# INTRODUCTION

## FRAMING EQUAL OPPORTUNITY

Almost twenty years ago now, Jonathan Kozol's *Savage Inequalities* offered the nation a disturbing portrait of unequal educational opportunities and stunted lives. Kozol took his readers on a journey through public schools in some of America's most impoverished cities and some of its wealthiest suburbs. In the poor cities, such as Camden, New Jersey, and East St. Louis, Illinois, the children were almost to the last one black or Latino, and most lived in poverty. The schools were old, broken down, and largely bereft of material resources. They were fearful places, places where danger lurked at every turn, and even the walls issued dire warnings about things like drug abuse and teen pregnancy. Many teachers and administrators were worn out and demoralized; they had given up hope. And the children, it seemed, knew what to make of all of this. They got the message: The larger society did not care about their education or their lives. In the wealthy suburbs, such as Cherry Hill, New Jersey, and Winnetka, Illinois,

of course it was all the other way. Most of the children were white and well off. The schools were modern and clean. Resources were abundant and curricular offerings vast. The schools were cheerful places. Here, enthusiastic teachers were able to provide good teaching and high expectations for learning. And here too, Kozol revealed, the children absorbed messages, although of rather different sorts from those absorbed in the poor cities.[1]

Mr. Kozol's journalism brought us face-to-face with simple questions about basic rights and distributive justice: Why should some children have much less spent on their public education than other children? Does not simple justice demand that poorer, disadvantaged children receive more resources, and not less than or even the same as, their already advantaged peers? Should "education" or "equal educational opportunity" now be included as the pantheon of fundamental constitutional rights?[2]

As it turned out, Kozol wrote at what is now the midpoint of a national school finance reform movement. Like many social change efforts in the United States, this one has relied quite heavily on law and courts. Litigation marked its beginnings in the late 1960s, and litigation continued to drive it even after it suffered a major defeat at the hands of the U.S. Supreme Court in *San Antonio v. Rodriguez* (1973). After *Rodriguez*, litigation campaigns had to proceed in state courts under state constitutional law. Between 1973 and 2007, lawsuits challenging school finance policies reached the high courts of all but seven states.[3]

This book is about the role of "things legal"—lawyers, rights claims, litigation, courts—in struggles to produce more egalitarian school finance and education policies. Unlike most other research on school finance litigation, this book puts the spotlight on would-be reformers and their mobilization of law and courts. It chronicles reformers' use of law and courts in two leading school finance reform cases: New Jersey (1970–2009) and Kentucky (1983–2009). A comparison of reformers' efforts in these two cases provides a great window through which we can gain new insights about the interplay of law and politics in litigation-based reform projects generally.

## LEGAL TRANSLATION AND WHY IT MATTERS

This book's central purpose is to highlight the crucial and often neglected role of legal translation in litigation-driven reform efforts. Toward this end, I

develop a distinctive interpretive framework for studying the origins, meanings, and consequences of legal translation. This focus on legal translation is important because it gives us new purchase on how agents can use law and courts to bring about desired changes in public policies.

The metaphor of translation implies a "carrying over" from one language or domain to another. As I use the term, *legal translation* refers to the conceptual and rhetorical processes though which reformers translate their values and goals into plausible legal claims and arguments. Legal translation involves, simultaneously, an appeal to legal authority and the selection and representation of "facts" and evidence. This definition recognizes that the raw materials for legal translation are potentially quite diverse and that compelling representations of facts often drive the evolution of legal doctrines. It also gives rise to important questions.

What options do reformers have in the framing of legal challenges? What choices do they make about legal translation, and why? What is the relationship between legal translation, on the one hand, and reformers' thinking and action with respect to extrajudicial strategies, on the other? What difference does it make for the politics of reform struggles that would-be change agents embrace one kind of legal theory and rhetoric rather than another kind? The answers to these questions help show what legal translation is, how it gets done in context and in practice, and the many ways in which it matters.

Legal translation matters for three reasons. First, speaking one way rather than another within law can either help or hinder reformers in their efforts to mobilize supporters outside of court. Second, because the content of legal claims will have different meanings for different audiences, speaking one way rather than another within law can either neutralize or countermobilize interested third parties and potential opponents. Third, speaking one way rather than another within law provides courts with specifically framed "opportunities for decision." Legal translation can therefore shape the evolution of legal doctrine. In turn, legal doctrine often sets the agenda of contention in politics and defines the language of public debate.

