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INVESTING IN OUR CHILDREN'S FUTURE: SCHOOL FINANCE REFORM IN THE '90S

INTRODUCTION
LAWYERS AND EDUCATION REFORM

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This is no ordinary issue of the *Harvard Journal on Legislation*. The Articles and Notes address a topic of unusual importance, school finance reform, with a provocative breadth of perspectives and insights. The role of lawyers and the legal process in resolving the crisis in public education is the subject of this Introduction. My thesis is that we will fail in meeting the education challenge unless we pursue a very substantial "legalization" of our strategies.

If relations with the Soviet Union remain comparatively congenial, the Cold War will be history, and we will perhaps address the now-paramount threat to our national welfare: the decayed state of public elementary and secondary education. There is no greater challenge to America's democratic character and awesome global power—a combination of national qualities unique in world history, but which we sadly take for granted.

Do we face an education crisis? Many people think not, a fact dismaying in itself because an aroused public will be necessary to address the problem. The education crisis, however, lacks the dramatic *gravitas* of the Cold War. The foreign enemy inspired screenplays and nightmares, fevered patriotism, and enormous peacetime spending on defense. The nation's welfare, and even survival, depended on a collective resolve. Political careers were made and wrecked on that one question, and no issue did as much to define the present character of the two political parties.

By contrast, education reformers have attempted all manner of rhetorical appeal, stressing the innocence of children, the prosperity of future generations, and even the apocalypse of class warfare. Yet no appeal has opened coffers or excited passions the way the Red Scare did in its many forms. The case for comprehensive education reform, it seems, will require more

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careful construction and advocacy than education reformers have provided thus far.

The model for such reform may be less the explosive, sometimes demagogic anti-tax revolt of the 1980's,[1] and more the protracted civil rights struggle of the second reconstruction. That struggle stretched from *Sweatt v. Painter*[2] in 1950, through *Brown v. Board of Education*,[3] the 1964 and 1965 federal legislation,[4] and into the Carter Administration of the late 1970's.[5] If this analogy is even partially correct, deep and successful reform in the political and policy spheres will require the mobilization of legal institutions, legal processes, and lawyers. It is difficult, therefore, to imagine a more deserving subject for an issue of the *Journal on Legislation*.

I. The Roles of Law and Lawyers: Beyond Litigation

The initial judgment of most observers would be that law and lawyers have little to do with the general crisis in public education, or with its solution. On further reflection, a few specific areas might emerge as exceptions: desegregation, certainly; the administrative complexities occasioned by procedural due process and its emanations; and regulation of the collective bargaining process. Then there are some programs that have spawned particular procedures and litigation, most notably federal and state programs establishing quasi-entitlements for children with special needs.

However, litigation has much wider application than this brief list. The spate of recent state constitutional cases has made school finance reform a very lively arena for lawyers and legal processes.[6] It was a blow to reformers when the United States Supreme Court signaled, in *San Antonio Independent School*

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[1] *See* Comment, *A New Generation of State Tax and Expenditure Limitations*, 22 Harv. J. on Legis. 269, 273–83 (1985).

[2] 339 U.S. 629 (1950).

[3] 347 U.S. 483 (1954).

[4] Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241; Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437.

[5] *See generally* Days, *Turning Back the Clock: The Reagan Administration and Civil Rights*, 19 Harv. C.R.-C.L. L. Rev. 309 (1984).

[6] *See* Alexander, *The Common School Ideal and the Limits of Legislative Authority: The Kentucky Case*, 28 Harv. J. on Legis. 341 (1991); Combs, *Creative Constitutional Law: The Kentucky School Reform Law*, 28 Harv. J. on Legis. 367 (1991); Hobby & Walker, *Legislative Reform of the Texas Public School Finance System, 1973–1991*, 28 Harv. J. on Legis. 379 (1991).

District v. Rodriguez,[7] that the federal constitution does not provide the tool that advocates need to challenge even radically unequal distribution of education funding. However, the recent success of litigation in New Jersey,[8] Texas,[9] Montana,[10] and Kentucky[11] creates new hope that state constitutions will provide the test of fundamental fairness which the Supreme Court could not find in the federal constitution.[12] The success of the school finance cases also serves to remind us that other education grievances can and must be explored under state law, using litigation theories ranging from tort to constitution to statute to regulation.[13] Indeed, even familiar problems in federal litigation, such as metropolitan remedies for segregation, now may find fresh solutions under state law.

But bringing education cases in state courts is not without its potential drawbacks. That state judges are sometimes popularly elected has an indeterminate effect on judicial activism. A judge may profit politically by championing school reform, or may assume considerable risks by taking on powerful school and legislative officials. This political dynamic alone is reason enough to dwell on the relationship between lawyering in the courtroom and the surrounding swirl of overtly political advocacy. A school finance case cannot be viewed merely as a battle over constitutional interpretation and equitable remedies. Instead—if the reader will forgive the post-Iraq martial metaphors—the constitutional battle is only one front in a complex war, and doctrinal argument only one of several weapons to be used by lawyers and others.

Another battle front, the interplay of doctrine and social science,[14] is critical in these cases. Unfortunately, both sides at

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[7] 411 U.S. 1 (1973).

[8] Abbott v. Burke, 119 N.J. 287, 575 A.2d 359 (1990).

[9] Edgewood Indep. School Dist. v. Kirby (Edgewood II), 34 Tex. Sup. Ct. J. 287 (1991).

[10] Helena Elementary School Dist. No. 1 v. State, 236 Mont. 44, 769 P.2d 684 (1989).

[11] Rose v. Council for Better Educ., 790 S.W.2d 186 (Ky. 1989).

[12] *See* McUsic, *The Use of Educational Clauses in School Finance Reform Litigation*, 28 HARV. J. ON LEGIS. 307 (1991).

[13] *See, e.g.*, Ratner, *A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills*, 63 TEX. L. REV. 777 (1985).

[14] *See* Minow, *School Finance: Does Money Matter?* 28 HARV. J. ON LEGIS 395 (1991); Benson, *Definitions of Equity in School Finance in Texas, New Jersey, and Kentucky*, 28 HARV. J. ON LEGIS. 401 (1991); Hanushek, *When School Finance "Reform" May Not Be Good Policy*, 28 HARV. J. ON LEGIS. 423 (1991); Murnane, *Interpreting the Evidence on "Does Money Matter?"*, 28 HARV. J. ON LEGIS. 457 (1991); Ferguson, *Paying for Public Education: New Evidence on How and Why Money Matters*, 28 HARV. J. ON LEGIS. 465 (1991).

their peril ignore the value of sophisticated data analysis of education expenditures. The antecedent question of whether higher levels of spending will indeed improve education is primarily a matter of interest to skeptical economists. The mainstream, conventional wisdom is justifiably unshaken by such skepticism: if we are interested in better education results, higher per-pupil expenditures are neither necessary nor sufficient in all cases, but money *is* very likely to help. Moreover, schools that are comparatively starved for resources will be successful only through extraordinary and unlikely effort. However imperialistic lawyers can be in offering their services and habits of mind in the solution of all problems, economists are even more dangerous with implicit claims that their grossly simplified models should displace the instincts and experiences of professionals, such as educators, who have worked for decades to understand the ingredients of progress. Crucial research must focus not on the empirical analysis of aggregate input-output models, but on the more conventional, less tidy, applied problem of program evaluation and replication. That is how social science can best serve struggling educators and advocates, who ought not to be diverted to rebutting and perfecting flawed economic models.

Community support, yet another battle front, may be crucial to plaintiffs in several respects. A broad plaintiff class of children, parents, and local school officials may be vital for purposes of standing, including remedial standing. This procedural hurdle itself requires community support, and an implicit test of political legitimacy. As the experience in Texas demonstrates,[15] once the court invalidates the school finance system and judicial appeals are exhausted, it will be extraordinarily difficult to devise a legally sufficient, politically acceptable, and fiscally responsible response. The work that the litigation team does in shaping the problem, and the public's political appreciation of it, will be critical. After all, as Tip O'Neill instructed, all politics is local. What lawyers do to teach and persuade the public and their elected representatives will be critical.

With respect to the litigation weapon, one might ask whether advocates have used it enough. In comparison with other sec-

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[15]. *See* Hobby & Walker, *supra* note 6; Yudof, *School Finance Reform in Texas: The* Edgewood *Saga*, 28 HARV. J. ON LEGIS. 499 (1991); Levine, *Meeting the Third Wave: Legislative Approaches to Recent Judicial School Finance Rulings*, 28 HARV. J. ON LEGIS. 507 (1991).

tors, the education process has been remarkably free of judicial intervention, even considering the history of desegregation, special needs programs, procedural due process challenges, bilingual education, and the like. Senior education administrators who doubt this need only consult with senior managers of industry, who face regulatory constraints from antitrust to environment to occupational safety and health to employment discrimination to ERISA to the SEC, FTC, and IRS. Typical school superintendents spend less time with lawyers than typical corporate CEOs, and spend less money on litigation. Few would be so bold as to suggest that more regulation and litigation would cure American's economic anemia, but it is clear that litigation has been an essential tool for enforcing public policy on recalcitrant bureaucracies—both regulated corporations and the public bureaucracies that default in their regulatory duties. Nothing about the education enterprise suggests that these traditional legal devices cannot be applied with similar effectiveness to enforce such public goals as improved educational equity and performance.[16]

School finance litigation forces us to appreciate the role of lawyers and legal processes in the broader context of political transformation and policy revolution. For revolution is precisely what plaintiffs may well envision, seized of courtroom victory on so fundamental a matter. Because education is perhaps the greatest determinant of our individual and collective prosperity, when we undertake to renovate the foundation of the education system, the entire structure of opportunity is up for grabs. The directness of the relationship between litigation and the political process of policymaking is highlighted in massive institutional reform litigation, such as school finance, because the political branches are necessarily drawn, perhaps kicking and screaming, into the remedial phase. Thus, the boundary between law and policy or politics becomes indistinct, as does the boundary between lawyer and policymaker.

However, litigation is not the only context for rethinking the roles of lawyers and legal processes. Less obviously, we must recognize that layers of federal and state programs, policies, and directives are stated in often complex statutes and regula-

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[16] There is growing sentiment favoring alternative dispute resolution methods as replacements or supplements for litigation. These tools are also finding application in education.

tions, the crafting of which should be very much the occupation of lawyers. For lawyers to claim a major role in the shaping and administering of statutes and regulations affecting the banking industry would be an unremarkable claim. Why should it be less so in education? Perhaps it is only because lawyers have not had the same monetary incentives to invade the education terrain in force. Similarly, it seems almost natural when lawyers dominate the shaping and administration of responses to environmental problems. Why, then, do so many people have the instinct that our response to education problems should be left to educators? Perhaps, the field of environmental concerns has not had an organized, unitary profession that laid prior claim to that terrain in the way that educators have in their own domain.

Educators and the public in general may recoil at the proposition that lawyers might be centrally involved in shaping the response to the education crisis. Obviously, lawyers should be brought to the table once the policy decision has been made by the "professionals" and the answer must be reduced to the formal language of statute or rule. And, certainly, compliance and enforcement problems may present matters of legal interpretation or call for judicial processes. But is the core business of designing education policy and institutions the appropriate work of lawyers?

Perhaps it is. Lawyers are not education professionals, but neither are they as irrelevant to resolving the education crisis as dentists. In other major sectors and complex endeavors, from banking to housing to health care, we have found legal skills and institutions indispensable in pursuing public purposes and promoting private welfare. Indeed, lawyering is clearly valuable during the process of reaching compromises on policy goals, solving problems of program organization, and creating mechanisms of accountability and enforcement. A lawyer's instincts and experience on such matters constitute an agenda which complements, and occasionally conflicts with, the agendas of educators at the policymaking table.

Lawyers cannot responsibly compete with educators on core matters of professional judgment, such as class size or mainstreaming of special needs students. As in other fields, however, the experts should find the substantive contributions of lawyers helpful. The blending of lawyering and policymaking occurs not just because legal procedures, including litigation and legislation, throw the two together, but because the intellectual method

of law itself has a certain parasitic quality: the lawyer must immerse herself in the client's substantive concerns in order to apply her skills. This is obviously true in difficult litigation, but it is even more true in complex counseling situations. In legislative and regulatory processes, the interpenetration is virtually complete.

Unhappily, too many lay advocates only know to use lawyers for litigation and drafting contracts, and too many lawyers know education practice only as administrative or judicial litigation. Even as we focus on litigation in this issue of the *Journal*, we do well to reject narrow constructions of the role of law in addressing the urgent problem of education.

II. GOVERNANCE OF EDUCATION

Closely tied to the problem of school finance is the question of education governance. To whom do the people delegate responsibility for our schools, and with what consequences for legal and political accountability when we are dissatisfied with the results? School finance inequalities illuminate both the vertical and horizontal dimensions of this question.

The vertical problem is seen in the complex intergovernmental structure of education. The stated tradition is *local* control, but *state* law and actors are often dominant because local governmental units, including school districts, are creatures of state law. The state retains (and not infrequently exercises) control over the revenue-raising powers of local authorities, as well as the policy framework for education programs. At the federal level, financial contribution to elementary and secondary education is falling towards a mere six percent of all money spent on education,[17] and that federal contribution is mostly targeted at needy communities and student populations.[18] Although fed-

[17] *Appropriations for Fiscal Year 1991: Hearings Before the Subcomm. on Dep'ts of Labor, Health and Human Services, and Education, and Related Agencies, of the Senate Comm. on Appropriations*, 101st Cong., 2d Sess. 174 (1990) (statement of Secretary of Education Lauro F. Cavazos). Furthermore, the education initiative announced by President Bush on April 18, 1991, makes clear that his administration does not favor any significant increase in federal spending or standard-setting in public education.

[18] For a discussion of the merits of a greater federal role in education, see Lu, *Liberator or Captor: Defining the Role of the Federal Government in School Finance Reform*, 28 HARV. J. ON LEGIS. 543 (1991); Hawkins, *Equity in Education*, 28 HARV. J. ON LEGIS. 565 (1991).

eral funding comes attached with many regulatory strings, it is too precious for state and local officials to reject. The bottom line is that the finances of any local school district depend on a set of interlocking and complex legislative, regulatory, and budgetary decisions by officials at three levels of government.

The horizontal problem is that at each of these levels of government, authority is divided among variegated executive and legislative institutions.[19] In Boston, for example, the mayor, city council, and elected school committee are in the throes of a pitched political battle for control of the disastrously failing school system; the state legislature and governor will make the ultimate decision, probably by their inaction. The quality of schools is second only to public safety on the agenda of Washington, D.C., but the mayor and city council have little control over the elected board of education. Similar controversies exist in communities across the country.

Both the vertical and horizontal dimensions of the governance problem implicate law. Formally and informally, the power to control school finance, education budgets, and education policy are defined, delegated, and checked by law and politics. On the one hand, public officials look to voters, electoral mandates, and ballot measures for their job security and legitimacy. On the other hand, law operates to create and shape power through constitutional provisions, statutes, regulations, and litigation. One cannot underestimate the importance of law in creating, sustaining, and eventually resolving the education crisis. The successful joining of law and politics implies, however, some obligation on the part of lawyers and legal institutions to better understand the issues of the education sector and to devote greater resources to a solution. It also implies that educators, administrators, and political authorities grappling with education reform will increasingly find lawyers under foot, in the wings, and at the table.

There is another relevant aspect of our processes of governance. It concerns the fare of policy reform proposals in the

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[19] One might add judicial institutions to the mix, not only because the courts may be enlisted to enforce law, but also because many school officials operate under consent decrees and injunctions which, for better or worse, create important constraints on the allocation of resources. *See, e.g.*, D.C. COMMITTEE ON PUBLIC EDUCATION, OUR CHILDREN, OUR FUTURE: REVITALIZING THE DISTRICT OF COLUMBIA'S PUBLIC SCHOOLS (June 1989) (report of blue ribbon citizen group on state of public education in the District of Columbia, discussing the complex variety of court orders faced by school officials).

machinery of governance. Surprisingly, the persistence of the crisis in education is not due to a shortage of good ideas. Keeping in mind that the perfect is the enemy of the good, and acknowledging that we do not know how to achieve, or perhaps even define, perfection, there is remarkable consensus about which reforms would improve significantly the performance of a given school. For example, the Business Roundtable has offered the following "essential components" as a general guideline for legislators, officials, and advocates seeking to create a new, successful education system:

> 1. The new system is committed to four operating assumptions: all students can learn at significantly higher levels; we know how to teach all students successfully; curriculum must reflect high expectations for all students, but instructional time and strategies must vary to assure success; every child must have an advocate.
> 2. The new system is performance or outcome-based.
> 3. Assessment strategies must be as strong and rich as the outcomes.
> 4. School success is rewarded and school failure penalized.
> 5. School-based staff have a major role in making instructional decisions.
> 6. Major emphasis is placed on staff development.
> 7. A high-quality pre-kindergarten program is established, at least for all disadvantaged students.
> 8. Health and other social services are sufficient to reduce significant barriers to learning.
> 9. Technology is used to raise student and teacher productivity and to expand access to learning.[20]

These recommendations are non-controversial, with the possible exception of the business-like emphasis (often more myth than reality in private business) on accountability and incentive systems. A group of prominent black intellectuals issued a similar manifesto two years ago.[21] And President Bush and the fifty governors espoused the same themes of excellence and accountability at the 1989 education summit.[22]

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[20] ESSENTIAL COMPONENTS OF A SUCCESSFUL EDUCATION SYSTEM: THE BUSINESS ROUNDTABLE EDUCATION PUBLIC POLICY AGENDA 2 (1990) (available from The Business Roundtable, 200 Park Avenue, New York, NY 10166).

[21] *See* COMMITTEE ON POLICY FOR RACIAL JUSTICE, VISIONS OF A BETTER WAY: A BLACK APPRAISAL OF PUBLIC SCHOOLING (Joint Center for Political Studies, 1989).

[22] *The Statement by the President and Governors*, N.Y. Times, Oct. 1, 1989, at 22, col. 2.

If there is such broad consensus on what to do for the system as a whole, and even for specific schools and particular children, we are left with a difficult question: why doesn't this expert consensus on desirable steps lead to actual reform on a wide scale? Put differently, with potential solutions so well understood, *what is it about our processes of governance that leaves so crucial a problem to fester for so long at such enormous human, social, and economic cost?* The same question can be asked about many other pressing problems, including Third World debt, the savings and loan crisis, and homelessness. Such a broad inquiry is beyond the scope of this Introduction, but ultimately that is precisely the inquiry triggered by an examination of school finance litigation.

Whatever may be the "complete" answer to larger questions of governance, the problem of school finance illustrates that lawyering must play a key role in breaking the virtual death-grip of inertia in our political and educational institutions. For all the limitations of rights-based advocacy, as illuminated by post-modern legal scholars and social theorists, the successful cases in Kentucky, Texas, and elsewhere have opened up a new world of possibilities with arguments about legal rights. In important respects, institutions in those states were comatose, drifting towards disaster; now they are careening towards who-knows-what. If this is not progress, at least it makes progress more possible.

III. Lawyering in the Legislative Response

After the liability phase, there remains the problem of a remedy, and specifically the difficulty of crafting a legislative response. Here it may be useful to distinguish litigation addressed solely to the financing structure from litigation such as that in Kentucky in which the entire structure of the educational system has been challenged. While the narrower case—a characterization which hardly does justice to the momentous character of the suit—will demand traditional lawyerly skills in redesigning a complex statutory formula, the broader structural challenge creates chaos, and out of chaos, opportunity.

As already noted,[23] the broad policy consensus about effective schools includes a number of measures not directly related to

[23] *See* text accompanying *supra* notes 20–22.

fiscal resources. It is increasingly apparent that, whether there has been litigation or not, legislatures must assume a senior leadership role in defining and imposing the basic framework of education reform goals, structures, and incentives. After all, broad delegations to professionals and units of local government have been the most salient feature of our drift into crisis. To reverse this pattern and reshape the array of powers and policies will require the same lawyerly skill we might imagine in a massive overhaul of any complex regime, though admittedly the education terrain is less familiar to the legal profession.

The legal, political, and fiscal acceptability of a legislative remedy are interrelated. Legal analysis will help shape the political environment, because some legislators will want to avoid action that subsequently might be found unconstitutional. Legal analysis will also shape fiscal acceptability, for example, by determining what revenue mechanisms are available, or how the tax base can be defined. Fiscal acceptability will certainly influence political calculations, but may also affect the legal analysis by shaping a judge's sense of what she can feasibly require under a vague constitutional standard of "efficient," "fair," or "equitable." This interaction of legal, political, and economic reasoning is typical of complex regulatory and policy problems.[24]

For example, legislators and their lawyer-advisers must apply hard-won lessons about regulatory failures in other contexts, such as the importance of considering incentive-based alternatives to command-and-control regulation, or the futility of establishing sanctions that, like nuclear weapons, are too devastating to use and therefore leave enforcers effectively unarmed.[25] An example is total cut-offs of funding. This weapon is always wrapped in cumbersome procedures and is unlikely to be used, so the underlying program requirements are blunted if no other sanctions are available. Crafting an effective set of enforceable requirements and incentives will require a broad mix of skills, including those of lawyers, and a good sense of comparative approaches to administrative arrangements. The architecture of public programs is an art not ordinarily familiar to policy analysts, subject matter experts, or even administrators accustomed

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[24] *See* C. EDLEY, ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY, 13–95 (1990).

[25] S. BREYER, REGULATION AND ITS REFORM (1982); C. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE 47–110 (1990).

to operating within predefined institutional parameters. Lawyers are arguably the equal of any others at the architectural task, if not better than most.

Lawyers can also help in defining substantive goals for performance of students, teachers, schools, and districts. The balance of objectivity, flexibility, ambition, and feasibility is not unlike the difficulties faced by legislators revising the Clean Air Act or strengthening the capital requirements for savings and loans institutions. The extent to which details should or can be specified in statute rather than delegated to an agency, and the procedures to be used by agencies in setting policy, are familiar to administrative lawyers. Generalists can contribute some insights that education specialists will lack, and vice versa. And such partnerships with specialists are, again, familiar to lawyers skilled in legislative and policy matters.

Indeed, able lawyers are habitually attuned to process, "rights," and the litigation eventuality. The nuances of process—who participates, with what formality, subject to how much delay, at what cost, with what provisions for administrative or judicial appeal, and appeal on what terms—can guarantee the failure of a program, though perhaps not its success. With respect to rights, education is interesting because of the enormous confusion of interests, which legal workmanship may remake as "rights." As children, parents, teachers, administrators, tiers of officials, and taxpayers all assert their interests, legislators must decide which interests will be girded with legally cognizable rights, enabling the rights-holder to best an opponent in an administrative or judicial forum. For example, as a legislature defines its expectations for services, quality or performance, will that definition generate legally enforceable rights for aggrieved children, parents, or communities? And enforceable through what procedures?

Thus, in responding to school finance problems at the instance of a judicial decree or in political response to litigation that has not reached a conclusion, legislators have an opportunity to embrace a broader conception of reform, and an opportunity as well to take advantage of all the wisdom we have, both legal and social scientific, about the administrative state.

IV. Conclusion: The Legalization of School Reform

School finance litigation is a point of entry for potentially sweeping changes to a state's education system, but that poten-

tial depends crucially upon the lawyering and the legislative response. There is more to lawyering than litigation, and more to legislating than writing down formulas and commands. Despite legions of detractors, law offers an important tool with which to address the crisis of education. This issue of the *Journal* offers rich insights with which to understand and shape that legal contribution.

The diffusion of power in education all but defeats accountability; it frustrates the reform impulse and saps the energy of civic participation. The gulf between public education professionals and most parents suppresses dialogue and promotes hierarchy. Ineffectual school personnel are shielded by civil service laws and labor contracts, while excellent personnel are underappreciated and over-regulated. Children and parents lack information about the true quality of their schools, or about alternatives. The political base of support for school spending and reform is diluted not only by general electoral apathy, but also by the disinterest of voters without children in public schools.

Under these circumstances, the astringent of legalism will serve well. Schools and school systems are public bureacratic agencies wielding vitally important discretionary powers over our children, yet that discretion largely escapes the disciplines imposed through law on other public decisionmakers. Rights, whether statutory or constitutional, can be powerful antidotes to bureaucratic indifference. Well-defined procedures can pose effective challenges to hierarchy, and create access for the voiceless. Formally structured incentives can clarify performance measures and goals. Coherent patterns of governance can enhance accountability and dissipate civic apathy. Management, policy science, and democratic processes have not been equal to the task of reforming public education. Law must try.

THE USE OF EDUCATION CLAUSES IN SCHOOL FINANCE REFORM LITIGATION

MOLLY MCUSIC*

Since 1912, thirty-one states have tested the constitutionality of their public school finance systems, some more than once.[1] Most of these challenges have attacked statutory financing schemes on the basis of one of three provisions: the fourteenth amendment to the federal Constitution, the equal opportunity clause of the state constitution, or the state constitution's education article.[2]

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[1] Of those states, 10 have found their state financing schemes unconstitutional. *See* DuPree v. Alma School Dist. No. 30, 279 Ark. 340, 651 S.W.2d 90 (1983); Serrano v. Priest, 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976) [hereinafter *Serrano II*]; Horton v. Meskill, 172 Conn. 615, 376 A.2d 359 (1977) [hereinafter *Horton I*]; Rose v. Council for Better Educ., 790 S.W.2d 186 (Ky. 1989); Helena Elementary School Dist. No. 1 v. State, 236 Mont. 44, 769 P.2d 684 (1989), *modified*, 236 Mont. 60, 784 P.2d 412 (1990); Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273 (1973), *cert. denied*, 414 U.S. 976 (1973) [hereinafter *Robinson I*]; Edgewood Indep. School Dist. v. Kirby, 777 S.W.2d 391 (Tex. 1989); Seattle School Dist. No. 1 v. State, 90 Wash. 2d 476, 585 P.2d 71 (1978); Pauley v. Kelly, 162 W. Va. 672, 255 S.E.2d 859 (1979); Washakie County School Dist. No. 1 v. Herschler, 606 P.2d 310 (Wyo. 1980), *cert. denied*, 449 U.S. 824 (1980). These statistics are slightly misleading. Although the vast majority of school finance cases have sought more equity in per-pupil expenditures, some plaintiffs have sought to overturn measures that redistribute money to poorer districts. All such challenges failed except in Wisconsin, where the court found unconstitutional a scheme in which wealthy districts paid a portion of their property tax revenue to the state for redistribution. *See* Buse v. Smith, 74 Wis. 2d 550, 247 N.W.2d 141 (1976); *see also* Levin, *Current Trends in School Finance Reform Litigation: A Commentary*, 1977 DUKE L.J. 1099, 1128–32 (1977).

[2] This Article discusses only the state constitutional claims, primarily those based on the education clause. During the late 1960's, many education reformers thought that the federal Constitution's equal protection clause might include a right to substantially equal funding for all school districts within a given state. *See* Thompson, Underwood & Camp, *Equal Protection Under the Law: Reanalysis and New Directions in School Finance Litigation*, in THE CONCEPT OF JUSTICE IN THE LAW 322 (forthcoming publication) [on file at the HARV. J. ON LEGIS.]. However, in 1973, the Supreme Court foreclosed these federal constitutional claims in San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973). In *Rodriguez*, the plaintiffs alleged that the Texas funding system violated the federal equal protection clause because disparities in funding impermissibly interfered with their fundamental right to an education, and because under the Texas system, the benefits of wealth-related educational opportunities were denied to a class of poor persons. Reversing a district court panel's invalidation of the Texas school finance system, the Supreme Court refused to establish a fundamental right to education because this right was not "explicitly or implicitly guaranteed by the Constitution." *Id.* at 33. The Court also held that the Texas system did not disadvantage any particular class. Because no fundamental right or suspect classification was implicated,

As inequities in school finance across the United States persist and increase, a growing number of students and educators are pursuing reform through the courts. The recent increase of public school finance reform litigation has provided an opportunity to analyze the theoretical strength of various claims.

Drawing on recent state court opinions, this Article will argue three points regarding public school finance reform litigation. First, state education clauses, rather than equal protection clauses, offer the strongest theoretical basis for seeking court-imposed education reform. Second, the wording of a state constitution's education article[3] invites a distinction between two types of claims: equity claims and minimum standards claims. The equity argument seeks the overthrow of the state's public school financing scheme as violating a constitutionally required equal educational opportunity. The minimum standards argu-

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the Court reviewed the statute under a rational basis standard. The Court easily found that the Texas system was rationally related to the state's interest in local control of schools. *Id.* at 49.

Some commentators continue to believe that the federal Constitution can provide a basis for state school finance reform. *See, e.g.*, Chambers, *Adequate Education for All: A Right, An Achievable Goal*, 22 HARV. C.R.-C.L. L. REV. 55, 68–72 (1987); Liebman, *Implementing* Brown *in the Nineties: Political Reconstruction, Liberal Recollection, and Litigatively Enforced Legislative Reform*, 76 VA. L. REV. 349, 405–13, 415–23 (1990).

[3] The language of the education article plays a primary role in its interpretation. Although a number of models exist for interpreting state constitutions, *see* Note, *Developments in the Law: The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1356–66 (1982) [hereinafter *Developments*]; Utter & Pitler, *Presenting a State Constitutional Argument: Comment on Theory and Technique*, 20 IND. L. REV. 635, 645–52 (1987), state court opinions interpreting state education clauses primarily rest on the text, on other state opinions, or on historical factors such as constitutional conventions and common educational practices at the time the constitution was written.

Of these factors, the text itself must play a primary role. Other states' court opinions interpreting identical constitutional language provide no guidance as to what the clause means in a particular state. Although most state constitutional conventions did borrow language from other state constitutions, they seldom had any idea what the text meant in those other states. *See* Utter & Pitler, *supra*, at 636, 658; Leshy, *Arizona Constitution*, 20 ARIZ. ST. L.J. 1, 5, 82 (1988).

Constitutional and state history, while more useful than state court opinions, is often difficult to find. Records of state constitutional debates, common educational practices, and the understanding of the ratifiers are often fragmentary or nonexistent, thus obscuring the founders' intent. *See* Miller, *The New Federalism in West Virginia*, 90 W. VA. L. REV. 51, 56–57 (1987) (discussing lack of a verbatim report in Arizona); Utter & Pitler, *supra*, at 658, 659 (same); Leshy, *supra*, at 41–42 (same); Comment, *Oregon's System of School Finance: A Challenge to Constitutional Principles and Tradition*, 69 OR. L. REV. 295, 329–30 (1990) (no history from Oregon constitutional convention on the meaning of the education clause). Moreover, state judges may ignore historical evidence, believing that the original intent or understanding of the clause is inappropriate in the context of modern conditions and values. Because of these limitations, the common and ordinary meaning of the constitutional language becomes crucial in interpreting education clauses. *See* J. ELY, DEMOCRACY AND DISTRUST 1, 16–18 (1980).

ment, as the words suggest, rests on a constitutional guarantee of a minimum standard of education. Because earlier attempts to categorize state education clauses by the support they offer school finance reform lawsuits did not respect this distinction,[4] this Article will create new categorizations to suggest which state constitutions, by the language of their education clauses, offer more support for each of the two claims. Third, of the two theories, minimum standards arguments do not invite the swarm of logistical, theoretical, and political difficulties that equity arguments do, and thus show greater promise for successful litigation.

Part I details the advantages of making a claim under an education clause rather than an equal protection clause. In contrast to suits brought under the equal protection clause, suits brought under the education clause do not create tension with federal law, and do not carry legal implications for areas unre-

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[4] In a 1974 article, Professor Grubb categorized state constitutions by their ability to provide a ground for a right to bilingual education. *See* Grubb, *Breaking the Language Barrier: The Right to Bilingual Education*, 9 HARV. C.R.-C.L. L. REV. 52, 66–70 (1974). His four categories, which did not include all 50 education clauses, were: (1) weak clauses, which merely call for the establishment of public schools, (2) thorough and efficient clauses, which emphasize the quality of education, (3) clauses which call for advancing education by "all suitable means" or which contain purposive preambles, and (4) clauses which term education "paramount" and impose specific duties on the states. *Id.* Subsequent commentators have relied on the categorization developed by Grubb. *See* Ratner, *A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills*, 63 TEX. L. REV. 777, 814–16 (1985); Note, *To Render Them Safe: The Analysis of State Constitutional Provisions in Public School Finance Reform Litigation*, 75 VA. L. REV. 1639, 1661–70 (1989) (authored by William E. Thro) [hereinafter Note, *To Render Them Safe*]; Thro, *The Third Wave: The Impact of the Montana, Kentucky, and Texas Decisions on the Future of Public School Finance Reform Litigation*, 19 J. LEGAL EDUC. 219, 243–49 n.130 (1990) [hereinafter Thro, *The Third Wave*]. Ratner used Grubb's categories to explain the relative usefulness of state education clauses as a basis for a constitutional duty to provide a basic education. Ratner also extended the classification system to include all of the education clauses. Thro relied on Ratner in both his Note and Article, asserting that the same categorization could explain a clause's usefulness in school finance reform litigation. The West Virginia Supreme Court also grouped state constitutions by quality standards. *See Pauley v. Kelly*, 162 W. Va. at 719–23, 255 S.E.2d at 884–86. The categorizations by Thro and the West Virginia court are virtually identical to those of Grubb and Ratner.

This categorization is inadequate not only because it fails to distinguish between equity and minimium standards arguments, but because it considers only a portion of state constitution education articles. The Arizona education clause, for example, is placed in the weakest category by Ratner, because it provides for a "general and uniform" system of education. *See* Ratner, *supra*, at 815; ARIZ. CONST. art. 11, § 1. However, the categorization ignores section 10 of the same article, which requires the legislature to make such appropriations as shall provide for the development and improvement of all state educational institutions. ARIZ. CONST. art. 11, § 10. The added dimension of section 10 needs to be considered, since it strengthens the Arizona education clause as a basis for school reform litigation.

lated to education. Also, education clauses that call for equal or uniform "systems" do not oblige the court or the plaintiff to prove the link between dollars spent (inputs) and education received (outputs), as the education clause demands only that the *system*, not the *education*, be equal or uniform. Finally, in addition to the equity argument, an education clause allows for a minimum standards argument, an avenue lost to the equal protection litigant.

Part II first describes the mechanics of equity-based claims under the state education clause. It then categorizes the education clauses of state constitutions according to the strength of their language and thus their potential to support an equity-based claim. The categorization includes a discussion of education article lawsuits brought under the equity theory and examines the extent to which courts have been guided by the language in their constitution's education article.

Part III first argues that minimum standards claims under state education clauses have distinct advantages over equity-based claims. Federal and state court opinions have shown that even courts that deny a right to *equal* education acknowledge the right to a *minimum* education. Also, because a minimum standards claim does not demand that every school district be made "equal" to the wealthiest school district, a successful claim need result only in boosted funding to substandard schools; it need not divert funds from richer districts, overthrow the state financing system, or otherwise disrupt local control of schools.

Part III also argues that minimum standards claims lend themselves more easily to the language of "output measures"—education received—than do equity claims. Output measures are preferable currency units for litigants because they sidestep the need to prove that more money produces more education. Output measures are also valuable because a dollar cannot always buy the same amount of education in one district as it can in another. Thus the use of output measures protects students from being guaranteed an "equal or minimum education" that meets the standard in terms of dollars spent, but not in education received. Output measures also excuse the courts from the role of educators or legislators. Courts need only order a certain minimum standard without having to step outside their expertise to dictate how that standard must be attained. Finally, Part III ranks state education clauses according to the strength of their language in supporting a minimum standards claim.

I. STATE EDUCATION CLAUSES AS A LITIGATION TOOL

Every state constitution contains an education clause[5] that generally requires the state legislature to establish some system of free public schools. Typically they contain language establishing the school system, establishing the management of the schools, and guaranteeing that the system is non-sectarian.[6] Most clauses also provide for the disbursement of funds generated by federal property grants, and many include language expressing standards for the educational system. It is this language that is used by plaintiffs seeking school finance reform.

Although education clauses have been invoked in every successful school finance case, they have traditionally served only a supporting role for equal protection claims. Prior to 1989, virtually every school finance case consisted primarily of an equal protection argument; only the New Jersey and Washington state courts invalidated their school finance schemes before 1989 on the basis of their education clauses alone, rather than in conjunction with their equal protection clauses.[7]

Recently, however, there appears to be a marked shift to the use of education clauses alone as a basis for reform. In 1989 and 1990, four state courts relied exclusively on the state education clause in deciding that some form of school finance reform was required.[8] Thus, although "prior to 1989, one was forced to conclude that, by themselves, the education clauses were largely useless as tools for school finance reform," recent decisions suggest that "education clauses, rather than equality

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[5] Some commentators have asserted that Mississippi does not have an education clause because it "permits the legislature not to establish a school system." *Developments*, *supra* note 3, at 1447 n.94; Note, *To Render them Safe*, *supra* note 4, at 1661 n.102, and sources cited therein. Mississippi's education article states in pertinent part: "The Legislature shall, by general law, provide for the establishment, maintenance and support of free public schools upon such conditions and limitations as the Legislature may prescribe." MISS. CONST. art. 8, § 201. This Article interprets this clause as requiring the Mississippi legislature to establish schools, although it does not mandate the type of schools. Therefore, this Article considers all 50 states to have education clauses.

[6] *See, e.g.*, ARIZ. CONST. art. XI, §§ 1–10; N.D. CONST. art. VIII, §§ 1–6.

[7] *Robinson I*, 62 N.J. 473, 303 A.2d 273, *cert. denied*, 414 U.S. 976 (1973); Seattle School Dist. No. 1 v. State, 90 Wash. 2d 476, 585 P.2d 71 (1978); *see also infra* note 43.

[8] *See* Rose v. Council for Better Educ., 790 S.W.2d 186 (Ky. 1989); Helena Elementary School Dist. No. 1 v. State, 236 Mont. 44, 769 P.2d 684 (1989), *modified*, 236 Mont. 60, 784 P.2d 412 (1990); Abbott v. Burke, 119 N.J. 287, 575 A.2d 359 (1990); Edgewood Indep. School Dist. v. Kirby, 777 S.W.2d 391 (Tex. 1989).

guaranty provisions, will be the primary focus of future school finance reform litigation."[9]

A. *Difficulties with Equal Protection Claims*

The movement toward increased dependence on education clauses stems partly from the theoretical and practical difficulties of equal protection claims. Although "no one questions a state court's power to construe state provisions as providing broader protection for individual rights" than the federal Constitution, state courts face theoretical constraints when they construe rights guaranteed in both the state and federal constitutions.[10] Because most state constitutions borrowed heavily from one another and from the federal Constitution,[11] "when a state court is called upon to interpret a provision in its bill of rights, that provision will typically have deep roots which may actually antedate the formation of the republic. This common historical thread would, in logic at least, dictate a uniform interpretation."[12] Thus, a state court decision that outstrips the mandate of federal law "can lead to tensions between the federal and state judicial systems."[13]

Additionally, most state courts have little state history or previous case authority to rely on when interpreting their equal protection clauses.[14] Thus, state courts often conform to federal doctrine when rejecting state equal protection claims.[15] The Georgia Supreme Court, for example, rejected a state equal protection claim in a school finance case, relying entirely on the earlier ruling of the United States Supreme Court and other

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[9] Thro, *The Third Wave*, *supra* note 4, at 240–41; *see also* Note, *After* Rodriguez*: Recent Developments in School Finance Reform*, 44 TAX LAW. 313, 321–36 (1990) [hereinafter Note].

[10] Utter & Pitler, *supra* note 3, at 642; *see also* Ratner, *supra* note 4, at 816.

[11] *See* Note, *To Render Them Safe*, *supra* note 4, at 1659; Miller, *supra* note 3, at 53.

[12] Miller, *supra* note 3, at 53–54.

[13] Utter & Pitler, *supra* note 3, at 640–43; Miller, *supra* note 3, at 53.

[14] *Developments*, *supra* note 3, at 1460; *see also* Miller, *supra* note 3, at 55 ("both the paucity of state-based constitutional law and the very nature of our federal system suggest that state courts should place reliance upon Supreme Court decisions").

[15] *See Developments*, *supra* note 3, at 1450–55; Utter & Pitler, *supra* note 3, at 645–46.

state courts that there was no fundamental right to education.[16] The Supreme Court of Washington, in *Northshore School District No. 47 v. Kinnear*, also accepted federal equal protection precedent as limiting the scope of its equal protection clause.[17]

On a more practical level, a state court that rejects the federal analysis may appear "transparently result-oriented."[18] "[D]ecisions by courts that interpret identically worded or nearly identically worded provisions but that reach radically different results may thereby undermine the legitimacy of state courts in the minds of the lay public."[19]

Furthermore, invalidating a school finance scheme on the basis of equal protection analysis virtually requires that education be declared a fundamental right, or that wealth must be designated a suspect classification.[20] Either ruling would have troubling legal implications.

"The difficulty with fundamental-interest equal protection analysis always has been how to identify a basis other than the

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[16] "Consistency in constitutional adjudication, though not demanded, is preferred. Consistent with the holding of the U.S. Supreme Court in *Rodriguez*, as well as the decisions of the highest courts in a number of sister states, we hold that education per se is not a 'fundamental right'. . . ." McDaniel v. Thomas, 248 Ga. 632, 647, 285 S.E.2d 156, 167 (1981); *Developments*, *supra* note 3, at 1148, 1452–54 ("the Georgia court's attempt to conform to *Rodriguez* is typical of other decisions refusing state equal protection relief").

[17] 84 Wash. 2d 685, 720–21, 530 P.2d 178, 198 (1975). The Washington Supreme Court effectively reversed this decision, in Seattle School Dist. No. 1 v. State, 90 Wash. 2d 476, 585 P.2d 71 (1978).

[18] Miller, *supra* note 3, at 56.

[19] Note, *To Render Them Safe*, *supra* note 4, at 1660. It should be noted, however, that the constraints felt by state courts in interpreting identical state constitutional provisions may be loosening. Especially in the area of pretrial rights of the accused, state courts appear increasingly willing to interpret their state constitutional provisions more broadly than their federal counterparts. *See, e.g.*, State v. Kirchoff, No. 87-603, 1991 Vt. LEXIS 8 (Vt. Jan. 25, 1991) (finding that warrantless search of "open fields" violated state constitution, although not the fourth amendment); Commonwealth v. Edmunds, 1991 Pa. LEXIS 28 (Pa. Feb. 4, 1991) (holding that a "good faith" exception to the exclusionary rule would violate the state constitution).

[20] *See infra* note 43. Some state courts claim to have abandoned the traditional equal protection analysis of the federal courts. However, their analysis remains remarkably similar in its focus on weighing the relative importance of education and the state's rationale for its policies. *See Robinson I*, 62 N.J. at 492, 303 A.2d at 282; Olsen v. State, 276 Or. 9, 20, 554 P.2d 139, 145 (1976) (applying a balancing test which found state justification for the school financing scheme outweighed detriment to children's education). *But see* DuPree v. Alma School Dist. No. 30, 279 Ark. 340, 651 S.W.2d 90 (1983) (invalidating school finance statutes as violative of equal protection without either finding a fundamental right or applying strict scrutiny). It should be noted, however, that the constraints felt by state courts in interpreting identical state constitutional provisions may be loosening. Especially in the area of pretrial rights of the accused, state courts appear increasingly willing to interpret their state constitutional provisions more broadly than their federal counterparts. *See, e.g.*, *Kirchoff*, No. 87-603, 1991 Vt. LEXIS 8; *Edmunds*, 1991 Pa. LEXIS 28.

judge's own druthers for designating particular interests as fundamental."[21] If courts that are inclined to rule education a fundamental right select an objective criterion to justify their choice, they may find the criterion extends fundamental status to an unmanageable number of human needs. For example, a state court that finds education to be a fundamental right, because it is logically inseparable from the fundamental right to vote,[22] may be bound by its logic to find food and shelter no less intertwined with the right to vote, and thus oblige the state to provide these equally as well.[23]

Courts have also been fearful of voiding school finance statutes on the grounds that they discriminate on the basis of wealth. If the state equal protection clause forbids distinctions based on wealth, courts fear that any state program that involves a money classification will be subject to invalidation:

> [I]f local taxation for local expenditures were an unconstitutional method of providing for education then it might be an equally impermissible means of providing other necessary services customarily financed largely from local property taxes, including local police and fire protection, public health and hospitals, and public utility facilities of various kinds.[24]

Perhaps for these reasons, litigation based on equal protection theories, while never very successful, became even less so in the 1980's.[25] Between 1973 and 1980, four state courts overturned their financing mechanisms as violations of state equal protection clauses.[26] However, state equal protection cases brought between 1980 and 1989 were defeated in every state except Arkansas.[27]

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[21] Liebman, *supra* note 2, at 421.

[22] The right to vote is well-established as a fundamental right protected by the equal protection clause of the fourteenth amendment. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533, 556–57 (1964).

[23] *See Robinson I*, 62 N.J. 473, 492, 303 A.2d 273, 283 (1973), *cert. denied*, 414 U.S. 976 (1973); Hornbeck v. Somerset County Bd. of Educ., 295 Md. 597, 648–49, 458 A.2d 758, 785 (Md. 1983); *see also* Liebman, *supra* note 2, at 431 n.281.

[24] *Rodriguez*, 411 U.S. at 54; *see also Robinson I*, 62 N.J. at 492, 303 A.2d at 283 ("[w]ealth is not at all suspect as a basis for raising revenue"); Kukor v. Grover, 148 Wis. 2d 469, 495–96, 436 N.W.2d 568, 579 (1989); *Hornbeck*, 295 Md. at 652, 458 A.2d at 787.

[25] *See* Secter, *Gaps Between Rich, Poor Schools Ignite Legal Fights*, L.A. Times, Nov. 26, 1990, at A1, col. 1.

[26] *See* Thro, *The Third Wave*, *supra* note 4, at 232. The year 1973 is selected as the starting date because in that year the Supreme Court, in *Rodriguez*, 411 U.S. 1, denied any claims under the federal Constitution. *See supra* note 2.

[27] DuPree v. Alma School Dist. No. 30, 279 Ark. 340, 651 S.W.2d 90 (1983); Thro, *The Third Wave*, *supra* note 4, at 232 n.62.

B. *Advantages of State Education Clauses*

"Given the adverse posture of the courts, there appears to be little hope for equality in education apportionment except by abandoning apparently ineffective fourteenth amendment and state equal protection arguments in favor of state constitutional language . . . found in many state education articles."[28] Reform based on the state education clause does not suffer from the disadvantages of reform which relies on equal protection arguments. Education, unlike personal liberties, has always been the primary responsibility of states, not the federal government.[29] In *San Antonio Independent School District v. Rodriguez*, the Supreme Court made it clear that fundamental public education reforms are "matters reserved for the legislative processes of the various States."[30] More importantly, the federal Constitution does not contain an education clause, so state courts have neither the obligation nor the prerogative to follow federal interpretation.[31] As a result, state court decisions based on the education clause "create no tension with federal law."[32] Additionally, courts may be more likely to require education reform under an education clause because "a decision under the education clause does not carry the same implications for other areas of the law as a decision under the equality guaranty provision."[33]

Perhaps the greatest theoretical advantage of equity claims based on education clauses is that they can sidestep the most intractable problem of public school finance reform litigation—the need to prove the link between dollars spent and quality of education received. Education can be defined by either input or output measures.[34] Inputs are the dollars spent or the educa-

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[28] Thompson, *Equal Protection Reanalysis*, *supra* note 2, at 326–27.

[29] *See* Neuborne, *Foreward: State Constitutions and the Evolution of Positive Rights*, 20 RUTGERS L.J. 881, 898 (1989); Ratner, *supra* note 4, at 817.

[30] 411 U.S. at 58; *see also* Wisconsin v. Yoder, 406 U.S. 205, 213 (1972) ("[p]roviding public schools ranks at the very apex of the function of a State").

[31] "Because it is impossible to read an education clause and federal constitutional provisions to embody the same literal content, a state court interpreting an education clause must develop the clause's independent meaning." *Developments*, *supra* note 3, at 1448.

[32] Utter & Pitler, *supra* note 3, at 643.

[33] Thro, *The Third Wave*, *supra* note 4, at 241.

[34] Another measure of equity described in school finance cases is taxpayer equity. "'Taxpayer equity' is defined as freeing the tie between 'capacity'—the district's per pupil property values, and 'effort'—the district's tax rate." Levin, *supra* note 1, at 1113. This would be attained through a "power equalization" formula. "Local districts would

tional resources those dollars purchase, such as student/teacher ratios, facilities or equipment. Output is the level of education received. Educational output is not as obviously quantifiable as input, but is most easily measured by student achievement tests.[35]

Perhaps because of their conceptual simplicity, input measures have been favored by the courts in equity cases, presenting plaintiffs with a difficult burden.[36] Educators, social scientists, and courts have been unable to agree on the correlation between educational expenditures and the quality of education.[37]

Courts that have found a link between education and money have relied on common sense and practical considerations rather than expert testimony.[38] The courts generally reason that unless every local school district spending more than the lowest dollar-per-pupil expenditures in the state were wasting the local taxpayers' money, there must be some connection between money and educational quality. Thus, courts rely on evidence "that the

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retain their power to set budgets and levy taxes, but the state would give an equalizing payment to the poorer districts so that every district in the state could raise the same number of dollars per student at whatever levy rate it adopts." Henke, *Financing Public Schools in California: The Aftermath of* Serrano v. Priest *and Proposition 13*, 21 U.S.F. L. REV. 1, 12 (1986); *see Serrano II*, 18 Cal. 3d at 747, 557 P.2d at 939, 135 Cal. Rptr. at 355 (1976). This standard is "concerned more with insuring taxpayer equity and district 'choice' rather than equalizing either educational inputs or outcomes for all children in the state." Levin, *supra* note 1, at 1113. Because it does not focus directly on educational opportunity, taxpayer equity is more likely to be implicated in an equal protection claim than a claim based on an education clause.

[35] For an explanation of input/output measures, see Levin, *supra* note 1, at 1107; Liebman, *supra* note 2, at 431 n.281.

[36] In *Serrano II*, for example, the district court judgment, upheld by the state supreme court, required that the state had to reduce wealth-related disparities in per pupil expenditures to "considerably less than $100 per pupil." 18 Cal. 3d at 749 n.21, P.2d at 940 n.21, 135 Cal. Rptr. at 356 n.21.

Size of classes, teacher qualifications, curriculum offerings, remedial services, facilities, materials, and equipment also are frequently used measures. *See, e.g.*, Horton v. Meskill, 172 Conn. 615, 634, 376 A.2d 359, 368 (1977) [hereinafter *Horton I*]; DuPree v. Alma School Dist. No. 30, 279 Ark. 340, 344, 651 S.W.2d 90, 92 (1983).

[37] "[T]here is little undisputed empirical evidence as to the relationship between input disparities and educational consequences." Levin, *supra* note 1, at 1108–09; Secter, *supra* note 25; *see, e.g.*, Hanushek, *Impact of Differential Expenditures on School Performance*, EDUC. RES. May 1989, at 45; Coleman, *The Good School District: A Critical Examination of the Adequacy of Student Achievement and Per Pupil Expenditures as Measures of School District Effectiveness*, 12 J. EDUC. FIN. 71 (1986); King, MacPhail-Wilcox & Taylor, *Relations Among Wealth, Need, Resource Allocation and Pupil Achievement Across North Carolina*, J. RES. & DEV. IN EDUC., Summer 1989, at 52; D. CARD & A. KRUEGER, DOES SCHOOL QUALITY MATTER? RETURNS TO EDUCATION AND THE CHARACTERISTICS OF PUBLIC SCHOOLS IN THE UNITED STATES 1 (National Bureau of Economic Research Working Paper No. 3358, 1990).

[38] *See, e.g.*, Washakie County School Dist. No. 1 v. Herschler, 606 P.2d 310, 334 (Wyo. 1980), *cert. denied*, 449 U.S. 824 (1980) ("Equality of dollar input is manageable. There is no other viable criterion or test that the appellees show to exist, and our exploration of the subject has resulted only in discovery of a quagmire of speculation, so slippery that it evades any secure grasp for judicial decision making.").

wealthier school districts are not funding frills or unnecessary educational expenses,"[39] to find "a distinct relationship between cost and the quality of educational opportunities afforded."[40]

However, other courts have relied on experts' disagreement to find that plaintiffs have failed to prove the link between money invested and education received.[41] They reason that equal protection guarantees equal education, not equal money; consequently, unequal funding does not prove a constitutional violation. This reasoning has defeated many equal protection claims. Even if courts are inclined to rule the financing system unconstitutional, they may balk at ordering more spending without proof that it will remedy the inequities.

Equity claims based on education clauses may sidestep this tangle because many clauses call for an equal, uniform, or efficient "system of public schools." Unlike equal protection arguments, education clause arguments do not demand an equal *education*, but an equal *system*, which involves facilities, curriculum offerings, teacher-student ratios, and money. Even if expenditure differences do not correspond to the education received, they do represent substantial differences in the system, and that is precisely what is forbidden by the language in the constitution.

Finally, education clause claims are more versatile than equal protection claims. They can provide a basis for arguing not only that the schools should be equal, but that schools must meet a minimum quality standard. As will be discussed later in greater detail, such standards claims may provide a stronger argument for court-imposed finance reform.[42]

II. Education Articles Under an Equity Theory

A. *Equity Claim Strategies*

Education clauses provide a basis independent of equal protection clauses for rejecting a state's school finance scheme on

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[39] Helena Elementary School Dist. No. 1 v. State, 236 Mont. 44, 54, 769 P.2d 684, 690 (1989), *modified*, 236 Mont. 60, 784 P.2d 412 (1990).

[40] *Serrano II*, 18 Cal. 3d at 748, 557 P.2d at 939, 135 Cal. Rptr. at 355 (1976); *see also Washakie County*, 606 P.2d at 334; Edgewood Indep. School Dist. v. Kirby, 777 S.W.2d 391, 393 (Tex. 1989); Abbott v. Burke, 119 N.J. 287, 295–96, 575 A.2d 359, 363 (1990).

[41] *See, e.g.*, Thompson v. Engelking, 96 Idaho 793, 799–800, 537 P.2d 635, 641–42 (1975); Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005, 1018 (Colo. 1982); Danson v. Casey, 484 Pa. 415, 427, 399 A.2d 360, 366 (1979).

[42] *See infra* text accompanying notes 87–111.

equity grounds.[43] The language in the constitution itself may require that the state provide an equal education to all students.[44] The Supreme Courts of three states, Kentucky, Montana, and Texas, have invalidated their school finance statutes by ruling that their state education clauses required equality.[45]

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[43] Although it is not the focus of this Article, education clauses are also used in conjunction with equal protection clauses, serving primarily as a basis for finding that education is a fundamental right subject to strict scrutiny review. *See* Note, *To Render Them Safe*, *supra* note 2, at 1647 (most state courts follow federal equal protection analysis, first determining whether there is a fundamental right or suspect classification and then applying the appropriate level of scrutiny). Five states have overturned their state school financing statutes based on their equal protection clauses: Connecticut, California, West Virginia, Wyoming, and Arkansas. In doing so, all the courts but Arkansas relied on their state education clause in finding that education was a fundamental right. *Serrano II*, 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976); *Horton I*, 172 Conn. 615, 376 A.2d 359 (1977); Pauley v. Kelly, 162 W. Va. 672, 255 S.E.2d 859 (1979); Washakie County School Dist. No. 1 v. Herschler, 606 P.2d 310 (Wyo. 1980), *cert. denied*, 449 U.S. 824 (1980). In general, courts use a number of approaches in finding a fundamental right based on the education clause. Most courts find a fundamental right by examining the education clause itself, its relationship to the constitution as a whole, and constitutional history to determine whether the document itself implies and the framers intended education to be a fundamental right. *See, e.g.*, *Horton I*, 172 Conn. 615, 653–55, 376 A.2d 359, 376–77 (1977) (Bogdanski, J., concurring); Pauley v. Kelley, 162 W. Va. 672, 255 S.E.2d 859 (1979); *Washakie County*, 606 P.2d at 310. Education clauses that specifically state that education is fundamental or primary easily lend themselves to this type of analysis. *See, e.g.*, ILL. CONST. art. X, § 1 (fundamental); GA. CONST. art. VIII, § 1 (primary); WASH. CONST. art. IX, § 1 (paramount).

At least one court follows the test outlined in *Rodriguez*, 411 U.S. at 33, that a right is fundamental if it is explicitly or implicitly guaranteed by the federal Constitution. *See* Bryant v. Continental Conveyor Equip. Co., 156 Ariz. 193, 196, 751 P.2d 509, 512 (1988). Under this test the mere existence of an education clause is dispositive.

Another criterion state courts have applied for assessing fundamentality is how close a nexus the right has with other constitutionally protected rights. *See, e.g.*, Serrano v. Priest, 5 Cal. 3d 584, 607–08, 487 P.2d 1241, 1258, 96 Cal. Rptr. 601, 618 (1971) [hereinafter *Serrano I*]. Fourteen state constitutions contain language explicitly expressing the importance of education in preserving democracy and the rights and liberties of the people. *See* ARK. CONST. art. 14, § 1; IDAHO CONST. art. IX, § 1; IND. CONST. art. 8, § 1; ME. CONST. art. VIII, pt. 1, § 1; MICH. CONST. art. VIII, § 1; MINN. CONST. art. XIII, § 1; MO. CONST. art. IX, § 1(a); R.I. CONST. art. XII, § 1; MASS. CONST., pt. 2, ch. V, § II; N.H. CONST., pt. 2, art. 83; N.C. CONST. art. IX, § 1; N.D. CONST. art. VIII, § 1; S.D. CONST. art. VIII, § 1; *see also* Wisconsin v. Yoder, 406 U.S. 205, 225 (1972) (since the 1700's, it has been recognized that citizens must be educated in basic skills "as a bulwark of a free people against tyranny").

One state court, the Arkansas Supreme Court, also relied on its state education clause in finding that its school financing statutes violated its equal protection clause, although it never decided whether education was a fundamental right. It simply looked to the education clause as reinforcing the decision that the equal protection clause applied. *DuPree*, 279 Ark. at 345, 651 S.W.2d at 93.

[44] "All states have education clauses whose language should be scrutinized closely to determine if they may be interpreted in such a way as to force substantial uniformity." Thompson, *Equal Protection Reanalysis*, *supra* note 2, at 331.

[45] Rose v. Council for Better Educ., 790 S.W.2d 186 (Ky. 1989); Helena Elementary School Dist. No. 1 v. State, 236 Mont. 44, 769 P.2d 684 (1989), *modified*, 236 Mont. 60, 784 P.2d 412 (1990); Edgewood Indep. School Dist. v. Kirby, 777 S.W.2d 391 (Tex. 1989).

Under an equity theory, plaintiffs argue that the education clause of the state constitution mandates some measure of equality that the state financing laws fail to provide.[46] The remedy they seek is substantial equality of funding for all school districts. Because school funding is based on local property taxes[47] and the property wealth of each school district varies, school funding is inevitably unequal.[48] If the litigants establish that the inequities violate the constitutional limits, the courts should invalidate the existing financing scheme, replacing it with a regime that does not rely on local property taxes.[49]

B. *Categorization of Education Clauses by Their Support for an Equity Claim*

The state constitutions may be categorized according to the strength of their support for an equity claim.[50]

[46] For a brief historical account of school finance inequities, see Note, *Unfulfilled Promises: School Finance Remedies and State Courts*, 104 HARV. L. REV. 1072, 1073–75 (1991).

[47] "With a single exception [Hawaii], each state mandates that local school districts raise much of the money necessary for operations through property taxes." Note, *To Render Them Safe*, *supra* note 4, at 1647.

Although all states have some method of providing minimum funding and some measure of equalization between property-rich and property-poor districts, funding still varies widely. *See id.* at 1648 n.36; Thro, *The Third Wave*, *supra* note 4, at 219–20 n.3 (describing the three generic financing methods used by states to minimize the disparity between local districts: flat rate grants of a certain amount per pupil or per teacher; a foundation program which guarantees state funding up to a certain level; and enacting power of equalization). Although the description in the above sources is useful, it does not begin to explain the great variety in school financing. First, most states adopt some mixture of the various programs. *See, e.g.*, *Washakie County*, 606 P.2d at 310. Second, the level of financing controls the effectiveness of any school finance plan. For example, Kentucky had an equalization program, but the money limit was so low that equalization aid had no impact. *See Rose*, 790 S.W.2d 186. Finally, even theoretically advanced and fully funded state finance schemes, such as Arizona's, defeat their own effectiveness by permitting finance options outside the plan. *See* ARIZ. REV. STAT. ANN. §§ 15-901 to -977 (1984).

Additionally, most of the equalization aid does not cover capital needs. Twenty-two states provide no assistance to local school districts for facility needs. D. THOMPSON, W. CAMP, J. HORN & G.K. STEWART, STATE INVOLVEMENT IN CAPITAL OUTLAY FINANCING: POLICY IMPLICATIONS FOR THE FUTURE 4 (1988).

[48] "Because a local school district that includes areas with predominantly high property values can typically raise more revenue from property taxes than a district with predominately low property values, wealth effectively determines the level of funding for the local schools." Note, *To Render Them Safe*, *supra* note 4, at 1647–48; *see also Horton I*, 172 Conn. at 628–37, 376 A.2d at 365–69; *DuPree*, 279 Ark. at 344, 349, 651 S.W.2d at 92, 95, *Washakie County*, 606 P.2d at 324–32.

[49] *See, e.g.*, *Washakie County*, 606 P.2d at 335 ("We are not attempting to isolate any particular statute as unconstitutional because it denies equal protection but we examine the entire system from organization of school districts through tax bases and levies and distribution of foundation funds, all of which have a bearing upon the disparity which exists.").

[50] One additional factor not considered in the categorizations in this Article may be

1. Constitutions Requiring "Equality"

The first group of state constitutions—those of Montana, Louisiana, New Mexico, and North Carolina—provide the strongest commitment to equality, by actually using the word "equality" in defining the state's obligation. Montana's education clause requires the state to provide a "system of education which will develop the full educational potential of each person. Equality of educational opportunity is guaranteed to each person of the state."[51] The Montana Supreme Court simply looked to the plain meaning of these words and held that each person in the state was guaranteed equality of educational opportunity as measured by per-pupil expenditures.[52]

The preamble to article VIII of the Louisiana constitution states that the public educational system is "designed to promote excellence in order that every individual may be afforded an equal opportunity to develop to his full potential."[53] Because it is part of the preamble, however, this strong language may be considered merely aspirational. The provision was hotly debated in the constitutional convention, and eventually was relegated to the preamble for fear that it would "paralyze education" if it were enforceable.[54] The Louisiana Supreme Court has not yet determined whether this preamble confers any positive, enforceable rights upon the citizens of the state.[55]

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useful to a litigant. Virtually all the state constitutions describe what should be done with the money earned on the lands set aside for school use. Many of the state constitutions, even though they do not contain any general equality language, mandate that these funds be distributed among districts on an equitable basis. *See, e.g.*, CONN. CONST. art. VIII, § 4 (the fund shall be "for the equal benefit of all the people"); MISS. CONST. art. 8, § 206 (the fund shall be distributed "in proportion to the number of educable children in each"); S.D. CONST. art. VIII, § 3 (the fund shall be distributed "in proportion to the number of children"). It could be argued that these specific mandates indicate more generally how the writers of the constitutions intended the education clauses to be interpreted, especially if at the time they believed that this income would be more than enough to finance the schools.

[51] MONT. CONST. art. X, § 1(1).

[52] Helena Elementary School Dist. No. 1 v. State, 236 Mont. 44, 52–55, 769 P.2d 684, 689–90 (1989), *modified*, 236 Mont. 60, 784 P.2d 412 (1990). The Montana Constitution also states that the legislature "shall fund and distribute in an equitable manner to the school districts the state's share of the cost of the basic elementary and secondary school system." MONT. CONST. art. X, § 1(3).

[53] LA. CONST. art. VIII, preamble.

[54] Hugg, *Federalism's Full Circle: Relief for Education Discrimination*, 35 LOY. L. REV. 13, 41–46 (1989).

[55] *Id.*

The New Mexico constitution also has a specific equality clause, but it is limited to Hispanic children. Section 10 of article XII states that "[c]hildren of Spanish descent in the state of New Mexico . . . shall forever enjoy perfect equality with other children in all public schools."[56] Although appearing limited in scope, the clause may have as broad an impact as a more general clause. Since school finance inequities occur primarily in minority schools, it is likely that a financing regime that would provide equality between Latinos and Anglos in New Mexico's public schools would provide equality to all children.[57]

North Carolina's constitution requires that the General Assembly provide a general and uniform system of free public schools "wherein equal opportunities shall be provided for all students."[58] Although this language matches the strongest of any state constitution, the North Carolina Appellate Court has found that the state is not required to "provide identical opportunities to each and every student."[59] The court stated that "[m]ore importance is to be placed upon the intent and purpose of a provision than upon the actual language used."[60] The framers' intention, according to the court, was to "reflect and preserve the then current method of financing the State's public schools," which did not provide equal educational opportunity.[61] The court decided that the only plausible way to interpret the clause was as a change from the "separate but equal" provision that it replaced. Mandating equal opportunities was meant only to "emphasiz[e] that the days of 'separate but equal' education in North Carolina were over."[62]

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[56] N.M. CONST. art. XII, § 10.

