COURTS AND PUBLIC SCHOOLS: EDUCATIONAL LITIGATION IN HISTORICAL PERSPECTIVE

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This study is an exploratory social history of litigation about public education. Using West digests as an index of appellate cases, it first examines the changing volume and character of litigation from the earliest recorded cases until 1981. It then relates trends in litigation to two broad phases of educational history: the system-building era, when courts helped to clarify the lines of authority in an ambiguously decentralized system; and the new functions of litigation in the twentieth century, when administrative progressives sought to use legislation to reshape schooling. It turns then to the relation between school law and social conflict over basic dividing lines of religion, race, and ethnicity and suggests that courts played a relatively small role in adjudicating such issues until recent times. Finally, it contrasts the recent history of litigation—by some called a "legal revolution"—when excluded groups sought to reshape schooling.

I. INTRODUCTION

A widow in Currie, Nevada, reached the end of her patience with the chairman of the school board. The schoolhouse, she believed, was on her land, and she made up her mind that she was going to turn it into a washhouse. It was time to go to court. She took the morning train to Elko to fetch the sheriff to eject the trespassers. When the sheriff arrived on the afternoon train, there was no sign of the schoolhouse, not even the foundation stones or the fence that had surrounded it. As soon as the morning train had disappeared around the bend, local residents had assembled teams of draft horses, put the schoolhouse on skids, and moved it a quarter of a mile to some railroad property, where the teacher and the pupils again

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commenced their regular lessons. The sheriff could find no one who had ever seen the schoolhouse on the old lot (Gulliford, 1981: 7).

Americans have had many ways of settling disputes about their common schools. One of these is going to court. Litigation over public education is the subject of this essay—a study in the social and legal history of American public education. The social history of the law—pioneered by scholars like Willard Hurst—represents a departure from the kind of traditional legal history that focuses on evolving doctrines in leading case law. It broadens the scope of inquiry to include the whole operation of the legal system in its interaction with society and the economy (e.g., Hurst, 1977; Gordon, 1975; Scheiber, 1981). While courts are still a central concern of this form of socio-legal history, case law is treated not as a hermetic domain but as an index of larger developments. "The legal system, described solely in terms of formal structure and substance, is like an enchanted courtroom, petrified, immobile, under some odd, eternal spell. . . . What gives life and reality to the legal system is the outside, social world" (Friedman, 1975: 15).

Sympathetic to this new social approach to the law, we are investigating how the legal system of public education—state constitutions, statutes, litigation, and administrative law—have shaped public schooling and how major changes in society and in educational institutions have, in turn, altered the demands placed upon the legal system. In this part of that broader study we focus on litigation but also treat briefly how statutory and administrative law has interacted with the courts.[1]

Social historians of the law have paid little attention to school law, and those concerned with law and education have mostly construed their subject in doctrinal terms. Scholarly writing on law and education has tended in two directions. One has been the study of landmark decisions of federal and state supreme courts that "settled" basic questions about such matters as race, religion, or the legality of private schools (e.g., Spurlock, 1955). The other has been the writing of school law textbooks aimed at educational administrators and lawyers hired by school boards (e.g., Bardeen, 1900; Bolmeier, 1970; Edwards, 1971; Voorhees, 1916). Studies that focus on major constitutional decisions are a vital part of U.S. intellectual and

[1] For a discussion of the changing character of educational provisions in state constitutions, see Tyack and James (1985).

political history and illuminate changing ideologies about the role of schooling in society. All legal cases are not born equal and do not have equal importance; one *Plessy* justifying racial segregation or one *Brown* outlawing it in assignments to public schools may serve as a major ratification of caste or a challenge to it, outweighing countless other cases in political importance and as doctrinal precedent. However, studies that focus on legal doctrines in landmark cases typically pay little attention either to the social and political conditions that gave rise to the decisions or to whether the doctrines were implemented (Lufler, 1980).

The landmark constitutional cases, moreover, represent only one kind of educational law, a variety highly unrepresentative of the mainstream of litigation. The topical organization of traditional school law texts from the nineteenth century onwards is quite different from that of the books that treat issues of fundamental rights. These textbooks mirrored the bureaucratic concerns of the administrators and the interest of lawyers in case precedents (Drury, 1958; Trusler, 1927). Few issues of school law were construed in basic constitutional terms until the middle of the twentieth century. Authors of school law textbooks tended to treat religious controversy as a problem of curriculum and racial segregation as a technical question of pupil assignment to schools. Indeed, questions of fundamental rights often seemed anomalous in the legal-bureaucratic framework adopted by the early textbook writers (Trusler, 1927; Chambers, 1939; Voorhees, 1916).

This essay is a foray into territory largely uncharted by either social historians of the law or writers on school law. We wish to raise new issues for analysis by presenting a new body of factual evidence and then turning these facts into puzzles. We also suggest tentative interpretations of what we find.

First, we ask how often Americans went to court to settle educational disputes, and we attempt to identify the kinds of issues they litigated there. We estimate the absolute numbers of appellate cases in school law, the rates of educational litigation when standardized by population, the types of questions that were contested in courts, and how these variables differed over time. We suggest some possible explanations for both the relative absence of school law cases until recently and the fact that the volume of educational litigation significantly changed around the turn of the century and again in the 1960s. We examine the kinds of educational issues people brought to the courts, alternative methods for

settling educational disputes, and the reasons why some kinds of disputes were not litigated. Ultimately, we are concerned with identifying those whom the legal system serves and those whom it neglects or even oppresses.

Generally, we find that trends in litigation reflect two broad phases of educational history, especially in relation to school governance and finance. The first phase of system-building—which lasted for much of the nineteenth century—was characterized by overlapping authorities and ambiguous regulations. Federal authority and the national bureaucracy were institutionally weak throughout the nineteenth century in education as in many other domains, reflecting a common fear of strong government (Skowronek, 1982; Bright, 1984). Even within the states, citizens disputed the proper degree of state centralization of power in education (Kaestle, 1983). While many citizens sought to locate final authority over educational policies in the hands of local representatives, others sought greater standardization of schools, particularly at the state level. One common result of these contending forces was an ambiguous compromise in school governance and finance, which looks today like a tangled web of authority in which legislative, executive, and judicial powers were intertwined. To complicate the picture still further, each level of school government—federal, state, county, township, and district—had differing constitutional and statutory responsibilities. In examining this phase—which lasted in most states at least until the turn of the twentieth century—we shall see how court decisions helped to clarify lines of authority in decentralized educational systems, largely in a pragmatic, case-by-case manner.[2]

As government became more centralized and schools more bureaucratized during the second phase—the progressive era—courts came to take on new functions. They became increasingly involved, for example, in issues of school consolidation, pupil transportation, and teacher tenure, and were a forum in which lay persons challenged new statutes and administrative law. State laws and court cases often interacted with one another. Confusing or unpopular laws gave rise to litigation; court decisions sometimes prompted new statutes, either to clarify the meaning of legislation or to authorize contested changes.

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[2] For a perceptive review of the literature on federalism, see Scheiber (1980); for a description of the court structure, see Glick (1983: ch. 12).

After examining the role of litigation in these two phases of educational history, we shall investigate the relation between school law and social conflict. Here we are concerned with appellate decisions that dealt with some of the basic dividing lines in American society: religion, race, and ethnicity, for example. We explore some of the reasons why such issues—which generated great political controversy—produced relatively few challenges in court up to the time of the *Brown* decision in 1954. The lack of court cases clearly does not reflect a lack of political concern. State legislatures passed many laws that reflected ethnocultural conflicts and the distribution of power in society. Whites passed laws requiring segregation of the races; Anglo-American groups mandated the use of English as the language of instruction; patriotic associations like the American Legion and the American Bar Association prescribed flag salutes and specific civic instruction; special interest groups persuaded legislatures to require schools to teach about alcohol, thrift, or cotton sorting. The courts rarely interfered with such majoritarian efforts to assert normative dominance in schools through law.

We suggest that until recently the school law developed by state and federal appellate courts largely buttressed the existing distribution of political and economic power, took a mainly conservative stance toward divisive social issues, and supported the drive toward professional discretion and bureaucratization that has characterized public education during the twentieth century. Outsiders—typically people from low socioeconomic strata—rarely gained much social justice through litigation, although they tried, even with minimal legal resources. In recent years, however, there has been a "legal revolution" in which excluded groups have with significant success sought to reshape public schooling through the courts. In the final section of the essay we discuss what effect this has had on the volume and character of educational litigation.

II. EVIDENCE ON EDUCATIONAL LITIGATION

Recent studies of the business of courts and litigation rates have marshalled a variety of sources and evidence to describe the volume, character, and long-term changes in court cases. The most comprehensive data bases are to be found in studies of the federal court system. Studies of the Supreme Court (Casper and Posner, 1976; Baum, 1981), the U.S. courts of appeals (Howard, 1973; Baum *et al.*, 1981-82), and the federal district courts (American Law Institute, 1934; Grossman and

Sarat, 1975; Clark, 1981) have tracked the number of case filings and caseloads since the late nineteenth century. But conclusions based on these studies are of limited generalizability because the vast majority of litigation takes place in the state courts (Marvell, 1984: 1320). Recent estimates report that 98 percent of all court cases filed in the U.S. are filed in state courts (Flango and Elsner, 1983: 16).

