” characterizes her position as a sufficientarian standard for fair educational opportunity. Satz in “Equality, Adequacy, and Education for Citizenship” seems also to share this emphasis on opportunities in her account of adequacy on for example p. 637-38, even though earlier she criticizes the metric of opportunity, writing “‘opportunity’ seems misplaced in primary and at least part of secondary school education. We expect children to go to school and master certain capabilities; it is not enough that they have the opportunities to do so.” (pp. 630-631)
more precise account of the differences between the two approaches in question. There are at least four classes of access claims that arise in educational contexts.

- **Access for whom** claims revolve around distinct groups or classes of persons.
  Sometimes, the classes may correspond to the standard ones in much of the social stratification literature – race, ethnicity, class, gender, immigration status. Concerns in these cases likely revolve around barriers to access for members of these groups. At other times, access for whom concerns arise with regard to say university admission policies that consider for admission only those who have graduated from high school. Here the distinction is between high school graduates and non-graduates.

- **Access to What** claims involve concerns about the substance of the opportunity.
  This is perhaps more familiar in the context of health care policy: what medical procedures, treatment and care precisely are accessible under say a given insurance plan. Education is often thought about in more seamless terms, but clearly on reflection it is similar to health care. How access to what questions are answered depends on the benefits involved. In health care, the current language is one of evidence-based medicine – a procedure or pharmaceutical should be accessible if it is shown to have a particular health benefit. The reasoning is similar for

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educational access. In the case of for example children with autism, early intervention through access to intensive behavioral treatment programs is claimed to have positive educational outcomes, which underpins claims for access to it. Often, of course, in education benefits are difficult to make tangible, even though they are there, as is evident in debates about the value of a liberal education. The general point is that access to what claims in education derive their urgency from constitutive educational outcomes.21

• **Access When** claims deal with two main issues. The first revolves around the claim that most educational resources are devoted to educating individuals while they are children or young adults. The other concerns the frequency of availability of educational programs. The times during the day that say continuing education programs or English as a Second Language courses for immigrants are offered is an example of a policy that might be subject to this type of claim.

• **Access Where** claims revolve instead around concerns about space and geography. Here is where concerns about providing for instance remote access education fit in. Similarly, the practice of many state universities to provide satellite campuses is also a reflection of these kinds of claims. Likewise, many of the “reasonable accommodation” claims advanced under the ADA fall into this category of access claim.

Although there is not a settled account of either the equal opportunities approach nor the educational adequacy approach, it is nonetheless possible to identify certain general

21 It is interesting to ask if there is a need here to develop some sort of concept akin to Norman Daniels’ “species normal functioning” in a health care context to give the idea of constitutive educational outcomes legs. See Norman Daniels, *Justice and Justification* (New York: Cambridge University Press, 1996), ch. 9.
positions each holds with regard to these access claims. I have summarized these
positions in Table 1.

**Table 1**

<table>
<thead>
<tr>
<th>Different Classes of Justice Claims to Access</th>
<th>Equal Opportunities in Education</th>
<th>Adequate Opportunities in Education</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Access for Whom?</strong></td>
<td>Equal opportunities in education should be available to all individuals regardless of race, religion, class, gender, disability, sexual orientation, ethnicity and other markers of identity. Given the fact of social stratification, compensatory measures will be necessary for vulnerable disadvantaged groups.</td>
<td>All individuals regardless of race, religion, class, gender, disability, sexual orientation, ethnicity and other markers of identity should have opportunities for an adequate education.</td>
</tr>
<tr>
<td><strong>Access to What?</strong></td>
<td>All individuals should have equal opportunities in education, although not necessarily the same opportunities because of differences in endowments and needs.</td>
<td>All individuals should have enough opportunities to enable them to reach a certain threshold in education. Any inequalities in educational opportunities above that threshold are permissible.</td>
</tr>
<tr>
<td><strong>Access When?</strong></td>
<td>The main focus should be on individuals when they are young. Those individuals from disadvantaged targeted groups should be targeted for special programs such as compensatory preschool and receive special accommodation in the scheduling of programs in comparison to other individuals with similar endowments.</td>
<td>The main focus should be on individuals when they are young. The important consideration is the availability of educational programs that constitute part of the bundle of adequate educational opportunities. This might apply to an English-as-a-Second Language program but not to tertiary education.</td>
</tr>
<tr>
<td><strong>Access where?</strong></td>
<td>Individuals with similar academic endowments should have the same opportunities.</td>
<td>Where ever an individual resides, it is a requirement that he or she has access to educational resources that provide for an adequate education. Innovations such as remote access technology may be sufficient to meet this standard.</td>
</tr>
</tbody>
</table>
From an egalitarian perspective, Table 1 neatly captures the most serious problems with the educational adequacy approach. Specifically, the educational adequacy approach allows for inequalities in educational opportunities above the required threshold of adequacy, which could potentially allow for immense differences in the quality of education children receive. Likewise, the educational adequacy approach does not pay special attention to the fact that some racial minorities and the poor are especially vulnerable in the education system. Both of these problems point to another issue, the finding that those students who enjoy greater educational opportunities above the threshold and those students who are not from vulnerable minority groups also enjoy the instrumental benefits of a good education – higher incomes, improved social status, career assets such as degrees and diplomas, accreditation, and other markers of success.\footnote{Koski & Reich, “When ‘Adequate’ Isn’t”, pp. 572 & 604-608. See also Harry Brighouse & Adam Swift, “Educational Equality versus Educational Adequacy: A Response to Anderson and Satz”, Oxford Centre for the Study of Social Justice Working Paper Series SJO08, January 2008), available at http://social-justice.politics.ox.ac.uk/working_papers/materials/SJ008_Swift&Brighouse_ResponseAnderson&Satz.pdf.}