[57] *See, e.g.*, Kirby v. Edgewood Indep. School Dist., 761 S.W.2d 859, 868 (Tex. Ct. App. 1988) (Gammage, J., dissenting), *rev'd*, 777 S.W.2d 391 (Tex. 1989) (stating that the low property wealth districts suffering under the school finance statutes are primarily Hispanic); *Serrano I*, 5 Cal. 3d at 590 n.1, 487 P.2d at 1244 n.1, 96 Cal. Rptr. at 601 n.1 (complaint alleging that a disproportionate number of minority children attend schools which provide "relatively inferior educational opportunities"); Robinson v. Cahill, 118 N.J. Super. 223, 228, 287 A.2d 187, 189 n.3 (N.J. Super. Ct. Law Div. 1972) (original complaint included claim of de facto racial discrimination and sought to redraw district boundaries); Abbott v. Burke, 119 N.J. 287, 342, 575, A.2d 359, 387 (1990) ("the overwhelming proportion of all minorities in the state are educated in the[] poorer urban districts"); *see also* Chambers, *supra* note 2, at 55–59; Liebman, *supra* note 2, at 370–81.

[58] N.C. CONST. art. IX, § 2(1).

[59] Britt v. North Carolina State Bd. of Educ., 86 N.C. App. 282, 289, 357 S.E.2d 432, 436 (1987), *cert. denied*, 320 N.C. 790, 361 S.E.2d 71 (1987) (internal quotations omitted).

[60] *Id.* at 286, 357 S.E.2d at 434.

[61] *Id.* at 287, 357 S.E.2d at 435.

[62] *Id.* at 289, 357 S.E.2d at 436.

2. Constitutions Requiring "Uniformity"

The second grouping consists of state constitutions that provide for a "uniform" public school system.[63] Florida's constitution, which requires that "[a]dequate provision shall be made by law for a uniform system of free public schools," is a typical example.[64]

"Uniform" is defined both in the dictionary and by many state courts as something approximating identical or equal.[65] The Wisconsin court concluded that uniform "could only have been intended to assure that those resources distributed equally on a per-pupil basis were applied in such a manner as to assure that the 'character' of instruction was as uniform as practicable."[66] The court viewed "character" as encompassing items such as teacher certification standards, minimum number of school days, and standard school curriculum.[67]

The Kentucky court found that an efficient system required equality and used equality interchangeably with uniformity. "The system of common schools must be substantially *uniform* throughout the state. Each child, every child, in this Commonwealth must be provided with an equal opportunity to have an

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[63] Many of the state constitutions containing the word "uniform" also require that the school system be "general," which is arguably also a requirement of some degree of equality. The Texas Supreme Court interpreted "general" as mandating a more equal public school system. The constitutional framers and ratifiers "stated clearly that the purpose of an efficient system was to provide for a '*general* diffusion of knowledge.' The present system, by contrast, provides not for a diffusion that is general, but for one that is limited and unbalanced. The resultant inequalities are thus directly contrary to the constitutional vision of efficiency." Edgewood Indep. School Dist. v. Kirby, 777 S.W.2d 391, 396 (Tex. 1989) (emphasis in original).

[64] FLA. CONST. art. IX, § 1; *see also* COLO. CONST. art. IX, § 2; ARIZ. CONST. art. 11, § 1; IDAHO CONST. art. IX, § 1; MINN. CONST. art. XIII, § 1; NEV. CONST. art. 11, § 2; OREGON CONST. art. VIII, § 3; WIS. CONST. art. X, § 3; N.D. CONST. art. VIII, § 2; S.D. CONST. art. VIII, § 1. The South Dakota Constitution also states that its system is "equally open to all." S.D. CONST. art. VIII, § 1. Presumably this language means that everyone in the state may attend school, rather than that all schools must be of equal quality.

[65] Uniform is defined as "having always the same form, manner, or degree: not varying or variable." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY (1988).

[66] Kukor v. Grover, 148 Wis. 2d at 492, 436 N.W.2d at 577 (1989). The Wisconsin Constitution requires that schools be "as nearly uniform as practicable." WIS. CONST. art. X, § 3. The Wisconsin court interpreted this provision in the face of a rather unusual challenge. The plaintiffs in *Kukor* were arguing that because students have different educational needs, the finance scheme which equalized on a per-pupil basis was not providing an equal education. The dissent agreed with the majority that the education clause's uniformity requirement mandated equality, but argued that the equality required was equality of educational opportunity, not of spending. *Id.* at 516–17, 436 N.W.2d at 588.

[67] *Id.* at 492–93, 436 N.W.2d at 577–78.

adequate education."[68] In Texas the court used "uniform" and "equal" interchangeably to mean "exactly the same distribution of funds."[69] In North Carolina, too, the appellate court used "uniform" to mean "equal." The North Carolina court stated that equality of opportunity would require absolute equality between all school systems and that the North Carolina constitution "clearly does not contemplate such absolute uniformity across the State."[70]

The primary obstacle litigants have faced in persuading a court that the uniform clause requires equal spending is not in proving that "uniform" means "equal," but in arguing that the equality required is in spending. In Washington, for instance, the court held that a general and uniform school system is one with "reasonably standardized educational and instructional facilities and opportunities."[71] It must be "a system administered with that degree of uniformity which enables a child to transfer from one district to another within the same grade without substantial loss of credit or standing."[72] Similarly, the California court used the term "uniform" as "uniform in terms of the prescribed course of study and educational progression from grade to grade."[73] The Arizona court too found that the uniformity requirement was met if the school system included uniform course requirements, textbooks, and teacher qualifications.[74]

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[68] Rose v. Council for Better Educ., 790 S.W.2d 186, 211 (Ky. 1989) (emphasis added).

[69] Edgewood Indep. School Dist. v. Kirby, 777 S.W.2d 391, 396 (Tex. 1989).

[70] Britt v. North Carolina State Bd. of Educ., 86 N.C. App. 282, 289, 357 S.E.2d 432, 436 (1987), *cert. denied*, 320 N.C. 790, 361 S.E.2d 71 (1987).

[71] Northshore School Dist. No. 47 v. Kinnear, 84 Wash. 2d 685, 729, 530 P.2d 178, 202 (1975).

[72] *Id.*

[73] Serrano I, 5 Cal. 3d at 596, 487 P.2d at 1249, 96 Cal. Rptr. at 609; *see also* WYO. CONST. art. 7, § 1. Wyoming's constitution is particularly susceptible to the interpretation that the uniformity standard applies to curriculum requirements only, because its constitution requires "complete and uniform system of public instruction" only, rather than a uniform public school system. *Id.* Conversely, North Dakota's constitution strongly suggests that uniformity in curriculum requirements is not the correct interpretation. The first of North Dakota's two uniform provisions specifies that the "legislative assembly shall provide for a uniform system of free public schools." N.D. CONST. art. VIII, § 2. In a later section, the constitution mandates that the legislative assembly "secure a reasonable degree of uniformity in course of study." *Id.* § 4. To avoid being redundant, "uniform" in section 2 must apply to something other than uniformity in course of study.

[74] Shofstall v. Hollins, 110 Ariz. 88, 515 P.2d 590 (1973); *see also* Carpio v. Tucscon High School Dist. No. 1, 111 Ariz. 127, 130, 524 P.2d 948, 951 (1974). The Colorado court required only that the General Assembly "establish guidelines for a thorough and uniform system of public schools" to provide a thorough and uniform system. Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005, 1018–19 (Colo. 1982).

3. Constitutions Requiring "Efficiency"

The third group of state constitutional provisions requires an "efficient" school system.[75] This language places some obligation on the state, although it does not demand equality.[76] Some courts have found, however, that "efficient" does require equality. The Texas court found that "thorough and efficient" meant that each child should be afforded a substantially equal opportunity to educational funds.[77] The court looked to the framers' intent and dictionary definitions of "efficient," and found that "'[e]fficient' conveys the meaning of effective or productive of results and connotes the use of resources so as to produce results with little waste."[78] It concluded that "it is apparent from the historical record that those who drafted and ratified article VII, section 1 never contemplated the possibility that such gross inequalities could exist within an 'efficient' system."[79]

The Kentucky court also found that an "efficient system" requirement mandated equality. It held that "[e]ach child, every child, in this Commonwealth must be provided with an equal opportunity to have an adequate education. Equality is the key word here."[80] Other courts, however, have found that "thorough

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[75] *See* ARK. CONST. art. XIV, § 1; ILL. CONST. art. X, § 1; KY. CONST. § 183 ; MD. CONST. art. VIII, § 1; OHIO CONST. art. VI, § 2; PA. CONST. art. III, § 14; TEX. CONST. art. VII, § 1; W. VA. CONST. art. XII, § 1; DEL. CONST. art. X, § 1; N.J. CONST. art. VIII, § IV (1).

[76] Clauses containing the word "uniform" are categorized as providing a greater basis for equality than clauses requiring a "thorough and efficient" school system for two reasons. First, the plain meaning of "uniform" is closer to "equal" than is the plain meaning of "efficient." Second, the use of uniform in state court decisions supports that interpretation. States finding that "efficient" means equal have included uniformity as one of the defining characteristics of an "efficient" system. *See* Rose v. Council for Better Educ., 790 S.W.2d 186, 210, 212 (Ky. 1989); Edgewood Indep. School Dist. v. Kirby, 777 S.W.2d 391, 396 (Tex. 1989). States finding that efficient does not require equality have also considered "uniform" to be a more stringent obligation. For example, the Maryland court found that the constitution had required at one time that the system of schools be uniform, but had since abandoned that requirement. "[T]he words 'thorough and efficient,' in the context of their usage in § 1, are not the equivalent of 'uniform.'" Hornbeck v. Somerset County Bd. of Educ., 295 Md. 597, 632, 458 A.2d 758, 776 (1983). According to the court, "thorough and efficient" did not require the legislature to fund and operate the public school system so that "the same amounts of money must be allocated and spent, per pupil, in every school district." *Id.*; *see also* Danson v. Casey, 484 Pa. 415, 424–26, 399 A.2d 360, 365–67 (1979) (finding uniformity not required and that the state financing scheme is constitutional as long as it is "reasonably related to the maintenance and support of a system of [thorough and efficient] public education").

[77] *Edgewood*, 777 S.W.2d at 397.

[78] *Id.* at 395.

[79] *Id.*

[80] *Rose*, 790 S.W.2d at 211.

and efficient" does not require a system of equal educational opportunity. The Supreme Court of Ohio, for example, found that only an absolute deprivation of education would violate the state's "thorough and efficient" constitutional provision.[81]

4. Constitutions Not Requiring Any Equality Standard

Nearly half of all state constitutions require or encourage the provision of a state education system, but provide no basis in their language for finding a constitutional obligation to achieve equality in public schools.[82] An example is Alaska's constitution: "The legislature shall by general law establish and maintain a system of public schools open to all children of the state, and may provide for other public educational institutions."[83]

Other state constitutions in this category have more unusual clauses, but likewise contain no wording that suggests an equality requirement. Georgia requires "[t]he provision of an adequate public education."[84] Maine limits the legislature's obligation to "requir[ing] the several towns to make suitable provision, at their own expense, for the support and maintenance of public

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[81] Board of Educ. v. Walter, 58 Ohio St. 2d 368, 390 N.E.2d 813 (1979), *cert. denied*, 444 U.S. 1015 (1980); *see also* Pauley v. Kelly, 162 W. Va. 672, 692, 255 S.E.2d 859, 870 (1979) ("equality of funding has not been required in the majority of states with mandated thorough and efficient school systems"); Danson v. Casey, 484 Pa. 415, 399 A.2d 360 (1979) (finding that "thorough and efficient" did not require absolute equality in educational services or expenditures, but rather equality in the relative sense of adapting to local conditions).

[82] Plaintiffs in California argued that the word "system" itself implied some measure of equality in the school system. Under California law the word system "implie[d] a 'unity of purpose as well as an entirety of operation.'" *Serrano I*, 5 Cal. 3d at 595, 487 P.2d at 1248, 96 Cal. Rptr. at 608–09. Plaintiffs argued that the school financing method was unconstitutional because no unity existed in the schools. Instead, they claimed, the financing scheme produced separate and distinct systems, each offering an educational program which varied with the relative wealth of the district's residents. *Id.* The California Supreme Court rejected this argument, contending that section 5 of article IX, which provides for a system of common schools, "should not be construed to apply to school financing" or it would clash with section 6, which authorizes the levying of local taxes. *Id.* at 596, 487 P.2d at 1249, 96 Cal. Rptr. at 609.

[83] ALASKA CONST. art. VII, § 1; *see also* MICH. CONST. art. VIII, § 2; CAL. CONST. art. IX, § 5. Connecticut's constitution offers even less: "There shall always be free public elementary and secondary schools in the state." CONN. CONST. art. VIII, § 1. A number of other constitutions similarly call for the establishment of public schools only, without mandating any equality standards. *See* ALA. CONST. § 256; HAW. CONST. art. X, § 1; KAN. CONST. art. 6, § 1; MISS. CONST. art. 8, § 201; MO. CONST. art. IX, § 1 (b); NEB. CONST. art.VII, § 1; N.Y. CONST. art. XI, § 1(a); OKLA. CONST. art. XIII, § 1; S.C. CONST. art. XI, § 3; TENN. CONST. art. XI, § 12; UTAH CONST. art. X, § 1; VA. CONST. art. VIII, § 1.

[84] GA. CONST. art. VIII, § 1, para. 1.

schools."[85] Iowa's constitution establishes only broad obligations: "the General Assembly shall encourage, by all suitable means, the promotion of intellectual, scientific, moral, and agricultural improvement."[86] Litigants seeking educational equity in states whose education clauses provide no leverage for equity-based claims might find equal protection claims more promising, despite the legal obstacles such claims present.

III. Education Articles Under a Standards Theory

The standards claim has been less utilized than the equity claim, but may show greater promise for successful school reform.[87] Under a standards theory, a plaintiff argues that the education article of the state constitution mandates some absolute minimum level of education that certain districts are failing to meet.

A. *Advantages of Standards Claims*

A standards claim enjoys both theoretical and practical advantages over an equity claim. Although the federal courts have ruled that equality in school financing is not required under the federal equal protection clause, they have suggested there may be a minimum standard of education that cannot be denied. The Supreme Court stated in *Rodriguez* that "[e]ven if it were conceded that some identifiable quantum of education is . . . constitutionally protected," the plaintiffs could not succeed in this case because they were unable to show that the Texas school finance system "fail[ed] to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoy-

[85] Me. Const. art. 8, pt. 1, § 1.

[86] Iowa Const. art. IX, 2d div., § 3; *see also* R.I. Const. art. XII, § 1; Mass. Const. pt. 2, ch. V., § II; N.H. Const. pt. 2, art. 83; Vt. Const. ch. II, § 68.

[87] Four state courts have overturned their state finance schemes partly in response to a minimum standards challenge. Rose v. Council for Better Educ., 790 S.W.2d 186 (Ky. 1989); Abbott v. Burke, 119 N.J. 287, 575 A.2d 359 (1990); Seattle School Dist. No. 1 v. State, 90 Wash. 2d 475, 585 P.2d 71 (1978); Pauley v. Kelley, 162 W. Va. 672, 255 S.E.2d 859 (1979). None of these decisions were purely minimum standards decisions; rather, the courts blended equity and minimum standards rationales. Also, because of the difficulty in finding an objective measure of educational quality, two courts implied a quality standard by comparing education among districts. *Abbott*, 119 N.J. at 358–64, 575 A.2d at 395–97 (1990); *Rose*, 790 S.W.2d at 186. None of the courts adopted the objective, quantifiable education standards that could provide the chief advantage of standards claims. *See infra* notes 98–111 and accompanying text.

ment of the rights of speech and of full participation in the political process."[88]

State courts have made similar arguments in denying equity claims. In *Hornbeck v. Somerset County Board of Education*,[89] the Maryland court rejected the plaintiffs' equity claims, holding that the "thorough and efficient" education clause was never intended to ensure uniformity or even rough parity between funding available for education in different school districts. The court recognized, however, that the Maryland constitution does require the state to establish "a statewide system of education, . . . as will provide the State's youth with a basic public school education."[90] Because the plaintiffs did not argue that "the school in any district failed to provide an adequate education measured by contemporary educational standards," the court was not forced to define a minimum standard.[91]

Because minimum standards claims call for a minimum, not an equal, education, a court remedy can mandate additional funding or other measures for substandard districts without invalidating the state financing scheme, or intruding on healthy school districts. This gives minimum standards claims three advantages over equity-based claims. Minimum standards claims are less likely to disrupt local control of schools, pit the judiciary against the legislature, or require legislators to enact a funding scheme that thwarts the interests of their wealthier constituents.

The Supreme Court first recognized the right to local control in *Rodriguez*:

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[88] 411 U.S. at 36–37. "Although the Court [in *Rodriguez*] characterized the requisite degree of injury as 'absolute deprivation of education,' it implicitly defined education as adequate education." Ratner, *supra* note 4, at 831; L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-650, at 1122–24 (1978). Federal courts continue to hint that if plaintiffs prove they are not receiving a minimally adequate education, they would be entitled to heightened scrutiny under the equal protection clause. *See* School Bd. of Livingston v. Louisana State Bd. of Educ., 830 F.2d 563, 568 (5th Cir. 1987), *cert. denied*, 487 U.S. 1223 (1988). No federal court has ventured to define what a minimally adequate education comprises.

[89] 295 Md. at 639, 458 A.2d at 780.

[90] *Id.* at 632, 458 A.2d at 776.

[91] *Id.* at 639, 458 A.2d at 780; *see also* Kukor v. Grover, 148 Wis. 2d 498, 436 N.W.2d 577, 580 (1989) (finding that while there might be some level of education that is a constitutional prerequisite, a claim focusing on spending disparities rather than absolute deprivation does not receive strict scrutiny under equal protection analysis); Olsen v. State, 276 Or. 9, 27, 554 P.2d 139, 148 (1976) (rejecting a challenge that the state education clause mandated equal spending in every district, but stating that the constitutional provision is satisfied if the state "provides for a minimum of educational opportunities in the district").

> [I]n part, local control means . . . the freedom to devote more money to the education of one's children. Equally important, however, is the opportunity it offers for participation in the decision making process that determines how those local tax dollars will be spent. Each locality is free to tailor local programs to local needs.[92]

Some variation of the local control rationale has been used by every state court that has refused to invalidate a school spending regime on equity grounds.[93] Local control would rarely be compromised in a system that guarantees a minimum standard of education because local areas would remain free to augment their programs above that state-mandated minimum.[94] Only when a school district chronically failed to meet the standard would the state intervene in the administration of that district, while other districts would remain unaffected.

Furthermore, a minimum standards claim is more likely to be ordered by the courts because a judge would be more willing to find for the plaintiff if it did not involve pitting his power against that of the legislature and invalidating the existing school financing regime.[95] Correspondingly, the legislature would be more willing to implement the court order if they did not perceive it as a threat to the interests of their wealthier constituents. In the past the legislative response to court-ordered school finance reform has been inadequate, in part, because property

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[92] *Rodriguez*, 411 U.S. at 49–50; *see* Milliken v. Bradley, 418 U.S. at 741–42 (desegregation case in which the court stated that "[n]o single tradition in public education is more deeply rooted than local control over the operation of schools").

[93] In Georgia, for example, the court found that "[t]he Georgia public school finance system preserves the idea of local contribution, perhaps out of concern 'that along with increased control of the purse strings at the state level will go increased control over local policies.'" McDaniel v. Thomas, 248 Ga. 632, 648, 285 S.E.2d 156, 167 (1988) (quoting *Rodriguez*, 411 U.S. at 53). In Wisconsin, the court favored the concept of local control, finding that "[t]he requirement that local control of schools be retained is of constitutional magnitude and necessarily compelling." *Kukor*, 148 Wis. at 504 n.13, 436 N.W.2d at 582 n.13. The West Virginia Supreme Court decided that the school financing system was "not subject to equal protection principles" because it relied on local levies which were specifically permitted in the state constitution. State of W. Va. *ex rel* the Bds. of Educ. of the Counties of Upshur v. Chafin, 376 S.E.2d 113, 120 (1988).

[94] A "claim [to an adequate education] does not challenge a state's interest in permitting separate localities to set different expenditure levels." Ratner, *supra* note 4, at 844; *Robinson I*, 62 N.J. at 520, 303 A.2d at 298 ("[n]or do we say that if the State assumes the cost of providing the constitutionally mandated education, it may not authorize local government to go further").

[95] Separation of powers principles and the traditional deference to the legislature's taxing and appropriations powers make state courts reluctant to interfere with legislatively created school finance systems. Perhaps more importantly, state courts may refuse to act counter to the popularly elected representatives because they often face elections and an easily amended constitution. *See* Note, *supra* note 46, at 1082–85.

rich districts have "impede[d] the efforts of the poorer districts' citizens to secure a satisfactory legislative remedy."[96] Because a successful standards case does not require the legislature to transfer wealth from rich to poor districts, it is less likely to excite the opposition of wealthy school districts and therefore more likely to effect meaningful reform.[97]

The second major advantage to standards claims is that they are easier to articulate in terms of output measures. Output measures of education are preferable because they reflect citizen interests more accurately than input measures. Plaintiffs are not so concerned with the money spent on their schools as they are with the amount of education that money buys.[98] Yet courts adopting input measures force plaintiffs to assume the burden of arguing for more resources that (they must also argue) will produce more education. When courts adopt output measures, the plaintiffs' task is simplified; they can now directly demand the constitutionally guaranteed level of education.

The use of output measures is also likelier to ensure the education of disadvantaged youth. For example, students with low English proficiency or little support at home require more intensive and expensive education in order to reach the same achievement level as less disadvantaged youth.[99] The use of output measures would guarantee a certain level of education while input measures would only guarantee minimum funding, even in cases where minimum funding cannot buy a minimum education.

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[96] *Id.* at 1078; *see also* Note, *supra* note 9, at 324 (describing the political difficulty of redistributing from the rich districts in Montana).

[97] Minimum standards arguments also avoid the ironic result of a successful equity-based claim that increases state subsidies to districts occupied principally by wealthy families, albeit "property poor" for lack of commercial and industrial property, while neglecting "property rich" districts, located principally in urban areas, that frequently have larger percentages of poor families. Under a standards theory, the state is obligated only to bring all the schools up to a certain standard; it need not reallocate the resources of the most wealthy among all schools. *See* Ratner, *supra* note 4, at 817 n.154; R. POSNER, ECONOMIC ANALYSIS OF LAW 595 (1986). This argument ignores the possible redistributive effects of any increase in state taxes that is necessary to finance the achievement of the minimum standard in poorer districts.

[98] *See supra* notes 34–41 and accompanying text.

[99] *See* Bd. of Educ. v. Nyquist, 94 Misc. 2d 466, 518, 408 N.Y.S.2d 606, 634 (Sup. Ct. 1978), *modified on other grounds*, 83 A.D.2d 217, 443 N.Y.S.2d 843 (App. Div. 1981), *modified on other grounds*, 57 N.Y.2d 27, 439 N.E.2d 359, 453 N.Y.S.2d 643 (1982), *appeal dismissed*, 459 U.S. 1138 (1983); Abbott v. Burke, 119 N.J. 287, 269–75, 575 A.2d 359, 400–03 (1990); McInnis v. Shapiro, 293 F. Supp. 327, 331 (N.D. Ill. 1968). *But see* Ratner, *supra* note 4, at 807–08 ("there is no proof that abnormally high per pupil expenditures are a prerequisite for successful urban schools").

Similarly, education costs differ across school districts. "In particular, urban areas have to pay more for teachers of equivalent education and experience, for site acquisitions and school construction, and for security than do rural areas."[100] When the constitution is interpreted to mandate a specific level of education rather than a specific amount of input, the state is obligated to provide a given level of education to all students. If the costs of providing that education vary over the student population, the state must spend a varying amount.[101]

Perhaps most importantly, the use of output measures enhances the legitimacy of the court's ruling by releasing the court from the role of educator or legislator. By holding that the education clause requires a specific level of education, not a specific level of financing, the court leaves to the legislature and the educators the question of how to achieve that level.

Courts can readily define the constitution's minimum education requirements with currently available tests and standards.[102] Currently, the legislatures of nearly all fifty states have adopted minimum educational standards that students are required to meet or face a variety of penalties.[103] By adopting a measure defined by the political majority, courts are not placed in the position of creating educational policy. Instead, they simply order state officials to supply the services that will enable children to satisfy the legislature's performance standards.[104] If the legislative measures are unavailable, courts can still avoid education decisions by adopting nationally accepted measures.[105]

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[100] Levin, *supra* note 1, at 1109.

[101] The New Jersey Supreme Court recognized this requirement in holding that:

> A thorough and efficient education requires such level of education as will enable all students to function as citizens and workers in the same society, and that necessarily means that in poorer urban districts something more must be added to the regular education in order to achieve the command of the Constitution.

Abbott, 119 N.J. at 374, 575 A.2d at 403.

[102] *See* Ratner, *supra* note 4; Liebman, *supra* note 2; Chambers, *supra* note 2.

[103] *See* Liebman, *supra* note 2, at 371–73.

[104] Defining the constitutional duty by legislatively enacted minimum standards does create the possibility that, following a court ruling, the legislature simply may revoke the laws. Professor James Liebman explains why this possibility should not prevent plaintiffs from pursuing standards claims based on legislatively defined requirements. *See id.* at 388–89.

[105] For example, the court could define the education required as the skills attained at each grade level on nationally administered achievement tests. A school would be failing to provide the constitutionally required educational level if a certain percentage of its students did not demonstrate a mastery of the basic skills appropriate to their grade level. For a detailed discussion of this analysis and the use of standardized tests, see Ratner, *supra* note 4, at 785–94. Other possible measures could be achievement

When the constitutional mandate is defined by a generally accepted output measure that has been adopted by the legislature, courts can remain in "an enforcement role that conforms to traditional visions of the judicial function."[106]

Output measures have been used more readily in minimum standards claims than in equality claims. In considering equity claims, courts have always used input measures, because measuring equality in terms of teacher/student ratio, quality of facilities, or dollars spent is a simple calculation. On the other hand, measuring equality of output is impossible without a method of quantifying all aspects of education, and such a method does not yet exist.[107] A standards mandate, however, does not require that total education be defined and measured, but simply requires that important features of a good education be articulated as a minimum acceptable standard.

Kentucky and West Virginia courts have defined their constitutionally required educational standard in terms of output measures. The West Virginia court stated generally that a "thorough and efficient" system of schools must "develop as best the state of education expertise allows, the minds, bodies and social morality of its charges to prepare them for useful and happy occupations, recreation and citizenship, and does so economically."[108] The court then listed eight specific categories in which a child must develop her capacity.[109] The Kentucky court de-

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levels required for entrance into the military or societally accepted reading and math norms as reflected by newspapers and modes of exchange. *See* Chambers, *supra* note 2, at 61 n.27.

Reliance on standardized tests as a measure of achievement, however, is controversial. Some commentators fear that their use may further undermine efforts to educate disadvantaged children. *See* Liebman, *supra* note 2, at 374–77; Chambers, *supra* note 2, at 60 n.21 and sources cited therein.

[106] Liebman, *supra* note 2, at 416.

[107] In Montana, for example, the state argued that "equality of educational opportunity [was] more appropriately measured by output, that is, by analysis of the success of students from the different school districts, rather than by input of dollars." Helena Elementary School Dist. No. 1 v. State, 236 Mont. 44, 54, 769 P.2d 684, 690, *modified*, 236 Mont. 60, 784 P.2d 412 (1990). The court did not accept this measure, however, because "the State had failed to submit convincing evidence on the output theory of measurement." *Id.*

[108] Pauley v. Kelley, 162 W. Va. 672, 255 S.E.2d 859, 877 (1979).

[109] The specified categories are as follows:

> Legally recognized elements in this definition are development in every child to his or her capacity of (1) literacy; (2) ability to add, subtract, multiply and divide numbers; (3) knowledge of government to the extent that the child will be equipped as a citizen to make informed choices among persons and issues that affect his own governance; (4) self-knowledge and knowledge of his or her total environment to allow the child to intelligently choose life work—to know his or her options; (5) work-training and advanced academic training as the

fined a "thorough and efficient" education in terms of seven general output goals that must be provided for each child to have an adequate education.[110] They include such capacities as sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization, and sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage.

While these rulings reflect some advantages of output measures, they win only half the battle. The court definitions demand substantive rather than financial improvements, they ensure the education of disadvantaged youth by guaranteeing an education, rather than a sum of money, and they leave in the hands of educators and legislators the responsibility for designing a plan that will deliver the required education. Unfortunately, by failing to designate quantifiable minimum standards, the court may find itself in disagreement with the legislature over whether the standards are being met, and thus find it difficult to enforce compliance.

Critics of school reform litigation have noted that litigants can win in the courts, yet lose in the schools, if the court-ordered reforms are too vague to ensure strong enforcement.[111] The

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child may intelligently choose; (6) recreational pursuits; (7) interests in all creative arts, such as music, theater, literature, and the visual arts; (8) social ethics, both behavioral and abstract, to facilitate compatibility with others in this society.

Pauley, 162 W. Va. at 705–06, 255 S.E.2d at 877.

[110] The general output goals are as follows:

[A]n efficient system of education must have as its goal to provide each and every child with at least the seven following capacities: (i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization; (ii) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices; (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation; (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness; (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage; (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and (vii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.

Rose v. Council for Better Educ., 790 S.W.2d 186, 212 (Ky. 1989).

[111] For descriptions of court-ordered reform that failed to change the schools, see Note, *supra* note 46, at 1075–78 (describing the lack of an adequate remedy in New Jersey); Note, *supra* note 9, at 324–27 (describing the difficulty in understanding the court's mandate in Kentucky); Liebman, *supra* note 2, at 392–93 (arguing that changes in Connecticut schools after successful litigation failed to improve student performance); *see also* Edgewood Indep. School District v. Kirby, 34 Tex. Sup. Ct. J. 287 (Jan. 22,

courts could circumvent this problem by defining the minimum standard according to achievement tests. This would make it simple for the courts to enforce its remedial measures, as there could be no dispute over whether the court-ordered reforms had been satisfied.

B. *Categorization of Education Clauses by Support for a Standards Claim*

As with equity mandates, the language of state education clauses imposes varying minimum quality standards on state educational systems.[112] Categorizing state educational clauses according to their theoretical support of a standards claim, however, is even more speculative than doing so for an equity claim.[113] Only four state courts have ruled that their state constitutions required a minimum standard of education.

1991) (rejecting legislature's proposal for reform); State *ex. rel.* Bds. of Educ. v. Chafin, 376 S.E.2d 113 (W. Va. 1988) (describing changes in schools since *Pauley v. Kelly*); Horton v. Meskill, 195 Conn. 24, 486 A.2d 1099 (1985) (describing changes in schools since decision in *Horton I*).

[112] While the vast majority of the clauses require a certain minimum quality standard for the educational *system*, others mandate a quality standard for the level of education itself. *Compare* KY. CONST. § 183 (requiring "an efficient system of common schools") *with* ILL. CONST. art. X, § 1 (requiring the state to provide for "the educational development of all persons to the limits of their capacities").

[113] Another way to categorize state education clauses, and at least part of the basis used by Grubb, *see supra* note 4, is by the extent of the state's obligation. Some state constitutions, for example, assert that the educational system should promote intellectual improvement but that the legislature need only "encourage" this goal. *See, e.g.*, CAL. CONST. art. IX, § 1; IOWA CONST. art. IX, 2d div., § 3. Most state constitutions have a more forceful requirement: commonly, that the legislature "shall establish," or "shall make such provisions," or "it shall be the duty of the Legislature to" do so. *See, e.g.*, KY. CONST. § 183; MD. CONST. art. VIII, § 1. A few states go even further. Washington's constitution, for example, states that "the education of all children within its borders [is] the paramount duty of the state." WASH. CONST. art. IX, § 1. Georgia states that public education is the "primary obligation" of the state. GA. CONST. art. VIII, § 1, para. 1.

This more forceful language best serves the equal protection argument that education is a fundamental right. The language is of little use in proving that the constitution requires the state to provide schools of a certain minimum quality standard. Whether the state has a paramount duty or simply a duty is of little consequence; the important factor is the content of the duty. If the constitution simply requires the state to establish a school system open to all students, it makes little difference if the state has a paramount duty to establish that system; there still exists no basis to argue that the constitution requires a specific quality of school system.

If, however, the constitution states an aspiration, rather than an obligation, for the legislature, it clearly provides a weaker basis for school finance litigation no matter what the specified quality standard.

1. Constitutions Specifying an Explicit and Significant Standard

The first group of state constitutions specify an explicit and significant level of education. The Illinois constitution, for example, states that "[a] fundamental goal for the People of the State is the educational development of all persons to the limits of their capacities."[114] The constitution further requires that the state "shall provide for an efficient system of *high quality* public educational institutions and services."[115]

Montana's constitution likewise sets a broad standard: "It is the goal of the people to establish a system of education which will develop the full educational potential of each person."[116] It too requires the establishment of "a basic system of free *quality* public elementary and secondary schools."[117]

The constitutions of Virginia, Louisiana, and Washington also establish a strong and specific educational standard. The Virginia constitution requires that the General Assembly "ensure that an educational program of high quality is established and continually maintained."[118] The Louisiana preamble declares: "The goal of the public educational system is to provide learning environments and experiences at all stages of human development, that are humane, just, and designed to promote excellence in order that every individual may be afforded an equal opportunity to develop to his full potential."[119]

The Washington constitution states a significant commitment to a level of education, although it is not defined in terms of quality. It requires that the state make "ample provision" for

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[114] ILL. CONST. art. X, § 1.

[115] *Id.* (emphasis added). The Committee on Education at the Illinois Constitutional Convention specifically stated that "the objective that all persons be educated to the limits of their capacities would require expansion beyond traditional public school programs." Comment following ILL. CONST. art. X, § 1, *quoted in* Grubbs, *supra* note 4, at 70 n.111.

[116] MONT. CONST. art. X, § 1(1).

[117] *Id.* § 1(3) (emphasis added).

[118] VA. CONST. art. VIII, § 1. Under the Virginia constitution, the standards of quality are determined by the Board of Education, "subject to revision only by the General Assembly." *Id.* art. VIII, § 2. A Virginia court might be prohibited under this constitution from setting its own standards of quality for schools, but certainly could adjudicate whether the Board's standards were being met.

[119] LA. CONST. art. VIII, preamble. Because this obligation is in the preamble, it may be construed by the Louisiana courts as merely aspirational. *See supra* notes 50–53 and accompanying text. However, in a later passage the constitution requires that the state calculate the cost of a minimum foundation program of education in public schools and fully fund that cost. *Id.* art. VIII, § 13(B).

the education of all children.[120] In an early standards case, *Seattle School District No. 1 v. State*, the Washington Supreme Court found that the state's education clause was not a suggestion but a specific duty imposed on the legislature.[121] After defining the word "ample" in the constitution as "liberal, unrestrained, without parsimony, fully, [and] sufficient,"[122] the court found that the state's constitutional duty "embraces broad educational opportunities needed in the contemporary setting to equip our children for their role as citizens and as potential competitors in today's market as well as in the marketplace of ideas."[123]

2. Constitutions Setting Less Explicit Standards

The second category comprises language that commits the state to a considerable quality standard for education, but which is not as explicit as the language of the constitutions in the first grouping. Two state constitutions in this category, Kansas and Arizona, specifically require that the legislature guarantee educational improvement. Kansas requires that the legislature "provide for intellectual, education, vocational and scientific improvement."[124] Arizona's provision mandates that the legislature "insure the proper maintenance of all State educational institutions, and shall make such special appropriations as shall provide for their development and improvement."[125]

The Arkansas constitution requires the state to "adopt all suitable means to secure to the people the advantages and opportunities of education."[126] Language in the South Dakota and Rhode Island constitutions is almost identical to this,[127] while Wyoming requires a system "adequate to the *proper* instruction of all youth."[128]

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[120] WASH. CONST. art. IX, § 1.
[121] 90 Wash. 2d 476, 499, 585 P.2d 71, 85 (1978).
[122] *Id.* at 516, 585 P.2d at 93.
[123] *Id.* at 517, 585 P.2d at 94.
[124] KAN. CONST. art. VI, § 1.
[125] ARIZ. CONST. art. XI, § 10.
[126] ARK. CONST. art. XIV, § 1.
[127] S.D. CONST. art. VIII, § 1 ("to adopt all suitable means to secure to the people the advantages and opportunities of education"); R.I. CONST. art. XII, § 1 ("it shall be the duty of the general assembly to promote public schools . . . and to adopt all means which it may deem necessary and proper to secure to the people the advantages and opportunities of education").
[128] WYO. CONST. art. VII, § 9 (emphasis added).

The largest subgrouping within this category contains those constitutions which require the "maintenance and support of a thorough and efficient system of free public schools."[129] Delaware, Kentucky, Maryland, Minnesota, Ohio, Texas, Pennsylvania, and West Virginia all contain similar provisions.[130] The interpretation of this constitutional language has been more frequently litigated than that of any other text.[131] The supreme courts of West Virginia, New Jersey, and Kentucky overturned their school financing schemes, based at least in part on a theory that the specific substantive level of education required in an "efficient" school system was not met.[132] The Kentucky court, for example, found that an efficient system of schools provides, at a minimum, that "children in Kentucky have a constitutional right to an adequate education."[133] The New Jersey court specifically stated that "thorough and efficient" is not "a constitutional mandate governing expenditures per pupil, equal or otherwise, but a requirement of a specific substantive level of education."[134]

3. Constitutions Setting Lower Standards

The third group of state constitutional provisions is similar to the second, but the language in the provisions suggests a lower standard of education than the constitutions in the second group. The provisions in this grouping can be further divided into two categories: those that provide a detailed and expansive standard of education, but limit the state's obligation to "encouraging," "promoting," or "cherishing" that standard; and those that provide merely for an "adequate" or "sufficient" education.

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[129] N.J. CONST. art. VIII, § 4, para. 1.

[130] DEL. CONST. art. X, § 1, sec. 1; KY. CONST. § 183; MD. CONST. art. VIII, § 1; MINN. CONST. art. XIII, § 1; OHIO CONST. art. VI, § 2; PA. CONST. art. III, § 14; TEX. CONST. art. VII, § 1; W. VA. CONST. art. XII, § 1.

[131] Pauley v. Kelly, 162 W. Va. 672, 255 S.E.2d 859, 865 (1979).

[132] Maryland, Ohio, and Pennsylvania all upheld their school finance schemes based on similar clauses. *See* Hornbeck v. Somerset County Bd. of Educ., 295 Md. 597, 458 A.2d 758 (1983); Board of Educ. v. Walter, 58 Ohio St. 2d 368, 390 N.E.2d 813 (1979), *cert. denied*, 444 U.S. 1015 (1980); Danson v. Casey, 484 Pa. 415, 399 A.2d 350 (1979). The Texas Supreme Court invalidated its school finance statutes based on this clause, but on an equity rather than a minimum standards theory. *See* Edgewood Indep. School Dist. v. Kirby, 777 S.W.2d 391 (Tex. 1989).

[133] Rose v. Council for Better Educ., 790 S.W.2d 186, 213 (Ky. 1989).

[134] Abbott v. Burke, 119 N.J. 287, 575 A.2d 359, 368 (1990); *see also Pauley v. Kelly*, 162 W. Va. at 255 S.E.2d at 878 ("[w]e also have determined that the Thorough and Efficient Clause requires the development of certain high quality education standards").

California's provision states that "the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement."[135] Iowa's, Indiana's, and Nevada's provisions are nearly identical.[136] North Dakota similarly requires the legislative assembly to take such steps as may be necessary "to promote industrial, scientific, and agricultural improvements."[137] The constitutions of Massachusetts and New Hampshire, written in the distinctive style of the 1780's, contain magnificent lists of the goals of public education, but only oblige the legislature to "cherish" them.[138] Although these constitutional provisions describe a clear and specific quality to be pursued, the lack of a legislative duty to achieve the standard considerably weakens the provisions. There may be factual situations where a state school financing regime inadequately "encourages" a specified level of education, but it is a difficult standard to prove.

The Georgia constitution also falls in this category; it mandates that "an *adequate* education for the citizens shall be a primary obligation of the State of Georgia."[139] Similarly, New Mexico provides for "[a] uniform system of free public schools *sufficient* for the education of, and open to, all the children of school age in the state."[140] Florida, too, requires an "adequate" education.[141] Although the requirement of an "adequate" educational system is less demanding than a "high quality" or "proper" one, adequacy of education is a clearly elaborated requirement that the state provide a minimum standard of education.

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[135] CAL. CONST. art. IX, § 1.

[136] IOWA CONST. art. IX, 2d div., § 3 ("the general assembly shall encourage, by all suitable means, the promotion of intellectual, scientific, moral, and agricultural improvement"); IND. CONST. art. VIII, § 1 ("it shall be the duty of the General Assembly to encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement; and to provide, by law, for a general and uniform system of Common Schools"). Adding literary, mining, and mechanical improvements to the requirements, the Nevada constitution states that "[t]he legislature shall encourage by all suitable means the promotion of intellectual, literary, scientific, mining, mechanical, agricultural, and moral improvements." NEV. CONST. art. 11, § 1.

[137] N.D. CONST. art. VIII, § 4. North Dakota has an added prescriptions requiring the legislative assembly to "take such other steps as may be necessary to prevent illiteracy." *Id.* Therefore, if litigation is based on evidence of illiteracy, North Dakota's constitution would provide an exceedingly strong basis for overturning the state school finance scheme.

[138] N.H. CONST. pt. 2, art. 83; MASS. CONST. pt. 2, ch. V, § II.

[139] GA. CONST. art. VIII, § 1 (emphasis added).

[140] N.M. CONST. art. XII, § 1 (emphasis added).

[141] FLA. CONST. art. IX, § 1.

4. The Bare Minimum

The final category consists of state constitutions that require education for all but express a minimal commitment to educational quality. Even within this general grouping, however, it is still possible to distinguish shades of state obligation to provide a specific level of education. Similar to an "efficient" system, the first subset consists of state constitutions that require some specific type of system—"general," "uniform," "thorough," or some combination thereof—but whose provisions do not define any quality standard. The Oregon constitution, for example, provides that "[t]he Legislative Assembly shall provide by law for the establishment of a uniform, and general system of Common schools."[142] However, unlike the "thorough and efficient" clause, no state court has found "uniform" or "general" to require a specific commitment to any educational standard.[143]

The next subgrouping requires merely that the legislature establish and maintain a system of public schools. The constitutions of Alaska, Missouri, Oklahoma, Michigan, Mississippi, New York, South Carolina, and Tennessee all contain this or similar language.[144] Although these clauses provide an explicit commitment to the existence and maintenance of a school system, they provide little basis for claiming that a minimum standard of educational quality is guaranteed.[145] Three other state constitutions, Connecticut, Nebraska, and Hawaii, contain even less of a quality commitment; they require that the state establish free schools, but not that it maintain them.[146]

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[142] OR. CONST. art. VIII, § 3.

[143] *See* WIS. CONST. art. X, § 3; COLO. CONST. art. IX, § 2; IDAHO CONST. art. IX, § 1. Other state constitutions share this language but are categorized differently in this Article because they contain additional language specifying a higher standard.

[144] ALASKA CONST. art VII, § 1; MO. CONST. art. IX, § 1(a); OKLA. CONST. art. XIII, § 1; MICH. CONST. art. VIII, § 2, sec. 2; UTAH CONST. art. X, § 1; MISS. CONST. art. 8, § 201; N.Y. CONST. art. XI, § 1; S.C. CONST. art. XI, § 3; TENN. CONST. art. XI, § 12.

[145] For example, in a recent decision in Tennesee, the Chancery Court held that "Article XI, section 12 . . . does not require any minimal level of funding for schools and contains no substantive standards which can be enforced, absent some legislative enactment." Tennesee Small School Systems v. McWherter, No. 88-1812-II, slip. op. at 4 (Chanc. Ct. Tenn. Jan. 19, 1989).

[146] CONN. CONST. art. VIII, § 1 ("[t]here shall always be free public elementary and secondary schools in the state. The general assembly shall implement this principle by appropriate legislation"); NEB. CONST. art. VII, § 1 ("[t]he Legislature shall provide for the free instruction in the common schools"); HAW. CONST. art. X, § 1 ("[t]he State shall provide for the establishment, support and control of a statewide system of public schools").

The final subgrouping provides still less of a basis for a standards claim. These constitutions virtually eliminate any state obligation, mandating instead that schools are the responsibility of local authorities. Maine's education clause, for example, provides that "the Legislature are authorized, and it shall be their duty to require, the several towns to make suitable provision, at their own expense, for the support and maintenance of public schools . . . ."[147]

Finally, Alabama's constitution stands alone in declaring that "nothing in this Constitution shall be construed as creating or recognizing any right to education or training at public expense . . . ."[148]

IV. CONCLUSION

This Article draws on legal theory as well as trends in lawsuits and court opinions to sketch an outline of promising directions in school finance reform litigation.

First, it is clear that lawsuits based on the education clauses of state constitutions offer greater promise for court-ordered reform than either federal or state equal protection arguments. Second, the language of education clauses invites a distinction between equity and minimum standards claims, and these clauses can be categorized according to the support their language provides each claim. Third, minimum standards claims have two advantages over equity claims. They are more respectful of the status quo, and are therefore more likely to be ordered by the courts and implemented by the legislature; and they lend

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[147] ME. CONST. art. VIII, § 1; *see also* VT. CONST. ch. II, § 68 ("a competent number of schools ought to be maintained in each town unless the general assembly permits other provisions for the convenient instruction of youth"); N.C. CONST. art. IX, § 2(1) ("[t]he General Assembly shall provide . . . for a general and uniform system of free public schools"), § 2(2) ("[t]he General Assembly may assign to units of local government such responsibility for the financial support of the free public schools as it may deem appropriate. The governing boards of units of local government with financial responsibility for public education may use local revenues to add to or supplement any public school or post-secondary school program").

[148] ALA. CONST. art. XIV, § 256. A case recently filed in Alabama, *Harper v. Hunt*, seeks to invalidate this portion of the Alabama Constitution. In the complaint, the plaintiffs argue that amendment 111, which explicitly denies a right to education, violates federal equal protection law because it was adopted in an attempt to defy the Supreme Court's decision in Brown v. Board of Educ., 347 U.S. 483 (1954). "Because Amendment 111 was invalid at the time of its adoption it could not operate to repeal the education guarantee of Section 256 of the Constitution of 1901." Complaint at 19, Harper v. Hunt (Ala. Cir. Ct. Jan. 18, 1991) [on file with author]. The court has not yet ruled on this argument.

themselves better to the use of output measures and hence can demand improvements in the substance—not just the accoutrements—of education.

The strongest theoretical basis for school finance reform litigation lies in minimum standards claims based on state constitution education clauses. While factors as unpredictable as the politics of the legislature and the temperament of the judges play a role in each case, it is nonetheless likely that for the immediate future, minimum standards claims will offer litigators the best chance to win greater educational opportunity for the students they represent.

THE COMMON SCHOOL IDEAL AND THE LIMITS OF LEGISLATIVE AUTHORITY: THE KENTUCKY CASE

KERN ALEXANDER*

> If I have a cake and there are ten persons among whom I wish to divide it, then if I give exactly one-tenth to each, this will not, at any rate, automatically call for justification; whereas, if I depart from this principle of equal division, I am expected to produce a special reason.
>
> —Sir Isaiah Berlin.[1]

The Kentucky case is about the continuing conflict over "cakes and shares." Can the state, by its own laws, create unequal opportunity by disproportionate allocation of its fiscal resources? Even the most conservative and anti-egalitarian person, who argues against state correction of marketplace inequalities, can scarcely maintain that the state, without strong justification, can itself create inequalities.[2] If the state departs from the principle of "equal division" of cakes and shares, then justice and fairness require that the deviation be based on a "special reason" or, at the least, on a relevant criterion. It is one thing to contend that government should refrain from involvement in overcoming inequalities and quite another to maintain that the state need provide no sufficient reasons for unequal treatment, or that the reasons alleged are irrelevant.[3]

The Kentucky case is, at heart, a calling to account of state legislation which has long distributed educational benefits in widely unequal proportions. In this case the Kentucky Supreme Court weighed the legislature's "special reasons" for inequality and found them deficient in constitutional rationale and justification.

On June 8, 1989, the Supreme Court of Kentucky held the entire statutory system of common schools to be unconstitutional, declaring that it is "up to the General Assembly to re-

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[1] I. BERLIN, *Equality*, in JUSTICE AND SOCIAL POLICY 131 (F. Olafson ed. 1961).

[2] A.B. ATKINSON, UNEQUAL SHARES: WEALTH IN BRITAIN 79 (1974).

[3] Von Leyden, *On Justifying Inequality*, 1963 POL. STUD. 60 (*cited in* ATKINSON, *supra* note 2, at 79).

create and re-establish a system of common schools . . . ."[4] This ruling constituted one of the most comprehensive interventions by a state judiciary into the realm of legislative policymaking for education. Because education is considered to be among the most important functions of state government,[5] this case, invalidating 153 years[6] of legislation and legislative autonomy, portends a marked and significant change in the way public schools are governed. The power of the legislature, which had been considered virtually omnipotent in matters of educational finance prior to the Kentucky case, fell to judicial intervention. This decision, as well as other similar school finance and taxation cases, laid the foundation for greater judicial scrutiny and intervention in the future.

The Kentucky litigation has its roots in a class of school finance cases commencing in 1968 in Virginia[7] and Illinois[8] which challenged under the equal protection clause of the fourteenth amendment the methods devised by legislatures for distributing state school funds. These cases signaled a new reliance on the courts by advocates of school finance reform to challenge legislative prerogative where malapportionment of funds resulted in discrimination against children who attended public schools in property-poor school districts. This type of litigation subsequently attracted great attention with the highly publicized decision in *Serrano v. Priest*,[9] in which the California Supreme Court ruled that unequal distribution of school funds violated the equal protection clauses of both the federal and California constitutions. Reliance on the federal equal protection guarantee remained a viable basis for plaintiffs only until 1973 when the United States Supreme Court removed this federal avenue of relief in *San Antonio Independent School District v. Rodriguez*.[10] The Supreme Court held that the equal protection clause afforded no relief from inequalities in educational opportunity

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[4] Rose v. Council for Better Educ., 790 S.W.2d 186, 214 (Ky. 1989).

[5] *E.g.*, Brown v. Board of Educ., 347 U.S. 483, 493 (1954) ("Today, education is perhaps the most important function of state and local governments.").

[6] A bill to establish the system of common schools was signed by the Governor on February 16, 1838. Act approved Feb. 16, 1838, ch. 898, 1837 Ky. Acts 274.

[7] Burruss v. Wilkerson, 310 F. Supp. 572 (W.D. Va. 1969), *aff'd mem.*, 397 U.S. 44 (1970).

[8] McInnis v. Shapiro, 293 F. Supp. 327 (N.D. Ill. 1968), *aff'd mem.*, 394 U.S. 322 (1969).

[9] 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

[10] 411 U.S. 1 (1973), *reh'g denied*, 411 U.S. 959 (1973).

caused by disparate allocation of state tax resources to local school districts.

In the wake of *Rodriguez*, and in spite of its evisceration of a federal constitutitonal basis for school finance reform, similar challenges brought wholly under the language of state constitutions continued. During the period from 1973 to 1989 litigation occured in numerous states, and in several instances the plaintiffs prevailed.[11]

The Kentucky litigation constitutes a meaningful link in this chain of challenges to state school funding formulae. Possibly the most important conclusion that can be drawn from the Kentucky decision is that state legislatures in most circumstances are unlikely to provide equal educational opportunities without judicial intervention. The Kentucky case shows rather dramatically that judicial intervention and interpretation of state constitutional provisions is necessary to provide initiative and guidance for the legislature if it is to abide by its constitutional obligations.

A most striking aspect of the Kentucky case was the breadth of the court's ruling and the promptness of the legislative response. The court's decision led directly to a complete revision of the scheme of school finance and substantial modification in the organization and administration of the public schools. The case caused the legislature to fashion new tax legislation which resulted in increased revenues of over one billion dollars. Without the impetus of the court it is doubtful that any new tax funds would have been found, and certainly few, if any, new funds would have been allocated to the public schools. The court provided the legislature with both the nerve and the rationale to raise taxes, equalize school funding, and make other necessary changes.[12]

[11] *See* DuPree v. Alma School Dist. No. 30, 279 Ark. 340, 651 S.W.2d 90 (1983); Serrano v. Priest, 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1977), *cert. denied*, 432 U.S. 907 (1977); Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971); Serrano v. Priest, 200 Cal. App. 3d 897, 226 Cal. Rptr. 584 (Ct. App. 1986); Horton v. Meskill, 172 Conn. 615, 376 A.2d 359 (1977); Knowles v. State Bd. of Educ., 219 Kan. 271, 547 P.2d 699 (1976); Helena Elementary School Dist. No. 1 v. State, 236 Mont. 44, 769 P.2d 684 (1989); Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273 (1973), *cert. denied*, 414 U.S. 976 (1973); Edgewood Indep. School Dist. v. Kirby, 33 Tex. Sup. Ct. J. 12, 777 S.W.2d 391 (Tex. 1989); Seattle School Dist. No. 1 v. State, 90 Wash. 2d 476, 585 P.2d 71 (1978); State *ex rel.* Bd. of Educ. v. Manchin, 366 S.E.2d 743 (W. Va. 1988); Pauley v. Kelly, 162 W. Va. 672, 255 S.E.2d 859 (1979); Kukor v. Grover, 148 Wis. 2d 469, 436 N.W.2d 568 (1989); Washakie County School Dist. No. 1 v. Herschler, 606 P.2d 310 (Wyo. 1980), *cert. denied*, 449 U.S. 824 (1980).

[12] As a result of the new legislation, revenues for all school districts increased; the poorest districts increased 25% and the richest increased 8%.

Less quantifiable, but possibly as important, was the psychology engendered by the court decision throughout the state. The court's mandate seemed to represent an external force authorizing an important social change that the people intuitively knew was morally necessary and long overdue. The court decision and the enactment of the new education law appeared to imbue the citizenry with a collective pride of ownership which later found the most obdurate legislators and reluctant taxpayers exalting themselves with praise for their accomplishments.

Beyond the substantial immediate educational benefits and improvements to the Kentucky schools, the Kentucky court decision is a noteworthy precedent because it reflects a palpable diminution in judicial deference. The case altered the boundary in the separation of powers, and portended a more assertive role for the judiciary as the oracle of interpretation for state constitutional mandates and as a permanent overseer of legislative responsiveness.

The legislature's inability to fulfill the state constitutional mandate of an "efficient system of common schools" in a manner consistent with the judiciary's interpretation of that clause was painfully obvious when seen from the court's view. The judiciary discovered a legislature which, while in principle operating under a constitutional mandate, had never in its history sought to define the implications of that mandate. Without cognizance or definition of constitutional intent the legislature had operated without course or reckoning. The inequitable nature of the resulting system of public schools led the Kentucky Supreme Court to the inescapable conclusion that:

> the General Assembly of the Commonwealth has failed to establish an efficient system of common schools. . . . Kentucky's *entire system* of common schools is unconstitutional.[13]

Prior to this case no guidelines had been drawn by a Kentucky court to provide direction for the legislature. As a result, the locus of responsibility for education had never been forthrightly circumscribed for the legislature. This the court accomplished by clearly enunciating the constitutional expectations in a comprehensive and unequivocal manner. The main aspects of the decision may be summarized in six important points.

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[13] Rose v. Council for Better Educ., 790 S.W.2d 186, 215 (Ky. 1989).

First, the court set the boundaries in the separation of powers between legislative prerogative and judicial responsibility. In so doing, the court asserted a limited but certain judicial role in delineating the affirmative constitutional obligations of the General Assembly to provide for public schools.

Second, the court acknowledged and established the fundamentality of education. The court avoided the legal contortions and gropings that have characterized the question of fundamentality under the federal equal protection clause, and chose instead to frame the fundamentality of education as a simple and obvious fact.

Third, the court gave form and substance to the education provision of the Kentucky Constitution and firmly established its importance as a standard to which the legislature must adhere.

Fourth, the court defined the foundational nature of public schools as common schools and set forth the implications of the constitutional intent for legislation.

Fifth, the court showed a willingness to interpret substantively the details of the education clause of the Kentucky Constitution by holding that an "efficient system" of public schools required equality of opportunity.

Finally, the court justified the appropriateness and efficacy of striking down the entire state system of education, rather than merely invalidating selected offending school funding statutes.

This Article will address these points in clarifying and explaining the precedential value of the Kentucky court decision and will elaborate specifically on the inherent incompatibility between legislative prerogative and the common school ideal.

I. The Necessary Decline of Judicial Deference

In spite of a perception that the courts have encroached on legislative powers, particularly in education, to effect political ends, the history of school finance litigation indicates a high regard and fidelity to judicial deference. Since the creation of public schools the state courts have exercised great self-restraint and have seldom invoked state constitutional provisions as a basis to restrain legislative authority.

Legislative control over education has been considered to be plenary,[14] limited only by individual rights and freedoms as

[14] N. Edwards, The Courts and the Public Schools 27 (1955).

enunciated in the federal or state constitutions. In addressing the nearly limitless scope of legislative prerogative over education, a mid-nineteenth century New York court enunciated the following rule: "The people, in framing the constitution, committed the legislature to the whole law-making power of the state, which they did not expressly or impliedly withhold. Plenary power in the legislature for all purposes of civil government is the rule."[15]

This limited judicial role has been even more pronounced when questions of school finance are raised because here the thorny issues of taxation and redistribution of wealth are confronted. The attitude of the courts in deferring to the legislature in fiscal matters was aptly illustrated in a 1912 school finance case in which the Supreme Court of Maine rejected the plaintiff's appeal for more equitable distribution of state school funds, saying:

> The method of distributing the proceeds of such a tax rests in the wise discretion and sound judgment of the Legislature. If this discretion is unwisely exercised, the remedy is with the people, and not with the court . . . . We are not to substitute our judgment for that of a coordinate branch of government working within its constitutional limits . . . . In order that taxation may be equal and uniform in the constitutional sense, it is not necessary that the benefits arising therefrom should be enjoyed by all the people in equal degree, nor that each one of the people should participate in each particular benefit.[16]

Contrary to these precedents the Kentucky case indicates that early judicial interpretations of state constitutions, vesting virtually unlimited discretion in the legislature, may be particularly inappropriate where education finance is concerned. The constitutional limits referred to by the New York and Maine decisions noted above neither addressed nor responded to affirmative state constitutional obligations defining a legislature's responsibility to provide for a system of education.

The need for an expanded judicial role in the oversight of legislative enactments is found in the obvious restrictive influence of the affluent and insular factions living in the state's wealthy school districts who shape educational policy to their own designs. Because the legislature merely reflects the inter-

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[15] People v. Draper, 15 N.Y. 532, 543 (1857).

[16] Sawyer v. Gilmore, 109 Me. 169, 177–78, 83 A. 673, 676–77 (1912).

ests pressed upon it by the more persuasive and politically dominant, it cannot, of its own volition, assuage the inequities created by the self-interest of factions.

A. *Factional Influence*

Failure of legislatures to satisfy their constitutional obligations is neither unique nor unexpected. In fact, legislatures often fail in their constitutional responsibilities to the people. James Madison understood the problem and discussed it extensively in the Federalist Papers.[17] According to Madison, popular governments had their Achilles' heel in the detriments of factionalism, which could subvert the public good to special interests on a regular basis. The problem lies in substituting individual and private interests for the public interest. In the words of Madison, "It is this 'factious spirit' which has tainted public administration."[18] It is natural for human beings to bond together to advance mutually agreeable ends which, although private in origin, can be achieved through concerted public action. A problem befalls the state when such concerted action oppresses others to the denigration of the common good.[19] The members of a constituent assembly, such as a state legislature, represent persons with special interests and partialities, which are difficult to accommodate without lessening the rights of others.[20]

Of all the special interests, none are more fervently asserted nor more likely to fracture legislative accord than those based on property and wealth. Madison was aware of this propensity, noting that the most "common and durable source of factions has been the various and unequal distribution of property."[21] The view that factions often are formed around unequal economic conditions has been widely recognized by others.[22]

It is in the area of school finance and taxation that Madison's concerns are most vividly illustrated. Those of property and influence seek to maintain advantage by restricting the redistri-

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[17] THE FEDERALIST No. 10, at 123 (J. Madison) (I. Kramnick ed. 1987).
[18] *Id.*
[19] *See id.*
[20] *See id.* at 124–25.
[21] *Id.* at 124.
[22] R. NIEBUHR, MORAL MAN AND IMMORAL SOCIETY 114 (1960) ("Inequalities of privilege are due chiefly to disproportions of power, and that the power which creates privilege need not be economic but usually is.").

bution of financial resources. State school finance formulae have, in many instances, become justifications for inequality, rather than a means to reduce differences in wealth and opportunity.

B. *Enclaves of Affluence*

Economic power and influence are at the root of the problem traditionally faced by state legislatures in providing fiscal resources for education, and Kentucky is no exception. Initially, in the formation of public schools, legislatures were reticent to accept responsibility for imposing taxes at the state level, and to avert this responsibility they delegated substantial taxing authority to localities. The local tax bases included extreme disparities in property wealth, and the revenue yields from the tax bases resulted in great differences in educational funding. By allowing local taxing power, the legislatures created nearly insurmountable problems of inequality.

Many school districts became enclaves of affluence while others were left with little fiscal strength. This pattern exists in Kentucky as well as other states. In Ohio, for example, the assessed valuation of property per pupil in the poorest school district is less than the annual expenditure per pupil in the wealthiest school district.[23] In Kentucky, at the time of the filing of the case, the poorest school district, McCreary County, spent only $1,700 per pupil, while a small, wealthy elementary school district, Anchorage, spent $4,800 per pupil. There are hundreds of similar situations around the country: small school districts with great wealth interspersed among inner-city and rural school districts of very low fiscal capacity and generally deficient educational circumstance.

Persons in these enclaves of wealth have been adept in convincing legislatures that their advantageous position is in some way justified and, indeed, necessary for the maintenance of a quality educational system. Such justifications, mostly defensive afterthoughts, have been successful enough to perpetuate wide

[23] The poorest district in Ohio is Huntington Local School District of Ross County, with an assessed valuation of property of about $14,557 per pupil while the richest is Perry Local School District of Lake County, which has revenues of $17,889 per pupil per year. K. ALEXANDER & R. SALMON, FISCAL EQUITY OF THE OHIO SYSTEM OF PUBLIC SCHOOLS 11 (1990).

revenue disparities between rich and poor school districts in most states.

C. *Insularity*

These widely disparate conditions have led some to observe that the public school system of the United States is not public at all, but rather a quasi-private or a quasi-public system. A sense of "solidarity and community" based on economic condition is formed around small, affluent school districts.[24] The interests of the parents and children in these districts are insular, particularized, and geographically defined. Moreover, their insularity and educational privilege are protected by the state legislatures. Their efforts are driven toward two primary objectives: maintaining the educational advantage for their children and "a near obsessive concern with maintaining or upgrading property values."[25] Kentucky and other state legislatures have reflected and fortified the insularity of these discrete areas of wealth through their school financing schemes.

Legislatures influenced by these special interests as well as traditional anti-tax forces stand as bulwarks against educational finance reform. Educational equity falls prey to self-interest, and the legislature is unable to provide for common and equitable schools. This situation prevailed in Kentucky and in other states, and for that reason advocates of school finance reform have turned to the courts to intervene in an effort to force legislatures toward greater educational equity.

II. Fundamentality: Education as a Natural Right

The degree to which state courts value education can have a great influence on their view of legislative prerogative and a legislature's compliance with constitutional obligations. Courts that reflect a belief that education is intrinsically valuable or fundamental are not likely to be deferential to legislatures which have malapportioned school revenues.

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[24] Reich, *Secession of the Successful*, N.Y. Times, Jan. 20, 1991, (Magazine), at 16, 42.