Studies of litigation in state courts are still in the preliminary stage. Kagan and his colleagues (1977) estimated the caseloads and distribution of legal disputes for sixteen state supreme courts between 1870 and 1970 by sampling published opinions in Shepard's Citations. Detailed studies of caseloads (usually civil cases) and litigation rates in local county trial courts have been reported, for example, by McIntosh (1980-81), Friedman and Percival (1976), and Young and Co. (1981), using various methods of estimation. While there is strong evidence of an increase in court filings and litigation rates in the most recent period in state trial courts (Flango and Ito, 1984) and in state appellate courts (Marvell and Lindgren, 1985), historical trends in the late nineteenth and early twentieth centuries are less clear (see discussion in Galanter, 1983: 36-50). One conclusion derived from this line of research is that whatever increase in overall litigation rates has occurred during the twentieth century, it has not been an "across the board" phenomenon. Litigation in certain areas of law—product liability, malpractice suits, and "public law," for example—has probably increased significantly while litigation in other areas of law (e.g., contracts, business disputes, and debt cases) has either remained constant or even declined (Friedman, 1983; Kagan, 1984). Many commentators suggest that litigation concerning schools and education has been one of the growth areas.

The most comprehensive sources from which one may readily sample educational cases are the historical digests issued by the West Publishing Company, references that legal researchers have used for almost a century. These digests record for different substantive areas cases litigated in appellate courts, beginning in the early nineteenth century and continuing until the present day. We focus on cases classified under the category of "Schools and School Districts." A particular virtue of the digests for our purposes is the relative consistency in the taxonomy of cases. Although there were some changes in the categories the digesters used—the subdivisions became more elaborate in later years, for

example—the basic classification of cases remained the same.[3] This permits relatively precise comparisons within categories for a long historical period.

There are problems and cautions, however, to bear in mind in using the digests to map educational litigation. One is the selectivity of reported appellate decisions. It is difficult to generalize about the character or number of lower court cases from reported appellate court decisions. Because of disparate structures and legal cultures, the ability and propensity of citizens and school officials to appeal losing cases is likely to vary substantially. In some areas of school law—compulsory attendance, for example—lower court litigation seldom resulted in appeals, whereas in other areas, such as racial discrimination and segregated schools, appeals were more frequently taken (Kousser, 1980a).

Another problem inheres in the legal categories themselves. For social historians interested in the social context of educational litigation, the taxonomy used in the West digests sometimes obscures more than it reveals. Vital issues like religion and race may be placed under unlikely umbrellas. From the first decennial (1897-1906) through the seventh (1956-1966) the topic of "Separate schools for colored pupils," for example, was placed under the rubric "Establishment, School Lands and Funds, and Regulation in General."[4]

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[3] In 1887 the West Publishing Company began issuing the yearly American Digest System, in which it gave brief synopses of all reported state and federal cases. Its staff of lawyer-editors then prepared the monumental Century Digest, which West described as "a complete and definitive digest of all American case-law from the establishment of the government down to 1896" and which included some 500,000 decisions (West, 1897: vii). From 1897 onward it compiled the yearly digests into decennial editions. In 1898 the American Bar Association called the West classification scheme of cases the "standard" and urged its general adoption. Numerous states began to use the West taxonomy in their own digests. The West digests thus helped to standardize legal categories, became a common point of entry into published case law, and were a reference tool that played an important part in professionalizing the work of lawyers by giving them a perspective that went beyond the limits of their state and region (Abramson *et al.*, 1983; Lamsom, 1974). Our use of the West digests obviously differs from the purpose for which they were intended.

[4] In retrospect, it is clear that legal categories are neither time-free nor ethically neutral. Such classifications may illuminate, however, how social questions were translated into lawyerly thinking since it is likely that the original West lawyer-editors sought to mirror existing ways of thinking among their clientele when they constructed their categories. Historians or lawyers may now wish to reclassify cases to match their own purposes—we find this essential in our own work—but the dominant taxonomy has itself been an influence on the development of law.

In addition to the problem of the legal labels, appellate cases are often only a cloudy window on original conflicts. Contests of values or interests become filtered and transformed on their way through the courts and the reporting system (Mayer, 1967: ch. 12). Citizens in a community may have quite specific everyday claims, gripes, outrage, and grievances (see Felstiner *et al.*, 1980-81; Miller and Sarat, 1980-81), but lawyers are likely to translate these claims selectively with an eye to what will bring about the best outcome for the client. If the case calls for a reasoned decision rather than a verdict on the facts, the judge may have filtered the information the lawyers selectively amassed to highlight those facts that enabled him (rarely her) to reach a parsimonious decision. He may or may not have had his opinion published, and a litigant may or may not have appealed his decision. The appeals process itself distances the historian from the original context, for appeals tend to sift facts, and they tend to focus primarily on procedural questions or broad principles.

Despite the caution needed in using this kind of evidence, we are convinced that historical patterns that emerge in the educational cases reported in the West digests are important to analyze, for they add a new perspective for understanding educational litigation, which in turn raises new questions. Some kinds of social and educational conflict have frequently found their way into the legal system, and some have not, and that is worth exploring. The volume and types of cases have changed over time, and those transitions call for interpretation.

III. VOLUME AND CHARACTER OF EDUCATIONAL LITIGATION OVER TIME

To estimate the volume of appellate educational cases reported in Table 1, we used the following estimation procedure. First we counted the number of pages under the "Schools and School Districts" category in each of the West decennial digests. For the nineteenth century we counted the actual number of reported educational cases. For the later decennial digests we took a random sample of pages within the school law category (at least 30 percent) to count the average number of cases reported on each page. The latter figure was multiplied by the total number of pages to arrive at an estimate of the total number of cases (see Benavot *et al.*, 1982).[5]

[5] This sampling procedure was carried out for each of the nine West decennials in each of the major subcategories of the school law section listed in Table 2. Because West editors cross-referenced some educational cases in

Table 1 reports nineteenth- and twentieth-century trends in the numbers of educational cases in state appellate and federal courts and annual rates of litigation for ten-year intervals beginning in the 1837-1846 period and continuing until the 1967-1976 period. Column 3 indicates that the total number of education cases grew over time and column 6 shows increases in the annual rate of litigation when controlled for population. The other columns in Table 1 break the volume and rate of litigation into separate estimates for state appellate and federal courts.

Figure 1 graphically illustrates changes in the rate of educational litigation over time from the figures presented in column 6 of Table 1. Note that the rate of litigation grew slowly during the nineteenth century. During the ten-year period from 1897-1906 it increased markedly; it fell somewhat in the next decade, and then it climbed to a peak during the worst years of the Great Depression. Following the Depression, the rate of litigation declined slowly until about 1966, when it again rose abruptly, especially in the federal courts. It is also noteworthy that beginning in 1897, litigation rates fluctuated more sharply than in the nineteenth century. As we shall suggest, these changes in the rate of educational litigation

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more than one subcategory of the school law section, we first thought that our estimates were somewhat inflated. To check this problem more carefully, we isolated all reported cases dealing with public schools in a finite period in the late nineteenth century (1870-1900) and found that a small proportion of school-related cases were not referenced in the "Schools and School Districts" category, but in other categories such as "Constitutional Law," which meant that our original estimates slightly undercounted the actual volume of school law cases. These two findings led us to conclude that our figures for the total number of educational cases are probably quite close to the actual number of educational cases litigated during each interval. To break down figures for total cases into state appellate and federal cases, we used estimates of the volume of educational cases litigated in federal courts published in Hogan (1985: 11). Figures for state appellate courts are computed by subtracting the number of federal cases from the total figures.

Average annual rates of litigation were calculated by dividing the estimated number of educational cases by the mean population at each 10-year interval and then dividing by 10. Population figures come from the U.S. Statistical Abstract (1983: 6). The mean population figure for each 10-year interval was calculated by summing the population figures for the first and last year of the interval, then dividing by 2; the population figure used for the interval "Before 1836" is from the year 1830. The following mean population estimates (in 100,000s) were used:

Before 1836 135	1887-1896.... 644	1937-1946 1344
1837-1846.....181	1897-1906.... 781	1947-1956 1544
1847-1856.....245	1907-1916.... 937	1957-1966 1819
1857-1866.....324	1917-1926... 1096	1967-1976 2066
1867-1876.....413	1927-1936... 1227	1977-1981 2235
1877-1886.....520		

Table 1. Volume of Educational Cases and Litigation Rates in State Appellate and Federal Courts During the Nineteenth and Twentieth Centuries Estimated in Ten-Year Intervals

