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The Pursuit of Comprehensive Education Funding Reform via Litigation

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The Pursuit of Comprehensive Education Funding Reform via Litigation

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INTRODUCTION BY: ANNA CHOI, KRISTEN FROESE, KYLA TAYLOR, Symposium Directors, Northwestern University Pritzker School of Law Students, JD '19.

MODERATOR: DESTINY PEERY, Associate Professor of Law at Northwestern Pritzker School of Law.

PRESENTER: LISA SCRUGGS, Partner, Duane Morris LLP.

MS. FROESE: Hi. Good morning, everyone. Welcome to the Journal of Law and Social Policy's 12th Annual Symposium. We're so glad to have you here with us today. I'm Kristen Froese. I'm one of the symposium editors.

MS. CHOI: Good morning. My name is Anna Choi, and I'm also one of the symposium editors. We are honored to have been able to organize the symposium this year with a lot of help, of course. And thank you for joining us today. A symposium on the right to education is near and dear to both of our hearts. And as a former high school teacher, I was especially reminded of the importance of this topic.

MS. CHOI: Professor Peery has graciously offered her time to moderate the panel today during which our three speakers will share additional thoughts on education in our country and answer audience questions. We'll reserve the last ten minutes for audience questions.

Ms. Scruggs is nationally recognized in school reform law. She is an experienced litigator and partner at Duane Morris and provides litigation and counseling services for education and school reform organizations, including individual charter and private schools, charter school networks, charter and education management organizations, school districts and other education non-profit and for-profit organizations and service providers.

She has handled a wide range of litigation, transactions, and policy matters relating to new school development, teacher evaluation, credentialing and certification reforms, public/private education ventures, virtual education, school finance and parent and student civil rights.

She has worked with the Chicago Public Schools, the third largest school district in the United States in a number of capacities. Most notably, she served as senior policy

advisor to the chief executive officer and as a member of the Blue Ribbon Commission to Evaluate Magnet and Selective Schools Admission Policy.

She has done a lot more, but to save time, I cannot read everything aloud. So please join me in welcoming Ms. Scruggs.

MS. SCRUGGS: Thank you so much for the opportunity to be here with you today. I feel like after hearing the two presentations, I think I mentioned to someone, I can sit down. They have covered a lot. But I am hopeful that part of what I am going to talk about can incorporate pieces of the prior presentations.

I am going to focus my remarks today on the case that has been probably still, although I'm not done yet, I feel like a pinnacle of my career as a litigator: *Chicago Urban League vs. The State of Illinois.* It was a challenge to the school funding system that we undertook in 2008.

I am going to talk a little bit about the origins of that case as well as the ultimate result, which was a settlement, and what that means for both the school funding system and the State of Illinois but also for the prospects of pursuing broad and comprehensive reform particularly in school funding systems via litigation. So just to start, after I graduated from college, I entered this dual degree program in education policy and law at the University of Chicago. I focused my graduate work on federal education policy, funding policy, and the goal of targeting resources where they were most needed.

I spent several years studying education finance systems, compensatory education programs, and equity in schools, primarily from an education policy perspective. When I started law school, I was very interested in considering the various paths to reform in education, having worked at CPS while I was in graduate school. Having kind of been on the ground with some of the reforms actually that Dr. Payne referenced for the first round, and seeing it from that perspective and really wanting to think about how, as a litigator, I could effect change within the school system rather than just the legislative politics that I had been studying and public policy implementation, which was also a big focus of mine during graduate school. As a student of the Civil Rights Movement, I really and truly believed in the transformative power of civil rights litigation. It was what I was taught. It was part of why I went to law school.

And then I met Professor Gerald Rosenberg. I am sure many of you have been exposed to or read "The Hollow Hope."[1] And I tell you that it became a really critical point in my education because it went against literally the reason I was in school. I thought as someone who grew up and whose life was transformed by the education that I was able to receive that this notion that I could not utilize what I gained from my education as a lawyer to actually bring about change for other people was a big blow to my plans and my thinking.

But just to talk a little bit briefly about "The Hollow Hope" and that book in particular, the primary thesis is that the Supreme Court is not, contrary to popular notions, able to effect widespread social change. You cannot get that done via litigation. And he lays out what I think is a really useful framework that he suggests this notion that you cannot affect broad social change through litigation up through the Supreme Court and traces that back to three primary constraints that are imposed on the courts.