Without much elaboration, I believe that one way to view the shift I noted above among proponents of educational adequacy from treating adequacy as a noncomparative principle to a comparative principle of justice is as a response to these problems. The comparative justice theme of shared democratic citizenship or the value of diversity in education provides, I think, a principled way for educational adequacy to constrain the inequalities that such an approach might treat as permissible. I shall not critically assess this strategy here because my main concern is with making the equal opportunities in education approach a more defensible alternative.
Table 1 also makes visible the most serious theoretical objections that have been pressed against the equal opportunities in education approach by educational adequacy proponents. The first objection (the leveling down objection) is that the requirement that educational opportunities be equal can be met not just by improving the opportunities of the less advantaged but also by leveling down the opportunities of the better off. The second objection (the insatiable needs objection) presses the claim that for some individuals the extra educational resources needed for them to enjoy equal opportunities are insatiable or approaching insatiable, which means that the approach would require the endless diversion of educational resources to that individual at the expense of the education of all other individuals. The third objection (the imprecision objection) is that except when equal opportunities cash out in terms of the same inputs for all students such as in the case of a school funding formula that provides the same amount of money for every student, it is unclear what precisely it means to equalize opportunities.

The discussion below is designed to address these three objections to the equal opportunities in education approach. There are three parts to the discussion. The first part outlines briefly a broader theory of equal opportunities. The second applies that theory to educational policy, extending the discussion from school financing litigation to three different issues in educational policy. The paper concludes by revisiting the Brown decision as an exemplar of the equal opportunities approach.

**The Three-Dimensional View of Equality of Opportunity**

Let me now begin to relate my analysis of educational adequacy and the equal opportunities approach to a broader theory of equality of opportunity I have developed
Equality of opportunity is, I suggest, an ideal for the normative regulation of competitions that distribute valuable opportunities in society. It is possible to distinguish three dimensions of fairness that might guide this regulation. **Procedural fairness** reflects a concern with the basic rules of procedure that guide a competition including the determination of the winners. **Background fairness** reflects a concern that there is a level playing field for all competitors. **Stakes fairness** focuses on the prizes or what is at stake in the competition. This third kind of fairness plays an innovative role in an account of equality of opportunity because of its capacity to constrain the risky pursuit of equal opportunities for all.

These three dimensions of equality of opportunity can be illustrated by considering the example of a boxing match. Boxing matches characteristically are regulated by certain familiar rules -- the so-called Queensberry Rules. Some of these rules reflect **procedural fairness** such as, for instance, not punching one’s opponent below the waist, no head butting, no swinging after the bell goes to end the round, and so on. Likewise, fair matches do not begin with an agreed-upon winner; instead, the winner is determined by the rules such as who wins by a knock-out or scores the most points in the case of a decision fight. Considerations of procedural fairness in this sense are presumably quite familiar. But boxing matches typically respect another dimension of fairness, as well. In competitions such as the Olympics, boxers are classified based on their body weight and fight other boxers in the same class. Underlying this practice is the intuition that there is something fundamentally unfair about a match between a 125 pound featherweight boxer and a 200 pound heavyweight. Assuming that the heavy weight boxer wins a match

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between the two, that outcome is said to be unfair even if the boxer did not violate the
rules of procedural fairness such as hitting the featherweight boxer after the bell ended the
round. Background fairness reflects the concern that boxers enter a match on roughly
equal terms with respect to body weight. Background fairness is met, in other words,
when there is a level playing field for all competitors. The third dimension of fairness
concerns the prizes, how the winner is determined, or what is at stake in the boxing match.
The idea that the winner in a boxing match is determined by a knock-out or points (as
opposed to say fighting until death) is part of this dimension. In for instance professional
boxing, the stake prize is money and a title. The practice is to have the winner receive say
75% of the money (say $750,000) and the loser 25% (250,000). The justification
typically is that this is fairer than a winner-take-all prize of $1,000,000. The dimension of
fairness drawn upon here is what I mean by stakes fairness.

This three-dimensional model of equal opportunities is an innovative advance on
how the concept of equality of opportunity has been viewed in treatments of egalitarian
justice. The traditional view of equality of opportunity is one-dimensional. This view
focuses on procedural fairness. In the 1960s, a number of influential liberal political
philosophers introduced a two-dimensional view of equality of opportunity. This two-
dimensional view stressed not only procedural fairness but also background fairness. Of
course, these ideas of procedural fairness and background fairness reflected in particular
the profound influence of John Rawls’s description of fair equality of opportunity in A
Theory of Justice.\(^\text{24}\) The two-dimensional view of equality of opportunity -- fair equality

