


M A K I N G A

FEDERAL CASE

Michael Rebell and his students hope to convince the Supreme Court that education is a Constitutional right

By Joe Levine

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IN 1968, SCHOOLS IN A POOR LATINO COMMUNITY in San Antonio, Texas, were so under-financed — an adjoining white neighborhood was spending nearly twice per pupil — that parents thought the local school board was stealing money. When they came to understand that public schools in the United States are funded through property taxes, ensuring that wealthier communities have better-resourced schools, they sued the state for violating the federal Constitution's Fourteenth Amendment, which guarantees all citizens equal protection under the law.

Rodriguez v. San Antonio, as the case became known, made it to the U.S.

Supreme Court, which just 14 years earlier had ended school segregation. Now, at the height of the Civil Rights era, *Rodriguez* was widely expected to become the sequel to that decision.

But by 1973, when the Court issued its ruling, a backlash against racial integration had begun. Chief Justice Earl Warren had retired, replaced by Warren Burger, a Nixon appointee. In a five-to-four decision, the Court found that no violation had occurred in *Rodriguez* because — as Associate Justice Lewis Powell (another Nixon appointee) wrote for the majority — “education...is not among the rights afforded explicit protection under our Federal Constitution.”

Rodriguez signaled a retrenchment in federal efforts to make schools more equitable, kicking the issue of school finance back to the states. Powell's opinion overrode arguments by Thurgood Marshall and William Brennan that education is, in fact, an implicit Constitutional right because citizens require it to exercise their First Amendment right to freedom of expression and their Fifteenth Amendment right to vote. The *Rodriguez* plaintiffs had made no such contention, Powell declared; they were simply seeking more money. Yet he did not exclude the possibility of the Court hearing a future case that *did* seek to connect school funding to the exercise of citizenship.

“The Court left a door open in *Rodriguez*,” says Michael Rebell, Professor of Law & Educational Practice and Executive Director of Teachers College's Center for Educational Equity (CEE). “But the Court has grown increasingly conservative, and the fear about bringing another case has been that it would close the loophole forever. So no one has wanted to touch it.”



Until now. This year, in Rebell's course "Schools, Courts and Civic Participation," 16 TC and Columbia Law School students are studying legal precedents and the separation of powers and searching for a plaintiff. By June 2018, they hope to file a complaint in a federal district court arguing that local schools are not adequately preparing young people as citizens — the first step toward reaching the Supreme Court to establish a Constitutional right to a quality education.

Why would Rebell, who hatched his plan when it appeared that a Hillary Clinton Presidency would tip the Court to a liberal majority, bring his case in the Donald Trump era, before a conservative-majority Court presided over by John Roberts?

"Establishment Republicans like Roberts are concerned about the damage that's being done right now to our civic institutions," Rebell says. Courts and judges have traditionally taken a very strong interest in teaching young people about the workings of government. Former Justice Sandra Day O'Connor founded an online initiative called iCivics, and current Justices Neil Gorsuch and Anthony Kennedy spoke last summer at the annual conference of the United States Courts for the Ninth Circuit, which focused on civic education.

"Civic education is meat and potatoes for judges, so this could be an opportunity for them to make a powerful statement," Rebell says.

Marathon Man

BRINGING A SUPREME COURT CASE TAKES YEARS, WITH no assurance of ever reaching the docket, but Rebell, who used to run marathons, is uniquely qualified.

A former class-action lawyer early in his career, Rebell became interested in whether these suits actu-

ally better people's lives. He published a theory in the *Yale Law & Policy Review* arguing that court-ordered remedies work best when they have input and buy-in from the people they're designed to help.

From the early 1990s through the mid-2000s, Rebell was given a major opportunity to test that theory as lead attorney and chief strategist for the Campaign for Fiscal Equity (CFE), the plaintiff in a suit seeking additional state funding for New York City's public schools. Previous school finance suits had sought to equalize funding for all schools — a non-starter in the world's foremost capitalist society. But Rebell's strategy differed on two counts. First, he set his sights on "adequacy" rather than strict equality. Citing language in New York's constitution that, unlike the nation's, *does* guarantee all children "a sound, basic education," he argued that schools need a certain minimum level of funding to fulfill that promise. And second, putting his theory of public engagement into practice, Rebell also held town meetings across the city and state to define the precise nature and cost of a sound, basic education. It's this kind of work that connects Rebell, a one-time Peace Corps volunteer and self-described "product of the Sixties," with what really seems to motivate him: a passionate belief in the power of the people.