[1] *See generally* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE (1991).

The first is the nature of constitutional rights. This notion that the nature of jurisprudence, precedent, and jurisdictional limitations preclude the Court from hearing or effectively acting on many social reform issues.

The second constraint is that the Court doesn't have sufficient independence from the legislative and executive branches to affect significant social reform, so it provides this notion that the courts alone are not capable of affecting this type of change.

And then the third is that the Court does not have the power to develop necessary policy and implement decisions that can affect significant reform. It's related I think to the second, but the third constraint talks a lot more about the need for a movement and support from citizens as well as having the motivation to get something done and to change. The courts alone cannot affect that change.

He spends a lot of time in the first edition of his book looking at *Brown v. Board* and going through and showing why and how his thesis is correct.[2] He has done a second edition which takes a look at more recent precedent. Again, I think his suggestion is that his theory and thesis hold true. My experience I would say from that class was that I was, you know, hell-bent on trying to figure out how to prove that wrong. And now having gone through the experience of litigating the Urban League case, it is not entirely wrong. I think it actually can be useful for those of us who really believe in the transformative power of trying to vindicate civil rights, that it's really critical, it's necessary for a democracy. And there are certainly limitations and there are certainly things that you can learn from the interdependency between the courts and the executive and legislative branches to help you and guide you in what you need to do in decision-making in your litigation. It doesn't mean you should not try to litigate these issues.

While I never, I don't think I will ever fully embrace the core thesis of "The Hollow Hope," I definitely think that it is something that is useful. I have used it since the Urban League case certainly, and I expect that if I take on something else, I will likely utilize those principles again. One of the things that I think both Dr. Payne and Mr. Phillips both mentioned was the fact that you have cases in nearly every state that have litigated issues about resources. They talked about the state constitutions as a venue for these types of challenges, and that is certainly the case. Adequacy of resources and smart use of those resources is something that is a frequent subject that is litigated in the courts. And in Illinois, we've been no different.

The primary case in Illinois before I would say our lawsuit was known as the *Edgar* case.[3] In 1996, that case reached the Supreme Court, and it was a basic challenge to the school funding system on the basis of the state constitution. In Illinois, we have a constitution that basically guarantees the right to a high-quality education for all students. Also, our constitution suggests that these states should bear the primary burden or have the primary obligation to fund schools. Given that we also have these provisions in the constitution, we have a school funding system in this state that was driven primarily by raising revenue via local property taxes.

You can very quickly see what the problem is. We have a wide variation throughout the state, given the property value and wherewithal, the ability to raise revenue for schools via local property taxes. Because of that, Illinois is one of the few states where the state was not providing the majority of the funding for schools. Most of the funding for public

[2] Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).
[3] *See* The Committee for Educational Rights et al. v. Edgar, 672 N.E.2d 1178 (Ill. 1996).

schools in the state was coming from local government. The *Edgar* case was a challenge to that basic system. They sued the state. There were a lot of other claims as well related to equal protection, but the primary driver of that case was this challenge under Article 1.

The plaintiffs in that case ran up against one of the constraints that really is identified in Professor Rosenberg's book in that the court deferred, all right, it punted it. They said this is an issue for the legislature. We do not as courts have the capacity to define what is a high-quality education. We do not have the tools, and that is not our job. That is for the legislature to decide. And *Edgar*, as a Supreme Court case, was seen by many of us in the educational community—and folks looking to litigate this issue—as a fundamental barrier to affecting any sort of real change.

However, the opportunity came around 2007–2008. There were a lot of different circumstances, some boycotts, and a lot of political pressure to do something about the school funding system in Illinois around 2007 and 2008. As a result of that, in addition to legislative pressure, and a lot of organizing that was happening at the ground level, there was new renewed interest in filing a lawsuit. I was lucky enough to be tapped to do that and led a team at Jenner & Block and took it on in 2008. Nine years later, we were able to resolve it.

But ultimately, what we did for the lawsuit itself was pull together what we thought was the best researched, best thinking around how you could challenge the school funding system. It was a kitchen sink approach: throw everything in there that we could and see what would stick, not exactly using Rosenberg's framework, certainly. But, I think similarly, when you look at cases in other states, we did a lot of talking with the team in the Campaign for Fiscal Equity in New York [and] the folks who did the *Abbott* cases in New Jersey. We again tried to pull all of that into a complaint that was ultimately filed in August of 2008 and later amended.