\(^{24}\) Rawls, A Theory of Justice (Cambridge MA: Harvard University Press, 1971), pp. 73-76. The other
major influence in the 1960s was Brian Barry’s discussion of procedural justice in Political Argument,
Reissue (Brighton, UK: Harvester/Wheatsheaf, 1990), esp. pp. 102-106. See also James S. Fishkin, Justice,
of opportunity -- constitutes a major advance over the one-dimensional view because it is sensitive to the extent to which the distribution of opportunities is partly a function of background socio-economic differences between individuals. The two-dimensional view can have significant redistributive implications because in order to ensure background fairness, it is often necessary to redistribute some of society’s scarce resources. The two-dimensional view continues to dominate perceptions of equality of opportunity. The added dimension of stakes fairness, however, makes for a more comprehensive account of equality of opportunity.25

What standards underlie these three dimensions of fairness? Let me give here just a thumb nail sketch. The standards of procedural fairness are generally specific to the particular competition. What counts as procedurally fair is often linked to what is at stake in the competition or is intended to protect participants from certain risks. In many competitions, the basic requirements of procedural fairness are not deeply contested. Those requirements often reflect a general consensus and have developed over time. Sometimes, of course, the rules or regulations governing a competition are found to be unfair and to violate procedural fairness. The clearest breaches of procedural fairness involve the exclusion of certain classes of persons from the competition. There are well known historical examples of this in professions such as law, medicine, and teaching.

Since the appearance of Rawls' *A Theory of Justice* in 1971, background fairness is now probably the most familiar site for equal opportunities concerns about fair competition. This dimension of fairness fixates on the initial starting positions or

25 This distinction between one-, two-, and three-dimensional view of equality of opportunity mimics the three-fold distinction between views of power by Steven Lukes in *Power: A Radical View* (London: MacMillan, 1974).
backgrounds of those potentially involved in a competition. The underlying insight is, of course, that the structure of these positions will affect who competes and how they will fare in the competition. From the perspective of competitive equality of opportunity, because pre-existing inequalities infect the fairness of competitive processes, there is a need to regulate these processes with a sensitivity to remedies for these inequalities.

Stakes fairness reflects a concern with the distribution of benefits and burdens within a competition and what constitutes winning or losing. Part of the issue here is concerns whether it is fair to have, for instance, a winner-take-all scheme. Imagine, say, divorce settlements that were structured in this way. Most of us would object that this is unfair because it is wrong to have the stakes so high; while it may be acceptable to have the winner receive more benefits, it is unfair that the loser receive nothing. Similarly, consider the labor market in this light. Often, employment in the competitive labor market is perceived in this way; those who get jobs receive wages and all other sorts of fringe benefits. One way to view a range of government program from unemployment insurance to workfare is as mechanisms to promote stakes fairness rather than attaching all the benefits to the winners in the competitive labor market.

There are three aspects of stakes fairness that inform equality of opportunity as a regulative ideal, which I shall elaborate upon in turn: (1) the concern that there should be constraints on the risks participants in competitions are exposed to;\(^{26}\) (2) the concern with what and how much is actually at stake in an individual competition; and (3) the concern with limiting the impact of the result of one competition on another.

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\(^{26}\) This emphasis is absent from my elaboration of stakes fairness in *Pursuing Equal Opportunities*.  

Competitions expose individuals to risks in the course of their participating in the competition. Boxers risk injury, for example, in every boxing match. These risks are a part of the normal functioning of the Queensberry rules. And indeed virtually any other sport is similar, whether it is football, baseball, soccer, diving, or ice hockey. How great should the risks be in any competition? Are there fairness constraints on the risks that individuals should be exposed to in order to compete? Would a fight to the death, for example, ever be fair? Likewise, does any competitor have the right to consent to risking a major (as opposed to a minor) physical assault? Stakes fairness is concerned with the regulation of these risks.

Another core idea of stakes fairness is the concern about what and how much is actually at stake in an individual competition. Hence, the analogy from prize fighting where it is the norm for professional boxers to share the money prize, the difference between the winner and loser being their proportion of the prize. This example expresses the insight that winner-take-all stakes for competitive opportunities are rarely fair. Appeals to stakes fairness suggest that it is principally a regulatory device to prescribe a

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27 Another analogy based on a controversial public issue may help to sharpen this idea of stakes fairness. Consider the case against capital punishment. Some opponents of capital punishment hold that it is simply wrong for the state to have the authority to kill someone. Others say something to the effect that two wrongs don’t make a right. Yet, among the general public, the most frequently cited reason for reservations about capital punishment concern wrongful convictions. Neither of the two views mentioned above are able to capture fully reservations based on the concern about wrongful conviction; they both hold that capital punishment in any circumstances are wrong. Think about capital punishment from the perspective of stakes fairness. Capital punishment in a modern legal system is a sentence that flows from a competitive trial system between the accused and the state. The relevant question is whether capital punishment makes the stakes too high in this competition. And it is easy to imagine why many people might concur; what wrongful conviction does is highlight how high (and unfair) the stakes are when capital punishment exists. Capital punishment is, to put it bluntly, the ultimate winner-take-all stake.

28 I have in mind here the well known objection that proponents of the interest or benefit theory of rights have pressed against the choice theory of rights. See for example Joseph Raz, The Morality of Freedom (Oxford: Oxford University Press, 1986).
wider distribution of the prizes at stake in a competition than a simple winner-take-all scheme.

