Remarks of Michael Rebell

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REMARKS OF MICHAEL REBELL†

I am honored to be participating in the celebration of the Fiftieth Anniversary of *Brown v. Board of Education*.

For me, it is also an occasion to celebrate the much more recent decision of the New York Court of Appeals in *Campaign for Fiscal Equity, Inc. v. New York*, (CFE) which was handed down last June. Before I discuss this important decision, I would like to say something about the court of appeals' preliminary 1995 decision in this case. It was a case in which Dean Bellacosa played an important role. In essence, the court in its earlier decision denied a motion to dismiss that would have cut off all future possibility of continuing this type of litigation. Some may say that the early decision ("CFE I") was merely a technical legal journey en route to a much larger and ultimately more significant decision on the merits ("CFE II"). Still, I would like to begin my discussion with *CFE I* because it embodies the theme I want to discuss with respect to how *CFE II* and the other education adequacy decisions relate to Brown and its implementation.

Let me take you back a few years to 1993. At the time I was not a young lawyer, but a younger lawyer, and a client of mine at the time was a gentleman by the name of Bob Jackson. Mr. Jackson was the chairperson of one of the community school boards in New York City at a time when schools in New York were facing severe cutbacks that were leading to layoffs of teachers and dramatic reductions in services. He was extremely distressed by this situation. Mr. Jackson was convinced that New York City was not getting its fair share of state education funding, and he insisted that I bring a lawsuit.

While I agreed that the state education formula was totally unfair to New York City, I explained to him that unfortunately somebody had already brought suit challenging the state

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education finance system. A number of years ago, a group of property-poor districts on Long Island filed *Board of Education, Levittown Union Free School District v. Nyquist* (Levittown). Despite winning an initial victory in the lower court, the court of appeals reversed and firmly held that there is no constitutional right under the New York State Constitution to fiscal equity in education. I told Mr. Jackson that with a major constitutional claim a lawyer can not easily go back to that same court barely a decade later with a very similar case.

Mr. Jackson, on the other hand, would not take no for an answer. He was adamant in his belief that there was an inequity in regard to state funding for the New York City schools and that ultimately, if we pushed hard enough, justice would prevail in the courts. Now, why do I bring this to your attention in connection with our discussion of *Brown*? I mention it because the vision of equal educational opportunity that motivated Bob Jackson to make that kind of statement was the same vision behind *Brown*. And his belief that the courts are the place in our society where ultimately issues of justice and equity would be resolved is the same faith in the legal system that motivated the *Brown* plaintiffs. We had been to the legislature with all its wheeling, dealing, and backroom politics. Quite frankly, with respect to school funding issues, in the legislature I believe there was still a significant amount of racist attitudes present as well. The only place that the core principles at issue would be fairly considered was in the courts.

Jackson’s passion and insistence motivated me to research developments in similar constitutional cases that had been decided by state courts in other jurisdictions. When I started the research, I saw an emerging trend toward a new theory of education adequacy in these cases, which was distinct from the equal protection arguments that had been presented to the New York Court of Appeals. I satisfied myself that this distinct theory would allow us to file a claim that would not be regarded as a frivolous case. I then knew that I could at least bring the case in good conscience as an officer of the court and argue that there was a serious issue that warranted the court’s careful attention. We did just that; the case reached the court of appeals and the court distinguished *Levittown*. The case went to trial,

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and Judge Bellacosa was one of the five-member-majority in the case that accepted the distinction between our new education adequacy claim and the equal protection claims in Levittown and denied the motion to dismiss.

As an aside I would note that sometimes in the literature on judicial activism, there are assertions that most novel Civil Rights claims emerge from the heads of law professors and legal advocates. The model is that a bright young lawyer with some new theory wants to test it, so she goes running around to find some plaintiff who will put his name on it. In my case, I can assure you, it was quite the opposite. Jackson was an insistent client who would not take no for an answer and who forced me to do research to find out what was happening in other states.