	Estimated Volume of Educational Cases Litigated in Court System			Average Annual Rate of Educational Litigation per Million Population		
Ten-Year Interval	State Appellate	Federal	Total	State Appellate	Federal	Total
Before 1836	112	0	112	.83	.000	.83
1837-1846	187	0	187	1.03	.000	1.03
1847-1856	263	1	264	1.07	.004	1.08
1857-1866	365	2	367	1.13	.006	1.14
1867-1876	518	3	521	1.25	.007	1.26
1877-1886	787	12	799	1.51	.021	1.54
1887-1896	1020	16	1036	1.58	.025	1.61
1897-1906[1]	2481	15	2496	3.18	.019	3.20
1907-1916	1883	22	1905	2.01	.023	2.03
1917-1926	3299	44	3343	3.01	.040	3.05
1927-1936	4822	67	4889	3.93	.055	3.98
1937-1946	4743	89	4832	3.53	.066	3.60
1947-1956	4525	113	4638	2.93	.073	3.00
1957-1966	4600	730	5330	2.53	.402	2.93
1967-1976	7017	3486	10503	3.40	1.687	5.08
1977-1981[2]	N/A	N/A	11946	N/A	N/A	5.35

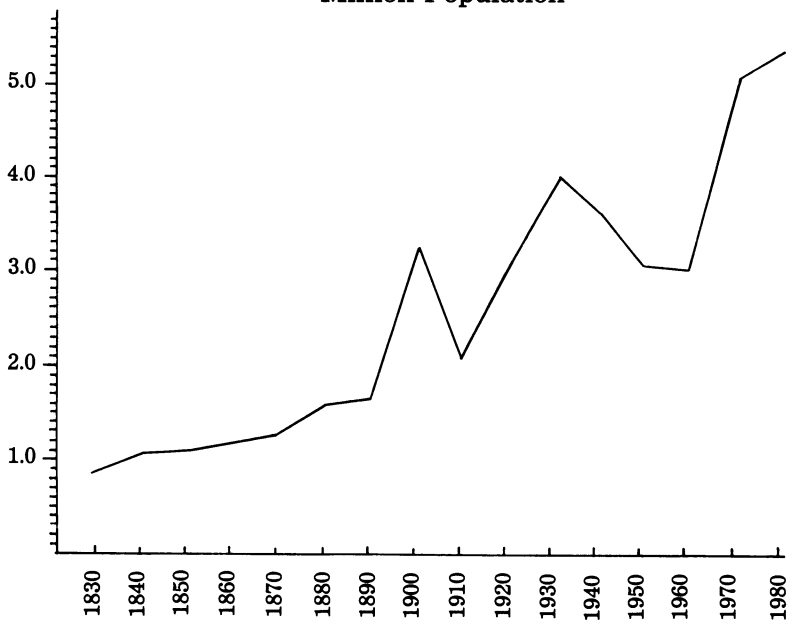
1. Although the Century Digest published in 1897 intended to cover all cases up to and including the year 1896, in fact it underreported the number of cases in 1895 and 1896 due to publication deadlines. Consequently, many cases decided in 1895 and 1896 are only reported in the First Decennial Digest (1907). The underreportage of cases in the 1887-1896 period and overreportage of cases in the following period help to explain the dramatic increase in cases between the two intervals. Undoubtedly, the actual figure for the earlier period is slightly higher and for the later period slightly lower.
2. The most recent 9th Decennial Digest includes only a 5-year period (1977-1981) rather than the usual 10-year period. For this reason we doubled our estimates from this decennial in order to get a rough estimate of changes in the volume of cases and rates of litigation in the most recent period.

reflect important organizational changes and protest movements in public education during the twentieth century.

Seen in historical perspective, a striking feature of Table 1 is the small number of reported education cases per capita. The average annual rate of litigation varies from less than one case per million people per year in the early periods to about five cases in more recent periods. Only about 3000 appellate cases out of some 500,000 in the Century Digest (to 1896) were listed under the category "Schools and School Districts," and the proportion of appellate cases involving schools or education remains under 1 percent in subsequent editions, according to our estimates, with the probable exception of the last two

decades.[6]

Figure 1. Average Annual Rate of Litigation—Cases per Million Population



Taken together, the low proportion of school law cases and the low rates of litigation per capita suggest a puzzle: why did such a major institution as the public school system generate so few court cases? Until the Great Depression public education was the largest employer and had the largest budget of any part of the public sector (except in wartime); it affected daily more people than any other public institution, and it potentially touched on the deepest questions of human values. Both in direct economic interests and in normative terms, education was an arena fraught with potential conflict, and it was certainly not low on the agenda of public law generally. Every

[6] Despite the low, though increasing, rate of educational litigation from the nineteenth century to the twentieth century, keep in mind that the total number of state appellate opinions per capita declined markedly during this period, as shown by Kagan *et al.* (1978: 964). In their sample of 16 state supreme courts, appellate opinions per capita declined from an average of about 185 opinions per million persons in the 1870-1900 period to about 60 opinions per million in the 1940-1970 period. So while the rate of all types of appellate litigation declined during the twentieth century, educational litigation increased during the same time. In another paper, Kagan *et al.* (1977: 135) partially illustrate this trend by reporting the increasing proportion of public law cases in the agendas of state supreme courts, from about 12% of all opinions in the 1870-1900 period to almost 20% in the 1940-1970 period. Thus, while the rate of appellate educational litigation may seem low in Table 1, it represents an increasingly important arena of legal dispute during the twentieth century.

state constitution contained educational provisions, often voluminous, and statutory and administrative law in education mushroomed, particularly in the twentieth century (Tyack and James, 1985; U.S. Commissioner of Education, 1887).

One clue to the low rates of education litigation comes from Friedman (1978), who points out that Americans generally did not go to court to redress ordinary disputes. In many places litigation was costly both in dollars and time, logjams in some courts delayed decisions, and legal processes seemed technical and impersonal. Laws like those compelling school attendance, which depended in the nineteenth century on local citizens acting as agents of a central state, were often ignored. The West Century Digest, for example, reports only two cases involving compulsory school attendance to 1896, although almost all states outside the South had passed compulsory attendance laws. A school official in Nevada explained why: in the rural sections of his state the compulsory law "is a dead letter," he wrote, "and will remain so as long as the initiative for the enforcement is in the hands of the trustees. They simply will not swear out warrants for the arrest of their neighbors" (Bender, 1927: 10).

One may conclude that Americans did not regard the courts as the place to settle disputes over public education. Indeed, in other social services as well there was probably not much litigation in the nineteenth century between individuals and the state. The common law seemed better adapted to settling disputes between private parties or public officials, typically disputes seeking to redress financial grievances, than to search for a more abstract form of justice (cf. Mayhew, 1975). Many citizens saw public education as a quasi-sacred institution, like the churches, an area inappropriate for judicial intervention (Tyack and Hansot, 1982).

The early state constitutions frequently spoke about the moral benefits of the "diffusion of knowledge" and linked knowledge and virtue (U.S. Commissioner of Education, 1875). Public school crusaders like Horace Mann believed that the common school should rest on consensus about political and moral values and should be above partisan politics. This public philosophy of education that defined the place of schools in society might reasonably be characterized as a Protestant-republican civil religion (Smith, 1967; Michaelsen, 1970). Persons who stood outside the presumed consensus on educational matters might well have thought that they stood

little chance of redressing their grievances in local courts, for the record seems to bear out this assumption.

Thus cloaked in Protestant-republican virtue, the schools would have seemed to most Americans to pose few issues for litigation, except in the conventional categories of the common law (like contracts) or specific issues in public law, like conflicts of authority over governance and finance. In any event, litigants rarely questioned in any fundamental way the principles that underlay the system. Judges, sharing that civil religion, were in general highly deferential to the professional prerogatives of educators and eloquent in defending the necessity of public schools. The courts were bulwarks of the system (Packard, 1914; Bassett, 1913).

Americans also had other means of settling disputes over school-related matters that were simpler, less costly, and seemed more appropriate than going to court. County and state superintendents of education often had official authority to adjudicate disputes as well as the informal ability to resolve controversies as they arose, and states often required citizens to take disputes to such officials for a decision before turning to the courts. In 1822, for example, the New York state legislature gave the state superintendent authority to hear controversies that arose over public education. Between then and 1913 state superintendents rendered over 12,000 official opinions (Finegan, 1914: 5-6). Elected county and state superintendents had a vested interest in mediating disputes to the satisfaction of the majority of those who elected them. Just as the growth of less expensive means of debt collection—for example, collection agencies—diminished the role of courts in debt cases, the availability of such administrative appeals probably dampened litigation (Friedman, 1983: 7-50; Kagan, 1984).

Local citizens also could—and did, in large numbers—go to the legislatures to obtain special laws adapted to their local needs (Alexander, 1929). They could ask their representatives to introduce special bills that enabled them to change the rules for electing school directors, to change school boundaries, to alter bonds or taxes, build schoolhouses, and accomplish many other purposes. Legislators often held parochial views of their duty, which predisposed them to look first to local interests. In Ohio, for example, the legislature passed hundreds of such special acts, serving the needs of individual districts. This was cheaper and simpler than going to court. Citizens could also throw the legislative rascals out when assemblymen passed

laws they did not like, as happened in Wisconsin and Michigan when the states passed laws in 1889 banning the teaching of foreign languages in elementary schools (Wyman, 1968: 269-98; Mapel, 1891: 52-57).

There were other ways to change school policies. Discontented school patrons could elect new local school trustees who agreed with them about where to place a new school or whom to hire as teacher. They could take disputes to respected members of their community for mediation. Or people could take matters into their own hands, as they did in Currie, Nevada, where, acting in a way that was not uncommon (Fuller, 1982), they simply moved a disputed schoolhouse.