With regard to the third aspect of stakes fairness, the fundamental idea is that winning or losing one competitive opportunity in civil society shouldn’t affect one’s prospects in a competition for another opportunity. For example, financial success shouldn’t translate into better educational prospects; ability to pay or any other similar measurement should not affect the educational opportunities an individual enjoys. In certain respects, this aspect of stakes fairness blurs the distinction between this dimension of fairness and background fairness; in effect, the concern can also be represented as one about the initial standing of individuals in a competition. But I use the language of stakes fairness because it seems to me that the most effective way to address the underlying concern here is by regulating the stakes in any given competition.

Now, it has been unclear to some how my introduction of stakes fairness as an additional dimension in a theory of competitive equality of opportunity differs significantly from Rawls’ vision of democratic equality, the combination of fair equality of opportunity and the difference principle.\textsuperscript{29} The underlying point is that constraining an outcome or benefit with an eye to broadening the scope of the distribution -- the core idea of stakes fairness as I have just represented it -- has been an important theme in modern economics and political philosophy, even though it has not been well developed within a theory of equality of opportunity. Some of the most familiar principles of welfare economics such as Paretian optimality and the Kaldour-Hicks rule are certainly a reflection of this theme. And, of course, the single most important philosophical

expression of this theme has been by John Rawls, in effect, his difference principle. With
the objective of clarifying further the idea of stakes fairness, let me draw out the
implications for Rawls’ case for the difference principle as a component of democratic
equality.30

Although Rawls presents the combination of fair equality of opportunity and the
difference principle as a single principle of justice (which he calls democratic equality), he
consistently presents the difference principle as a standard of fairness independent of
equality of opportunity.31 For Rawls, the two principles of justice as fairness and their
constitutive parts are designed to work in tandem but reflect the distinct values of freedom
and equality. Within the second principle, he imagines the requirements of fair equality of
opportunity and the difference principle pulling in different directions. Infringements of
fair equality of opportunity for Rawls arise when there is an inequality of opportunity.
The question for him is when are infringements of fair equality of opportunity justified.
The difference principle allows for only one sort of justified infringement: ‘an inequality
of opportunity must enhance the opportunities of those with the lesser opportunity.’32
Notice, therefore, that the basic role of the difference principle is to justify unequal
opportunities.

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30 The following argument is drawn from Lesley Jacobs, “The Weakened Case for Rawlsian Democratic
Equality” in Shaun Young, editor, Reflections on Rawls: An Assessment of his Legacy ( Aldershot UK:
Ashgate Publishing: forthcoming January 2009). See also the contribution to that volume by Thomas
Pogge.

31 Throughout the discussion here, the difference principle refers only to the second part of the second
principle of justice as fairness. This is consistent with how Rawls now insists the term be used, e.g. Justice
as Fairness (Cambridge MA: Harvard University Press, 2001) p. 43n3 and A Theory of Justice, Revised

32 Rawls, A Theory of Justice, p. 303. Rawls also writes, ‘Infringements of fair equality of opportunity are
not justified by a greater sum of advantages enjoyed others or by society as a whole.’ (302) This passage
has been deleted from A Theory of Justice, Revised Edition (p. 265).
For Rawls, this function of the difference principle is fundamental to his case for democratic equality. Rawls contrasts democratic equality to three other alternative combinations of equality of opportunity with other principles which give priority to inequalities being to everyone’s advantage. In *A Theory of Justice*, however, Rawls imagines only two different models of equality of opportunity, a one-dimensional model (formal equality of opportunity) and a two-dimensional model (fair equality of opportunity). Suppose however that we consider how strong Rawls’ case would be if a three-dimensional model of equality of opportunity involving stakes fairness was added as a possible interpretation of the second principle of justice. The relevant point is that Rawls wrote *A Theory of Justice* while the concept of equality of opportunity was still evolving; he allowed for only two models, formal and fair equality of opportunity. What are the implications for his case for democratic equality if a more comprehensive model of equality of opportunity is entertained?
This can be represented in the following table, which is adapted from Rawls.\textsuperscript{33}

\begin{table}[h]
\centering
\caption{Comparing Interpretations of the Second Principle}
\begin{tabular}{|l|l|l|}
\hline
\textbf{“Equally open”} & \textbf{Principle of Efficiency} & \textbf{Difference Principle} \\
\hline
One-dimensional Equality of Opportunity (formal), which includes procedural fairness & System of Natural Liberty & Natural Aristocracy \\
\hline
Two-dimensional Equality of Opportunity (fair), which includes procedural and background fairness & Liberal Equality & Democratic Equality \\
\hline
Three-dimensional Equality of Opportunity (includes stakes fairness) & Liberal Equality plus Stakes Fairness & \\
\hline
\end{tabular}
\end{table}

The principle of efficiency holds for Rawls that, “an arrangement of the basic structure is efficient when there is no way to change this distribution so as to raise the prospects of some without lowering the prospects of others.”\textsuperscript{34} The problem with this principle is that it allows for a range of efficient but extreme positions and hence cannot serve alone as a principle of justice. It must be supplemented by a principle of equality of opportunity, which functions to narrow the efficient positions to those that are just. What then is wrong with the principle of efficiency combined with a two-dimensional model of

\textsuperscript{33} A Theory of Justice, Revised Edition, p. 57.
\textsuperscript{34} Ibid, p. 61.
equality of opportunity. In effect, Rawls objects to liberal equality on the grounds that fair equality of opportunity can only be imperfectly carried out and that liberal equality permits, “the distribution of wealth and income to be determined by the natural distribution of abilities and talents…and this outcome is arbitrary from a moral perspective.”35