With that as background, I would like to step back and speak in broader terms about the significance of this nationwide Education Advocacy Movement. It is an amazing chapter in the history of state court constitutional law. Litigation of this type has taken place over the past thirty years in forty-four of the fifty states. Plaintiffs have won victories in over twenty-five of those states, and in an increasing number in recent years. How many of you remember the 1973 decision of the Supreme Court of the United States in San Antonio Independent School District v. Rodriguez? When one looks back thirty years, it is apparent that the federal courts had closed their doors to litigation involving fiscal equity in education. In Rodriguez, the Supreme Court held that fiscal inequities in the funding of public education was not a matter that rose to the level of a fundamental interest under the federal Constitution. Therefore, the federal courts were not going to involve themselves in these potentially thorny cases. The decision seemed to mark a bleak day for those of us who were active in education advocacy at that time because Rodriguez was seen as the next major phase of the education revolution. Rodriguez, we hoped, would be the culmination of the implementation of Brown.

As Professor Greenberg mentioned, there were great difficulties in implementing Brown in the years immediately following the Supreme Court’s ruling. Largely, it involved the racism, and the political resistance that emerged from the political culture of the time. At the same time, the concept of

educational opportunity and a real sense of urgency resounded through the briefs in *Brown*. Leaders like Thurgood Marshall expected that if they won a legal victory in *Brown* within a few short years, all the schools throughout the country would be open to black children. Sadly, though, relatively little attention was paid at the time to what would happen inside those schools once the doors were opened, and whether merely opening the doors was going to be enough to provide a truly equal educational opportunity for these children. To be sure, these particular children had a great deal to overcome in light of the educational deficiencies they had suffered, the disadvantages they had in the economics of their lives, and the whole range of socioeconomic backgrounds that came with a century of oppression and poverty as well as enduring the legacies of slavery.

In the 1960s, the country slowly came to realize that a crucial component of the implementation of *Brown* would be a very fundamental resource question. The black schools in the South were not only segregated, but they also were totally starved of any fair modicum of resources. These schools had huge classes, facilities that were falling apart, the teachers were inadequately prepared, and usually these schools received old textbooks when the white schools received the new editions. It was a horrendous situation, and this lack of resources increasingly came to the fore of the discrepancy between educational opportunities for black and white children. Even when these children managed to get into an integrated school, they were usually being integrated into the poorest schools which also had terrible resource deficiencies. In short, the resources were wholly inadequate to provide the affirmative educational opportunities that were necessary to overcome legacies of disadvantage and slavery.

This was the unfortunate climate in which *Rodriguez* arose. So many hopes were tied to that decision because many advocates expected it to be the case to hold that fair access to resources is a mandatory part of the Equal Protection Clause of the Constitution. In Texas at that time, as in most states, the inequities in education finance stemmed largely from the property tax base of public school financing. In *Rodriguez*, the children who lived in the poor plaintiff district were receiving half as much money per capita as children in the neighboring
district. Paradoxically, the taxpayers in the poor minority district paid 25% higher taxes, despite the fact that their children received only half as much funding. Notably, these calculations even took into account the extra federal funding and extra state funding. The disparities were huge. People, therefore, thought that these facts were so overwhelming that the Supreme Court would have to respond positively to them. The Court acknowledged that the facts presented a problem, but it nevertheless determined that it would not advance federal Equal Protection theory to cover this situation.

This brings us to state court constitutionalism. At the time that the doors to the federal court houses were being closed to claims for fiscal equity in education, most civil rights attorneys thought that was probably the end of the road for this type of claim. The conventional wisdom was that if you were going to initiate a civil rights action, you had to strategize a way to obtain federal jurisdiction. Going to state court, it was thought, would lead inevitably to disaster for civil rights plaintiffs due to the state courts' general conservatism, their unwillingness to handle cases of this type, and their overall lack of sufficient resources to deal with large institutional reform litigations. We all believed at the time that if you wanted major civil rights breakthroughs, you had to go to federal court.

After Rodriguez, the federal courthouse doors were shut, and so some lawyers decided nevertheless to file these claims in state court because it was their only alternative. To the great surprise of the civil rights bar, plaintiffs started winning these cases. As cases were won in California, New Jersey, and West Virginia, others were started in New York and other states. Unfortunately, I do not have time to elaborate upon the whole thirty-year panorama of the development of fiscal equity in education arguments. Suffice it to say, the state courthouse doors began to open, and these arguments began to take shape and effect significant changes.

This openness speaks to a crucial impact of Brown. As Professor Greenberg explained, Brown gave rise to a far-reaching vision of equal educational opportunity. When you look back historically over the past fifty years, you realize the depth of what I call a democratic imperative for equal educational opportunity which Brown unleashed. Once uncabined, this vision and this imperative, in my view, is going to prove
ultimately unstoppable. It will to push until it finds its natural
center of gravity, and that center of gravity is going to be at a
level that is consistent with the very best of democratic
principles.