Members of deeply alienated and relatively powerless minorities—for example, Catholics in a district in which students were forced to read the King James Bible—might withdraw their children and send them to church schools. Often the burden of creating alternative school systems fell on persons least able to pay, as in the case of immigrant Catholic working-class families (Kaestle, 1983: 161-71).

Both the disinclination to go to court and the existence of alternative ways to resolve or avoid conflicts probably contributed to the low rates of educational litigation throughout the nineteenth and most of the twentieth centuries. While rates were low, litigation did occur. Table 2 draws on the major school law categories in the West digests to describe the kinds of litigation that appeared in the appellate courts and to show how the matters that occupied the courts changed over time.

From the data in Table 2 we can suggest some generalizations about the changing character of educational litigation. The first is that the great majority of court cases in education seemed to fit into standard categories of the common law (land law, contracts, torts) and of public law (taxation, statutory interpretation, public personnel issues). The compilers of the West digests did not need to create many new basic classifications (like pupil discipline, curriculum, or separate schools for blacks) specific to education. This is not surprising, for public schools resembled small businesses: they owned land, bought supplies, hired and fired employees. At the same time, they were public agencies created by the states, and thus bound by statutes and constitutional provisions.

Second, the great bulk of cases fit into the twin categories of finance and government. Finance issues are generally included in categories 5, 6, and parts of 2 (school funds, district

Table 2. Percent Distribution of Appellate Cases in School Law by Major Legal Categories for the Nineteenth Century and for Ten-Year Intervals in the Twentieth Century (1810-1981)

(Estimated number of cases in parentheses)

	1810-1896	1897-1906	1907-1916	1917-1926	1927-1936	1937-1946	1947-1956	1957-1966	1967-1976	1977-1981
1. Cases Concerning Private Schools	2.0	1.1	1.0	0.8	0.7	0.7	1.5	1.3	3.3	1.9
Public Schools:										
2. Establishment & Regulation of School Lands & Funds	7.0	8.2	6.1	3.7	5.4	4.4	6.3	7.6	17.8	14.1
3. Creation, Alteration and Dissolution of School Districts	15.2	14.6	20.5	27.7	19.9	11.6	22.0	21.0	7.3	2.4
4. Government, Officers, and District Meetings	19.4	14.5	12.8	9.9	12.8	11.0	11.1	13.1	9.9	10.2
5. District Property, Contracts, and Liabilities	10.8	12.9	14.0	14.2	15.5	14.1	11.0	13.0	7.3	6.7
6. District Debt, Securities, and Taxation	23.8	23.4	25.5	26.4	25.2	25.5	19.7	12.0	6.3	4.4
7. Claims and Actions against School Districts	3.9	2.7	2.2	1.8	2.4	4.2	3.8	4.3	2.7	4.7
8. Teachers: Employment, Tenure, Discharge, & Compensation	11.8	15.1	10.8	8.3	13.6	23.2	20.4	17.2	29.3	44.6
9. Pupils, Conduct and Discipline of Schools	6.0	7.5	7.1	7.2	5.5	5.2	4.4	10.4	16.1	11.1
TOTALS	100.0 (3286)	100.0 (2496)	100.0 (1905)	100.0 (3343)	100.0 (4889)	100.0 (4832)	100.0 (4838)	100.0 (5330)	100.0 (10503)	100.0 (5973)

property, contracts and liabilities, district debt, bonds and taxation). Governance issues are found mainly in categories 3, 4, and 7 (creation and alteration of school districts, school administration, school boards and officers and claims against districts). We estimate that issues involving finance and governance may account for some three-quarters of all cases until the 1960s.

Third, it appears that it took a strong motive—often a monetary one—to drive people into court. Note, for example, the large proportion of cases under headings of contracts, liability, bonds, debt, and taxation. The sharp rise in recent years of cases involving teacher tenure and compensation is another case in point.

Finally, despite some fluctuation in categories concerning school districts, teachers, and pupils (categories 3, 8, and 9), there appears to be considerable consistency in the proportions of cases, at least until recent years. In later sections we will explore the legal issues involved in categories that increased since *Brown*.

We have included cases on private schools for comparative purposes. The proportion of cases involving non-public schools was far smaller than the percent of the population that attended such institutions (roughly 10-15 percent from about 1890). One reason may be that about 90 percent of private school pupils were in Catholic institutions, in which non-judicial methods of settling disputes were common (church law and the sacred authority of prelates, for example). Another may be that people discontented with private schools took their business elsewhere (Hirshman, 1970; Saunders, 1977).

IV. LITIGATION AND THE TANGLED WEB OF GOVERNANCE AND FINANCE

As public sector institutions, the common schools were, and are, part of a complex, overlapping legal web of governance and finance. Ambiguities about who had final authority and responsibility over different aspects of the schools and educational policy gave rise to a large proportion of the school cases we have identified. For example, a number of legal questions arose from federal grants of school lands and other federal subsidies stemming from the Northwest Ordinances of 1785 and 1787 and later Congressional legislation. These endowments, regulated by state constitutions and statutes, created lively litigation about who was to rent or sell school lands; whether the proceeds were to go to townships, counties, or states; how the funds were to be distributed and spent; and whether the proceeds were illegally diverted to other uses (Knight, 1885; Swift, 1911).

In the nineteenth century and until the 1930s, the standard view was that under the Tenth Amendment to the Constitution education was a function left to the states. Thus, legally, all subordinate levels of educational governance—such as counties, townships, and districts—were creatures of state constitutions or statutes (Garber, 1934). State constitutions often conflicted with state statutes on school law, however, and it was often unclear how powers had been allocated among the different levels and branches of government. In part, this ambiguity resulted from ambivalence over the centralization versus the

decentralization of authority and, in part, from sloppy draftsmanship on the part of amateur and part-time legislators (Bryce, 1888; Keller, 1977; McVey, 1911). Whatever the cause, judges faced a difficult task when they were called on to interpret school law.

Although the federal, state, and county governments were all part of a complex network of school finance and governance, everyday decision-making about education was highly decentralized, usually down to the individual district.[7] As the nineteenth century advanced, states prescribed increasingly complicated regulations about the procedures such districts should follow in making binding decisions: when trustee elections and annual meetings should be held, how district boundaries should be determined, how to allot school funds and raise taxes, how to obligate the district legally in making contracts or hiring certified teachers, and many other matters (U.S. Commissioner of Education, 1887).

This legalization of procedures probably had a double effect; it channeled local conflicts into prescribed methods of settling disputes; and when these routines were violated, it gave the losers a means of redress in the courts. The potential for conflict at the local level was high. It was no trivial matter in a cash-poor rural district to decide who was to obtain a contract to provide firewood or to teach, where the school was to be located, or how much to tax the farmers. The law thus could be seen as a fence—"Good fences make good neighbors"—and a doorway into the courts if necessary (Fuller, 1982; Burton, 1928; Jackson, 1949).

There is some evidence that many lay trustees and teachers knew school law. In his study of rural schools in the Midwest, Fuller (1982: ch. 3) found that many district officials went by the book in running district meetings and kept the painstaking records required by law. A Minnesota superintendent of schools commented that citizens there knew more about education law than about any other kind—except perhaps the

[7] Even the U.S. Supreme Court became involved. Most issues it treated in the nineteenth century seem trivial by twentieth-century standards. Five of the seven cases it decided in the area of education concerned such questions as whether funds generated by the sale of school lands should revert to the township in which they originated in Indiana (*Davis v. Indiana*); whether a special Nebraska law empowering a district to levy bonds was legal (*School District v. Insurance Company*); whether a farmer had to pay city taxes for schools when his land was annexed to Pittsburgh (*Kelly v. Pittsburgh*); whether school bonds issued in excess of the constitutional limit had to be honored (*Doon Township v. Cummins*); and whether a school trustee had illegally incurred a debt of $772.50 (*State of Indiana v. Glover*).

fish and game laws. Knowledge of school law was often a part of the examinations teachers took to obtain certificates and so was stressed in the teacher institutes. In Colorado, school law was a required part of the school curriculum for all pupils (U.S. Commissioner of Education, 1887: 59).

In Nebraska in 1877 the official pamphlet on school laws bore this message in bold letters on its back cover:

> THIS VOLUME IS PUBLIC PROPERTY!
>
> It is to be kept in the custody of the school officers, and produced by them at all meetings of the district, for consultation by the voters . . . (Thompson, 1877).