In March 2006, Rebell and CFE prevailed. Responding to an order by New York's highest court, the



state legislature passed an Act to phase in, over four years, a \$5.2 billion annual funding increase to New York City schools and \$4 billion annually for the schools in the rest of the state. Only a fraction of that money changed hands before the 2008 recession hit, though the state has since begun to increase school funding again. However, plaintiffs in two dozen other states have won similar lawsuits, mostly using variants of Rebell's "educational adequacy" strategy.

Higher Stakes

THIS TIME, THOUGH, REBELL ISN'T NECESSARILY seeking more money. His goal, at first glance, seems surprisingly modest and abstract — a declaratory judgment, or pronouncement by the Court, that 21st-century schooling must be reoriented to accomplish what (he argues) the Constitution's framers saw as its primary goal: preparing the nation's young people to function as knowledgeable, capable citizens.

In a forthcoming book titled *Flunking Democracy* (University of Chicago Press), Rebell backs that claim with quotes from John Adams ("A memorable change must be made in the system of education, and knowledge must become so general as to raise the lower ranks of society nearer to the higher") and Thomas Jefferson ("Ignorance and despotism seem made for each other"). He cites clauses in 32 state constitutions, referenced by judges in virtually every successful school finance lawsuit, that, in large part, define civic preparation as the purpose of education. And he offers powerful evidence, including trends in voter participation, newspaper readership and national student assessments, that the civic knowledge and engagement of young people — particularly those of color, in under-resourced schools — are in free fall.



Rebell won a multi billion-dollar judgment in New York, but this time around he isn't necessarily seeking money. His goal is a declaratory judgment, or pronouncement by the Supreme Court, that schooling must be reoriented to what the Constitution's framers saw as its primary goal: to prepare students to function as knowledgeable, capable citizens.



TC doctoral candidates Sarah Horsch, Iris Daruwala and Melissa Lyon are among the students helping Rebell prepare his case. “We’re not going to get a true democracy until people understand how it functions and what their role is,” says Daruwala. Adds Horsch: “Civic preparation isn’t a partisan issue. Everyone should have a voice — and you start with the education system.”

How did we come to such a pass? Rebell cites disillusionment with government and erosion by the internet of physical community. But above all, he argues, American schools have adopted a market-oriented view focused wholly on instilling job skills and increasing individual opportunity. Teachers no longer receive preparation in leading discussions of controversial topics and are often barred from doing so. A narrow focus on English and math has triggered cuts in art, drama, service learning, debate club, school newspapers and other venues for grappling with knotty human issues.

Could a declaratory judgment really reverse that direction? The details would be left to the states, which sounds chancy. Yet there is precedent here, too. In 1974, in a case called *Lau v. Nichols*, the Su-

preme Court ordered San Francisco’s public school system to provide equal education to students with limited English proficiency. A year later, Congress passed major follow-up legislation, and the federal Office for Civil Rights developed the Lau Remedies, leading to the development of bilingual programs in most public schools.

“If the U.S. Supreme Court declares that educational opportunities to prepare students for civic preparation constitute a constitutional right,” Rebell writes in *Flunking Democracy*, “that principle will become a permanent, foundational feature of education policy.”

Long-Range Planning

THE GREAT LESSON OF LEGAL HISTORY, REBELL has come to believe, is to expect the unexpected. “Major policy-changing legislation is a saga that develops over time, and the people who start it would often be as surprised as anyone to see the outcome,” he told students in his “Schools, Courts and Civic Participation” class in September. “And courts don’t always do what you want them


to. We’re asking the Court to take a stand that will strongly influence public policy, and the Court will be acutely aware of public sentiment — so framing the policy consequences can be critical.”