[25] *Id.*

As observed above, the state courts traditionally have been reluctant to read affirmative obligations into their respective state constitutions. Earlier courts maintained that "state legislatures *must do* so much, but they may do more."[26] Before the advent of the school finance cases, however, there was little judicial precedent defining in any detail the scope of a legislature's obligations.[27]

The question of whether education is a fundamental right has provoked much judicial debate and has been a barometer measuring a court's willingness to scrutinize legislative enactments. In most litigation, the extent to which a court defers to the legislature varies inversely with the degree to which the court sees education as essential to the well-being of the individual and the state. Because the equal protection clause of the federal Constitution has been held not to encompass education as a fundamental right,[28] several state courts have labored extensively over whether education is fundamental under their respective state constitutions. Where fundamentality is denied, plaintiff children in poor school districts usually continue to receive considerably less money for their education.[29]

The Kentucky court dismissed the argument that education is not a fundamental right, asserting simply that "[a] child's right to an adequate education is a fundamental one under our [state] Constitution."[30] The court found its justification for fundamentality in the "animus to Section 183";[31] that is, in the motives, intentions, and purposes of the writers of the Kentucky Constitution who maintained that common schools were "essential to the prosperity of a free people."[32]

The basis for this conclusion was found not in the word "efficient" as a modifier of the words "system" and "common," but in the more generally acknowledged importance of education as the basis for the "prosperity of a free people," for the development of "patriotism," and for the understanding of "our government."[33] Thus, it appears that fundamentality as perceived

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[26] N. EDWARDS, *supra* note 14, at 28.

[27] *Id.*

[28] San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973).

[29] *See* Board of Educ. of City School Dist. of Cincinnati v. Walter, 58 Ohio St. 2d 368, 390 N.E.2d 813 (1979), *cert. denied*, 444 U.S. 1015 (1980); McDaniel v. Thomas, 248 Ga. 632, 285 S.E.2d 156 (1981).

[30] Rose v. Council for Better Educ., 790 S.W.2d 186, 212 (Ky. 1989).

[31] *Id.* at 206.

[32] *Id.* at 205 (quoting Beckner, Delegate to Kentucky Constitutional Convention, in III DEBATES CONSTITUTIONAL CONVENTION 1890, at 4459 (1890)).

[33] *Id.*

by the Kentucky court may not rest precisely on the express inclusion in the constitution of any particular word, but more broadly on a view of the importance of education to sustain a republican form of government.

The court adopted the philosophy, commonly expressed by educational historians, that "a free society devoted to achieving the natural rights of its citizens can be maintained and tyranny prevented only if the people in general are well educated."[34] Such a broad-based philosophical justification for fundamentality suggests that a wide range of wording at various levels of specificity could justify the presumption that education is a fundamental right. Therefore, a court of like mind in another jurisdiction could conceivably hold that education is so important and vital to a republican form of government as to be by its very nature fundamental, regardless of any express constitutional provision.

Without unduly extending the importance of the Kentucky case as a legal precedent, it may be maintained that the case has opened the path for aggrieved plaintiffs from poor school districts to assert fundamentality under the education provisions of their respective state constitutions with little concern for the precise wording. The Kentucky case seems to indicate that virtually any constitutional provision for education suffices to establish the court's right to apply strict scrutiny to legislation in securing equal educational opportunity. In this light, the decision appears to suggest that education is a form of natural right of obvious, intrinsic, and transcending value sufficient to invoke unremitting judicial attention.

III. Constitutional Provisions Justifying Intervention

In spite of the Kentucky court's apparent willingness to assign to education an inherent or natural preeminence, the legal expression of that right must, in the end, be found in the intent of some specific constitutional context. Such contexts usually emanate from two sources in the state constitutions: the education provision and the state equal protection clause. The education clause is normally a positive requirement that the legislature provide for education, while the state equal protection clause,

[34] R. Butts & L. Cremin, A History of Education in American Culture 93 (espousing the Jeffersonian viewpoint).

or its equivalent, is a negative prohibition forbidding the state from taking away an individual's fundamental right.

The positive education provisions, usually found in the body of the constitution, are basically of three types. The first broadly affirms the value of education, extolling its "virtues,"[35] and calls on the government to "cherish"[36] education as a foundation of democracy. This type of provision is sometimes called a New England clause because it emanated from early consideration of public education in that region.[37] It also employs the terminology used by Jefferson in his 1779 "Bill For the More General Diffusion of Knowledge."[38]

The second type of positive provision requires that the legislature provide for a "system" of public schools. Although the word "system" is replete with historical meaning, the term, standing alone, does not have the strength of more specific wording defining the type of system required. For example, the Supreme Court of California held that the undefined term "system" in the clause, "The legislature shall provide for *a system of common schools* . . . ,"[39] could not be interpreted to require uniform expenditures among the school districts.[40] The California court had earlier held that the word "system" as used in article IX, section 5 of that state's constitution, implied a "unity of purpose, as well as an entirety of operation," requiring the legislature to provide "one system which shall be applicable to

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[35] 1 A.E.D. HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 282 (1984).

[36] Mize, San Antonio Independent School District v. Rodriguez*: A Study of Alternatives Open to State Courts*, 8 U.S.F. L. Rev. 90, 110–11 (1973-74).

[37] *See, e.g.*, MASS. CONST. pt. 2, Ch. V, § II:

> The Encouragement of Literature, Etc.
>
> Duty of legislatures and magistrates in all future periods
>
> Wisdom, and knowledge, as well as virtue, diffused generally among the body of the people, being necessary for the preservation of their rights and liberties; and as these depend on spreading the opportunities and advantages of education in the various parts of the country, and among the different orders of the people, it shall be the duty of legislatures and magistrates, in all future periods of this commonwealth, to cherish the interests of literature and the sciences, and all seminaries of them; especially the university at Cambridge, public schools and grammar schools in the towns; to encourage private societies and public institutions . . . .

[38] 2 THE WORKS OF THOMAS JEFFERSON 414–26 (P. Ford ed. 1904).

[39] CAL. CONST. art. IX, § 5.

[40] Serrano v. Priest, 5 Cal. 3d 584, 595, 487 P.2d 1241, 1249 (1971). The court instead relied on the equal protection clause of the California Constitution to invalidate the state school finance program.

all the common schools within the state,"[41] but the term "system," used without a modifier, could not be interpreted to require equality of expenditures.[42]

Tennessee is another state whose constitution uses the word "system" without an adjective or modifier. Article IX, section 12 of the Tennessee Constitution requires that the "General Assembly shall provide for the maintenance, support and eligibility standards of a system of free public schools."[43] Here, the system must be "maintained and supported," implying that an inadequately funded system may be constitutionally deficient, but the lack of a modifier for "system" tends to weaken the requirement.

The third type of positive constitutional provision includes one or more adjectives to define the kind of system required. Words such as "general and uniform,"[44] "efficient,"[45] "thorough and efficient,"[46] "adequate,"[47] "thorough and

[41] *Id.* (citing Kennedy v. Miller, 97 Cal. 429, 432, 32 P. 558, 559 (1893)).

[42] *Id.* at 596. The California Supreme Court has subsequently held that the words of the California Constitution requiring that the legislature "provide for a system of common schools by which a *free school* shall be kept up and supported in each district . . ." mean that "public education is a right enjoyed by all—not a commodity for sale. Educational opportunities must be provided to all students without regard to their families' ability or willingness to pay. . . . This fundamental feature of public education is not contingent upon the inevitably fluctuating financial health of local school districts." Hartzell v. Connell, 35 Cal. 3d 899, 904, 913, 679 P.2d 35, 201 Cal. Rptr. 601, 604, 610 (1984). It seems that the California court's view is that fundamentality can be found in the state's positive education provision even though only "system" is used because "[p]ublic education forms the basis of self-government and constitutes the very corner stone of republican institutions." *Hartzell*, 35 Cal. 3d at 906, 679 P.2d at 40, 201 Cal. Rptr. at 606 (citing Winans, Chairman, Committee on Education, in CAL. CONST. CONVENTION, DEBATES AND PROCEEDINGS 1878–1879, at 1087). The court seems to say that education is, by its very nature, fundamental.

[43] *See also* N.Y. CONST. art. XI, § 1.

[44] WASH. CONST. art. 9, § 2; *see* Seattle School Dist. No. 1 v. State, 90 Wash. 2d 476, 585 P.2d 71 (1978). The Constitution of Arizona states that the government "shall provide for the establishment and maintenance of a general and uniform public school system . . . ." ARIZ. CONST. art. XI, § 1; *see* Shofstall v. Hollins, 110 Ariz. 88, 515 P.2d 590 (1973). The Montana Constitution provides explicitly for a system of education that guarantees "equality of opportunity" to each person. MONT. CONST. art. X, § 1, (1); *see* Helena Elementary School Dist. v. State, 236 Mont. 44, 769 P.2d 684 (1989).

[45] KY. CONST. § 183 (providing for "an efficient system of common schools throughout the state"); *see also* TEX. CONST. art. VII, § 1 ("[I]t shall be the duty of the legislature of the state to establish and make suitable provision for the support and maintenance of an efficient system of public free schools.").

[46] OHIO CONST. art. 6, § 2 (providing for "a thorough and efficient system of common schools throughout the state"); *see* Board of Educ. of City School Dist. of the City of Cincinnati v. Walter, 58 Ohio St. 2d 368, 390 N.E.2d 813 (1979). W. VA. CONST. art. XII, § 1 (providing for a "thorough and efficient system of free schools . . . ."); *see* Pauley v. Kelly, 162 W. Va. 672, 255 S.E.2d 859 (1979).

[47] GA. CONST. art. VIII, § I, para. I ("The provision of an adequate education for all citizens shall be a primary obligation of the State of Georgia, the expense of which shall be provided for by taxation."); *see* McDaniel v. Thomas, 248 Ga. 632, 285 S.E.2d 156

uniform,"[48] and other combinations give substantive meaning to the constitutional mandate.

Some of the school finance cases are based, not on an affirmative mandate to foster public education, but rather on negative constitutional provisions in the states' bills of rights. Justice Black once referred to these prohibitions against governmental infringement on individual rights or liberties as "a remarkable collection of 'thou shalt nots.'"[49] A prohibition of this type has its roots in the theory of natural rights advanced by Locke and espoused by Jefferson. When these rights have been expressed or implied by the language of state constitutions, the courts have held that such an enunciation establishes a fundamental right. For example, the California Supreme Court has inferred the fundamentality of education from the state's equal protection provision, ruling that the state equal protection clause[50] possesses an "independent vitality which, in a given case, may demand an analysis different from that which would obtain if only the federal standard were applicable."[51] Thus, the state equal protection provision—in effect, a negative, "thou shalt not"—may on its own constitute a viable approach to challenge the unequal distribution of school funds.

The Kentucky case suggests three relationships between the equal protection and the education clauses of a state's constitution. First, the state equal protection restraint may not be needed to prevent disparate allocation of tax resources among school districts. The Kentucky court found it unnecessary to consider the equal protection question at either the state or federal level, relying on the fundamentality found in the state's positive education clause to justify intervention.[52] From this view the Kentucky case reinforced the idea that the fundamentality of education flows from the education clause and is not

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(1981). The Georgia Constitution is the only state constitution which uses the term "adequate" in its education provision.

[48] COLO. CONST. art. IX, § 2; *see* Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005 (Colo. 1982).

[49] Reid v. Covert, 354 U.S. 1, 9 (1956).

[50] CAL. CONST. art. I, § 7 (a).

[51] Serrano v. Priest, 18 Cal. 3d 728, 764, 557 P.2d 929, 950, 135 Cal. Rptr. 345, 366 (1977).

[52] The Kentucky court said: "We have decided this case solely on the basis of our Kentucky Constitution, Section 183." *Rose*, 790 S.W.2d at 215. In addition to the Kentucky Supreme Court, only the supreme courts of two other states, Montana and Texas, have used this rationale. *See* Helena Elementary School Dist. No. 1 v. State, 236 Mont. 44, 769 P.2d 684 (1989); Edgewood Indep. School Dist. v. Kirby, 33 Tex. Sup. Ct. J. 12, 777 S.W.2d 391 (Tex. 1989).

dependent on equal protection for redress of plaintiffs' complaints. The positive enunciation of the general need for education to perpetuate a republican form of government is sufficient authority for fundamentality.[53]

Second, the education provision of a state constitution may without support or complement from any other constitutional source require substantial uniformity in the allocation of school funds. The New Jersey Supreme Court in *Robinson v. Cahill*[54] first expressed this view indicating that the system of school financing could be held unconstitutional solely on the basis of the positive mandate of the education provision of the state constitution. Unlike the Kentucky case, *Robinson* did not find that education was fundamental, nor did it need to. Rather, the New Jersey court found that unconstitutionality could be determined even though education is *not* fundamental for equal protection purposes. The court in *Robinson* held simply that the affirmative mandate of the education provision of the New Jersey constitution had not been fulfilled by the legislature, and that "A system of instruction in any district of the state which is not thorough and efficient falls short of the constitutional command."[55]

A third application of both the education provision and the state equal protection clause, slightly different from either Kentucky's or New Jersey's, is expressed in *Pauley v. Kelly*.[56] Here, the West Virginia Supreme Court found the positive mandate of the education provision sufficient to establish fundamentality, and that this fundamentality may be applied to invoke the state's equal protection clause.[57] In *Pauley*, the court saw the equal protection clause and the "thorough and efficient" education provision to be harmonious and complementary. The court wrote: "Certainly, the mandatory requirement of a 'thorough and efficient system of free schools,' . . . demonstrates that education is a fundamental constitutional right in the state."[58]

Thus, the Kentucky case, in tandem with *Serrano*, *Robinson*, and *Pauley*, suggests substantial judicial flexibility in the application of both the negative constitutional prohibitions of equal

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[53] *Rose*, 790 S.W.2d 186.
[54] 303 A.2d 273, *cert. denied*, 414 U.S. 976 (1973).
[55] *Id.* at 294.
[56] 255 S.E.2d 859 (W. Va. 1979).
[57] *Id.* at 859.
[58] *Id.* at 878.

protection and the positive constitutional requirements of the education provisions in redressing the unequal apportionment of school funds. This flexible view may allow separate application of either the equal protection or the education provision, or, in the alternative, it may permit some "harmonious" combination of the two to strike down an unequal allocation of school funds. In a vein of even greater flexibility, the Kentucky court appeared to suggest that education is, by its very nature, an inherent right, obligating the court to give it special consideration in carefully scrutinizing any legislation which may deny its exercise.

IV. THE COMMON SCHOOL IDEAL

The failure of legislatures to finance public schools equitably is primarily caused by a structural conflict between the common school ideal and the nature of the legislature as a constituent assembly. Because the public schools are "common schools," state legislatures must provide educational services to all children in all areas of the state, regardless of the special interests which may seek to skew the allocation of resources to meet their own exclusive ends.

The common school concept is a manifestation of the social contract. Basic to the philosophy of common or public schools is the idea that education is a natural right, an outgrowth of Locke's and Rousseau's natural rights of man. The common school "is *common*, not as inferior . . . but as the light and air are common."[59] The common schools are to be open to all, where "the children of the rich and poor sit down side by side on equal terms, as members of one family—a great brotherhood . . . ."[60] The spirit of public schools is that they be "free" and "equal."[61]

The object of the common schools was well defined in 1838, by the first Kentucky State Superintendent, who maintained that:

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[59] Doane, *Address*, 15 AM. J. EDUC. 8 (1865) (*cited in* R.F. BUTTS & L. CREMIN, A HISTORY OF EDUCATION IN AMERICAN CULTURES 194 (1953)).

[60] 1 COMMON SCHOOL JOURNAL 60 (1839) (*cited in* R.F. BUTTS & L. CREMIN, *supra* note 59, at 195).

[61] 2 COMMON SCHOOL ASSISTANT 41 (1837) (*cited in* R.F. BUTTS & L. CREMIN, *supra* note 59, at 194).

> The great object of the Common School law is to give to every child in the Commonwealth a good common school education; to develop the whole intellect of the State. The great principle of the System is that of equality; the rich and poor are placed on the same footing . . . .[62]

This concept of commonality is expressed in most other state constitutions whether the particular constitution actually uses the term "common," "public," or "free."

Several state constitutions include the word "common" to define the type of school system contemplated by the people. For example, Kentucky's constitution requires "an efficient system of common schools."[63] Other state constitutions require "an efficient system of public free schools,"[64] or "a system of free public elementary and secondary schools."[65]

The word "common" has significant antecedents emanating from the eighteenth and early nineteenth centuries. The Puritan concept of Commonwealth is probably the source of the notion of commonality and the foundation for formation of the state as an instrument to advance the common good.[66]

The framers of the Kentucky Constitution, like the authors of the constitutions of other states, clearly intended their states to be commonwealths.[67] According to the Massachusetts Constitution of 1780, the end of the sovereign state or commonwealth was "to secure the existence of body-politic . . .[,] a voluntary association of individuals . . . [, or] social compact, by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good."[68] It was believed that

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[62] Bullock, *First Annual Report to the Legislature*, Jan. 3, 1839, in B. HAMLETT, 7 HISTORY OF EDUCATION IN KENTUCKY 19 (1914).

[63] KY. CONST. § 183.

[64] TEX. CONST. art. VII, § 1.

[65] VA. CONST. art. VIII, § I.

[66] O. HANDLIN & M. HANDLIN, COMMONWEALTH: A STUDY OF THE ROLE OF GOVERNMENT IN THE AMERICAN ECONOMY: MASSACHUSETTS 1774–1861, at 28–31 (1969).

[67] Kentucky, Massachusetts, Pennsylvania, and Virginia are by their constitutions expressly organized as commonwealths; the other states are so constituted that they hardly differ from this functional notion of a commonwealth. References to commonality and commonwealth permeate Jefferson's writing. *See* T. JEFFERSON, *A Bill for the More General Diffusion of Knowledge*, in BASIC WRITINGS OF THOMAS JEFFERSON 41 (P. Foner ed. 1950).

[68] Preamble to the Massachusetts Constitution of 1780, JOURNAL OF CONVENTION 222 (1780), *cited in* O. HANDLIN & M. HANDLIN, *supra* note 66, at 29.

"a Government or a Body Politic ought to be one connected system having but one common interest, and one public will."[69]

The goal of advancing the common good has been held in constant tension by contrary efforts to promote private interests. The intertwining of property wealth with the private interest has always been the greatest hinderance to commonality and was the most worrisome to the early political philosophers. John Adams noted that a broader interest should prevail beyond the self-interest of the propertied few,[70] and that a unified state interest must transcend the various special interests.[71] A unity of interest or commonality of purpose was required to overarch the diverse constituent interests bearing on the legislature. The objective, as expressed by Adams, was for the body politic to provide benefits in "common to all its members" and to constitute "one moral whole."[72] The state was to be a "Common Wealth, with an identity and interests of its own," above and beyond the specialized interests.[73]

This commonality of interest, and the ideal of the common public school pervade early nineteenth century discussions of education. As early as 1758, Rousseau's *Discourse on Political Economy* maintained that common schools should be created under public authority. Public authority, he argued, should be *parens patriae*: the state would possess, in the name of all the citizenry, the same authority over all school children as the father over his own child.[74]

Rousseau observed that public education "is one of the fundamental rules of popular or legitimate government,"[75] and that education should be equal and common to all. He said:

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[69] E. LUDLOW, *Letter to Mr. Hutchinson*, in 4 MASSACHUSETTS SPY, Mar. 3, 1774; *see also* O. HANDLIN & M. HANDLIN, *supra* note 66, at 31.

[70] J. ADAMS, 4 WORKS 194, *cited in* O. HANDLIN & M. HANDLIN, *supra* note 66, at 30.

[71] Letter from John Adams to James Warren (Oct. 20, 1775), *reprinted in* 1 LETTERS OF MEMBERS OF THE CONTINENTAL CONGRESS 239–40 (E. Burnett ed. 1921); T. PARSONS, THEOPHILUS PARSONS 364–66, *cited in* O. HANDLIN & M. HANDLIN, *supra* note 66, at 30.

[72] J. ADAMS, *Address of the Convention to the People*, in JOURNAL OF CONVENTION 216 (1780); J. ADAMS, *Defense*, in 4 WORKS 404, *cited in* O. HANDLIN & M. HANDLIN, *supra* note 66, at 29.

[73] O. HANDLIN & M. HANDLIN, *supra* note 66, at 29; *see also* J. DEWEY, PHILOSOPHY AND CIVILIZATION 283 (1931).

[74] J. ROUSSEAU, THE SOCIAL CONTRACT AND DISCOURSES 149 (G. Cole trans., revised by J. Brumfitt & J. Hall 1973).

[75] *Id.*

> If children are brought up in common in the bosom of equality; if they are imbued with the laws of the State and the precepts of the general will . . . we cannot doubt that they will learn to cherish one another mutually as brothers . . . .[76]

The words "equality" and "mutuality" are, therefore, essential and constitute the essence of the common school system in a commonwealth. Use of the term "common" imposes a highly meaningful and definitive standard by which state legislatures must abide if constitutional intent is to be satisfied. The Kentucky court elaborated on the term, saying that common schools shall be free to all, available to all, substantially uniform, and shall provide equal opportunities for all.

The Kentucky case nevertheless illustrates the difficulty of achieving this ideal of the common school. State legislatures charged with the creation and maintenance of an equitable system of public schools are distracted by local or special interests from achieving a system which is unified and common. The Kentucky Supreme Court found that the legislature had failed to meet the state constitution's mandate of an "efficient system of common schools."[77] The role of the legislature was to allocate resources equitably among the schools, but the performance of this basic function was beyond the legislature's political capacity.

Wide revenue disparities among school districts evidenced the inability of the Kentucky General Assembly to provide for the common good through an equitable system of common schools. Kentucky is not alone. With the possible exception of Hawaii, no state legislature in the United States has succeeded, without intervention by the courts, to effectuate the envisaged system of common schools. The Kentucky case thus represents a notable example of incompatibility between the common school ideal and the legislature's capacity to effectuate the ends implicit in that ideal.

V. Equality of Opportunity

The differential growth of local school district tax bases creates a perpetual movement toward inequality requiring persistent and affirmative legislative action to maintain equity in

[76] *Id.*
[77] *Rose*, 790 S.W.2d at 189.

school finance. By using local taxes to support education, the legislature commits itself to the difficult responsibility of acting affirmatively to overcome emerging local disparities. Unfortunately, the history of school finance reveals only sporadic interest by legislatures in correcting these inequalities.

The reasons for the failure of legislatures to take remedial action are many and varied, but as observed above, the most persistent and pernicious are special interests which tend to gridlock legislative response to the problem. Within this context, the Kentucky case suggests three reasons supporting more assertive and, perhaps, perdurable judicial intervention.

A. *A State System*

The first reason emanates from the apparent willingness of legislatures to assert their prerogatives while attempting to avert their responsibilities. In *Rose* the legislature maintained that the lack of equality of educational opportunity was due to local administrative ineptitude or deficiencies in local aspiration and was not the fault of the legislature.[78] The court readily rejected this assertion, pointedly observing that:

> The sole responsibility for providing the system of common schools is that of our General Assembly . . . . This obligation cannot be shifted to local counties and local school districts.[79]

The court placed both the responsibility and the blame squarely on the shoulders of the legislature. Thus, if local inadequacies produce inequalities, the fault lies with the legislature, not the locality. Inequality results from the statutory system created by the legislature, and the constitution places the obligation for correction on that same legislature. It is a state system, not a local one. This conclusion of the Kentucky court is not unique in light of other school finance cases, but the court's intensity and vigor in asserting legislative obligations and in recognizing the legislature's non-performance suggests the importance of this reasoning.

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[78] *Id.* at 211.
[79] *Id.*

B. *Centrality of Equality*

A second reason cites the failure of the legislature to appreciate the fact that equality of resources is essential in creating and maintaining an "efficient" system of schools. The Kentucky court stated emphatically that "Equality is the key word here . . . ."[80] and that equality of educational opportunity is an "essential" and "minimal" characteristic of a system of common schools.[81] Moreover, the court made clear the inescapable linkage between common schools and equality, saying "Common schools shall provide equal educational opportunities to all Kentucky children, regardless of place of residence or economic circumstances."[82] By its various acts, or omissions, which not only permitted but caused wide revenue disparities among school districts, the legislature had done little to ameliorate inequality or accommodate equality. Thus, the legislature had violated the underlying principles, implicit in the Kentucky Constitution, that public schools must be "adequate, equal, and substantially uniform."[83]

Although the court clearly based its conclusions on constitutional intent and the legal obligations of the legislature to effectuate equality of opportunity, it displayed a legal moralism which, in other contexts, has been enunciated by various legal scholars. Possibly the most notable view states that equality should be the rule, variation from which requires proof that the departure is justified.[84] Where the state creates differences in opportunity without rationale or basis in fairness, the legislation should be invalidated by the courts. Where an entire system is created by the state which unfairly distributes the resources of the state, the entire system is unjustified. According to this view, unequal allocation of resources is justified only if the departure from strict equality favors the least advantaged.[85] An analogous argument maintains that a treatment-as-equals principle requires that if there is a fixed amount of money, then each person is entitled to have an equal share.[86] It further states that departure from strict equality of resources is justified only if a student-by-

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[80] *Id.*
[81] *Id.* at 212.
[82] *Id.*
[83] *Id.*
[84] J. RAWLS, A THEORY OF JUSTICE 302–03 (1971).
[85] *Id.*
[86] R. DWORKIN, A MATTER OF PRINCIPLE 269 (1986).

student assessment of needs justifies a difference.[87] This is, in essence, the position adopted by the Kentucky court. The court called for a system of "substantial" uniformity throughout the state.[88] Reasonable variation is permitted based on the justification of rationally determined differences in educational needs of children.

C. *Necessity of Adequacy*

The third reason identified by the court was that the legislature had failed to provide adequate state and local funding for the school system. The court noted that Kentucky ranked fortieth nationally in per-pupil expenditures and thirty-seventh in teacher compensation.[89] Even the more affluent school districts were inadequately funded, said the court, according to "accepted national standards."[90] The court concluded that "A child's right to an adequate education is a fundamental one under our Constitution. The General Assembly must protect and advance that right."[91]

In so ruling the Kentucky court greatly expanded the discussion of what constitutes an adequate education. To date most courts have either poorly defined or avoided the issue entirely.[92] The Kentucky court resolved the question by stating that "an adequate education must have as its goal the development within each child of seven basic capacities."[93] The court also accepted

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[87] *Id.* at 272.
[88] *Rose*, 790 S.W.2d at 212.
[89] *Id.* at 197.
[90] *Id.* at 198.
[91] *Id.* at 212.
[92] Courts in New Jersey, Washington, New York, and West Virginia have grappled with a definition of adequacy; in so doing, they have all confronted the inherent difficulty of reconciling such a definition with the elusive interplay between a given level of funding and the return on investment, in terms of resources and programs. *Cf.* Wise, *Educational Adequacy: A Concept in Search of Meaning*, 8 J. EDUC. FIN. 300–15 (1983) ("Can the term [adequacy] be defined in a way that is philosophically satisfying? Is it technically possible to give the term operational meaning? If so, is the measure politically feasible to adopt? Finally, what would the cost implications be?").
[93] Those capacities include: (1) oral and written communication skills, (2) knowledge of social, economic, and political systems, (3) understanding of governmental processes, (4) knowledge of mental and physical wellness, (5) grounding in the arts, (6) training or preparation for academic or vocation sufficient to choose and pursue life work intelligently, and (7) sufficient academic and vocational skills to compete favorably with counterparts in surrounding states. *Rose*, 790 S.W.2d at 212. The last of these—the ability to compete favorably with children from other states—suggests a level of funding comparable to other surrounding states.

the opinion of expert witnesses who concluded that a primary attribute of an efficient system of schools was that it must provide an adequate education.[94] The court's requirement of more adequate funding left the General Assembly few options but to raise the entire level of funding by allocating additional tax revenues to the public schools.[95] In this way the court influenced both the allocation and derivation of additional revenues to support the public schools.

VI. The Efficacy of Striking the Entire System

The fact that the Kentucky court struck down the entire system of public schools clearly reaches beyond the court decisions of other states. Courts in other school finance cases had confined their judgment to the unconstitutionality of state school finance formulae, methods of taxation, and/or other statutes bearing on financing methods which tended to create disparities in revenues.[96] Some commentators have maintained that the legislative response to the Kentucky decision would not have been possible had the court merely ruled that the school finance formula, alone, was unconstitutional.[97] The Kentucky court obviously concluded that the most efficacious means to bring the system in line with the constitutional mandate was to erase completely the web of statutory and regulatory contraints which had together militated against the achievement of an efficient system.

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[94] Richard Salmon testified that "resources provided by the system must be adequate and uniform throughout the state" and this author's opinion was that "an efficient system is unitary, uniform, adequate and properly managed." *Id.* at 210–11, 213.

[95] The court, however, was careful to stress that it was not directing the General Assembly "to enact any specific legislation . . . [or] to raise taxes." *Rose*, 790 S.W.2d at 212. The General Assembly was free to pursue its obligation as it felt best.

[96] One plausible explanation for this difference in approach may lie in the fact that these other cases raised challenges to the school finance structure under the state's equal protection clause, rather than the education clause. *See, e.g.*, Serrano v. Priest, 18 Cal. 3d 728, 776, 557 P.2d 929, 958, 135 Cal. Rptr. 315, 374 (1976), *cert denied*, 432 U.S. 907 (1977) ("We conclude that . . . the California public school financing system . . . denied plaintiffs the equal protection of the laws under the relevant provisions of our state Constitution."); *see also* Pauley v. Kelly, 255 S.E.2d 859, 882–84 (W. Va. 1979). The West Virginia Supreme Court "chose to make no definitive judgment" on whether the school finance system was so deficient in certain counties that it failed to provide a thorough and efficient system.

[97] Address by Senator Michael Moloney, Chairman of the Senate Appropriations Committee, Kentucky Senate, Harvard Journal on Legislation Symposium: *Investing in Our Children's Future: School Finance Reform in the '90s* (Feb. 9, 1991).

The court's rationale for rendering such a comprehensive judgment on state school finance system was direct and simple.[98] The court noted that the plaintiffs had made "no allegation that only a part of the common school system is invalid . . . ."[99] The plaintiffs had not asked the court to declare any specific statute unconstitutional, but rather had requested that the court determine whether the system as constituted was efficient. The plaintiffs, in a post-argument memorandum to the trial court, maintained that the "real issue" in the case was that "the legislature has failed to perform the constitutional mandate for an efficient system of common schools throughout the state." The redress sought was the overturn of the *entire* system, not a component part thereof. The plaintiffs further asked the court for a comprehensive remedy, a mandatory order directing the defendants to "enact legislation that would provide an efficient and uniform system of common schools throughout the state."[100]

Had the court tried to remedy the complaint by striking only selected statutes, thereby requiring specific statutory revision, the court's order could have been interpreted as a more serious intrusion into legislative prerogative. By invalidating the entire system, the court was able to set forth more general guidelines by which the legislature itself could effectuate a constitutional remedy.

The more general approach used by the court enabled it to define the intent of the constitution, set forth constitutional guidelines, and compel legislative adherence without seriously encroaching on legislative powers. The court made it clear that "the specifics of the legislation will be left up to the wisdom of the General Assembly."[101]

With particular regard to the separation of powers, the Kentucky Supreme Court said:

> Clearly, no "legislating" is present in the decision of the trial court, and more importantly, as we have previously said, there is none present in the decision of this Court . . . . Our job is to determine the constitutional validity of the system of common schools within the meaning of the Kentucky Constitution, Section 183. We have done so. We have de-

[98] *Rose*, 790 S.W.2d at 215 ("Lest there be any doubt, the result of our decision is that Kentucky's entire system of common schools is unconstitutional.").

[99] *Id.*

[100] Plaintiffs' Post-Argument Memorandum, Council for Better Educ. v. Wilkinson, No. 85-CI-1759 (Ky. Cir. Ct. Apr. 28, 1988).

[101] *Rose*, 790 S.W.2d at 214.

> cleared the system of common schools to be unconstitutional. It is now up to the General Assembly to re-create, and re-establish a system of common schools within this state which will be in compliance with the Constitution.[102]

The court's unique approach in effecting the comprehensive invalidation of the entire system tended to preserve legislative autonomy rather than to diminish it, and in so doing the court was able to maintain the proper balance in the separation of powers.

One may view the substance of the Kentucky case from several perspectives, but in the final anaysis, its importance rests primarily on the court's rejection of the legislature's proffered justification for inequality. There were no "special reasons" of sufficient weight and substance to justify the state's disparate allocation of the "cakes" and "shares" of educational opportunity. This rejection is relevant to future legislative formulation of educational policy because the court restricted the scope of legislative authority by defining constitutional boundaries. The authority of the legislature, which once had been perceived as plenary, was thereby sharply circumscribed and defined.

The constitutional underpinnings for the morally objectionable inequalities emanated from several sources. The foremost limitation on the legislature was found in the ideal of the common school and its implications for equal treatment and equality of opportunity. Within the constitutional mandate that the legislature establish a system of common schools was the implicit requirement that educational opportunity be substantially uniform throughout the state. The Kentucky court's generalized belief that education is a fundamental right created a formidable obstacle to legislative defense of inequality. The fact that the court declared that education is a transcendent and fundamental interest to both the individual and the state added great strength to the plaintiffs' case and was fatal to the state's defense. Moreover, the *a priori* importance of education extended the court's concerns beyond the equality of allocation to the more complex question of adequacy and sufficiency of funding.

Pervading the case, too, was the court's concern for the preservation of the principle of separation of powers and the proper balance between responsible judicial intervention and deference to legislative authority. In the final analysis, though, the case

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[102] *Id.*

suggests that the legislature is, by its constituent nature, susceptible to those effects which militate against constancy to the principle of equality. After all, as Madison observes, what are the legislators themselves but "advocates and parties to the causes" that their factional constituents determine.[103] And it is the striving for economic advantage and the "unequal distribution of property" which is the most persistent and pernicious instigator of inequality.[104] The interests and objectives of these factions generally run counter to the common school ideal, placing an insoluble dilemma on the frail shoulders of the legislature. Therefore, in order for equality of opportunity to prevail, the state courts will, of necessity, become faithful and continuing participants in overseeing legislation governing education fiscal policy.

[103] THE FEDERALIST No. 10, *supra* note 17, at 123.
[104] *Id.*

CREATIVE CONSTITUTIONAL LAW: THE KENTUCKY SCHOOL REFORM LAW

BERT T. COMBS*

The news media from San Antonio, Texas to London, England have lauded Kentucky's School Reform Law enacted by the General Assembly in the spring of 1990.[1] It was "[o]ne of the most comprehensive restructuring efforts ever undertaken by a Legislature," said *Education Week*.[2] "The most sweeping education package ever conceived by a state Legislature," noted the *New York Times*.[3] Kentucky was singled out by President Bush as a state that used "creative thinking" to transform its public schools.[4]

The extensive publicity of the Kentucky School Reform Law[5] seemed to be partially based on the surprise of the news media that a bold, revolutionary reform movement in education would be born in Kentucky. Excellence in education had never been a hallmark of the state. As Circuit Judge Ray Corns stated in his Findings of Fact, Kentucky's school system was one of the most severely deficient in the nation.[6] Kentucky ranked nationally in the lowest twenty-five percent on almost every indicator of educational performance.[7] Relative to other states, Kentucky was very near the bottom of the ladder in functional literacy, and it had one of the lowest percentages of citizens completing

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[1] *See, e.g., Kentucky's Bold Reforms*, Express-News (San Antonio, Tex.), Apr. 4, 1990; *Kentucky Ahead of Fields in LMS*, Education Guardian, (London), July 3, 1990, at 1, col. 1; *The Kentucky Plan*, Valley News (Hanover, N.H.), Apr. 3, 1990; *Starting Over*, N.Y. Times, Apr. 8, 1990, at 34, col. 1; *Kentucky Radically Reforms Public Education*, Courier-News (Bridgewater, N.J.), Apr. 20, 1990, at A7, col. 1.

[2] *Lawmakers in Kentucky Approve Landmark School Reform Bill*, Educ. Week, Apr. 4, 1990, at 1, col. 4.

[3] Fiske, *Lessons: In Kentucky, Teachers, Not Legislators, Will Be Writing the Lesson Plans*, N.Y. Times, Apr. 4, 1990, at B6, col. 1.

[4] *Bush Lauds Kentucky for Efforts to Reform Sehools*, Lexington Herald Leader, Apr. 5, 1990, at A8, col. 1.

[5] KY. REV. STAT. §§ 156.005–156.990 (1990).

[6] Council for Better Educ. v. Collins, No. 85-CI-1759, slip op. at 11 (Franklin Cty. Ct., Ky. May 31, 1988).

[7] BUREAU OF THE CENSUS, U.S. DEPARTMENT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1986, at 134 (Table 217) (1985).

high school.[8] Kentucky students also ranked very low in performance on standardized testing.[9]

The Kentucky School Reform Law was enacted in response to a Kentucky Supreme Court decision declaring the state's *entire system* of public schools unconstitutional.[10] That decision was the culmination of a 1985 lawsuit led by sixty-six of Kentucky's 178 local school districts. The genesis of the suit itself involved a visit in early 1985 to my law office in Louisville by a small group of old friends with whom I had worked in the field of education during my term as Governor in the early 1960's. These people, who were still working in education, reminded me that I had at one time claimed to be Kentucky's education Governor. They also pointed out that I was now holding myself out as a top-notch lawyer. I had to admit that both of these statements were true. They further reminded me that Kentucky's school system, in addition to being inefficient, was completely inadequate at providing even basic skills to our children. There is no question that the state educational system was in imminent danger of becoming the weakest in the country.

My friends cited a litany of grave facts about education in Kentucky, highlighting that *not a single school district* in the state was financed to the level of the national average; indeed, many of the districts were in such dire poverty that there was no pretense that the school system was even minimally "efficient" as that term is used in the state Constitution. They also reminded me that Kentucky's General Assembly had never (at least within the memory of any living person) adequately financed the state's public schools. The result, according to them, was that the children of Kentucky were being deprived of their constitutional right to a decent and equal education and that we as onlookers were wasting our "seed corn" for the future.

The group concluded their discourse by saying that they wanted to bring a lawsuit against the Governor and the General Assembly to require them to provide an efficient system of public schools. More significantly to me, they wanted me to represent them in their proposed lawsuit.

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[8] *Id.*

[9] Office of Planning Budget and Evaluation, U.S. Department of Education, *State Education Statistics Supplement, Student Performance and Resource Inputs, 1986 and 1987* (1988).

[10] *See* Rose v. Council for Better Educ., 790 S.W.2d 186 (Ky. 1989).

As a name partner in one of Kentucky's largest law firms, I needed to sue the Governor and the General Assembly about as much as a hog needs a side saddle. It would be inevitable that the lead counsel in the lawsuit would be projected into the political arena, and I was trying hard to forget that I had ever been in politics. I had found it difficult enough to make the transition from Governor to private attorney and was reluctant to expose myself again to the brickbats that could be expected on the political firing line. Being in Kentucky politics is a little like being in the Mafia—once in, it's next to impossible to get out.

I expressed my admiration and respect for these people who wanted to improve Kentucky's schools but explained that I was not in a position to represent them in their proposed lawsuit. I knew, of course, that there was very little money available and that as a practical matter, I would have to handle the case pro bono if I agreed to serve as counsel. My friends said that they understood my position, but nevertheless they persisted. To shorten this personal aside, I agreed after two or three more meetings to serve as lead counsel pro bono with the understanding that my staff would be paid minimal compensation for their services.[11]

That was the beginning of the lawsuit that produced one of the most dramatic and significant constitutional law decisions in the history of Kentucky. The Supreme Court of Kentucky relied upon section 183 of the Kentucky Constitution, an innocuous-looking, very succinct provision, in dealing a fatal blow to the entire scope of the educational framework of Kentucky. Section 183 of the Kentucky Constitution states: "The General Assembly shall, by appropriate legislation, provide for an efficient system of common schools throughout the state."[12] It was in light of that provision that the court scrutinized the allegations of the sixty-six property-poor school districts and then held: (1) that Kentucky's elementary and secondary system was inadequate and inefficient within the meaning of Section 183 of the Kentucky Constitution;[13] (2) that the opportunity to obtain an adequate education is a fundamental right protected by the

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[11] Debra Dawahare, then an associate in my firm and now a partner, served as associate counsel with high distinction. Ted Lavit, a good lawyer with previous experience in school cases, also served very capably as associate counsel.

[12] KY. CONST. § 183.

[13] *Rose*, 790 S.W.2d at 189.

Kentucky Constitution;[14] and (3) that the wide disparity in funding between the affluent districts and the poor districts was discriminatory to the children in the poor districts, violating the equal protection clause of the fourteenth amendment to the United States Constitution and section 183 of the Kentucky Constitution.[15]

Between the genesis of the lawsuit and the dynamic constitutional conclusion was an intriguing dialectic between constitutional theorizing and pragmatic legal strategizing. Hovering over both the constitutional implications and the legal in-fighting was, inevitably, the specter of political interests.

The most compelling question of constitutional law that arose dealt with the separation of powers issue. Section 183 of the Kentucky Constitution rests the obligation to provide an efficient system of state schools solely with the General Assembly.[16] But how far could the judiciary go in telling the General Assembly to perform its constitutional obligation to provide an "efficient" school system? A political question of decisive proportions—never publicly discussed—was how would the court attempt to enforce its judgment if the General Assembly refused to obey its mandate? The fear of a constitutional "show-down" was heightened by Kentucky's uniquely strong language concerning separation of powers. The Kentucky Constitution provides in section 27 for a division of governmental powers among the legislative, executive, and judicial departments.[17] At section 28 it *emphasizes* the division beyond a doubt: "no person or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others . . . ."[18]

Strategy and procedural questions assumed even more importance in this case than in the usual one. We knew that the defendants would raise as a defense every technical obstacle known to the law. We would have preferred to file our case in federal court in view of the general belief that federal courts are less subject to political pressure than state courts. Kentucky state judges are elected by the people. But we were aware of

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[14] *Id.* at 215.
[15] *Id.* at 198.
[16] KY. CONST. § 183.
[17] *Id.* § 27.
[18] *Id.* § 28. Kentucky legend has it that when the state constitution was being written in 1791, the drafting committee journeyed to Monticello to confer with Thomas Jefferson, who advised them to include these words in the Kentucky Constitution.

the Texas case, *San Antonio Independent School District v. Rodriguez*,[19] in which the United States Supreme Court held that education is *not* a fundamental right under the *federal* Constitution. We knew, too, that in *Brown v. Board of Education*, the Court held that "education is perhaps the most important funtion of the state and local governments";[20] and that "such an opportunity [the right to an education], where the state has undertaken to provide it, is a right which must be made available to all on equal terms."[21] We decided that we had no choice but to file the suit in state court. It was filed in the Franklin Circuit Court, which has statutory jurisdiction over state officials.[22]

Another troublesome question was who should be named as plaintiffs and defendants. There was no precedent in Kentucky and little elsewhere. We incorporated the sixty-six complaining school districts into a non-profit corporation called "The Council for Better Education." The corporation, seven other school districts, and twenty-two public school students suing as individuals were named as plaintiffs.

Even more difficult was the question of who should be named as defendants. The Governor was named by reason of her constitutional duty to make recommendations to the General Assembly and her control over the budget. The Superintendent of Public Instruction was named because of her constitutional authority to supervise the state school system. The State Board of Education, which had limited statutory authority over the school system, was also named as a defendant. The State Treasurer was named by reason of her presumed control over state funds.

It was obvious that the Kentucky General Assembly should be named as a defendant. The crucial question was how to get the General Assembly properly before the court in a manner that would not cause the case to become bogged down by procedural problems. The Kentucky Senate is composed of thirty-eight members; the Kentucky House of Representatives has 100 members. To name each of the 138 members as defendants would have made the Complaint very cumbersome. Moreover, the difficulty in serving the necessary subpoenas, notices, and other documents on 138 defendants would have made it impos-

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[19] 411 U.S. 1 (1973).
[20] 347 U.S. 483, 493 (1954).
[21] *Id.*
[22] Frankfort, the state capital, is located in Franklin County.

sible—because of the turnover in the General Assembly—to move the case along.

We fully expected that the members of the General Assembly would resent being sued and that they would rely on the separation of powers argument to the fullest extent possible. After considerable thought, we decided to present our case as a declaratory judgment action, emphasizing that the public officials were being sued only in their representative capacities and minimizing our request for specific relief against the members of the General Assembly.

We never expected this case to reach the point of confrontation between the General Assembly and the judiciary. We were concerned that if this should occur, the controversy between the court and the General Assembly would overshadow the merits of the plaintiffs' demands for improvement of the school system. Our objective was to obtain a declaratory judgment by Kentucky's highest court that the state's school system was inadequate and inefficient to the point of being unconstitutional and that the oath of the members of the General Assembly required that body to establish and maintain a system that was constitutional. Our concept of the plaintiffs' case was that such a declaration by the supreme court would generate sufficient awareness of the dire needs of the public schools that the pressure of public opinion would spur the General Assembly into action. We thought, too, that a supreme court decision could act as a buffer for those more timid members of the General Assembly ("limber twigs," in Kentucky vernacular) who panicked when the word "taxes" was even mentioned.

To obtain jurisdiction over the General Assembly, we named as defendants John A. Rose, President Pro Tempore of the Senate, and Donald J. Blandford, Speaker of the House of Representatives. We had scant precedent that this constituted legal service on the General Assembly as a whole. But we did have some authority for our position.[23] The question of the

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[23] Seattle School Dist. v. State, 90 Wash. 2d 476, 585 P.2d 71 (1978) (the Speaker of the House of Representatives was named as a defendant representing all members of the House); Barkley v. O'Neill, 624 F. Supp. 664 (S.D. Ind. 1985) (the plaintiff sued members of the United States House of Representatives by suing the Speaker of the House); Jackson v. Congress of the United States, 558 F. Supp. 1288 (S.D.N.Y. 1983) (both Houses of Congress were found to be proper parties as intervenors in a suit challenging the one Houses exercise of legislative veto); Synar v. United States, 626 F. Supp. 1374 (D.D.C. 1986) (House Speaker O'Neill and Bipartisan Leadership group intervened as defendants to support an Act challenged on constitutional grounds).

sufficiency of the service on the General Assembly caused us trouble later in the supreme court. The dissenting judges thought that the members of the General Assembly were not properly before the court.[24]

The filing of the case angered some of the defendants. After all, they said, it is black-letter law that the state is an omnipotent creator of all entities of local government—from municipalities of all sizes to school districts. It is the state to whom they look for their very existence, their funding, and their abolition if the state so decides. The very idea that a lowly entity like a school district could rise up against its progenitor, file suit, and demand constitutional rights from it was politically preposterous and personally repugnant. It was a curious paradigm of Pygmalion—but wholly without the charm of Galatea's myth or the whimsy of Henry Higgins.

The legislators were indeed not pleased. The President Pro Tem of the Senate castigated the plaintiffs *and their counsel* on the floor of the Senate for having the temerity to ask the judiciary to encroach upon the domain of the General Assembly.[25] The Senate passed a bill that no school funds could be used to pay the expenses of a lawsuit against the General Assembly; this enactment died in the Committee on Education in the House of Representatives.[26] Judge Corns, to whom the case was assigned in the Franklin Circuit Court, overruled defendants' various motions to dismiss without much delay.[27] Plaintiffs proceeded to prove their case.

The proof was both voluminous and overwhelming—almost without dispute—that although there were a substantial number of school districts in the state with adequate school systems, in the majority of the districts the schools were inadequate and inefficient.[28] Moreover, the proof was clear and convincing that the wide disparity in funding between the affluent districts and the poor districts was discriminatory to the children of the poor

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[24] *Rose*, 790 S.W.2d at 227.

[25] Statement made by Senator Eck Rose, President Pro Tem of the Senate, on the floor of the senate during Kentucky General Assembly, Regular Session, 1990.

[26] S. 102, 1986 Ky. Leg., Reg. Sess, 1986. Each of the school districts forming the Council for Better Education had contributed 50 cents per school child in the district toward the cost of maintaining a lawsuit. This was sufficient for actual costs, but not for legal fees.

[27] Various Motions of Franklin County Court; Council for Better Educ. v. Collins, No. 85-CI-1759 (Franklin Cty. Ct., Ky. June 8, 1989).

[28] Council for Better Educ. v. Collins, No. 85-CI-1759, slip op. at 11 (Franklin Cty. Ct., Ky. May 31, 1988).

districts.[29] The proof was also clear that there was a direct correlation between adequate funding for a school district and the educational attainment of that district's school children.[30]

Circuit Judge Ray Corns handed down his Findings of Fact, Conclusions of Law, and Judgment in May 1988 and Supplemental Findings in October 1988.[31] He held that the right to an adequate education is a fundamental right under the Kentucky Constitution; that Kentucky's common school finance system was unconstitutional and discriminatory; and that the Kentucky General Assembly had failed to provide an efficient system of common schools throughout the state as mandated by section 183 of the Kentucky Constitution.[32] He directed the General Assembly to establish an "efficient" system of public schools throughout the state and to provide for adequate financing of the system—in short, to do what section 183 specifically required.[33]

None of the defendants appealed from Judge Corns's Judgment except the President Pro Tem of the Senate and the Speaker of the House. They, very properly, took the position that a judgment of this importance should not be permitted to become final without an appeal to the Kentucky Supreme Court.

The opinion of the supreme court was handed down on June 8, 1989.[34] It was a block-buster five-to-two decision. The Court stated forcefully in the first paragraph that "the General Assembly has fallen short of its duty to enact legislation to provide for an efficient system of common schools throughout the state."[35] Furthermore, it found that "the common school system in Kentucky is constitutionally deficient"[36] and that "a child's right to an adequate education is a fundamental one under our Constitution."[37] It continued in equally forceful prose: "the result of our decision is that Kentucky's entire system of common schools is unconstitutional . . . . [T]he General Assembly must

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[29] *Id.* at 12.

[30] Council for Better Educ. v. Collins, No. 85-CI-1759, slip op. at 10 (Franklin Cty. Ct., Ky. Oct. 14, 1988).

[31] Council for Better Educ. v. Collins, No. 85-CI-1759, slip op. 10 (Franklin Cty. Ct., Ky. May 31, 1988 & Oct. 14, 1988).

[32] Council for Better Educ. v. Collins, No. 85-CI-1759, slip op. at 8, 12 (Franklin Cty. Ct., Ky. Oct. 14, 1988).

[33] *Id.*

[34] Rose v. Council for Better Educ., 790 S.W 2d 186 (1989).

[35] *Id.* at 189.

[36] *Id.*

[37] *Id.* at 212.

provide adequate funding for the system."[38] The Court withheld the finality of its decision until the adjournment of the General Assembly at its next regular session.[39]

The supreme court decision in *Rose* created big headlines in the Kentucky press, much speculation among Kentucky people, and very much consternation among Kentucky politicians. The people wondered aloud about what the General Assembly would do in response to the court's mandate and perhaps more importantly, wheter the court decision required additional taxes. Most of Kentucky's successful politicians run from the word "taxes" like the devil runs from holy water.

People close to state government thought that the odds were about even that the General Assembly would either ignore the Court mandate or would give it lip service and then drag its collective feet in mock deference. Those people who thought the state's future depended on improvement in our educational system waited with concern and almost bated breath (and an almost prayerful optimism too much wished to speak aloud) to learn of the General Assembly's reaction to the court's decision and mandate.

The General Assembly permitted the dust to settle, and then, to the surprise of most, and with the approval of even more, announced that it agreed with the supreme court decision and that it would comply with the court's mandate. The miraculous was to become a reality.

Thus Kentucky school reform was born. Thus the General Assembly took a quantum step in the direction of progressive government and in the esteem of the thinking people of the state. The leadership of the General Assembly still faced difficult problems. The question remained whether a majority of the Assembly would follow the leadership's recommendation and pass a school reform bill that would require a levy of additional taxes. Also, Governor Wallace Wilkinson, who had succeeded Martha Layne Collins, had promised during his campaign that he would oppose additional taxes and had shown no indication that he would change his mind.[40] Fortunately, Governor Wilk-

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[38] *Id.* at 215, 216.

[39] *Id.* at 216. The Kentucky General Assembly meets in January every two years for 60 legislative days. The adjournment date for the next session was to be in the spring of 1990 from the vantage point of the opinion. *Id.*

[40] *Wilkinson Says No to Additional Taxes During Campaign*, Lexington Herald Leader, May 29, 1987, at A1.

inson had also promised that he would improve the state's school system.[41] It was generally thought that the General Assembly would not vote for an increase in taxes unless the Governor would go along.

When the General Assembly convened in regular session in January 1990, the leadership moved boldly ahead toward passage of a school reform package. Nationally recognized experts in the field of education were retained as consultants, and the leadership did the necessary homework to bring a majority of the membership on board. Near the end of the legislative session, the Governor and the legislative leadership did some bare-knuckle negotiating—after which the Governor recommended passage of the school reform bill, including the imposition of sufficient additional taxes to finance it.[42] The Kentucky School Reform Law was then duly enacted into law.[43]

Legal historians will note that Kentucky's School Reform Law is a classic example of how this democracy of ours can work for progress when the heads of the three coordinate branches of government lay aside their egos and pride of turf and work together. Here, concerned citizens brought their message to the judiciary as well as to the General Assembly and the Governor. All three branches of state government, to their great credit, faced up to their constitutional obligations. The result was the enactment of a school reform measure that has been acclaimed as a model for other states. The Kentucky Judiciary, the General Assembly, and the Governor deserve high praise.

Implementation of the School Reform Law lies ahead of us. The task is formidable and will not be accomplished overnight. But the people of Kentucky—especially those in the field of education—are determined to make the new law work. A Commissioner of Education,[44] who is given broad supervisory power under the new law, has been appointed and is moving aggressively and efficiently toward implementation.

We Kentuckians claim that there is more of the history and romance of this country of ours wrapped up in the place we call

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[41] OFFICE OF THE GOVERNOR, Q.A. IMPROVING KENTUCKY SCHOOLS: A CONVERSATION WITH GOVERNOR WALLACE WILKINSON (on file with author).

[42] *Senate Oks School Reform Tax Bill*, Lexington Herald Leader, Mar. 29, 1990, at A1.

[43] KY. REV. STAT. §§ 156.005–156.990 (1990).

[44] Thomas C. Boysen, formerly Superintendent of San Diego County Schools, San Diego, California.

Kentucky than in any comparable space. There are also more contrasts. Those who are familiar with Kentucky history were not surprised that the state has produced a revolutionary school reform law. Kentucky often does the unusual.

During the years of civil war, Kentucky could not decide which side it was on. After the war was over, it joined the loser.

Kentucky produces more Bourbon whiskey than any other state. Yet, until very recently, ninety of the state's 120 counties were dry. Christian County was wet, and Bourbon County was dry.

The Kentucky Constitution and Kentucky Statutes contain strict prohibitions against gambling, but Kentucky was the first state to uphold the pari-mutuel system of betting on horse races. Kentucky's highest court rationalized that when one places a bet on a horse at a racetrack, one is not gambling; one is instead making a contribution toward improving the breed of thoroughbred horses.[45] And so Kentucky is the race horse capital of the world. The Kentucky Derby is the most spectacular two-minute event in the world of sports.

Both Abraham Lincoln and Jefferson Davis were born in Kentucky. Mary Todd Lincoln was born and raised in Kentucky; she had three half-brothers killed in the service of the Confederacy.

Kentucky's three major industries—bourbon whiskey, tobacco, and race horses—are considered to be "sin" industries and produce comparatively little revenue for the state. Whiskey and tobacco are heavily taxed by the federal government. This causes Kentucky to be a poor state in terms of tax revenue. Kentucky has been too poor to paint and too proud to whitewash.

Even though Kentucky is considered to be one of the most illiterate states in the Union, it has produced eight Justices of the United States Supreme Court and is the only state which has ever had three native sons serving on that Court at the same time: Fred Vinson, Stanley Reed, and Wiley Rutledge.[46]

Kentucky has now decided to become educated and has embarked on a crusade to accomplish that objective. Do not be surprised if we should, within the next decade, develop a first-

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[45] State Racing Comm'n v. Latonia Agric. Ass'n, 123 S.W. 681 (Ky. 1909).

[46] *See* WEBSTER'S BIOGRAPHICAL DICTIONARY 1525, 1243, 1296 (1972). The other five justices are Louis Brandeis, John M. Harlan, James C. McReynolds, Thomas Todd, and Robert Trimble. *Id.* at 186, 667, 950, 1475, 1485.

class, world-wide educational system. And do not be surprised if, within the next decade, a panel from Kentucky should find itself studying teaching techniques at Harvard.

Most people would think that is impossible. But Kentuckians do not know that it is impossible. So we might just go ahead and do it. Kentuckians do know about the bumblebee. According to the laws of aerodynamics, a bumblebee cannot fly because its body is too big and its wings are too short. But the bumblebee does not know that. So it just goes ahead and flies. We intend to make Kentucky's school reform program fly.

LEGISLATIVE REFORM OF THE TEXAS PUBLIC SCHOOL FINANCE SYSTEM, 1973–1991

WILLIAM P. HOBBY, JR.*
BILLY D. WALKER**

The Texas public school finance system has been the object of legislative reform efforts for the past two decades. The major impetuses for change were judicial intervention, political pressure, and increased public awareness of the inequities and structural weaknesses of the system. The Texas Legislature has confronted a multiplicity of education funding issues constrained by the state's political and legal milieu. It has utilized time-proven processes to address the issues, and has been product-oriented, enacting four major reform proposals in only eight legislative sessions between 1975 and 1990. This Article explores: (1) the antecedents of Texas school finance reforms; (2) the milieu of recent Texas reforms; (3) the legislative reform processes that were followed; and (4) the public school finance reform products they engendered.

I. TEXAS SCHOOL FINANCE REFORM ANTECEDENTS

Modern public school finance reform efforts in Texas had their inception in the federal district court decision in *Rodriguez v. San Antonio Independent School District*[1] in 1971. However, Texas had a six-decade history of school finance equity reforms prior to the *Rodriguez* litigation. It was not until 1909 that the Texas public education system fully developed, with the entire state blanketed by school districts with local property tax authority. As amorphous school districts became formally defined, the legislature became abruptly aware of the disparities in taxing

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[1] 337 F. Supp. 280 (W.D. Tex. 1971), *rev'd*, 411 U.S. 1 (1973). For a discussion of *Rodriguez*, see *infra* notes 26–29 and accompanying text.

and spending that had until then been cloaked by the lack of organization, the vagaries of geographic distance, and the provincial perspectives of the citizens.

In its first significant departure from the constitutional dictum of per-capita flat grants to schools,[2] the Texas Legislature in 1915 appropriated monies for special rural school equalization aid to districts already at the maximum legal tax effort.[3] This action devolved from a campaign promise of Governor James E. ("Pa") Ferguson, who drew strong voter support from rural areas of the state in 1914. The provision was probably unconstitutional until 1918.[4] In that year, a free textbook amendment to the Texas Constitution authorized the legislature to appropriate treasury funds for special educational purposes or to supplement the per-capita apportionment.[5]

In 1919, seizing upon its new constitutional authority, the Texas Legislature, under the leadership of Governor William P. Hobby, Sr., made its first appropriation from general revenue to enhance the per-capita apportionment to schools. While the action was intended as a stop-gap measure to aid districts with post-World War I financial problems,[6] the Texas Legislature has from 1919 forward always exercised its general appropriation authority for state aid grants.

In 1920 Leonard P. Ayres, a professor at the University of Texas, published a ranking of the states in various categories of educational achievement and fiscal effort.[7] The abysmal rankings of Texas led the legislature in 1923 to establish and to finance a Texas Educational Survey Commission. The Commission published its findings in eight volumes in 1925, recommending sweeping changes in the area of public school finance. The finance volume of the report suggested that state funds for education cease to be distributed on a per-capita basis and instead, "be apportioned with reference to the *ability* and *willingness* of communities to contribute to their schools."[8] The concept drew upon the seminal power equalization theories of

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[2] TEX. CONST. art. VII, § 2 (1876). "Flat grants" are state grants-in-aid to districts that are based solely on student population without reference to local school district fiscal capacity.

[3] 1915 TEX. GEN. LAWS 24.

[4] F. EBY, THE DEVELOPMENT OF EDUCATION IN TEXAS 317 (1925).

[5] TEX. CONST. art. VII, § 3 (1918).

[6] *See* F. EBY, *supra* note 4, at 318.

[7] *See* L. AYRES, AN INDEX NUMBER FOR STATE SCHOOL SYSTEMS (1920).

[8] 2 TEXAS EDUCATIONAL SURVEY REPORT 31 (G. Works ed. 1925) (emphasis added).

Updegraff[9] and the foundation program theories of Strayer, Haig, and Mort.[10] The work of this early commission established the efficacy of the interim, or *ad hoc*, committee as a method of guiding legislative education reform efforts.

In 1929 Texas revamped its rural equalization aid provisions to differentiate aid based on crude measures of local fiscal capacity as well as local tax effort. Such equalization was upheld as constitutional in 1931 on the grounds that aid to "financially weak" school districts was a "suitable provision" under the Texas Constitution.[11] Another reform of the equalization laws occurred in 1937 when aid was based on a state salary schedule for teachers and a teacher unit formula.[12]

A persistent problem throughout the history of Texas education had been the existence of a large number of small, inefficient school districts. As late as 1936 there were 6953 districts in the state, including 5938 common (fiscally dependent) districts enrolling an average of sixty-five students.[13] By the mid-1930's transportation capabilities had improved to the point that school district consolidation became a cogent issue. In 1938 the State Board of Education, after three years of extensive research, proposed the most radical and detailed consolidation plan ever formulated in the state.[14] Conservative elements in the state resisted the plan, and, for this reason, it was never implemented by the legislature.[15]

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[9] H. UPDEGRAFF, RURAL SCHOOL SURVEY OF NEW YORK STATE: FINANCIAL SUPPORT (1922) (conceptualizing a system in which each district received a "guaranteed yield" of state and local funds for each unit of local tax effort, with the amount of the state grant per unit dependent upon district wealth).

[10] G. STRAYER & R. HAIG, THE FINANCING OF EDUCATION IN THE STATE OF NEW YORK (1923); P. MORT, THE MEASUREMENT OF EDUCATIONAL NEED (Teachers College, Columbia University Contributions to Education No. 150, 1924). Strayer, Haig, and Mort conceptualize a system in which the state guarantees to each student the funds necessary for minimally adequate educational opportunity. This "foundation" program is funded by equalized local tax efforts; therefore, the amount of state support for each district varies in inverse proportion to local taxable wealth.

[11] Mumme v. Marrs, 120 Tex. 383, 396, 40 S.W.2d 31, 36 (1931) (interpreting TEX. CONST. art. VII, § 1 (1876), stating that "it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools").

[12] *See* C. EVANS, THE STORY OF TEXAS SCHOOLS (1955). The teacher unit formula determined the number of teachers to which a district was entitled, thus determining the amount of state assistance the district would receive.

[13] STATE BOARD OF EDUCATION, REPORT OF THE RESULTS OF THE TEXAS STATEWIDE SCHOOL ADEQUACY SURVEY 11 (1938).

[14] *Id.* at 99–1794.

[15] School district consolidation remains a volatile political issue in Texas even though the number of school districts has declined to 1056 by natural attrition.

By 1947 extreme pressure developed for change in Texas public school finance policy. The post-World War II period brought increases in both school enrollments and the cost of living, as well as a concomitant fear that revenues could not keep pace with expanding educational needs under the existing structure. The per-capita state contribution was a mere $100 per pupil,[16] creating the need for substantial local taxation in a system with highly disparate wealth. There still were over 5000 school districts in the state, the majority of which operated as tax havens.[17] Moreover, legal attacks on segregation and the spending differential between white and black students were increasing.[18]

In 1947 the Texas Legislature formed the Gilmer-Aikin Committee and charged it with formulating a new plan for financing the schools.[19] In its report, the committee called for an equalized foundation program concept, along with numerous other education program improvements.[20] The foundation program was based on the simple premise that each student should be afforded an equal *minimum* educational opportunity financed by equalized local tax effort and supplemented by state aid sufficient to compensate for the variations in local ability to pay. The committee also recommended that school facilities be funded on an equalized operating cost basis after school district reorganization had occurred. Further, the plan allowed local districts to enrich their programs beyond the state minimum program guarantee. The committee formed citizens' advisory groups at the county level, enlisted the support of influential citizens, and therefore entered the 1949 legislative session with strong citizen support. Although legislative debate was heated and significant opposition was encountered, the Gilmer-Aikin proposals were enacted in 1949 with only minor modifications.[21]

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[16] TEXAS RESEARCH LEAGUE, THE ROAD WE ARE TRAVELING 29 (1956).

[17] TEXAS RESEARCH LEAGUE, TEXAS PUBLIC SCHOOL FINANCE: A MAJORITY OF EXCEPTIONS 3 (1972). "Tax haven" districts are those in which substantial taxable wealth exists but which do not tax or tax at very low rates.

[18] Yudof & Morgan, Rodriguez v. San Antonio Independent School District: *Gathering the Ayes of Texas—The Politics of School Finance Reform*, in FUTURE DIRECTIONS FOR SCHOOL FINANCE REFORM 87 (1974).

[19] R. STILL, THE GILMER-AIKIN BILLS: A STUDY IN THE LEGISLATIVE PROCESS 11–12 (1950). The committee work was guided in 1947 and 1948 by the advice of L.D. Haskew, Dean of Education at the University of Texas, and Edgar Morphet, a nationally recognized school finance expert.

