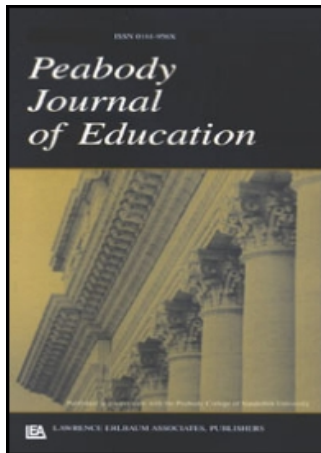


On: 26 June 2008
Access Details: Free Access
Publisher: Routledge
Informa Ltd Registered in England and Wales Registered Number: 1072954
Registered office: Mortimer House, 37-41 Mortimer Street, London W1T 3JH, UK



Peabody Journal of Education

Publication details, including instructions for authors and subscription information:

<http://www.informaworld.com/smpp/title~content=t775653692>

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Clint Bolick ^a

^a The Goldwater Institute Phoenix, Arizona

Online Publication Date: 01 April 2008

To cite this Article: Bolick, Clint (2008) 'A Framework for Choice Remedy Litigation', Peabody Journal of Education, 83:2, 285 — 296

To link to this article: DOI: 10.1080/01619560801997119

URL: <http://dx.doi.org/10.1080/01619560801997119>

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A Framework for Choice Remedy Litigation

Clint Bolick

The Goldwater Institute Phoenix, Arizona

Although school choice proponents have generally been on the offensive in legislative arenas over the past 2 decades, they have played almost constant defense in the judiciary, seeking to prevent courts from undoing school choice programs. Opponents typically wield state constitutional provisions against school choice programs. Properly construed, such provisions often are intended not to thwart but to secure educational opportunities. School choice supporters should consider taking the offensive, applying such provisions toward their intended ends by challenging defective schools and seeking meaningful remedies for children trapped in them. Choice remedy litigation can provide an effective complement to legislative efforts in the larger campaign to secure for disadvantaged children the precious educational opportunities that are their constitutional right.

Ever since the first urban private school choice program was enacted nearly 2 decades ago, legal challenges have been a constant feature of the terrain. Parental choice advocates have successfully fended off First Amendment challenges, culminating in *Zelman v. Simmons-Harris* (2002)¹ but have met with less success thus far in defending programs against state constitutional challenges.

It is odd in a nation doctrinally committed to equal educational opportunities (and most of whose state constitutions expressly provide a right to education) that advocates of expanded choices should find themselves constantly on the legal defensive. Given that appalling educational inequalities continue to prevent us from fulfilling this sacred moral promise to our nation's children and that courts exist to uphold fundamental rights and to dispense justice and equity, advocates of parental choice should not consider it a natural condition to be on the defensive in

Correspondence should be sent to Clint Bolick, Goldwater Institute, Scharf-Norton Center for Constitutional Litigation, 500 East Coronado Rd., Phoenix, AZ 85004. E-mail: cbolick@goldwaterinstitute.org

¹I recount the successful initial 12-year litigation effort to defend school choice programs in Bolick (2003).

the legal arena. Most to the point, we should not permit constitutional guarantees of educational opportunity to be used to thwart such opportunity. Yet we allow that to happen when we cede the legal arena to our foes.

Opportunities abound for advocates of parental choice to advance their cause through litigation. In this article, I focus on the most promising approach for systemic change: choice-remedy litigation using state constitutional guarantees and building on funding equity jurisprudence.

For more than 35 years, courts across the nation have applied state constitutional guarantees regarding education to increase funding for public schools. In some instances, those who favor greater parental choice have attempted to influence the course of such cases, sometimes by opposing them and sometimes by seeking to intervene to advocate a different remedy. Mostly they have sat on the sidelines, allowing the groups who are prosecuting such lawsuits to define the terms of the debate in terms of money rather than meaningful educational opportunities. Unfortunately, the massive increases in funding that have resulted from such lawsuits rarely have trickled down to the intended beneficiaries of the educational guarantees.

That will remain the case until advocates of parental choice enter the fray in a serious and systematic way. This article is intended to sketch a path for parental choice advocates to effectively invoke educational guarantees to increase educational opportunities for the children who most need them.