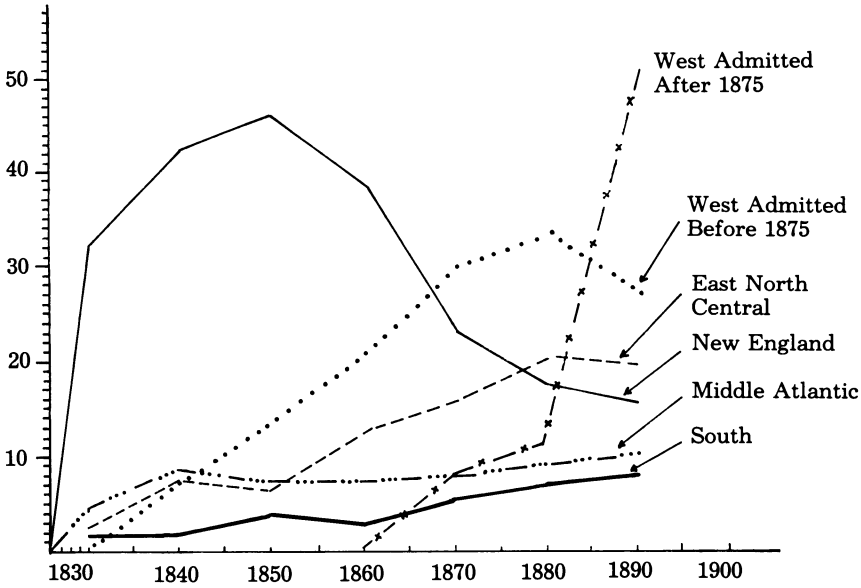
The state superintendent who issued the pamphlet appended footnotes to the more controversial or obscure provisions to prevent "the burden of a voluminous correspondence" from school officers requesting clarifications of the law. In this public philosophy of schooling, the law was not so much the esoteric domain of the lawyer as it was a guide accessible to all citizens, a way of resolving conflicts among them about procedures.

We have suggested that constitutional and statutory law interacted with litigation as people established school systems. Laws provided a framework of governance and finance, but one that was often ambiguous in details that mattered to citizens in local districts. The courts provided a means of clarifying the meaning of laws and of resolving disputes that arose as educational leaders and state legislators attempted to structure the educational system through statutes. If this conjecture is correct, one would expect rates of school litigation to rise during the early stages of school legislation and then decline as governance and finance become more routinized.

To provide a partial test of this idea, we have calculated the rates of educational litigation during the nineteenth century for different regions of the country, grouping states roughly according to the periods in which common school reformers created a legal structure for public schools (i.e., compulsory attendance legislation and school codes). Figure 2 partially confirms this expectation that litigation accompanied the legal establishment of common schools. Note the pattern of a steep rise in litigation followed by drops in New England,[8] the East North Central states, and Western states admitted before 1875.

[8] Although there had been public schools in New England in the colonial period, the common school revival of the mid-nineteenth century increased the level and altered the character of both statutory and court law. James Blodgett's introduction to the *Report of Education in the United States*

Figure 2. Appellate Cases per Million Population per Decade



Note to Figure 2:

Region of Country	States Included	Mean Year of Compulsory Attendance Legislation	Range of Years
New England	ME, VT, NH, CT, MA, RI	1870.0	1852-1883
Middle Atlantic	NY, PA, NJ, DE, VA, MD, WV	1894.0	1874-1908
South	AL, MS, AR, LA, TX, FL, GA, TN, SC, NC, OK	1912.0	1905-1918
East North Central	OH, IN, KY, MI, IL, WI	1881.4	1871-1897
West Before 1875	MN, IA, MO, KS, NE, CA, OR, NV	1877.3	1873-1905
West After 1875	ND, SD, CO, ID, MT, UT, WY, WA	1882.8	1871-1890

Litigation rates in the Western states admitted after 1875 climbed dramatically towards the end of the nineteenth century. The South showed the lowest rates of reported court cases, but litigation began to rise after public school systems expanded following the Civil War. Rates of litigation in the Middle Atlantic states consistently increased during the entire

at the Eleventh Census (1893) gives rich evidence on the actual diversity of school formation in different states and territories.

period but were relatively low in comparison with other states. One reason is that several Middle Atlantic states had administrative procedures for settling disputes within the educational system, for example by appeals to the county and/or state superintendents (see Finegan, 1914). Taken as a whole, the graph suggests a rough correlation across time between legislation establishing school systems and challenges in the courts.

Local conflicts and ambiguities in the public law governing the schools seem to have been a major cause of litigation in the nineteenth century, but in the twentieth century the character both of the schools and of litigation underwent important changes. To that subject we now turn.

V. THE COURTS AND THE BUREAUCRATIZATION OF PUBLIC EDUCATION

Statutory and administrative law were major means of educational reform used by professional leaders in public education from the progressive era onwards. The generation of professional leaders who came to power in the early twentieth century had a new vision of how to create a comprehensive, centralized, and "socially efficient" system of schooling. In part, this involved using state law to standardize schools according to their blueprint. With the support of influential allies among business and professional elites and foundation officials, these educators sought to change the locus and process of decision-making by modifying the older decentralized mode of school governance and by putting in its place a more centralized system in which lay boards deferred to professionals. Their ideal was to replace "politics" by expert and neutral "administration." They believed that educational authority should rest more on expertise than on popular participation, and they sought to create a buffered zone of administrative law in which they could enjoy greater professional discretion (Tyack and Hansot, 1982: part 2).[9]

There was little place for any kind of litigation in this vision of educational governance. Ideally, the state constitutions should establish the general principles upon which public education was based; the statutes governing

[9] For prescriptive advice to educators concerning legislation, see Carr (1930); summaries of school legislation can be found in the *Reports* of the U.S. Commissioner of Education, 1893-94, vol. 2; 1903-04, vol. 1; and U.S. Office of Education *Bulletins*, 1906, no. 3; 1908, no. 7; 1910, no. 2; 1913, no. 55; 1915, no. 47; 1918, no. 23; 1920, no. 30; and 1922, no. 20.

schools should be pruned and organized into a logical education code; and the state legislature should standardize schools according to the plans of the professional educators (Cubberley, 1922; Caulkins, 1934: 27-29).

Although school leaders rarely achieved their ideal school codes, they did manage to influence state legislation. They had a direct and personal interest in securing better funding, tenure laws, certification standards, restricted entry, better school buildings, expanded secondary schooling, and the consolidation of rural schools. Under new state charters that gave professionals greater power, they increased the scope and complexity of city and state educational systems until they became large pedagogical conglomerates, patterned to some degree on business bureaucracies. Partly because they had themselves largely designed and lobbied for the new legislation—and stood to benefit from it—educators were effective in implementing the new laws that elaborated and standardized public schools.

In the nineteenth century, when control of the schools had been highly decentralized, citizens and parents had many ways to settle disputes over public schools without going to the courts. In the twentieth century, however, educational leaders and their elite allies sought to restrict lay participation in educational decision-making. They were often successful in giving state and local educational officials greater autonomy in making regulations and exercising professional judgment (Tyack, 1974: 126-76).

In addition, some of the older means of settling disputes short of going to court worked less well than they had in an earlier era. It became less common for state legislatures to pass special legislation adapted to the wishes of local communities, and the legislatures themselves became more attuned to the desires of the most powerful interest group concerned with the schools, the educators themselves. Appeals from decisions of local school boards or officials typically went inside the system, up the hierarchical ladder of authority.

As state departments of education and key administrators at the local level began to assert more control over the educational system, local boards had less discretion. Statutes specified, for example, how teachers were to be certified, what their contracts should contain, the grounds under which they might be dismissed, and, to a degree, what they should teach. New school codes, devised in part by educational experts, mandated patterns of administrative organization, curricular

programs, funds and their apportionment, school building standards, rules for transporting pupils, compulsory attendance regulations, health and sanitary requirements, standardized contracts for the appointment and tenure of professionals, and incentives and penalties designed to consolidate small districts (Remmlein, 1955; Keesecker, 1937).

Such new laws prompted challenges in the courts as statutes and judge-made law proceeded in interactive fashion. In part, the laws created new types of disputes—for example, over the consolidation of school districts or the transportation of pupils (Punke, 1943). In part, they gave litigants new forms of legal standing—due process for the firing of teachers covered by tenure laws, for instance. With the decline of older means of settling disputes, the courts also loomed larger as a means of redressing grievances than they had in the past. The increased insulation of the schools from popular participation in decision-making, the rise in administrative law, and the standardization of school practice by state law meant that, apart from the courts, lay people had fewer means of influencing what happened in their local community schools.

As Table 1 demonstrates, the number of education cases and the rate of litigation slowly increased from the end of the nineteenth century until the beginning of the twentieth century, then rose precipitously to somewhat more than three cases per million per year and fluctuated around this point for the next sixty years. For most of this same period the relative proportions of most cases remained fairly stable, as shown in Table 2, although some kinds of cases became much more prevalent at certain points in time while others correspondingly decreased. Beginning in the 1960s, however, both the volume and nature of cases changed markedly, as we shall later discuss.

The growing number of school law cases was an unwelcome development to those who sought to centralize and professionalize modern public education. In theory, a professionalized school system, based on modern school codes, was to be "above politics" and above litigation. Opposition did not disappear so conveniently. To lay bare the nature of cases adjudicated in the courts during the twentieth century, we break out certain subcategories of school law in greater detail. Table 3 shows the changing volume of cases involving the consolidation and alteration of school districts (categories 1 through 5), school transportation (category 6), and legal decisions on the employment, suspension, and compensation of teachers (categories 7, 8, and 9). Note the marked increase in

the number of cases and rates of litigation in these areas beginning in the 1917-1926 period.