[20] GILMER-AIKIN COMMITTEE, TO HAVE WHAT WE MUST . . . . A DIGEST OF PROPOSALS TO IMPROVE PUBLIC EDUCATION IN TEXAS 16–17 (1948).

[21] *See* R. STILL, *supra* note 19.

While the positive effects of the Gilmer-Aikin laws were soon evident, weaknesses in the newly created school finance structure also became apparent, particularly in the county economic index used to measure local fiscal capacity as a surrogate for equalized local taxable wealth.[22] In addition, state funding became captive to politics, never actually reaching levels necessary for an adequate minimum education, with the result being that property-poor school districts were again losing out.

By 1965 the need for extensive revision of school financing methods became obvious. Once again, an interim committee was created, this time by Governor John Connally. The Governor's Committee on Public School Education conducted extensive research into nearly every facet of public education and issued its report in 1968.[23] At the time, the report was both radical and ambitious, recommending massive consolidation of school districts, a greatly expanded foundation program to improve equalization, and the replacement of the county economic index with measures of equalized property value as the means of determining local district fiscal capacity, among many other suggestions. However, by 1968 Connally was no longer governor, and his successor, Preston Smith, showed little inclination to pursue the issue of school finance reform.[24] In addition, substantial teacher salary increases made the combined costs politically infeasible.[25] Therefore, most of the proposals were ignored.

Early school finance reform efforts thus continually relied upon interim committees. Such committees allowed bi-partisan political participation, as well as the input of influential experts in education issues. Political participation in these committees contributed to the efficacy of their proposals. The Texas Educational Survey Commission (1923), the Gilmer-Aikin Committee (1947), and the Governor's Committee on Public School Education (1965) are prominent examples of such commissions. In the first two instances landmark reforms resulted soon after the committees made their recommendations. In the last case,

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[22] R. HOOKER, ISSUES IN SCHOOL FINANCE: A TEXAS PRIMER (1972).

[23] GOVERNOR'S COMMITTEE ON PUBLIC SCHOOL EDUCATION, THE CHALLENGE AND THE CHANCE (1968).

[24] Yudof & Morgan, *supra* note 18, at 92.

[25] *Id.* The salary increases were part of the plan but were not sensitive to local fiscal capacity, due to the lack of significiant equalization features in existing law.

virtually all the 1968 recommendations of the Governor's Committee were implemented by 1984.

II. The Texas Legal and Political Milieu

A. *Legal Milieu*

On December 23, 1971, many Texans were stunned when a United States District Court declared the state's public school finance scheme unconstitutional. The plaintiffs in *Rodriguez v. San Antonio Independent School District*[26] had argued that the state's method of financing education, a minimum foundation program that relied heavily on unequalized local taxable wealth, discriminated against children living in property-poor districts and denied those students equal protection guaranteed by the fourteenth amendment to the United States Constitution. The trial court agreed and granted the state two years to develop a more equitable system.[27]

In March 1973 the United States Supreme Court reversed the lower court's findings in a five-to-four decision.[28] The Texas system was held to be constitutional for several reasons, one of the most important of which was that education was not a fundamental interest protected by the federal Constitution.[29] Despite this reversal, the publicity surrounding the case raised the consciousness of state leaders, legislators, and residents of Texas concerning the inequities of the Texas public school finance system. The case catalyzed legislative reform of school finance despite the lack of judicial mandate.

More than a decade later, in May 1984, a similar suit was filed assailing the validity of the Texas school finance system under the state constitution. Originally filed as *Edgewood Independent School District v. Bynum*,[30] the suit sought relief under Texas constitutional provisions for "equal protection" and an "efficient system of public free schools."[31] In July 1984, in special session, the Texas Legislature enacted House Bill 72, an education re-

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[26] 337 F. Supp. 280 (W.D. Tex. 1971), *rev'd*, 411 U.S. 1 (1973).

[27] *Id.*

[28] San Antonio Indep. School Dist. v. Rodriquez, 411 U.S. 1 (1973).

[29] *Id.* at 35.

[30] This case never reached trial. It challenged the pre-House Bill 72 school finance system, which was altered considerably in 1984.

[31] Tex. Const. art. I, § 3; art. VII, § 1.

form bill that included significant equity improvements in school finance.[32] However, in 1985 the case was refiled as *Edgewood Independent School District v. Kirby*,[33] challenging the newly enacted system on the same "equal protection" and "efficiency" grounds listed above.

In early 1987 the *Edgewood* case was tried in state district court in Travis County, Texas. In June the judge held that the Texas public school finance system was unconstitutional under both the "equal protection" and "efficient system" provisions.[34] The court gave the state until September 1, 1989 to enact a constitutional system that would become effective not later than September 1, 1990. As long as implementation of the new system had begun by that date, it could be phased in gradually. An injunction was placed on the flow of state aid into the existing, unconstitutional system if the legislature did not act in a timely manner.[35] The state of Texas appealed the decision.

In December 1988 the Third Court of Appeals of Texas reversed the lower court in a two-to-one decision.[36] The appellate court declined to apply a strict scrutiny standard and found that the finance system met a rational basis test. The court agreed that the school finance system was unfair and in need of equity reform, but held that the Texas Constitution did not require such reform.[37] The plaintiffs appealed.

In July 1989 the Texas Supreme Court heard oral arguments for *Edgewood*. That October the justices reversed the appellate court in a unanimous decision.[38] Justice Oscar Mauzy, one-time chair of the Texas Senate Education Committee and a long-time advocate of school finance reform, authored the opinion. Modifying some of the trial court's provisions, the court held that the "efficient system" clause had been violated. The court did not reach the question of whether there had been an "equal protection" violation. The justices gave the Texas Legislature until May 1, 1990 to enact a new, constitutional system. If the

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[32] 1984 Tex. Sess. Law Serv. 28 (Vernon).

[33] Edgewood Indep. School Dist. v. Kirby, No. 362,516 (250th Dist. Ct., Travis Cty., Tex. June 1, 1987), *rev'd*, 761 S.W.2d 859 (Tex. Ct. App. 1988), *rev'd*, 777 S.W.2d 391 (Tex. 1989).

[34] *Id.*

[35] *Id.*

[36] 761 S.W.2d 859.

[37] Walker & Thompson, *Special Report:* Edgewood ISD v. Kirby, 14 J. EDUC. FIN. 427–28 (1989) (discussing the appellate court decision).

[38] 777 S.W.2d 391 (1989).

new system was not enacted in a timely manner, the trial court injunction was to be enforced.[39]

In a special session, the Texas Legislature enacted Senate Bill 1[40] in June 1990, after obtaining two stays of the court's injunction from the new district court to which the case had been referred. In July 1990 the state district court heard arguments on the constitutionality of the new system, and in September it declared the new system still unconstitutional.[41] However, instead of enforcing the previous injunction, the district court granted the state until September 1, 1991 to develop yet another system.[42] The plaintiffs, seeking enforcement of the original injunction, appealed to the Texas Supreme Court.

In November 1990 the Texas Supreme Court heard oral arguments for a second time in the *Edgewood* case. In a unanimous opinion, the court, after deciding that the new system was unconstitutional, held that the trial court had erred in extending the effective date of the injunction against the distribution of state aid to September 1, 1991.[43] The court instead shortened the legislative deadline for enacting a constitutional system to April 1, 1991.[44]

B. *Political Milieu*

The state's political milieu has strengthened the prospects for general education reform in Texas. Reform of the public school finance system has been made more difficult, however, by factors such as the state's static economy, its antiquated taxation system, differing business interests, population demographics, normative political values, and increased partisan politics.

In the mid-1970's, when the Texas Legislature responded to the *Rodriguez* litigation, conditions were ideal for reform. The state's economy was on the rise, and state revenues were consistently increasing without changes in state tax rates. There was political consensus for change, and a single party, the Dem-

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[39] *Id.* at 397–99.

[40] 1990 Tex. Sess. Law Serv. 1 (Vernon). For a discussion of S. 1, see *infra* note 70 and accompanying text.

[41] Edgewood Indep. School Dist. v. Kirby, No. 362,516 (250th Dist. Ct., Travis Cty., Tex. Sept. 24, 1990).

[42] *Id.* at 2–3.

[43] Edgewood Indep. School Dist. v. Kirby, 34 Tex. Sup. Ct. J. 287 (1991).

[44] *Id.* at 292 n.17.

ocrats, dominated both houses of the legislature. Furthermore, with no court overseeing the change, the reforms could accommodate numerous political and normative values through legislative compromises. While arguments occurred in the legislature on the specifics of reform plans, state leaders such as Governor Briscoe, Lieutenant Governor Hobby, and House Speaker Clayton, all Democrats, concurred on the direction that broad legislative reforms should take.

Among the shared goals of state leaders were the following: (1) finance reforms should "level up" rather than "level down"; (2) as many districts as possible should be aided in order to engender political and popular support for the necessary appropriations; (3) the finance system should maintain local control of taxing and spending; (4) the system should appear legitimate to the citizens of the state; and (5) the equity of the system ought to be further improved with each reform.

By the early 1980's, however, the political climate had changed considerably. First, the state's economy had begun to deteriorate, bringing concomitant losses in state revenue. In 1983 the legislature was forced to consider increases in state tax rates for the first time in over a decade. Second, economic affairs rekindled business interest in education. In fact, a prominent Texas businessman, H. Ross Perot, played a key role in the education reforms of 1984. The tenor of the business community's attitude was that education reform should be a prerequisite to state tax increases.

By the late 1980's and into 1990, political conditions changed again. Republican Governor William Clements had begun his second, nonconsecutive, four-year term in office in 1987. In addition, by 1989 the Republican Party had enlarged its presence in the House of Representatives to approximately 60 seats of 150. Overall, Republican strength was at its high point since the end of Radical Republican Reconstruction in Texas more than 100 years before.

To summarize, the major factors influencing school finance reform in the early 1990's are: (1) the requirement for change rising out of a judicial mandate in the *Edgewood* decision; (2) the decline in the state economy and an accompanying decrease in revenues; (3) the failure to overhaul the Texas state tax system despite another "blue-ribbon" panel created in 1987;[45] (4) the

[45] This panel was the Select Committee on Education formed by Governor Clements,

dissolution of legislative agreement on basic school finance values such as adequacy, equity, efficiency, legitimacy, and local control; and (5) the gain in Republican voting strength, as reflected in the Texas House of Representatives and governor's office.

III. Texas Reform Processes

Many of the school finance reform efforts in Texas have followed either world wars or judicial decisions. The major exception was the reform which occurred in 1984, which arose as a result of state economic decline, national concern over education as voiced in such reports as *A Nation at Risk*,[46] and the personal dedication of several individuals. In virtually all cases pointed out above, legislative reform efforts derived from interim committees that produced cogent information, recommendations, and alternative courses. In many cases, the political composition of the interim group aided in developing political support for the committee proposals.

The post-*Rodriguez* period generated several studies, particularly in the fifteen-month period between the two *Rodriguez* decisions. The most expansive remedy was that developed in 1973 by the Joint Interim Senate Committee chaired by Senator Mauzy, who in 1989 authored the Texas Supreme Court's *Edgewood* opinion. The committee formulated a power equalization approach to a new foundation program with increased levels of state support and legal minimum and maximum property tax rates for each school district.[47] The committee's suggested approach was the most equalizing of the major inter-*Rodriguez* committee proposals.[48]

When most legislators learned of the United States Supreme Court's *Rodriguez* decision in March 1973, they were relieved by the "stay of execution" and desisted from seeking reform legislation. One equalization measure did pass the House of

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Lieutenant Governor Hobby, and House Speaker Lewis. *See infra* note 54 and accompanying text.

[46] The National Commission on Excellence in Education, A Nation at Risk (1983).

[47] Joint Interim Senate Committee to Study School Finance, Report on Public School Finance 5–6 (1973).

[48] *See* Walker, A Comparison of Six Alternative Models for the Equalization of Educational Expenditures in the Texas Public Schools 46, 151, 156–57 (1977) (Ph.D. dissertation, available in Tex. Tech. Univ. library).

Representatives but met a swift demise in the Senate. Governor Briscoe, who was bent on a more deliberate movement toward school finance equity, formed the Governor's Office of Educational Research and Planning. This group conducted school finance research in the ensuing months, much of which was incorporated into law in 1975. Other major proposals or studies were presented by a Senate study panel, several House study groups, the State Board of Education, the Texas Research League, the Legislative Property Tax Committee, and the Texas Advisory Commission on Intergovernmental Relations.[49]

The next major interim committee emerged from the 1983 session of the Texas Legislature. In that session the legislature was confronted by revenue constraints resulting from static state revenues—particularly revenues from oil and natural gas taxes, and the state general sales tax. An unfamiliar dilemma emerged: legislators could increase state tax rates for the first time in over twelve years, or they could curb spending by providing only the funds necessary to carry out current law. They chose the latter option, since there was no desire to increase state taxing levels for education without reciprocity in terms of reform of the Texas public education system.

In June 1983 Governor Mark White appointed the Select Committee on Public Education, which was chaired by Perot. The committee was charged with investigating the financing of public school education in Texas with a view toward reform by early 1984. The committee broadened the scope of its mandate, held numerous public hearings, and reported its recommendations in April 1984.[50]

Among the committee suggestions were: (1) an appointed State Board of Education to replace the elected State Board; (2) a more equalized school finance structure based upon a weighted pupil method of distribution instead of adjusted personnel units;[51] (3) increased teacher salaries on the state minimum salary schedule; (4) a career ladder program for classroom teachers based at least partially on teaching performance; (5) smaller classes in the early grades; (6) a longer school day

[49] Walker, *History of Texas Public School Finance, 1876–1977*, 4 TEX. TECH J. EDUC. 159–73 (1977).

[50] Walker, *Special Report: Texas School Finance Update*, 10 J. EDUC. FIN. 505 (1985).

[51] In the system utilized from 1937 to 1984, school districts were entitled by formula to personnel units, which were converted to dollars according to the state minimum salary schedule. In the reformed system, students replaced personnel as the funding units.

and school year; (7) restrictions on extracurricular activities; and (8) numerous new programs, such as pre-kindergarten education for four-year-olds.[52] The recommendations were substantively adopted by the legislature in House Bill 72.[53]

Subsequent to the 1987 trial court decision in *Edgewood*, another Select Committee on Education was formed by Governor Clements, Lieutenant Governor Hobby, and House Speaker Lewis. This committee worked throughout 1988, making its report[54] at almost the same time as the 1988 appellate court reversal of the *Edgewood* decision. A special working group created by State Comptroller (now Lieutenant Governor) Bob Bullock, and representing a broad spectrum of education organizations, also produced school finance recommendations in 1988. Immediately following the Texas Supreme Court decision in *Edgewood*, Clements, Hobby, and Lewis once again formed an interim committee, the Governor's Task Force on Education, which reported its school finance recommendations in February 1990, just prior to four special sessions on school finance needed to produce a response to the *Edgewood* case.

IV. The Reform Results

Each interim committee discussed above contributed directly to reform of both the Texas school finance system and other aspects of public education. Such committees have been critical because of their bipartisan political participation and their marshalling of popular support for reform. The post-*Rodriguez* studies led to House Bill 1126 (1975),[55] while the efforts of the Select Committee on Public Education resulted in House Bill 72 (1984).[56] The 1988 Select Committee contributed to some equalization changes in Senate Bill 1019 (1989),[57] while the Governor's Task Force had a major impact on Senate Bill 1 (1990).[58]

House Bill 1126 was a compromise reform bill constructed in the waning hours of the 1975 legislative session. Nevertheless,

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[52] *See* Walker, *supra* note 50.

[53] 1984 Tex. Sess. Law Serv. 28 (Vernon).

[54] Select Committee on Education, Final Report and Recommendations (1988).

[55] 1975 Tex. Sess. Law Serv. 334 (Vernon).

[56] 1984 Tex. Sess. Law Serv. 28 (Vernon).

[57] 1989 Tex. Sess. Law Serv. 816 (Vernon)

[58] 1990 Tex. Sess. Law Serv. 1 (Vernon).

it made notable revisions in the state's financing plan through: (1) greatly expanded state aid; (2) financing formulas sensitive to pupil needs; (3) an equalized measure of local fiscal capacity;[59] (4) an increased local share of the foundation school program;[60] and (5) a second-tier equalization aid program grafted onto the foundation program and targeted to property-poor districts.[61] These provisions constituted the first major equity reform in Texas public school finance since 1949.[62] Only minimal positive equity effects, however, followed passage of the legislation,[63] and they were not sustained for more than two years.[64]

In a special session lasting from June 4 to July 3, 1984, both liberal and conservative elements in the state subjected state legislators to extreme pressure with regard to school finance reform, tax increases at the state level, and other education issues. While the prospects for school finance reform and state tax increases did not look promising at the outset of the session, Governor White, Lieutenant Governor Hobby, House Speaker Lewis, and other influential state officials pressured the legislators. Perot made the most significant impact by using personal funds to marshal a cadre of influential lobbyists.

House Bill 72 was the tangible result of the special session. The bill, more than 200 pages long, touched on nearly all aspects of public education in the state. In addition, state taxes were increased in part to fund the provisions of the statute. In the heated debate over House Bill 72, legislators focused on the non-finance education reforms and approved the school finance ones with relative ease.

The major school finance reforms of the law were:[65] (1) retention of the foundation program model adopted in 1949,

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[59] This changed the method of distributing aid from an "economic index" as a measure of local ability to relying on the estimated market value of taxable property in the district. Sunderman & Hinely, *Toward Equality of Educational Opportunity: A Case Study and Projection*, 4 J. EDUC. FIN. 440 (1979).

[60] This approximately doubled the amount of money charged to local districts through the local fund assignments. *Id.* at 440–41.

[61] This provided $50 million as an equalization fund for distribution to districts with less than 125% of the state average of property value per child. *Id.* at 441.

[62] *See* B. WALKER & P. HUTCHINSON, INTRODUCTION TO TEXAS SCHOOL FINANCE 41–47 (1978).

[63] Sunderman & Hinely, *supra* note 59, at 436–50.

[64] J. AUGENBLICK & K. ADAMS, ANALYSIS OF THE IMPACT OF CHANGE IN THE FUNDING OF ELEMENTARY/SECONDARY EDUCATION IN TEXAS, 1974–75 to 1977–78 (1979).

[65] Walker, *supra* note 50; B. WALKER & W. KIRBY, THE BASICS OF TEXAS PUBLIC SCHOOL FINANCE 10–13 (1984) (containing a full discussion of the content of House Bill 72 with respect to school finance).

with equalization aid distributed in addition to Foundation Student Program ("FSP") allocations; (2) a change in the distribution unit from adjusted personnel units to weighted pupils; (3) establishment of a basic allotment per Average Daily Attendance ("ADA");[66] (4) implementation of a Price Differential Index to adjust basic allotments; (5) more liberal adjustments in the basic allotment for small and sparse-area school districts; (6) expanded pupil weighting by instructional arrangement for special education funding; (7) expansion of compensatory education aid; (8) expansion of bilingual education aid; (9) weighting of vocational education students by full-time equivalents; (10) establishment of a "sum certain" ceiling on FSP costs, with prorating to be done if necessary; (11) a new method of computing the Local Fund Assignment based upon a statewide local share of thirty percent of FSP costs (33.3% in 1985–86 and afterward); (12) expansion of the amount of equalization aid and creation of a new formula for distributing it;[67] (13) equalization transition aid for districts losing state aid per ADA from the prior year; (14) removal from the Available School Fund all revenues except those dedicated by the state constitution;[68] (15) rollback election protection for school districts losing state aid per ADA; (16) deletion of funding for driver education, school-community guidance centers, and student-teacher supervisors; (17) a vastly revised state minimum salary schedule for teachers and other professional personnel; (18) a career ladder program of salary supplements for classroom teachers; (19) increased transportation allocations within the same linear density formulas; (20) implementation of an experienced teacher allotment; (21) implementation of a pre-kindergarten program for disadvantaged four-year-olds; (22) initiation of summer bilingual education programs for limited English-speaking preschoolers; (23) class size maximums of twenty-two in grades K-2 (with grades 3-4 added in 1988-89); (24) movement of some Teacher Retirement System payments to local school districts;

[66] The basic allotment is a statistic in Texas school finance that represents the average cost of educating one standard pupil. The allotment is then increased by certain adjustments for regional price variations and economies of scale, and is weighted for differing pupil needs, such as special education.

[67] Funding was greatly increased and entitlements were based on a percentage of district entitlements in the Foundation School Program rather than on absolute dollar amounts.

[68] The Available School Fund is a constitutionally required fund that distributes on a per-capita basis the earnings from the Permanent School Fund and proceeds from constitutionally dedicated taxes.

and (25) a mandate for an annual performance report in each school district that included school budgeting factors.[69]

Senate Bill 1019 (1989),[70] which was enacted while the *Edgewood* case was on appeal to the Texas Supreme Court, addressed equity issues within the parameters of available revenues. The most salient provision was an expanded second-tier equalization program based on power equalization, or guaranteed yield, principles.[71]

In response to the Texas Supreme Court decision in *Edgewood* requiring legislative enactment of school finance equalization, the Texas Legislature met in special sessions from February 27 to June 7, 1990. The variety of proposals, the lack of prospects for immediate revenues, and disagreements over "accountability" and "efficiency" issues delayed passage of a reform bill. When the May 1, 1990 injunction deadline came without passage of a school finance reform bill, state district court Judge F. Scott McCown stayed the injunction an additional month. He also appointed a special master and two associate masters to draw up a court plan should the Legislature fail to act. On June 5, the Legislature enacted Senate Bill 1, and the governor signed it on June 7, 1990.

Senate Bill 1 provided an immediate funding increase, principally from an increase in the state general sales tax rate. In addition, the bill (1) established a five-year phase-in of reforms; (2) required that ninety-five percent of the pupils be in a wealth-neutral finance system by 1995; (3) added facilities and equipment to the foundation program definition (though without specific funding); (4) established a structure for reformulating all funding elements periodically to achieve the equity standard; (5) increased the adequacy of the basic foundation program; (6) increased the local share of the foundation program; (7) increased the guaranteed yield in the power-equalized second tier program; (8) raised the tax rate matched by the state in the variable ratio guaranteed yield program; and (9) enacted numerous accountability, efficiency, and programmatic reforms.[72] The general approach to equity embodied in the plan involved increased state aid, increased local funding to lessen the impact

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[69] 1984 Tex. Sess. Law Serv. 28 (Vernon).
[70] 1989 Tex. Sess. Law Serv. 816 (Vernon).
[71] *See* H. UPDEGRAFF, *supra* note 9.
[72] Walker, *The Impact of School Finance Litigation in Texas, 1968–1990*, 1 TEX. RESEARCHER 10–11 (1990).

of the unequalized local tax dollars, and an optional guaranteed yield program that was greatly enlarged.[73]

V. CONCLUSION

The Texas system of public school finance has been the target of persistent reform efforts. Prior to 1971, many of the efforts arose from political pressure and grassroots public awareness of the need for change. Since 1971 the *Rodriguez* and *Edgewood* cases have introduced litigation as a reform impetus. Historically, the Texas Legislature has made frequent use of "interim committees" to frame the parameters of legislative reform. In most cases the study recommendations have been implemented within varying economic, political, and legal milieus requiring artful compromises between competing normative values. Nevertheless, the Texas Legislature has been product-oriented, producing four major school finance reforms since 1975. Currently, the Texas Supreme Court has rejected the legislative plan on the grounds that equalization for ninety-five percent of the students is not "substantially equal," thus necessitating still another reform effort in 1991.

[73] *Id.*

SCHOOL FINANCE: DOES MONEY MATTER?

MARTHA MINOW*

Does money matter? This question, of course, may emerge from theological, philosophical, economic, and anthropological studies; it might even arise in the midst of an intimate discussion. But the question is striking in the specific context of debates over school finance reform. This panel demonstrates that the question is a difficult one; the fact that many reputable academics on educational theory are debating whether levels of funding actually affect the quality of schooling is evidence that this question raises a number of complex issues.[1] I would like to locate the debate over this question in several contexts; in so doing, I offer my own judgment about which contexts should matter.

In historical perspective, the debate over the effect of differential spending levels on schooling can be traced to the struggle initiated by the NAACP to desegregate all educational institutions. Starting with higher education, especially graduate schools, the NAACP forced the courts to make good on their promise of equality, even in the bizarre formulation of *Plessy v. Ferguson*:[2] states could maintain racially segregated educational institutions if those institutions were in fact equal. It was relatively easy to demonstrate that facilities provided for blacks were shams. As their next step, the NAACP lawyers detailed comparisons of programs and expenditures in which segregating states at least tried to create two sets of institutions.[3] The pred-

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Professor Minow would like to thank Patty Arzuaga, who provided valuable research assistance for this piece.

[1] *See* Benson, *Definitions of Equity in School Finance in Texas, New Jersey, and Kentucky*, 28 HARV. J. ON LEGIS. 401 (1991); Ferguson, *Paying for Public Education: New Evidence on How and Why Money Matters*, 28 HARV. J. ON LEGIS. 465 (1991); Hanushek, *When School Finance "Reform" May Not Be Good Policy*, 28 HARV. J. ON LEGIS. 423 (1991); Murnane, *Interpreting the Evidence on "Does Money Matter?"*, 28 HARV. J. ON LEGIS. 457 (1991).

[2] 163 U.S. 537 (1896) (upholding the constitutionality of "separate but equal" public school systems).

[3] *See generally* R. KLUGER, SIMPLE JUSTICE (1977).

icate of this work was that green follows white: money for schooling follows the white students. With aims not only to desegregate but also to integrate, the reformers demanded that black students be able to sit next to white students. Only then could black children be assured the same educational opportunities as white children.

It may be hard to believe in this light that anyone would doubt that differences in school expenditures bear on the quality of education. Yet today there are other contexts in which to discuss this matter. Some argue that any class-based inquiry into differences in school expenditures should be recast as a question about what factors actually correlate with school achievement and life success. Since researchers for decades have argued that nothing that happens at school is as important as factors at home,[4] spending more money on schooling is beside the point. Of course, other researchers emphasize that school quality is correlated with returns on education measured in terms of earnings.[5]

Beyond this debate are the politics of tax allocations, a twilight zone where smoke and mirrors meet accounting practices. Still another element of school finance debates is the widespread perception that most public elementary and secondary schools are inadequate and that American youths leave school uneducated and unprepared for available jobs and for a world economy. Since the corporate community in particular has come to realize that the work force in the year 2000 will be largely composed of non-whites and people from economically disad-

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[4] *See* J. COLEMAN, E. CAMPBELL, C. HOBSON, J. MCPARTLAND, A. MOOD, F. WEINFELD & R. YORK, EQUALITY OF EDUCATIONAL OPPORTUNITY (1966); C. JENCKS, INEQUALITY: A REASSESSMENT OF THE EFFECT OF FAMILY AND SCHOOLING IN AMERICA (1972); R. THORNDIKE, READING COMPREHENSION EDUCATION IN FIFTEEN COUNTRIES (1973).

[5] *See, e.g.*, D. CARD & A. KRUEGER, DOES SCHOOL QUALITY MATTER? RETURNS TO EDUCATION AND THE CHARACTERISTICS OF PUBLIC SCHOOLS IN THE UNITED STATES (National Bureau of Economic Research Working Paper No. 3358, 1990).

Perhaps the conclusions about the roles of schools depend on the researchers' attitudes about public obligations towards students. For example, a recent and careful study confirms the impact of family background on school achievement, but emphasizes that poor children achieve their expected grade levels in reading in the early years of schooling, then fall behind later. *See* J. CHALL, V. JACOBS & L. BALDWIN, THE READING CRISIS: WHY POOR CHILDREN FALL BEHIND 28–29 (1990). The study shows how home environments helped these children in the early school years, but the absence of parents at home with higher educational and literacy attainments hurt poor children in middle school years. *Id.* at 146–47. The study concludes that "the school's role assumes greater importance for the literacy development of low-income children in grades 4 to 7." *Id.* at 147.

vantaged backgrounds, business leaders realize that they must invest in the education of these very people.

Largely, this means investing in the education of people other than their own families and even their own neighbors. This brings us to another important context for locating the school finance debate: we should situate the debates over reforming school finance in light of societal ambivalence over who should be responsible for other people's children. Put succinctly, although ours has often been characterized as a "child-centered society," this tag-line has resonance, if it does at all, only with parents' treatment of their own children, not with their treatment of other people's children. Otherwise, how could we be behind twenty-one other nations in reducing rates of infant mortality?[6] When it comes to other people's children, ours is a society reluctant to impose public obligations. When it comes to school expenditures, ours is a society that emphasizes the right of individual choice about where to live and thus how much to be taxed for schooling.[7] In this light, the debates over reforming school finance at times seem to challenge parental prerogatives in the name of imposing obligations to support other people's children.[8] Indeed, it is the point of collision between two competing ethics: the ethic of neutrality that is supposed to guide governmental action, and the ethic of preferring your own that is permitted to guide family behavior.[9] Add this to issues about money, and we have just about every contemporary variable that can generate white-hot controversy; only gender or class issues could intensify the debate.

Now let's pause right here. Issues of class differences provide a critical context for contemporary school finance debates. In a country in which everyone claims to be in the middle class, from those who are barely making it to those who are thoroughly rich, it has been very difficult to sustain political or even academic understandings of class differences and conflicts. Perhaps paradoxically, however, the fact of sharp class differences may be confirmed by the refusal of the United States Supreme Court

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[6] *See* R. MECHEL, SAVE THE BABIES 2 (1990).

[7] *See, e.g.*, Toch, *Plugging the School Tax Gap*, 108 U.S. NEWS & WORLD REP. 58 (1990) ("Parents have always voted with their feet when it comes to their kids' education, deliberately moving into neighborhoods with good schools.").

[8] Versions of this recur in debates over tax-tuition credits for those who send their children to private schools.

[9] *See* Stiehm, *Government and the Family: Justice and Acceptance*, in CHANGING IMAGES OF THE FAMILY 361–75 (V. Tufte & B. Myerhoff eds. 1979).

to treat wealth as a "suspect" classification deserving strict scrutiny under the equal protection clause.[10] Complicating matters is the fact that "wealthy" school districts often correspond less to the presence of "wealthy" residents than to industrial and commercial establishments strengthening the local tax base. Those very establishments may make these less-desirable places to live and thus places where less-wealthy families make their homes. This fact renders inconclusive any effort to use class as a tool to criticize school finance patterns.

In the face of all these controversial contexts, I hope we do not lose sight of just one more frame around the problem. Let me call it sheer fairness. Consider this recent statement by the Texas Supreme Court in rejecting its legislature's effort to revise the school finance system found to violate the state constitution. The court noted that even if the new plan would produce a more equitable utilization of state educational dollars,

> [i]t does not remedy the major causes of the wide opportunity gaps between rich and poor districts. It does not change the boundaries of any of the current 1052 school districts, the wealthiest of which continues to draw funds from a tax base roughly 450 times greater per weighted pupil than the poorest district.[11]

Consider this statement of per-pupil expenditures on Long Island: "the total gap between poor districts and the regional average is said to have risen to $1,500 per pupil, from $400 in 1982."[12] Referring to Illinois, one author estimated that "[a]t the extreme, the annual spending range stretches from $2,100 per youngster in the worst-endowed district to more than $12,000 in the most plush."[13]

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[10] San Antonio School Dist. v. Rodriguez, 411 U.S. 1 (1973). *But see* Serrano v. Priest, 18 Cal. 3d 728, 557 P.2d 929 (1977) (wealth is suspect class under state constitution). The most recent wave of school finance reform litigation has bypassed this issue by relying on language in state constitutions that refers to efficient or appropriate educations. *See, e.g.*, Abbott v. Burke, 119 N.J. 287, 295, 575 A.2d 359, 367 (1990) ("thorough and efficient"); Edgewood Indep. School Dist. v. Kirby, 777 S.W.2d 391, 397 (Tex. 1989) ("efficient"). *See generally* Thro, *The Third Wave: The Impact of the Montana, Kentucky, and Texas Decisions on the Future of Public School Finance Reform Litigation*, 19 J. LEGAL EDUC. 219 (1990).

[11] Edgewood Indep. School Dist. v. Kirby, No. D-0378, slip op. at 15 (Tex. Sup. Ct., Jan. 22, 1991).

[12] Hildebrand, *21 School Districts to Sue State: Poorer Island Areas Want More Money*, Newsday, Jan. 24, 1991, at 8.

[13] *Gaps Between Rich, Poor Schools Ignite Legal Rights*, L.A. Times, Nov. 26, 1990, at 1, col. 1.

Specific stories make such numbers vivid. The public school in Thomson, Illinois has a leaky roof and no money to teach physics, chemistry, or math courses, so students seeking those classes must drive to other towns. But recently the administrators found a way to replace some broken classroom furniture without spending a cent. They scavenged for desks and chairs in a dumpster after a wealthier school down the road discarded the furniture.[14]

Similar disparities appear in teacher/pupil ratios, the distribution of teachers with master's degrees, and availability of computers and other resources. Schools are not just means to ends, but also places where great numbers of people spend their days. This means such disparities don't just look bad on paper; they feel bad in life. It is true that researchers find it difficult to measure the outputs of education, and even more difficult to correlate those outputs with inputs. However, equality of inputs is something we *can* measure. Equal inputs also actually affect current quality of daily school experiences.[15] The fact that disparities in expenditures continue to disadvantage schools with predominantly minority student enrollments simply underscores the rank unfairness of the system and demonstrates the continuing legacy of racial segregation that inspired the initial school reform litigation.[16]

I have only one more point. Actually it is a serious wrinkle. Whatever equality means, it at least aspires for equal, or similar, treatment for those who are alike. What should equality mean, though, for those who are different? That question has inspired the development of special education programs for children with

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[14] *Id.* "'They had the luxury of getting rid of stuff that was better than what we were using,' sighed John Bickell, the school superintendent in Thomson, a farming town about 150 miles west of Chicago near the Mississipppi River." *Id.*

[15] *See* Note, *A Statistical Analysis of the School Finance Decisions: On Winning Battles and Losing Wars*, 81 YALE L.J. 1303, 1318–19 (1972); *see also* Kukor v. Grover, 148 Wis. 2d 469, 488, 436 N.W.2d 568, 587–88 (1989) (Bablitch, J., dissenting) (noting that both majority and dissenters on the court in the school finance case agree that "the trial record clearly establishes that the educational needs of a significant number of school children in this state, primarily those from high poverty districts, are very great, and these needs are not being met. These children come to school unready to learn . . . . The little money that is channeled into [compensatory programs and supporting services] comes at the expense of the regular education programs, thereby 'shorting' the regular programs.").

[16] *See* Board of Educ. of Okla. City Pub. Schools v. Dowell, 111 S. Ct. 630, 643 n.5 (1990) (Marshall, J., dissenting) (citing Camp, Thompson & Crain, *Within-District Equity: Desegregation and Microeconomic Analysis*, in THE IMPACTS OF LITIGATION AND LEGISLATION ON PUBLIC SCHOOL FINANCE 273, 282–86 (J. Underwood & D. Verstegen eds. 1990)).

disabilities and bilingual education programs for children whose primary language is not English. Not only are these programs unlike the otherwise prevailing school programs, they may also impose different costs. They may impose greater costs.[17] But equality and fairness do not mean treating every student identically. As one state court justice wrote,

> [w]hile a majority of our children are handed the "educational ball" on the twenty yard line, a significant number are handed this ball on the one yard line with a three-hundred pound lineman on their back. Unquestionably both groups of youngsters have the "opportunity" to score an educational touchdown. The opportunity, however, is far from equal.[18]

As we discuss equality and equity, let us not forget that equality does not mean treating people the same when they are different.[19] Money matters here. Money matters for sheer fairness. Money matters to sustain even the debate over whether money matters, as the work presented here demonstrates.

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[17] Plaintiffs seeking school finance reform have tended to exempt these programs in their requests for equalization. *See, e.g.*, Plaintiff's Response to Interrogatories, Murdoch v. Dukakis, No. 90-128, at 13–14 (Mass. filed Apr. 24, 1990) (response by Andrea Beauchesne), *pending sub nom.* Murdoch v. Weld. This subject has not received as much careful attention in the school equalization debates as it deserves, although the costs of special programs have contributed to tax revolts and other objections to school budgets.

[18] *Kukor*, 148 Wis. 2d at 488, 436 N.W.2d at 588.

[19] *See* M. MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 19–48 (1990).

DEFINITIONS OF EQUITY IN SCHOOL FINANCE IN TEXAS, NEW JERSEY, AND KENTUCKY

CHARLES S. BENSON*

Within the last two years, plaintiffs have successfully challenged the constitutionality of state/local systems of educational funding in Texas, New Jersey, and Kentucky. Nearly every state has been subject to some form of school finance litigation during the last twenty years.[1] However, in these three states, the premises and values of plaintiffs, as well as the nature of judicial rulings on constitutionality and the legislative responses to those rulings, differ in important ways from previous attempts at school funding reform. In particular, the remedies demanded in the three states set new and higher standards for equity in school funding. This Article explores alternative definitions of equity in educational funding, as presented by the courts and legislatures of these three key states.

Before turning to the Texas, New Jersey, and Kentucky cases, it may be helpful to consider two background matters. First, who should benefit from educational funding? Should the courts be concerned primarily with equity for students, or do other groups, such as parents, taxpayers, and employers, also hold rights worthy of protection? Second, what standards of equity were established in the first generation of school finance cases, as epitomized by *Serrano v. Priest*?[2] Against the background of the modest reforms of *Serrano*, the Texas, New Jersey, and Kentucky cases clearly break new ground.

I. EQUITY FOR WHOM?

Students are the most obvious beneficiaries of equitable treatment in school funding. Economic, educational, and social fam-

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[1] *See* van Geel, *Equal Protection and School Finance: Bargained Incoherence*, in SPHERES OF JUSTICE IN EDUCATION 324 (D. Verstegen & J. Ward eds. 1991).

[2] 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1977).

ily status are strongly linked to student performance in school.[3] Children of low-income parents frequently attend deficient schools that are plagued by inexperienced teachers, large classes, deteriorating school buildings, and a lack of textbooks, library books, and laboratory equipment.[4] Inadequate public investment in schooling for these lower-income children reinforces the many disadvantages some poor students already bear from their home environments.

This public neglect of lower-income students flies in the face of American ideology. Our political mythology enshrines the notion of equal rights for individuals and abhors the idea of a hereditary caste that determines economic status and success. Yet states and municipalities tolerate and even protect disparities in educational funding that have at least some effect on the social mobility of poor children. To overcome these paralyzing inequities and achieve "a society in which family wealth has no relation to probabilities of educational attainment and economic success . . . the educational services offered to poor children must be of at least as high quality as services received by middle-class children."[5]

Since 1965, the federal government—under Title I (now Chapter I) of the Elementary and Secondary Education Act[6]—has tried to raise expenditures per student in schools attended by low-income students above the average level of expenditures in the school district as a whole. That is, the federal government attempts to spend more money on low-income students within given school districts. This federal role in equalization is necessarily incomplete, as it addresses only funding disparities among schools in a particular district, not the often sizable disparities among the districts themselves. State courts, in contrast, have concerned themselves on the whole with interdistrict differentials, instead of intradistrict disparities.[7] Federal and state efforts to equalize educational provision are therefore complementary rather than coextensive.

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[3] R. BRIDGE, C. JUDD & P. MOOCK, THE DETERMINANTS OF EDUCATIONAL OUTCOMES 213–27 (1979).

[4] A. WISE, RICH SCHOOLS, POOR SCHOOLS 134–42 (1972); Benson & O'Halloran, *The Economic History of School Finance in the United States*, 12 J. EDUC. FIN. 495, 511–12 (1987).

[5] Benson & O'Halloran, *supra* note 4, at 496.

[6] Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (codified as amended at 20 U.S.C. §§ 2701–2976 (1990)).

[7] *See, e.g.*, Serrano v. Priest, 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1977).

Although students, especially low-income students, are the clearest intended beneficiaries of school finance reform, they are by no means the only claimants for equitable funding systems. Parents invest in the present and future well-being of their children, and it would be the rare parent who did not desire a successful and happy life for those children. It is reasonable for parents to expect the state to respect and complement their investments in their children by investing in adequate educational facilities that will help their children become contributing members of society. Parental investment transcends boundaries of race and class. In fact, some evidence suggests that many low-income parents commit greater time and energy to childrearing than do parents in many middle-class households.[8] Nevertheless, with respect to parenting, the middle class enjoys indubitable advantages of superior education and material assets. If the state were effective in neutralizing those advantages—and a class-blind educational system requires such neutralization—middle-class parents would likely resent the drain of their affluence to poorer students. Despite this risk of class hostilities, however, no humane educational policy should overlook the plight of conscientious inner-city parents who must send their children to grossly ineffective schools, schools that will destroy their children's ambitions with their atmosphere of drugs, violence, and general social pathology. Yet states and municipalities have tolerated such harmful and incompetent schools decade after decade.

Taxpayers also have a stake in educational equity. The standard school finance case assesses the plight of local taxpayers in property-poor school districts and recognizes the inequity of their having to pay high property taxes, even though their high rates fail to generate sufficient revenue for an adequate school system.[9] However, questions of taxpayer equity have a broader scope than this typical expression. School failure is associated with incarceration, welfare dependency, and bad health,[10] all of which drain the public coffers. To avoid these later costs, tax-

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[8] *See* Benson, *Household Production of Human Capital: Time Uses of Parents and Children as Inputs*, in FINANCING EDUCATION: OVERCOMING INEFFICIENCY AND INEQUITY 62, 65 (W. McMahon & T. Geske eds. 1982).

[9] FINAL REPORT OF THE CONSULTANT STAFF TO THE CALIFORNIA SENATE SELECT COMMITTEE ON SCHOOL DISTRICT FINANCE 34–35 (June 12, 1972) (on file at the HARV. J. ON LEGIS.).

[10] H. LEVIN, THE COSTS TO THE NATION OF INADEQUATE EDUCATION, S.R. DOC. NO. 342-3, 92d Cong., 2d Sess. 31–48 (1972).

payers in general might wish to support the funding remedies advanced by more progressive courts. On the other hand, employers, who are a sub-group of taxpayers, are likely to urge a different approach to cost-effectiveness. Increasingly, employers are concerned that their new hires lack the analytical skills found in the workforces of Europe and East Asia.[11] These employers/taxpayers may define equity as spending the always elusive educational dollar on better instruction for the students who learn swiftly and will make good employees, not on those who are relatively slow and therefore unpromising.

Beneficiaries of equity in educational finance are multiple, and their definitions of equity are diverse. Lawmakers should balance their conflicting claims, but state legislatures are often dominated by suburban interests, tipping the scales in favor of middle-class parents and their progeny.[12] When progressive courts uphold the claims of low-income students and promote educational efficiency as an objective for society in general, not the privileged in particular, they correct this pervasive bias of state legislatures and push the states toward sounder and more equitable educational policies.

II. STANDARDS OF EQUITY IN FIRST-GENERATION LITIGATION

In the landmark *Serrano v. Priest*[13] case, the Supreme Court of California found that California's school district funding depended on the property tax base within each district.[14] Vast variations in districts' real property wealth created huge disparities in the revenue available to individual districts, and, consequently, in those districts' levels of educational expenditures.[15] For example, "in Baldwin Park the assessed valuation per child totaled only $3,706; in Pasadena, assessed valuation was $13,706; while in Beverly Hills, the corresponding figure

[11] *See* T. BAILEY, CHANGES IN THE NATURE AND STRUCTURE OF WORK: IMPLICATIONS FOR SKILL REQUIREMENTS AND SKILL FORMATION (1989).

[12] C. BENSON, THE ECONOMICS OF PUBLIC EDUCATION 400 (3d ed. 1978) ("[T]he political structure of many state legislatures renders any show of favoritism toward large cities anathema.").

[13] 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1977).

[14] *Id.* at 737–38, 557 P.2d at 932, 135 Cal. Rptr. at 348.

[15] *Id.* at 740, 557 P.2d at 934, 135 Cal. Rptr. at 350.

was $50,885—a ratio of 1 to 4 to 13."[16] The greater the taxable property values in a school district, the higher its school expenditures per student.[17] The Court held that these gross funding disparities based on district wealth violated the California constitutional guarantees of equal protection.[18]

Although *Serrano* set the pattern for the first generation of school finance cases,[19] the court's decision was somewhat limited in its definition of student equity. First, the *Serrano* court's constitutional inquiry would be satisfied on a showing of mere equality of expenditures across districts. This often takes the form of so-called "district power equalizing" ("DPE"),[20] which equalizes yields of revenue per student at any given local tax rate for all districts in the state.[21] Constitutionality is generally defined *ex ante*, which enables the state to establish a DPE scheme and leave it to the districts to set an expenditure pattern. If low-wealth districts continue to spend less per student than high-wealth districts, that becomes an acceptable pattern because the low-wealth districts have an ostensible opportunity to spend more at no higher local tax rate than a rich district.[22]

Second, the *Serrano* decision addressed no student-outcome issues, nor was it concerned with intradistrict allocations of expenditures. Silence on these two matters offered little hope for improvement of inner-city schools. If a large city had schools that showed extremely low standards of student achievement, or that were dilapidated and poorly staffed, nothing in *Serrano* applied pressure on the city district to try to raise funding and achievement in those disintegrating schools.

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[16] *Id.* (quoting Serrano v. Priest, 5 Cal. 3d 592, 594, 487 P.2d 1241, 1248, 96 Cal. Rptr. 601, 607–08 (1971)).

[17] *Id.*

[18] 18 Cal. 3d at 776, 557 P.2d at 958, 135 Cal. Rptr. at 374; *see* CAL. CONST. art. I, § 7; art. IV, § 16.

[19] M. YUDOF, D. KIRP, T. VAN GEEL, B. LEVIN, KIRP & YUDOF'S EDUCATIONAL POLICY AND THE LAW 582 (2d ed. 1982) [hereinafter KIRP & YUDOF].

[20] *See generally* J. COONS, W. CLUNE III & S. SUGARMAN, PRIVATE WEALTH AND PUBLIC EDUCATION 201–42 (1970). Ironically, in California the combination of the *Serrano* case and Proposition 13, CAL. CONST. art. XIIIA, §§ 1–7, has produced virtual equality of state distributions and equality of expenditures per student. Brief for Defendant at 5–7, Gonzales v. Riles, No. CA 000 745 (Cal. Super. Ct. 1983) (on file at the HARV. J. ON LEGIS.).

[21] In practice, DPE met an acceptable standard if most districts in the state were covered; it was also permissible to set an upper limit on the revenues per student that the state would match. J. GUTHRIE, W. GARMS & L. PIERCE, SCHOOL FINANCE AND EDUCATION POLICY 138–41 (2d ed. 1988) [hereinafter J. GUTHRIE].

[22] KIRP & YUDOF, *supra* note 19, at 576–77.

Third, the *Serrano* decision did not tackle the issues of the composition of local tax bases.[23] Generally, a large city will contain substantial numbers of non-residential taxable properties, such as stores, restaurants, hotels, office buildings, and, in earlier times, industrial plants. In contrast, suburban districts are inhabited by middle-class families and have relatively little such property within their borders. Disregard of the composition of local tax bases means that large cities, by the *Serrano* criteria, tend to have school districts that are classified as relatively rich, while many middle-class suburbs, which lack large amounts of non-residential property, are considered relatively poor. However, this method of classifying districts as rich and poor ignores the fact that the typical large city contains a high concentration of low-income families. This concentrated poverty drains the supposed wealth of large cities but still leaves them vulnerable to losing education revenues to the unrealistically defined "poor" suburbs.[24]

The general effect of *Serrano*-type equity is to reduce state aid to rich districts and to increase state distributions to poorer ones. The rich districts can respond by raising their school tax rates, reducing their school expenditures, or some combination of the two. If *Serrano*-type equity is applied without regard to composition of local tax bases, big cities' school tax rates soar and their school expenditures plummet. On the other hand, all but the truly rich suburban districts benefit. Their tax rates sink as their school expenditures rise. The low-income families concentrated in large cities, who are often powerless to protest, see an increase in their school tax bills and further deterioration of the schools their children attend. Consequently, *Serrano*-type equity produces school finance equalization only among suburban districts, taking from "high-wealth" cities and giving to "low-wealth" suburbs, but without regard for the individual consequences of the incomplete tax base classifications.[25] The program redistributes wealth from the budgets of large cities to the suburbs, through the channels of the state's fiscal offices.

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[23] *See Serrano*, 18 Cal. 3d at 759 n.38, 557 P.2d at 946 n.38, 135 Cal. Rptr. at 362 n.38 (recognizing the plight of some urban high-wealth districts but leaving such problems to the legislature "by virtue of [its] institutional competency as well as constitutional function").

[24] KIRP & YUDOF, *supra* note 19, at 608–19.

[25] *Serrano* bars only funding inequities that result from the differing wealth of the districts. *Serrano*, 18 Cal. 3d at 765–66, 557 P.2d at 951, 135 Cal. Rptr. at 367.

III. EQUITY IN TEXAS

The Texas school finance case is *Edgewood Independent School District v. Kirby* (*Edgewood I*).[26] A typically protracted example of school financing litigation, *Edgewood* is important primarily for four of the court rulings it has inspired.[27] When *Edgewood* came to the attention of the Texas Supreme Court in 1989, the case revealed a classic pattern of revenue disparities between property-rich and property-poor school districts. District spending per student ranged from a low of $2,112 to a high of $19,333, and the inequities were due only to district wealth, not to a lack of tax effort in the poorer districts. While "property-rich districts can tax low and spend high," the court wrote, "property-poor districts must tax high merely to spend low . . . . The 100 poorest districts had an average tax rate of 74.5 cents and spent an average of $2,978 per student. The 100 wealthiest districts had an average tax rate of 47 cents and spent an average of $7,233 per student."[28]

These disparities affected both the quality of educational services and local economic development, trapping property-poor districts in a vicious cycle of poverty. Lacking a sufficient tax base, the property-poor districts were forced to levy higher taxes to meet minimum standards for school accreditation. Business and industry, loath to expose themselves to this higher tax burden, avoided the property-poor communities, making it difficult for poor districts to improve their tax base by attracting development. Caught in this web of regenerating poverty, students in property-poor districts had to make do with curricula, equipment, textbooks, teachers, and programs that were significantly inferior to those enjoyed by students in high-wealth areas. "At the time of trial, one-third of Texas school districts did not even meet the state-mandated standards for maximum class size."[29]

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[26] 777 S.W.2d 391 (Tex. 1989) [hereinafter *Edgewood I*].

[27] In reverse chronological order, the opinions are Edgewood Indep. School Dist. v. Kirby, 34 Tex. Sup. Ct. J. 368 (1991) (denial of rehearing) [hereinafter *Edgewood IV*] (available Apr. 10, 1991, on LEXIS and Westlaw, State Library, TX file); Edgewood Indep. School Dist. v. Kirby, 34 Tex. Sup. Ct. J. 287 (1991) [hereinafter *Edgewood III*] (available Apr. 10, 1991, on LEXIS and Westlaw, State Library, TX file); Edgewood Indep. School Dist. v. Kirby, No. 362,516, slip op. (Tex. Dist. Ct., 250th Dist. Sept. 24, 1990) [hereinafter *Edgewood II*]; *Edgewood I*, 777 S.W.2d 391 (Tex. 1989).

[28] *Edgewood I*, 777 S.W.2d at 392–93.

[29] *Id.* at 393.

Because of these disparities, the state's school financing system violated the Texas Constitution,[30] which requires "an efficient system of free public schools" dedicated to the "general diffusion of knowledge" statewide:[31]

> There must be a direct and close correlation between a district's tax effort and the educational resources available to it; in other words, districts must have substantially equal access to similar revenues per pupil at similar levels of tax effort. Children who live in poor districts and children who live in rich districts must be afforded a substantially equal opportunity to have access to educational funds.[32]

Only under such conditions could Texas fulfill its constitutional mandate to disseminate knowledge statewide.[33]

Note that the court did not demand the elimination of inadequately financed school programs. Instead, it placed on the Texas Legislature the more limited requirement that poor and rich districts have "equal opportunity to have access to educational funds."[34] In the jargon of school finance, the court is requiring Texas to establish a district power equalization program, otherwise known as a guaranteed valuation plan, under which equal local tax rates must yield equal local expenditures per student. State subsidies make up any shortfalls, and are obviously higher in poor districts than in rich ones. Indeed, very rich districts are entitled to no subsidy at all. The court indicated no interest in what happened after the tax-base equalization plan went into effect. Hence, its implicit criterion for equity must be *ex ante*, not *ex post*.

The legislature responded to the Supreme Court ruling by passing Senate Bill 1.[35] The district court described the bill as establishing a "three-tier" school financing arrangement.[36] In the lowest tier, districts would levy a uniform property tax rate to support a kind of minimum, standard school program, which cost $1,910 per student in 1991.[37] If the state-mandated, uniform property tax rate did not generate enough money to support the

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[30] *Id.* at 397.
[31] TEX. CONST. art. VII, § 1.
[32] *Edgewood I*, 777 S.W.2d at 397.
[33] *Id.*
[34] *Id.*
[35] Act of June 7, 1990, 1990 Tex. Gen. Laws 1 (codified in scattered sections of TEX. EDUC. CODE ANN. §§ 16.001–16.403 (West 1991)).
[36] *Edgewood II*, slip op. at 4.
[37] Act of June 7, 1990, *supra* note 35, § 1.05 (codified at TEX. EDUC. CODE ANN. § 16.101 (West 1991)).

minimum program, the state would provide the difference between the local yield and the total district cost.[38] The second tier is a power-equalized stratum between the uniform tax rate for the minimum program (54 cents per $100 of assessed valuation in 1990–91) and a maximum equalized school tax rate of $1.18 per $100 of assessed valuation. Within the second-tier band, all districts would receive the same dollars per student ($17.90 in 1990–91) for each penny increase in the local tax rate.[39] The third tier is unequalized, without state subsidy, and with no upper limit of expenditures.[40]

The District Court of Travis County was not impressed (*Edgewood II*). The court declared that Senate Bill 1 had failed to accomplish the Texas constitutional mandate as interpreted by the Texas Supreme Court in *Edgewood I*. "The Texas School Financing System remains unconstitutional because it continues to deny school 'districts . . . substantially equal access to similar revenues per pupil at similar levels of tax effort,'" the court said.[41] The court particularly condemned the unequalized third tier.[42]

Senate Bill 1 left the rich districts rich and the poor districts poor, the court said.[43] State subsidies under the first tier would equalize expenditures only to a level of arbitrarily determined "adequacy," which would accomplish no real leveling of educational opportunity.[44] Even after full implementation of maximum funding under the second tier, the bill would equalize only up to $1.18.[45] And the third tier, unrestricted by the bill, would "continue to make available enormous wealth for property-rich districts . . . ."[46] "The districts at the 90th to 95th percentile in wealth, containing 150,000 students, will be able to raise and spend $26.00 per weighted student per penny of tax rate above $1.18,"[47] the court said. "The poorest districts (bottom five percent), containing 150,000 students, will only be able to raise and spend $3.00 per weighted student per penny of tax rate above

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[38] *Id.* § 1.09 (codified at TEX. EDUC. CODE ANN. § 16.252).
[39] *Id.* § 1.11 (codified at TEX. EDUC. CODE ANN. §§ 16.302–16.304).
[40] *Edgewood II*, slip op. at 16 ("Senate Bill 1 equalizes only up to $1.18 in the second tier [and] does nothing to equalize or restrict use of the third tier.").
[41] *Id.* at 2 (quoting *Edgewood I*, 777 S.W.2d at 397).
[42] *Id.* at 16.
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] *Id.*

$1.18."[48] Such wealth-based inequities violated even the district court's narrow interpretation of revenue disparities. Though local districts were always free to spend greater or lesser sums per pupil based on community priorities, *Edgewood II* required that those differences should stem only from disparate tax efforts, never from disparate wealth.[49]

If a state has large differences among districts in assessed valuation per student, as Texas does, and if complete tax base equalization is the objective, the arithmetic of guaranteed valuation formulas and DPE schemes limits a legislature's policy options.[50] The district court opinion discussed these available options. One option is for the state to assume sole, or virtually sole, responsibility for educational finance.[51] Called "full state funding," this arrangement is currently in effect in California.[52] A second option, leaving the total state share at a conventional level—for example, fifty percent—is for the state to demand that rich districts surrender the excess revenue they generate under a DPE schedule. The state then redistributes these funds to poorer districts.[53] This is called "recapture."[54] Third, the state could set upper limits on expenditures per student, called "revenue caps."[55] Fourth, the state could consolidate school districts to equalize tax bases.[56] The district court left it to the legislature to choose among these options.[57]

The district court also lifted the Supreme Court injunction granted in *Edgewood I*,[58] an injunction that had required state

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[48] *Id.* at 17. "Weighted student" refers to the practice in school aid formulas of counting students at different levels (secondary vs. middle, for example) at different values, or "weights," to recognize presumptive differences in costs of educating students at different levels.

[49] *Id.* at 19.

[50] For a thorough explanation of this arithmetic, see C. BENSON, *supra* note 12, at 311–28.

[51] *Id.* at 24.

[52] J. GUTHRIE, *supra* note 21, at 141–42.

[53] Suppose, for example, that under a district power equalizing schedule, districts that tax themselves at a rate of $1.50 per $100 of assessed valuation are entitled to spend $4,000 per student. A rich district having 1000 students might raise $6,000 for each of its 1000 students at a local tax rate of $1.50. To preserve fiscal neutrality, that is, a one-to-one relationship between local tax rates and expenditures per student, it is necessary that the rich district surrender its excess yield to the state for redistribution. This would amount to ($6,000–$4,000 = $2,000) x 1000 students = $2,000,000. The state would "recapture" the extra $2,000,000. The richer and larger the district, the greater the sum recaptured.

[54] *Edgewood II*, slip op. at 25.

[55] *Id.*

[56] *Id.*

[57] *Id.* at 38.

[58] *Id.* at 2.

redress of the funding disparities by May 1, 1990.[59] Plaintiffs returned to the Supreme Court, claiming that the injunction had been lifted in error. On January 22, 1991, the Supreme Court agreed with the plaintiffs and ordered state action by April 1, 1991 (*Edgewood III*).[60]

The *Edgewood III* court endorsed no particular approach to correcting Texas's school finance disparities, instead stressing that the legislature should choose whatever means necessary to fulfill its constitutional mandate.[61] However, the court did mention both tax base consolidation and school district consolidation as possible avenues for reform and made a special point of stressing that tax base consolidation would not necessarily be unconstitutional.[62] The district court, in contrast, had theorized that tax base consolidation would run afoul of certain provisions of the Texas constitution.[63]

As a final chapter, on February 25, 1991, the Supreme Court denied a motion for rehearing and took two additional positions (*Edgewood IV*). First, contrary to the 1990 district court decision, the Supreme Court declared that unequalized local enrichment is acceptable, so long as it is not excessive, whether or not it derives from wealth or from tax effort.[64] Second, the court held that tax base consolidation was constitutional only insofar as it could be achieved through the creation of new school districts.[65] Generalized recapture would run afoul of the state constitution, which prohibits the legislature from merely recharacterizing a local property tax as a state tax.[66] However, the court said that the state could organize new "school districts along county or other lines and [give them] the authority to generate local property tax revenue for all the other school districts within their boundaries."[67] Such an action would conform to the state constitution.[68]

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[59] *Edgewood I*, 777 S.W.2d at 399.
[60] *Edgewood III*, 34 Tex. Sup. Ct. J. at 292.
[61] *Id.* at 291.
[62] *Id.*
[63] *Edgewood II*, slip op. at 25; *see* TEX. CONST. art. VII, § 3; art. VIII, § 1(e).
[64] *Edgewood IV*, 34 Tex. Sup. Ct. J. at 368–69.
[65] *Id.* at 368.
[66] TEX. CONST. art. VIII, § 1(e).
[67] *Edgewood IV*, 34 Tex. Sup. Ct. J. at 368.
[68] TEX. CONST. art. VIII, § 3 ("[T]he Legislature may authorize an *additional* ad valorem tax to be levied and collected within all school districts heretofore formed or hereafter formed, for the *further* maintenance of public free schools." (emphasis added)).

To what extent does *Edgewood* differ from the first generation of school finance cases, typified by *Serrano*?[69] Not much. The Texas court couches its concerns strictly in terms of fiscal disparities and its suggested remedies are only financial. *Edgewood*'s actual effect on Texas classrooms remains unclear, particularly because the court says nothing about accountability for student achievement. How much revenue a district generates for its schools is a matter of local choice, and if a wealthy district has low aspirations in education, its school children will be deprived just as they would be if the district had insufficient taxable resources. High-wealth city districts will apparently still risk losing funds to lower-wealth suburbia, even though the cities must cope with high concentrations of low-income and minority children. If certain districts need technical assistance to raise their standards of performance, the Texas court leaves it up to the districts themselves to recognize their needs, find help, and pay for it.

However, the Texas opinions do explore the outer limits of action through fiscal means. The courts seem committed to the idea of fiscal neutrality, even though *Edgewood IV* indicates that the Supreme Court might tolerate some unequalized local enrichment.[70] Furthermore, tax base consolidation is a preferred and long-neglected policy action for dealing with school funding disparities, and the court's statement that tax base consolidation would not necessarily be unconstitutional augurs well for its eventual implementation. These points of strength in the *Edgewood* opinions should not be slighted, especially because the objective of raising levels of student achievement can be approached in a complementary fashion through other actions and other means. As fiscal policy, the Texas opinions look good. Given this heartening beginning, the legislature will almost surely provide an improved financial base on which other educational advances can flourish.

IV. Equity in New Jersey

The New Jersey school finance decision, *Abbott v. Burke*,[71] differs from the Texas case in several important respects. It also

[69] 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1977).
[70] *Edgewood IV*, 34 Tex. Sup. Ct. J. at 368–69.
[71] 119 N.J. 287, 575 A.2d 359 (1990).

departs from the standard pattern of such cases nationwide. The *Abbott* plaintiff-appellants concentrated on the plight of twenty-eight poor, urban school districts (now thirty districts) and the students whom they serve. The New Jersey Supreme Court also focused on those districts,[72] requiring the New Jersey Legislature to improve substantially the districts' levels of educational provision. *Abbott* may be the first case in which a court has targeted distribution of educational resources solely to inner-city schools, schools that are the most glaring failures of our American educational system.[73]

The plaintiff's brief begins with a thorough discussion of the statutory structure for financing education.[74] It presents data on per-student expenditures for different types of school districts. These figures showed clearly that the poor urban school districts had expenditure levels far below those of suburban districts.[75] New Jersey's education code[76] accounted for these disparities, plaintiffs said,[77] citing code provisions that granted minimum aid to districts regardless of district wealth[78] and that limited or capped various state reimbursements.[79] The brief also draws particular attention to the *ex ante* nature of the guaranteed valuation distribution of state equalization aid.[80] *Ex ante* relief almost inherently disadvantages large cities. Big city residents are often unwilling to vote for higher local school taxes because they distrust city governments and doubt their increased taxes will indeed improve their school systems.[81] Without increasing taxes, a district cannot tap into the bounty of the state's guaranteed valuation funds, and therefore cannot take advantage of financing reforms.

The New Jersey Supreme Court chose not to involve itself to any large degree in the technicalities of educational finance. What appeared to impress the court was not so much per se

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[72] *Id.* at 343 n.18, 575 A.2d at 387 n.18.

[73] *Id.* at 295, 575 A.2d at 363 ("We hold the [Public School Education] Act unconstitutional as applied to poorer urban school districts. Education has failed there, for both the students and the State.").

[74] Brief for Appellant at 6–16, Abbott v. Burke, 119 N.J. 287, 575 A.2d 359 (1990) (No. 30433) [hereinafter Abbott brief] (on file at the HARV. J. ON LEGIS.).

[75] Abbott brief, *supra* note 74, at 20–22.

[76] N.J. STAT. ANN. §§ 18A:7A-1 to 7A-52 (West 1989).

[77] Abbott brief, *supra* note 74, at 31.

[78] N.J. STAT. ANN. §§ 18A:7A-3, 7A-18 (West 1989).

[79] *Id.* § 18A:7A-25.

[80] Abbott brief, *supra* note 74, at 31–32.