There is, of course, still substantial backsliding in the courts
and the legislatures in realizing Brown's vision. Nevertheless, I
believe that the momentum of the Brown vision of equal
educational opportunity is incessant and that it will prevail. I
submit that such pressure is what motivated civil rights
attorneys, totally despondent after the loss in Rodriguez, to
continue to push the fiscal equity issue in the state courts. And
ultimately, it is why, I believe, the state courts, despite the
negative predictions at the time, proved highly receptive to these
arguments. Because of the democratic imperative propelled by
Brown, each time there was a setback in the legal direction,
creative attorneys nevertheless insisted on going forward and
would come up with an alternate.

In CFE, we encountered many of these challenges. In
particular, I have mentioned the fact that we had the
unfortunate precedent of the plaintiffs' defeat in Levittown to
confront. Fortunately, we were inspired by an initial plaintiff,
Robert Jackson, who absolutely refused to give up. In fact,
unwavering plaintiffs across the nation became part of a growing
trend in these fiscal equity and educational adequacy cases. In
the first few years after the loss in Rodriguez, the plaintiffs won
almost all of the major battles.

Suddenly, however, in the early 1980s the pendulum began
to swing the other way. There were a lot more filings, but
unexpectedly defendants started to prevail and over-all, during
the '80s, defendants won about two-thirds of the cases, including
Levittown. Ten years later, however, the pendulum swung back,
and if you track the cases from 1989 to 2003, plaintiffs have won
over 70% of them.

So what is going on here with this back-and-forth pendulum
motion? If you look at the fiscal equity cases in broad terms, you
might say that the democratic imperative clearly prevailed in the
first wave of plaintiff victories. The implementation of equal
educational opportunity started there. On the other hand, in
every one of these early cases, after the initial court decrees were
issued, the remedy stage proved difficult. In states like New
Jersey compliance issues have gone back and forth between the
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The legislature and the state supreme court more than a dozen and a half times over the course of three decades. Fortunately, in the past few years, an effective remedy has finally begun to take shape in New Jersey. Judges in other states, of course, took heed of these developments and were not inclined to look forward to years of contempt motions and inter-institutional battles with the legislature. Why, then, all of a sudden did things change in 1989? It was at this time that the standards-based reform movement in education was occurring, a development that itself might be said to have been motivated in part by the continuing awareness of the Brown vision. The standards-based reform movement really had two origins. One of them was rooted in a business perspective that the nation’s schools appeared mediocre. There was both a real and perceived problem of competitiveness in the global marketplace. Therefore, improving the caliber of the school systems seemed an economic imperative. At the same time, there was also a clear equity concern that permeated the standards movement from the start. Over-all, the standards movement proclaimed that the nation could improve the caliber of its schools by setting definitive standards, which made clear what was expected of children, and challenging all children to reach those goals.

In setting these standards, the state education leaders took the position that the nation could simultaneously achieve both excellence and equity. They stated that the new challenging standards were benchmarks that were reasonable for all children. The nation’s educational leaders have repeatedly stated that every child, black or white, could attain the desired level of educational attainment, if they were provided sufficient supports and sufficient opportunity.

The standards-based reform movement, therefore, reinvigorated educational reform and reinvigorated the quest for equal educational opportunity. Looking at it from the judicial perspective, this reform movement also provided judges manageable standards for dealing with the remedy stage of a fiscal equity lawsuit. The education standards promulgated by state education departments provided a clear vision of what needed to be done to give all children genuine opportunity. What the courts needed to do was hold the state leaders’ feet to the fire and compel them to fund the specific types of reforms that they themselves had determined were necessary and appropriate.
The shift in legal theory from equity claims based on equal protection concepts to education adequacy claims based on substantive language in individual state constitutions that guaranteed all students some basic level of adequate education also was substantially aided by the standards movement. These education clauses which guaranteed all children a "thorough and efficient" education or a "sound basic education" had been written into state constitutions a century or more earlier. In most cases they emerged during the nineteenth century battles to establish "common schools" and codified the victory of the democratic forces that established the nation's public school systems. But as substantive judicial concepts, these clauses lay dormant for over a hundred years because they could not easily be translated into pragmatic legal doctrines. What is a "thorough and efficient" or a "sound basic education?" How could courts deal with these vague terms.