Table 3. Number and Rate of State and Federal Appellate Cases Dealing with the Bureaucratization and Centralization of Public Schools (1810-1981)*

(Litigation rates per million population in parentheses)

	1810-1896	1897-1906	1907-1916	1917-1926	1927-1936	1937-1946	1947-1956	1957-1966	1967-1976	1977-1981
1. Constitutional & Statutory Provisions for District Creation	18	8	56	116	115	51	103	70	72	9
	(.10)	(.10)	(.60)	(1.1)	(.94)	(.38)	(.67)	(.38)	(.35)	(*)
2. Boundary Changes; Annexation & Detachment of Territory	60	53	57	171	106	74	136	86	57	16
	(.24)	(.68)	(.61)	(1.6)	(.86)	(.55)	(.88)	(.47)	(.28)	(.14)
3. Consolidation and Union of School Districts	9	10	13	51	38	25	64	56	39	4
	(*)	(.13)	(.14)	(.47)	(.31)	(.19)	(.41)	(.31)	(.19)	(*)
4. Proceedings for District Alteration & Review of Proceedings	106	71	89	178	22	112	272	424	274	49
	(.43)	(.91)	(.95)	(1.6)	(.18)	(.83)	(1.8)	(2.3)	(1.3)	(.43)
5. Submission of District Alteration to Popular Vote	25	28	17	71	47	51	123	97	50	9
	(.10)	(.36)	(.18)	(.65)	(.38)	(.38)	(.80)	(.53)	(.24)	(*)
6. Transportation of Pupils/ Busing	5	2	13	35	81	61	54	61	216	86
	(*)	(*)	(.14)	(.32)	(.66)	(.45)	(.35)	(.34)	(1.1)	(.77)
7. Teachers: Selection, Employment, & Tenure	16	27	13	27	105	299	225	178	*755*	*647*
	(.10)	(.35)	(.14)	(.25)	(.86)	(2.2)	(1.5)	(.98)	(3.6)	(5.6)
8. Teachers: Suspension, Removal, & Due Process	84	71	38	60	146	402	*308*	*379*	*1539*	*1426*
	(.34)	(.91)	(.41)	(.55)	(1.2)	(3.0)	(2.0)	(2.1)	(7.5)	(12.4)
9. Teachers: Compensation	96	31	49	47	62	111	111	78	226	192
	(.39)	(.40)	(.52)	(.43)	(.51)	(.83)	(.72)	(.43)	(1.1)	(1.7)
10. Compulsory Attendance/ Truancy	7	13	7	23	15	20	25	23	37	27
	(*)	(.17)	(*)	(.21)	(.17)	(.19)	(.17)	(.15)	(.29)	(.32)

*Rates less than .10 are not reported. Italicized figures refer to estimates based upon a 30% sample of pages and entries per page.

Consolidation of rural schools and the expansion of the size and scope of school districts were key goals of educational reformers, who believed that small, isolated schools were barriers to the regularization and professionalization of public education. This was the only way, they thought, to provide

enriched educational opportunities and autonomy for teachers in poor and sparsely settled rural districts, where lay trustees outnumbered the teachers and where parsimonious farmers fought improvements that cost more money (e.g., Proceedings, 1920; Lathrop, 1925; Sher, 1977).

The figures of reported cases on the creation and alteration of districts given in Table 3 show waves of increased litigation that correlate roughly with enabling legislation and mandatory laws on the consolidation and reformation of school districts in the 1920-1940 period and in the postwar years. The cases themselves reveal a multiplicity of interests and values in conflict: of educators pressing for larger, modern school systems; of legislators passing laws that may have been deliberately ambiguous because of sharp differences of opinion in the assemblies; of local board members and citizens who disagreed among themselves about the kind of schools they wanted; of adjacent districts quarreling about boundaries and who was to pay for what (Howard, 1923; Fuller, 1982: ch. 11).

Part of the conflict over consolidation and the creation and alteration of school districts arose from the clash of formal authority with local loyalty and customs. Constitutional doctrine was clear enough: school districts were the creation of the state, which at any time could alter them. The school property of these local communities technically belonged to the state. When first settled, towns and school districts in new territories might have seemed arbitrary, the artifact of the surveyor's transit and the land speculator's blueprint for wealth. But once inhabited, a community came to have a symbolic and real life of its own and created loyalties and fed rivalries with other communities. The school building was often the center of communal life. It had typically been built by the hands of the settlers themselves; its teachers were their sons and daughters; and their town's children gained there a mental window on the world beyond (Barber, 1953). To merge this school with a neighboring district might splinter or threaten a communal identity.

State legislators, coming in large numbers from such rural areas, were caught between the desires of many of their constituents who wished only to be left alone and the claims of educators and their allies that a modernized school system demanded consolidation, standardization, and centralization. The education laws they passed often held in tension these competing demands, encouraging the enlargement of districts and the upgrading of schools but leaving room for local self-

determination through elaborate procedures for posting notices for meetings, submitting alterations to popular vote, and reviewing actions. The result was often laws full of loopholes that dissenters could use to reverse decisions through the courts. The cases reported in Table 3 reveal this increase in litigiousness, particularly the surges in cases dealing with altering district boundaries and consolidation (categories 1 through 5), which peaked in periods like the 1920s and the years after World War II when legislatures passed consolidation statutes.

Table 3 also documents the rise of a new kind of court action related to consolidation: transportation cases (category 6). As widely separated schools were united into larger units, it became necessary to convey pupils from home to school, first by wagon or sled or boat and then (with the rapid improvement of roads and technology) by bus. The increase of transportation cases, especially in the 1927-1936 period, reflects the bureaucratization of this service. At first the laws passed by the legislatures contained ambiguities about who was entitled to be transported and where the public money was to come from. Many of the early cases came from parents eager to get their child on the wagon or bus—not, as in the last generation, to get their child off the bus (note the increase of transportation cases and litigation rates, many of them "anti-busing," beginning in the 1967-1976 period). Litigation also shaped bus routes, the development of procedures for awarding contracts, and new rules of safety and liability.

Another domain in which public education became rapidly bureaucratized during the twentieth century was the employment and dismissal of teachers. In the nineteenth century the typical teacher was young, relatively untrained, and hired by local trustees exercising generally unrestrained discretion. Under such circumstances, teachers had few rights they could assert in court, unless they had a contract, which most probably did not. This changed in the twentieth century, when statutes began to define the status and obligations of teachers and create procedures for due process. By the mid-1920s, for example, 23 states specified clauses that should be included in contracts; 44 indicated causes for dismissal; 21 provided appeals processes within the educational system; and 11 legislated some form of tenure (Anderson, 1927: 149). These legal developments in education mirrored those in other sectors of public and unionized employment.

Although many educational leaders deplored teachers who went to court, teachers in fact did take increasingly to litigation, as shown in categories 7 through 9 in Table 3 by the marked rise in the rate of employment-related appeals beginning in the Depression and the yet more substantial increase in the years since 1967. In California, for example, 42 percent of 811 education decisions of appellate courts from 1858 to 1979 involved personnel issues like dismissal, tenure, salary, and similar matters; these increased sharply after new tenure laws were passed during the 1930s (Griffin and Jensen, 1982: 4).

For the most part, challenges by lay people in court to the bureaucratization and centralization of authority in education did not succeed. In the first half of the twentieth century, judges largely upheld school officials in situations of conflict. One commentator on parental rights observed that the new statutes, administrative regulations, and court decisions produced a situation in which the parents

> may not decide what school they wish their child to attend; whether or not the distance to school is so unreasonable or the way sufficiently dangerous to require transportation; at what age their child should begin school; what subjects he will study once he is in school and from what texts; how long he should continue his education; under what circumstances they may withdraw their child from school (Loughery, 1952: 104).

The child was indeed becoming legally as much the creature of the state as of the parents, and parents generally had little power to resist compulsory attendance regulations (Bender, 1927; Tyack and Berkowitz, 1977). Rather than stemming the tide of educational bureaucratization, school law became a powerful tool in the hands of those who wished in educational matters to employ the power of the state over that of parents. The governing principle of school law, said one expert, was that "the public school exists as a State institution simply because the very existence of civil society demands it. Education formulated by the State is not so much a right granted pupils as a duty imposed upon them for the general good" (Hodgdon, 1933: 229).

Thus the "State" and its legal system were not equally accessible to every group. Statutory law was most powerful as a tool of those professional educators and their elite allies who sought to transform the educational system into bureaucracies buffered from lay influence. The courts usually supported the

discretion allocated educators and upheld the new school laws, but they occasionally gave satisfaction to disaffected individuals and groups who had legal standing and legal resources to challenge this new version of the one best system. But for those groups that suffered the most severe forms of discrimination—in particular, the poor and racial and religious minorities—the law moved only weakly toward redistributive justice, at least until the last generation.

VI. SOCIAL CONFLICT AND SCHOOL LAW BEFORE *BROWN*

We have thus far been analyzing the cases listed in the West digests under the heading of school law. We have suggested that the great bulk of cases were not of the character celebrated in the landmark decisions that have attracted the most attention from legal scholars. The mainstream of cases dealt primarily with everyday business questions like contracts and with issues of finance and governance. While litigation revealed conflict in society, it was for the most part controversy between people who had the resources to go to court and were members of favored groups.