[81] Benson & O'Halloran, *supra* note 4, at 503.

financial disparities among districts, but the resulting differential quality of services.[82] New Jersey children in affluent suburbs enjoyed a splendid range of educational opportunities equal to those offered by almost any group of schools in the country, but children in poor, urban districts had only basic skills training and drills in reading, writing, and arithmetic.[83] The court found the current system of finance simply irreparable. Given the dramatic disparities of wealth, spending, and educational need between inner-city and suburban districts, the court decided that the current funding regime could never conform to the New Jersey constitutional requirement of a thorough and efficient system of free public elementary and secondary schools.[84] It called for a new system, to be devised by the legislature.[85] "These intractable differences of wealth and need between the poorer and richer, and the 'discordant correlations' within a poorer district between its students' educational needs and its ability to spend, are more than the present funding system can overcome," the court said. "The failure has gone on too long; the factors are ingrained; the remedy must be systemic. The present scheme cannot cure it."[86]

To guide the legislature in its reform, the New Jersey court proceeded to set a general standard of educational attainment for students in the poor, urban districts. The court noted that graduates from schools in the urban districts would live and work in the same society as graduates from the rich districts. A fair educational system would provide the students in the urban districts with the means to develop mental capacities to compete successfully for good jobs in the same markets as the affluent graduates.[87] But the court's objectives for student attainment went far beyond the criterion of successfully competing for good jobs, stressing that courses resulting in such intangibles as good citizenship, cultural appreciation, and community awareness were also essential to a true education.[88] "[I]f these courses are not integral to a thorough and efficient education, why do richer

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[82] *Abbott*, 119 N.J. at 382, 575 A.2d at 407 ("[D]isparity alone does not render the Act unconstitutional.").

[83] *Id.* at 359–63, 575 A.2d at 395–97.

[84] N.J. CONST. art. VIII, § 4.

[85] *Abbott*, 119 N.J. at 385–87, 575 A.2d at 408–09.

[86] *Id.* at 338, 575 A.2d at 384.

[87] *Id.* at 312, 317, 575 A.2d at 371, 374.

[88] *Id.* at 363–64, 575 A.2d at 397.

districts invariably offer them?" the court asked.[89] While inner-city schools could provide only basic skills training to their students, New Jersey students in richer school systems enjoyed everything from foreign language instruction to hands-on computer experience.[90] "If absolute equality were the constitutional mandate, and 'basic skills' sufficient to achieve that mandate, there would be little short of a revolution in the suburban districts when parents learned that basic skills is what their children were entitled to, limited to, and no more," the court said.[91] This disparity in educational opportunity between rich and poor districts violated not only the New Jersey Constitution but the New Jersey Code,[92] which required a "breadth of program offerings designed to develop the individual talents and abilities of pupils."[93]

The court held that in order to meet its objectives in the poor, urban school districts, those districts required a level of resources beyond the levels of educational provision in the richer, suburban districts. "If the educational fare of the seriously disadvantaged student is the same as the 'regular education' given to the advantaged student, those serious disadvantages will not be addressed, and students in the poorer urban districts will simply not be able to compete," the court said.[94] Only by infusing more resources into the inner cities to dispel these ingrained disadvantages could the state meet its constitutional requirement of providing each child with a thorough and efficient education.[95]

The court also held that voters in the poorer urban districts could not block the inflow of educational resources. In effect, the resources were to be put into the schools of the poorer urban districts whether or not local voters approved local tax increases.[96] Hence, the New Jersey court adopted an *ex post* solution to financial provision, at least as far as the poorer urban districts were concerned.

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[89] *Id.*
[90] Id. at 359–63, 575 A.2d at 395–97.
[91] *Id.* at 364, 575 A.2d at 397–98.
[92] *Id.*
[93] N.J. STAT. ANN. § 18A:7A-5d (West 1989).
[94] 119 N.J. at 374, 575 A.2d at 402–03.
[95] *Id.* at 375, 575 A.2d at 403.
[96] *Id.* at 386, 575 A.2d at 409.

On June 21, 1990, the New Jersey Legislature passed the Quality Education Act of 1990.[97] The Act established a new finance formula, called a foundation program plan, similar in operation to the first tier in the Texas financial system.[98] The Act provided funding for the current year,[99] offered permanent aid for at-risk children,[100] shifted the student count for aid purposes from average daily attendance to enrollment,[101] abolished minimum aid,[102] and put the burden of paying teachers' pensions on local districts.[103] All these provisions were expected to benefit urban districts. The Act required all districts to spend at the foundation program amount per student unless they could prove efficient operation at a lower figure.[104] The legislation classified poorer urban districts as "special needs districts," and denied them the right to plead a case for spending less than the foundation program amount.[105] The expenditures in the special needs districts should advance more rapidly than expenditures in the other districts of the state, meeting the court's standard by 1996.[106] The special needs districts were also to be provided with technical assistance in improving their programs.[107]

Even in isolation from the dramatic legislative response it inspired, *Abbott* differs significantly from the first generation of school finance cases. *Abbott* focuses on the seriously disadvantaged urban districts. The case articulates a standard of educational attainment in those districts: preparation of graduates to work and live as active, informed citizens in a world populated by graduates of superior school systems. It also defines the necessary investment to achieve that standard: what the best suburban districts spend per student, plus more to address special disadvantages. Last, the ruling guards against local prerogatives that might block the court's intent. If local control might stand in the way, then local control must stand aside, at least in terms of financial commitment. *Abbott v. Burke* offers strong

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[97] Quality Education Act of 1990, 1990 N.J. Laws 52 (to be codified in scattered sections of N.J. STAT. ANN. § 18A (West 1989)).

[98] *Id.* §§ 4–5 (to be codified at N.J. STAT. ANN. §§ 18A:7D-4 to 7D-5).

[99] *Id.* § 5(b) (to be codified at N.J. STAT. ANN. § 18A:7D-5(b)).

[100] *Id.* § 80 (to be codified at N.J. STAT. ANN. § 18A:7D-20).

[101] *Id.* § 6(a) (to be codified at N.J. STAT. ANN. § 18A:7D-6(a)).

[102] *Id.* § 30 (to be codified at N.J. STAT. ANN. § 18A:7A-3).

[103] *Id.* § 43(a)(1)(v) (to be codified at N.J. STAT. ANN. § 18A:7A-3).

[104] *Id.* § 83(b) (to be codified at N.J. STAT. ANN. § 18A:7D-11(b)).

[105] *Id.* § 83(a) (to be codified at N.J. STAT. ANN. § 18A:7D-1(a)).

[106] *Id.*

[107] *Id.* § 89 (to be codified at N.J. STAT. ANN. § 18A:7D-32).

hope that the courts will make a concerted effort to correct our gravest educational deficiencies. It stands apart from first-generation school finance litigation.

V. EQUITY IN KENTUCKY

The Kentucky case represents the most comprehensive attack yet on the constitutionality of a state educational system. Instead of focusing on financial issues, as do the first generation of cases and the recent Texas litigation, in Kentucky financial questions play only a subsidiary role in the reform of public education. The Supreme Court of Kentucky did require the Kentucky General Assembly to change school financing, but these required changes were simply a means to reach a far broader set of goals.

In the case of *Rose v. Council for Better Education*, the Supreme Court of Kentucky declared that the Kentucky system of common schools violated the state constitution, and directed the legislature to create an entirely new school system.[108] Financial reform would be one part, but only one part, of the creation of that new system.

The Supreme Court found that wide variations in financial resources had created unequal educational opportunities throughout Kentucky and that these disparate opportunities crippled the educational attainments of students who lived in property-poor districts. "The achievement test scores in the poorer districts are lower than those in the richer districts and expert opinion clearly established that there is a correlation between those scores and the wealth of the district."[109]

In defining an efficient system of education, the Supreme Court accepted the trial court's statement that an efficient system must seek to provide each child with facility in six areas. Those areas were oral and written communication; economic, social, and political systems; governmental processes; self-knowledge; arts; and vocational training. Ultimately, the public school system should produce graduates with sufficient aca-

[108] 790 S.W.2d 186, 189 (1989); *see* KY. CONST. § 183 (mandating "an efficient system of common schools throughout the state").

[109] 790 S.W.2d at 197.

demic and vocational skills to compete with anyone in any academic or employment setting.[110]

The Kentucky Supreme Court then presented the "essential, and minimal characteristics of an efficient system of common schools":

> 1) The establishment, maintenance, and funding of common schools in Kentucky is the sole responsibility of the General Assembly.
> 2) Common schools shall be free to all.
> 3) Common schools shall be available to all Kentucky children.
> 4) Common schools shall be substantially uniform throughout the state.
> 5) Common schools shall provide equal educational opportunity to all Kentucky children, regardless of place of residence or economic circumstance.
> 6) Common schools shall be monitored by the General Assembly to assure that they are operated with no waste, no duplication, no mismanagement, and with no political influence.
> 7) The premise for the existence of common schools is that all children in Kentucky have a constitutional right to an adequate education.
> 8) The General Assembly shall provide funding which is sufficient to provide each child in Kentucky an adequate education.[111]

In terms of United States educational policy, the first, sixth, and eighth characteristics transcend most states' positions. Most states regard public education as a shared responsibility of the state and the local community.[112] In contrast, the Supreme Court of Kentucky placed the "sole responsibility" for public education on the General Assembly, including the responsibility to monitor local programs and to assure an adequate level of support.

The Kentucky General Assembly responded to the Supreme Court's decision by passing the Kentucky Education Reform Act of 1990 ("Reform Act").[113] With respect to state/local financing of education, the Reform Act's provisions are simple and straightforward. It guarantees a base funding level for each

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[110] *Id.* at 212.
[111] *Id.* at 212–13.
[112] J. GUTHRIE, *supra* note 21, at 75–77.
[113] Kentucky Education Reform Act of 1990, 1990 Ky. Rev. Stat & R. Serv. 476 (Baldwin) (codified as amended in scattered sections of KY. REV. STAT. ANN. (Baldwin 1990)).

student in each district.[114] A local tax contribution in partial support of the guaranteed sum is mandatory, equal to $0.30 per $100 of assessed valuation in the district.[115] If a school board fails to provide this minimum level of local support, the members are subject to removal from office.[116] The school board can increase the guaranteed sum by fifteen percent under a state-subsidized guaranteed valuation plan.[117] Subject to vote of the people in a district, the school board may increase expenditures an additional thirty percent, but these latter increases are to come entirely from local sources.[118] In effect, then, Kentucky has capped expenditures per student at forty-five percent above the basic support level. In contrast to the range of expenditures found in many states, Kentucky keeps permissible disparities in per-student spending low.

The Reform Act also provides for raising standards of quality in Kentucky's schools and for protecting children deemed to be "at risk." The State Board of Education must develop a statewide assessment program, including performance-based testing, to judge the relative success of individual schools in meeting the court's criteria.[119] The Commonwealth will reward schools that show improved student performance over a two-year period with salary increases for teachers and staff.[120] If a school's percentage of successful students (with "success" defined by the state)[121] does not increase, the school must develop a school improvement plan and can apply for financial assistance to implement the plan.[122] If a school's percentage of successful students declines by less than five percent, the school must prepare an improvement plan, for which the state will provide technical assistance.[123] If a school's percentage of successful students declines by more than five percent, the school is officially "in crisis."[124] Outside experts assigned to assist the school then have power to dismiss or transfer personnel.[125] In addition, the Act

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[114] *Id.* § 97(1) (codified at KY. REV. STAT. ANN. § 157.360(1)).
[115] *Id.* § 105(12)(a) (codified at KY. REV. STAT. ANN. § 160.470(12)(a)).
[116] *Id.* § 105(12)(b) (codified at KY. REV. STAT. ANN. § 160.470(12)(b)).
[117] *Id.* § 107(1) (codified at KY. REV. STAT. ANN. § 157.440(1)).
[118] *Id.* § 107(2) (codified at KY. REV. STAT. ANN. § 157.440(2)).
[119] *Id.* § 4(1) (codified at KY. REV. STAT. ANN. § 158.6453(1)).
[120] *Id.* § 5(1) (codified at KY. REV. STAT. ANN. § 158.6455(1)).
[121] *Id.* § 5(2) (codified at KY. REV. STAT. ANN. § 158.6455(2)).
[122] *Id.* § 5(3) (codified as amended at KY. REV. STAT. ANN. § 158.6455(3)).
[123] *Id.* § 5(4) (codified at KY. REV. STAT. ANN. § 158.6455(4)).
[124] *Id.* § 5(5) (codified at KY. REV. STAT. ANN. § 158.6455(5)).
[125] *Id.* § 5(5)(d) (codified at KY. REV. STAT. ANN. § 158.6455(5)(5)(d)).

allows students to transfer from a school in crisis to a successful school even if they must cross district lines to do so.[126]

The Reform Act also stipulates that preschool programs must be provided for all four-year-olds deemed to be at risk.[127] Near primary schools where at least twenty percent of students qualify for free or reduced price lunches, Kentucky will establish Family Resource Centers to offer preschool and after-school child care, health services, and training for new and expectant parents.[128] Kentucky will also establish Youth Service Centers under the free lunch criterion near schools serving students twelve or older.[129] These centers will provide referrals to health and social services, employment placement, job training, and a variety of counseling services.[130]

The Reform Act sets maximum class sizes,[131] mandates school-based decisionmaking,[132] and provides state funds for new programs in the professional development of teachers and administrators.[133] The Commonwealth has pledged to explore the effective use of educational technology,[134] and, as a first step, it will use competitive bidding and negotiation to secure the lowest possible prices for teachers who wish to purchase their own personal computers.[135] In short, the Reform Act embraces a substantial number of provisions intended to enhance quality of schooling. Perhaps the most innovative provisions are those that offer financial rewards to successful schools, require other schools to prepare improvement plans, and allow restaffing and student reassignment for schools in crisis.

VI. SUMMARY

Each state's school finance case discussed here—Texas, New Jersey, and Kentucky—represents advances in equity over the first generation of cases epitomized by *Serrano*.[136] There is also

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[126] *Id.* § 5(5)(c) (codified at KY. REV. STAT. ANN. § 158.6455(5)(5)(c)).
[127] *Id.* § 16(1) (codified at KY. REV. STAT ANN. § 157.3175(1)).
[128] *Id.* § 18(3) (codified at KY. REV. STAT. ANN. § 156.497(3)).
[129] *Id.* § 18(4) (codified at KY. REV. STAT. ANN. § 156.497(3)).
[130] *Id.*
[131] *Id.* § 97(4) (codified at KY. REV. STAT. ANN. § 157.360(4)).
[132] *Id.* § 14(2) (codified at KY. REV. STAT. ANN. § 160.345(2)).
[133] *Id.* § 12 (codified at KY. REV. STAT. ANN. § 156.670).
[134] *Id.* § 22 (codified at KY. REV. STAT. ANN. § 156.670).
[135] *Id.* § 23(1) (codified at KY. REV. STAT. ANN. § 156.690).
[136] 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1977).

a progression within the group of three new cases. Texas concentrates on essentially a financial arrangement. New Jersey targets major school improvements to benefit inner-city youth, and declares that equity means that inner-city youth must be able to compete with their suburban peers in work and society. Finally, Kentucky presents an extraordinarily thorough reform plan, developed in response to a complaint about funding disparities. In light of this progression, the future of court action in helping to create systems of education that are both equitable and economically efficient looks far brighter than it did just twenty years ago.

WHEN SCHOOL FINANCE "REFORM" MAY NOT BE GOOD POLICY

ERIC A. HANUSHEK*

For over two decades, courts and legislatures have been embroiled in debate and controversy over the way in which local public schools are financed. Interestingly, this has been an area where the state-level discussion has completely dominated policy deliberations.[1] The federal government has never played an important role in either the general policy development or the actual financing of schools.[2] And, as a direct result of the United States Supreme Court ruling in *San Antonio Independent School District v. Rodriguez*,[3] the court discussion has been conducted exclusively at the state level. Each state has pursued an independent policy, according to the requirements of its constitution, the preferences of its citizens and legislators, and the wisdom of its courts. Nevertheless, while sometimes obscured by the details of specific state actions, there are common elements to the school finance policy developments in the states. It is worthwhile to assess these common elements, especially since there are important interactions with broader issues of school policy that have recently moved to the forefront.

One important lesson we have learned over time is that school finance court cases, legislative decisions, and school policies in general are more complicated than we once thought. The framework for deliberations on school finance reform was developed in the 1960's and was given national attention through the landmark case in California, *Serrano v. Priest*.[4] In the early stages,

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[1] During this time no schooling issue except racial desegregation has received the same attention as financing issues. School desegregation is also the one area of school policy that has been dominated by federal attention and decisionmaking. It has been litigated chiefly in the federal courts and has been almost exclusively a matter of federal, not state, policy.

[2] *See* W. GARMS, J. GUTHRIE & L. PIERCE, SCHOOL FINANCE: THE ECONOMICS AND POLITICS OF PUBLIC EDUCATION 75–95 (1978).

[3] 411 U.S. 1 (1973) (reversing the district court's invalidation of the entire Texas school finance system and rejecting its application of strict scrutiny).

[4] 5 Cal. 3d 584, 589, 487 P.2d 1241, 1244, 96 Cal. Rptr. 601, 604 (1971) (*Serrano I*) (finding California's school financing plan in violation of the federal equal protection clause because "it makes the quality of a child's education a function of the wealth of his parents and neighbors"). Less than two years later, the *Rodriguez* decision foreclosed fourteenth amendment challenges to state educational finance schemes. Note, *To Render*

two common assumptions provided the basis for the standard interpretation of the issues: (1) traditional school funding, which relies heavily on local funds raised substantially by property taxes, leads to large disparities between the education available to rich (suburban) students and poor (urban and rural) students; and (2) the inequities in the quality of schooling resulting from the fiscal system must be corrected, and the courts are an obvious vehicle to force legislatures to provide the economically and educationally disadvantaged students with better schools.[5] School finance reform tended to be viewed as another element of the War on Poverty where, in this case, the improved schooling believed to result from more equitable funding could be used as an instrument for improving the well-being of poor children. We have discovered, perhaps unfortunately, that much of this simplistic view is misleading if not patently incorrect. Setting effective school policy, either judicially or legislatively, is more complicated than these common assumptions suggest.

This Article concentrates on the policy considerations of altering public school financing. These considerations are complicated by having fifty financing systems, fifty state constitutions, and nearly as many court and legislative histories. This Article does not attempt a systematic analysis of each state's issues. Instead, it concentrates on policy issues that transcend state boundaries. Moreover, it avoids all consideration of legal theories and interpretations that have surrounded the major court cases, except those that intersect with the larger educational policy matters.

The heart of the analysis relates our current knowledge of school operations to traditional school finance discussion and to the development of more effective educational policies. Most school finance discussion, as opposed to school policy discussion, has focused almost exclusively on variations in expenditures per student.[6] This is reasonable if schools are operating

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Them Safe: The Analysis of State Constitutional Provisions in Public School Finance Reform Litigation, 75 VA. L. REV. 1639, 1650–51 (1989).

[5] *See, e.g.*, J. COONS, W. CLUNE & S. SUGARMAN, PRIVATE WEALTH AND PUBLIC EDUCATION (1972) [hereinafter J. COONS].

[6] *See, e.g.*, R. BERNE & L. STIEFEL, THE MEASUREMENT OF EQUITY IN SCHOOL FINANCE: CONCEPTUAL, METHODOLOGICAL, AND EMPIRICAL DIMENSIONS (1984). This analysis, perhaps the most thorough quantitative analysis of school finance equity issues that is available, devotes less than two of its 300 pages to consideration of equity measured by anything except expenditures on school inputs. *See also* J. COONS, *supra* note 5.

efficiently.[7] With efficient operation, the level of expenditure is a good index of performance. However, if schools are not operating efficiently, variations in expenditure levels may or may not indicate variations in school quality.

One fundamental observation and conclusion underlies the discussion in this Article: *There is no systematic relationship between school expenditures and student performance.*[8] This implies significant inefficiency in the operation of schools and has obvious and profound implications for the discussion about altering school finance arrangements. Legal arguments and policy decisions that allegedly advance educational equity are suspect if based on the conventional assumptions about expenditure variations. Indeed, many popular changes (clinging to the view that expenditures and quality are closely correlated), both proposed and adopted, no longer look like "reform" but instead tend to move away from good educational policy.

School finance discussions have not been oblivious to the potential pitfalls of focusing exclusively on expenditures. Reformers frequently make passing reference to issues of efficiency along with an assertion that the research is ambiguous.[9] But, without clarifying these ambiguities, the reformers then fall back on pragmatic considerations as the underlying justification for the focus on expenditure variations. These include, for example, assertions that expenditure variations are an intuitively reasonable measure of school quality differences or that they are at-

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[7] The term "efficient" here is used in the economist's sense of obtaining the maximum possible performance from any given expenditure of resources. This definition is very different from that employed in a number of legal arguments emanating from state constitutional requirements to provide an efficient system of public schools. *See, e.g.*, Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273, *cert. denied*, 414 U.S. 976 (1973).

[8] *See infra* text accompanying notes 32–46.

[9] *See, e.g.*, J. COONS, *supra* note 5, where they discuss T. RIBICH, EDUCATION AND POVERTY (1968). They state, "Ribich's painstaking analyses suggest, if anything, a variety of sometimes conflicting relationships between cost and purely economic benefits from added dollar increments." J. COONS, *supra* note 5, at 29. They go on to indicate:

> There are similiar studies suggesting stronger positive consequences from dollar increments, and there are others suggesting only trivial consequences, but the basic lesson to be drawn from the experts at this point is the current inadequacy of social science to delineate with any clarity the relation between cost and quality. We are unwilling to postpone reform while we await the hoped-for refinements in methodology which will settle the issue.

Id. at 29–30.

See also R. BERNE & L. STIEFEL, *supra* note 6; Kearney & Chen, *Measuring Equity in Michigan School Finance: A Further Look*, 14 J. EDUC. FIN. 319 (1989); Underwood, *Changing Equal Protection Analyses in Finance Equity Litigation*, 14 J. EDUC. FIN. 413 (1989).

tractive because they are so easily measured.[10] I will argue that neglecting the evidence on expenditure relationships is likely to cause serious distortion in policies aimed at either improving equity or improving overall school performance.[11]

This Article begins with a discussion of the evidence regarding expenditures and school performance. It then considers how this evidence relates to court cases and overall judgments about a state's schools. It concludes by discussing how court cases, and the corresponding legislative actions, relate to effective policies for school reform.

I. WHAT WE KNOW ABOUT SCHOOL EXPENDITURES[12]

The interpretation of expenditure differences is central to all discussions of school finance. This Part considers in detail the evidence relating expenditures to student performance. It is impossible to ignore these data when the policy objective is either improving overall student performance or advancing the cause of educational equity. This Part begins with a discussion of aggregate data regarding the state of education in the United States, data which reveal the reason for concern over school performance. The aggregate data are followed by an analysis of the results of studies into the relationship between school expenditures and performance.

A. *Aggregate Data*

Much of the current concern about the performance of our schools is motivated by the fact that student performance has actually fallen during a period in which we have continually increased our spending on schools. Figure 1 illustrates this by

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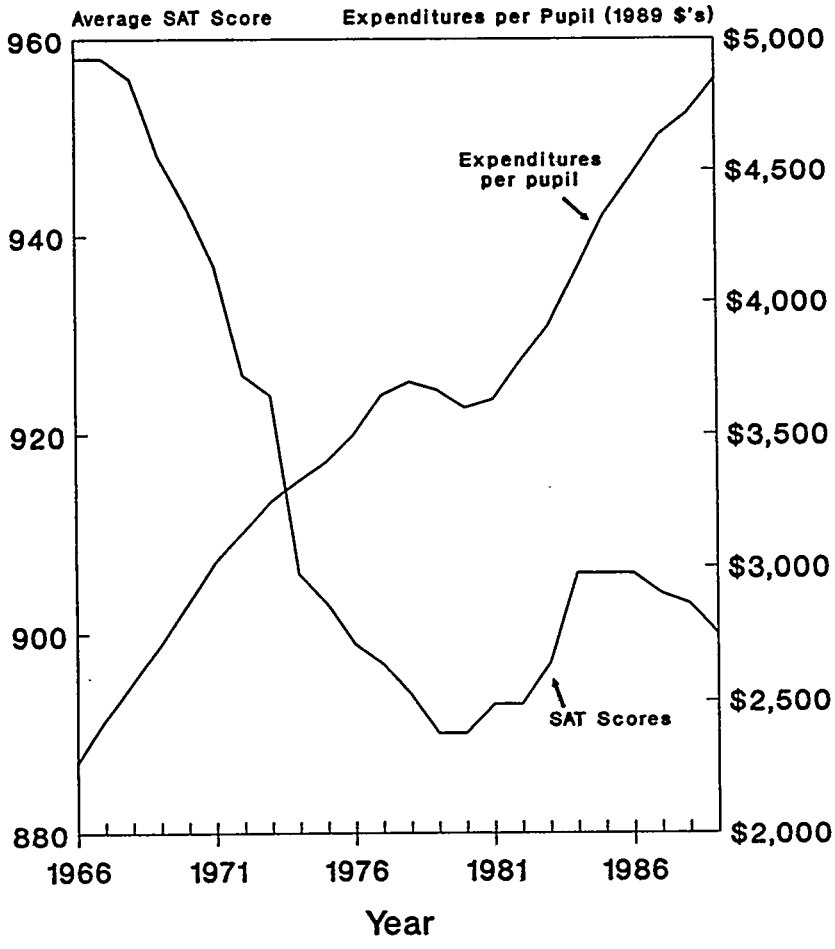
[10] *See, e.g.*, J. COONS, *supra* note 5, at 26. After discussing the difficulty of employing alternative measures of real resource differences (such as education levels of teachers), the authors state: "We have no stomach for such an imbroglio. Ultimately we will need a standard appropriate to the rigors of judicial proof, and the only convincingly quantifiable item in the spectrum is money available for the general task of education in each district." *Id.*

[11] *See infra* text accompanying notes 55–68.

[12] This section draws extensively on the presentation in Hanushek, *The Impact of Differential Expenditures on School Performance*, 18 EDUC. RESEARCHER 45 (1989), which in turn updates previous analyses in Hanushek, *Throwing Money at Schools*, 1 J. POL'Y ANALYSIS & MGMT. 19 (1981), and Hanushek, *The Economics of Schooling: Production and Efficiency in Public Schools*, 24 J. ECON. LITERATURE 1141 (1986) [hereinafter *Economics of Schooling*].

Figure 1
Real School Expenditures and SAT Scores: 1966-1989



Note: Current expenditures in 1989 dollars per student in average daily attendance.

superimposing the trend in student performance on the trend in educational expenditures. Real expenditures per pupil have risen steadily and dramatically over the past two decades.[13] Specifically, after allowing for inflation, expenditures per pupil more than doubled between 1966 and 1989;[14] this corresponds to a 3.5% compound annual growth rate. At the same time, performance as measured by Scholastic Aptitude Test ("SAT") scores fell to a level significantly below the mid-1960's levels.[15] Moreover, while there was some recovery in scores from the 1979-80 trough, the marginal gains of the 1980's have now faded.[16]

There are reasons (discussed below) for quibbling about these specific statistics for both achievement and spending. But, after allowing for the objections, the overall conclusion that there are serious problems with the current operations of the U.S. schooling system does not change. Expenditures have risen while performance has fallen.

The measurement of performance by SAT scores has been questioned because the test does not rely on a representative sample, because the test-taking population has changed over time, and because the content of the test itself may have changed. Analysis of these objections, however, indicates clearly that real performance declines have occurred. The observed achievement decline is not simply an artifact of that specific test.[17] Further, declines have been registered on a variety of other tests given over the same time.[18] Continued international evidence also places U.S. students behind a surprisingly large range of foreign students on math and science performance.[19] For example, in tests of advanced algebra for

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[13] NAT'L CENTER FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., DIGEST OF EDUCATION STATISTICS 156 (25th ed. 1989) (Table 145) [hereinafter DIGEST OF EDUCATION STATISTICS].

[14] *Id.* Current expenditures per student are deflated by the consumer price index.

[15] *See* DIGEST OF EDUCATION STATISTICS, *supra* note 13, at 120 (Table 108).

[16] *Id.*

[17] See CONGRESSIONAL BUDGET OFFICE, TRENDS IN EDUCATIONAL ACHIEVEMENT (1986); CONGRESSIONAL BUDGET OFFICE, EDUCATIONAL ACHIEVEMENT: EXPLANATIONS AND IMPLICATIONS OF RECENT TRENDS (1987).

[18] CONGRESSIONAL BUDGET OFFICE, TRENDS IN EDUCATIONAL ACHIEVEMENT, *supra* note 17; CONGRESSIONAL BUDGET OFFICE, EDUCATIONAL ACHIEVEMENT: EXPLANATIONS AND IMPLICATIONS OF RECENT TRENDS, *supra* note 17.

[19] C. MCKNIGHT, F. CROSSWHITE, J. DOSSEY, E. KIFER, J. SWAFFORD, K. TRAVERS & T. COONEY, THE UNDERACHIEVING CURRICULUM: ASSESSING U.S. SCHOOL MATHEMATICS FROM AN INTERNATIONAL PERSPECTIVE (1987) [hereinafter C. MCKNIGHT]; *see also* A. LAPOINTE, N. MEAD & G. PHILLIPS, A WORLD OF DIFFERENCES: AN INTERNATIONAL ASSESSMENT OF MATHEMATICS AND SCIENCE (1989).

twelfth graders in 1982, U.S. students trailed students from such countries as Hong Kong and Hungary, bettering only the students from Thailand in the fifteen countries sampled.[20] Thus, there is no doubt that students are performing worse now than they did in the past (when spending on schools was noticeably less).

Similarly, some have argued that the tasks facing schools have changed over time so that the comparisons of expenditures are not strictly appropriate. For example, increased expenditures may partly reflect attempts to educate more expensive students—handicapped students, immigrants, and other educationally disadvantaged students.[21] Again, however, while these changes in student populations undoubtedly have some influence on costs, they are insufficient to explain the substantial aggregate increases that have transpired.

Moreover, it is important to note that actual expenditure patterns in schools over the past several decades show changes that reflect common policy recommendations. Student/teacher ratios have fallen steadily for the past three decades. While there were twenty-five students per teacher in public elementary and secondary schools in 1965, there were fewer than eighteen in 1985.[22] Over the same period, the proportion of teachers holding a master's or higher-level degree rose from under one-quarter to over one-half.[23] Median teacher experience also nearly doubled, rising from eight years in 1966 to fifteen in 1986.[24] The only aggregate input that has not followed this steady pattern is teacher salaries. Real teacher salaries, as best one can tell, have varied: average salaries rose through the 1960's, fell back in the mid to late 1970's, and rose again during the 1980's.[25]

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[20] C. McKNIGHT, *supra* note 19. On the other hand, evidence from international tests in 1964 suggests that U.S. students have historically done relatively poorly. 2 INTERNATIONAL STUDY OF ACHIEVEMENT IN MATHEMATICS (T. Husén ed. 1967).

[21] Another argument concentrating on why some of the expenditure increases might have occurred is that when the size of the student population declined in the 1970's, some districts resisted laying off personnel. *See, e.g.*, Murnane, *Teacher Mobility Revisited*, 16 J. HUM. RESOURCES 3 (1989). Other things being equal, this led to reduced class size and increased per-pupil expenditures. For our discussion, however, the causes of such increases are essentially irrelevant. The point remains that there were increased resources devoted to schools and there was no apparent gain in student performance.

[22] DIGEST OF EDUCATION STATISTICS, *supra* note 13, at 69 (Table 56).

[23] *Id.* at 72 (Table 59).

[24] *Id.* Moreover, only three percent of teachers in 1986 were in their first year of teaching. The aging and stagnation of the teaching force has been the subject of separate concerns.

[25] *Id.* at 77 (Table 66). Teacher salary data over time are provided by the National Education Association, and the sample and reliability of these are unknown.

The aggregate picture is clear. School spending has increased dramatically since the mid-1960's. This increase has largely been the result of instituting policies which educational decisionmakers have proposed as a way of improving student performance. Yet, student performance has actually fallen over the same period. While indicative of substantial problems in the operations of schools, these aggregate data can nevertheless mask important differences among individual school systems. Therefore, it is valuable to corroborate this evidence with observations of the relationship between expenditures and performance at the place where education actually takes place, the school.

B. *Individual and School Level Analyses*

Detailed studies of student performance in individual schools and classrooms provide more precise information about how school resources relate to student performance. Although research into the determinants of students' achievement takes various approaches, one of the most appealing and useful is what economists call the "production-function" approach, or in other disciplines the "input-output" or "cost-quality" approach. This approach focuses attention primarily on the relationship between school outputs (test scores, attendance rates, etc.) and measurable inputs into the educational process (teacher education levels, class size, expenditures, etc.).[26]

Knowledge of the production function for schools would enable a policymaker to predict results from additions or subtractions of resources and to determine appropriate actions if the prices of various inputs were to change. The problem, of course, is that the production function for education is unknown and must be inferred from data on students and their schools.

The origin of estimations of input-output relationships in schools is usually traced to the monumental U.S. study *Equality*

[26] This is contrasted to a more common approach in educational research of "process-outcome" studies, in which attention rests on the organization of the curriculum, the methods of presenting materials, the interactions of students, teachers, and administrators, and the like. An entirely different approach—true experimentation—has been much less frequently applied, particularly when investigating the effects of expenditure differences. Experimentation would employ random assignment techniques to investigate specific interventions. For example, it would be possible to assign students randomly to different-sized classrooms and then to observe subsequent differences in student performance. Such an approach, while conceptually appealing from an analytic viewpoint, is expensive and difficult to do convincingly.

of Educational Opportunity, more commonly known as the "Coleman Report."[27] The U.S. Office of Education produced this report in response to the Civil Rights Act of 1964's requirement of an investigation into the extent of inequality (by race, religion, or national origin) in the nation's schools.[28] The study's fundamental contribution was to direct attention to the distribution of student performance. Instead of addressing questions of inequality simply by producing an inventory of differences among schools and teachers by race and region of the country, the Coleman Report sought to *explain* those differences. It delved into the relationships between inputs and outputs of schools. Even though it was not the first such effort, the Coleman Report was much larger and more influential than any previous (or subsequent) input-output study. It involved surveying and testing 600,000 students in 3000 schools across the U.S.

The attention given the Coleman Report derived, however, not from its innovative perspective or unparalleled description of schools and students but from its major conclusions. Broadly stated, the Coleman Report found that schools are not very important in determining student achievement.[29] Families, and to a lesser extent peers, were the primary determinants of variations in performance. The findings were controversial and immediately led to a large (but diffuse) research effort to compile additional evidence about the relationship between school resources and school performance.[30] Before turning to the subsequent research, it is worth examining the structure of the statistical analysis.

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[27] J. COLEMAN, E. CAMPBELL, C. HOBSON, J. MCPARTLAND, A. MOOD, F. WEINFIELD & R. YORK, EQUALITY OF EDUCATIONAL OPPORTUNITY (1966) [hereinafter Coleman Report]. This, however, was not the first such effort. *See, e.g.*, H. Kiesling, Measuring a Local Government Service: A Study of Efficiency of School Districts in New York State (1965) (unpublished Ph.D. dissertation).

[28] Civil Rights Act of 1964, Pub. L. No. 88-352, § 402, 78 Stat. 241, 247.

[29] The Coleman Report is a very complicated document, subject to a variety of interpretations. For some indications of the controversy surrounding the Coleman Report along with a discussion of the conclusions, see Mosteller & Moynihan, *A Pathbreaking Report: Further Studies of the Coleman Report*, in ON EQUALITY OF EDUCATIONAL OPPORTUNITIES 3 (F. Mosteller & D.P. Moynihan eds. 1972); *see also* Moynihan, *Educational Goals and Political Plans*, PUB. INTEREST, Winter 1991, at 32.

[30] There were also extensive analyses of the report's methodology and the validity of its inferences. *See, e.g.*, Bowles & Levin, *The Determinants of Scholastic Achievement—An Appraisal of Some Recent Evidence*, 3 J. HUM. RESOURCES 3 (1968); Cain & Watts, *Problems in Making Policy Inferences from the Coleman Report*, 35 AM. SOC. REV. 228 (1970); Hanushek & Kain, *On the Value of "Equality of Educational Opportunity" as a Guide to Public Policy*, in ON EQUALITY OF EDUCATIONAL OPPORTUNITY, *supra* note 29, at 116.

The underlying model guiding the Coleman Report and most subsequent studies is straightforward.[31] It postulates that the output of the educational process—that is, the achievement of students—is related directly to a series of inputs. Policymakers directly control some of these inputs such as the characteristics of schools, teachers, and curricula. Other inputs such as those of family and friends, plus innate endowments of the students, generally cannot be affected by public policy. Furthermore, although achievement is usually measured at discrete points in time, the educational process is cumulative: past inputs affect students' current levels of achievement. Based upon this model, analysts use statistical techniques, typically some form of regression analysis, to identify the specific determinants of achievement and to make inferences about the relative importance of the various inputs into student performance. These studies of educational production relationships measure output not only by students' scores on standardized achievement tests but also by other quantitative measures, such as school attendance rates, college continuation or dropout rates, and post-school earnings. The general interpretation is that they are all potential indicators of future success in the labor market and society.

The precise statistical models analyzed in different studies have varied widely in detail but have also included many common measures of inputs into the educational process. Family inputs are typically measured by socio-demographic characteristics of the families, such as parental education, income, and family size. Peer inputs, when included, are typically measured by aggregate summaries of the socio-demographic characteristics of other students in the school. School inputs typically include measures of the teachers' characteristics (education level, experience, sex, race, etc.), the schools' organization (class sizes, facilities, administrative expenditures, etc.), and district or community factors (e.g., average school expenditure levels). Except for the original Coleman Report, most empirical work has relied on data, such as the normal administrative records of schools, that were collected for other purposes.

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[31] For a list of subsequent studies, see *infra* Appendix.

C. *Empirical Results for Expenditure Effects*

The production-function approach has been employed broadly to investigate the impact on student performance of the core factors determining expenditures on education. The fundamental objective has been to estimate the changes in output caused by the key "purchased" inputs of schools. Instructional expenditures make up about two-thirds of current school expenditures.[32] Instructional expenditures themselves are determined primarily by the level of teacher salaries and by class size.[33] And, in most U.S. school districts, teacher salaries are directly related to the years of teaching experience and the educational level of the teacher.[34] Thus, the basic determinants of instructional expenditures in a district are teacher experience, teacher education, and class size. Most studies, regardless of what other school characteristics might be included, at a minimum attempt to analyze the effect of these factors on student-performance outcomes.[35] Because the analyses have such common specifications, the effects of the expenditure determinants can easily be tabulated.

The analysis here concentrates on the cumulative results of estimates of determinants of expenditures on student achievement. A total of 187 distinct "qualified studies," the result of an extensive search, were found in thirty-eight separate published articles or books.[36] These studies, while restricted to public schools, cover all regions of the U.S., different grade levels, different measures of performance, and different analytical and statistical approaches. About one-third draw their data from a

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[32] DIGEST OF EDUCATION STATISTICS, *supra* note 13, at 151 (Table 141).

[33] E. COHN, THE ECONOMICS OF EDUCATION 66–67 (rev. ed. 1979).

[34] *Id.* at 235.

[35] These are also the factors most likely to be found in any given data set, especially if the data come from standard administrative records.

[36] A qualified study is a production-function estimate that (1) is published in a book or journal; (2) relates some objective measure of student output to characteristics of the family and the schools attended; and (3) provides information about the statistical significance of estimated relationships. Note that a given publication can contain more than one estimated production function by considering different measures of output, different grade levels, or different samples of students. Different specifications of the same basic sample and outcome measure, however, count as only one study. The search was of studies published through 1988. All studies that could be located through bibliographic searches and that met the criteria listed above were included. Interestingly, results of the Coleman Report could not be included because information about the statistical significance of the different inputs was unavailable.

single school district, while the remaining two-thirds compare school performance across multiple districts. A majority of the studies (104) use individual students as the unit of analysis, whereas the remainder rely upon aggregate school, district, or state-level data. The studies are split about evenly between primary schooling (grades 1–6) and secondary schooling (grades 7–12). Over seventy percent of the studies measure school performance by some kind of standardized test. However, those that use non-test measures (such as dropout rates, college continuation, student attitudes, or performance after school) are for obvious reasons concentrated in studies of secondary schooling. There is no indication that differences in sample and study design lead to differences in conclusions.[37]

The available studies all provide regression estimates of the partial effect of given inputs, holding constant family background and other inputs. These estimated coefficients have been tabulated according to two pieces of information: the sign and the statistical significance (five-percent level) of the estimated relationship. Statistical significance is included to indicate confidence that any estimated relationship is real and not just an artifact of the sample of data employed.[38]

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[37] The tabulations in the Appendix yield the same qualitative conclusions whether stratified by grade level, by whether individual or aggregate data were used, by output measure, or by value-added or level form of estimation. The distinction between value-added and level form relates to whether earlier achievement of the student is accounted for or not. When earlier achievement is included in the analysis, the estimates indicate how much achievement is added over and above where the student began.

[38] In any statistical analysis, which necessarily relies on a sample of all possible students and classroom environments, an estimated relationship may not be real but only perceived to exist because of the specific sample. Standard regression techniques provide ways of estimating the likelihood of being fooled into thinking there is a relationship when in fact there is not. The shorthand term "statistically significant" means that we would get an estimate of the relationship as large as the one obtained less than five percent of the time when there is actually no relationship. In other words, when the estimate is "statistically significant," we are quite confident that some relationship does indeed exist. In all cases, however, the estimates of statistical significance assume that the "correct" relationship is being estimated; that is, that the model of achievement is properly specified to include the relevant factors determining performance.

Recent critiques of standard regression approaches to analyzing educational achievement have concentrated on the fact that sampled students are clustered in classrooms and schools. *See, e.g.*, Raudenbush, *Educational Applications of Hierarchical Linear Models: A Review*, 13 J. EDUC. STATISTICS 85 (1988). This clustering implies that conventional methods of analyzing statistical significance may be biased. Unfortunately, both the magnitude and direction of bias in the estimated variance of the coefficients are unknown. Analysts have proposed a variety of techniques for estimation of such models (often called hierarchical or multi-level models), but the actual applications have provided little direct information about either the effects of individual resources or their correct statistical properties. For a general discussion of the modeling approach, see *id.* at 85.

The table in the Appendix summarizes the expenditure components of the 187 studies. The left-hand column indicates the specific resource measures identified. According to both conventional wisdom and generally observed school policies, each factor in the table should increase student achievement. More education and experience on the part of the teacher cost more and are presumed to improve individual student learning; smaller classes (more teachers per student) are also expected to be beneficial.[39] More spending in general—higher teacher salaries, better facilities, and better administration—should also lead to better student performance. The magnitudes of estimated relationships are ignored in the tabulations; only the direction and statistical significance of any relationships are analyzed.[40] Having a positive sign in a production function is clearly a necessary requirement for justifying a given input or expenditure, but in general would not be sufficient. Here it is not necessary to evaluate the quantitative magnitudes, because, as we shall see, there is little indication of any relationship with the key inputs.

The data in the Appendix provides a picture of how well conventional wisdom and common school policies hold up to analysis. The columns in the table divide the available estimates by direction of effect and by statistical significance. Since not all studies contain estimates of each expenditure component, the first column simply indicates the total number of estimates available. Thus, for example, 152 of the 187 studies include an estimate of the effect of teacher/student ratios, or class size. Of the 152 estimates of the effects of class size, only twenty-seven are statistically significant. Of these, only fourteen show a positive relationship, while thirteen display a negative relationship.[41] One hundred and twenty-five estimates show that class

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[39] Tabulated results are naturally adjusted for variables measured in the opposite direction; for example, the sign for estimated relationships of student/teacher ratios, instead of teacher/student ratios, is reversed.

[40] It would be extremely difficult to provide information of quantitative differences in the coefficients because the units of measure of both inputs and outputs differ radically from one study to another. For one attempt to provide quantitative estimates of varying class sizes, see Glass & Smith, *Meta-Analysis of Research on Class Size and Achievement*, 1 EDUC. EVALUATION & POL'Y ANALYSIS 2 (1979). This work, however, has been considerably criticized, largely because of the ultimate difficulties in doing such analyses. For an overview and evaluation of such quantitative syntheses of research, often called "meta-analysis," see THE FUTURE OF META-ANALYSIS (K. Wachter & M. Straf eds. 1990).

[41] Teacher/student ratios are treated here as being synonymous with class sizes. Most of these studies reflect the situations before school districts implemented expensive

size is not significant at the five-percent level. Among the statistically insignificant relationships, the coefficients have the "wrong" sign by a forty-six to thirty-four margin.[42]

The estimates of the effects of teacher education level tell a similar story. The statistically significant results are split between positive and negative relationships, and in a vast majority of cases (100 out of 113) the estimated coefficients are statistically insignificant. Again, even among the statistically insignificant coefficients, a case cannot be made that greater teacher education will lead to greater student performance.[43]

Teacher experience is slightly different. A clear majority of estimated coefficients point in the expected direction, and almost thirty percent of the estimated coefficients are both statistically significant and of the conventionally expected sign. But these results only appear strong relative to the other school inputs considered; they are hardly overwhelming in an absolute sense. Moreover, these results can be interpreted in different ways. Specifically, positive correlations could result from more senior teachers having the ability to locate themselves in schools and classrooms with better students. In other words, causation may run from achievement to experience, not the other way around, and estimates would be an overstatement of the effects of experience on student performance.[44]

Overall, the results are startlingly consistent. No compelling evidence emerges that teacher/student ratios, teacher education, or teacher experience have the expected positive effects on student achievement. We cannot be confident that hiring teachers with more education or having smaller classes will improve

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programs such as those for disabled children, thus it is reasonable to interpret these ratios as reflecting class sizes. This interpretation may be misleading today. The introduction of extensive requirements for dealing with disabled children in the mid-1970's has led to new instructional personnel without large changes in typical classes.

[42] Note that not all studies report the sign of insignificant coefficients. Forty-five studies report insignificant estimated coefficients for teacher/student ratios but do not report any further information.

[43] Note that only 113 studies report evidence about teacher education. Since data on teacher education are so readily available, it is possible that a number of additional studies investigated teacher education effects but discarded the results without reporting them after finding negative or insignificant effects.

[44] Experience measures may, on the other hand, confuse the differences in performance accruing to experience for any individual teacher with differences in performance across groups of teachers. For example, if the best teachers all leave teaching within the first five years, any teacher with more experience will simply be a poorer teacher. If this were the case, the studies could underestimate the true effect of added teacher experience.

student performance. Teacher experience appears only marginally stronger in its relationship to student performance.

The remaining rows of the table summarize information on other expenditure components, including administration, facilities, teacher salaries, and total expenditures per student.[45] There are few estimates of positive and statistically significant effects for administrative inputs or facilities. The absence of a strong relationship between quality of administration and quality of facilities on one hand and performance on the other may result in part from variations in how these are measured. The quality of administration is measured in a wide variety of ways, ranging from characteristics of the principal to expenditures per pupil on non-instructional items. Similarly, the quality of facilities is identified both through spending and through many specific physical characteristics. While the estimated effects of quality of administration appear marginally stronger than quality of facilities, the available evidence on both again fails to support the conventional wisdom convincingly.

Finally, the table shows that variations in teacher salaries and expenditures per student do not play an important role in determining achievement.[46] These results are, of course, not surprising because the underlying components of these expenditure items were already seen to be unrelated to achievement.

Based on a reading of only a few of these studies, many previously were led to the conclusion that the results were inconsistent and ambiguous, but a systematic tabulation demonstrates that the findings are consistent. This consistency, however, does not support the conventional wisdom. The research reveals no strong or systematic relationship between school

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[45] Information on each of these variables is less frequently available than information on student/teacher ratios, teacher education, and teacher experience. This lack of information is partially explained by reliance on administrative records which do not include expenditure components (except perhaps teacher salaries). The level at which these expenditure components are measured, combined with the underlying statistical samples, offers another explanation; for example, since expenditures per student are generally measured for districts, analyses of individual student data for a single district would not be able to include this variable.

[46] The interpretation of salary and expenditure estimates is sometimes clouded by including them *in addition* to teacher experience, education, and class size. Also, because prices can vary across the samples in the separate studies, it is more difficult to interpret the dollar measures than the real input measures. Finally, 8 of the 13 significant positive expenditure results in the Appendix come from the different estimates of Sebold & Dato, *School Funding and Student Achievement: An Empirical Analysis*, 9 PUB. FIN. Q. 91 (1981). In this study, imprecise measurement of family inputs suggests that school expenditures may be in fact a proxy for family background.

expenditures and student performance. This is the case both when expenditures are decomposed into their underlying determinants and when they are considered in the aggregate.

There are several obvious reasons to be cautious in interpreting the results of individual statistical studies. First, incomplete information, poor quality data, or faulty research could distort the statistical results of any study. Second, the individual actions of school administrators make detection of any relationship difficult. For example, if the most difficult students to teach were consistently put in smaller classes, any independent effect of class size could be difficult to disentangle from the effects of student characteristics. Finally, statistical insignificance of estimates can result from a variety of data problems, such as high correlations among the different measured inputs. In other words, virtually any study is open to challenge.

Uncertainties such as these about individual results motivated the tabulation of estimates shown in the Appendix. If the resource inputs investigated in the studies were in fact central to variations in student achievement, one would expect the tabulations to show a much stronger pattern in the conventionally expected direction, even in the face of problems with any particular study. The lack of a systematic relationship between the measured variables and student achievement is striking. Furthermore, given the general biases toward publication of statistically significant estimates, the paucity of such results is notable. Although individual studies may be affected by specific analytical problems, the aggregate data provided by the 187 separate estimates lead relentlessly to the conclusion that, after family backgrounds and other educational inputs are considered, differences in educational expenditures are not systematically related to student performance.

Importantly, these generalizations are based on the structure and operating procedures of schools currently observed. An organizational structure with different incentives could produce very different results. For example, almost every economist would support the proposition that increasing teacher salaries would expand and improve the pool of potential teachers. However, any improvement in the quality of teaching would depend on whether schools could systematically choose and retain the best teachers from the pool. Alternatively, salary differentials might demonstrate a stronger relationship to student performance if schools faced a greater incentive to produce student

achievement and if mechanisms for teacher selection were altered. In other words, there seems little question that money could count, but within the current organization of schools, it does not do so systematically.

Moreover, the criterion of consistency used to evaluate the results and the potential for policy improvements does not suggest that money never counts. The results are entirely compatible with some schools using funds effectively and others not. But, unless some way is found to change the districts that would squander additional funds into districts that would use them effectively, added resources are not likely to lead to any improvement in average performance. Good uses of funds are balanced by inefficient uses within the current structure.

These results must also be interpreted in terms of the observed operations of schools. They do not indicate that, for example, unrestricted increases in class size would have no effect on student performance. All of the findings reported rely upon the range of experiences employed by existing public school systems, and so none of these findings gives much indication of what might happen if the current structure of schools were radically changed. In other words, the evidence on class size relates to classes roughly in the fifteen to forty student range and has little to say about the effects of classes with either two students or 300. Moreover, the evidence does not predict what would happen if there were a sudden change in the operating characteristics of schools. If, say, school budgets were cut by twenty percent, performance could deteriorate dramatically, because conditions of schools and their teachers would change significantly from their current operations. Thus, real care is necessary in generalizing from these results to major policy changes that are outside the bounds of our current experiences.

It may also be that expenditures below some minimum level could be consistently important, but there are alternative conceptualizations of minimum expenditures. For purposes of this discussion, minimum conotes a level below which expenditure variations must necessarily result in student performance differences. Other commentators, however, use minimum as a statement of the lowest acceptable spending, a concept more related to preferences than to the actual operations of schools. The preceding evidence also makes it clear that most observed school systems are quite far from minimum expenditure defined in the first way.

D. *Other Inputs into Education*

Since the publication of the Coleman Report, intense debate has surrounded the fundamental question of whether schools and teachers are at all important to the educational performance of students. The Coleman Report has been commonly interpreted as finding that variations in school resources explain only a negligible portion of the variation in student achievement. If true, it would not matter which particular teacher a student had or which school a student attended—a conclusion most people would have difficulty accepting.

The findings from direct analyses of differences among teachers are unequivocal: teachers and schools differ dramatically in their effectiveness. A number of studies provide analyses of the differential effectiveness of teachers and schools based on estimation of the average gain in performance of each teacher's (or school's) students.[47] These studies confirm that there are striking differences in teacher and school performance as measured by average gain in student achievement.

The faulty impressions about the non-importance of teachers and schools left by the Coleman Report and by a number of subsequent studies are the result of a confusion between the measures of effectiveness and true effectiveness itself. In other words, existing measures of characteristics of teachers and schools are seriously flawed and thus are poor indicators of true effectiveness; when these measurement errors are avoided, schools are seen to have important effects on student performance.[48]

These input-output analyses have also investigated a wide variety of other school and non-school factors. Although it is

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[47] These studies are analyses of covariance or, equivalently, regression analyses using individual teacher (or school) dummy variables in addition to measures of prior student achievement, family background factors, and other explicitly identified inputs in a regression format. *See* D. ARMOR, P. CONRY-OSEGUERA, M. COX, N. KING, L. MCDONNELL, A. PASCAL, E. PAULY & G. ZELLMAN, ANALYSIS OF THE SCHOOL PREFERRED READING PROGRAM IN SELECTED LOS ANGELES MINORITY SCHOOLS (1976) [hereinafter D. ARMOR]; R. MURNANE, IMPACT OF SCHOOL RESOURCES ON THE LEARNING OF INNER CITY CHILDREN (1975); Hanushek, *Teacher Characteristics and Gains in Student Achievement: Estimation Using Micro-Data*, 61 AM. ECON. REV. 280 (1971) [hereinafter *Teacher Characteristics*]; Murnane & Phillips, *What Do Effective Teachers of Inner-City Children Have in Common?*, 10 SOC. SCI. RES. 83 (1981); E. Hanushek, The Trade-Off Between Child Quantity and Quality: Some Empirical Evidence (January 1991) [hereinafter Trade-Off] (unpublished manuscript on file at the HARV. J. ON LEGIS.).

[48] *See, e.g.*, D. ARMOR, *supra* note 47; R. MURNANE, *supra* note 47; *Teacher Characteristics*, *supra* note 47; Trade-Off, *supra* note 47.

difficult to be specific in any summary of other factors because the specifications of the various inputs employed in the statistical analyses are quite idiosyncratic, three generalizations are possible. First, family background is clearly important in explaining differences in achievement.[49] Second, while considerable attention has been given to the characteristics of peers or other students within schools, the findings about their effects are ambiguous.[50] Finally, studies have examined many additional measures of the effects of schools, teachers, curricula, and especially instructional methods on achievement,[51] but no simple characterization of good teachers emerges.[52]

While not systematically addressed by existing research, one plausible interpretation of the combined results of these studies is that an important element of "skill" is involved in being a successful teacher.[53] Skill refers simply to the ability of some teachers to promote higher achievement of students. The evidence previously presented then indicates that it is currently impossible to identify, much less to measure, components or elements of this skill with any precision. Moreover, the direct evidence casts doubt on whether any form of teacher training course could be organized to foster high skill levels in teachers. In simplest terms, if we cannot define or measure it, how can we teach it?

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[49] *See, e.g.*, text accompanying notes 29–30.

[50] *See, e.g.*, E. HANUSHEK, EDUCATION AND RACE: AN ANALYSIS OF THE EDUCATIONAL PRODUCTION PROCESS (1972); V. HENDERSON, P. MIESZKOWSKI & Y. SAUVAGEAU, PEER GROUP EFFECTS AND EDUCATIONAL PRODUCTION FUNCTIONS (1976); Winkler, *Educational Achievement and School Peer Group Composition*, 10 J. HUM. RESOURCES 189 (1975).

[51] *See* E. COHN & T. GESKE, THE ECONOMICS OF EDUCATION (3d ed. 1990).

[52] Perhaps the closest thing to a consistent conclusion across the studies is that "smarter" teachers, those who perform well on verbal ability or other standardized tests, do better in the classroom. Even there, however, the evidence is not very strong. *See, e.g.*, E. HANUSHEK, *supra* note 50; *Teacher Characteristics*, *supra* note 47; Murnane & Phillips, *supra* note 47; Strauss & Sawyer, *Some New Evidence on Teacher and Student Competencies*, 5 ECON. EDUC. REV. 41 (1986); Trade-Off, *supra* note 47. Tabulations similar to those in the Appendix indicate that 31 studies have analyzed teacher verbal scores. Of these, eight find positive and significant relationships and another ten find positive but insignificant relationships.

[53] The idea of skill differences among teachers is not the only possible interpretation of the data. Differences in achievement across classrooms could reflect differences in teachers, in other classroom-specific factors, or a combination of both. The teacher skill interpretation is suggested by the fact that principals' ratings of teachers are correlated with the covariance estimates of classroom differences. *See* D. ARMOR, *supra* note 47; R. MURNANE, *supra* note 47. Evidence on the stability of teacher effects across grades, test area, and years for individual teachers further supports the teacher skill interpretation. *See* Trade-Off, *supra* note 47. For a discussion of skill differences in the production function context, see *Economics of Schooling*, *supra* note 12.

II. Implications for School Finance Reform

This evidence relates directly to consideration of future school finance reform. Although school finance policy frequently contains many state-specific nuances, this discussion concentrates on two aspects of "reform" common to many states. Most reform programs assume that a basic objective is to limit local variations in school expenditures or, if variations are to exist, to ensure that such variations are not related to the property wealth of the district.

A. *The Central Implication for Equity Discussions*

The evidence on school performance indicates that variations in school expenditures are exceedingly poor measures of the variations in education provided to students. If student education is the concern, the conventional evidence about interdistrict disparities in spending does not identify where educational deficiencies are to be found, and evidence about spending variations is generally irrelevant for either an equal protection or an educational disparity challenge in court.[54] Such evidence about differential expenditures simply does not indicate differential quality of education. Therefore, showing how expenditures vary (either independently or with characteristics of districts and students) ought to be irrelevant to any litigation or legislative discussion directed at disparities in student performance.

We must be quite precise about the interpretation of expenditures. As previously noted, most economists would readily accept that differences in spending would be directly related to the quality of education, if schools were operating efficiently. The evidence indicates clearly, however, that it is inappropriate to assume efficient operation of schools. Only the most narrow definition of educational equity would require paying attention to expenditure variations in the face of the evidence that such

[54] School finance court cases have typically contained two elements. First, the equal protection argument asserts that the school expenditure differences related to variations in the local property tax base are discriminatory. *See* Underwood, *supra* note 9. Second, the state constitution "education clause" argument asserts that large variations in expenditures are impermissible. *See, e.g.*, Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273, *cert. denied*, 414 U.S. 976 (1973); Abbott v. Burke, 100 N.J. 269, 495 A.2d 376 (1985). In both instances, the direct evidence provided for the alleged wrong involves variations in expenditures (sometimes linked to other things such as property tax wealth).

expenditure variations are unrelated to the quality of education provided. Indeed, the measure of equity would have to be rigidly linked to expenditures on educational inputs without regard to the effectiveness of the inputs chosen.

B. *Other Implications of Equity-Motivated Changes in Spending*

There is another side to this discussion. What is likely to happen if policymakers simply make policy on the basis of expenditure differences and ignore the evidence that expenditure differentials may have no effect on student performance? This question is prompted by several arguments of the following type: "The educational problem of the poor is serious, and equalizing expenditures cannot hurt"; or, "We should at least give everyone the same chance to make mistakes." Unfortunately, the policies flowing from these and similar notions are problematic; they carry a number of implications that, intended or not, raise serious policy concerns.

First, the likely result of actions to ameliorate funding disparities between districts, whether such actions are mandated by the courts or are voluntary moves by legislatures, is to increase overall spending.[55] The reason is simple: a state legislature, faced with a need to alter expenditure patterns, finds it much easier to redistribute a larger pie than a fixed pie.[56] The evidence indicates, however, that such added funds will on average be dissipated on things that do not improve student achievement—at least unless other, larger changes are also made.[57] Teachers, administrators, and, perhaps, taxpayers in

[55] In some states, where it is believed that a portion of the districts are "below minimum" (defined usually in terms of preferences), *see supra* paragraph preceding Part I(D), the objective of raising overall expenditures is explicitly discussed, even though the legal case for such activities is generally tenuous.

[56] In the school finance debate, this is frequently referred to as "leveling up," bringing the low spending districts up to the spending of the top districts. The arguments behind the policy involve either the need to do more for education across the board or the pure political necessity resulting from pressures of electoral politics. Of course, aggregate expenditures will rise with policies that stop far short of full leveling up. For example, introducing a new financing scheme with a "save harmless" clause (a guarantee that each district receives at least as much as it would have received under the previous policy) would lead directly to aggregate increases. For a discussion of the politics of alternatives, see W. GARMS, J. GUTHRIE & L. PIERCE, *supra* note 2, at 215–47. There is seldom much interest in the idea of "leveling down" because of the potential for disruption and the obvious divisiveness of such a policy.

[57] *See supra* Part III.

the districts that gain new funds will probably be happier, but the average state taxpayer and parent will find that the resulting changes do little more than increase tax bills.

Second, there is no assurance that the new funds will go to the schools of poor children. As indicated previously, one of the pervasive views of finance "reform" is that poor children will be helped (or, at least, will have a better chance by virtue of greater funding). But reform schemes designed to follow district wealth patterns can lead to unexpected outcomes, because there is no clear relationship between district wealth and the concentration of student poverty. Some states find that wealthier districts in terms of property wealth per student also have concentrations of poorer families and children. New York State provides a good illustration.[58] The largest districts in the state intervened on the side of the plaintiffs in *Levittown v. Nyquist* and introduced a new argument, municipal overburden,[59] in order to protect their funding. In other states, property wealth and poverty may be negatively correlated; that is, high property wealth tends to be found in districts with a small poverty population, but even in these states the overall pattern clearly does not hold jurisdiction by jurisdiction.[60] Therefore, while not a necessity, it is likely that funds going to many districts with concentrations of poor children actually will be reduced by plans to neutralize expenditures on the basis of district wealth. Moreover, because of a combination of federal

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[58] Consider the six largest cities in New York State: New York City, Buffalo, Rochester, Yonkers, Syracuse, and Albany. Albany and Yonkers have tax bases where real property per student is greater than the state average; New York City, Rochester, and Syracuse have tax bases per student only slightly below the state average; and Buffalo is left with a tax base 30% below the state average. NEW YORK STATE OFFICE OF THE COMPTROLLER, FINANCIAL DATA FOR SCHOOL DISTRICTS (1982) [hereinafter N.Y. FINANCIAL DATA]. Yet, all these districts except Yonkers have poverty rates for children above the state average. For example, while the average poverty rate in New York State for children 18 years old or younger in 1980 was 19.0%, it was over 36% in New York City and over 30% in Buffalo. UNITED STATES BUREAU OF THE CENSUS, COUNTY AND CITY DATA BOOK 756 (1983) [hereinafter COUNTY AND CITY DATA BOOK].

[59] The argument of municipal overburden is that excessive demands for non-school expenditures faced by urban districts subtract from what otherwise would be available for schools. Therefore, the state funding formula should recognize these other expenditures in allocating school support. *See, e.g.*, Levittown v. Nyquist, 57 N.Y.2d 27, 439 N.E.2d 359, 453 N.Y.S.2d 643 (1982). For an economic analysis, see Brazer & McCarty, *Interaction Between Demand for Education and for Municipal Services*, 40 NAT'L TAX J. 555 (1987).

[60] As described *supra* note 58, there is considerable variation in tax bases and poverty rates within a state. Thus, for example, Albany had a property tax base per student that was 34% above the state average, *see* N.Y. FINANCIAL DATA, *supra* note 58, and yet it also had a poverty rate above the state average, *see* COUNTY AND CITY DATA BOOK, *supra* note 58, at 756.

and state grants, districts with concentrations of poor students frequently have above-average spending, regardless of their property wealth or overall economic health.[61] Programs to limit variations in expenditure could operate to cut back existing compensatory spending for disadvantaged students.

Third, spending differences may not even accurately reflect the real resources each district is able to deliver (i.e., the actual educational inputs). This is the simple result of possible cost differentials facing individual districts. That is, if districts face different prices for things they might buy, from teachers to buildings and equipment, dollar variations themselves do not indicate variations in available real resources. As a simple example, if the schools in one city were less pleasant and desirable than those in other cities, it would be necessary to pay a higher salary to get a teacher of equal quality.[62] An extension of this involves districts faced with concentrations of students who are more difficult to educate, because of a variety of pre-existing education deficiencies. These, like cost differences for inputs, lead to expenditure variations in districts behaving in an otherwise identical manner.[63]

Fourth, we should not gear educational policies toward districts since residents actively choose their package of housing and local public goods and will move if that package no longer is the most attractive. There is extensive evidence that individuals make choices among districts in part to satisfy their de-

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[61] For example, in the New York State situation, each of the six large districts except New York City had expenditures per student above the state average. *See* N.Y. FINANCIAL DATA, *supra* note 58.