FROM EQUITY TO ADEQUACY TO CHOICE

The earliest school finance equity case was filed in federal court. The U.S. Supreme Court rejected the notion of an affirmative right to education in the U.S. Constitution in 1973 (*San Antonio v. Rodriguez*). Under that precedent, to satisfy the dictates of equal protection under the 14th Amendment, a state need only demonstrate a “rational basis” for the classifications it creates in the education context—a standard so deferential to that in reality it does not require government decision makers to articulate a basis for its classifications at all, much less one that is in any sense truly rational.

Since that decision, advocates of school finance equity have focused on state courts and constitutions to achieve their objectives. The school finance equity campaign has been one of the most successful of the efforts by liberals over the past 40 years to advance their ends through state courts, rather than through a federal judiciary that has turned increasingly conservative.²

²Only recently have conservatives and libertarians begun systematically to focus on state constitutions to advance freedom. The Goldwater Institute was the first market-oriented policy group to

The first two successful school finance equity cases took place in the early 1970s in New Jersey (*Robinson v. Cahill*, 1973) and California (*Serrano v. Priest*, 1971). Like many state constitutions, New Jersey's contains an explicit education guarantee, specifically entitling all children to a "thorough and efficient" education. By contrast, California's constitution did not contain an express education guarantee. But as part of our system of federalism, states are free to interpret their own constitutions to confer greater protections than the federal constitution, even where the language in the two constitutions is exactly the same. The California Supreme Court did so, recognizing education as a "fundamental" constitutional right. Under that standard, government classifications can survive judicial scrutiny only if they are narrowly tailored to a compelling governmental interest. Applying their state constitutions, the New Jersey and California Supreme Courts invalidated their respective state finance systems.

The first lesson that parental choice advocates can learn from the finance equity cases is that judicial action can bypass, compel, or at least hasten legislative action. Not all were successful: Several state courts ruled the question of funding equity "nonjusticiable," holding that no matter how explicit the education guarantee, the state constitution vested the matter entirely to legislative discretion. But enough of the lawsuits were successful to effectuate a fundamental change in education finance across the nation, largely accomplishing the movement's three signal objectives: (a) the displacement of property tax-based school financing with financing from state sources, (b) the displacement of primarily local responsibility for school financing with primarily state responsibility (along, of course, with greater control), and (c) dramatically increased funding, particularly for property-poor school districts. Left only to the legislative arena, finance equity advocates might never have accomplished all of those changes, or at least not in so short a period, given the powerful forces arrayed in support of the status quo. But judicial action forced recalcitrant legislatures to act and created an inexorable national tide of education finance reform.

The finance equity advocates deployed three important weapons that were crucial to their success. First was a cadre of tenacious, committed, skilled lawyers who relentlessly litigate finance equity cases and who in turn developed a core of "experts" available to testify in cases across the country. Second was an aggressive campaign in the court of public opinion. Third was the "sweetheart" lawsuit—cases in which government defendants were all too happy with a finding of constitutional deficiencies that would reap them millions or billions of additional taxpayer dollars. Parental choice advocates should be able to acquire the first two weapons but rarely if ever the third. Even if they can find states with sympathetic

launch a litigation program, the Scharf-Norton Center for Constitutional Jurisprudence, to focus almost exclusively on vindicating freedom protections in the state constitution (see Bolick, 2007).

attorneys general, they can count on powerful interests (such as teacher unions and school boards) to intervene as defendants and mount a vigorous defense.

Typically, the finance equity cases proceeded by showing large funding disparities between property-rich and property-poor districts and seeking injunctive relief. In theory, the injunctions left discretion in the hands of the legislature, but in reality they were a loaded gun: Solve the problem, or else. Legislatures eventually complied, raising taxes and pouring massive new funding into property-poor school districts. Per-pupil funding in such districts has increased dramatically (in some instances to \$20,000 per student). Meanwhile, in some states—most infamously, New Jersey—courts for many years have maintained jurisdiction over school funding, even to the level of minutiae. Hence, even with a number of court losses, finance equity advocates have succeeded beyond their wildest dreams.

But what the finance equity advocates have not been able to deliver—if it ever was their intended goal—is genuinely improved educational opportunities for disadvantaged schoolchildren (Hanushek, 2006). Over time, massively increased funding reaps diminishing returns, with school bureaucracies, personnel, and vendors (not to mention the lawyers) displacing needy schoolchildren as the true beneficiaries of the public largesse.