We now shift our approach, somewhat, and ask to what degree great conflicts that agitated American school politics—contests based on race, ethnicity, and religion—entered the appellate courts to be registered in the West digests as a part of the corpus of school law (we do not treat here cases dealing with Native Americans). Table 4 indicates the number of cases reported in the West digests involving issues of religion, race, and ethnicity/language in the public school curriculum.

In an illuminating study, Peterson (1935) used the West digests to identify 113 cases from 1865 to 1935 that defined the status of the black separate school. She found a high degree of consistency in the results of the cases, which she grouped into five categories. The 24 cases that challenged segregation in states that had no laws establishing separate schools were all successful. The 44 cases that tested the constitutionality of separate schools in states where segregation was legally sanctioned all failed. Litigants also lost the seven cases in which they contested the authority of school officials to assign children to segregated institutions (some of these involved the definition of who was a "Negro"). The cases that claimed that black pupils suffered a disadvantage because segregated schools were unequal went both ways: in one-third of the suits the court found for the blacks, and in the other two-thirds against

Table 4. Estimated Number of Appellate Cases Involving Issues of Race, Language, Ethnicity, and Religion (1810-1981)

(Litigation rates per million population in parentheses)

	1810-1896	1897-1906	1907-1916	1917-1926	1927-1936	1937-1946	1947-1956	1957-1966	1967-1976	1977-1981
ETHNICITY/LANGUAGE										
1. Curriculum and Courses of Study (e.g., bilingual education)	3	1	0	3	0	0	1	0	6	5
	(*)	(*)	(*)	(.03)	(*)	(*)	(*)	(*)	(.03)	(.04)
RELIGION										
2. Religious Instruction/ Prayer	13	10	3	5	3	5	10	16	6	16
	(.05)	(.13)	(.03)	(.05)	(.02)	(.04)	(.06)	(.09)	(.03)	(.07)
RACE										
3. Separate Schools for "Colored" Pupils; Desegregation	13	9	8	5	13	7	21	151	*1457*	*644*
	(.05)	(.12)	(.09)	(.05)	(.11)	(.05)	(.14)	(.83)	(7.05)	(5.60)
4. Race or Color; Separate Taxation	47	11	11	11	7	4	3	28	6	0
	(.19)	(.14)	(.12)	(.10)	(.06)	(.03)	(.02)	(.15)	(.03)	(*)

*Rates less than .01 are not reported. Italicized figures are estimates of cases based upon a 30% sample of entries per page in the subcategory. Sources: West's Century Digest (1897) and the 1st through 9th decennial digests. Peterson (1935) reports 42 separate taxation cases between 1870 and 1934 which were not reported in the West decennial digests; these are included in category #4.

them, often because the evidence of inequality was inadequately marshalled. In all of the cases contesting separate taxation for black and white schools the courts found such financing unconstitutional (though the practice persisted in some places despite the rulings). All told, Peterson found that blacks won favorable verdicts in 43 percent of the cases and lost in 57 percent, but their chances of winning depended heavily on which legal doctrine was being challenged or applied and in which part of the country the suit was brought.

Like Peterson, Kousser (1980a; 1980b) and Kluger (1977) have documented the courageous efforts of blacks to use the courts to protest both segregation and unequal school provisions. Many of these cases failed to be reported, and other forms of protest, such as boycotts, did not leave a legal trace. While the courts were an avenue of redress open to blacks even in the caste society of the deep South, they fared far less well there than in the North. People bringing suits faced danger and sacrifice, and so long as the legal system that buttressed segregation remained intact, legal progress in achieving equality was glacial and the volume of litigation slight in comparison with the gravity of the issues and the social conflict that race aroused. In the years following *Brown*, when the legal doctrine of separate but equal crumbled and the civil rights movement crested, court challenges became a cascade, as we discuss below.

The number of decisions about religion reported under school law has been few and remains few, despite the salience of religion in the development of American public schooling (see category 2 in Table 4). One might think that few cases were needed because landmark decisions settled questions once and for all in matters relating to religion, but in fact, state appellate courts rendered quite conflicting verdicts on religion, and even some Supreme Court decisions have left significant gray areas for interpretation. Even relatively clear decisions, such as those on prayer and Bible reading during the 1960s, have been widely flouted. Indeed, these questions still stir the muddy waters of constitutional amendment at each Congressional session (Mott and Edelstein, 1973).

Throughout most of American history local majorities seem to have had their way with religious elements in the curriculum. Those local majorities were typically Protestant, and the "compromise" they most favored on sectarian instruction—teaching the King James Bible without

comment—was hardly fair to Catholics, Jews, or non-believers (Tyack, 1970).

In response, many "dissenters" chose to attend their own schools rather than accept the pan-Protestant version of public education. Exit from the system was one means of dispute resolution—common for Catholics—and the departure of dissenters reduced levels of conflict for those remaining in the system (Lannie, 1968). In more recent years fundamentalist Protestants have opposed what they see as the secular humanism of the public school and formed their own "Christian academies."

Despite the large number of state statutes requiring "Americanization," outlawing the use of foreign languages in public elementary schools, and proscribing textbook treatment of certain countries, there have been remarkably few court cases dealing with ethnocultural conflict over public education. The few landmark cases like *Meyer v. Nebraska* stand out like lone peaks, not culminations of lengthy chains of hills and mountains. Even in recent years, when interest in bilingualism and ethnicity has increased, the West digests contain more cases concerned with athletic eligibility than with ethnic issues in curriculum.[10]

It would, however, be a serious mistake to conclude that the small number of reported cases on religion, language, and ethnicity during most of American history meant that public education was unshaken by dissent over these matters. Conflicts over religion in the public schools divided whole communities and drove angry mobs to the streets to riot and burn. Laws requiring English as the medium of instruction in elementary schools were so unpopular that they unseated Republican legislative majorities in Wisconsin and Illinois in the early 1890s (Montgomery, 1972; Wyman, 1968). One might have expected more litigation on "ethnic" matters because religion and race, in particular, potentially raised constitutional issues that could be expected to have surfaced more in appellate courts, but local contests over such questions of policy were perceived less as constitutional issues to be adjudicated in the courts than as occasions to determine which groups had the most political power in the community.

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[10] The last two West decennial digests contain a growing number of cases treating "equality of dignity" issues involving non-mainstream culture and the school curriculum; *Meyer v. Nebraska* was hardly a celebration of cultural pluralism, and its argument had to do as much with Meyer's right to a teaching position as with the value of cultural diversity.

Politically dominant groups had few compunctions about enacting their ethnocultural preferences into school law, whether through constitutional provisions or statutes. Under the skillful prodding of the Women's Christian Temperance Union, for example, every state required instruction in "temperance." Many states mandated segregation of blacks. Religious lobbies persuaded legislatures to require the reading of the Bible in public schools, to ban the teaching of evolution, and to start the day with prayers. Statutes dictated that textbooks should show reverence toward the founding fathers and that children should pledge allegiance to the flag. States outlawed the teaching of German and mandated that no language but English be used in elementary schools (Flanders, 1925; Shelton, 1979; Edelman, 1976).

Such laws demonstrated what Friedman refers to as "normative dominance," legislation in which in-groups were attacking out-groups in the society by using the schools to teach their values as authoritative (Friedman, 1978). It is true that dominant groups typically framed their arguments so that their views seemed part of an obvious consensus of all right-thinking people and that out-groups occasionally fought back and sometimes won. But what is striking in retrospect is how infrequently such normative dominance was challenged in the courts. We have found no appellate cases, for example, disputing the teaching of temperance in the schools or complaining about the indoctrination in official American values that often passed for social studies and civics (Gellerman, 1938; Chamberlain, 1925; Hood, 1923).

The courts allowed considerable leeway for official imposition of beliefs and practices. Even landmark decisions limiting what the state could require, such as *Meyer v. Nebraska* and *Pierce v. Society of Sisters*, left broad discretion to legislatures and to school officials. It was only after a long and painful series of defeats, including one unavailing appeal to the Supreme Court, that the Jehovah Witnesses won for their children the right to salute the flag at the opening of the school day. In the case of *West Virginia State Board of Education v. Barnette*, according this right, the Court declared that "if there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." In so writing, the justices were evidently not thinking of children in public schools, who had been subject to court-approved

legislative prescriptions of orthodoxy not only in "politics, nationalism, religion" but in other domains, like temperance.

If social conflicts over race, religion, class, and ethnicity produced relatively few court cases, that does not mean that litigation on such issues was unimportant, or that one can safely ignore landmark cases. The courts have long been a last resort of redress for blacks, for dissenters from the pan-Protestant coloration of public education, and for ethnic pluralists. Major cases like *Meyer, Pierce*, and *Barnette* have served an important purpose in setting outer limits to the quest for the Americanization of diverse people, and the desegregation and religion cases have reflected and stimulated basic social change. But until recently the courts have played a muted, often conflicting, and relatively minor role in adjudicating basic social conflicts that surfaced in school law. Members of racial, religious, and other minority groups typically lacked the legal resources to challenge inequities, and their subordination to the majority was often not regarded as a legal issue. As reflected in the old school law textbooks and the cases digested in West, courts seldom focused on constitutional principle but instead saw themselves as adjusting minor conflicts of common and public law that resulted from construction of a "one best system." It is only in recent years that litigation patterns in these areas and the stance taken by courts have changed. Supreme Court decisions involving race, ethnicity, and religion in the schools now seem to have established a national standard for appraising local practice. It is to this changing role of law in public education that we now turn.