Similarly, we confronted some of the challenges that Mr. Phillips described with their class action. We actually decided to pursue state court, to try to avoid some of the challenges, the administrative hurdles of federal court and of class actions. We had individual plaintiffs, we had amicus from school districts who were the ones who were the most affected by the school funding system, and we brought a series of claims in our case.

The first, we re-brought the *Edgar* claim. I still feel very strongly about this one. I would go back and do it again if I could because one of the primary findings in that case was that the state was not capable and the courts were not capable of identifying and determining what a high-quality education was.

And since *Edgar*, the state had actually revamped its accountability system and literally created mechanisms for the state to determine how much money was necessary to achieve an adequate education. They defined it in statute. And then they created an education funding advisory board to evaluate it on a regular basis. They didn't actually fund that group all the time. They certainly did not appoint people to that commission all the time, but they did have it there in statute. Our contention was that this was an opportunity for the Court to revisit that question because the state had actually answered the question, provided the Court had the capacity to just look at what the EFAB number was. If the EFAB number was not what the state was actually allocating for funding, we thought, that's pretty straightforward. Maybe not.

If you think about the constraints once again, this fell squarely onto this notion that courts are not supposed to delve into this area of legislative prerogative: how much funding

a school received, how much was needed, and what was adequate. The court doubled down in our case as well and said this is not for us to decide; it is for the legislature. We did get some good language in the motion to dismiss. The first judge that we had gave us some really favorable language that we thought would be helpful when we got to the Supreme Court, which of course, just to speak again to the litigation strategy, our assumption when we first filed. We thought that the case would get dismissed, all claims would get dismissed, and we would quickly move on to the appellate court and then get to the state supreme court. And we had some good reason to believe that we had some favorable folks, unlike the current U.S. Supreme Court composition, and that we had some good information that, we would have a fair shot if we got to the state supreme court.

We had the Article 1 claim and the *Edgar* claim, which was dismissed readily. We also brought two equal protection claims. I get very amped up about these. You know, equal protection claims are nearly impossible to win. They are very difficult to win, and particularly, these two were intentional discrimination claims that we had to make. We made one based on race and one based on socioeconomic status.

Of course, the one based on socioeconomic status was tossed out quickly under *Rodriguez*.[4] And, you know, for obvious reasons, contending with that Supreme Court precedent, we were not going to be able to do it, but we brought it anyway, thinking that if we could get to the Supreme Court, we could try to change the thinking on that. On the intentional race discrimination claim, again, this was something that for us, the research involved was really motivating and continues to impact my thinking around school, work, and our structure: the way we organize education in schools today.

Our theory was basically that if you look back at the time when the first school funding system was established, when the school funding system that was in practice was established in the State of Illinois, there was proven, demonstrated, documented racial residential segregation. We argued that by imposing on top of what you knew was very clear residential segregation by race and suggesting that you would then have a system that relied primarily on local property taxes to fund schools, you knew that there was going to have basically a system that discriminated against the families and students in those local neighborhoods by race. You knew that you were going to discriminate and that it was a knowable outcome by creating that system. We tried to kind of reach back and make that argument and did a lot of legislative history work. It was impactful for us and the team as we thought about what that meant for school systems and how they were today and the focus on neighborhood schools. The court did not buy it and tossed that one as well.

We also had a novel tax-based claim. It was also based on the Constitution. I'm not going to go into it for those who are tax law geeks but the long and short of it is, we looked at the state law around how funds were supposed to be raised for schools and argued that under the Constitution and the system that was set up, they weren't following the Constitution. They weren't doing what they were supposed to do.

Finally, we actually brought a statutory claim. This was a disparate impact claim under the Illinois Civil Rights Act of 2003 which was a new law that had been established as a result of a supreme court ruling that held there was no prior right of action under Title VI for filing for disparate impact.

At this point we were excited because ultimately it allowed us to bring the race-based discrimination claims without having to prove intentional discrimination. That was really

[4] San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973).

important for us and we were hopeful, but still surprised, when the court actually denied the motion to dismiss with regard to that claim. And lo and behold, we had the opportunity for discovery.

This was a nice fork in the road in the litigation where, you know, we originally anticipated just going straight through from one part to the next. We had to deal with this decision when the court threw out most of the claims but left us with one.