As funding inequities began to disappear—indeed, in many states, state funding for urban school districts significantly exceeds median district funding—advocates of yet greater public funding altered their legal theories to fit changed circumstances. The focus on funding equity began to shift to educational “adequacy” (see, e.g., Heise, 1995). Now the proof centered not on funding disparities but on the failure of students, regardless of how much money was being spent, to succeed academically. But the remedy remained the same: more money for “overburdened” schools.

Again, the plaintiffs succeeded in enough cases to get the spigot running again. Over the past several years, advocates of increased funding have prevailed in New York, Texas, and other states. And again, increased funding has not been accompanied by commensurate improvements in system accountability or student achievement.

That failure, especially in states that have traveled furthest down the road of increased funding, would seem to open the door to parental choice remedies. The equity and adequacy lawsuits are seriously flawed in multiple respects. First, the intended beneficiaries of the state constitutions’ education guarantees are not school districts but *children*. But children thus far have been mere props in the quest to secure ever-greater funding for school systems. Second, and related to the first, school districts are not *victims* of constitutional malfeasance but perpetrators of it. They are, at the very least, the state’s agents in delivering on the constitutional obligation to provide educational opportunities. Yet they show up in equity and adequacy lawsuits not as defendants but as plaintiffs. Third, the remedy defies

the most basic requirement of equity because it is grossly mismatched to the constitutional violation: Instead of providing immediate, make-whole relief to the victims, it showers dollars upon constitutional tort-feasors.

Unfortunately, advocates of greater funding have so dominated the legal arena and the terms of the debate for so long that they have turned the ordinary rules of equity upside down in *Alice in Wonderland* fashion: What in any other area of the law would be unthinkable now is commonplace; what should be commonplace is deemed radical.

To put the situation into perspective, I like to use a simple analogy from the context of product liability—which really is what we’re dealing with here. Let’s say a consumer purchases a car and receives from the manufacturer a warranty of “thorough and efficient” transportation. It turns out that the car is a complete lemon. The manufacturer attempts to repair it to no avail, leaving the consumer with no transportation at all, much less something thorough and efficient.

If the consumer went to court, what would a court do to redress the violation? What a court emphatically would not do is to award billions of dollars to the automobile manufacturer in the hopes that in this decade or the next it might produce a thorough and efficient automobile that it might provide to the consumer. Rather, it would give the purchaser her money back, which she can use at once to select a better product. The question is not a close one. Yet in the topsy-turvy world of school litigation, the first remedy is ubiquitous, whereas the second is dismissed as—gulp—judicial activism.

In reality, a “choice” remedy is not unknown even in education. Under the federal Individuals with Disabilities Education Act (IDEA), all disabled children are guaranteed a “free appropriate education.” In the first instance, public schools have the obligation and opportunity to provide an appropriate learning environment. But if they fail to do so, the U.S. Supreme Court has ruled unanimously that they must provide it at public expense in a private school chosen by the parents (*Florence County Sch. Dist. No. Four v. Carter by and through Carter*, 1993). Indeed, the more than 100,000 disabled children attending private schools under this interpretation of IDEA compose the nation’s largest parental choice program.

Parental choice advocates should endeavor to convince state court judges that they should interpret their own constitutions to provide precisely such immediate and meaningful relief. Indeed, even in states where funding equity or adequacy decrees are in place, parental choice advocates can argue that choice is an essential *interim* remedy; while the legislature complies with court orders and greater funding and accompanying reforms work their presumed magic, students should not be forced to remain in schools that are demonstrably inadequate. Parental choice advocates can show that even a temporary deprivation of educational opportunities can constitute irreparable injury and moreover can demonstrate, drawing upon experiences in Milwaukee, Florida, and elsewhere, that parental choice drives systemic accountability and reform.

Two such efforts along those lines were prosecuted in the early 1990s by the Institute for Justice—one in Chicago and the other in Los Angeles. Both failed in court (*Jenkins v. Leininger*, 1995).³ In Illinois, the state constitutional guarantee of a “high-quality” public education was deemed aspirational only and therefore nonjusticiable. In California, the constitution was interpreted to preclude the voucher remedy. Despite the adverse court rulings, the cases were enormously successful in the court of public opinion, reaping a favorable headline in *USA Today*, editorial support from the *Washington Post*, and prominent coverage by national television media. The terms of the public debate over parental choice began to shift, linking the interests of disadvantaged inner-city schoolchildren with greater school choice. In turn, where only one urban school choice program (Milwaukee) existed prior to the lawsuits, several states and Congress enacted more than one dozen programs across the nation in the following decade.