In tracing legal translation's origins and mapping its consequences, I argue that reformers' legal translation processes are shaped by two kinds of ideological orientations that reformers will have or display.[4] First, reformers will have substantive ideology—that is, a vision encompassing values, perceptions, and goals. Second, reformers will also have a legal ideology—that is, an ideology

about law, politics, and change. A substantive ideology provides direction to legal translation simply because reformers resorting to law and courts must render their vision in formal-legal terms. But a legal ideology also shapes translation because what reformers end up saying in court depends in part on how they see their litigation in relation to politics and change.

I offer a typology of three kinds of legal ideologies: legalism (or "the myth of rights"), realism (or "the politics of rights"), and culturalism. As views of law, politics, and change, legalism, realism, and culturalism each yield distinctive senses of what law is and how it relates to politics, how best to structure attorney–client relations, what courts are like and what they can and cannot do, and how social change actually occurs.

In both cases studied in this book, reform groups claimed that school finance policies violated state constitutions; in both, state supreme courts agreed. The two cases are dissimilar, however, in that the respective reform projects embraced different substantive visions of education and inequality, framed different legal arguments (legal translation), and took different approaches to combining litigation with broader political activities. In each case, reformers had to struggle to translate their visions into law. In neither case was the translation process simple or mechanical. In each case, translation mattered, for it influenced reformers' prospects in court and in politics, shaped the content of judicial opinions and the language of public debate, and produced distinctive policy processes and outcomes.

I find that legal strategies work best when used in conjunction with broader political mobilization and coalition building. This finding is consistent with much prior research on law and the politics of reform. However, I also argue that ideological coherence (or fit) across the legal and political prongs of reform projects has an important and overlooked connection to overall success. A focus on legal translation is required to apprehend the ideological content of legal claims and the key question of how that content fits with (or does not fit with) broader political arguments and mobilizing strategies. More generally, the focus on legal translation is intended to foster further reflection and research on how would-be change agents think about legal framing options in relation to political conflict and envisioned processes of change, and on how the content and character of legal arguments matter in politics.

## CASE SELECTION AND THE CASES IN BRIEF: TWO WORLDS OF EDUCATION REFORM

I develop the framework for understanding legal translation in conjunction with the examination of two leading school finance cases. Why school finance reform litigation, and why these two cases?

While working on another topic (known in political science as "the new judicial federalism"), I had occasion to read many school finance decisions. I soon came across two remarkable ones. In *Abbott v. Burke* (1990), the New Jersey Supreme Court mandated that poor children in the Garden State's urban ghettos receive "greater than equal" resources, compared to their already advantaged peers in the state's wealthiest suburbs. In *Rose v. Council for Better Education* (1989), the Kentucky Supreme Court invalidated every state law and regulation pertaining to education. But what struck me most about these two opinions were their radically different ideological content and rhetorical qualities. Although both opinions justified judicial interventions in school finance policy, they proceeded on the basis of different foundational assumptions about public education and inequality. It was as if they had come from two different worlds of meaning. My focus then shifted to understanding how these opinions came to be and to how they mattered in broader social and political contexts. I found their origins in reformers' different choices about legal translation and legal and political mobilization.

Each reform project emerged out of different historical conditions and personal experiences, and each had to make its way through different local political cultures and political-institutional channels. The story of each project is long and complicated. For now, I would just like to highlight the central features of legal translation and legal/political mobilization in each one.

### *New Jersey: Savage Inequalities In Law and Politics, 1970–2009*

The New Jersey school finance controversy encompasses two related cases, *Robinson v. Cahill* (1970 through 1976) and *Abbott v. Burke* (from 1981 to date), and involves twenty-seven separate opinions by the New Jersey Supreme Court. In this effort, lawyers working out of a public interest law office in Newark (the Education Law Center, or ELC), took up the mantle of reform. These lawyers and their allies were steeped in an educational reform ideology that emerged in

the mid-1960s in the wake of the civil rights movement. I will refer to this ideological orientation as a "compensatory vision" of education and inequality.