The lawyers in *Lau* adroitly minimized the implications of their case, he said. They chose a Chinese-American plaintiff because Chinese-Americans were stereotyped as diligent students and because the Chinese-American population’s relatively small size seemed likely to soothe worries about the costs of expanding English education. In contrast, the *Rodriguez* plaintiffs hired a community lawyer who possessed no education law background and who was wholly unaware that an entire legal community had long been discussing possible strategies for just such a case.

“So do we want to be more like the lawyers in *Lau* or in *Rodriguez*?” Rebell asked his students.

Lau, was the unanimous answer. Rebell agreed, but cautioned that there are times when plaintiffs’ wants and needs outweigh the dictates of smart legal strategy. In New York’s school finance case, for example, he and his legal team had asked the state’s highest court to define a sound basic education as preparation for gainful employment as well as citizenship. The court appeared to have accepted only the citizenship part in its tentative definition, but in town meeting after town meeting, parents made it clear that they wanted both definitions.

“Finally we had this thing out at a big forum in the South Bronx,” Rebell recalled. “I said to the people, look, I understand what you’re saying, but if we push the court on something they rejected, there’s a real risk we’re gonna lose the case. And this woman says, ‘Hey, Mister, if you’re telling me you can’t guarantee my kid gets a job, what in hell is your damned case worth anyway?’ So we went back and added preparation for competitive employment to the evidence we presented at the trial. We would never have done it without that public reaction.”

He paused and grinned at the students hanging on his words. “The Court’s final definition of sound basic education included both citizenship and competitive employment. And we won.” 

OFF COURSE

America’s schools are falling short in preparing young people for civic participation

“

f most native-born Americans were required to take the citizenship test...they would fail,” writes Michael Rebell in his forthcoming book, *Flunking Democracy*. That provocative title succinctly sums up what Rebell views as a national crisis: Civics education has been getting short shrift in schools, and students in poverty and students of color are the least likely to get the civic preparation they need in order to participate in politics and work to

bring about change in their communities. ■ As Rebell powerfully documents, in the wake of the 2008 recession, many high-needs high schools in New York were forced to eliminate field trips, guest speakers and civics-related after-school offerings, including community service programs, speech and debate clubs, school newspaper and student government. In the 2014 congressional races, only 45.8 percent of eligible white people voted, and just 40.6 percent of eligible black voters and 27 percent of Hispanic voters. Higher-income people are far more likely to work for a political campaign, contact elected officials, sit on a board or get involved in informal community work.

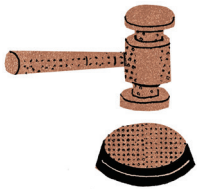
■ How to change this distressing picture? Rebell believes that getting the U.S. Supreme Court to mandate a right to education that ensures civic preparation would be a major step in the right direction, but he and Teachers College’s Center for Educational Equity (CEE) are working several other related angles as well. ■ “We’re looking at civics education from a rights-based perspective,” says Joe Rogers, Jr., CEE’s Director of Public Engagement. “Because civic preparation isn’t just aspirational. It’s something that New York’s schools are legally — and constitutionally — obligated to provide for their students.” ■ CEE is in the process of sounding out New York state high school principals, teachers, students and parents on how their schools should, ideally, conduct civic preparation, as well as on what resources schools currently have and what they would need to do a better job.

■ Yet many people — particularly those in communities with high



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CEE Director of Policy
& Research

concentrations of poverty — have no idea that the state constitution guarantees civic preparation as an educational right. Thus, CEE is also laying the groundwork for a public-engagement campaign to explore the civic mission of the schools in districts all around the state. ■ Among the first questions that CEE wants to take to the public: How should New York define “productive civic participant”? Should schooling simply prepare students to go to the polls once a year or should it supply the necessary knowledge and support the development of the skills to effect change in their communities year-round? ■ “So often it’s the lawyers and policy wonks who are driving education policy,” Rogers says. “But we believe strongly that those most affected by these decisions must be at the table.” ■ “We don’t create our policy recommendations about civics education from thin air,” says Jessica Wolff, CEE’s Director of Policy & Research. “We’re facilitating a conversation about what civic preparation really means — and about what skills and knowledge young people must acquire in order to grapple with complex issues and work out their own views.” ■ In September 2017, New York’s Board of Regents issued its plan for implementation of the federal Every Student Succeeds Act, passed by Congress in 2015. The plan includes a proposal for the creation of a “college, career and civic readiness index.” CEE’s research and public engagement will go a long way to help the state measure up.