Rawls defends the superiority of democratic equality over liberal equality in the following way: “This principle removes the indeterminateness of the principle of efficiency by singling out a particular position from which the social and economic inequalities of the basic structure are to be judged. Assuming the framework of institutions required by equal liberty and fair equality of opportunity, the higher expectations of those better situated are just if and only if they work as part of a scheme which improves the expectations of the least advantaged members of society.”36 It is in this way that democratic equality differs from liberal equality in not leaving, “too much to social and natural contingency.”37

Now, consider the combination of the principle of efficiency with a three-dimensional model of equality of opportunity, which I have labeled in Table II the principle of liberal equality plus stakes fairness. This is significant I believe because stakes fairness narrows the range of just efficient positions without invoking the difference principle.38 In effect, by promoting a wide distribution of benefits and limiting the effects of inequalities in one domain on another, it corrects for Rawls’ objection that liberal

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35 Ibid, p. 64.
36 Ibid., p. 65.
37 Ibid., p. 69.
38 It is important to recognize that Rawls did not believe that the principle of efficiency and the difference principle were incompatible. See Ibid., p. 69.
equality permits distributive shares to be determined by social and natural contingencies. Instead, like the difference principle, a three-dimensional model of equality of opportunity would constrain some contingencies.

The force of the point I am making is I believe reinforced if we draw the comparison between difference principle and equality of opportunity, on the one hand, and the principle of average utility and equality of opportunity, on the other hand. Rawls did not in *A Theory of Justice* make this comparison, although he subsequently indicated that he wished he had.\(^3\)

The principle of average utility holds in effect that inequalities are justified when they maximize the average utility of individuals in a society. Whilst Rawls spent a considerable amount of time critiquing the principle of utility as a self-standing principle of justice, he did not address this idea of a mixed conception, that is to say, a mixed conception that combines equality of opportunity with the principle of average utility. Consider the relevant addition to Table II, as represented in Table III.

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### TABLE III: Comparing Interpretations of the Second Principle

<table>
<thead>
<tr>
<th>“Equally open”</th>
<th>Principle of Efficiency</th>
<th>Difference Principle</th>
<th>Principle of Utility</th>
</tr>
</thead>
<tbody>
<tr>
<td>One-dimensional Equality of Opportunity (formal), which includes procedural fairness</td>
<td>System of Natural Liberty</td>
<td>Natural Aristocracy</td>
<td>Mixed Conception with Procedural Fairness</td>
</tr>
<tr>
<td>Two-dimensional Equality of Opportunity (fair), which includes procedural and background fairness</td>
<td>Liberal Equality</td>
<td>Democratic Equality</td>
<td>Mixed Conception with Procedural and Background Fairness</td>
</tr>
<tr>
<td>Three-dimensional Equality of Opportunity (includes stakes fairness)</td>
<td>Liberal Equality plus Stakes Fairness</td>
<td></td>
<td>Mixed Conception with Procedural, Background and Stakes Fairness</td>
</tr>
</tbody>
</table>

Now, it is not difficult to anticipate the main force of Rawls’ reservations about the mixed conception when it involves only formal or fair equality of opportunity. It would seem still consistent with say fair equality of opportunity to promote a higher level of average utility where some people receive very small distributive shares because it does
not have an eye to the fairness of the outcome. Of course, the strength of a mixed conception that builds on a three-dimensional model of equality of opportunity is precisely that stakes fairness functions to constrain the feasible extreme distributions that potentially can maximize average utility.

**A New Model for Equal Opportunities in Education**

The three-dimensional model of equal opportunities I have just described functions as a regulative ideal for competitions over scarce opportunities. The different dimensions – procedural, background, stakes -- of fairness it identifies provide normative standards for regulating different components of the competition. Competitions for allocating some of the benefits and burdens of social life come in many different forms. The model of equal opportunities as a regulative ideal is not a mirror of the competitions it is designed to govern, but functions as an independent moral critic of the practices in those competitions. Schemes for public school financing are one instance of such competitions. The role of an equal opportunities approach is to assess such schemes by the normative standards of procedural, background and stakes fairness. Earlier, in the course of finding common ground between the equal opportunities approach and the educational adequacy approach, I noted that both approaches were both focused on opportunities and shared the normative currency of access. The four-fold schemae of access for whom, to what, when and where provided a basis for drawing out the contrasts between the two approaches and the weaknesses of each. In the general equal opportunities model I have just sketched out, these four types of educational access claims fall within the regulative domain of procedural fairness and background fairness. Indeed, when focusing on distributive
justice and education, much of the attention should be on the challenge of meeting the requirements of background fairness.

Stakes fairness should function in an equal opportunities in education approach, I suggest, as a constraining principle on the provision of educational access. Table I made clear three distinct objections that might be pressed against an equal opportunities in education approach. The leveling down objection maintains that the requirement that educational opportunities be equal can be met not just by improving the opportunities of the less advantaged but also by leveling down the opportunities of the better off. The insatiable needs objection presses the claim that for some individuals the extra educational resources needed for them to enjoy equal opportunities are insatiable or approaching insatiable, which means that the approach would require the endless diversion of educational resources to that individual at the expense of the education of all other individuals. The imprecision objection emphasizes that except when equal opportunities cash out in terms of the same inputs for all students such as in the case of a school funding formula that provides the same amount of money for every student, it is unclear what precisely it means to equalize opportunities. Each of these objections illustrates the need to have a principle that sets constraints on the urgency of access claims in educational contexts. The point I am obviously making is that stakes fairness is able to fulfill this role.