Still, the last thing the parental choice movement needs is to invest precious resources in quixotic lawsuits. One of the frustrating but important realities we need to confront is that even as the appeal of school choice increasingly transcends class and philosophical boundaries, for many in positions of power the issue remains fiercely partisan and ideological. Thus, perversely, many of the same judges who are quick to recognize a central and activist role for the judiciary in enforcing state constitutional education guarantees often are ideologically opposed to parental choice. Likewise, judges who philosophically inclined toward parental choice tend to be deferential toward legislative prerogatives. The success of choice remedies depends on intellectually honest judges who are willing to vigorously yet objectively enforce constitutional guarantees.

What if anything has changed since the early 1990s to justify a renewed investment in litigation as a major part of the parental choice arsenal? At least five things.

First, conditions continue to deteriorate in inner-city public schools, with little to show for massive increases in public funding. Things had to get worse before they could get better—and they have. Many who genuinely believe in equal opportunity are growing more open to parental choice.

Second, advocates for increased public funding have unwittingly opened the legal door to choice remedies. The shift from equity to adequacy has created a favorable legal terrain for parental choice advocates, for a choice remedy fits much more naturally (as a permanent, partial, or interim remedy) than increased funding to districts that fail to meet constitutional standards.

Third, the progress of the movement toward educational accountability, abetted by the accountability requirements of the No Child Left Behind Act (NCLB),⁴

³The California decision is unpublished.

⁴In addition to the accountability requirements that are helpful to choice advocates in identifying failing schools, NCLB presently includes a guarantee of public school choice for children who are

has fueled the development of state standards for academic performance. Courts understandably often are reluctant to create standards by which to measure whether the state's constitutional obligations are being fulfilled. Now, with states setting their own standards for educational adequacy, parental choice advocates simply can apply those standards—which serve as the proverbial “smoking gun”—to establish the state's liability in failing to provide a constitutionally adequate education. That leaves to parental choice advocates the principal task of demonstrating that choice is the proper remedy.

Fourth, school choice now is a proven solution to the ills of inner-city public education. We can deploy our own cadre of experts to demonstrate that choice is the *only* remedy that *immediately* allows children to leave failing schools and enter better performing schools and that choice instills accountability and provides a catalyst for improvement in the public school system.

Fifth, after several years of legislative successes, opponents are striking back. This year and next may witness, for the first time, a net *decline* in the number of private school choice programs and the children able to utilize them, as a result of court challenges, voter initiatives and referenda, and shifting legislative majorities. In Utah, for instance, opponents successfully referred to the ballot the nation's first universal school choice program and scored a resounding 62–38 percentage victory at the polls. A carefully developed litigation program, combined with an aggressive campaign in the court of public opinion, is essential to preserve and accelerate the momentum of the school choice movement and the precious opportunities it is poised to deliver.

LITIGATION LOGISTICS

Advocates in nearly all states should consider choice-remedy litigation. Obviously, the states that could benefit most are those with serious education problems and few prospects for achieving school choice through normal political processes. But states without troubled urban school districts can consider such lawsuits on a smaller scale, and states with existing limited school choice programs may enjoy an advantage in the litigation arena if the positive effects of choice are well known.

enrolled in schools that fail to make adequate yearly progress for two consecutive years. Few among the many eligible children have availed themselves of such options for a variety of reasons, including the failure of school districts to publicize the options (as the law requires them to do) and the lack of adequate school alternatives. Unfortunately, NCLB does not provide a private right of action to enforce the choice options and, of course, does not include private schools as options. The Alliance for School Choice currently has a complaint pending before U.S. secretary of education Margaret Spellings asking her to enforce the public school choice options for California children in the Los Angeles and Compton school districts.

The experiences of the funding equity and adequacy cases as well as the early voucher-remedy cases are instructive in guiding future efforts to achieve choice remedies under state constitutional education guarantees. Two absolute prerequisites exist before advocates should seriously consider filing a choice-remedy lawsuit in a given state: an enforceable education guarantee, and the availability of a choice remedy under the state constitution.