[62] This situation, called "compensating differentials" by economists, can exist whenever jobs or job locations include different attributes such as riskiness, opportunities for learning, or favorable living conditions in the case of cities. *See generally* R. EHRENBERG & R. SMITH, MODERN LABOR ECONOMICS: THEORY AND PUBLIC POLICY (1991). In the context of teachers see Antos & Rosen, *Discrimination in the Market for Public School Teachers*, 3 J. ECONOMETRICS 123 (1975); Kenny & Denslow, *Compensating Differentials in Teachers' Salaries*, 7 J. URB. ECON. 198 (1980); Toder, *The Supply of Public School Teachers to an Urban Metropolitan Area: A Possible Source of Discrimination in Education*, 54 REV. ECON. & STATISTICS 439 (1972). Differences in the attractivenss of areas can also lead to differences in housing and land prices, thus affecting other inputs to education. *See, e.g.*, Roback, *Wages, Rents, and the Quality of Life*, 90 J. POL. ECON. 1257 (1982).

[63] Indeed, many state funding formulae recognize such issues and attempt to adjust for input cost differences or for differences in student preparation, disabled status, and the like. *See, e.g.*, E. COHN & T. GESKE, *supra* note 51; W. GARMS, J. GUTHRIE & L. PIERCE, *supra* note 2; E. TRON, PUBLIC SCHOOL FINANCE PROGRAMS, 1978–79 (1980); PUBLIC SCHOOL FINANCE PROGRAMS OF THE UNITED STATES AND CANADA, 1986–87 (R. Salmon, C. Dawson, S. Lawton & T. Johns eds. 1988). Nevertheless, making such adjustments is extremely difficult.

mands for various public services. People who place considerable weight on quality schooling search for districts that seem to emphasize that. People interested in other goods or even low public expenditures seek districts that provide the level and pattern of the services they are looking for. Certainly this common method of selecting public services has drawbacks. Moving can be expensive, and some might find it difficult to move to the districts they would like because of housing prices, commuting costs, or discrimination. Nevertheless, individuals generally have considerable latitude in choosing schools. They are not inextricably tied to a particular district and are not doomed to whatever expenditure levels currently exist in a specific district. Finally, individual districts change their expenditures in line with the desires of the population and with population shifts, so that districts may increase or decrease their expenditures over time.[64] Thus, policy discussions that speak generally of the population as captives of districts with undesirable spending patterns tend to miss an extremely important feature of the political economy of local jurisdictions.[65]

Fifth, the preferences and movements of citizens across district boundaries have direct ramifications for the observed distribution of property wealth. Specifically, districts that offer a particularly favorable tax and school-quality package will be attractive to many people. This will lead to a bidding-up of housing prices in desirable jurisdictions, because they are in great demand, other things being equal.[66] Otherwise identical houses will sell for different amounts *because of* citizens' evaluations of the taxes and school quality being offered. The result is that people pay for their schools up front through the capi-

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[64] For example, it is possible to trace the shifts in district spending in Indiana between 1977 and 1987. From simple tabulations I have done, only 43 of the 76 top-spending districts in 1977 remained in the top quartile in 1987; only 42 of the 76 bottom-quartile districts remained there from 1977 through 1987.

[65] There may be, as noted, particular portions of the population that for one reason or another face especially high moving costs and thus are less mobile than others. Primary concern here focuses on poor and minority groups locked into inner cities. Such mobility constraints are a serious matter that will be considered *infra* text accompanying note 77.

[66] In fact, it is well documented that "otherwise identical" houses will sell for different amounts because of citizens' evaluations of the taxes and the schooling being offered in the area. *See, e.g.*, Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956); Oates, *The Effects of Property Taxes and Local Public Spending on Property Values: An Empirical Study of Tax Capitalization and the Tiebout Hypothesis*, 77 J. POL. ECON. 957 (1969); Rosen & Fullerton, *A Note on Local Tax Rates, Public Benefit Levels, and Property Values*, 85 J. POL. ECON. 433 (1977); Wendling, *Capitalization Considerations in School Finance*, 3 EDUC. EVALUATION & POL'Y ANALYSIS 57 (1981).

talization of school quality in the price of their homes. Therefore, some places that initially look attractive from the vantage point of the tax rate are actually less attractive because the low rate is multiplied by a high valuation (relative to the other attributes of the home). This has, among other things, the direct effect of increasing the property tax base of the community. But remember, the property tax base is often brought into the discussion of the "inequities" of the school finance system with an implication that it is independent of the tax and school choices made by districts.

Sixth, reform changes in the funding formula of the state imply distributing somewhat arbitrary capital gains and losses across the districts and citizens in the state. Districts will become more or less fiscally attractive by major changes in the financing laws. The capitalization process described above will yield potentially significant fluctuations in housing values as an unintended result of financing changes. In addition to the inequity of arbitrary gains, school finance reform may disrupt the local housing markets by causing sudden fluctuations in property values and creating uncertainty among buyers and sellers.

Seventh, in most states the actual spending levels reflect a wide variety of things, including the preferences of the citizens. While it is common to argue that local property wealth is the primary determinant of expenditure differences where local property taxes support school spending, that simply is not the case. For example, even though New Jersey and Indiana have relied on local property taxes to fund schools, rough estimates indicate that less than a fifth of the variation in expenditures would be eliminated by equating local property wealth per student.[67] This result is caused by the combination of local preferences, differences in student needs, curricular choices, cost differentials, and a variety of other factors. It shows that variations in spending are not dominated by variations in local property wealth.

Eighth, differences in tax rates across communities bear no direct relationship to the degree of educational equity.[68] The

[67] These calculations rely on estimates I conducted on the relationship between expenditures per student and wealth per student in districts in these states. The R^2 of simple regression in each state was less than .20. This means that one fifth would be an estimate of the upper bound on the potential for equating spending by eliminating property tax base differences. For an explanation of the statistics involved, see E. HANUSHEK & J. JACKSON, STATISTICAL METHODS FOR SOCIAL SCIENTISTS (1977).

[68] Here we presume that attention is given to "equalized" tax rates. Since assessment

pattern of tax rates may be an issue from the standpoint of various notions of "taxpayer equity," but they seldom have much to do with equity considerations in education. Most importantly, school finance reform has been based on perceived differences in the quality of education available, and the quality of education is not related in any simple way to tax rates. The tax rate provides an indication of the price that residents face to raise funds for schools, and high tax rates might indicate that some districts find it more difficult than others to raise funds through the property tax. But, tax rates differ according to a variety of factors including community preferences, community income and wealth, the amount of non-residential wealth in the tax base, among other factors. Further, while the education clauses of state constitutions may place requirements on states to provide certain levels of education, they never indicate that school tax rates must be equalized across a state.

The thrust of these eight policy concerns is to underscore the point that simple alterations in expenditure patterns can have important and undesirable effects. From what we know about the educational process and about behavior of local jurisdictions, we arrive at the inescapable conclusion discussed in the introduction: that general assumptions behind early school finance reform are at best misleading.

III. Policy Alternatives

Concerns about the directions school finance reform has taken do not, of course, vitiate the undeniable need to improve our public schools. The intentions of finance reformers have been good. Only their approach is questionable. Three critical facts lead to the judgment that structural change in our school systems is essential. First, in absolute terms students are not performing up to expectations. Performance as measured by standardized tests over time, by international comparisons of tests, by various measures of workplace performance, and by common perceptions is currently unacceptable.[69] Second, as indicated earlier, there is overwhelming evidence that the resources devoted to

practices and property valuation for tax purposes can vary widely, the tax rate per $100 of assessed value can vary widely solely because of the underlying assessment practices. In many states, the nominal tax rates levied by individual communities bear little relationship to actual tax burdens.

[69] *See supra* Figure 1.

schools have been both large and growing, but have not been effectively used.[70] Third, the significantly skewed distribution of educational success, which leaves poor and minority students behind the rest of the population,[71] is incompatible with most people's views on the goals of our society.

The previous sections indicate why the reforms as commonly considered in school finance debates are unlikely to address these primary concerns. Focusing on the distribution of funds between districts distracts attention from the issues of the organization of schools, the incentives for performance, and the goals of the system. Because of the contentiousness of issues surrounding the distribution of funds, school finance debates have the potential for absorbing all the energy devoted to school policy. Thus, in addition to offering few solutions to the problems previously identified, there is a significant opportunity cost in putting off the fundamental restructuring required by the current education problems. This problem of distraction, of course, is not inevitable, but there are strong forces pushing in that direction.

That courts and legislatures have concentrated on finance reform rather than more fundamental policy considerations is not particularly surprising. There is an understandable, albeit erroneous, logic to this choice: expenditure differences are readily measurable; there is a plausible argument behind their importance; there is no obvious alternative focus of policy; and proceeding on the basis of expenditure differences at least represents an effort to improve matters. This logic recognizes that there are serious problems with our schools, and that an attempt should be made to fix things.

This logic fails by mistakenly rejecting the possibility of better policies. As discussed previously, there is no set of simple changes involving either resources or programs that shows a consistently strong relationship to student performance. But it is not necessary to think of policies solely in terms of mandating certain inputs.

There is an alternative formulation of educational policies that avoids the pitfalls of previous approaches and that offers considerably more promise of improvement. The alternative is to

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[70] *Id.*

[71] *See* CONGRESSION BUDGET OFFICE, TRENDS IN EDUCATIONAL ACHIEVEMENT (1986).

move to organizations and incentive systems which directly reward performance. The current set of policies pursued in most states either directly provides or requires that certain inputs go into its educational system—expenditures, class sizes, teacher training, etc. Districts follow these input policies essentially without regard to their effectiveness, either in the aggregate or in specific contexts. The alternative being proposed is to concentrate on the output—student performance—instead of inputs that we think or hope are important in determining student performance.

A variety of systems have been used or suggested to promote performance-based policies. These include merit pay for teachers, merit awards for schools that perform well, and a variety of plans emphasizing choice of educational institution. The essential common ingredient to the various plans is that resources are directly related to performance: if performance is high, resources are high; if performance is low, resources are commensurately low. For example, merit pay for teachers operates by increasing the salaries of those teachers who perform well but not of those who perform poorly. Similarly, a choice plan, which allows students and parents to choose among alternative schools, works by reinforcing parental judgments about school quality with greater resources flowing to the schools that attract more students.

The focus of each of these policies is on providing incentives that would work to improve performance without needing to specify exactly how schools should be run. By providing tangible incentives for improved performance, most decisionmaking could be improved. The actual operations of hiring, promotion, curriculum, student placement, etc., while not specified or centrally regulated, should respond to incentives. This has been demonstrated by wide ranging research, both in education and elsewhere.[72] The trick, of course, is getting the incentives

[72] Responsiveness to incentives has been demonstrated extensively for consumers and workers in the U.S. economy. *See, e.g.*, Freeman, *Legal "Cobwebs": A Recursive Model of the Labor Market for New Lawyers*, 57 REV. ECON. & STATISTICS 171 (1975). Responsiveness has been shown to relate not only to monetary incentives but to regulatory requirements. (Many school incentives currently in place are regulatory in nature, as opposed to monetary.) For example, it has been demonstrated that mandatory seat belt requirements for automobiles reduce the risk of driving fast, thereby creating an incentive to increase driving speeds and contributing to more pedestrian injuries and deaths. Peltzman, *The Effects of Automobile Safety Regulation*, 83 J. POL. ECON. 677 (1975). In examples closer to schools, it has been shown that movement into and out of teaching responds to monetary incentives. Murnane & Olsen, *The Effects of Salaries*

correct, and this will take experimentation, bargaining, and evaluation.

There are many different versions of these performance-based plans, particularly in the area of the choice plans. Commonly discussed choice plans range from magnet or special schools, which exist in many urban districts, to full voucher systems, which provide parents with funds to pay tuition at either public or private schools of choice. Other choice plans include choice within public school districts, open enrollment throughout any public school in the state, and tuition tax credits that rebate a portion of any tuition payment to the parents.

Performance-based options have been discussed elsewhere and will not be reviewed here.[73] Instead, the following will merely highlight key aspects of the options. The central theme of this discussion is that performance-based plans have a number of conceptually appealing elements, but each option has little historical evidence to provide details of either how it should be implemented or the magnitude of gains that might be expected. In other words, there is considerable uncertainty, particularly about details of implementation, because these approaches are largely untried. The uncertainty should not, however, be taken as a reason for avoiding these otherwise promising approaches. It does suggest the necessity of adopting a more interactive approach to policymaking.

The performance-based view of educational policy is very different from the current view. It is also not well suited to judicial implementation and administration because the remedies are difficult to specify explicitly and are not easily tracked. But, a performance-based view offers realistic hopes for school improvement, something that cannot be said for narrow interventions that have focused solely on expenditures and other inputs.

The potential for performance-based plans is supported by a portion of the research into educational performance summa-

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and Opportunity Costs on Length of Stay in Teaching: Evidence from North Carolina, 25 J. HUM. RESOURCES 106 (1990). This is extended in a variety of ways in R. MURNANE, J. SINGER, J. WILLET, J. KEMPLE & R. OLSEN, WHO WILL TEACH? POLICIES THAT MATTER (forthcoming 1991). In none of these analyses, however, is there any direct linking of teaching movements with the quality of the teacher force.

[73] For one outline and evaluation of major alternatives, see Chubb & Hanushek, *Reforming Educational Reform*, in SETTING NATIONAL PRIORITIES: POLICY FOR THE NINETIES 213 (H. Aaron ed. 1990).

rized previously.[74] The research that involved estimation of total teacher effects indicated extremely large and significant variations in the performance of individual teachers and schools.[75] Importantly, while research cannot identify the separate components of successful and unsuccessful teaching, it does support the simple but powerful notion that good performance can be identified by school administrators.[76] This ability would be needed for such options as merit pay for teachers. Further, the potential for performance-based policies is considerably strengthened if one gives credence to individual parents who frequently act like they can tell the difference between good and bad teachers. Such perceptiveness on the part of parents is a basic requirement for choice-based plans.

The point is simple: a range of effective policies appears to be available. They are, however, almost certainly very different from the traditional policies and traditional school finance reform efforts. Moreover, implementing some of these fundamental reforms might take added funds, particularly in the initial phases. But, this investment has a greater potential for return than expenditures aimed at equalizing the same educational inputs that have failed to produce results in the past.

Finally, the restructuring of incentives in schools appears to be the only feasible answer to dealing with the gloomy record of schools in improving the performance of educationally and economically disadvantaged youth. A variety of input-oriented programs, including a large portion of federal school programs, have attempted to deal with the disadvantaged, but there is little evidence that this has had much impact.[77] As pointed out pre-

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[74] *See infra* Appendix and text accompanying notes 32–46.

[75] *See supra* text accompanying note 47.

[76] It is important to reiterate that research has concentrated on the value added by teachers and not on the absolute performance levels of students. In other words, the real issue is what a teacher adds to student knowledge and performance. Because students can differ widely, based on different family backgrounds and education in the home, policy must concentrate on the school-specific portion of achievement. The research demonstrates that there can be low value added in a "good" suburban school where the absolute level of achievement is quite high. Similarly, there can be high value added within "bad" central city schools where students come to school quite unprepared but leave with schools having added noticeably to their achievement. *See, e.g.*, Trade-Off, *supra* note 47.

The identification of teacher performance is rightfully centered on value added and not the overall performance of students. The research indicates that principals can distinguish between value added and general student performance. *See* D. ARMOR, *supra* note 47; R. MURNANE, *supra* note 47.

[77] *See* Hanushek, *Expenditures, Efficiency, and Equity in Education: The Federal Government's Role*, AM. ECON. REV., May 1989, at 46.

viously, the economically disadvantaged are handicapped by less ability to secure good schooling through moving—the route to better schooling by middle- and upper-income families. Choice-based programs would directly aid those most at risk now in selecting better schools by effectively breaking the link between residential location and school quality. The alternative to restructuring incentives is to continue expansion of the programs that have thus far been unsuccessful.

The evidence from past analyses demonstrates that good teachers exist in what are commonly thought to be bad, urban districts.[78] Their existence, however, is masked by generally low achievement levels; that is, even though an individual teacher may elicit more than one year of achievement growth within a one-year period, low absolute levels of performance could hide it. The policy problem is that we have not been able to attract, to identify, and to retain sufficiently large numbers of such good teachers to have the kind of influence that is needed. This is just the appeal of performance-based incentive schemes. They are designed to reinformce good performance. We should, at the same time, not have overly optimistic expectations. As has been thoroughly documented, family influences are very powerful in determining achievement levels,[79] so, while specific teachers might have a substantial influence on achievement, they might not overcome deficits arising from factors outside the schools. Indeed, it may take the continued efforts of many good teachers over the course of the student's school career. This reality, however, should not deter our efforts to provide the best possible education.

IV. Conclusion

School finance reform, as commonly understood by courts and legislatures across the country, is likely to work against the improvements much needed by public schools. By emphasizing primarily the distribution of expenditures per student, financing reform is almost certain to exacerbate existing problems of inefficiency in school operations. The discussions of school finance reform typically attempt to distinguish discussions of

[78] *See, e.g.*, D. Armor, *supra* note 47; R. Murnane, *supra* note 47; Trade-Off, *supra* note 47.

[79] *See supra* text accompanying notes 29–30.

efficiency from discussions of equity. Such a distinction is impossible, however, if the quality of the education of children is a factor in evaluating equity. The education of children depends directly on the ability of school districts to translate resources into student achievement. If schools are ineffective at this, simply heaping more resources on poorly performing districts will do little to improve educational equity.

Research has demonstrated conclusively that, within the current organization and operation of schools, there is no consistent relationship between resources and student performance. Common policy arguments, used to justify the plea for added resources to school districts, simply are not supported by evidence. Ignoring the evidence on the lack of relationship between resources and performance is likely to lead to policies that increase the level of inefficiency without increasing student performance. History indicates that while some districts might use additional funds effectively, other districts will probably use them ineffectively—leading to little or no aggregate improvement in education quality from increased funding. The current incentive structure in schools simply does not promote efficient use of resources.

There are large differences in performance among teachers and schools. Evidence indicates that parents and administrators can identify quality teachers and schools. What has been lacking is an effective structure for channeling knowledge about performance into overall school improvement. A variety of structural changes have been proposed, but there is little operational experience with them. It is essential that experimentation with the alternatives begin. However, by primarily emphasizing the distribution of expenditures per student, the current school finance debate detracts attention from the more promising course of structural changes.

Appendix: *Summary of Estimated Expenditure Parameter Coefficients from 187 Studies of Educational Production Functions*

	Statistically Significant			*Statistically Insignificant*			
	Number of Studies	+	−	*Total*	+	−	*Unknown Sign*
Teacher/Student Ratio	152	14	13	125	34	46	45
Teacher Education	113	8	5	100	31	32	37
Teacher Experience	140	40	10	90	44	31	15
Teacher Salary	69	11	4	54	16	14	24
Expenditures/Student	65	13	3	49	25	13	11
Administration	61	7	1	53	14	15	24
Facilities	74	7	5	62	17	14	31

SOURCES:

D. ARMOR, P. CONRY-OSEGUERA, M. COX, N. KING, L. MCDONNELL, A. PASCAL, E. PAULY & G. ZELLMAN, ANALYSIS OF THE SCHOOL PREFERRED READING PROGRAM IN SELECTED LOS ANGELES MINORITY SCHOOLS (Rand Corporation Report No. R-2007-LAUSD, 1976).

Behrendt, Eisenach & Johnson, *Selectivity Bias and the Determinants of SAT Scores*, 5 ECON. EDUC. REV. 363 (1986).

Beiker & Anschek, *Estimating Educational Production Functions for Rural High Schools: Some Findings*, 55 AM. J. AGRIC. ECON. 515 (1973).

Boardman, Davis & Sanday, *A Simultaneous Equations Model of the Educational Process*, 7 J. PUB. ECON. 23 (1977).

Bowles, *Toward an Educational Production Function*, in EDUCATION, INCOME AND HUMAN CAPITAL 11 (W.L. Hansen ed. 1970).

Brown & Saks, *The Production and Distribution of Cognitive Skills Within Schools*, 83 J. POL. ECON. 571 (1975).

J. BURKHEAD, INPUT-OUTPUT IN LARGE CITY HIGH SCHOOLS (1967).

COHN, *Economies of Scale in Iowa High School Operationis*, 3 J. HUM. RESOURCES 422 (1968).

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INTERPRETING THE EVIDENCE ON "DOES MONEY MATTER?"

RICHARD J. MURNANE*

The purpose of this Article is to offer my interpretation of the evidence relating school district expenditure levels to school district performance, as measured by student achievement gains. This interpretation has two themes. First, I contend that statistical studies assessing the relationships between school resources and student achievement do not provide reliable answers to the question "Does money matter?" Second, I believe that increasing the funds available to districts in which children have low achievement will improve performance in only some of those districts. The challenge is to devise remedies that will increase achievement in those districts where increased funding, by itself, would not have made a difference.

I. EXISTING STATISTICAL STUDIES DO NOT ANSWER THE QUESTION "DOES MONEY MATTER?"

In my view, it is simply indefensible to use the results of quantitative studies of the relationship between school resources and student achievement as a basis for concluding that additional funds cannot help public school districts. Equally disturbing is the claim that the removal of funds, as has happened in Massachusetts recently, typically does no harm. As I will show, even the best studies available have too many problems to support such strong conclusions.

I want to be clear that my perspective is not that of someone who is hostile to this kind of research. In fact, I have conducted a number of statistical studies of the relationship between school

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resources and student achievement growth.[1] I believe that a great deal has been learned from these studies about the impact of schooling on children's achievement, and that new studies in this genre, such as the work Ronald Ferguson describes in this volume, will increase our knowledge further.[2] Nevertheless, while useful, such studies cannot answer the critical question "Does money matter?"

Let me describe briefly two reasons why I find educational production function studies an inappropriate basis for determining whether money matters. First, these studies do not adequately address serious questions of causation. For example, many school districts have relatively high expenditure levels, including state and federal compensatory education funds, *because* they serve students with low achievement levels. The same is true for the allocation of compensatory education funds among schools within a given school district. Given this situation, any comparison of achievement levels across districts with different expenditure levels per pupil, or across schools within the same district, lends little insight into any beneficial impact of funding on student achievement. The statistical controls used to account for differing achievement levels among students remain inadequate in even the best studies.

A second concern is that the logic underlying the argument that money does not matter does not carry over to similar studies of other organizations. The rationale behind the conclusion that money does not affect school performance presumes waste when school expenditures do not appear in quantitative studies as having positive relationships with student achievement. This is not a specious argument. It follows from the logic underlying this argument, however, that studies relating inputs and outputs of organizations that do face competitive pressures, such as private schools, and private for-profit firms in other sectors of the economy, would show positive relationships be-

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[1] In different circles, these studies are referred to as "cost-quality studies," "educational production function studies," or "input-output studies." *See* R. MURNANE, IMPACT OF SCHOOL RESOURCES ON THE LEARNING OF INNER-CITY CHILDREN 2 (1975); Murnane & Phillips, *What Do Effective Teachers of Inner-City Children Have in Common?*, 10 SOC. SCI. RES. 83 (1981); Murnane & Phillips, *Learning by Doing, Vintage and Selection: Three Pieces of the Puzzle Relating Teaching Experience and Teaching Performance*, 1 ECON. EDUC. REV. 453 (1981).

[2] Ferguson, *Paying for Public Education: New Evidence on How and Why Money Matters*, 28 HARV. J. ON LEGIS. 465 (1991).

tween all resources funded by these firms and their measures of output.

This simply is not the nature of the evidence. I have compiled the statistics examining the relationships between inputs and student achievement in private schools.[3] The results show that, just as with public schools, private schools pay for inputs that are not directly related to student performance, such as teaching experience beyond the first five years. The fact that private schools do this even when under strong competitive pressures makes it illogical to conclude that public schools are wasting money when they pay for experience.

Similarly, a number of studies have shown that private sector firms in competitive industries outside of education reward workers for attributes not directly related to productivity. For example, firms pay for experience even though evidence shows that workers with ten years on the job are no more effective than those with four years on the job.[4] The interesting difference lies in the interpretation of these findings. Economists looking at schools point to this pattern as clear evidence of inefficiency.[5] The economists who studied these private sector firms did not conclude that the firms were inefficient—this could not be so, they argue, because these firms were surviving in a competitive environment.[6] Instead, the economists conclude, the firms must have good, if not obvious, reasons to reward experience.[7]

My point is not to argue that all school districts use resources wisely—some do not, as I discuss below. Instead, the point is that it is inappropriate to make judgments about whether school districts use resources wisely or not based solely on the results of educational production function studies.

II. Other Evidence on Whether Money Matters

There is further research that bears on the question of whether money matters. For example, a recent study by two Princeton

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[3] Murnane, Student Achievement Statistics (unpublished computer compilation on file with author) (Mar. 1, 1982).

[4] *See generally* Medoff & Abraham, *Are Those Paid More Really More Productive?: The Case of Experience*, 16 J. Hum. Resources 186 (1981).

[5] *See, e.g.*, Hanushek, *The Economics of Schooling: Production and Efficiency in Public Schools*, 24 J. Econ. Literature 1141 (1986).

[6] *See, e.g.*, Hutchens, *Seniority, Wages and Productivity: A Turbulent Decade*, 3 J. Econ. Persp. 49, (1989).

[7] For a discussion of alternative reasons firms might reward length of time in service, see *id.*

economists, David Card and Alan Krueger, uses national data to show that men who were educated in states with relatively small public school classes and with relatively high teacher salaries earned more in the labor market than men educated in states with larger classes and lower teacher salaries.[8] This research is interesting because it focuses on an outcome that is of great concern—labor market earnings—rather than on the more typical indicators of school performance such as student scores on standardized achievement tests. Indeed, at best the latter measures only some of the skills that are important in earning a living. The results of the Card and Krueger study raise the possibility that small classes and high teacher salaries affect students' subsequent ability to earn a living more than they affect scores on standardized achievement tests.

The research relating measures of school quality to subsequent earnings of graduates can also be challenged. There are alternative explanations for the positive correlations between measures of school quality in a state and the subsequent earnings of graduates. For example, the coincidence of high school resource levels and high earnings of graduates could stem from an unmeasured third variable, such as the high quality of a state's natural resources. Furthermore, as with educational production function studies, this type of research treats schools as black boxes, without attempting to determine how expenditure levels affect the behaviors of students and teachers.

Other research indicates that money influences the career decisions of teachers and potential teachers. For example, salaries affect whether beginning teachers will teach for only one year or stay for four or five years, long enough to learn how to teach, and possibly to be of real service.[9] There is also evidence that the competitiveness of teaching salaries relative to those in alternative occupations affects the number of people who want to teach, which in turn influences how selective school districts can be in choosing among applicants for teaching positions.[10] This evidence suggests that if school districts choose wisely,

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[8] D. CARD & A. KRUEGER, DOES SCHOOL QUALITY MATTER?: RETURNS TO EDUCATION AND THE CHARACTERISTICS OF PUBLIC SCHOOLS IN THE UNITED STATES (National Bureau of Economic Research Working Paper No. 3358, 1990).

[9] R. MURNANE, J. SINGER, J. WILLETT, J. KEMPLE & R. OLSEN, WHO WILL TEACH? POLICIES THAT MATTER (forthcoming book 1991) [hereinafter WHO WILL TEACH?].

[10] Manski, *Academic Ability, Earnings, and the Decision to Become a Teacher: Evidence from the National Longitudinal Study of the High School Class of 1972*, in PUBLIC SECTOR PAYROLLS 291, 292–93 (D. Wise ed. 1987).

higher salaries will result in higher quality teachers. Thus, the evidence on the impact of money on the career decisions of teachers and potential teachers supports the view that funding levels influence a district's ability to staff its schools with skilled teachers.

Research examining school district hiring practices shows that some districts are very skillful in using their resources to recruit effective teachers.[11] For these districts, a larger pool of applicants probably does allow them to find better teachers. Case studies of school district hiring practices, however, also suggest that some districts use such ineffective recruiting and screening practices that raising teaching salaries by even three or four thousand dollars would probably not result in better teaching staff.[12] This is the reason that Charles Manski, in his 1987 article, concludes that an effective strategy to improve the quality of the teaching pool requires both higher salaries and minimum ability standards.[13]

In some cases the ineffective practices spring from poor management. In others, they stem from cronyism, where connections supersede merit in obtaining a teaching position. In still other cases, the poor practices come from collectively-bargained teacher transfer rules.

Elaborate, restrictive internal transfer rules pose a serious obstacle to effective recruiting of skilled teachers in many districts. For example, each spring, when recruiting officers for the Boston public schools search for new teachers, the only information they can provide to strong applicants about their prospective jobs is the salary.[14] Typically no information about the subject or the grade level a teacher would teach, or the location of the school in which the new teacher would work, is available until the week classes begin in September. Under these circumstances, many strong candidates are likely to turn down job offers even if salaries are competitive with those of employment alternatives. This is only one example of the general idea that adequate funding levels are a necessary, but not sufficient, condition for the development and maintenance of high quality school programs.

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[11] *See* WHO WILL TEACH?, *supra* note 9.

[12] *See id.*

[13] *See* Manski, *supra* note 10 at 292–93.

[14] Interview with Manuel P. Monteiro, Senior Manager of Personnel for the Boston Public School System (Dec. 11, 1990).

III. A New Focus for School Finance Reform

The array of evidence concerning school funding levels, school district practices, and school performance leads me to believe that additional funding will improve schooling in some districts, but that a policy of increasing funding levels will not by itself lead to higher student achievement in all districts. For this reason, I think it would be a mistake for school finance reform strategies in the 1990's simply to aim at increasing expenditures in low spending districts. In some districts it will help, but in others it will not help unless strategies are devised to change the way people interact.

Indeed, it is important to remember that, at its core, education consists of the interaction of human beings. Unless additional funding results in a change in someone's behavior, no real change in outcomes will occur. Some districts need dramatic overhauling of the practices used to recruit and screen applicants for teaching positions. In many districts this will require renegotiation of union contracts.[15]

Another change involves how teachers spend their time and how instruction is organized. Consider student writing as an example. It seems logical that students must write frequently and have their writing corrected in order to learn to write well. Consequently, improving writing may require hiring graders, or even reducing the size of English classes, both of which cost money. Thus, more money may be a necessary condition for improving student writing. It is not, however, a sufficient condition; increasing per-pupil expenditures may result in smaller class sizes, but not in an increase in the amount of writing that students do.

The challenge, as I see it, is to alter the remedies in successful school-finance litigation. Instead of just increasing funds, the remedies should include incentives for local districts and individual schools to devise and implement plans for raising student achievement. Such plans might involve changes in the practices used to hire teachers, and the design of a strategy to increase the amount of student writing. If districts do devise strong plans, and develop strategies to monitor the extent to which they are meeting the goals they set out, then providing the funds to

[15] This is happening in a number of districts, including Boston, Mass.; Hartford, Conn.; and Rochester, N.Y. *Id.*

implement these plans may make a difference. However, the dollars must follow the plans.

Some readers may view this proposal as an attempt to restrain state expenditures by withholding funds from districts unable to devise and carry out coherent plans to improve student achievement. This is not my intent. It is my belief that the state is obligated to provide a good education to all children, not simply to provide a particular level of funding. While it is difficult to define all of the elements of a good education, writing provides an instructive example. Districts with good writing programs should be able to document that students write regularly, that writing is corrected regularly, and that student progress in developing writing skills is monitored on an ongoing basis.[16] I believe that states are obliged to ensure continuing resources for school districts with effective writing programs. States are also obligated to take strong action, including requiring changes in governance structure, in districts that are unable to devise and implement programs designed to provide students with solid writing skills.

IV. WHY UNDERSTANDING THE EVIDENCE MATTERS

Some readers may wonder why this Article emphasizes that educational production function studies cannot reliably answer the question "Does money matter?" They might point out that a substantive conclusion of this Article, that increasing funding levels does not guarantee improved school performance, is not unlike the theme of the article by Professor Eric Hanushek in this volume.[17] However, while Professor Hanushek relies heavily on educational production function studies to support his conclusion, this Article notes their limitations. It is important to understand these shortcomings in order to fully inform the educational policy debate in the years ahead.

It remains to be seen how school finance strategies of the future will affect student achievement. An optimistic scenario is that innovations in school finance reform strategies will be successful in helping all school districts to improve their performance. Such success will not eliminate the debate about

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[16] *See generally* D. GRAVES, WRITING: TEACHERS AND CHILDREN AT WORK (1982).

[17] Hanushek, *When School Finance "Reform" May Not Be Good Policy*, 28 HARV. J. ON LEGIS. 423 (1991).

school funding levels, however. Competition for resources and concern about tax levels will remain, and some advocates of tax relief will search for evidence that funding levels are tightly related to school performance.

It is my prediction that, even if school resources are used wisely in every district, educational production function studies will show that money is devoted to resources that appear to be unrelated to student achievement. I base this prediction on the results of input-output studies in other sectors.[18] It is therefore important that the limitations of these studies be understood so that difficult public policy debates about funding levels are not unduly influenced by the results of studies that cannot reliably answer the question "Does money matter?"

[18] *See generally* Medoff & Abraham, *supra* note 4; Hutchens, *supra* note 6.

PAYING FOR PUBLIC EDUCATION: NEW EVIDENCE ON HOW AND WHY MONEY MATTERS

RONALD F. FERGUSON*

Allocating resources efficiently and equitably in public primary and secondary schools has been an elusive goal. Among the primary reasons is the surprising scarcity of data appropriate for establishing the relative importance of various schooling inputs. As a result, recent research to discover how increasing spending might affect the quality of schooling and how improving the quality of schooling might affect how much children learn has reanalyzed old data or has relied on data sets that are very limited in size and scope. Generally, aside from a few exceptions that this Article cites, the findings of such studies have been ambiguous and unpersuasive.

Breaking the usual pattern, the analysis here examines a large and unusually complete set of data that the author has assembled for the state of Texas. The data include a wide range of indices for almost 900 districts, in which over 2.4 million students attend school.[1] This Article addresses (1) determinants of student test scores, (2) factors that influence which districts attract the most effective teachers, and (3) how and why money matters. Overall, empirical results here reveal a complex pattern but one that is more consistent with conventional wisdom among educators than the findings of most past studies. The study has implications for all states that are working to bring quality and equity to public education.

Evidence presented here shows that differences in the quality of schooling account for between one quarter and one third of the variation among Texas school districts in students' scores

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[1] The text of the Article is written to be accessible to readers with no technical training. However, the Appendix has statistical tables that report results from multiple regression estimates. Readers interested in more technical and complete reports of this material should write to the author.

on statewide standardized reading exams. Most of the estimated effect of schooling is due to a single measure of teacher quality: teachers' performances on a statewide recertification exam required of all Texas teachers in 1986. Experience and master's degrees are additional measures of teacher quality that predict higher test scores for students. Though teacher quality and students' socioeconomic status are highly correlated, this Article carefully establishes that good teachers have distinguishable impacts on students' exam scores—effects that are separate from those, for example, of well-educated parents.

Class size matters as well. Reducing the number of students per teacher in districts to eighteen (which means class sizes in the low twenties)[2] is very important for performance in the primary grades. One reason that past studies have failed to find class size effects may be that most have not looked for thresholds. Indeed, below the threshold of eighteen, this study finds that varying the number of students per teacher in the district has no influence on test scores.

The Article identifies a number of factors that influence the supply of teachers to any given school district. The socioeconomic status of families—particularly parental education—is among the most important. In fact, the results suggest that a primary cause of inequity across districts in the quality of education is that districts of higher average socioeconomic status find it easier, with any given salary scale, to attract teachers with strong skills and experience.

Other things being equal, teachers are also attracted to districts that pay higher salaries. This permits districts that pay higher salaries to hand-pick the better teachers. This is true for each of the teacher quality measures that the results show affect student test scores. When combined with the finding that teachers prefer higher-socioeconomic-status districts, the fact that higher salaries attract better teachers suggests a potentially effective but politically unlikely state policy for equalizing the quality of education.

Specifically, quite apart from the common focus on equalizing spending per student, a serious equalization policy would strive

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[2] The number of students per teacher in a district is lower than the number of students per classroom because teachers have periods off during the day and because some specialist teachers do not teach regular classes. If, for example, the typical teacher spent 80% of his or her time in the classroom, 18 students per teacher in the district would translate to an average of 22.5 students per classroom.

to equalize the most important of all schooling inputs: teacher quality. It would require state-enforced salary differentials: higher pay for teaching in districts that would otherwise be less attractive to teachers—principally, districts where the average socioeconomic status of families is lower. These salary *differentials* would aim to equalize the net attractiveness of different school districts in the eyes of potential teachers. Note that the total amount spent per student on education might continue to be higher in more well-to-do districts, but teacher salaries would not.

For the state as a whole, however, upgrading the quality of schooling would require more than salary differentials that rearranged how teachers distributed themselves across competing school districts. Primarily, it would require measures to assist existing teachers in efforts to upgrade their skills, to retain talented and experienced teachers, and, over the longer term, to attract academically stronger candidates of all races into primary and secondary school teaching. Details on methods of achieving these goals are beyond the scope of this Article, but certainly better salaries, enhanced social status, and other changes would make the profession more attractive to talented young people.

Part I of this Article provides a brief discussion of past research. Part II describes the data that the project uses. Parts III to V review the empirical findings. The closing section of the Article summarizes some policy implications of the empirical findings.

I. Previous Research

The best known and most extensive study of the link between resources and academic performance remains *Equality of Educational Opportunity*, released in the summer of 1966 and known widely as the "Coleman Report."[3] Coleman's team of researchers analyzed data for 569,000 elementary and secondary school students from 3155 schools, selected from grades one, three, six, nine, and twelve, representing seven broad ethnic groups. The report concluded:

[3] J. Coleman, Equality of Educational Opportunity (1966).

> [S]chools bring little influence to bear on a child's achievement that is independent of his background and general social context; and . . . this very lack of an independent effect means that the inequalities imposed on children by their home, neighborhood, and peer environment are carried along to become the inequalities with which they confront adult life at the end of school.[4]

The study's findings and methodologies were controversial and prompted analysts from several academic disciplines to reanalyze the data over the following decade. Perhaps the best known of this second group are *On Equality of Educational Opportunity* and *Inequality: A Reassessment of the Effect of Family and Schooling in America*.[5] Despite much well-founded criticism, the general conclusion stood: no one was able to find clear and important effects of school resources on student achievement in the Coleman data.

Even today, research that measures the effects of educational inputs on student performance has confirmed few findings across independent analyses and data sets. Professor Eric Hanushek's authoritative review of the literature on the economics of education reports: "[D]ifferences in quality [i.e., students' standardized test scores] do not seem to reflect variations in expenditures, class sizes, or other commonly measured attributes of schools and teachers."[6] On the other hand, evidence confirms the existence of teacher skill differences. For example, controlling for student skill levels at the beginning of the school year, differences among teachers in the average achievement gains of their students during the year can be highly statistically significant.[7] Also, researchers find that the college a teacher attended helps to predict his or her students' performances.[8] However, evidence of a relationship between teachers' competency exam performance and student achievement is scarce and weak.[9]

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[4] *Id.* at 325.

[5] ON EQUALITY OF EDUCATIONAL OPPORTUNITY (F. Mosteller & D.P. Moynihan eds. 1972); C. JENCKS, INEQUALITY: A REASSESSMENT OF THE EFFECT OF FAMILY AND SCHOOLING IN AMERICA (1972).

[6] Hanushek, *The Economics of Schooling*, 24 J. ECON. LITERATURE 1141, 1142 (1986).

[7] R. MURNANE, IMPACT OF SCHOOL RESOURCES ON THE LEARNING OF INNER CITY CHILDREN (1975); D. ARMOR, P. CONRY-OSEGUERA, M. COX, N. KING, L. MCDONNELL, A. PASCAL, E. PAULY & G. ZELLMAN, ANALYSIS OF THE SCHOOL PREFERRED READING PROGRAM IN SELECTED LOS ANGELES MINORITY SCHOOLS (Rand Corporation Report No. R-2007-LAUSD, 1976).

[8] *See* Summers & Wolfe, *Do Schools Make a Difference?*, 67 AMER. ECON. REV. 639 (1977).

[9] One recent study finds that teachers' scores on the National Teachers Exam ("NTE")

Two recent papers by David Card and Alan Krueger combine data from state school systems during the first half of the twentieth century with data on men's ages, races, and earnings available in public use samples of the 1960, 1970, and 1980 United States Censuses.[10] They examine whether characteristics of state school systems where men were educated during the first half of the century can predict their earnings decades later even for men who no longer live in the states where they attended school. What Card and Kruger find is that teacher salaries, the number of students per teacher, and the length of the school year are each statistically significant predictors of men's later earnings.

The combined results of other recent studies offer possible explanations for the effect on earnings that Card and Krueger find for teacher salaries. Murnane and Olson find that higher teacher salaries increase the number of years that teachers remain in the profession.[11] Manski finds that higher salaries attract candidates with higher Scholastic Aptitude Test ("SAT") scores into teaching.[12] As outlined below, the present study shows that teachers' experience and test scores are important predictors of test scores for students.[13] Further, other recent studies have found that reading and math test scores are important predictors of earnings for young men.[14] Combining results that link teacher salaries to teacher quality, teacher quality to students' test scores, and students' test scores to their later earnings reproduces the Card and Kruger result that teacher salaries affect

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help to predict students' exam scores across school districts. But the data available for the study included only a few demographic controls. Strauss & Sawyer, *Some New Evidence on Teacher and Student Competencies*, 5 ECON. EDUC. REV. 41 (1986).

[10] D. CARD & A. KRUEGER, DOES SCHOOL QUALITY MATTER? RETURNS TO EDUCATION AND THE CHARACTERISTICS OF PUBLIC SCHOOLS IN THE UNITED STATES (National Bureau of Economic Research Working Paper No. 3358, 1990); D. Card & A. Krueger, School Quality and Black/White Relative Earnings: A Direct Assessment (July 1990) (preliminary draft).

[11] Murnane & Olsen, *The Effects of Salaries and Opportunity Costs on Duration in Teaching: Evidence from Michigan*, 11 REV. ECON. & STATISTICS 347 (1989).

[12] Manski, *Academic Ability, Earnings, and the Decision to Become a Teacher: Evidence from the National Longitudinal Study of the High School Class of 1972*, in PUBLIC SECTOR PAYROLLS (D. Wise ed. 1987).

[13] The present study also confirms the effects that Murnane and Olson find linking salaries to experience and teacher test scores.

[14] *See, e.g.*, O'Neill, *The Role of Human Capital in Earnings Differences Between Black and White Men*, 4 J. ECON. PERSPECTIVES 25 (Fall 1990); *see also* R. FERGUSON, SOCIAL AND ECONOMIC PROSPECTS OF AFRICAN AMERICAN MALES: WHY READING, MATH, AND SOCIAL DEVELOPMENT SHOULD BE LEADERSHIP PRIORITIES (Report to the W.K. Kellogg Foundation and Working Paper, Malcolm Wiener Center for Social Policy, John F. Kennedy School of Government, Harvard University, Mar. 1991).

students' later earnings. Hence, after decades of uncertainty and even pessimism concerning whether schooling adds anything to family and community influences, new studies are beginning to find evidence that money affects the quality of schooling and that the quality of schooling influences not only test scores but later earnings as well.

II. The Data

Each observation in the data that this study uses is for an individual school district. Texas has more than 1000 districts. This study was able to assemble fairly complete data for almost 900 of those. Districts omitted because of missing data were generally very small. Also, Dallas and Houston are not included in the calculations because the weighting scheme in the estimating procedure would have given these two cities too much influence over the results.[15] The smallest number of districts represented in any of the estimates that this Article presents is 838 in equations explaining composite district-average reading scores. The number of students in these districts is 2.4 million. For individual grade levels, the number of districts in the analysis ranges from 857 for eleventh grade to 890 for first grade. The number of districts in equations explaining the supply of teachers is 887. The number of teachers in these districts is 150,000.

For some parts of the analysis, disaggregated data measuring performance and social background characteristics for individual children and their individual teachers would have been preferable. Unfortunately, large microdata sets covering the same broad range of variables that this study uses are not available. Under certain quirky circumstances, using school district averages rather than data for individual children produces misleading results because of "aggregation bias."[16] However, the findings reported below disclose a systematic and internally consistent story whose coherence and plausibility indicate

[15] In order to correct for the problem of heteroskedasticity, each district is weighted in regressions by the square root of its student body (when the average student score is the dependent variable) or by the square root of the number of teachers (in teacher supply equations). For an explanation of heteroskedasticity, see any standard econometrics text. *E.g.*, R. Pindyck & D. Rubinfeld, Econometric Models and Economic Forecasts (1976).

[16] For a discussion of aggregation bias, see G. Maddala, Econometrics (1977).

strongly that aggregation bias is not a serious problem in this study. Any subsequent analysis based on disaggregated data for individual students and teachers is likely to add interesting and important details but not to change the central findings.

Social science theories suggest that educational outcomes such as grades and test scores are the products of innate ability, school inputs, and inputs from families and communities. The data for this study do not include variables that measure innate abilities. Nor do they separate family effects from community effects. Instead, family, community, and innate ability effects are subsumed by school district averages for various socioeconomic indices. Many of these come from a special tabulation of the 1980 U.S. Census that provides data by school district. Others come from Texas sources.

Although the data from the 1980 Census are from five years before the 1985-86 school year, aside from isolated aberrations, relevant socioeconomic features are not likely to have shifted enough in so short a time to seriously distort the interdistrict comparisons upon which the results depend. This seems to be confirmed by the results reported below. The results are fully consistent with standard findings for how socioeconomic background influences student performance.

All of the school data are current and come from Texas sources. The description of the data in the next few pages will begin with characteristics of schools and teachers and proceed to variables that measure family and community background characteristics.

A. *The Texas Examination of Current Administrators and Teachers*

In 1986 Texas began certification testing for primary and secondary school teachers and administrators. Instead of "grandfathering" existing teachers, as most states have done, Texas decided to require its existing teachers to earn recertification by passing the Texas Examination of Current Administrators and Teachers ("TECAT"). The TECAT tested basic literacy skills. Headings for various sections of the exam included: identify the main idea (ten items); identify specific details (five items); identify sequential steps (five items); distinguish fact from opinion (ten items); draw inferences (five items); use and select refer-

ence sources (ten items); and comprehend job-related vocabulary (ten items). Passing required a total score of forty-seven points from a possible fifty-five. The passing rate on the first administration of the exam in March 1986 was 96.7%.[17] Those who failed the exam were permitted to retake it. In the end, few teachers lost their jobs because of poor performance on the exam.

Whatever its value as a certification screen, the TECAT has produced rare and valuable data for testing the influence that teachers' literacy skills have on students' test performances. Arkansas is the only other state that has tested all of its teachers and, as far as we know, no one is conducting a similar analysis of those test results.

B. *Other Measures of School Quality*

Several additional characteristics of each school district enter the analysis. These include teacher experience, the percentage of teachers who have master's degrees, the average school size (separately for primary and secondary schools), total district enrollment, and the number of students per teacher in the district. It is necessary to use the students-per-teacher variable because a direct measure of average class size is unavailable.

One set of indices covering the school district as a whole across all grades comprises the explanatory data for each grade. For example, the teacher test score data in the equation for any given grade is the average score for all of the teachers in the district across all grades.[18] The same holds for other school and socioeconomic background variables. While this is primarily because available data are not disaggregated by grade level, it has the advantage of including teachers who taught current students in earlier grades. Thus, it comes closer to measuring students' cumulative educational experience than would an equation containing data only for the current school year. These

[17] This number comes from an unpublished summary of information presented to the May 1986 meeting of the Texas State Board of Education by the Texas Education Agency.

[18] The exception is for teachers' passing rates, which the study has separately for primary and secondary school teachers. The author is expecting in later analyses to have average scores separately for primary and secondary teachers, but this data is not yet available.

same explanatory data enter equations that estimate the dropout rate and the percentage taking the SAT.

C. *Measures of School Spending*

Measures of school spending per student include overall operating expenditures and variables covering a number of separate spending categories. The major categories include administration, instructional service (teacher salaries and instructional equipment), cocurricular activities, transportation, and maintenance. The same data sources that give information on spending also give the size of the school district's property tax base per student. Estimated results use not only the property tax base, but also measures that indicate whether the largest component of the base is residential, business, oil and gas, or land.[19]

The salary variables that the analysis uses are the salary for starting teachers and that for teachers with ten years of experience. Most of the time the analysis uses the average of the two as a single measure of what the district pays to teachers.

D. *Characteristics of the Surrounding Region*

Several variables measure important characteristics of the region that surrounds any given district. Texas schools fall into twenty regions of roughly equal size. To capture the effect of salaries in competing districts, we calculate the regional average salary (for both starting and ten-year teachers), omitting the home district. Hence, this number is different for each district in the region. The annual number of teacher graduates from colleges in the region (per 1000 public school students in the region) is a measure of the availability in the region of new teachers. Also, the average SAT score of students attending the regions' teacher training institutions provides an estimate of the "quality" of the new-teacher supply. Finally, we have constructed a measure of the average age-adjusted salary of college-

[19] The results concerning the influence of the property tax base are not included in the body of this Article. The reason is that this variable is used only in the first stage of the two-stage weighted least squares procedure used to estimate the supply equations. In that procedure, the property tax base is among the variables used in the first stage to estimate the value for salary that is used in the second stage. In those first-stage regressions, not discussed here, the property tax base has a large statistically significant effect on the district's salary. *See* table 6 in the Appendix.

educated workers in the county where the district is located. This variable together with the salary in competing school districts provides a measure of the opportunity cost of teaching in the focal district.

E. *Students' Exam Scores*

Students' reading and math scores used in this analysis come from the Texas Educational Assessment of Minimum Skills ("TEAMS") exams. TEAMS exams are standard multiple choice tests administered to first, third, fifth, seventh, ninth, and eleventh graders. The TEAMS results that this study analyzes are from the second semester of the 1985-86 school year. In addition, we use results for the same group of children two years later (1987-88) and four years later (1989-90). The latter allow the study to check the degree to which school and community characteristics that explain differences in scores across districts at a point in time also predict how much progress students achieve from year to year.

F. *Data from the Census*

Variables from the Census include the following: income per household and per capita, levels of education among the adult population, the poverty rate in households with children, the prevalence of single-parent female-headed households, and the percentage of households in which English is a second language. Since our school data cover only public schools, the percentage of a district's children attending public (versus private) school is included as a control variable.

G. *Other Socioeconomic Background and Context Measures*

Data from the 1985-86 school year, gathered from various sources in Texas, include the percentage of students who are from migrant farm worker families, the percent Hispanic, and the percent black. Also, the analysis allows for separate effects for cities, suburbs, rural districts, towns, non-metropolitan cities (growing and stable), and districts along the Mexican border with high poverty rates. These capture effects that vary system-

atically by type of place and are not captured by other variables in the estimated equations.

III. Determinants of Student Performance

A. *General Findings Concerning Schooling Effects*[20]

Controlling for all of the family and community background influences discussed above, all four of the variables in the analysis that are direct measures of school and teacher characteristics (TECAT scores, students per teacher, experience, and master's degrees) have statistically significant effects on students' test scores. Teachers' language skill as measured by the TECAT score is the most important school input for both math and reading. The next most important school characteristic in the analysis is teacher experience, followed by class size and master's degrees. The next few pages outline the study's general findings concerning determinants of student performance. The text in the body of the Article will be in non-technical language. Readers who want to know more may consult the tables in the Appendix.

1. *The TECAT helps to explain variation across districts in students' average scores at a point in time.* After the first grade, teacher scores on the TECAT account for about one fifth to one quarter of all variation across districts in students' average scores on the TEAMS exam. The TECAT has little influence on the dropout rate or on the percentage of students planning to take the SAT; the only effects of the TECAT on the latter indices appear to be small and indirect, acting through the effect of the TECAT on students' test scores.

2. *The TECAT predicts changes in students' average scores over time.* Item 1, above, reports that TECAT scores explain variation across districts *at a point in time* even for ninth and eleventh grades. However, estimates predicting *changes over time* suggest that much of the learning that the TECAT "causes"

[20] The general findings reported in this Part are also presented in Ferguson, *Racial Patterns in How School and Teacher Quality Affect Achievement and Earnings*, 2 Challenge: A J. Res. on Black Men 1 (Spring 1991).

occurs between third and seventh grades. Teachers' scores have much smaller effects on *changes* in student scores from the first to the third grades and after the seventh grade. These estimates, for example, compared third graders' scores in 1986 to the same group's scores in 1988 when they were fifth graders and in 1990 when they were seventh graders.

3. *Primary school teachers appear to be particularly important for establishing the reading foundation upon which students depend in later years.*[21] Primary school teachers' passing rates on the TECAT have three times the impact of secondary school teachers' passing rates for predicting eleventh graders' passing rates on the TEAMS reading exam. Conversely, neither the primary school nor the secondary school teachers' passing rate is statistically significant in predicting *changes* in students' scores after the seventh grade (e.g., the difference between seventh graders' scores in 1985-86 and the same group of students' ninth-grade scores in 1987-88 or their eleventh-grade scores in 1989-90).

4. *Teachers with more years of experience produce higher student test scores, lower dropout rates, and higher rates of taking the SAT.* Experience accounts for a bit more than ten percent of the interdistrict variation in student test scores. The two experience variables are the percentage of teachers with five to nine (i.e., to 8.99) years of experience and the percentage with nine or more. Both have statistically significant effects on test scores. In the primary grades, the two have roughly equal coefficients, suggesting that once teachers have five years of experience, additional years do not add to their effectiveness. However, the results suggest that high school teachers with nine or more years of experience produce better results on students' test scores than do those with five to nine years. Beyond the effect on test scores, an increase of ten in the percentage of teachers with nine or more years of experience leads to a drop of almost four percent in the dropout rate (e.g., from a twenty-five-percent dropout rate to a twenty-one-percent rate) and increases the percentage of students taking the SAT by three.

[21] At the time that this Article was being written, TECAT passing rates were available separately for primary and secondary school teachers but average TECAT scores were not. Hence, it was necessary here to use passing rates rather than average scores.

5. *Master's degrees produce moderately higher scores in grades one through seven.* The percentage of teachers who have master's degrees accounts for about five percent of the variation in student scores across districts for grades one through seven. Master's degrees have no predictive power after the seventh grade.

6. *Large classes lead to lower scores in grades one through seven.* This study (and most others) lacks a direct measure of average class size. It does, however, have a measure of the number of students per teacher in the district. Average class sizes will be larger than "students per teacher" because some teachers are specialists who do not teach regular classes and because most teachers get periods off during the day. The results here show that reducing the number of "students per teacher" is important only when it exceeds eighteen. (Tests show that, at least in this data set, the threshold is indeed at eighteen and not at seventeen or nineteen.) Each additional student over eighteen causes the district average score to fall by between one tenth and one fifth of a standard deviation in the interdistrict distribution of test scores for grades one through seven. This is among the stronger effects for any variable in the study. However, it is an effect that is clearly restricted to the primary grades. "Students per teacher" influences neither high school test scores, dropout rates, nor the percentage taking the SAT.

B. *Interpreting the TECAT Effect*

The findings summarized in items 1, 2, and 3 above suggest quite strongly that the TECAT is capturing real production effects and not spurious correlations. Still, we can only speculate about what teachers with high scores do differently from teachers with low scores. One possibility is that teachers with higher scores more often attended colleges that were effective at preparing them to become good teachers. Alternatively, or in addition, teachers with higher scores may have thinking habits that make them more careful in preparation of lesson plans or more articulate in oral presentation. Also uncertain is the degree to which remediation for teachers with low scores can help them to develop those skills that make teachers with higher scores more effective in the classroom.

Finally, some aspects of teaching skill—such as the ability to motivate students—may be poorly correlated with this test. For example, black and Hispanic teachers appear to motivate larger numbers of black and Hispanic students to report plans to take the SAT with the hope of attending college. Results so far are less clear about whether racial matching also motivates students to learn more.[22] However, if there is a racial-matching effect that influences the student exam scores that this project studies, it is probably independent of the TECAT: the findings show that any given increase in teachers' scores predicts the same positive difference in students' scores no matter what the races of the teachers.

C. *Findings Concerning Home and Community Effects*

Most studies find that conditions in home and community environments outside of the school are important determinants of schooling outcomes.[23] The next few paragraphs review patterns from the present study that are fully consistent with standard findings.

Two variables in this study represent parents' education: (1) the percentage of adults living in the district with exactly four years of high school and (2) the percentage who have some college education. The latter is by far the most important explanatory variable in the analysis aside from teachers' TECAT scores. In the overall analysis, its importance for predicting students' test scores is roughly equal to the TECAT's in magnitude and in statistical significance. Parental education is also important where the TECAT is not: for explaining first-grade reading scores, dropout rates, and the percentage of students taking the SAT.

Income in this analysis appears to have an effect on test scores only when parental education is omitted from the equation. Adding parental education always causes the estimated effect of income on test scores to become very small, statistically insignificant, and sometimes even negative.

A similar statement characterizes the relationship between poverty and female-headed households. The percentage of chil-

[22] The author is expecting additional data that may permit more precise estimates to get at this question.

[23] *See, e.g.*, studies reviewed in Hanushek, *supra* note 6.

dren living in poverty never has a statistically significant influence on students' test scores when the analysis controls for the rate of female headship. In fact, the percentage of children living in poverty is highly statistically significant only when both female headship and students' race variables are omitted; its measured significance becomes very marginal when either of these is added. Female headship, conversely, is a statistically significant predictor of test scores for all grades up to and including ninth.

Hence, the general finding is that money per se is not a critical ingredient in home and community environments for affecting schooling outcomes.

Two additional variables capture special forms of disadvantage experienced mainly by Hispanic students. These are (1) the percentage of students from homes where English is a second language and (2) the percentage from migrant farm worker families. In both cases, larger percentages tend to drive down average test scores, though the statistical significance of these effects varies across grade levels.

Variables representing the percentage of students who are Hispanic and the percentage who are black are essentially stand-ins for factors that are correlated with race but not otherwise represented in the estimated equations (e.g., peer culture, ethnic idiosyncrasies in grammar). The coefficient for "students percent Hispanic" is always statistically significant and negative and its magnitude does not change much across the grade levels.

In contrast, the coefficient for "students percent black" is statistically insignificant for first, third, and fifth grades, marginally significant for seventh grade, and highly significant for ninth and eleventh grades. This means that other variables included in the analysis explain virtually all of the difference in test scores between black and white districts in the primary grades, but not in the later grades; the magnitude of the effect for ninth grade is triple that for seventh grade and five times that for third grade.

A final set of variables measures otherwise unexplained place effects. For example, are children's test scores in cities higher or lower than in other types of places for reasons not captured by other variables in the analysis? The estimates answer this question separately for cities, suburbs, rural districts, towns, and non-metropolitan cities (growing and stable). The answer is generally no. In other words, forces that cause test scores to differ by type of place are captured well by other variables in

the analysis. Only districts with high poverty rates along the Mexican border have statistically significant effects that consistently distinguish them. And there, the effects are negative for grades three through seven and positive for grades nine and eleven.

This brief summary shows patterns that fit well with what standard theories and common sense might predict. Generally, teachers matter, as do various features of the home and the community.

IV. Determinants of Teacher Supply

This Part outlines findings concerning the supply of teachers across school districts. The four teacher supply indices focused on here are the teachers' average TECAT score, the percentage of teachers with nine or more years of experience, the number of teachers per student, and the percentage of teachers with master's degrees. Recall that findings above show that each of these affects students' exam scores.

A. *The Market Process: Matching Teachers with Districts*

Teachers' unions in Texas do not exercise much influence over salaries or hiring practices. Therefore, officials in local school districts can make decisions concerning salary levels and the number of teachers to employ, based on their perceptions of district needs and in response to market signals. Among the strongest market signals are the salaries that competing districts pay and the salaries that teachers could earn locally if they chose to work in occupations other than teaching. Another signal is the number of applicants who respond to advertisements of open teaching positions. Taking these signals and the needs of their districts into account, officials decide what salaries to offer and choose target numbers of teachers to employ.

Some districts are more attractive places to teach than others and receive more responses to their advertisements. Factors that make a district more attractive than its neighbors can include the salary that it pays, the characteristics of the students and their families, perceived working conditions, and commuting distances from where potential teachers live. Given some set of (typically vaguely defined) criteria, administrators rank

the applicants who respond and hire from the top of the list. Teachers not hired remain available to apply to other districts. If (a) the criteria (implicit and explicit) that districts use to rank teachers are very similar across different districts, and (b) the criteria that teaching candidates use to rank districts are very similar among teaching candidates, the outcome will be a market configuration where generally the most attractive teachers teach in the most attractive districts. If the criteria that districts use for ranking potential teachers really are correlated with teaching effectiveness, then students in the most attractive districts will have the best teachers. Results reported below support this characterization of how the market operates.

B. *Estimates of Teacher Supply*

Using a statistical procedure that allows us to distinguish supply from demand relationships, we have estimated equations to measure how much particular factors influence teachers to supply themselves to any given district.[24] Again, the teacher supply measures are: teachers per student, teachers' average TECAT score, the percentage with nine or more years of experience, and the percentage with master's degrees.[25]

In accordance with theory, the statistical results confirm that the overall supply of teachers to any given district depends on the number of potential candidates in the region and on the attractiveness of the district to those candidates. Specifically, the results show that salary is a highly statistically significant predictor for all four supply measures—districts that pay higher salaries are clearly more attractive to teachers. The standardized salary measure here is the average of the starting salary in the district and the salary for teachers with ten years of experience.

The opportunity costs of teaching in a particular district include the salary in competing districts and the salary in competing occupations. The estimates show that when salaries in

[24] The proceedure is a two-stage least squares regression. The demand-side variables used as instruments in the first stage and excluded from the second stage are the property tax base per student, supplemented by variables that measure which of four types of property constitute the largest share of the base, as well as per-capita income in the district.

[25] Table 5 in the Appendix shows the two-stage least squares regression estimates of the supply equations. The choice to use nine or more years instead of some other measure of teacher experience, e.g., five or more, is arbitrary.

competing districts rise, the supply of teachers to the home district falls in a statistically significant way for all four indices. Similarly, the salary in competing occupations index has negative signs in all four equations. However, it is highly statistically significant only for the percentage of teachers with nine or more years of experience; it is marginally significant for teachers' TECAT scores and statistically insignificant for teachers per student and the percentage with master's degrees.

The general availability of new entrants to the market for teachers is measured here by the number of new teacher graduates in the region, per 1000 public school students. Our findings show that as this number rises the average number of teachers per student in a district goes up and, conversely, the number of students per teacher drops. Also, as one might expect, increasing the number of new graduates drives down the percentage of teachers with nine or more years of experience and the percentage with master's degrees as well.

The average SAT score for students at the regions' teacher training institutions positively affects the average TECAT scores of teachers in the region but does not influence the other three teacher supply measures.

The same family and community background variables that enter the supply equation were in equations used earlier for predicting student exam scores. However, the only clearly important community background variables in the teacher supply equations are the parents' education variable, "adults percent with some college," and variables associated with the races of students. The "adults percent with some college" variable has a highly statistically significant influence for three of the four supply measures. The exception is the percentage of teachers with nine or more years of experience.[26]

The race-related variables that influence the supply of teachers are: the percentage of students from migrant farming families; the percentage for whom English is a second language; the percent black; and the percent Hispanic. All four of these variables have negative predicted effects on teachers' average TECAT scores and on teacher experience. For TECAT scores in particular, the effects are very large and statistically very sig-

[26] If both young and experienced teachers alike prefer districts where parents are more educated, one should not be surprised to find that the effect of parents' education on the experience mix among teachers who supply themselves to the district is relatively neutral.

nificant. In a paper that focuses more on racial patterns in the results, we show that, for fifth graders, differences in TECAT scores explain almost half of the black/white difference in student scores.[27] Indeed, after accounting for TECAT scores and other socioeconomic background factors, the black/white difference in student scores is not statistically different from zero until the seventh grade.

The primary explanation for why TECAT scores are lower in heavily black and Hispanic districts is that black and Hispanic teachers tend to have disproportionately lower average TECAT scores. However, white teachers in heavily minority districts also have lower scores than white teachers in districts that have fewer minority students. In fact, for all three races of teachers, those who teach in heavily minority school districts tend to have lower scores.

The goal of achieving both high-quality instruction and racial diversity among teachers should be a high priority. Succeeding may require a wide array of creative strategies for recruiting and selecting teachers. For example, experience with alternative certification programs in New Jersey and Texas shows, tentatively, that alternative certification can attract academically stronger minorities into the profession.[28] Various measures, including better training for principals, may help existing teachers to upgrade skills as well.

The next Part of the Article builds on the above and considers the role of financial resources more explicitly.

V. How Money Matters

Money matters when the real inputs that it purchases matter. As an introduction to empirical estimates showing that money does indeed matter, the next few paragraphs discuss what one might logically expect to be the relationships of various expenditure categories to student achievement.

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[27] Ferguson, *supra* note 20.

[28] *See* Texas Education Agency, Division of Teacher Education, Alternative Teacher Certification in Texas (1990); New Jersey State Department of Education, Annual Report on Certification Testing (1990).