In the case of the leveling down objection, the implication is that what is required by the equal opportunities approach can be met in a way that runs counter to why we value opportunities in education at all. From the perspective of stakes fairness, this objection can be viewed as raising the concern of what is at stake – the quality of the educational opportunities -- in the competition. The problem with leveling down is precisely that it
diminishes that stake. Stakes fairness can be understood to function as a constraint on when leveling down for the sake of equal opportunities is impermissible. In some instances, diminishing the quality of education for some may be permissible, in particular, when it is an opportunity that can be bought. In other instances, for example, when parental social capital impacts on the quality of education, stakes fairness would constrain any effort to level down for its effects. There is an interesting parallel here to access to health care. In the Canadian health care system, since the 1960s, the purchase of medically necessary medical services outside the public universal system has been prohibited. However, the Supreme Court of Canada recently ruled that this prohibition is unconstitutional when the public provision of particular medically necessary medical services are untimely or the quality falls below a reasonable standard. Provided that these conditions are met, the Court held, the prohibition is constitutional. I am suggesting that stakes fairness underpins an analogous standard in education, which would avoid the leveling down objection to the equal opportunities in education approach.

What substantial aspect of stakes fairness is at issue in the leveling down objection? Earlier, I argued that one of the distinctive concerns of stakes fairness is with constraints on the risks participants in competitions are exposed to. In the case of boxing, my point was that the stakes fairness functions to regulate the risk of injury that boxers face. Some of the rules of procedural fairness reflect this concern such as prohibitions against head-butting and bunching below the belt as do the rules for determining the
winner of the match. Stakes fairness is a reflection of the ideal that participants should not have to take such big risks in order to enter the competition. Something analogous is at stake in the leveling down scenario. Individuals participating in an education system regulated by equal opportunities for all should not be exposed to the risk that their educational opportunities are diminished significantly in order to equalize the opportunities for all. I think that something like this reasoning underpins the Supreme Court of Canada’s decision in the health care context: Canadians participate in the public health care system, which allocates health care in a manner that aspires to universal access, but their participation is constrained by the ideal that this does not expose them to too much risk of injury from health care needs that are not met in a timely fashion or to a certain standard of high quality medical services.

The insatiable needs objection can be handled in a very similar fashion. Ultimately, the scenario painted by this objection involves balancing the special educational needs of an individual versus the opportunity costs for others. Whereas background fairness requires that the needs of the disadvantaged individual be brought up to a level comparable to others, stakes fairness sets constraints on the fulfillment of this requirement, to wit, when it becomes a significant burden on the provision of educational opportunities for others and the gain for the individual is very marginal. The judgment of when this occurs is a difficult one, but it can be done. Indeed, as I noted at the outset, justice is in essence about balancing competing urgent claims and this situation is exactly one of those where justice is at stake. Again, the parallel to allocating health care is instructive since the provision of medical services to someone, which yields only very marginal improvements in health status, may be immensely costly to others who have less
urgent needs. Although there is no consensus in a health care context about how, as a matter of principle, to make this trade off, there is nonetheless a consensus that a theory of health care allocation needs a principle that addresses this challenge. Likewise, my point is that stakes fairness can and should fulfill this role in an equal opportunities in education approach. What is at issue in both the educational and health care context is the risk some participants are exposed to in order to pursue equal opportunities for others. Meeting the insatiable needs of a particular individual is at some point going to cross a threshold where it exposes others to a level of risk of injury that is unfair.

The imprecision objection warrants a different kind of response. There exist simplistic ways in which an equal opportunities in education approach might be precise. In the public school financing debate, the same dollar funding for every student is precise, but rarely satisfactory because of all of the contingencies that affect educational spending as well as the differences in the needs of individual students. John Roemer has advanced a theory of equal educational opportunities which is admirable for its technical precision. But, as I have argued elsewhere, Roemer’s theory is narrow and two-dimensional, which means that it misses the dynamic possibilities that a competition regulated by equal opportunities provides for. In my view, the imprecision objection stems from mistaken expectations about an equal opportunities approach that functions as a regulative ideal. The distinction I have in mind is between educational policy and an ideal that regulates

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43 This is commonly called the best chances/best outcome problem. See Daniels, *Justice and Justification*, pp. 318-320.
that policy.\textsuperscript{46} The ideal sets the parameters on that policy, but within those parameters it does not specify the content of the policy. From this perspective, a three-dimensional equal opportunities approach through the lens of procedural, background and stakes fairness sets the parameters on the objectives of educational policy and how they can be pursued. The imprecision objection is grounded on mistaken expectations in the sense that it seeks from a regulative ideal precise answers to educational policy issues.

The main argument I have been advancing for a three-dimensional equal opportunities in education approach is that the addition of stakes fairness grounds a principle of constraint that allows that approach to avoid the leveling down and insatiable needs objections. As I noted above, some of the most recent educational adequacy proponents have sought to develop an account of educational adequacy that can likewise appeal to a principle that constrains the pursuit of educational adequacy and thereby meet some of the most potent objections to that approach. What I wonder about is how well an equal opportunities approach compares to an educational adequacy approach on issues other than school funding litigation.