With regard to the first prerequisite, it is most useful to have a clear articulated guarantee (particularly one that is normative, such as “thorough and efficient” or “high quality”) that the highest court in the state has found to be justiciable. But it is enough, to at least consider going forward, that some guarantee exists and that the courts have not ruled that the clause is *not* justiciable. In most states, the equity advocates or others have resolved those questions one way or the other.

The terrain is less certain with regard to the permissibility of a voucher remedy. Only two states—Michigan and Massachusetts—have state constitutions that clearly preclude publicly funded private school choice altogether. Two others—Wisconsin and Ohio—have upheld school vouchers. The other states fall somewhere in-between.⁵ The most common obstacles are the so-called Blaine Amendments, which are found in most state constitutions and prohibit aid to sectarian schools. Blaine Amendments should not necessarily deter school choice advocates, both because they can be construed to permit aid to students (as in Wisconsin and Arizona). To the extent they are applied to discriminate against religious school choices, they may violate the nondiscrimination guarantee of the First Amendment – an issue that school choice advocates are anxious to bring to the U.S. Supreme Court. Even in states that clearly or apparently prohibit private school choice, the effort may be worth pursuing in order to support change of the constitutional rule or its interpretation; or to set up a Blaine Amendment challenge in the U.S. Supreme Court.⁶

Once the basic legal parameters are established, the choice advocates should determine the factual predicate to establish a constitutional violation. Increasingly, especially in accord with NCLB, states have established accountability systems that assign grades to schools. Ideally, the system will be one like Florida’s, which ranks schools using grades from A to F, or New Jersey’s, in which the state legislature has given definition to the constitution’s education guarantee through proficiency tests, the results of which are available school by school. NCLB rankings, which measure “adequate yearly progress,” are not necessarily a surrogate for successful or failing schools (though schools that have failed to make adequate yearly progress for several years in a row safely can be said to be failing schools). But absent state standards that can be used to determine the identity of failing

⁵For a state-by-state assessment of the constitutionality of school choice, see <http://ij.org/pdf/folder/schoolchoice/50statereport/50stateSCreport.pdf> (Institute for Justice Web site).

⁶For a more extensive discussion of Blaine amendments, see Bolick, (2003).

schools, prospective litigants might consider using National Assessment of Educational Progress scores. If the state itself does not classify schools as “failing,” choice advocates will have to work carefully with experts to determine a defensible standard for identifying failing schools.

Using the state’s own school performance data is an excellent way to establish liability, because the data provide an objective measure created by the defendants themselves. Another possibility exists in states in which successful adequacy lawsuits have been litigated: Plaintiffs seeking choice remedies can build on already-existing findings of liability and argue that existing remedies are inadequate.

The most likely choice remedy litigation will take the form of a direct lawsuit. However, in states with existing lawsuits, choice advocates might consider intervening in those lawsuits to seek a different or interim remedy or, if the existing lawsuit is a class action, seeking to remove families from the existing class. The rules for intervention vary by state; generally, all require prompt action to intervene. But even in a long-standing lawsuit, new plaintiffs (or members of the plaintiff class) can argue that the remedies fail to vindicate their rights. The loss of educational opportunities, even temporarily, can be irremediable, as many educational experts can attest. Joining ongoing lawsuits provides the additional benefit of helping alter the terms of the debate. If the effort to intervene or break the class in an existing lawsuit is unsuccessful, the advocates subsequently can file a new independent lawsuit.

The advocates also will have to determine whether to proceed with a class action or to proceed on behalf of a group of individual plaintiffs, which may depend on applicable state rules. Class actions have bigger impact: By definition, every member of the class (which can number in the tens of thousands) will be entitled to relief. However, certifying the class presents an additional legal battle, and indeed the sheer numbers in a class action may scare a judge. If school districts are named as defendants, it may be necessary to find class representatives in each district. The advocates will have to perform a careful cost–benefit analysis to decide whether to proceed with a class action or an action on behalf of a group of individuals.

Either way, the lawsuit typically will proceed on behalf of named parents suing on their own behalf and on behalf of their children. It is important to choose dedicated parents who have a compelling story as the lead plaintiffs or class representatives.