The New Jersey reformers saw racism and poverty as central, intertwined problems in American politics, and public education as a key arena in the struggle for solutions. On this view, as currently organized, public schooling reflects and reinforces "savage inequalities"—illegitimate advantages and disadvantages, systematically related to race and class. If it could be appropriately restructured, however, a system of public education could be a powerful remedial and equalizing force. The principle of distributive justice at the center of this view is compensatory: Educational resources should go disproportionately to the disadvantaged. The metaphor typically invoked for "equal educational opportunity" is that of a competitive but fair footrace for the good things in life.

At crucial turning points in this conflict, the ELC lawyers were remarkably creative in translating this vision into compelling legal claims and arguments. This was no easy task, and I show precisely how these reformers did it. Legal mobilization and judicial receptivity to their claims allowed them to project their vision onto the state's political agenda and to define the terms of public debate, even though many other actors continued to disagree with their views. And, ultimately, reformers won policy changes requiring a vast redistribution of state education aid to poor urban school districts.

In *Robinson v. Cahill* (1973) [*Robinson I*], the New Jersey Supreme Court invalidated the state's school finance system. It accepted the basic contours of reformers' innovative argument, holding that the state constitution's education clause implied an individual right to some substantive "minimum level" of equal educational opportunity. Reformers won an important legal victory in *Robinson* but then suffered a political defeat when they were unable to influence the legislative process thereafter. But the *Robinson* litigation taught reformers some valuable lessons and had other significant "feedback effects." It thus set the stage for the difficult task of translating the compensatory vision into plausible legal claims.

In 1981, the ELC filed its second challenge in a case styled *Abbott v. Burke*. After another decade of legal warfare, the New Jersey Supreme Court embraced reformers' vision and boldly fashioned its own remedial tests to implement this vision as policy. In *Abbott II* (1990), the court held that the state constitution required that children in twenty-eight poor urban districts receive at least as

much money for regular education as did children in the state's wealthiest suburbs. Over and above this "parity mandate," the court also ordered the state to formulate and fund special compensatory programs and services in the poor urban districts. Widespread resistance to these judicial mandates then sent reformers back to court again and again. And, again and again, the New Jersey Supreme Court stayed the course. The mandated parity funding was finally achieved in 1997–1998. Since then, battles over the funding and implementation of additional programs and services have been ongoing. Between 1990 and 2005–2006, poor urban school districts received approximately $3 billion more in basic education aid than they would have received otherwise, absent the reformers' project and the favorable court decisions. In many ways, then, this is as success story about how a group of intrepid liberal reformers mobilized law and courts to transform educational policy in their state.

At the same time, I highlight two main criticisms of the New Jersey reform project. First, these reformers were often overly legalistic in their approach to litigation and social change. For a very long time, they acted as though legal pronouncements coming from courts would be sufficient to bring about desired changes. Eventually, they learned that this was not so, and that answers to puzzles of political change, if they are to be found at all, must be found through political action as well as litigation. Indeed, I argue that reformers rescued their entire project from constitutional obliteration in 1992 only by adroitly using their court victories for political mobilization, deal making, and coalition building. It was reformers' late turn to politics, and nothing else, that enabled the state high court to remain steadfast in its own commitment to redistributive change. Second, for strategic reasons not unrelated to their legalism, the New Jersey reformers frequently evaded and repressed legitimate questions about what else might have to change in poor school districts before additional resources could be used wisely. Questions about the wise use of resources have always haunted the New Jersey reform project, and they continue to haunt it to this day.[5]

### *Kentucky: The Common School and the Quest for Consensus, 1983–2009*

In Kentucky, the reform project began in 1983 when a state-level administrator organized a group of school districts to back a legal challenge to the state's school finance system. This administrator put local school officials in contact

with prominent local lawyers and policy experts. By mid-1985, the group included sixty-six of Kentucky's then existing 180 school districts. The group then incorporated as the Council for Better Education and filed suit. The Kentucky reform effort was also supported by a separate citizen's organization called the Prichard Committee for Academic Excellence. Founded in 1983, the Prichard Committee was initially much less concerned with school finance than with other educational policy issues. At the outset of the litigation, these two reform groups declined to work together. However, just before the case reached trial in 1987, they joined forces in support of the litigation.