Consider three familiar issues in educational policy that I believe reflect the weighing of competing morally urgent claims, the proper balance of which is the key to just educational policy making. Turn to the first issue. Internationally, the public benefit of an increasing proportion of the population undertaking tertiary education is widely recognized and the OCED has long set it as a priority for its member states. Over the past decade, however, the private benefit of tertiary education – the benefit to individuals who

\textsuperscript{46} This distinction is obviously Kantian in character, although I believe in broad strokes it corresponds to Ronald Dworkin’s distinction between principle and policy, especially in \textit{A Matter of Principle} (Cambridge MA: Harvard University Press, 1985).
actually undertake tertiary education – has become more controversial. This is because there has been a growing income gap between individuals who have not completed high school or just graduated from high school, on the one hand, and those individuals who have completed some post-secondary tertiary education. The gap that I am emphasizing here is not the one that stems from the correlation between socio-economic background and educational achievement, that is to say, the finding that students from for instance poorer families do less well in school. That gap raises a separate host of questions about who has access to tertiary education and how others can be included, which is readily acknowledged by the OCED.

I suspect that most of us here recognize that it is a different question to ask, however accessible tertiary education is, if it is fair that those as a group who say complete a university degree can be expected to make so much more than those who don’t. Is it fair for our society to place such a the premium on tertiary education or, conversely, such a penalty on those who do not pursue tertiary education? I simply cannot see how an educational adequacy approach can answer this question. Yet, it is a question that clearly falls within the preview of stakes fairness. One of the fundamental aspects of stakes fairness identified above is to regulate the prizes or instrumental benefits for an individual that accrue from success in educational competitions – higher incomes,

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49 There may be an effort to link it to the question of democratic citizenship and the degree of inequality in wealth and income that is consistent with that ideal of citizenship. But I am inclined to think that any tie-in to educational adequacy is extremely weak.
improved social status, career assets such as degrees and diplomas, accreditation, and other markers of success – and seek a wide distribution of these benefits. Does the growing income gap correlated to tertiary education violate the demands of stakes fairness?

Let us now turn to a second issue. At the state or provincial level, the social benefits of having high school graduates meet certain standards of competence in literacy and mathematics and having accountability mechanisms for assessing individual achievement of those standards has been a fundamental feature of education reform over the past twenty years. A reflection of this feature is found in the fact that over the past decade, an increasing number of states and provinces began to require high school students to pass a standardized “exit” test in order to graduate from high school. This exit test can in its least controversial form involve only a functional literacy requirement but generally assesses comprehensively students in a set of subject areas. By 2009, a majority of states (26) in the United States will withhold high school diplomas for students who have not passed comprehensive exit exams.

Exit exams for high school graduation are a paradigmatic example of so-called high stakes testing. The logic of exit exams from an educational adequacy perspective is transparent, even though in fact the educational reform movement focused on greater accountability and the embrace of educational adequacy by the courts are distinct, albeit

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50 Some states such as Mississippi adopted a standardized Functional Literacy Exam requirement in 1988 and subsequently in 2000 moved to a requirement that graduating high school students pass a set of subject area standard tests that included not only a literacy component but also history, algebra, and biology. See www.mde.k12.ms.us/acad/OSA/newgrad.html (accessed on August 27, 2008).

51 www.ecs.org/html/IssueSection (accessed on August 27, 2008)
parallel, developments. Yet, I doubt that an account of educational adequacy is able to capture the precise concern that the charge of high stakes testing is intended to ignite. The concern with high stakes testing should be distinguished from simply a concern with standardized testing. Certainly, the fairness of relying on standardized testing, given well documented phenomena such as the black-white test score gap, gender differences on test performance, and the disparate class impact of testing requirements are at issue. Many of these concerns can and have been addressed through policy reforms centered on access. Under an educational adequacy approach, what we need is improvements in the educational opportunities available in the school system that can bring students up to a level where they can pass the high school exit test. From the perspective of stakes fairness, it is crucial to distinguish between the quality of the educational opportunities available to high school students and the instrumental benefits of graduating from high school – the high school diploma. Having the high school diploma is an accreditation which has immense value in the labor market (albeit as we saw above, much less value than a university degree.) Ultimately I think that in the case of exit tests for high school graduation, the charge of high stakes testing appeals to the uneasiness many of us have about the “one size fits all” approach to what should be required of a high school graduate in our society. More so than at any time in the past, high school graduation is a basic


These are also at issue in less contentious testing requirements such as the requirement that teacher certification in the State of California requires passing the California Basic Educational Skills Test (CBEST). But I suspect that the CBEST is not perceived by most as an example of high stakes testing, although it has been subject to significant (but ultimately unsuccessful) litigation on the grounds that it discriminates against latino teacher candidates. See The Association of Mexican-American Educators (AMAE) v. The State of California, 937 F.Supp. 1397 (9th Circuit, 1996). I provided a theory for why standardized testing raises civil rights concerns in chapter 4 of Pursuing Equal Opportunities.