Choosing defendants also presents a difficult decision. Failing schools may be scattered across the state. Sweeping all failing schools within the lawsuit makes for a high-impact case and a statewide story. But it can also make for a cumbersome lawsuit. If the lawsuit encompasses multiple districts, the individual districts may be necessary parties, which will result in lots of lawyers on the other side. If the state is primarily responsible for education and its funding, however, it may be

possible to sue the state alone, even if the plaintiffs reside in multiple districts. Alternatively, the advocates may target a small number of especially troubled schools or school districts. Courts may be more willing to grant extraordinary relief if the scope is relatively narrow and confined to school districts that are universally acknowledged to be egregious.

The desired remedy is a pro rata share of the student's education funding to use at a private (or public) school of the family's choice. To the extent that state funds alone are sufficient to cover tuition, that may make it easier to sue the state without the necessity of including school districts. It is important to emphasize such a remedy is not a judicially created voucher program; rather, it is a damages remedy directed at victims of a constitutionally deficient educational system, just as in the IDEA context. Trial experts can also show that choice ensures accountability in the public schools.

Other remedies may be possible depending on local circumstances. In the ongoing New Jersey case, *Crawford v. Davy*, the plaintiffs are seeking both a private school choice remedy and an injunction against residence-based school assignments where they operate to consign children to failing schools. Advocates may also wish to consider alternate remedies, such as lifting caps on charter schools, especially where private school choice may be problematic.

If the advocates are free to choose the venue in which to file, they should do so with an eye toward judges with courage and integrity. Choice-remedy lawsuits should be filed in state courts; federal lawsuits are all but certain to be dismissed unless NCLB is strengthened by adding a private right of action.

Creating the legal team is a crucial decision. Public interest law firms may be particularly adept at prosecuting choice-remedy litigation. Large mainstream law firms can bring useful clout and resources—but they can be expensive. Some may be willing to litigate such cases on a pro bono or discounted basis. Law professors may be willing litigators as well. It is desirable to have a diverse legal team, whose members bring varied experience, backgrounds, political affiliations, and connections. The lead attorney should have sufficient time, expertise, and commitment. Prominent lawyers and law professors can provide credibility by signing on of-counsel.

For most lawyers, the learning curve will be steep. It may be useful to include one or more lawyers who have experience with choice-remedy cases as consultants to the local legal team. Their expertise can help bring the local team up to speed and provide economies of scale in working through the logistical and legal issues and drafting the complaint.

The lawsuit should be coordinated by a well-established nonprofit organization, which can collect tax-deductible contributions for the lawsuit. The organization (and its partners) can take responsibility for community organizing, plaintiff recruitment, data collection and production, media, and political action. The overall team should span the divides of party affiliation, ethnicity, and wealth.

The courtroom efforts should proceed in concert with an aggressive campaign in the court of public opinion and (where feasible) legislative activities. The lawsuit should be announced with a major news conference, and rallies should accompany major court events.

In *Crawford v. Davy*, which I consider a model for choice-remedy litigation, the coordinating roles are provided by Excellent Education for Everyone, the Latino Leadership Alliance, and the Black Ministers Alliance. The lawsuit is extremely well crafted and skillfully guided by two local attorneys, Julio Gomez and Patricia Bombelyn, who in turn are aided by a team of legal advisors. The lawsuit has been covered favorably and extensively throughout the state, fueling legislative efforts to create school choice programs.

The impact of choice-remedy lawsuits can be magnified to the extent that lawsuits in multiple states can be coordinated. Filing one lawsuit is a statewide or regional story; filing two or more is a national story.

Litigation can be a lengthy and grueling process. Investors and participants must gear for a multiyear battle and probable setbacks. But lawsuits can provide a wonderful galvanizing opportunity, especially in states where legislative prospects are dim. Litigation is *action*, which too often is difficult to sustain in states with powerful opposition to school choice. Properly framed, choice-remedy lawsuits can inform and mold public support for school choice while providing an opportunity for tangible progress through judicial or legislative action.

The factors discussed here are likely to arise in all choice-remedy litigation, but there is no magic formula for success. Local circumstances will define the realm of the possible and inform strategy in specific cases. Successive teams of creative lawyers surely will learn from the experiences of their predecessors and improve upon the product. Eventually, with commitment and ingenuity, we will score a litigation breakthrough that will pave the way for additional victories. But along the way, with every step, we will attract to our cause new allies among people of good faith who come through our efforts to recognize the urgency of the problem and the necessity of systemic remedies. In that way, litigation that surely will be difficult to win will nonetheless prove impossible to lose.

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