After the trial court rendered a decision in reformers' favor in 1988, state defendants appealed directly to the Kentucky Supreme Court. In *Rose v. Council for Better Education* (1989), the state high court used the finance challenge as the occasion for striking down all laws and regulations pertaining to the state's entire public school system. Within a year after this sweeping decision, the legislature passed the Kentucky Education Reform Act of 1990 (KERA). KERA was an ambitious, multifaceted reform law. It included not only a new school finance system but also a welter of other substantive educational reforms. The finance reforms produced an infusion of funds for education from both state and local levels and a significant narrowing of the expenditure gap between rich and poor districts. The entire effort and its integrated set of "systemic" reforms soon made Kentucky, of all places, a nationally recognized leader in education reform.[6]

The Kentucky reformers championed what I will characterize as a common school vision of public education and equal opportunity. Unlike the educational reform ideology at work in New Jersey, the common school vision emphasizes education for common citizenship and social integration, and downplays the competitive, economic purposes and functions of schooling. When it comes to policy reform, proponents of this view tend to focus on the content of the curriculum, pedagogical style, and the culture and sense of mission in and around schools. The rhetorical emphasis is on what all children share (or should share) in common through public education, whatever their differences.

Moreover, unlike the New Jersey advocates, the Kentucky reformers took a realistic, pragmatic approach to litigation and change. Throughout, they coordinated their lawsuit with broader political strategies. Over time, this combination of litigation and political action created a favorable environment for

bold judicial intervention and sweeping policy change. But there is more to this story than the mere fact of political efforts to complement litigation.

I argue that the Kentucky reformers' success can be explained not only by their sustained and coordinated use of legal and political strategies, but also by the ideological coherence of their overall project. In everything they said and did, in many different institutional locations and forums, they marched under the same banner of the common school. On this analysis, ideological coherence across legal and political prongs of reform efforts emerges as an important but generally overlooked factor in explaining the success or failure of litigation-involved reform projects.

In these two case studies, then, different patterns of legal and political mobilization, including significantly the nature of legal translation, shaped quite different local "cultures of argument" about education, inequality, and school finance policies. Each case represents a distinctive style of school finance litigation and reform. Each is in its own way a success story, and each has its particular problems, tensions, and unintended consequences, both positive and negative.

## LEGAL MOBILIZATION THEORY AND THE POLITICS OF REFORM

There is a long tradition of research in political science concerned with the role of things legal in struggles for social change. The umbrella term most often used to describe this tradition is *legal mobilization theory*.[7] The use of the word *mobilization* signals that agency and process are being studied. Whatever their differences, legal mobilization approaches typically shift the spotlight away from the more common focus on courts and judicial impact and shine it on the practical consciousness and strategic choices of would-be change agents. These approaches also typically conceptualize law as potentially "constitutive" of social relations and political understandings. On this view, specifically legal discourses are potentially powerful in the construction of cultural understandings and framing of politics.

I draw on this research tradition by provisionally adopting the standpoint of reformers and examining the interplay of law and politics from their perspective, by exploring the role of legal ideas and arguments in framing

public debates and political conflicts, and by using a case study approach and interpretive methods in order to gain access to agents' practical consciousness and strategic thinking in relevant contexts.

But I go further, by offering a conceptual vocabulary and framework for a "closer-in" focus on legal translation, which, in turn, facilitates an exploration of the political implications of legal framing, both within reform organizations and in broader political contexts. In my view, existing research has not taken questions about legal framing options and choices seriously enough. Actors often have some measure of choice in how they project their claims into the legal system, and, I show, these choices are of great moment. Legal framing options ought to be regarded as a kind of political opportunity, and opportunities can be seized or missed. In addition, I think there is more to say about reformers' use of both legal and political strategies. Once we have a clear picture of legal translation, we can then examine how the content of legal claiming matches up with what reformers are saying and doing outside the courts. Again, I argue that ideological coherence across the legal and political prongs of reform projects is an important but overlooked factor that increases the likelihood of success.