We ultimately, after much discussion, decided to go ahead and continue to litigate and engage in discovery, which was a lot of fun. For those people in the room who have worked on the case, they definitely recall various trips to Springfield and the stops at the one Dairy Queen.

And we just had a lot of discovery, hundreds of thousands of documents. We were very aggressive in pursuing discovery. And as a result, we had some really strong support for our claim. We also had some issues that came up, certainly. And again, they played back to some of the constraints that Rosenberg points out. One of them was related to who do we sue. Do we sue the state board of education or do we sue the state as well? The state ultimately determined that they had immunity and determined again—still wrong about that—that the Illinois Civil Rights Act could not be applied directly to the state, only a unit of state government, and so we had to stick with the State Board of Education of Illinois (ISBE).

What that ultimately meant was that we had to prove that it was something that ISBE did that caused the racial disparities in the school funding system, so we set about to do that. That meant that our discovery process was very extensive. We looked under every hood. Ultimately, we did find what we determined was something that we could pin on the State Board of Education, but it also revealed one of the other limitations of pursuing this statutorily based claim: that was the remedy question.

There were a lot of questions that we began to have to grapple with when we got to the point where we said, "okay, what happens if we win?" It started to look like we were going to win, so people started asking that question.

Strategically, just to take a step back on the remedy question, when we started out, we actually made a very conscious decision not to be clear about what we thought the remedy was because we had a coalition that we were constantly trying to hold together. That was something that was really critical. The moment that we identified a particular remedy or a strategy—that would break apart our coalition.

For example, the question that many people asked is, "okay, let's say that the school funding system is unconstitutional. Well, if you don't get any more money, because Illinois is in a constant state of budgetary crisis, that means you're going to take money from my district." That was the constant thinking: that you're not going to increase the pie, so that means that if we redistribute the funds to make them more equitable, that is going to result in my school district to be less well funded. That was challenging because we had districts who were supporting us as amicus and we had other groups. We were across the state. We had plaintiffs from across the state, and we had Urban League affiliations from across the state, so it was really critical for us to hold it together.

The way we did that was we didn't stipulate what the remedy was. We said, well, ultimately, that will be up to the legislature to do that. We just want a declaration that the system is unconstitutional and violates the ICRA. We want the Court to evaluate whether

the school funding system that is created is constitutional, and we want to go under the ICRA and make them correct it until it meets that standard.

We got away with that for a long time until it got close to the end. The courts started and—well, frankly, the Attorney General's Office started making arguments that, hey, the remedy that they're seeking, it's pretty broad and it's going to require the state to act, and the state is no longer a party to this case.

One of the byproducts of litigating a case this long is that we had several judges, and there was a lot of up and down. One of the challenges is that we had a judge at the beginning who was the one who granted the motion to dismiss in part and denied it in part. That allowed us to engage in the discovery. He decided to go to another court in the suburbs for some crazy reason. We had this other judge who was a former legislator, which was horrible for us because literally to this day, I remember walking into court. He was like, "How is this case even here?" We had been litigating for several years at this point. He made us rebrief *Edgar*. It was horrible.

Former Attorney General Madigan had a great team of attorneys, and they seized upon that opportunity. They started raising questions about the remedy and began suggesting that the remedy—we laid out a bunch of options—would require the state to act. That matter was going to be impermissible given the scope of the ICRA. So frankly, I think, you know, we were living with that for a while, litigating that. The beauty of the judicial appointment gods: we got a different judge. He left, and we got another judge who really liked us which was great.

We filed a motion to reconsider. Five years into the case, we filed a motion to reconsider the ruling that I was just talking about with the remedy and everything. He accomplished it by granting a motion to limit our expert report. It was a motion in limine to get rid of our expert report because our expert report talked about the problems and the only kinds of remedies that would solve the problem. We brought a motion to reconsider the exclusion of our expert report. It was granted by this new judge. We were back in business. It was great.

The case was taking a really long time—I had three kids in the interim—there are legions of Jenner & Block lawyers who worked on this case up to this point in time. They all have kids now.

We had, also at the Urban League, the lead plaintiff who was a great former litigator: Andrea Zopp, who was the head of the Urban League at the time. That was a really fun period of time because she was like, "Okay. How do we, you know, kind of really grab at this and push it."