Here again, the standard-based reform movement made a real difference. All of a sudden, judges realized that the state education departments and the highest education policymakers were clearly articulating what constituted a minimum or an adequate education. This gave potential new life to these archaic, abstract constitutional clauses. A judge deciding one of these cases now had a handle on what an adequate education could mean and should mean in contemporary times.

Despite advances, forty years after Brown we still had not achieved equal educational opportunity. Notwithstanding these new legal theories and their resonance in state constitutions, the vision of equal educational opportunity is still a work in progress. The fact that in the challenges to state education finance systems, the pendulum did swing back in plaintiffs' favor in 1989 has brought new energy and new possibilities to Brown's concept of equal educational opportunity. I think it is highly significant that in New York, and six other states in the 1990s, the highest courts reconsidered prior decisions, and despite the fact that they had denied challenges to state education finance systems a decade earlier, they were open to the new adequacy theory and they were willing to fundamentally reconsider this issue. This reconsideration was under the guise of a new legal theory but nevertheless, from a broad historical sweep, it demonstrates that when inequities persist, advocates will
persevere and courts will be open to new arguments that are based on fundamental principles of equity and fairness.

In sum, then, what I have described thus far is the manner in which I see the fiscal equity cases of the 1990s relating directly back to the legacy of Brown. We are using new and different legal mechanisms, but we are carrying on the very same battle. We have come to realize that the state courts in these education adequacy cases are opening their doors, and through these doors we are finding a great deal of potential for finally realizing far-reaching education reforms.

Let me briefly describe the status of CFE and its significance with respect to the education adequacy movement. We are, in essence, attempting to turn a legal decision into a real difference in children's lives and achievements. The New York Court of Appeals ruled in our favor last June and it thereby culminated ten years of preparation and litigation.

After the court of appeals rejected the motion to dismiss in 1995, we went back to trial. We had a seven-month trial, which was an extraordinary undertaking. It allowed us to explore every facet of the education system of New York City and the State of New York. Also, we were able to investigate the definition of what constitutes a "sound basic education," a phrase the Court had used in Levittown, for defining children's rights under Article XI of the State Constitution. Since under the equity theory in that case, plaintiffs did not argue that students in the poor district were being denied a minimum level of education; their claim was that these children were being denied a level of funding equal to what was being made available in other districts. Thus, the court in Levittown had no occasion to define what constitutes a sound basic education.

In our case, we came forward and pressed the education adequacy argument. We based it on this language of a sound basic education the court had used to articulate the core educational rights contained in the New York State Constitution. We argued that tens of thousands of children in New York City were not getting their constitutional opportunity for a sound basic education. After the court accepted this argument in CFE I and allowed us to proceed to trial, defining precisely what was a "sound basic education" became one of the most important issues at the trial.
In its 1995 decision, the court took a very innovative approach to this definitional issue. It issued a tentative definition of what constitutes a sound basic education. The court defined it in terms of the skills that students would need to be civic participants capable of "voting and serving on a jury"—a fascinating definition. Though it was not a final definition, it served as a "template" to guide the trial judge in dealing with these issues. The Court indicated that after evidence was gathered on this issue at trial, it would review the record on appeal and make a final determination as to what the definition should be.

When you stop to consider what the court was doing, it really was a fascinating new direction in constitutional law. The highest court in the state was candidly writing a "first draft." It was revealing its current thinking, but saying that it was open to reconsidering that perspective based on the evidence and legal arguments that would come forth at the trial. Courts, of course, almost never speak in such an open manner.

I suspect that Judge Bellacosa and his colleagues, in issuing that decision, assumed that at trial there would be a great deal of input from educational experts and attorneys. What they may not have known is that in fact we would use that ruling as a starting point for the development of the state-wide public engagement process. We reasoned that, if we ever won this case, at the remedy stage we would have to deal with a range of political issues. We wanted to avoid what happened in New Jersey and other states. In our case, we had a special problem since in New York there is obviously a history of upstate/downstate splits when it comes to "nitty-gritty" issues like funding education. There also quite frankly was a substantial amount of racist thinking that went on when some people in Albany were determining how much money children in New York City were going to receive. We therefore decided to start a process of trying to commence a state-wide dialogue to deal with some of these issues from the beginning.