A. *Reasons that Spending Varies*

The focus here is on current operating expenditures. Among the things that operating expenditures pay for are teachers, teaching equipment, administrators, equipment for extracurricular activities, transportation to get children to and from school, and maintenance on plant and equipment. Some of these expenditures—particularly transportation and maintenance—have logical relationships to learning that are at best indirect. Districts that spend more than others in these categories often do so because their students live farther from schools or because their buildings have physical characteristics that make them more expensive to maintain. Few would argue that more spending for transportation and maintenance should increase test scores, though most would agree that such spending "matters."

Variation in the prices of important inputs is another source of necessary variation in expenditures across school districts. Skilled labor is the most important input and represents the largest share of the budget. Across any given state, the market for labor can be very segmented and, for various reasons, pay differentials between places can persist over long periods of time without provoking much interregional migration. As discussed earlier, the age-adjusted local wage for college-educated workers in the county where a district is located is an estimate in this study of what teachers can earn if they leave teaching. However, it also represents a rough index of what districts pay for locally purchased goods or services in which professional labor is an important input.

This "salary in competing occupations" measure varies considerably across the state. Its ninetieth percentile is nearly 150% of the tenth percentile. Similarly, teachers' salaries vary across the state's twenty regions. "Salary in competing districts" is the average teacher salary within the region where a district is located. As indicated earlier, we omit the salary that the home district pays when calculating this regional average. The value of this variable at its ninetieth percentile is $3,400 (seventeen percent) higher than at its tenth percentile. Clearly, districts in different professional labor markets and facing different levels of salary competition from surrounding districts will need to spend different amounts of money to purchase equal levels of schooling inputs.

Political discussions of school spending often attribute differences in spending to differences in the efficiency with which schools manage resources. Spending for administration is the category most often alleged to be too big: filled with waste and inefficiency. Also, while seldom labelled as inefficient, a category of spending often among the first to be cut during periods of budget stringency is extracurricular activities. Like transportation and maintenance, administration and extracurricular activities are spending categories whose logical connection to test scores is not strong. The reason that they come under attack more often than transportation may be that unlike the latter, existing levels of the former seem less "necessary."

Obviously, money that schools spend directly for instruction—for teachers and instructional equipment—is the expenditure that should have the strongest empirical relationship to test scores. This Article has already discussed several patterns which suggest that instructional expenditures are important. The teacher supply results, when combined with the results for student test scores, demonstrate that hiring teachers with stronger literacy skills, hiring more teachers (when students-per-teacher exceeds eighteen), retaining experienced teachers, and attracting more teachers with advanced training are all measures that produce higher test scores in exchange for more money.

B. *Additional Empirical Results*

Earlier the Article summarized results for how school and community inputs affect test scores across various grade levels. The estimating equations used for those discussions did not directly include any spending indices. The equations that form the basis of the present discussion do. This discussion does not alter any of the general findings reported earlier. What it does is add a more explicit consideration of spending. However, instead of discussing individual grade levels, the discussion will focus on explaining a composite score that is the average of scores across the five grades: three, five, seven, nine, and eleven. Patterns vary a bit across the grades, but generally the most important variables in the analysis are important for all grades and therefore little is lost by using the composite.

The only important schooling effect that does not show up when estimated using the composite score is the effect of teach-

ers' master's degrees. As discussed earlier, master's degrees explain some of the variation in student performance in the primary grades. The effect of "students per teacher" is likewise restricted to the primary years, but it is strong enough that it shows through even when the data from different grades are merged. Two tables in the Appendix, tables 7 and 8, show the actual estimates. To make comparisons easier to see, the first two columns are the same in table 8 as in table 7. As in sections above, the text in the body of the Article will explain the significant findings in nontechnical language.

Two of the equations reported in the Appendix (columns 3 and 5 of table 8) exclude all school input and school expenditure variables except one: overall operating expenditures. Other variables in these equations cover family and community background. When the "salary in competing districts" and the "salary in competing occupations" variables are excluded from the equations, the operating expenditure variable shows a positive but statistically insignificant effect on test scores. However, when both are added, the estimate shows that spending more does lead to higher scores. The reason that the effect goes undetected in the first specification but not in the second is that some differences between districts in operating expenditures simply reflect that they are operating in different economic environments. The second specification includes two controls for such differences. What the estimate in the second specification shows is that increasing operating expenditures by fifty percent has about the same predicted effect on students' test scores as increasing the percentage of parents with college educations by ten—say from thirty to forty.

But of course increasing expenditure in some categories has larger payoffs than in others. The average amount spent on instructional services in Texas in 1985-86 was about $2,000 per student.[29] This was between fifty and sixty percent of operating expenditures. Consider a fifty-percent change ($1,000) centered, for example, around the mean, so that expenditure in this category goes from $1,500 to $2,500. The predicted effect on student test scores is equivalent to an increase of twenty, say from thirty to fifty, in the percentage of adults with college

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[29] TEXAS RESEARCH LEAGUE, BENCH MARKS FOR SCHOOL DISTRICT BUDGETS IN TEXAS (July 1986 & July 1987).

educations[30]—twice as much as for the fifty-percent change in total operating expenditures considered above.

Again, instructional services represent between fifty and sixty percent of operating expenditures in a typical district. If a fifty-percent increase in instructional expenditures has twice the impact on test scores as a fifty-percent increase in overall expenditure, an apparent implication is that virtually all of the net impact on test scores of increasing operating expenditures is due to that portion spent on instruction.

Equations that use salary and class size in place of the instructional expenditure variable and omit other schooling inputs show that much of the effect of increasing instructional expenditure comes through its effect on salaries. A fifty-percent increase in teachers' salaries predicts a slightly larger increase in student scores than does a fifty-percent increase in instructional expenditures.

Even when all of the other schooling inputs and salary variables are taken into account,[31] the instructional services expenditure variable still has small residual impact that is almost statistically significant. A similar statement holds for salary, which always remains statistically significant. What this suggests is that there are additional instructional inputs and characteristics of teachers that more money and higher salaries attract but that have not been included in the analysis. Note, however, that the absence of these additional inputs from our estimating equations has virtually no effect on estimates for the effect of class sizes and TECAT scores: the measured effects of the latter two variables are quite independent of what salary or spending variables are accounted for in the analysis.[32]

Outside of expenditures for instructional inputs, other categories of spending are mixed in their effects on test scores. Other things held equal, spending more for transportation or maintenance predicts lower test scores, while spending more for extracurricular activities predicts higher scores. We leave it to the reader to speculate about the reasons.

Estimates of the effect on students' scores of spending more for administration tend to be positive for a vary narrow range: districts spending less than about $325 per student in 1985-86.

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[30] *See* column 3, table 7 in the Appendix.
[31] *See* column 1, table 7 in the Appendix.
[32] *Compare* column 2 of tables 7 and 8 *with* other columns in these tables.

Roughly ten percent of the districts fall in this range. Above this level, spending more for administration predicts no additional improvement in student scores. Hence, these results do not contradict those who allege that most districts spend too much for administration.

VI. Conclusion and Implications for Policy

The research that this Article describes strongly supports the conventional wisdom that higher-quality schooling produces better reading skills among public school students and that when targeted and managed wisely, increased funding can improve the quality of public education. While not intuitively surprising, these results are much more encouraging than the majority of the evidence from studies of the past thirty years. Led by the famous Coleman Report, the accumulated evidence has failed to show convincingly that schooling and money for schools add anything to the learning that occurs in other family and community environments.

Differences between the findings reported here and those in other studies are due to several unique features of the data. Most importantly, this is the first study to include a good measure of literacy skills for such a large group of teachers, complemented by such a rich array of data on other school and socioeconomic background measures. Also, the data set for this study is unusually large even when compared with the Coleman data. Statistical procedures in the present study include fewer actual entries because they group students into districts. Nevertheless, the over 2.4 million students in the almost 900 districts that this study covers represent five times the 569,000 children in the data that Coleman used. Hence, the information embedded in this study's data is quite extensive.

The first set of causal relationships that this Article explores concerns how school inputs affect students' scores on standardized exams. Results show that better literacy skills (i.e., higher TECAT scores) among teachers, fewer large classes, and more teachers with five or more years of experience (nine or more for high school) all predict better student test scores, controlling for a number of family and community background factors.

Second, the results show that three types of factors determine to which school districts teachers supply themselves: the edu-

cation level of adults in the community, the racial makeup of the community, and teacher salaries relative to surrounding districts and other occupations. Since more and better teachers can help to raise standardized test scores and higher salaries attract more and better teachers, money matters for raising test scores. Beyond the money spent directly for teachers and basic instructional equipment, however, school spending typically pays for overhead functions that may be essential but do not directly influence test scores.[33]

The results of this analysis have three strong implications for school finance reform. First, equal salaries will not attract equally qualified teachers to dissimilar school districts: for any given salary, teachers prefer school districts with higher socioeconomic status and judge the attractiveness of teaching in a given district against the allure of other opportunities. This suggests that a state policy of salary differentials—where districts with lower socioeconomic status pay higher salaries—will be necessary if each district is to get its proportionate share of the best teachers.

Second, large classes hurt scores but many classes may be unnecessarily small. A ratio of eighteen teachers per student at the district level appears to be a threshold. Recall that this is smaller than average class size in the district and probably translates to an average class size in the low twenties. Adding teachers to achieve a lower ratio than eighteen generally will not raise test scores. Adding teachers in order to push the ratio down to eighteen students per teacher, however, helps: for fifth grade, lowering the ratio from twenty-one to eighteen is comparable to raising the percentage of adults with college educations in the district by more than twenty, say from thirty to more than fifty.[34]

Third, forcing all districts to comply with any uniform set of spending rules or spending levels would be very risky business—probably impossible to administer successfully. This is because schools have different demands on their resourses (e.g., necessary maintenance and transportation expenditures vary greatly), because standard practices often include expenditures

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[33] This does not mean that overhead functions have no effect on test scores; it means only that the effects are indirect and not always positive. *See supra* text near the end of Part V(B).

[34] Tests to check whether the threshold was at 17 or 19 rather than at 18 yield the conclusion that it is, at least in this set of data, indeed at 18.

that are inefficient but difficult to regulate from above (e.g., schools apparently overspend on administration and reduce class sizes below typically optimal levels, but they may sometimes have good reasons), and because the number and quality of teachers that a district can attract depend not only on the salary it pays but also on the salaries that surrounding districts and other professions pay.

Finally, beyond school finance reform, what the evidence here suggests most strongly is that teacher quality matters and should be a major focus of efforts to upgrade the quality of schooling. Skilled teachers are the most critical of all schooling inputs. Even ignoring class sizes and teacher experience, TECAT scores in Texas explain between twenty and twenty-five percent of the variation across districts in students' test scores in the data that this Article has analyzed.

APPENDICES

DESCRIPTIVE STATISTICS

	MEAN	STANDARD DEVIATION	MINIMUM	MAXIMUM
TEACHERS' AVERAGE TECAT SCORE	0.000	1.000	-7.106	2.574
TEACHERS PERCENT 5 TO 9 YEARS EXPERIENCE	20.694	3.967	0.0	68.181
TEACHERS PERCENT 9+ YEARS EXPERIENCE	51.576	8.110	9.090	99.065
STUDENTS PER TEACHER	17.209	1.930	6.6	22.7
TEACHERS PERCENT MASTERS DEGREES	33.167	10.144	0.0	84.931
FIRST GRADE READING SCORE	0.000	1.000	-9.094	4.794
THIRD GRADE READING SCORE	0.000	1.000	-5.337	4.053
FIFTH GRADE READING SCORE	0.000	1.000	-5.186	4.065
SEVENTH GRADE READING SCORE	0.000	1.000	-4.321	3.938
NINTH GRADE READING SCORE	0.000	1.000	-3.980	4.599
ELEVENTH GRADE READING SCORE	0.000	1.000	-3.771	3.807
COMPOSITE READING SCORE (GRADES 3,5,7,9,11)	0.00	1.000	-4.694	2.880
STUDENTS PERCENT WHO DROP OUT	32.415	10.246	1.0	69.0
STUDENTS PERCENT PLANNING TO TAKE THE SAT	55.272	14.668	1.851	100.0
STUDENTS PER PRIMARY SCHOOL	5.629 (HUNDREDS)	1.828	.06	11.663
STUDENTS PER HIGH SCHOOL	14.592 (HUNDREDS)	7.471	.22	34.97
STUDENTS IN THE DISTRICT	18.353 (THOUSANDS;	18.820 DALLAS AND HOUSTON	.072 EXCLUDED)	66.463
STUDENTS PERCENT LIVING IN POVERTY	14.571	9.920	0.0	90.0
PERCENT FROM FEMALE HEADED HOUSEHOLDS	13.680	5.015	1.3	35.2
STUDENTS PERCENT ENGLISH 2ND LANGUAGE	3.743	5.463	0.0	36.7
STUDENTS PERCENT MIGRANT	1.437	3.836	0.0	27.985
STUDENTS PERCENT IN PUBLIC SCHOOLS	95.206	3.784	56.591	100.0
STUDENTS PERCENT HISPANIC	30.593	30.151	0.0	100.0

DESCRIPTIVE STATISTICS, Continued

	MEAN	STANDARD DEVIATION	MINIMUM	MAXIMUM
STUDENTS PERCENT BLACK	11.003	13.721	0.0	88.5
ADULTS PERCENT WITH SOME COLLEGE	32.701	13.263	6.1	77.0
ADULTS PERCENT HS GRAD & NO COLLEGE	29.140	5.697	5.9	45.9
FIVE YEAR ENROLLMENT GROWTH RATE	12.819	22.739	-100.0	637.0
LOCAL UNEMPLOYMENT RATE (INDEX)	2.528	1.183	0.0	13.7
AVERAGE READING SAT AT REGION'S TEACHER COLLEGES	421.238	33.969	354.794	480.0
REGION'S TEACHER GRADS 1985, PER 1000 PS STUDENTS	2.632	1.733	.653	7.296
BUDGET FOR OPERATING EXPENSES (PER STUDENT)	3300.718	526.278	2042.41	11081.94
BUDGET FOR ADMINISTRATION (PER STUDENT)	436.474	137.954	221.46	2209.86
BUDGET FOR INSTRUCTIONAL SERVICES (PER STUDENT)	1908.999	269.778	1055.64	5091.93
BUDGET FOR EXTRA-CURRICULAR (PER STUDENTS)	85.026	56.204	0.0	558.58
BUDGET FOR TRANSPORTATION (PER STUDENT)	102.939	58.143	0.0	938.0
BUDGET FOR MAINTENANCE (PER STUDENT)	395.619	118.965	115.91	2940.76
PROPERTY TAX BASE PER STUDENT	230410.0	232606.1	15494.0	1.33e+07
1ST YEAR SALARY	18325.12	1592.011	11518.00	24720.00
SALARY WITH 10 YEARS EXPERIENCE	24313.97	2046.102	18528.00	32602.00

TABLE 1

WEIGHTED LEAST SQUARES REGRESSION ESTIMATES
OF AVERAGE READING SCORES ON THE TEAMS EXAM FOR SCHOOL DISTRICTS IN TEXAS[1]
(Dependent variable standardized to have mean=0 and Standard Deviation=1.)
1985-86 SCHOOL YEAR

(t-ratios in parentheses)

DEPENDENT VARIABLE: DISTRICT'S AVERAGE SCORE ON TEAMS READING EXAM	FIRST GRADE	THIRD GRADE	FIFTH GRADE	SEVENTH GRADE	NINTH GRADE	ELEVENTH GRADE
TEACHERS' AVERAGE TECAT SCORE (TATS)	-.013 (-0.21)	.251 (6.12)	.245 (6.11)	.211 (5.95)	.198 (5.43)	.235 (6.82)
Add next line to TATS coefficient when TATS>1.00:	1.89	.615	.878	.668	.546	.665
	(3.35)	(1.69)	(2.45)	(2.11)	(1.66)	(2.00)
TEACHERS PERCENT 5 TO 9 YEARS EXPERIENCE	.016 (1.73)	.022 (3.70)	.007 (1.25)	.011 (2.11)	.006 (1.16)	.003 (0.65)
TEACHERS PERCENT 9+ YEARS EXPERIENCE	.013 (2.30)	.016 (4.51)	.015 (4.40)	.010 (3.36)	.014 (4.67)	.014 (4.95)
TEACHERS PERCENT MASTER'S DEGREES	.013 (3.37)	.005 (2.06)	.004 (1.64)	.005 (2.23)	-.003 (-1.35)	-.003 (-1.34)
STUDENTS PER TEACHER (STP)	-.006 (0.19)	.047 (2.42)	.036 (1.88)	.011 (0.67)	.017 (1.00)	-.023 (-1.37)
Add next line to STP coefficient when STP>18.00:	-.150	-.187	-.177	-.116	-.027	.045
	(-2.18)	(-4.22)	(-4.06)	(-2.93)	(-0.68)	(1.21)
STUDENTS PER PRIMARY SCHOOL	-.083 (-3.39)	-.054 (-3.46)	-.010 (-0.65)	-.010 (-0.74)	.025 (1.73)	-.002 (-0.17)
STUDENTS PER HIGH SCHOOL	- -	- -	- -	- -	-.004 (-0.99)	-.008 (-2.06)
STUDENTS PER DISTRICT	.002 (0.71)	-.006 (-2.94)	-.003 (-1.27)	-.002 (-1.09)	-.006 (-3.18)	.004 (2.26)
ADULTS PERCENT HS GRAD & NO COLLEGE	-.001 (-0.11)	.017 (3.30)	.010 (2.00)	.010 (2.16)	.006 (1.23)	-.001 (-0.18)
ADULTS PERCENT WITH SOME COLLEGE	.016 (3.37)	.020 (6.58)	.018 (5.93)	.018 (6.95)	.027 (9.65)	.032 (12.21)
STUDENTS PERCENT POVERTY	-.007 (-0.74)	.005 (0.74)	-.004 (-0.73)	-.001 (-0.14)	-.002 (-0.41)	-.008 (-1.49)
PERCENT FROM FEMALE HEADED HOUSEHOLDS	-.048 (-3.93)	-.018 (-2.24)	-.012 (-1.62)	-.017 (-2.45)	-.011 (-1.65)	-.001 (-0.19)
STUDENTS PERCENT ENGLISH 2ND LANG	.004 (0.21)	-.010 (-0.83)	.012 (1.04)	-.015 (-1.46)	-.025 (-2.36)	-.013 (-1.32)
STUDENTS PERCENT HISPANIC	-.007 (-2.28)	-.008 (-4.43)	-.007 (-4.01)	-.009 (-5.61)	-.010 (-5.90)	-.009 (-5.91)
STUDENTS PERCENT BLACK	-.0002 (-0.05)	-0.004 (-1.36)	-.003 (-0.96)	-.005 (-1.79)	-.015 (-5.90)	-.016 (-6.64)
NUMBER OF DISTRICTS:	890	889	886	885	857	857
VARIATION EXPLAINED[2]:	.14	.45	.46	.52	.52	.55

[1] These regressions also included: students percent in public schools, and several 0,1 variables for: border poverty districts, metropolitan cities, suburbs, rural districts, towns, and non-metropolitan growing cities.

[2] The usual R^2 measure is biased upward in weighted regressions. The measure reported here is the ratio of (a) one minus the square root of the mean squared error of the regression, adjusted for weighting, to (b) the standard deviation of the dependent variable. Hence, it is a measure of the fraction of the variation in the dependent variable that the regression has explained.

TABLE 2

WEIGHTED LEAST SQUARES REGRESSION ESTIMATES OF ELEVENTH GRADE AVERAGE SCORES AND PASS RATES, DROP-OUT RATES, AND PLANS TO ATTEND COLLEGE (i.e., to take the SAT).*
TECAT MEASURES: Teachers' Pass Rates for Elementary and High School.
(t-ratios in parentheses)

DEPENDENT VARIABLES:	AVERAGE READING SCORE GRADE 11	READING PASS RATE GRADE 11	AVERAGE MATH SCORE GRADE 11	MATH PASS RATE GRADE 11	PERCENT WHO DROP OUT	PERCENT PLANNING TO TAKE SAT
Column:	1	2	3	4	5	6
ELEMENTARY TEACHERS' TECAT PASSING RATE	.023 (2.12)	.385 (4.81)	.033 (2.64)	.335 (3.05)	-.133 (-0.62)	-.241 (-0.81)
HIGH SCHOOL TEACHERS' TECAT PASSING RATE	.039 (2.73)	.137 (1.32)	.036 (2.18)	.282 (1.98)	.397 (1.44)	-.973 (-2.47)

* These regressions use teachers' passing rates on the TECAT instead of the district-wide mean Score on the TECAT. Other variables in the estimated equations are the same as in Table 1 above and are not shown.

TABLE 3

STUDENTS' DISTRICT-AVERAGE READING SCORES FOR 1988 EXPLAINED BY SCHOOL, HOME, AND COMMUNITY INPUTS AND BY SCORES FOR 1986*
Weighted Least Squares Regression Estimates
(t-ratios in parentheses)

DEPENDENT VARIABLE: DISTRICT'S AVERAGE SCORE ON READING EXAM 1988	FIFTH GRADE	FIFTH GRADE	SEVENTH GRADE	SEVENTH GRADE	ELEVENTH GRADE	ELEVENTH GRADE
COLUMN:	1	2	3	4	5	6
TEACHERS' AVERAGE TECAT EXAM SCORE	0.216 (5.63)	0.126 (3.49)	0.258 (6.28)	0.159 (4.14)	0.161 (3.60)	0.052 (1.27)
TEACHERS' AVERAGE TECAT EXAM SCORE (Increment for Z>1)	0.600 (1.75)	0.363 (1.15)	1.245 (3.40)	0.878 (2.60)	0.507 (1.25)	0.206 (0.57)
AVERAGE SCORE TWO GRADES EARLIER (1986)	-	0.364 (12.44)	-	0.406 (12.70)	-	.535 (14.00)

* These regressions use students' average scores for 1988 as the dependent variables. The average score for the same cohort of students two grades earlier, in 1986, enters as an explanatory variable. Other variables in the estimated equation are the same as in Table 1 above and are not shown.

TABLE 4

STUDENTS' DISTRICT-AVERAGE READING SCORES* EXPLAINED BY SCHOOL, HOME, AND COMMUNITY INPUTS (USING TEACHERS' PASS RATES ON TECAT FOR ELEMENTARY AND HIGH SCHOOL)
Weighted Least Squares Regression Estimates
(t-ratios in parentheses)

DEPENDENT VARIABLE: DISTRICT'S AVERAGE SCORE ON READING EXAM	FIRST GRADE	THIRD GRADE	FIFTH GRADE	SEVENTH GRADE	NINTH GRADE	ELEVENTH GRADE
ELEMENTARY TEACHERS' READING PASS RATES	.005 (0.25)	.047 (3.53)	.034 (2.57)	.026 (2.23)	.022 (1.92)	.023 (2.07)
HIGH SCHOOL TEACHERS' READING PASS RATES	-.045 (-1.70)	.012 (0.72)	.011 (0.67)	.015 (0.97)	.021 (1.38)	.039 (2.72)

* These regressions use teachers' passing rates on the TECAT instead of the district-wide mean Score on the TECAT. Other variables in the estimated equations are the same as in Table 1 above and are not shown.

TABLE 5

TEACHER SUPPLY EQUATIONS
Two-Stage Weighted Least Squares Regression Estimates[1]
(t-ratios in parentheses)

DEPENDENT VARIABLES:	TEACHERS' AVERAGE TECAT SCORE	PERCENT 9+ YEARS EXPERIENCE	LOG(TEACHERS PER STUDENT)	PERCENT W/ MASTERS DEGREES
LOG(SALARY)	3.914 (6.06)	59.047 (6.89)	0.756 (7.23)	56.060 (5.43)
LOG(SALARY IN COMPETING DISTRICTS)	-2.116 (3.80)	-39.08 (5.29)	-0.277 (3.06)	-36.145 (4.06)
LOG(SALARY IN COMPETING OCCUPATIONS)	-0.555 (1.77)	-12.756 (3.06)	-0.176 (0.35)	-6.539 (1.30)
AVERAGE READING SAT AT REGION'S TEACHER COLLEGES	0.002 (3.37)	0.004 (0.44)	0.000 (0.83)	0.008 (0.72)
REGION'S TEACHER GRADUATES 1985, PER EXISTING TEACHER	0.023 (1.86)	-0.647 (3.91)	0.010 (4.67)	-1.448 (7.26)
LOG(STUDENTS IN THE DISTRICT)	-0.343 (1.00)	-1.170 (2.62)	-0.060 (10.72)	0.167 (0.31)
LOG(STUDENTS PER ELEMENTARY SCHOOL)	0.163 (2.18)	2.372 (2.45)	-0.044 (3:61)	-4.356 (3.73)
FIVE YEAR ENROLLMENT GROWTH RATE	0.001 (0.44)	-0.148 (9.16)	-0.001 (4.46)	-0.243 (1.25)
LOCAL UNEMPLOYMENT RATE	-0.072 (2.91)	0.445 (1.37)	0.000 (0.06)	0.841 (2.15)
ADULTS PERCENT WITH SOME COLLEGE	0.015 (5.47)	0.032 (0.88)	0.004 (8.65)	0.143 (3.32)
ADULTS PERCENT HIGH SCHOOL GRAD AND NO COLLEGE	0.006 (1.14)	0.095 (1.40)	0.001 (1.32)	-0.148 (1.81)
STUDENTS PERCENT LIVING IN POVERTY	0.010 (1.80)	-0.025 (0.34)	0.002 (2.18)	-0.105 (1.16)
STUDENTS PERCENT FROM FEMALE HEADED HOUSEHOLDS	0.004 (0.61)	0.454 (5.02)	0.002 (1.40)	0.497 (4.56)
STUDENTS PERCENT FROM MIGRANT FARMING FAMILIES	-0.113 (1.52)	-0.239 (2.35)	-0.003 (2.19)	0.116 (0.95)
STUDENTS PERCENT ENGLISH 2ND LANGUAGE	-0.043 (3.95)	-0.247 (1.71)	-0.000 (0.12)	-0.090 (0.52)
STUDENTS PERCENT BLACK	-0.442 (20.19)	-0.115 (3.63)	0.000 (1.09)	-0.044 (1.15)
STUDENTS PERCENT HISPANIC	-0.121 (7.19)	-0.037 (1.63)	0.001 (2.93)	0.137 (5.04)
NUMBER OF DISTRICTS:	887	873	887	873
VARIATION EXPLAINED[2]:	.49	.18	.31	.24

[1] These regressions also included: students percent in public schools, and several 0,1 variables for: border poverty districts, metropolitan cities, suburbs, rural districts, towns, and non-metropolitan growing cities.

[2] See notes to Table 1 for explanation.

TABLE 6

SALARIES AND OPERATING EXPENDITURES[1]
ESTIMATES FROM REDUCED FORM EQUATIONS
Weighted Least Squares Estimates
(t-ratios in parentheses)

DEPENDENT VARIABLES:	LOG(STARTING SALARY)	LOG(SALARY WITH 10YRS EXPERIENCE)	LOG(OPERATING EXPENDITURE PER STUDENT)
LOG(STARTING SALARY IN COMPETING DISTRICTS)	0.461 (5.98)	0.045 (0.06)	-0.299 (2.18)
LOG(SALARY AFTER 10YRS IN COMPETING DISTRICTS)	-0.042 (0.49)	0.409 (4.91)	0.802 (5.27)
LOG(SALARY IN COMPETING OCCUPATIONS)	0.102 (3.22)	0.136 (4.45)	0.295 (5.26)
LOG(PROPERTY TAX BASE PER STUDENT)	0.038 (5.40)	0.048 (7.03)	0.102 (8.19)
plus increment to coefficient:			
WHEN BUSINESS IS LARGEST COMPONENT	0.033 (3.49)	-0.008 (0.83)	0.053 (3.13)
WHEN OIL&GAS IS LARGEST COMPONENT	0.036 (3.62)	0.016 (1.62)	0.080 (4.53)
WHEN LAND IS LARGEST COMPONENT	-0.003 (0.29)	-0.010 (1.01)	0.020 (1.16)
AVERAGE READING SAT AT REGION'S TEACHER COLLEGES	-0.00018 (2.29)	-2.056 e-06 (0.03)	-0.00047 (3.20)
REGION'S TEACHER GRADUATES 1985, PER 1000 STUDENTS	0.002 (1.39)	-0.001 (0.59)	0.005 (1.81)
FIVE YEAR ENROLLMENT GROWTH RATE	-0.00009 (0.66)	0.00025 (1.89)	-0.00026 (1.05)
LOCAL UNEMPLOYMENT RATE	0.009 (3.22)	0.009 (3.08)	0.017 (3.32)
LOG(PER CAPITA INCOME)	0.050 (2.33)	-0.042 (2.02)	0.030 (0.80)
ADULTS PERCENT WITH SOME COLLEGE	-.0012 (3.33)	0.00089 (2.60)	0.004 (6.62)
ADULTS PERCENT HIGH SCHOOL GRAD AND NO COLLEGE	-0.001 (2.23)	0.0005 (0.85)	0.002 (1.53)
STUDENTS PERCENT LIVING IN POVERTY	0.00009 (0.14)	0.0007 (1.14)	0.005 (4.08)
STUDENTS PERCENT FROM FEMALE HEADED HOUSEHOLDS	-0.0001 (0.17)	0.001 (1.69)	0.005 (3.84)
LOG(STUDENTS IN THE DISTRICT)	0.024 (6.70)	0.017 (4.94)	-0.018 (2.78)
STUDENTS PERCENT BLACK	.00007 (0.31)	-0.001 (4.50)	-0.0003 (0.742)
STUDENTS PERCENT HISPANIC	0.0003 (1.63)	.00001 (0.06)	0.001 (3.07)
NUMBER OF DISTRICTS;	887	887	887
VARIATION EXPLAINED[2]:	.36	.37	.31

[1] These regressions also included: students per elementary school, percent migrant, percent with English 2nd language, percent in public schools. Also, they include several 0,1 variables for: border poverty districts, metropolitan cities, suburbs, rural districts, towns, and non-metropolitan growing cities.

[2] See notes to Table 1 for explanation.

TABLE 7

WEIGHTED LEAST SQUARES REGRESSION ESTIMATES
OF AVERAGE READING SCORES ON THE TEAMS EXAM FOR SCHOOL DISTRICTS IN TEXAS.*
DEPENDENT VARIABLE IS COMPOSITE SCORE FOR GRADES 3, 5, 7, 9, 11.
(Dependent variable standardized to have mean=0 and standard deviation=1.)

(t-ratios in parentheses)

COLUMN:	1	2	3	4	5	6
TEACHERS' AVERAGE TEXAT SCORE (TATS)	0.238 (7.75)	0.260 (8.39)	-	-	-	0.240 (7.83)
Add next line to TATS coefficient if TATS>1.00:						
	0.860 (2.89)	0.991 (3.29)	-	-	-	0.896 (3.02)
TEACHERS PERCENT 5 TO 9 YEARS EXPERIENCE	0.009 (1.95)	0.009 (2.02)	-	-	-	0.008 (1.82)
TEACHERS PERCENT 9+ YEARS EXPERIENCE	0.014 (5.12)	0.015 (5.68)	-	-	-	0.015 (5.39)
STUDENTS PER TEACHER (SPT)	0.009 (0.54)	0.020 (1.34)	-	-	-0.008 (0.47)	-0.002 (0.10)
Add next line to STP coefficient if STP>18.00:						
	-0.118 (3.26)	-0.113 (3.26)	-	-	-0.127 (3.40)	-0.120 (3.42)
TEACHERS PERCENT MASTERS DEGREES	0.001 (0.47)	0.002 (0.90)	-	-	-	0.0009 (0.47)
LOG(SALARY)	0.756 (2.19)	-	-	1.484 (4.57)	1.438 (4.49)	1.015 (3.23)
LOG(SALARY IN COMPETING DISTRICTS)	-0.350 (0.92)	-	-0.428 (1.09)	-0.715 (1.75)	-0.564 (1.39)	-0.330 (0.87)
LOG(SALARY IN COMPETING OCCUPATIONS)	-0.890 (3.71)	-	-0.813 (3.20)	-0.797 (3.10)	-0.833 (3.28)	-0.858 (3.60)
BUDGET FOR ADMINISTRATION (BFA)	0.004 (2.01)	-	0.009 (3.92)	0.008 (3.41)	0.007 (2.98)	0.004 (1.77)
Add next line to BFA coefficient if BFA>310:						
	-0.004 (2.07)	-	-0.009 (4.12)	-0.008 (3.52)	-0.007 (3.04)	-0.004 (1.79)
BUDGET FOR INSTRUCTIONAL SERVICES (BFIS)	0.00021 (1.62)	-	0.00066 (5.86)	-	-	-
Add next line to BFIS coefficient if BFIS>2180:						
	-0.000069 (0.39)	-	-0.00041 (2.28)	-	-	-
BUDGET FOR EXTRA-CURRICULAR	0.001 (2.65)	-	0.002 (3.76)	0.002 (3.61)	0.002 (3.8)	0.001 (2.61)
BUDGET FOR TRANSPORTATION	-0.001 (3.65)	-	-0.002 (4.12)	-0.001 (3.27)	-0.002 (4.31)	-0.001 (3.50)
BUDGET FOR MAINTENANCE	-0.00045 (2.22)	-	-0.00017 (0.80)	0.000059 (0.30)	-0.00012 (0.61)	-0.0003 (1.93)
NUMBER OF DISTRICTS:	838	838	838	838	838	838

* These regressions also include all of the school size, district size, and community background variables shown in Table 1 and listed at the bottom of that table as included but not shown.

TABLE 8

WEIGHTED LEAST SQUARES REGRESSION ESTIMATES OF AVERAGE READING SCORES ON THE TEAMS EXAM FOR SCHOOL DISTRICTS IN TEXAS.*
DEPENDENT VARIABLE IS COMPOSITE SCORE FOR GRADES 3, 5, 7, 9, 11.

To facilitate comparisons, first two columns same as in Table 7
(t-ratios in parentheses)

COLUMN:	1	2	3	4	5
TEACHERS' AVERAGE TECAT SCORE (TATS)	0.238 (7.75)	0.260 (8.39)	-	0.266 (8.71)	-
Add next line to TATS coefficient if TATS>1:					
	0.860 (2.89)	0.991 (3.29)	-	1.030 (3.46)	-
TEACHERS PERCENT 5 TO 9 YEARS EXPERIENCE	0.009 (1.95)	0.009 (2.02)	-	0.010 (2.12)	-
TEACHERS PERCENT 9+ YEARS EXPERIENCE	0.014 (5.12)	0.015 (5.68)	-	0.016 (6.17)	-
STUDENTS PER TEACHER (SPT)	0.009 (0.54)	0.020 (1.34)	-	0.007 (0.40)	-
Add next line to STP coefficient if STP>18.00:					
	-0.118 (3.26)	-0.113 (3.26)	-	-0.118 (3.41)	-
TEACHERS PERCENT MASTERS DEGREES	0.001 (0.47)	0.002 (0.90)	-	0.003 (1.44)	-
LOG(TOTAL OPERATING EXPENSES)	-	-	0.320 (2.52)	-0.141 (0.93)	0.143 (1.22)
LOG(SALARY)	0.756 (2.19)	-	-	-	-
LOG(SALARY IN COMPETING DISTRICTS)	-0.350 (0.92)	-	-0.490 (1.21)	-0.094 (0.25)	-
LOG(SALARY IN COMPETING OCCUPATIONS)	-0.890 (3.71)	-	-0.663 (2.60)	-0.774 (3.30)	-
BUDGET FOR ADMINISTRATION (BFA)	0.004 (2.01)	-	-	-	-
Add next line to BFA coefficient if BFA>310:					
	-0.004 (2.07)	-	-	-	-
BUDGET FOR INSTRUC-TIONAL SERVICES (BFIS)	0.00021 (1.62)	-	-	-	-
Add next line to BFIS coefficient if BFIS>2180:					
	-0.000069 (0.39)	-	-	-	-
BUDGET FOR EXTRA-CURRICULAR	0.001 (2.65)	-	-	-	-
BUDGET FOR TRANSPORTATION	-0.001 (3.65)	-	-	-	-
BUDGET FOR MAINTENANCE	-0.00045 (2.22)	-	-	-	-
NUMBER OF DISTRICTS:	838	838	838	838	838

* These regressions also include all of the school size, district size, and community background variables shown in Table 1 and listed at the bottom of that table as included but not shown.

SCHOOL FINANCE REFORM IN TEXAS: THE *EDGEWOOD* SAGA

MARK YUDOF*

As one pessimist has opined, school finance reform is like a Russian novel: it's long, tedious, and everybody dies in the end. For that reason, among others, I will keep my remarks brief today. Besides, to paraphrase Samuel Johnson, there are some people who are not only dull themselves but they bring out dullness in others.

For more than fifty years, Texas has been in a more or less constant process of reforming its finance system for public education. Each reform has led to the infusion of more state dollars to guarantee a higher minimum expenditure per pupil and to narrow disparities between poor and affluent school districts. Every reform was followed by a period of relative complacency. However, during each complacent period, inflation, expanding enrollments, new state and federal mandates, and higher expenditures by richer districts caused the disparities to grow and fester, leading poorer districts and their allies to press for the next round of reforms. This process continued unabated even after the United States Supreme Court upheld the state's system in *San Antonio Independent School District v. Rodriguez* in 1973.[1] Lawsuits in this domain alter only the rules of engagement; they never settle the underlying dispute. Too much is at stake.

Sixteen years after *Rodriguez*, the Supreme Court of Texas entered the quagmire, holding in *Edgewood Independent School District v. Kirby (Edgewood I)*[2] that the state's school financing system violated the state constitution.[3] While *Edgewood I* had enormous political, educational, and policy consequences for Texas, it was a genuinely unremarkable opinion when viewed against legal developments in other states. The Texas Supreme Court construed the constitutional mandate of efficiency in public education to require fiscal neutrality.[4] Fiscal neutrality means

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[1] 411 U.S. 1 (1973).

[2] 777 S.W.2d 391 (Tex. 1989).

[3] *See* TEX. CONST. art. VII, § 1.

[4] *Edgewood I*, 777 S.W.2d at 397.

that expenditures on education must be a function of the wealth of the state as a whole and not of the wealth of each of the more than 1000 school districts in Texas.[5] A property tax of one penny per $100 of assessed value in a poor district must yield the same revenue as that rate would yield in a district with ten or even a hundred times its property wealth. This definition of equality—really taxpayer equity—echoes the plaintiffs' arguments in *Rodriquez* and is similar to supreme court decisions in other states. (Fiscal neutrality decisions are usually indistinguishable even to the kremlinologists of school finance reform.)

But there is one aspect of *Edgewood I* that was interesting and important—particularly from the vantage point of devising practical responses to the court's decision. The court drew back from requiring complete or perfect fiscal neutrality; rather, it stated that students in different districts must have "substantially" equal sums of money available for education.[6] Those involved in the reform process—legislators, lawyers, educators, and the parties themselves—took this to mean that the state need not guarantee exactly the same yield per penny of tax effort in the poorer districts as in the very richest districts—those districts, often having few students, but with millions of dollars of property wealth per pupil. "Substantially equal" access does not mean "absolutely equal" access to education funds. While the parties and different policymakers disagreed about how high the level should be, whether ninety or ninety-five or ninety-eight percent of students or school districts should be within the fiscally neutral system, they did not disagree on the basic ground rules for reform.

As one would expect, the response to *Edgewood I* was formulated through a process of tough political bargaining, with the legislature convening for a regular session and number of special sessions, and the governor insisting upon no new taxes. The ultimate compromise, embodied in Senate Bill 1,[7] involved a continuation of a multi-tiered financing system and the infusion of nearly $1 billion in new state funds (and new taxes) and a phased-in, multi-year plan for satisfying the court's order. The "out years" of the plan were fuzzy, and the experts disagreed on what degree of equity would be achieved at full implemen-

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[5] *Id.*

[6] *Id.*

[7] Act of June 7, 1990, 71st Leg., 6th Called Sess., ch. 1, 1990 Tex. Gen. Laws 1 (codified in scattered sections of TEX. EDUC. CODE ANN. § 16 (Vernon 1991)).

tation. But the important point, for present purposes, is that Senate Bill 1 essentially exempted the wealthiest districts from the plan and used state funds to guarantee tax yields in the other districts. In other words, the Texas Legislature left out 132 of the richest school districts in Texas, districts with about 170,000 of the state's 3.3 million pupils.[8] A penny of tax effort in the poorer districts would yield the same amount of money for education as a penny at the 95th percentile of wealth per pupil—but not the 100th percentile. The 100% solution would have required many tens of billions of dollars, a sum that probably would have exceeded the state's current total budget for all goods and services. The ninety-five percent solution was not cheap, but it was economically and politically feasible. The rallying cry was "95 in '95," the 95th percentile of equalization by the year 1995.

In January 1991 the supreme court overturned Senate Bill 1 in the *Edgewood II* decision.[9] That decision is genuinely remarkable. The court did not hold that the 95th percentile was too low, that the phase-in period was too long, or that the legislature's promises for the out years were illusory. Rather, the court held that the legislature's approach was conceptually flawed[10] and that it need not even bother to review the evidence and the claims and counterclaims about what would be achieved by 1995.[11] "To be efficient, a funding system that is so dependent on local . . . property taxes must draw revenue from *all* property at a substantially similar rate."[12] This implies that a system must include every district in the state, no matter how rich or small, and anything short of that is per se unconstitutional. In short, "substantially" equal access meant perfectly equal access—with only minor differences in tax rates being acceptable.[13]

In the real world, perfection (or near perfection) is expensive. "Perfect" diamonds cost many times what merely good quality diamonds cost. A bottle of twenty-five-year-old scotch typically costs four times what one would spend for a twelve-year-old bottle. A BMW will sell for twice as much as a Honda. Perfection also brings conflict with other values and priorities. The

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[8] *See* Edgewood Indep. School Dist. v. Kirby (Edgewood II), 34 Tex. Sup. Ct. J. 287, 290 (1991).

[9] *Id.* at 287.

[10] *See id.* at 289–90.

[11] *Id.* at 289.

[12] *Id.* at 290.

[13] *See id.*

"perfect" or best health-care system may leave few resources for criminal justice or mental health. The public policy that would completely eliminate child abuse and neglect may undermine the autonomy and privacy of families. The best industrial policy for enhancing worker productivity may have a devastating impact on the environment or conditions of employment. As Voltaire once said, "the best is the enemy of the good." The epiphenomena of perfection are highly imperfect.

The same is true in the domain of school financing. Under *Edgewood II*, every plan considered by the legislature in the spring of 1990, including those favored by the plaintiffs, is unconstitutional. Under a perfect fiscal neutrality regime, a property tax of a penny per $100 of assessed value in a poor district with $20,000 per pupil property value would yield two dollars per pupil. An equal tax effort in a wealthy district with $5,000,000 per pupil property value would yield $500 per pupil. It does not take a mathematical wizard to figure out that, unless some limits are established on the fundraising capacity of the wealthy district, Texas cannot establish fiscal neutrality between such districts without avoiding confiscatory taxes, bankruptcy, or the complete abandonment of other vital state services. When framed in these terms, there is no fiscal solution to the crisis. The whole education system must be restructured—and the supreme court indicated as much. State subsidies alone cannot do the job. Indeed, no state, other than perhaps California or Hawaii, currently would satisfy the standard of *Edgewood II*.

What might Texas do? There are a variety of approaches. First, the state might assume full responsibility for collecting the taxes for financing public education. The state would levy income, sales, property, or other taxes and distribute the revenues on a nondiscriminatory basis. (In Texas, an income or state property tax would require a constitutional amendment authorizing such taxes.)[14] The result would be the abolition of the local property tax and the further centralization of educational policymaking at the state level. Local communities would no longer be involved in the financing of public education.

Second, Texas might consolidate school districts or tax bases of school districts. Regional districts, particularly if the lines were carefully gerrymandered, would diminish the disparities in wealth between districts. A uniform tax rate would be estab-

[14] *See* TEX. CONST. art. VIII, § 1-e.

lished for the entire regional district, and poorer areas within the regional district would pay less in taxes than they received back from the regional governing authority. These large regional districts might follow county lines (although, generally speaking, cross-county districts would be better in terms of school finance reform) and they generally would not describe existing school districts or communities. Depending on the nature of the consolidation, there might be a diminution of authority at the local level, less grass-roots involvement of parents and voters in public schools, and educational districts with far larger geographic areas and student populations. Such "megadistricts" might produce some economies of scale (except in sparsely populated rural areas), but they also might exacerbate other problems. The trend in a number of large urban areas (including New York City, Chicago, and Los Angeles) has actually been toward decentralization of administrative authority as a means of blunting increased bureaucratization and promoting parental involvement.

Third, the state might adopt a "recapture" plan. Without going into the gory details of such an approach, let me note that rich school districts would be permitted to use their substantial property wealth for education, but would not be permitted to keep all of the funds that they were able to raise. Thus, to return to my earlier example, the rich district might be permitted to retain only $251 of the $500 it is able to raise with a tax of a penny per $100 of assessed value. The remaining $249 would be sent to the poor district that raised only two dollars at the same tax rate, thereby guaranteeing equal revenues of $251 to both districts. The net effect is to equalize the tax bases of districts by means of revenue transfers.

The recapture approach has some appeal to state officials because it enables them to say they achieved fiscal neutrality, without raising state taxes. The problem is that it is likely to result in higher local property taxes, as affluent districts seek to preserve their programs with lower yields for their tax effort. It also places a de facto cap on local expenditures. At some point, rich districts will keep so little of what they raised that they will not tax themselves at a higher rate—even if programs suffer. In addition, it may be hard for many voters to swallow the idea that they are obliged to pay for public schools in other districts (although this obligation is frequently accepted with respect to other state-wide services and taxes). Furthermore, it appears

that the Texas Constitution may represent an insurmountable obstacle to recapture.[15]

Finally, the state can combine one or more of the other approaches with a system of state subsidies. For example, the state might establish countywide districts and use state funds to guarantee a uniform yield between rich and poor counties. The likely cost of achieving fiscal neutrality would be much lower because variations in county property wealth per pupil are much narrower than the variations in wealth among the more than 1000 school districts. The size of the subsidies would generally be in an inverse relationship to the size of the regional districts; i.e., the smaller the district, the larger the state subsidy that would be required. If the state were divided into six large regions of nearly identical wealth, state expenditures to guarantee yields would be quite modest.

In the midst of the legislature's deliberations over the politically unappealing avenues to achieving perfect fiscal neutrality, five justices on the supreme court recanted. In *Edgewood III*, in the context of a motion for reconsideration, the court held that perfect fiscal neutrality was not required once an "efficient" system had been established.[16] What is an efficient system? Apparently, it is one that includes all of the property in the state in the plan, that allows poor districts some access to the wealth of more affluent districts (by establishment of consolidated tax districts), and that still provides substantially (but not perfectly) equal access to resources.[17] Thus, some unequalized local enrichment clearly is permissible.[18] But in returning to the *Edgewood I* formulation, the court declined to identify the precise point at which too much local enrichment would tip the balance against fiscal neutrality and in favor of unconstitutionality.

Edgewood III was greeted with a mixture of consternation and relief. The state house and senate approved conceptually similar but conflicting bills.[19] The conference committee of the two bodies then approved a complex measure that would combine consolidated county tax districts (with some modifications), recapture, and guaranteed yields to achieve compliance with the

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[15] Edgewood Indep. School Dist. v. Kirby (Edgewood III), 34 Tex. Sup. Ct. J. 368, 368 (1991) (citing TEX. CONST. art. VIII, § 1-e, art. VII, § 3).

[16] *Id.*

[17] *See id.* at 368 n.2.

[18] *Id.* at 368–69.

[19] S.B. 351, 72d Leg., Regular Sess. (1991).

court's mandate.[20] The bill passed in the senate and failed in the house. Some legislators questioned the constitutionality of the recapture and enrichment provisions. Some opponents of the bill perceived that the enactment of the measure would have produced less local control, higher property taxes, and a levelling down in terms of the quality of educational programs. Others argued that the proposed system was still too dependent on local property taxes and allowed too much unequalized enrichment by wealthy districts. Still others feared that many of the large urban districts (Houston, Dallas, Austin, Fort Worth) would be big losers. In terms of the state as a whole, the large urban districts are relatively wealthy (often having nearly twice the average property wealth per student as the state as a whole). As a result, the bill probably would have required those districts to transfer some tax revenue, despite the fact that they have large populations of poor and minority students with costly educational needs.

What is likely to happen? Even Nostradamus would be out of his depth in predicting the future of school finance reform in Texas. The supreme court has not spoken with great clarity; the picture would be far less confusing if *Edgewood II* and *III* had never been decided. The deadline imposed by the courts, April 1, 1991, has passed. The legislature is deeply divided. Some members of the legislature are acting in a statesman-like manner; others do not understand the complex issues; still others vote in accordance with how the school districts in their house and senatorial districts will fare. The only certainty is that the process of action and reaction between the courts and the legislature is likely to be long and tedious. The story is beginning to resemble *War and Peace*, though it is likely to be less amusing. One can only hope that its conclusion will be less catastrophic.

[20] *Id.*

NOTE

MEETING THE THIRD WAVE: LEGISLATIVE APPROACHES TO RECENT JUDICIAL SCHOOL FINANCE RULINGS

GAIL F. LEVINE*

The latest wave of school finance litigation, based on the education clauses of state constitutions, promises more victories for plaintiffs and more challenges for legislators who will have to meet the new judicial mandates.[1] Although successful only twice before 1989,[2] the use—and success—of this litigation tactic exploded in 1989 and 1990, when it sparked reform in Texas, Washington, Kentucky, and Montana.[3]

People have been trying to reform school finance systems through litigation for twenty years. The first wave of litigation, which challenged financing systems with the federal Constitution's equal protection clause, began in 1971 with *Serrano v. Priest*[4] and ended with *San Antonio Independent School District v. Rodriguez*[5] in 1973. The second wave of litigation, alleging

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[1] This Note follows the litigation taxonomy of Thro, *The Third Wave: The Impact of the Montana, Kentucky, and Texas Decisions on the Future of Public School Finance Reform Litigation*, 19 J. LEGAL EDUC. 219 (1990). In his article, Thro discusses the Third Wave victories in Rose v. Council for Better Educ., 790 S.W.2d 186 (Ky. 1989); Edgewood Indep. School Dist. v. Kirby (Edgewood I), 777 S.W.2d 391 (Tex. 1989), and Helena Elementary School Dist. v. State, 236 Mont. 44, 769 P.2d 684 (1989). Abbott v. Burke, 119 N.J. 287, 575 A.2d 359 (1990) was decided after Thro's article was published.

Other commentators have grouped the litigation similarly. *See, e.g.*, W. Taylor & D. Piche, *A Report on Shortchanging Children: The Impact of Fiscal Inequity on the Education of Students at Risk*, H.R. DOC. NO. 36-895, 101st Cong., 2d. Sess. 49 (1990) at 7–17, 63–71 [hereinafter *Taylor Report*]; Underwood & Sparkman, *School Finance Litigation: A New Wave of Reform*, 14 HARV. J.L. & PUB. POL'Y 517 (1991); McUsic, *The Use of Education Clauses in School Finance Reform Litigation*, 28 HARV. J. ON LEGIS. 307 (1991).

[2] Thro, *supra* note 1, at 239–40 (citing Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273 (1973), *cert. denied sub. nom.* Dickey v. Robinson, 414 U.S. 976 (1973); Seattle School Dist. No. 1 of King County v. State, 90 Wash. 2d 476, 585 P.2d 71 (1978)).

[3] *See, e.g.*, *Edgewood I*, 777 S.W.2d at 392; *Seattle*, 90 Wash. at 525, 585 P.2d at 98; *Rose*, 790 S.W.2d at 194–95; and *Helena*, 236 Mont. at 54, 769 P.2d at 690.

[4] 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971), *cert. denied*, 432 U.S. 907 (1977).

[5] 411 U.S. 1 (1973), *reh'g denied*, 411 U.S. 959 (1973).

violations of state constitution education clauses and/or state constitution equality guarantee clauses, began thirteen days after *Rodriguez* with *Robinson v. Cahill* (*Robinson I*).[6]

Only a few victories for school finance reform emerged from the two waves of litigation efforts.[7] In 1989, however, three rapid victories—the first since 1983—inaugurated the third wave of school finance reform litigation in which courts are overturning school finance systems solely because they violate state constitution education clauses.[8] To date, six third wave cases have struck down school finance systems.[9] Although not every third wave case has produced a plaintiff's victory,[10] and although it may still be too early to tell whether the string of recent successes will trigger additional victories, at least one expert predicts that "the education clauses . . . will be the primary focus of future school finance reform litigation" because the tactic makes it "easier for a state court to reach a pro-finance reform result" and because "sufficient precedent" now backs them.[11] Several other commentators have also suggested that potential litigants base their actions on the state education clause.[12]

Although all third wave plaintiffs continue to employ the same litigation strategies as the plaintiffs in the first and second wave cases, judges are prescribing widely varying mandates. The reforms that third wave courts demand of the legislatures fall roughly into three groups: those that require total revenue equal-

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[6] 62 N.J. 473, 303 A.2d 273 (1973), *cert. denied*, 414 U.S. 976 (1973).

[7] In addition to *Serrano*, *Rodriguez*, and *Robinson I*, victories were achieved in the following first and second wave cases: Dupree v. Alma School Dist. No. 30, 279 Ark. 340, 651 S.W.2d 90 (1983); Washakie County School Dist. No. 1 v. Herschler, 606 P.2d 310 (Wyo. 1980); Pauley v. Kelly, 255 S.E.2d 859 (W. Va. 1979); Horton v. Meskill, 172 Conn. 615, 376 A.2d 359 (1977). Thro, *supra* note 1, at 221 n.13.

[8] *Edgewood I*, 777 S.W.2d 391; *Helena*, 236 Mont. 44, 769 P.2d 684; *Rose*, 790 S.W.2d 186.

[9] These cases are: *Rose*, 790 S.W.2d at 216; *Helena*, 236 Mont. at 55, 769 P.2d at 690; *Abbott*, 119 N.J. at 385, 575 A.2d at 408; *Robinson I*, 62 N.J. at 519, 303 A.2d at 297; *Edgewood I*, 777 S.W.2d at 391; *Seattle*, 90 Wash. 2d at 522, 585 P.2d at 96 (1978).

According to Thro, *supra* note 1, at 228–29, *Robinson I* and *Seattle* are second wave cases because they were decided before 1989. Because they were decided solely on the state education clauses, however, I include them in my analysis of third wave cases.

[10] A challenge based partly on the state education clause failed recently in Wisconsin. *See* Kukor v. Grover, 48 Wis. 2d 469, 436 N.W.2d 568 (1989). Similar challenges before 1989 were rarely successful. *See* Thro, *supra* note 1, at 240–41.

[11] Thro, *supra* note 1, at 241–42.

[12] *See* Underwood & Sparkman, *supra* note 1; McUsic, *supra* note 1; Thompson, Underwood & Camp, *Equal Protection Under the Law: Reanalysis and New Directions in School Finance Litigation*, in THE CONCEPT OF JUSTICE IN THE LAW 327, 332 (1990).

ity,[13] those that require minimum revenue equality,[14] and those that require access equality.[15]

Years can pass before a legislature satisfactorily meets the judicial challenge of its state court. For example, Texas's latest episode of school finance litigation and legislation has lasted nearly seven years. It began in 1984, when a group of property-poor school districts led by the Edgewood Independent School District ("I.S.D.") filed a suit challenging the constitutionality of the Texas school finance system.[16] By 1987, Edgewood I.S.D., joined by sixty-seven other school districts as well as students and parents, had won a trial court declaration that the school finance system violated the state's constitutional mandate "to establish and make suitable provision for the support and maintenance of an efficient system of public free schools."[17] Although the Texas court of appeals reversed the decision of the trial court,[18] Texas became a leading participant in the third wave when a unanimous Texas Supreme Court struck down the system based solely on the state education clause.[19]

The problem at the heart of *Edgewood I* is common to the school finance systems of forty-eight other states:[20] differences

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[13] *See, e.g., Abbott*, 119 N.J. at 385–86, 575 A.2d at 408 (holding that poorer urban school districts must have budgets substantially equal to property-rich, suburban districts).

[14] *See, e.g., Helena*, 236 Mont. at 54, 769 P.2d at 690 (holding that Montana failed to provide every district with a budget that could finance an education program of sufficiently high "quality"); *Rose*, 790 S.W.2d at 217 (holding that Kentucky must provide "adequate" funding for every district in the school system); *Seattle*, 90 Wash. 2d at 537, 585 P.2d at 97 (holding that Washington must ensure every district in the school system "sufficient funds" to support a "basic education"); *Robinson I*, 62 N.J. at 515, 303 A.2d at 295 (holding that New Jersey must ensure every district in the school system funds adequate to "equip a child for his role as a citizen and as a competitor in the market place").

[15] *See, e.g., Edgewood I*, 777 S.W.2d at 397; *Edgewood II*, 34 Tex. Sup. Ct. J. 287, 290 (1991). Both cases held that Texas must guarantee all school districts substantially equal access to educational funds.

[16] The suit, originally styled Edgewood Indep. School Dist. v. Bynum, No. 362,516 (250th Dist. Ct., Travis Cty., Tex. May 23, 1984), was later modified to address a new education law enacted in 1984 (House Bill 72, 1984 Tex. Sess. Law Serv. 28 (Vernon)) and refiled as Edgewood Independent School District v. Kirby, No. 362,516, slip op. (250th Dist. Ct., Travis Cty., Tex. June 1, 1987). *See* K. HAYES & D. SLOTTJE, EQUALITY AND INEQUALITY IN TEXAS SCHOOL FINANCE 3 (1990); *Key Dates in School Finance Case*, Dallas Morning News, Sept. 26, 1990, at 16A, col. 1.

[17] *Edgewood I*, slip op. at 6 (citing TEX. CONST. art. VII, § 1).

[18] Kirby v. Edgewood Indep. School Dist., 761 S.W.2d 859 (Tex. App. 1988).

[19] *Edgewood I*, 777 S.W.2d 391 (Tex. 1989).

[20] Hawaii and the District of Columbia each operate a single school system for their jurisdictions. Note, *To Render Them Safe: The Analysis of State Constitutional Provisions in Public School Finance Reform Litigation*, 75 VA. L. REV. 1639, 1647 (1989); *Taylor Report*, *supra* note 1, at 4 n.7.

in property wealth among school districts produce different abilities to raise funds. The same tax levied in a wealthy district yields much more than it does in a poorer district. Because fifty-seven percent of Texas's education funds comes from local property taxes,[21] the gap between tax effort and tax yield made it difficult for some school districts to raise even enough funds to support state-mandated programs.[22] The solution mandated by *Edgewood I* required the legislature to guarantee that a district's ability to raise funds for education would not depend substantially upon its property wealth. In effect, the decision required that all districts have substantially equal access to educational dollars.[23]

The court required the legislature to meet its mandate by May 1, 1990, or face a statewide school closing.[24] Under the pressure of this verdict, the 71st Legislature convened on February 27, 1990, but deadlocked through three special legislative sessions and broke its court-ordered deadline.[25] Fearing the judicial imposition of school closings, the legislature and governor enacted Senate Bill 1 on June 7, 1990.[26] Although *Edgewood I* contained no "magic formulas" to help legislators determine whether proposed laws would be constitutional,[27] the requirement of "substantial" access equality provided some latitude for legislative action. Relying on this apparent latitude, the authors of Senate Bill 1 guaranteed equal revenue for equal effort, to most, but not all, school districts, and for most, but not all, expenses.

Most lawyers and policymakers believed that *Edgewood I* allowed the exclusion of some fraction of the wealthiest school

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[21] Thirty-nine percent of education funding comes from state funds and seven percent from federal sources. Property tax, the only local tax source available to Texas school districts, constitutes 89% of locally raised funds. B. WALKER & C. CLARK, BRIEFING PAPER: TEXAS PUBLIC SCHOOL FINANCE AND RELATED ISSUES 8 (Texas Center for Educ. Research, rev. ed. 1990) [hereinafter BRIEFING PAPER].

[22] *Edgewood I*, 777 S.W.2d at 392.

[23] The court in *Edgewood I* wrote, "[c]hildren who live in poor districts and children who live in rich districts [must] be afforded a *substantially* equal opportunity to have access to educational funds." 777 S.W.2d at 397 (emphasis added). Specifically, "districts must have *substantially* equal access to similar revenue per pupil at similar levels of tax effort." *Id.* (emphasis added).

[24] *Id.* at 399 (modifying trial court's injunction by extending the deadline). *See Edgewood I*, slip op. at 7.

[25] *Key Dates in School Finance Case*, Dallas Morning News, Sept. 26, 1990, at 16A, col. 1.

[26] *Id.*

[27] Interview with Albert Kauffman, lead counsel for plaintiffs in *Edgewood I* (Mar. 8, 1990).

districts from the equalization plan.[28] Therefore, Senate Bill 1 excluded districts like Glen Rose I.S.D., home to 1170 students[29] and one revenue-generating nuclear power plant, whose students were among the top five percent in taxable property wealth. As the state argued, "the annual cost of equalizing all districts to the revenue levels attainable by the richest districts would be approximately four times the annual cost of operation of the entire state government."[30] Further, *Edgewood I*'s mandate of a system promising substantially equal access to educational funds seemed to intentionally temper the *Edgewood I* district court's harsh requirement that the system provide "each school district in this state . . . the same ability as every other district" to raise education funds.[31] Based on this assumption that the standard was more flexible,[32] Senate Bill 1 promised equal gains for equal effort only up to the point necessary to maintain equality in the system as a whole.[33] Beyond that point, however, Senate Bill 1 allowed districts to supplement their budgets with independent, locally raised funds.

Plaintiffs immediately challenged the new law in a second suit, *Edgewood Independent School District v. Kirby* (*Edgewood II*).[34] A few months later, a state trial court found that the law did not meet the mandate of *Edgewood I*, and gave the legislature until September 1, 1991 to revamp the system again.[35] After an expedited appeal, the Texas Supreme Court rendered its decision, agreeing that Senate Bill 1 failed to meet *Edgewood I*'s mandate, moving the deadline up to allow the legislature only nine and a half weeks to reform the system, and clarifying the mandate in *Edgewood I*.[36] Eliminating the latitude that lawmakers thought the "substantial" access equality mandate of

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[28] Mark G. Yudof, Testimony on School Finance Reform Before the Texas Senate Finance Committee, Feb. 4, 1991.

[29] *Edgewood II*, 34 Tex. Sup. Ct. J. at 290.

[30] *Id.* at 289.

[31] *Edgewood I*, slip op. at 5.

[32] Brief for State-Appellees and Cross-Appellants at 46, *Edgewood II*, 34 Tex. Sup. Ct. J. 287 (1991) [hereinafter Brief for State-Appellees].

[33] *Id.* at 46.

[34] No. 362,516, slip op. (250th Judicial Dist. 1990), *aff'd*, 34 Tex. Sup. Ct. J. 287 (1991).

[35] *Edgewood II*, slip op. at 3. If the 72d Legislature failed to meet the deadline, the court would "consider enjoining the expenditure of all state and local funds or ordering defendants to disburse available funds in the most efficient manner until such time as the Legislature does establish an efficient system [that guarantees substantially equal access to educational dollars]." *Id.*

[36] *Edgewood II*, 34 Tex. Sup. Ct. J. 287.

Edgewood I provided, *Edgewood II* held that the constitution's education clause required the state to guarantee equal revenue for equal tax effort.

Edgewood II eliminated the assumption of *Edgewood I* that the wealthiest districts may be excluded from an equalization plan. The court made it clear that such exclusions are unconstitutional.[37] Because this mandate imposes such a tremendous cost to the state, the court suggested one cost-saving solution, the consolidation of rich and poor districts.[38] The court so strongly emphasized consolidation that many lawmakers assumed it too was mandated[39] and have incorporated it into their proposals.[40]

As for the second issue of how many pennies of tax effort the system must include, *Edgewood II* is again much stricter than *Edgewood I*. *Edgewood I*'s standard of "substantially equal access" seemed to permit some variation in each district's gains per penny of tax.[41] *Edgewood II*, however, is widely interpreted to forbid any unequalized revenue. The supreme court opinion lets stand the *Edgewood II* district court's reversion to the *Edgewood I* district court's stricter standard which forbade any amount of unequalized funds. Behind the stricter standard is a cynical, but perhaps realistic, rationale: if the courts permit fiscal inequalities above a legislatively set level of adequacy, "the state would be free to fund . . . at any level it deemed adequate, and then label the local districts' use of [locally raised, unequalized funds as] 'supplementation' of an efficient [i.e., fiscally neutral] system."[42] Even the defendants assumed that

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[37] The Texas Supreme Court noted that, "[t]o be efficient, a funding system that is so dependent on local ad valorem property taxes must draw revenue from all property at a substantially similar rate." *Edgewood II*, 34 Tex. Sup. Ct. J. at 290. The court cited disapprovingly three school districts, all in the top five percent of wealth, that tax themselves very little but raise a lot of revenue. *Id.*

[38] By consolidating rich, low-taxing school districts with their poor, high-taxing neighboring school districts and imposing a uniform tax across the consolidated region, the state could raise more revenue from the wealthy districts and use it to aid the poorer ones, easing the state's financial burden. *Id.*

[39] Although the *Edgewood II* opinion insists that it does "not prescribe the means which the legislature must employ in fulfilling its duty," *id.* at 291, the opinion is the most specific school finance reform handed down in any state. John Augenblick, a Denver-based consultant who has advised several state governments on school finance reform, believes that the *Edgewood II* court has "mixed up . . . measures of equity [and] methods of getting there." Interview with John Augenblick (Feb. 19, 1991).