And so ultimately, what we decided to do was to file our own affirmative motion for summary judgment, because there was no question that the Attorney General's Office was going to be able to litigate this forever, which was not what we wanted. In the meantime, some of the challenges with regard to our school funding system persisted. The State of Illinois continued to be either 48th or 49th in terms of its contribution by the state to school funding. We decided to file this affirmative motion for summary judgment. We lucked out because the state board of education adopted a new policy in light of what was a heightened budgetary crisis in the state.

To summarize it, the State of Illinois was appropriating, you know, let's say they $6,000 per student. However, they wouldn't actually fund the system with enough money to give $6,000 per student to every school district. They didn't tell the state board of

education how to deal with it, so they didn't legislate. They would just, you know, short them on money and say, state board of education: it's your job is to distribute the funds or to disburse them. You figure out how to do it.

And guess what? They ultimately passed a policy that said we'll do across-the-board cuts called proration. What we then seized upon was this basic, you know, ultimately, you saw that by doing across-the-board cuts, this disproportionately affected school districts that were serving the majority of minority students. And that was our in. We filed a motion for summary judgment based on the expert reports of both our national expert, and we also had a local expert which was really critical because she just had a lot more credibility locally and understood the school funding system and the specifics and the conversations around them.

With that motion for summary judgment, the administration had changed a variety of things. They came to the table. We had at least three different times in this litigation that we had settlement conversations, and they never went anywhere, so I was very pessimistic that we were going to be able to resolve this. I just wanted to push on a motion for summary judgment, but they were very persuasive in suggesting that we needed to have settlement talks.

And then in addition to that, we were starting to hear that because of the pending motion for summary judgment, and I think in part becuase it was strong, there were also some risks for us because the remedy was again going to be in question. Even if we won our motion for summary judgment, it was on proration, right, so what other kind of changes could we get. We were going to argue that they had to blow up the entire system, but we had no guarantee that that was something we were going to be successful doing. There was some risk for us, some real risk for them.

And then we also had an internal campaign where we started telling legislators in the General Assembly, hey, you know, we filed this motion for summary judgment. We're about to win. We're about to win. We're about to win. There was a lot of other activity. Advance Illinois in the state started really pushing on the issue of funding. You had the coalescence of a lot of other events in terms of who was in office and education advocacy groups that decided to take on the issue of funding.

The potential of the loss in this lawsuit actually had two things happen: one, we ultimately decided to go ahead and settle. Two, we saw a major change in the legislation that basically made our settlement moot because they legislated proration away which is the kind of result that, you know, I would argue that we couldn't have envisioned at the beginning, but it certainly was a positive outcome.

A few takeaways: Like I said, we litigated this case from 2008 to 2017. There were a lot of different players, a lot of lessons learned, but a few key things to think about: one, I talked about it earlier on the experts, it was really important that we had a nationally known expert who had litigated school funding cases in other states and who people immediately feared when being across the table from him. But in addition to that, I think having the local expert who had been on commissions with other folks and who had a real ear to the ground on what was happening in Springfield and the legislature was critical to our overall strategy.

The other piece was the reevaluation of our overall strategy throughout the litigation. Like I said, very similar to the litigation that Carter talked about, we were assuming we were just going to push through, lose at the state court level, lose at the appellate level and

then go to the state supreme court. That didn't happen. Then, we completely changed our strategy.

When we got the different judges, you know, again, I will tell you there are people who thought I was absolutely insane in filing the motion to reconsider, but that was a critical turning point in the case; and then also being willing to actually engage in settlement talks each time. They progressively were better and ultimately were successful. Those were some of the really important takeaways from the litigation.

All right. I just wanted to say, you know, at the end of the day, you know, harkening back to the constraints, I think it is a really helpful way, if you're going to engage in this type of litigation, and both at the beginning in drafting your complaint and thinking about how do we ensure that we are minimizing these constraints, really making this something that the Court is going to be willing to entertain on the front end, and to the extent there is an interdependence really in terms of your ultimate outcome with the executive branch and the legislative branch, that you have a strategy for that. That was something where we really didn't do a lot of.

In New Jersey and in New York, they had organizations who were specifically focused on education, and so they had an entire campaign, an organizing campaign that supported the litigation. That's really critically important so that you are not solely and exclusively focused on the courts and litigating. You should also be building that external pressure both with legislators and with your executive branch officials. Then, also frankly on the ground with organizers. That that is just really, really important. I think I'll stop there.