THE EQUITY TEAM

CEE’s Jessica Wolff, Director of Education Policy & Research; Joe Rogers, Jr., Director of Public Engagement; and Paloma Garcia, Program Associate

T H E S M A R T

ON CIVIC

A leading philanthropic family is

A S A YOUNG STUDENT, RAYMOND SMART was, by his own description, “a troublemaker” who bedeviled teachers and administrators with “questions they didn’t want to hear.” Smart took issue with schooling, and still does, “because the system is inflexible and uninterested in how children assimilate information.”

Now a leading education philanthropist who chairs the Smart Family Fund, Smart has continued making just such trouble. His efforts to help reinvent American education include critical support for charter schools such as the highly-praised Amistad Academy in New Haven, Connecticut, whose innovative reforms have been replicated in a chain of eastern charters.

More recently, Smart and his sons, Archibald and Roland, have been leading supporters of Teachers College’s Center for Educational Equity (CEE), led by the pioneering school finance litigator Michael A. Rebell, Professor of Law & Educational Practice. CEE’s Comprehensive Educational Opportunity Project explores use of the legal system to close the massive funding gaps between school districts in rich and poor communities and ensure that funds produce better education for all.

M O N E Y I S

EDUCATION

betting on TC's efforts

"I think it's the single most important subject or topic that is hurting life in this country," says Raymond Smart.

The Smarts are particularly enthused about Rebell's plans to persuade the U.S. Supreme Court to establish a Constitutional right to education premised on the preparation of young people to function as capable citizens. They believe that the 2016 election and ensuing divisive politics demonstrate the importance of civics education aimed at giving students the tools to grapple with issues that face their communities, the nation and the world. They're hopeful that better informed voters will tackle problems such as gerrymandering (the redrawing of voter districts to protect incumbent office holders).



RAYMOND SMART

Archibald Smart adds that civics education is an important "piece of the puzzle" that's been lost in the rush to bolster math and science instruction. "If students have no sense of American history and no regular civics curriculum, how can we expect — come Election Day or when it's time

to get involved in local, state or national issues that have a huge impact — that they'll be well-informed and prepared?"

Informing the public is a longstanding tradition in the Smart family. Raymond Smart's grandfather, David A. Smart, was one of three



ARCHIBALD SMART

principal founders of *Esquire*, working the business side of the magazine that has published Ernest Hemingway, F. Scott Fitzgerald, Tom Wolfe and Gay Talese. After the sale of the publication in the early 1970s and the rest of the firm, which marketed textbooks and other educational material, in 1983, the family turned toward philanthropy.

Raymond Smart worked in one of his family's businesses, making short educational films, before taking leadership in his family's philanthropic efforts. For a time, he headed the large Smart Family Foundation. The latter has now split into four separate units, with Raymond, Archibald and Roland controlling the Smart Family Fund, which continues to focus on school reform issues.



Raymond, Archibald and Roland Smart want to revolutionize American schooling. With America riven by political strife, they are optimistic about better civics instruction and equitable funding to make that happen in poorer districts. They view Rebell's planned lawsuit as pivotal to that change.

Not surprisingly, given what he calls his "existential distrust" of the school system, Raymond Smart was intrigued by the promises of the charter-school movement to reward experimental approaches to teaching. With the Amistad project and many subsequent projects, he's developed a reputation for his hands-on approach.

"He's been so supportive," Rebell says. "He cares about these issues."

Roland Smart says in some cases the newly refocused philanthropy (for which he serves as a board member) can operate like "an angel" investor, using seed money to identify experimental reform efforts that will work and then merit investments from larger foundations. The innovation that will revolutionize American schooling deserves the most investment, Roland Smart says, "but we've not yet found it."

But the Smarts seem to relish the hunt. With America riven by political strife, Raymond Smart is optimistic there will be momentum for both better civics instruction and equitable funding to make it happen in poorer districts. He views Rebell's efforts as pivotal: "The potential for the lawsuit to change everything is terrific." — **WILL BUNCH**



ROLAND SMART