See for instance various statements by the organization FairTest at www.fairtest.org (accessed on August 28, 2008).
pre-condition for any sort of success in our society. Given the incredible diversity that exists as a matter of fact among persons,\textsuperscript{55} having a single path for graduation is an affront to our sense of fairness because it amounts to the denial of this diversity. What stakes fairness requires is multiple paths to acquiring a high school graduation, something that exclusive reliance on an exit exam result denies. As an aside, although there is an immense amount of rhetoric on both sides of the exit exam debate about the inflexibility or rigor of the exit exam as a requirement of high school graduation, anecdotally it seems to me that virtually all states with exit exams provide alternative paths to acquiring a high school diploma. In other words, they are compliant in practice with the demands of stakes fairness.

The final issue I propose to consider centers on the difficult decisions faced by school boards throughout North America with regard to school closures in areas with declining student populations. Consider a concrete Canadian example. In northern Ontario, in the small logging village of Caramat (population: 75), the school district decided in the spring 2008 to keep open the village’s local public school, with only 5 students from kindergarten to grade 8. Two decades ago, the school with four classrooms was full. The next closest elementary school is 45 kilometers away. The annual cost of operating the school for 2008-2009 is $480,000.\textsuperscript{56} Clearly, in the case of school closures, the value and importance of young students having access to local schools is in play. But the specific example I gave above is intended to highlight the trade-offs and costs involved in providing this access. In the case of the Caramat school, the cost of keeping the school open is nearly $100,000 per pupil in a community where the average annual household income is below $60,000. From an educational adequacy perspective, the

\textsuperscript{55} See e.g. Amartya Sen, \textit{Inequality Reexamined} (Cambridge MA: Harvard University Press, 1992), ch. 4.
answer depends on whether you think that keeping the local school open is an essential ingredient of providing the five students with the educational opportunities that constitute a sound basic education. Yet, there are other considerations in play. Does it make sense to spend so much money on formal schooling in Caramat rather than say subsidizing cheaper more effective nonschool educational interventions such as parental support and daycare programs in the community? Indeed, it might be better for the state to subsidize the household expenses of the four families with children in that community so that they can move to one of the other communities in the area with a more viable existing school. Couldn’t such subsidies improve the education and indeed the overall standard of living of the children instead of stovepiping public funding into the local school? Stakes fairness as one dimension of an equal opportunities in education approach sets constraints on decisions that seek to stovepipe public funds in ways that focus exclusively on one objective – keeping a local school open – at the expense of other valuable alternatives. It recommends instead policies that do not mandate winner-take-all solutions.

**Conclusion**

The theoretical rivalry between the equal opportunities and the educational adequacy approaches to just educational policy has its origins in legal strategy and the courts. The ascendancy of educational adequacy is, as I noted earlier, closely tied to the success it has enjoyed in state court litigation over the past twenty years challenging the fairness of public school funding systems. The displacement of the equal opportunities in education approach likewise is commonly attributed to the *Rodriguez* decision by the

divided United States Supreme Court in 1973, which in effect denied the relevance of the
*Brown* decision to public school funding litigation. Although I have sought here to
contribute to the retrieval of the equal opportunities in education approach by elaborating
on a particular theoretical model of equality of opportunity – the three-dimensional model
of equal opportunities – and showing in particular how the idea of stakes fairness
strengthens the case for that approach, I do not share with many other proponents of that
approach an uncritical reverence for the *Brown* opinion. The 1954 opinion of Chief
Justice Warren in the *Brown v. Board of Education of Topeka* is often held up as an
exemplar of the equal opportunities in education approach. And the retrieval of that
approach is frequently linked to efforts to reestablish in American jurisprudence the
relevance of *Brown v. Board of Education*. My uneasiness with this reverence for *Brown*
stems from the scrutiny that that decision has received from egalitarian socio-legal
scholars over the past 25 years. This scrutiny has been wide ranging and extensive. Much
of it has focused on how little impact the decision has had on actually improving the
educational opportunities of African Americans and reducing de facto racial segregation in
public schools.58 Even more relevant to my point here, however, are the critics who have
questioned the very focus on litigation and the attendant dependency on the courts to
address inequalities that *Brown* engendered. Derrick Bell recently wrote,

“*Brown* teaches that advocates of racial justice should rely less on judicial decisions and
more on tactics, actions, and even attitudes that challenge the continuing assumptions of

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white dominance.” For Bell and others, the emphasis on litigation in the equal opportunities approach has drained the community involvement that is fundamental to the pursuit of a more egalitarian society. Now, here there probably is a valuable lesson to be learned from the legal strategy of those who have pursued the educational adequacy approach. Much of the emphasis has been on the number of successes that that legal strategy has seen in recent years. Yet, what has characterized much of that success has been not simply judicial decisions but rather the policy dialogue between the state courts, legislatures, educational policy makers, and the general public about what precisely constitutes educational adequacy under the terms of their state constitution. At the outset, I noted that the equal opportunities in education approach faces two challenges. I have sought in this paper to address the conceptual one. The other challenge is for this approach to gain a hearing again in educational policy circles. Instead of pining for a revival of Brown, perhaps it would be more effective, and indeed more consistent with its core principles, to try to invigorate a policy dialogue between stakeholders in a manner akin to the one that educational adequacy proponents maintain.

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61 Rebell writes on p. 256 of "Educational Adequacy, Democracy, and the Courts": “In many of the states where there have been effective remedies, the productive interchange among the branches has been accompanied by significant public engagement processes. For example, in Kentucky, the remedial principles developed by the Select Committee and adopted by the Kentucky Supreme Court were strongly influenced by an extensive round of statewide dialogues – including a 20,000 person televised town meeting.”