VII. HISTORICAL PERSPECTIVES ON "LITIGIOUSNESS" IN EDUCATION SINCE *BROWN*

Throughout most of American educational history, school law has been a staid and predictable area of law, mostly practiced by ordinary attorneys, the bulk of whose practice was in other areas. The intellectual challenge, money, and prestige lay elsewhere. A Clarence Darrow might take on a Scopes trial or tenacious and brilliant lawyers might mount the NAACP's campaign against school segregation, but generally school law did not attract the leaders of the profession or treat momentous questions.

In recent years—which some observers have called an era of litigiousness or even of an "imperial judiciary"—much of this has changed. Education law has become front-page news and

has attracted the attention of outstanding lawyers. Rebell and Block (1982: 16) argue that public education has become "the single area where judicial activism has had the most direct, visible, and controversial impact on Americans."

Some scholars have questioned whether the perceived increase in litigiousness, which has led some to suggest that Americans suffer from a dread disease called "hyperlexis," has in fact occurred. Rather than a general increase in court cases, scholars like Friedman and Galanter suggest a "selective explosion" of certain kinds of cases. Education appears to be part of this "selective explosion." According to our estimates of the volume of educational cases, shown in Table 1, there has been in recent years a sharp increase both in the absolute number of education cases (from 5330 in 1957-1966 to 10503 cases in 1967-1976) and in the average annual rates of litigation (from 2.9 cases per million people in the 1957-66 period to 5.1 cases in the 1967-76 period).

Since the 1960s, there have also been significant shifts in the proportion of cases in the different categories. The proportion of cases falling into the historically dominant categories of governance and finance have sharply declined in the last three decennial volumes noted in Table 2, while the proportion of cases dealing with teachers went from 17 percent to 45 percent. Segregation cases mushroomed in the 1960s, when litigation based on constitutional cases and civil rights statutes flourished (Kirp, 1974). Pupil discipline cases (including cases arising out of hair and dress codes) jumped from 46 in 1957-66 to 601 in 1967-76 (see Donoghoe, 1972; Brown, 1972). Other issues commanded attention in a new way, such as sex equality, Bible reading and prayer, school finance reform, language policy, rights of privacy and expression for students, due process in discipline and suspension of pupils, the classification of mentally retarded children, and special education (Kirp and Yudof, 1977; Mott and Edelstein, 1973; Marvell *et al.*, 1982). There has also been a marked rise in educational cases litigated in federal courts (Benavot, 1985). Many of these new issues have been framed as class action suits and thus in their impact have gone well beyond the individuals involved.

It would be simplistic to regard this surge of litigation as merely the product of activist lawyers and an "imperial judiciary" working in some kind of social or political vacuum. Courts alone could not have created the vast change in social policy that the new cases entailed. Rather, the increase in the

number and character of court cases in education is also attributable to a complex interaction of social protest movements (like civil rights groups demanding desegregation), new statutes (for example, establishing bilingual education), the development of new executive guidelines and regulations (on the proper use of compensatory education funds, for instance), the work of public interest law firms (defending student rights to due process or free expression, as one example), and networks of legal reformers in foundations and the universities (who pressed law suits to equalize state school appropriations, among other causes) (Handler, 1979; Tyack and Hansot, 1982: part 3).

A key force bringing about the changes in law was the power of organized protest groups that mobilized minority constituencies, dramatized their demands through skillful publicity and actions, and devised strategies to bypass government agencies that had ignored or demeaned them. Groups previously excluded from influence used the law to help to bring about social justice (Kluger, 1977). People dissatisfied with the existing distribution of power in local communities and in state governments turned not to local or state power-wielders—for such elites had been agents of injustice in the first place—but rather to outside agencies for redress. These included the federal courts and the Congress or administration, executive and administrative agencies, as well as liberal allies in the churches, the foundations, and national voluntary groups (Mosher *et al.*, 1979). The *Brown* decision itself, for example, was the product of decades of hard work, courage, personal sacrifice, and carefully honed strategy on the part of the NAACP and countless blacks in local communities (Kluger, 1977). It foreshadowed a rise in education cases in states—especially in the South—where formerly the courts had buttressed inequality.

In the 1960s and early 1970s one social movement after another mobilized political support, inspired by the successes of blacks in the civil rights movement. Women, Hispanics, the handicapped, and many others sought greater equality in education. For a time it seemed that better schooling was the door to progress and that law offered the key to the door. Once ignored minorities and their liberal allies pressed for federal (and in some cases state) statutes like the Civil Rights Act and laws and administrative regulations on bilingual education, special education, multicultural curriculum, Title I of the Elementary and Secondary Education Act, and sex equity.

Teacher groups also supported legislation to establish collective bargaining and greater procedural rights (Boyd, 1976).

The new statutes and administrative rules, representing a new awareness of issues of social justice on the part of elected officials, gave rise to new educational litigation. The demands of social protest groups and the activism of the legislative and executive branches of the federal government stimulated suits, as did the growth of public interest law firms and the legal branches of teacher organizations. In addition to these new stimuli to litigation, judges in recent years have shown a willingness to broaden the scope of judicial review based on constitutional doctrine, displaying "a fresh, vivid sensitivity to human and individual rights and to the abuses of government" (Friedman, 1983: 31).

There are today many Americans—both among the general public and among educators and legal scholars—to whom the growth in statutory and administrative law and in court cases represents pathology. There is too much intrusion of central government, they say, and too many judges exceed their proper zone of discretion and competence. The most obvious example of this is desegregation, but the list of grievances is long. Some people yearn for a day when outsiders—and judges—knew their place (Glazer, 1975; Rebell and Block, 1982: ch. 1).

If one were to go back to the early 1950s, one would find less litigiousness than today, fewer and less complex federal and state regulations, and more acceptance by government officials and judges of the authority of educational leaders (Goldhammer, 1977). One would also find that the law often supported and almost always acquiesced in segregation of the races in the southern half of the nation, compulsory religious exercises in a multitude of school districts, sex-based discrimination, gross inequities in the funding of schools between districts and between rich and poor schools within districts, the systematic favoring of middle-class and prosperous students in curricular and other matters, and a pervasive lack of due process in the treatment of pupils' rights and in the relations between administrators and teachers. Education lawyers then seldom represented interests that could not pay for their services, so judges adjudicated only those disputes that the parties could afford to bring to the courts. The traditional answers of education law went largely unquestioned and the conventional wisdom of the common law and public law was used to decide cases. It was a comfortable world for those who held power and wanted to preserve the status quo, but it left

untouched some of the most pressing questions of social justice in public education.

VIII. CONCLUSION

In this study we have sought to map the demands that American society has placed upon the court system with respect to school law. Seeing the law as responsive to powerful social changes and as an index of power—and not as some hermetic domain of judges and lawyers—we have explored the social context that gave rise to educational litigation. We have suggested some connections between litigation and the changing character of authority and power in public education.

Our analysis suggests how different stages in the history of public schooling help to explain changes in the rates of educational litigation and the types of issues brought to court. During most of the nineteenth century, Americans had a variety of formal and informal methods of settling disputes over education. Few went to court, except to settle those normal business questions that were the staple of the common law. There was one exception, however. In some regions of the country, litigation proved to be a useful way to untangle the complex web of political authority over the governance and finance of the public schools that had been created by states and local districts in an era of distrust of government. This very ambiguity over levels and branches of authority made it increasingly clear to professional educators and their elite allies that a more unified system of control was desirable.

Beginning with the progressive era, the centralization and bureaucratization of authority was a central theme of the twentieth century. During this period of reform from the top down, the volume and character of reported cases began to change. Despite the aversion of professionals to litigation—indeed to any challenge to their hegemony, including "politics"—citizens took increasingly to the courts. Lay people contested unpopular reforms such as the consolidation of schools or sought entitlement to newly-mandated programs like the transportation of pupils in these reorganized districts. The very laws that created new legitimacy for professional educators—such as laws or regulations concerning teacher contracts and tenure—gave insiders in the educational bureaucracies new standing before the law. In an organizational age, associations assisted individuals to assert such rights.

The most recent period of upheaval in American education—beginning with *Brown* in 1954—stimulated yet another major shift in litigation through a sharp increase in the rates and change in the nature of court decisions. Minority groups previously excluded from power in educational decision-making achieved new influence through litigation, especially in the federal courts, where litigation mushroomed. With the help of public interest lawyers, students also found that they had rights assertable in court. Feminists, Hispanics, the disabled, and many others entered the legal fray. Older doctrines of tort law that protected public officials in education shifted in favor of the plaintiffs while judges became more skeptical of the professional expertise of educators. Willy-nilly, judges found themselves responsible not just for deciding abstract questions of law but for intervening in the everyday operations of school systems. The people who ran school systems that once had been highly decentralized, and that embodied the virtues and prejudices of diverse local communities, came to realize that they could be held responsible for upholding national standards of justice.

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