We wondered how we might begin the dialogue process. The court's sound basic education template gave us this wonderful opening. We took this opportunity and went to communities throughout New York City and throughout New York State. We said, "[t]he highest court in the state has issued a challenge, and we need your help to determine what this constitutional
language truly means. This is too important for just the lawyers and the experts to handle. Everybody has got a stake in this."

We received incredible input from citizens all over the state. Quite frankly, this public input changed the original legal theory that we and our colleagues had in mind. ("Our colleagues," of course, mean the team of about ten attorneys at Simpson Thacher & Bartlett, one of the major New York firms, who have worked pro bono with us on this case for so many years. They have added immeasurably to our legal team.) In any event, our legal team was thinking in certain strategic directions, but when we received input from the public engagement, we began heading in an entirely different direction.

Defining what a sound basic education means came to the forefront of our strategy. There is a great deal of language in the 1995 decision that repeatedly uses the word "minimum." Many people who read this and some of the other early decisions of state courts said, "[t]his adequacy concept may be a new legal argument that can open some new possibilities for you. But, ultimately, what were we going to get out of this case if 'adequacy' is defined in very minimal terms?" Is the definition of adequacy going to cover the core issues of class sizes and the qualification of teachers? Are we ever going to reach such serious substantive questions, or is the court going to rule that minimum means that merely that every child is guaranteed to be in some building with some teacher and getting some excuse for an education?

As the issue developed during trial, the State took the position that sound basic education should be defined very minimally. They actually argued that sound basic education in the twenty-first century meant no more than an eighth grade level education. The clause at issue was written in 1894. Going back historically, they made the argument the intent of the framers of that clause must have been no more than an eighth grade education because in the nineteenth century, few people went to secondary school.

We, of course, argued that the state's educational system had to provide children with the skills to prepare themselves to be capable citizens and to be effective employees in the twenty-first century. As this case proceeded, the trial court decided in our favor and went into great detail about the types of skills children need to be competent workers and capable voters and
jurors. These are high-level skills, indeed. The trial court specifically found that jurors need to be able to interpret complex campaign finance laws and to understand the significance of DNA. There was no question that this represented a high and challenging standard.

When we reached the appellate division, the position that an eighth grade education would suffice prevailed. With respect to skills for employment as a factor, the appellate division specifically determined that the constitution guarantees only the skills necessary to get a job and stay off welfare. If that is where adequacy would be defined, what had we achieved for Bob Jackson's children and other minority children in New York City? Would we only be reinforcing segregation? Defining adequacy in that way would mean that the city's schools would have no greater obligation than to prepare children to flip burgers while the children in Scarsdale were being prepared for the college track.

Fortunately, the appellate division decision did not ultimately prevail. In its 2002 decision, the court of appeals was given an opportunity to look again at Brown and its historical significance and the court did just that. I have no knowledge of the confidential deliberations of the court, but what I can tell you is that as we argued before those judges, I could tell from the eye contact and body movements that they were listening. Notably, we had put in our briefs that the final determination should include provision for a "meaningful high school education."

I distinctly remember one of the judges grilling me specifically on this phrase and saying, "Where do you get this language 'meaningful high school education?'" I looked straight at the judges and said, "Your honors, I am going to be very blunt and honest with you. You have to adopt that phrase because you have a responsibility as the highest court in the state to clarify that, in the twenty-first century, eighth grade education is not enough for the minority children in New York City. You have to, in the strongest possible language, erase the impression that has been left by that horrendous appellate court decision."

The judges of the court of appeals recognized the importance of communicating to the broad public as well as the legal profession that they were rejecting that totally unacceptable view that urban students—largely minority students—can be relegated to a nineteenth century eighth grade education. They
unflinchingly held that all students in the state of New York are indeed entitled to the opportunity for "a meaningful high school education."

I submit to you, ladies and gentlemen, that in practical terms this holding represents a very significant advance with respect to implementing the original vision of Brown. Every child in New York City—and 84% are minority right now—has a constitutional right to the resources and the opportunities necessary to receive a meaningful high school education. I leave you with this note of optimism and the hope that the vision of Brown continues to be carried on by other federal and state courts, just as it has been carried on so nobly by the court of appeals here in the State of New York.