[40] *See* discussion of proposals, *infra* Part III.

[41] Brief for State-Appellees, *supra* note 32, at 5.

[42] *Edgewood II*, slip op. at 19.

latitude to provide unequalized local revenue no longer exists,[43] and most of the proposals before the legislature last spring forbade it.[44]

Implicit in the *Edgewood* litigation and in all such school finance litigation is a desire to boost the quality of education generally, not just to equalize its distribution. The plaintiffs' desire to improve the education provided by schools in the poorer districts was the original motivation of the litigation.[45] The *Edgewood I* court found Texas's school finance system unconstitutional not because it wanted to achieve absolute equality, but because some districts enjoyed great wealth while others could not meet their educational needs.[46] Moreover, the *Edgewood I* and *II* courts limit their opinions to discussions of financing and avoid discussing other factors that also determine education quality.[47]

In accordance with its clarified interpretation, the *Edgewood II* court enjoined the state from allowing the schools to run unless the legislature passed a suitable law by April 1, 1991.[48] Texas may not have quickly repaired the constitutional flaw in its school funding system, but other states confronting a crisis in public school financing may learn much from an analysis of its experience.

Part I of this Note briefly describes Texas's school finance history.[49] Part II discusses the three principles of equal educational opportunity that shape all judicial mandates. Part III analyzes several proposals before the Texas Legislature this spring which attempt to cure the constitutional defects in school fi-

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[43] The lead counsel for the state, Toni Hunter, believes that *Edgewood II* forbids any unequalized local revenue. Wong, *Reschooling Texas*, Texas Observer, Feb. 22, 1991, at 16, col. 3.

[44] Of the five proposals analyzed in this Note, only one, the floating cork plan, permits unequalized local revenue. *See infra* notes 155–160 and accompanying text.

[45] Complaints from parents to Edgewood I.S.D. administrators about the poor quality of education and school facilities spurred both the *Edgewood* and the *Rodriguez* litigations. Equality would bring better quality, plaintiffs believed, and James Vasquez, superintendent of the Edgewood I.S.D., said that that belief sustained his district's long legal battle. Pinkerton, *Court Strikes Down School Finance Plan: "The Future is Secure,"* Austin American-Statesman, Oct. 3, 1989, at A1, col. 3. Reformers have sustained their 20-year-long effort for one "basic reason[:] Children residing in low wealth districts are seldom taught by the best trained, the most experienced and the most successful teachers." Cardenas, *Unequalized Local Enrichment*, 17 INTERCULTURAL DEV. RES. A. NEWSL. 2 (Jan. 1990).

[46] *Edgewood II*, slip op. at 5.

[47] *See infra* notes 72–74 and accompanying text.

[48] *Edgewood II*, 34 Tex. Sup. Ct. J. at 291 n.17.

[49] For a thorough account of Texas school finance history, see B. WALKER, EQUITY IN TEXAS PUBLIC SCHOOL FINANCE: SOME HISTORICAL PERSPECTIVES (1988).

nance laws. Part IV discusses the possibility of the preemption by other states of litigation altogether by drafting a good law and amending it into the state constitution. A brief Epilogue discusses the developments in Texas's reform effort since February 1991.

I. TEXAS'S SCHOOL FINANCE PROGRAM

Texas lawmakers have stacked new financing schemes upon old, creating today's multi-layered school finance structure. At its bedrock is the Texas Constitution of 1876,[50] which gave each student an equal portion of a common fund for his education. The constitutional provision, however, did nothing to ensure that such portion was enough to fund even a basic education.[51] Today, these appropriations comprise such a small proportion of the education budget (providing about $300 per student in 1990-91),[52] that the *Edgewood* opinions often ignore it[53] and several proposals this spring abolish it and fold its money into other tiers.[54] Until such a plan is adopted, however, this oldest funding method survives in Texas as the bottom tier of educational funding.

When expanding enrollments after Reconstruction strained the state's appropriations, the state haltingly began to encourage school communities to contribute to their local school budgets.[55] Since the average state aid to districts remained low, these locally raised funds—dependent on both local wealth and local willingness to tax for education—became more important.[56] By the end of World War II, growing enrollments and increased costs of living had increased educational costs enough to pressure the legislature to reform the financing plan.[57] To ensure all

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[50] TEX. CONST. art. VII, § 1.

[51] These appropriations only supported communities that could already afford to build a schoolhouse. Before this, the state educated only paupers and orphans and left all others to be educated at local expense. *See* BRIEFING PAPER, *supra* note 21, at 3.

[52] *Edgewood II*, 34 Tex. Sup. Ct. J. at 289 n.10.

[53] The texts of the *Edgewood II* district court and the *Edgewood II* supreme court opinions both ignore this tier, consistently labelling another tier as the "first tier." *See, e.g., Edgewood I*, slip op. at 13; *Edgewood II*, 34 Tex. Sup. Ct. J. at 289. However, the *Edgewood II* district court does include this original tier in a graph. *Edgewood II* slip op. at 52.

[54] *See, e.g.*, the floating cork plan, *infra* Part III(C).

[55] B. WALKER, DEVELOPMENT OF THE TEXAS REVENUE SYSTEM FOR PUBLIC EDUCATION 1–3 (Texas Center for Educational Research, 1990).

[56] *Id.* at 3.

[57] *Id.* at 4.

students an equal minimum educational opportunity, regardless of local wealth, in 1949 the legislature enacted the Minimum Foundation Program ("MFP"), which is formally the second tier of funding although it is popularly considered the first tier.

The MFP immediately boosted state support of schools, but unfortunately, it became outdated and underfunded in less than ten years.[58] This left many school districts dependent upon locally raised and unequalized funds as support for even basic functions.[59] Many Texans were shocked, nevertheless, when a federal district court threatened the entire education finance system in 1971.[60] Although the United States Supreme Court ultimately upheld the system in 1973 in *San Antonio Independent School District v. Rodriguez*,[61] the legislature did try to equalize school financing at that time. It enlarged the foundation tier of funding, granted equalization aid to certain property-poor districts, and adjusted tax assessment methods and funding formulas.[62] Further, it increased equalization aid, raised the MFP tax rate, and reduced per-capita payments to very wealthy districts.[63]

The decline in oil and gas prices and the collapse of Texas real estate and banking in the past decade, however, have inhibited state spending, placing the burden of paying for dramatic and expensive education reforms enacted in 1984 on the local districts, where educational offerings depend in part on local wealth.[64] After the *Edgewood I* trial court found the system's heavy reliance on unequalized local taxes unconstitutional, the legislature tried to address the problem by introducing a guaranteed yield tier into the finance system.[65] The guaranteed yield tier promises most districts,[66] no matter how property-rich or

[58] Yudof & Morgan, Rodriguez v. San Antonio Independent School District*: Gathering the Ayes of Texas—The Politics of School Finance Reform*, 38 LAW & CONTEMP. PROBS. 383, 387 (1974) (citing a report by the Texas Research League).

[59] B. WALKER, *supra* note 55, at 4.

[60] Rodriguez v. San Antonio Indep. School Dist., 337 F. Supp. 280 (W.D. Tex. 1971), *rev'd*, 411 U.S. 1 (1973).

[61] 411 U.S. 1 (1973).

[62] H.B. 1126, 1975 Tex. Sess. Law Serv. 334 (Vernon).

[63] H.B. 72, 1984 Tex. Sess. Law Serv. 28 (Vernon). H.B. 72 required districts to provide, and help pay for, many expensive reforms, including lower student/teacher ratios and the teachers' minimum salary schedule and career ladder.

[64] B. WALKER, *supra* note 55, at 5–6.

[65] S.B. 1019, 1989 Tex. Sess. Law Serv. 816 (Vernon), replaced the next year by S.B. 1, Act of June 7, 1990, 71st Leg., 6th called Sess., ch. 1, 1990 Tex. Gen. Laws 1 (codified in scattered sections of TEX. EDUC. CODE ANN. § 16 (Vernon 1991)).

[66] Senate Bill 1's guaranteed yield system excluded the school districts with the wealthiest five percent of the state's students, about 132 districts. *Edgewood II*, 34 Tex. Sup. Ct. J. at 290.

property-poor, that each penny of their tax efforts[67] beyond a statutory minimum will yield the same revenue as it would in all other districts. For example, a rich and a poor district, both taxing themselves at the same rate, raise revenue directly related to their wealth. The state's guaranteed yield system makes up the difference between them. In effect, almost all districts are guaranteed equal yields on their tax efforts. The guaranteed yield system survives as the third tier of funding.[68]

The *Edgewood I* and *II* courts, however, apparently dissatisfied with the legislature's efforts, demanded that Texas improve significantly this third tier of financing and strengthen its access equality guarantee.[69] Not all third wave mandates demand what Texas courts have.[70] Part II outlines in general the three possible judicial mandates that legislatures of third wave states must meet.

II. Principles of Educational Equality

"Let me be clear about what I mean by education reform," William Bennett wrote while he was United States Secretary of Education. "Fundamentally, education reform is a matter of improved results . . . . Education reform looks to output, not inputs . . . ."[71] The *Edgewood I* court made it equally clear that what it meant by school reform had little to do directly with

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[67] Senate Bill 1's guaranteed yield system promised equal tax yield for equal tax effort only up to the 91st penny of tax effort. Beyond that, tax yields were not equalized. S.B. 1, *supra* note 65.

[68] A final source of funding, from the federal government, is not included here. It constituted only 7.1% of Texas school district revenues in 1989-90, and it is beyond the control of state legislatures since Congress has earmarked it for specific programs (largely breakfast and lunch subsidies for students). *See* Briefing Paper, *supra* note 21, at 2.

Other states have school finance histories similar to Texas's. For example, Kentucky's constitution had an analogous per-capita funding provision until it was deleted in a 1952 constitutional amendment, and its Minimum Foundation Program and Power Equalization Program correspond to Texas's second and third tiers. *Rose*, 790 S.W.2d at 194.

[69] For a discussion of access equality, see *infra* Part II(C).

[70] *See, e.g.*, *Abbott*, 119 N.J. 287, 575 A.2d 359 (mandating total revenue equality); *Helena*, 236 Mont. 44, 769 P.2d 684; *Rose*, 790 S.W.2d 186; *Seattle*, 90 Wash. 2d 476, 585 P.2d 71; *Robinson*, 62 N.J. 473, 303 A.2d 373 (all mandating minimum revenue equality).

[71] W. Bennett, Our Children and Our Country 222 (1988)

improved results or better outcomes.[72] Likewise, most third wave states do not measure their school finance system's constitutionality by its academic results, but instead aim to equalize inputs.[73] For example, the *Edgewood I* court equalizes the power of Texas taxpayers, apparently assuming that equality in financing will bring higher quality education across the board.[74] The *Abbott* court also required equalization of poorer urban and richer suburban budgets, hoping that such equality will indirectly raise quality.[75] Even the courts that mandate higher academic standards often measure the constitutionality of school systems not by the results they produce, but by whether the systems ensure all students enough money to finance an adequate education.[76] None of these courts require that students learn; all of them require that students be taught.

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[72] The court, referring only to the school financing system, wrote, "the system itself must be changed," speaking of the school *financing* system only. *Edgewood I*, 777 S.W.2d at 397; *cf. Rose*, 790 S.W.2d at 215, which addresses not only financing statutes but all statutes and regulations "creating" and "implementing" the "whole gamut of the common school system in Kentucky." The opinion covers things generally independent of finance concerns, like laws covering the creation of local school districts and school boards. *Id.*

[73] For example, the *Helena* court found that there was insufficient evidence to warrant adopting an output standard. 769 P.2d at 690.

Courts have several good reasons to avoid such a standard. First, no one yet knows how to meet it. The mastery of the social science techniques needed to balance the cultivation of the native intelligences and socio-economic backgrounds of different students in order to produce equal academic outcomes is probably beyond our reach. *See* Yudof, *Equal Educational Opportunity and the Courts*, 51 TEX. L. REV. 411, 422 (1973). Many of the important factors that determine educational outcome—like family life, parental encouragement, or love—are certainly beyond our reach.

Second, courts would experience difficulty determining whether the schools were satisfying such a mandate. The battery of test scores commonly used to gauge achievement usually measure only superficial knowledge, ignoring not only many academic subjects but also important educational outputs like maturity, citizenship, and self-concept. McDermott & Klein, *The Cost-Quality Debate in School Finance Litigation: Do Dollars Make a Difference?*, 38 LAW & CONTEMP. PROBS. 415, 424–27 (1974). In New Jersey, for example, the state asked the *Abbott* court to review its academic outputs, not just its inputs, but the court insisted on considering inputs because "proof of an adequate substantive education"—one that, as the New Jersey constitution requires, equips students "in their roles as citizens and competitors in the labor market"—is "largely circumstantial." *Abbott*, 119 N.J. at 316–17, 575 A.2d at 374.

Third, quality might be sacrificed to equality under this definition. The level of academic achievement need not be high, but simply equal, to satisfy this principle. A graduating class of illiterates would satisfy.

[74] "The legislature is duty-bound to provide for an efficient system [i.e., a substantially fiscally neutral system] of education, and only if the legislature fulfills that duty can we launch this great state into a strong economic future with educational opportunity for all." *Edgewood I*, 777 S.W.2d at 399.

[75] *Abbott*, 119 N.J. at 391–94, 575 A.2d at 411–12.

[76] Kentucky legislators, in restructuring their entire system, must allocate funding sufficient to provide each child in Kentucky with an adequate education. An adequate education consists of developing communication skills; political, social, and economic

School districts in the typical third wave state spend different amounts of money on their children's education. Often, districts that are poorer than others, or more strapped by the financial burdens of running a large city,[77] or simply less interested in funding education,[78] will tax themselves at a lower rate than other districts for their children's education. Third wave mandates aim to level the differences in educational inputs among the state's districts in one of three ways: (1) by equalizing all districts' budgets (total revenue equality); (2) by equalizing only the significant parts of all districts' budget (minimum revenue equality); or (3) by equalizing all taxpayers' abilities to contribute to their districts' budgets (access equality). Regardless of the precise requirements, all three methods employ some common elements: their use of the dollar as the key input, and their weighting of districts and students.

Although courts often acknowledge that money is only one, and possibly not the most important, educational input,[79] courts often measure the equality of inputs in either dollars or the things dollars buy (low student/teacher ratios, library books, etc.)[80] because less tangible inputs are practically impossible to

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knowledge; understanding of government and culture; and sufficient vocational skills to enable the student to pursue various careers and compete favorably with students from other schools in the academic and job markets. *Rose* 790 S.W.2d at 212–13; *see also Helena*, 236 Mont. at 55, 769 P.2d at 690.

[77] *Abbott*, 119 N.J. at 355–57, 575 A.2d at 393–94. For a broad view of this problem, called municipal overburden, see M. YUDOF, T. VAN GEEL & B. LEVIN, KIRP & YUDOF'S EDUCATIONAL POLICY AND THE LAW 612–16 (2d ed. 1982).

[78] As one court noted, "[s]chool boards frequently submitted inadequate levy requests based upon 'practical politics,' rather than need, to ensure passage . . . . The [permissive tax for education] is neither dependable nor regular." *Seattle*, 90 Wash. 2d at 524–25, 585 P.2d at 98; *see also Rose*, 790 S.W.2d at 199.

[79] The *Helena* court acknowledged this, although it intentionally limited itself to discussing dollar inputs: "[W]e do not suggest that financial considerations . . . are the sole elements of a quality education or of equal educational opportunity. There are a number of factors which are a significant part of the education of each person in Montana . . ." such as individual teachers, classroom size, parental support, and the individual student's motivation to pursue his education. *Helena*, 236 Mont. at 56, 769 P.2d at 691.

The *Abbott* court acknowledged the same thing: "We note the convincing proofs in this record that funding alone will not achieve the constitutional mandate of an equal education in these poorer districts . . . ." *Abbott*, 119 N.J. at 295, 575 A.2d at 363. Other means of improvement might include reformed management, community relations, parental interest, staff attention, and "numerous other characteristics not clearly related to funding." *Id.* at 319, 575 A.2d at 375.

Although *Edgewood I* assumed a close connection between "the amount of money spent on a student's education" and the child's "educational opportunity," 777 S.W.2d at 393, *Edgewood II*, like *Helena* and *Abbott*, recognized "that an efficient funding system will [not], by itself, solve all of the many challenges facing public education today." 34 Tex. Sup. Ct. J. at 291.

[80] The question of whether more money produces better-educated students has been debated for decades. Researcher James S. Coleman, whose famous "Coleman Report"

count. Since dollars make the most judicially manageable standard,[81] however, third wave opinions often focus on dollars alone.[82]

Educational equality demands that dollars be distributed equally, but courts like the *Edgewood I* court permit the state to take into account differences among districts and pupils, according to a process called weighting. Conceptually, equalizing weights requires, first, apportioning all districts equal budgets per student under the assumption that all districts and all students have equal needs. Second, upon recognizing that the assumption is false, it requires giving more funds to districts that are more expensive to run (e.g., certain big-city districts) and to districts with children who are more expensive to educate (e.g., children who require speech therapy).[83] Texas law, for example, has weighted students in vocational, special, remedial, compensatory, and other programs, all of whom the state be-

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of 1965 cast doubt on the connection between academic results and the size of educational budgets, wrote 17 years later that, still, "not much is known about what characteristics of schools affect achievement." J. COLEMAN, T. HOFFER & S. KILGORE, HIGH SCHOOL ACHIEVEMENT: PUBLIC, CATHOLIC, AND PRIVATE SCHOOLS COMPARED xxvi (1982) [hereinafter COLEMAN]. According to a widely accepted model, school budgets are only one factor in the education production function, along with family background characteristics, peer characteristics, and innate endowments of the student. *See* BRIEFING PAPER, *supra* note 21, at 10. Indeed, Coleman and his colleagues have found that high academic standards and firm discipline are more closely related to verbal and math skill achievement than dollars spent on facilities, textbooks, and course offerings. *See* COLEMAN, *supra* at 187. Clear school goals, strong principal leadership, and teamwork between principals and teachers can make more difference in students' educational achievemement than their family background and peer group influence. *See* J. CHUBB & T. MOE, EDUCATIONAL CHOICE: ANSWERS TO THE MOST FREQUENTLY ASKED QUESTIONS ABOUT MEDIOCRITY IN AMERICAN EDUCATION AND WHAT CAN BE DONE ABOUT IT 11–13 (Texas Public Policy Foundation, 1990). Other researchers have found that traditional, expensive reforms, like shrinking class sizes or paying experienced teachers more, are only weakly related to student performance. *See* Hanushek, *The Economics of Schooling: Production and Efficiency in Public Schools*, 24 J. ECON. LITERATURE 1141, 1166–68 (1986).

[81] One court noted, "we deal in dollar input per pupil terms because dollar input is plainly relevant and because we have been shown *no other viable criterion* for measuring compliance with the constitutional mandate." *Robinson I*, 62 N.J. at 515–16, 303 A.2d at 295 (emphasis added); *see also* Washakie County School Dist. No. 1 v. Herschler, 606 P.2d 310, 334 (Wyo. 1980), *cert. denied*, 449 U.S. 824 (1980) ("Equality of dollar input is manageable. There is no other viable criterion or test that the appellees show to exist, and our exploration of the subject has resulted only in discovery of a quagmire of speculation, so slippery that it evades any secure grasp for judicial decision making.").

[82] *See, e.g.*, *Abbott*, 119 N.J. at 380, 575 A.2d at 406; *Helena*, 236 Mont. at 50, 769 P.2d at 688.

[83] *Edgewood I*, 777 S.W.2d at 398. The *Edgewood II* district court reaffirmed the court's desire to give the legislature latitude in weighting districts and pupils: "What the weight per student should be is a difficult legislative judgment. Formulas to take these differences into account are imprecise at best." The court then declined to "tinker" with a particular legislative weighting judgment. *Edgewood II*, slip op. at 33–34.

lieves to be more expensive to educate than the average student.[84] It has also weighted districts according to a "cost of education index" that adjusted state aid to districts according to their "region, size, area, density, educational characteristics, and economic conditions," or any other factors beyond their control.[85] By acknowledging the variety of district and student needs, weighting treats different pupils and different districts differently in order to serve them all equally.

All three methods of equalizing educational inputs—total revenue equality, minimum revenue equality, and access equality—share a common problem. In attempting to equalize budgets among districts, legislatures sometimes seek to take money raised in one district and give it to another, a technique called recapture. When employing this technique, however, legislatures may have to navigate carefully around taxation problems posed by their state's constitution. The Texas Constitution, for example, forbids the statewide collection of ad valorem taxes for any purpose, including education,[86] and a 1931 precedent prevents the legislature from compelling one district to raise money for the education of "nonresident pupils."[87] However, nothing prevents the legislature from creating districts for the purposes of taxation along any lines they choose.[88]

A. *Total Revenue Equality*

Total revenue equality equalizes the total budgets per student of all school districts.[89] The source of the educational funds may vary: they may come from a state sales and/or income tax, from a uniform local tax gathered into a common pot and redistributed evenly to the districts, or from a uniform local tax equalized by state aid. However, whatever the source, in the end all districts,

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[84] S.B. 1, *supra* note 65, at §§ 1.05–1.07.

[85] *Id.* § 1.13. Most of the reform proposals analyzed in Part III also retain similar weights. *See Seattle*, 90 Wash. 2d at 529, 585 P.2d at 100 (discussing Washington's weighting system, which is similar to that of Texas).

[86] TEX. CONST. art. VIII, § 1-e(1).

[87] Love v. City of Dallas, 120 Tex. 351, 367, 40 S.W.2d 20, 27 (1931). Other states have similar restrictions. *See, e.g.*, Buse v. Smith, 74 Wis. 2d 550, 247 N.W.2d 141 (1976).

[88] *Edgewood II*, 34 Tex. Sup. Ct. J. at 291.

[89] In other words, every similarly weighted district would receive exactly the same budget per pupil. *See supra* notes 66–68 and accompanying text.

regardless of their taxable wealth, would enjoy the same revenue.

Total revenue equality equalizes a district's *total* budget, necessities and educational luxuries both, unlike minimum revenue equality[90] which equalizes only the "necessary" portions of districts' budgets, and risks allowing lawmakers to define that "necessary" portion too narrowly. Total revenue equality thus has the advantage of avoiding what might be false or merely politically motivated distinctions between educational necessities and frills, preventing the shortchanging of poor districts. Without total revenue equality, budget-conscious legislatures tend to allow the "necessary" level of funding for an adequate education to sink over time, leaving poor districts struggling to raise adequate revenue while rich districts enhance their budgets with local funds.[91] On the other hand, because total revenue equality requires legislators to equalize not just the "necessary" portions of a school district's budget but the total budget, it binds all school districts, rich and poor, to the same level of revenue.

Although equality ensures only similar, not improved, schools, total revenue equality advocates believe the resulting "common interest" will guarantee better schools.[92] Total revenue equality means that if residents of rich, politically powerful districts pressure their legislators to increase their school budget, school budgets across the state would have to increase in order to satisfy their home districts. Spending caps therefore affect rich and poor school districts similarly, for better or worse.

The problem with total revenue equality, however, is that it may backfire and hinder educational budget growth statewide. Historically, the growing budgets of rich districts have opened an embarrassing revenue gap between rich and poor districts, which legislators have periodically closed.[93] As a result, funding for education increases statewide, although rich districts get to enjoy it first.[94] Forbidding rich districts from spending more than others through the total revenue equality principle would close the gap forever, thereby eliminating the continual pressure to

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[90] *See infra* Part II(B).

[91] Cardenas, *supra* note 45, at 1, 3.

[92] Cortez, *School Finance Equity Proponents Unveil "The Equality Plan,"* 17 INTERCULTURAL DEV. RES. A. NEWSL. 11, 13 (Jan. 1990).

[93] *Edgewood II*, slip op. at 24.

[94] *Id.* at 26.

raise educational funding on a statewide basis. Advocates of total revenue equality point out that this clamps the treadmill of increasing costs for education[95] and takes away from rich districts their "perennial privilege of leading the parade";[96] opponents worry that with total revenue equality "there may not be a parade."[97] Opponents also note that centrally set budgets may be too low, may be inadequately funded, or may come with strings attached.[98] Further, to avoid cutting some districts' budgets, legislators would have to "equalize up" to the richest district, which would be overwhelmingly expensive and perhaps beyond the fiscal capacity of many states.[99]

Another serious problem with total revenue equality is that it would eliminate local control over raising educational funds. True, poorer districts would have more money to control, and districts could still decide how best to spend their money, but levels of revenue and tax rates would be fixed centrally. Loss of local control over the purse strings may bring loss of control over policies—for example, teaching loads, class size, curricular and program choices, student discipline, and selection of administrative personnel—that have traditionally been decided locally[100] and are perhaps best decided in that way.[101] Whether or not decentralized management is better, the argument for local control derives its force from basic democratic principles. Barring any compelling need to curb the choices citizens make, democracy favors empowering a district's parents to make the best decisions for their children's education.[102]

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[95] Cortez, *supra* note 92, at 12.

[96] *Edgewood II*, slip op. at 26.

[97] The state argued to the *Edgewood II* district court that in California and New Mexico, similar revenue caps stopped the growth of educational budgets. *Id.* at 26.

[98] *Id.* at 24–25.

[99] *Edgewood II*, 34 Tex. Sup. Ct. J. at 289.

[100] *See Rodriguez*, 411 U.S. at 53 n.109 (citing Simon, *The School Finance Decisions: Collective Bargaining and Future Finance Systems*, 82 YALE L.J. 409, 434–36 (1973)). *But see* Wong, *supra* note 43 (reporting that Texas Governor Ann Richards believes that too many administrative decisions are made centrally: "Local control is a myth when Austin bureaucrats draft 10 rules for every action a teacher takes.").

[101] Some Texas educators and researchers argue that the local control of schools improves academic performance by fostering greater personnel harmony and permitting more flexible teaching styles tailored to individual students' needs. *See generally* EDUCATION TASK FORCE REPORT, CHOICE IN EDUCATION: OPPORTUNITIES FOR TEXAS (Mar. 1990); J. CHUBB & T. MOE, EDUCATIONAL CHOICE, *supra* note 80.

[102] Yudof, *supra* note 73, at 496. *Rodriguez* noted the important democratic aims of local control. *Rodriguez*, 411 U.S. at 53 ("The persistence of attachment to government at the lowest level where education is concerned reflects the depth of [the financial and administrative] commitment of its supporters."). The Supreme Court has continued to view local control as "'an intrinsically valued process' entitled to substantial deference

These disadvantages may have been an important factor in the decisions of the third wave courts, only one of which has mandated total revenue equality so far. The *Abbott* court ordered the New Jersey legislature to ensure that the budgets of "poorer urban districts" were "substantially equal" to the budgets of the state's property-richest districts.[103] A system based on total revenue equality would meet the Texas Supreme Court's standard for equalization,[104] but the *Edgewood I* court ruled that the Texas Constitution does not require the stricture of total revenue equality.[105] Total revenue equality overshoots Texas's judicial mandate, and its many practical disadvantages make it an unappealing path for the Texas legislature to choose.

B. *Minimum Revenue Equality*

In 1949 Texas made a noble promise that every student would receive an equal education, at least up to some floor of adequacy.[106] The Minimum Foundation Program[107] was based on the principle of minimum revenue equality, and despite decades

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and respect even when the effects upon nonresidents may be quite unfavorable." Gelfand, *The Burger Court and the New Federalism: Preliminary Reflections on the Roles of Local Government Actors in the Political Dramas of the 1980's*, 21 B.C.L. REV. 763, 799 (1980) (footnotes omitted); *see also* Gelfand, *The Constitutional Position of American Local Government: Retrospect for the Burger Court and Prospect for the Rehnquist Court*, 14 HASTINGS CONST. L.Q. 635, 638 (1987).

State high courts, too, have often found the preservation of local control a strong enough state interest to justify the challenged school finance systems. LaMorte & Williams, *Court Decisions and School Finance Reform*, 21 EDUC. ADMIN. Q. 59, 78–79 (Spring 1985); *see, e.g.*, Olsen v. State, 276 Or. 9, 554 P.2d 139 (1976).

[103] *Abbott*, 119 N.J. at 388, 575 A.2d at 408. The court, however, added a restriction. Pure total revenue equality may be pegged at any level including $0 per student; the *Abbott* court, following *Robinson*, requires it to be pegged at a level with "sufficient funds to address their [the students of poorer urban districts] special needs." *Id.* at 389, 575 A.2d at 409.

[104] One of the "major causes of the wide opportunity gaps between rich and poor districts" is that Texas permits local taxes to create interdistrict disparities. *See Edgewood II*, 34 Tex. Sup. Ct. J. at 290. Texas may avoid equalizing total revenue only by meeting the court's standard of fiscal neutrality: "To be efficient, a funding system that is so dependent on local ad valorem property taxes must draw revenue from all property at a substantially similar rate." *Id.*

[105] "Efficiency does not require a per capita distribution . . . [n]or does it mean that local communities would be precluded from supplementing an efficient system established by the legislature." *Edgewood I*, 777 S.W.2d at 397–98.

[106] S.B. 116, 51st Leg. (1949).

[107] The system is currently called the Foundation School Program.

of adjustments and a federal constitutional challenge[108] it continues to serve as the first tier of Texas's system.[109]

Ideally, minimum revenue equality provides every student with equal funding,[110] up to the point considered necessary to finance an adequate education. Legislators of states whose courts have found a constitutional mandate for minimum revenue equality must define the minimally adequate level of education[111] and ensure that it is financed. Individual school districts, however, may choose to tax themselves further to enrich their programs. Thus, unlike total revenue equality, minimum revenue equality allows districts to spend unequal amounts of money, and unlike access equality, allows them to raise it with varying ease, since rich districts can raise more money at a given tax rate than poor districts can.

The great advantage of school finance systems based on minimum revenue equality is the guarantee of an adequate education budget. Its biggest problem, however, is in determining how much money funds an "adequate" minimum education. When the United States Supreme Court upheld Texas's system in *Rodriguez*, Justice Powell, writing for the Court, said the Court had no way of knowing whether the state's educational floor was high enough, there being no well-defined "minimum" to meet.[112] State courts that mandate minimum revenue equality have faced similar problems.[113]

Equalizing *total* revenue, by contrast, provides a much more judicially manageable standard. Determining how much is "enough" is difficult, but determining whether all districts have the same budgets is simple. One scholar put it: "'As much as'

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[108] *Rodriguez*, 411 U.S. 1.

[109] As described earlier, *see supra* notes 57–58 and accompanying text, this is actually the second tier but is generally referred to as the first tier.

[110] More precisely, every similarly weighted district would receive equal minimum revenue. *See supra* notes 66–68 and accompanying text.

[111] State courts often order their state legislatures to develop a system that meets "broad guidelines" of "education concepts [that] make up the *minimum* of the education that is constitutionally required." *Seattle*, 90 Wash. 2d at 518, 585 P.2d at 95 (emphasis in original); *see also Helena*, 236 Mont. at 57, 769 P.2d at 692; *Abbott*, 119 N.J. at 388, 575 A.2d at 409 (mandating that students of poor urban districts receive an education "sufficient to address their special needs"); *Rose*, 790 S.W.2d at 212; *Seattle*, 90 Wash. 2d at 533–34, 585 P.2d at 102–03.

[112] Justice Marshall noted in a dissenting opinion "[e]ven if the Equal Protection Clause encompassed some theory of constitutional adequacy, . . . [n]either the majority nor appellants inform us how judicially manageable standards are to be derived for determining how much education is 'enough' to excuse constitutional discrimination." *Rodriguez*, 411 U.S. at 89 (Marshall, J., dissenting).

[113] *See* B. WALKER, *supra* note 55, at 3.

seems to provide just the certainty of measure which 'enough of' so sorely lacks."[114]

Determining how much funding is "enough" challenges courts and legislatures to draw a line between educational necessities and frills. Such a line is, admittedly, difficult to draw. Justice Marshall wondered in his *Rodriguez* dissent whether the extra wealth enjoyed by rich school districts—which financed luxuries, not necessities, those districts claimed—really was academically insignificant when those wealthy school districts were willing to protect them so zealously in court.[115] More recently, one of the third wave courts that mandated total revenue equality predicted "little short of a revolution in the suburban districts [if] parents learned that basic skills is what their children were entitled to, limited to, and no more."[116]

A line can and ought to be drawn between academic essentials and non-academic luxuries, such as Astroturf stadiums, handwarmers for football players, and heated swimming pools. Many third wave courts have not hesitated to draw such lines between "basic education" and other "programs, subjects, or services which are attractive but only tangentially related to . . . reading, writing, arithmetic, . . . [and preparing] our children for their role as citizens and as potential competitors in today's market as well as in the market place of ideas."[117] Such "tangentially related" services really are frills, no matter how attached to them the wealthy school districts seem to be, and any attempts to equalize them would be both pointless and perhaps prohibitively expensive.

Ensuring that the line between necessities and luxuries is drawn correctly, however, has been a frequent problem. Cost estimates in Texas have tended to reflect the political budgetary

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[114] Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 18 (1969).

[115] *Rodriguez*, 411 U.S. at 85 (Marshall, J., dissenting).

[116] *Abbott*, 119 N.J. at 364, 575 A.2d at 397–98. The *Edgewood II* district court illustrates the point with a story of a father who has

> two sons—John and Javier. He says to each that he will divide his wealth between them equally so that he may spend the same on each. For John he provides food, clothing, shelter, a car, tennis lessons, and pocket money. For Javier he provides food, clothing, and shelter. Javier says to his father, how is this equal? His father answers: "This is exactly equal. I have done an accountable cost study and learned that a boy does not need a car, tennis lessons, or pocket money to grow into a fine man. So these costs do not count. I have provided for you equally."

Edgewood II, slip op. at 15.

[117] *Seattle*, 90 Wash. 2d at 517–19, 585 P.2d at 94–95.

process more than true educational costs,[118] leaving schools historically underfunded. Just eight years after the Minimum Foundation Plan was enacted, many school districts were spending locally raised "enrichment" funds on basic costs.[119] By 1989 funds from the Foundation School Program did not even cover the costs of state-mandated minimum requirements.[120] Senate Bill 1, enacted in the spring of 1990, raised the promised revenues by about $400 to $1,910 per student for the 1990–91 school year (to rise to $2,128 per student for 1991–92 and 1992–93), but even this fell short of minimum budgets suggested by state cost studies.[121] Some state courts that mandate minimum revenue equality trust their legislatures to guard against such erosion.[122] Texas's courts, however, apparently frustrated with the historical failure of the Foundation School Program to live up to its promise, demand not the reform of the existing system but a fundamental change.[123]

Simply providing all districts greater equal minimum revenues, however, will clearly not satisfy the *Edgewood I* and *II* courts. Although some proposals in Part III use minimum revenue equality as a part of a legislative answer to the judicial challenge, Texas must incorporate into its solution another principle: access equality.

C. *Equal Access to Revenue or Fiscal Neutrality*

The first two principles of educational equality focus on what a student receives; they require that he receive exactly as much

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[118] *Edgewood II*, slip op. at 10.

[119] Yudof & Morgan, *supra* note 58, at 387. In Montana in 1950, the Maximum General Fund Budget Without a Vote ("MGBFWV," analogous to Texas's Foundation School Program) provided 81.2% of a district's general fund revenues; in 1985–86, it provided only 35%, and most districts had to raise extra local taxes to fund their school budgets. The court found that the MGBFWV funds fell "short of even meeting the costs of complying with Montana's minimum accreditation standards," and the extra tax money was not funding "frills or unnecessary educational expenses." *Helena*, 236 Mont. at 47–48, 54, 769 P.2d at 686, 690.

[120] *Edgewood I*, 777 S.W.2d at 391, 392. The cost of meeting education statutes in Washington school districts outstripped legislative appropriations, leaving local districts to bridge the widening gap. Local taxes raised 6.8% of a district's total school revenue in 1960 and 37.7% in 1974–75. *Seattle*, 90 Wash. 2d at 524, 585 P.2d at 98.

[121] S.B. 1, *supra* note 65. The Texas Education Agency and the Accountable Costs Advisory Committee found that a $1,973-per-pupil budget would support a program to meet state-set standards. *See* BRIEFING PAPER, *supra* note 21, at 7.

[122] Locally raised taxes may "not become a device for diluting the State's mandated responsibility." *Robinson I*, 62 N.J. at 520, 303 A.2d at 298. Furthermore, "to allow local citizens and taxpayers to make a supplementary effort in no way reduces or negates the minimum quality of education required in the statewide system." *Rose*, 790 S.W.2d at 212.

[123] *See Edgewood I*, 777 S.W.2d at 397.

as students in other districts do. The third principle focuses instead on what his parents are able to give him. Access equality neutralizes the well-recognized discrepancy in the abilities of property-rich and property-poor districts to raise tax revenue. It therefore gives the property-poor districts the ability to raise money for education as easily as rich districts can while not imposing expenditure limits on any school district. Under access equality, equal tax rates yield equal tax dollars. To ensure that a property-poor district will net just as much revenue as a property-rich district at any given tax rate, the state gives aid to make up the difference for poor districts and takes away locally raised funds from rich districts that raise too much at that tax rate.[124] This Robin Hood technique is known as "recapture."

The access equality principle has several advantages over the other two principles. For lawmakers concerned with equalization, access equality, unlike minimum revenue equality, equalizes access to all educational expenditures, not just the "necessary" budgetary items. For legislators pressured to improve education, access equality imposes no spending caps on school budgets and preserves local control, unlike total revenue equality. Indeed, it encourages local control, since poor districts would have access to more dollars to control.

In its pure form, however, access equality has some serious disadvantages. First, the recapture provision which redistributes local property taxes from property-wealthy to property-poor districts is extremely unpopular politically, and some rich districts avidly seek ways to avoid it. As early as the early 1970's, the residents of wealthy districts developed means of escape, either through private schools or through elaborate loopholes. Residents of wealthy districts might levy a high, non-recaptured property tax for "sports, music, art, and even advanced French" through the local recreation department instead of the schools.[125] Some Texas school districts have even been considering establishing private foundations—"educational booster clubs"—that would help them maintain their programs despite recapture.[126] To be politically viable, a system based on the fiscal neutrality

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[124] J. COONS, W. CLUNE & S. SUGARMAN, PRIVATE WEALTH & PUBLIC EDUCATION 34, 205 (1970).

[125] Levin, *Alternatives to the Present System of School Finance: Their Problems and Prospects*, 61 GEO. L.J. 879, 922 (1973).

[126] *Funding Plans Confuse, Worry School Officials*, Dallas Morning News, Feb. 24, 1991, at 32A, col. 1.

principle may have to use the recapture provision only sparingly, or may avoid it altogether by substituting state aid derived from some source other than district property taxes to equalize educational funds.

A second problem is that from the child's point of view, the fiscally neutral system that *Edgewood I* and *II* prescribe is, ironically, not very different from the minimum equality system combined with unequalized local funds that the decisions explicitly reject. Taste simply substitutes for wealth as the determinant of how much money a school enjoys. Children who live in education-valuing districts, instead of merely those who live in wealthy ones, will get generous school funding; children who do not, will not.[127] Without any state-set expenditure floor for education, access equality does little to ensure them an adequate education. Fortunately, nothing in access equality blocks the legislature from setting a minimum expenditure floor, thereby protecting students in communities which place a lower value on education.

Each of the three principles outlined above has disadvantages that may not be outweighed by its positive effects. Legislatures faced with one of these judicially mandated principles should consider creating a solution that employs the beneficial aspects of each. In Texas, for example, even though the *Edgewood* opinions mandate only access equality, none of the legislative proposals uses a single principle in its pure, paradigmatic form. These proposals are not purebreds but hybrids, combining the three principles in different ways and tempering them with political concerns. Part III examines each in turn.

III. Proposals

Texas Senator Carl Parker (D-Port Arthur) summed up the somber mood at the Texas capitol this spring: "We have a terminal illness, and no one has come up with a pleasant-tasting medicine."[128] The problem is that none of the proposals to reform school finance is attractive. The *Edgewood* courts required legislators to equalize all districts' access to educational funds,

[127] Some courts faced with this problem solved it by forbidding their states from adopting access equality below a certain level of expenditures. *See, e.g., Rose*, 790 S.W.2d at 216.

[128] Bennett & Barta, *Legislature Stymied by Schools*, Dallas Morning News, Feb. 3. 1991, at 4J, col. 5.

but no proposal before the legislature this spring was based on access equality alone. Reflecting the concerns for quality as well as equality, each proposal examined below combines minimum revenue equality with the access equality. The former prevents parents from spending too little and ensures that the quality of every child's education, measured in dollars, will never sink below a statutory floor. The latter equalizes taxpayers' abilities to provide for their district's schools by guaranteeing that a penny of tax effort will raise the same amount of revenue in every district. Ironically, however, in many of these proposals, the drive for equality, emphasized by the *Edgewood* opinions, often outstrips the need for improved educational quality, an underlying motivation for the entire litigation.

A. *Access Caps*

One way Texas might equalize access to educational funds is by setting an access ceiling, or cap. All districts would have access to budgets only as large as the statutory access cap. Two plans proposed this spring—one advocated by the plaintiffs themselves in their *Edgewood II* brief (the "plaintiffs' plan"),[129] the other supported by the chair of the Texas Senate Education Committee, Sen. Carl Parker (D-Port Arthur) (the "Parker Plan")[130]—adopted access caps. After ensuring all school districts equal minimum revenue,[131] both plans would permit dis-

[129] The plaintiffs' plan is based on a 71st legislative session bill sponsored by two South Texas Democrats, Sen. Hector Uribe (D-Brownsville) and Rep. Gregory Luna (D-San Antonio). *See* H. URIBE & G. LUNA, THE URIBE-LUNA PLAN (1990). After the bill died in the Senate Education Committee in 1990, the plaintiffs asked the *Edgewood II* district court to order the legislature to enact it or some similarly equitable plan. The court refused this request, *Edgewood II*, slip op. at 37–39, and the supreme court did not modify that part of the district court's decision. *Edgewood II*, 34 Tex. Sup. Ct. J. at 291.

[130] S.B. 49, 72d Leg. (1991).

[131] Both systems achieve this by collecting revenue according to wealth and distributing it according to student population. Since a statewide property tax is unconstitutional, TEX. CONST. art. VII, § 1(e), the two plans collect and redistribute along different geographical boundaries.

Under the plaintiffs' plan, every county would levy a tax at a state-set rate and pool the revenues. This would help equalize among districts in each county. The state would then equalize funding among counties by giving funds to property-poor counties. Finally, the counties would distribute funds to each district according to student population. At this point, every school district in the state would pay exactly the same tax ($.80 per $100 taxable property wealth) and enjoy the same level of funding per student ($2,300 in 1990–91). Brief for Appellants, at 35–36, *Edgewood II*, 34 Tex. Sup. Ct. J. 287 (1991) [hereinafter Appellants' Brief].

Under the Parker plan, a uniform statewide property tax would be collected in each

tricts to tax themselves further. The state would guarantee that each penny of this optional tax effort would yield the same revenue in all districts,[132] but both of the proposals would set caps on how much a district might further tax itself for education.[133] Like the other proposals analyzed in this Note, these plans may require a constitutional amendment.[134]

Both plans would certainly meet the *Edgewood II* court's mandate to tax the property wealth in all, not just most, districts. Property wealth currently insulated in low-tax, high-revenue yielding districts would be taxed at a higher rate than currently and would benefit other, poorer districts. Further, adherence to the court's suggestion to consolidate districts or tax bases strengthens the plans against future constitutional challenges without increasing the costs to the state.[135] Both plans also meet the *Edgewood II* mandate to equalize access to all, not just some, revenue. The plans prevent unequalized funding at any level of tax effort, by forbidding districts to raise money for their students beyond the access cap.

Although both plans may satisfy the *Edgewood II* court's demand for equality, they may also frustrate the implicit motivation of the *Edgewood* series: to improve the quality of education. The problem is that neither plan contains effective mechanisms to ease their access caps[136] as educational costs

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of 20 new, consolidated tax districts created by the plan. The revenue would then be redistributed to school districts according to student population. At this point, every school district in the state would pay the same tax ($1.00 per $100 taxable property wealth) and enjoy the same level of funding per student. S.B. 49, 72d Leg. (1991).

[132] Appellants' Brief, *supra* note 131, at 35; S.B. 49 at § 12.

[133] The plaintiffs' plan allows only an additional $.20 tax, H. URIBE & G. LUNA, *supra* note 129, at 5 (1990); the Parker plan allows a $.25 additional tax. S.B. 49 at § 13.

[134] It is unclear whether the plaintiffs' plan will require a constitutional amendment to validate its recapture provision. Since *Edgewood II* "wounded but did not kill" the constitutional ban on recapture, the plaintiffs' plan's recapture provision may be unconstitutional. Yudof, *supra* note 28, discussing *Edgewood II*, 34 Tex. Sup. Ct. J. at 291. The Parker plan requires a constitutional amendment to repeal the ban on statewide property taxes, to limit school property taxes to $1.25 per $100 of taxable property wealth, and to handle certain school bond issues. S.J. Res. 1, 72d Leg. (1990). It may also run afoul of article VIII, § 1 of the Texas Constitution, which requires taxation to be "equal and uniform." Texas Association of School Boards, Questions and Concerns: SB 49 and SJR 1 (Feb. 4, 1991) [hereinafter *Questions and Concerns*].

[135] Fifty-eight percent of the state's districts serve fewer than 1000 students each. BRIEFING PAPER, *supra* note 21, at 1. By maintaining these small school districts, the state subsidizes expensive duplication of effort that consolidation would help eliminate. *Edgewood II*, slip op. at 28. "With 1052 school districts, some having as few as two students, and with up to twenty districts within a single county, duplicative administrative costs are unavoidable." *Edgewood II*, 34 Tex. Sup. Ct. J. at 290.

[136] The plaintiffs' plan has no formal mechanism to adjust its tax cap. Appellant's Brief, *supra* note 131, at 35–36. The Parker plan adjusts its tax cap according to the

rise.[137] As a result, these two proposals do more than merely equalize access to revenue, as the *Edgewood II* court requires; they also level total revenue and tax rates.[138] They may guarantee all students access to equal funds for their education but not necessarily enough funds for an adequate education. Even at its maximum tax rate, the Parker plan caps spending per weighted student in average daily attendance in the 1990–91 school year at $3,277, only slightly more than the approximately $3,000 minimum recommended by state cost studies to run a basic educational program.[139] At this rate, Dallas I.S.D. would lose about $30 per pupil and Austin I.S.D. would lose about $459 per pupil.[140] The maximum tax rate of the plaintiffs' plan, $1.00, may already be less than what the average district taxes itself for education.[141]

Further, the plans have made at best imperfect provisions for the access cap level to rise with inflation or increased costs.[142] The access caps prevent any district from spending more on its students' education than the state-set level, a prospect that frightens many high-spending school districts. Advocates of the plaintiffs' plan hope that the flat revenue will bind parents together in a common interest, forcing them to press collectively the legislature for decent funding. Wealthy parents, however, may find it easier to move their children into private schools than to convince the whole state to increase funding,[143] and

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biennial recommendations of advisory committees. S.B. 49 at § 5. Those recommendations may be more likely, however, to reflect politics than true educational needs. *Edgewood I*, slip op. at 10.

[137] The statewide average of local education tax effort rose nearly 50% between 1983 and 1988, from $.56 to almost $.83 per $100 of taxable property wealth. Inflation, expensive state-mandated reforms, declining property values, and increasing student population are driving educational costs up. TEXAS EDUCATION AGENCY, THE FINANCIAL CONDITION OF LOCAL SCHOOL DISTRICTS: THE EFFORT NEEDED TO RAISE LOCAL REVENUE 2–5 (1989). Early figures indicate that the 1990–91 average tax rate exceeds $1.00 per $100 of taxable property wealth. Appellant's Brief, *supra* note 131, at 8.

[138] As districts tax themselves to the limit to meet inflation, growing enrollments, and educational costs, the access caps may remain static. Practically, the margin of variation will shrink, effectively leveling tax rates and school revenue.

[139] *Questions and Concerns*, *supra* note 134, at 1.

[140] *Id.*

[141] Appellant's Brief, *supra* note 131, at 8.

[142] Student population in Texas has risen 7.6% over the past five years, and the Texas Education Agency projects further growth in the coming year. *Id.* at 4. Property values have dropped nine percent since 1986. *Id.* at 2–3.

[143] "[T]he end result of any plan that abolished all forms of enrichment [i.e., a district's supplementation of a state-set budget with local funds] would likely trigger a further exodus of the middle class from the public schools, and a further erosion of political support for any decent level of funding." *Texas Agenda: Public Educaton Should Be Core Issue of Concern*, Dallas Morning News, Jan. 14, 1991, at 12A, col. 1.

without children of their own in the public schools, these wealthy parents may feel less enthusiasm for high taxes to support education.[144]

Finally, the proposals' centralization of control of tax rates and the size of school budgets would spell the end of local control over school districts. Although local school districts would still decide whether to levy the optional taxes for education, and poorer school districts would control more wealth than before through the optional tax, the optional tax is statutorily limited. Advocates of these two plans promise that tax-base consolidation and administration consolidation are separate, but the distinction may prove false. In theory, all districts would still decide how to spend their money, but funds from Austin that originally came without strings attached may not remain free of them very long.[145] The countywide collection of funds will have to be managed by a new level of bureaucracy.[146]

Besides arguably removing from principals and teachers the adminstrative power necessary to improve students' performance, this loss of local control dilutes the democratic principle of parental and taxpayer control over the education of their children. As a result, consolidation is so unpopular that not even the plaintiffs and the plaintiff-intervenors advocated it.[147] The Texas Association of School Boards, among other organizations, publicly opposed consolidation of taxation and administration,[148] and rightly or wrongly, consolidation is perceived to be so disastrous that it was called "'the Scud missile of the 72nd Legislature.'"[149]

In sum, the access cap plans, while possibly satisfying the *Edgewood II* equality mandate, certainly anger citizens by cur-

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[144] Without "some publicly acceptable solution . . . the middle class [may] simply turn against public education, exit completely to private schools and vote 'no' to any form of public education expenditure." Bennett & Barta, *Legislature Stymied by Schools*, *supra* note 128, at 4J.

[145] *School Ultimatum: Legislature Gets a Tough Challenge*, Dallas Morning News, Jan: 24, 1991, at 30A, col. 1.

[146] One commentator has opined that "[a]s a practical matter, it is unlikely [that] residents of a county would want to support other school systems over which they have no control" because their tax bases, but not their administrations, have been consolidated. "Even if the state did not mandate administrative consolidation, local voters eventually might demand it." *Id.*

[147] *Edgewood II*, slip op. at 25.

[148] Texas Association of School Boards, *Legislative Program for 1991.*

[149] *School Reform Ordered: Court Calls for Funding Overhaul*, Dallas Morning News, Jan. 23, 1991, at 21A, col. 6 (quoting Sen. John Montford (D-Lubbock), chair of Senate Finance Committee).

tailing local control and may actually threaten educational quality by capping budgets.

B. *Penny Pool Plans*

Two slightly more attractive alternatives for school finance reform, now called the penny pool plans, were proposed independently by Rep. Harvey Hilderbran (R-District 67) and the State Board of Education. These plans avoid stifling local control and stunting of budget growth. Like the access cap plans, these plans begin with the minimum revenue equality principle. Each sets a minimum tax rate[150] that is redistributed[151] through recapture, ensuring every district the same minimum budget.

But unlike the access cap plans, the penny pool plans put no caps on the amount of additional, optional tax effort that taxpayers of a district can exert on behalf of their schools.[152] Instead, the state would pool each district's additional revenue with that of every other district, and would then redistribute the revenue to all districts according to their tax efforts. Each district would contribute according to its ability and tax effort; each district would receive only according to its tax effort.

The penny pool plans may meet the *Edgewood II* equality standards. First, they encompass all school districts, recapturing funds from property-rich districts sheltered by Senate Bill 1. Second, every penny of tax effort is equalized, the first 70 to 100 cents (depending on the plan) by recapture and all tax effort beyond that by pooling.

The penny pool plans are more responsive than the access cap plans to increasing costs of education and to taxpaying parents who want to spend more on their children's education. The plans allow a district to raise as much educational money as it wants, thereby preserving educational quality and local control. In addition, the plans allow a district to raise money

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[150] The minimum tax rate would be $.70 for the first plan. H. HILDERBRAN, BILL SUMMARY: FEATURES OF HOUSE BILL 680 AND HOUSE JOINT RESOLUTION 32 (Feb. 1, 1991). The second plan would have a minimum tax rate of $.80 for operations and $.20 for debt service. STATE BOARD OF EDUCATION PLAN, STATE BOARD OF EDUCATION PROPOSED TEXAS SCHOOL FINANCE SYSTEM §§ 1.2, 2.1 (Feb. 3, 1991).

[151] Redistribution across district lines may require a constitutional amendment, which Hilderbran's bill proposes in accompanying H.J. Res. 32. If such redistribution is not constitutional, the State Board of Education plan opts for a constitutional regional recapture system.

[152] The plans do, however, preserve the longstanding tax cap of $1.50.

with as much ease as any other district, thereby preserving access equality.

A logistical flaw, however, may make the penny pool plans the functional equivalent of an access cap. When the pooling process begins, a school district would tell the state government the size of the budget it wants. The state, taking into consideration all similar requests, would then calculate the tax effort that a district of its size and wealth must exert to get its desired budget. This process would require various stages to make adjustments.[153] In theory the penny pool plans do not cap the tax effort, but the plans' administration may prove so burdensome that it may discourage districts from enriching their schools as much as they would want.

Like the access cap plans, the penny pool plans may meet the *Edgewood II* equality mandate, but may potentially retard the growth of school budgets and thus, jeopardize educational quality. A third legislative option, the floating cork plan,[154] trades the penny pool plans' continual equity for a less complex administration that would not discourage voters from spending more on their local schools.

C. *Floating Cork Proposal*

Like the other plans, the floating cork plan begins with a recaptured minimum tax effort that would guarantee every student a funding floor, that is, minimum revenue equality. Like the other plans, districts could then tax themselves more, and up to a point, the state would ensure that each district yielded equal revenue for equal effort; that is, access equality. Beyond that point, however, the floating cork plan permits additional taxation and, in a small and temporary margin, allows yield again to depend on local wealth.

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[153] J. Walch, The Penny Pool Plan: Doing Better for the Children of Texas 16 (Fredericksburg Indep. School Dist., unpublished document).

[154] The Equity Center, an association of school districts of limited taxable wealth and a plaintiff-intervenor in *Edgewood II*, originally proposed a precursor to the floating cork plan during the 71st Legislature's special sessions in 1990. The School Finance Working Group—whose members include the Budget-Balanced Schools, the Equity Center, the Urban Council of School Districts, and various school boards—revised the plan in response to *Edgewood II*, and five co-authoring state representatives filed the plan as House Bill 986 in February 1991. D. BLEVINS, MEMORANDUM TO EQUITY CENTER MEMBER DISTRICTS (Feb. 14, 1991).

Under the floating cork plan, a district that strongly supports education could tax itself at as high a rate as it wanted, even beyond the point to which the state equalized access. Rich, high-taxing districts would yield more per penny of tax effort than poor, high-taxing districts. This gap in revenue and access equality would be temporary and quickly corrected. Periodic reviews would update the access guarantee to match the revenues that these very high-taxing districts could achieve, guaranteeing all districts access to as much revenue as the richest, highest-taxing districts enjoyed.

The *Edgewood II* district court appreciated the "certain unintended genius" of a system that allows districts to raise some unequalized funds: "[A]s the rich districts draw on their [unequalized revenue], pressure is created on the state to raise [the equalized revenue] to ensure some level of equity, thereby raising total funding for education. In other words, the rich districts pull the state forward."[155] Even the plaintiff-intervenors in *Edgewood II* understood the importance of unequalized enrichment in moving the state forward. Without rising budgets in rich districts, little would trigger more state spending on education from Austin for the poorer districts.[156]

On the other hand, the access cap and penny pool plans eliminate the pull for larger school budgets that unequalized revenues bring. Trusting the state legislature to allow school districts to raise an adequate budget, the other plans reflect a hope that the legislature will relax the state-set access caps when future inflation and increased educational costs render the revenue ceiling inadequate. But while districts wait for steadily rising political pressure to pop the access cap, there will still be a gap in some districts between what students receive in educational benefits and what their parents and local taxpayers would like to give them.

Some of the other proposals try to address this problem through biennial budget reviews to readjust (usually raise) the

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[155] *Edgewood II*, slip op. at 24.

[156] The disparity helped the plaintiffs' case in *Edgewood II*:

> We won the lawsuit because of Highland Park [one of the wealthiest and highest spending districts in the state]. We never would have gotten those increases [in funding] without Highland Park. [And should rich-district spending far outstrip poor-district spending], we want to go back to the courts in a few years and say, look, they're doing it again.

Interview with Craig Foster, executive director of the Equity Center (Feb. 1, 1991).

tax cap to reflect rising costs and growing enrollments.[157] However, those biennial reviews would guarantee all districts access only to a state-set spending level rather than access to real spending levels that the districts themselves would like to achieve. "Most experts fear . . . that funding determined by state bureaucrats with their accountable cost studies will be inadequate."[158] The legislature has a history of seeking to define adequacy at a level lower than "the elected school boards charged with the responsibility to educate our children say they need to do the job."[159]

The floating cork plan, by contrast, reflects the real spending desires of parents and other taxpayers. Although the floating cork plan never achieves perfect equalization because of its temporary and small gap in access equality, the *Edgewood II* district court noted that, "[i]n the long run, all districts might be better off with less equalization without caps than more equalization with caps."[160] The plan trades the tax caps that bind districts in continual equality for the tension of temporary inequalities that benefits school budgets statewide.

The floating cork plan allows taxpayers to spend as much money as they want on education, preserves local control, and although it may be expensive, its cost is directly responsive to voters. Unfortunately, it probably is the one plan described here that will not satisfy the *Edgewood II* court. Its recapture provision satisfies the first part of the court's mandate by not shielding any district from education taxes. The plan, however, may violate the court's prohibition of unequalized revenue by allowing a small gap between the revenue raised by wealthy districts taxing at the same rate as poorer districts. Whether this periodically corrected, but recurring inequity meets the *Edgewood II* standards is questionable. The plans' advocates support it with the most enigmatic sentence in the *Edgewood* literature, a line from *Edgewood I* expressly reaffirmed in a footnote of *Edgewood II*: "Nor does it [the Texas Constitution] mean that local communities would be precluded from supplementing an efficient system established by the legislature; however any local

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[157] *See, e.g.*, the Parker plan, S.B. 49, § 5; the STATE BOARD OF EDUCATION PLAN, *supra* note 150, at § 7.4.

[158] *Edgewood II*, slip op. at 24.

[159] *Edgewood II*, slip op. at 15.

[160] *Id.* at 30.

enrichment must derive solely from local tax effort."[161] Supporters of the plan interpret this to mean that "once efficiency [i.e., substantial access equality] is achieved, supplementation is allowed without state equalization . . . for those districts taxing above the maximum equalized tax rate."[162] Even the plan's advocates, however, seem unsure whether its interpretation parallels that of the Texas Supreme Court,[163] and many school finance experts feel certain that it does not. It is tragic for Texas that its best option for school finance reform may be precluded by the court opinions which originally sparked the school finance reform debate.

One of the few features common to most of these proposals is the necessity of a constitutional amendment. Amending the constitution is nothing unusual for Texas,[164] and some portion of the constitution will probably change to resolve this debate. The only question remaining is which amendment will bring the best school finance system to Texas students.

Part IV analyzes the difficulties legislatures face in enacting a court-mandated plan. In addition, Part IV proposes a two-step plan to preempt restrictive judicial mandates by improving school financing and fixing the improvements into the constitution.

IV. AMENDMENT PROPOSAL

The *Edgewood II* mandate helped shock legislators into understanding the importance of bringing equality to school finance and encouraged them to consider raising taxes for education in a tight-budget year.[165] Legislators who fear a tax-wary electorate and unpopular reforms are sometimes reluctant to change the

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[161] *Edgewood II*, 34 Tex. Sup. Ct. J. at 289 n.11 (citing *Edgewood I*, 777 S.W.2d at 398).

[162] The Equity Center, *Summary: Revision of the "Floating Cork" Plan to Meet* Edgewood II 3 (Feb. 13, 1991).

[163] The Equity Center is supplementing its interpretation with a proposed constitutional amendment that sanctions its periodic inequities.

[164] Voters have amended the Texas Constitution 327 times since 1876, STAFF OF TEX. LEG. REF. LIB., RECORD OF CONSTITUTIONAL AMENDMENTS SUBMITTED TO THE PEOPLE (1990) and the education article has been amended six times since 1984, when the *Edgewood* litigation began. TEX. CONST. art VII.

[165] The 72d Legislature faces a $3.9 billion budget shortfall and many expensive judicial mandates other than the one for education. Slater, *Daunting Budget Gap Awaiting Lawmakers: Richards Believes Tax Hike Can Be Avoided*, Dallas Morning News, Jan. 4, 1991, at 1A, col. 1.

education system. They often require a judicial mandate, threatening to shut schools down statewide or to impose an extremely unpopular judicially crafted solution,[166] and sparking protests from angry educators, parents and, possibly, students.

Without a judicial mandate, reform of school finance may be difficult to achieve; but with a judicial mandate, it may be equally challenging. The *Edgewood II* court-ordered deadline may have given the legislature the will to raise money for education, but its tightened mandate so narrowed legislators' options that the legislature may be unable to adopt the "best" plan. For example, the floating cork plan, which encourages educational budgets to rise to meet educational needs over time is probably unconstitutional under *Edgewood II*. Access cap and penny pooling plans, although probably constitutional under *Edgewood II*, threaten to stunt the growth of school budgets even as educational costs rise.[167]

In order to pass good legislation, some Texans have resorted to defensive legislative tactics: amending the state constitution to trump its interpreters. One such constitutional amendment, proposed by the Equity Center, effectively rewrites the portions of the *Edgewood II* opinion that prevent the floating cork plan's constitutionality.[168] Such defensive tactics, however, still leave legislators chasing judges in pursuit of school finance reform. The amendment proposal urges a bolder legislative tactic: first, enacting a good law, and then, securing it in the state constitution by amendment.

Legislators in other states, learning from Texas's dilemma, should seize the initiative and preempt the courts. They should use the threat of litigation—and the fear of possibly restrictive and sometimes educationally destructive judicial mandates that

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[166] The threat of the imposition of a court plan helped push the deadlocked governor and legislators to pass Senate Bill 1 in Spring 1990. Plaintiffs argue that "the lesson to be learned from this process is that . . . the power rather than the words of the Court are respected by the Legislature and Governor." Appellants' Brief *supra* note 132, at 16.

[167] *See supra* notes 136–144, 153 and accompanying text.

[168] H.J. Res. 45, 72d Leg. (1991), would amend article VII of the Texas Constitution with the addition of section 3-d, which would read:

> A school district may supplement an efficient system established by the legislature under Section 1 of this Article by levying and collecting additional ad valorem taxes authorized by the legislature, provided the system guarantees all districts equal access to not less than the amount per student at the ninety-seventh percentile of all school districts' state and local tax revenue per student.

might flow from it—to push their colleagues to equalize education *before* plaintiffs file a complaint in state court. Litigation may be a poor reform tactic,[169] but active legislators can make it their reluctant colleagues' most powerful incentive to act.[170] Rather than waiting for the high court of their states to prescribe a narrow band of solutions, legislators should convince the public of the need for reform[171] and draft good school finance law.

No single legislative solution can be the model for the crafting of a "good" law for every state, but any preemptive law should answer both the quality and equality concerns that spark litigation and the state's interest in encouraging spending on education. Texas's floating cork plan is a good example of such a compromise. It satisfies most of the typical plaintiffs' and poor districts' desires, equalizing access to educational dollars up to a very high point that periodically rises to reflect the districts' true spending wishes, but permitting short periods of access inequality. Likewise it satisfies many of the state's and the wealthy districts' needs, allowing districts' budgets to grow unhampered by tax caps or awkward administration and preserving local control of unconsolidated school districts, but not without considerable expense to the state and a demanding display of political will.

Perhaps twenty years ago, a compromise law like this might have satisfied the needs of property-poor districts sufficiently to have avoided the waves of litigation to reform school finance.

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[169] Interview with Billy D. Walker (Feb. 18, 1991).

[170] One commentator has written,

> *Edgewood II* seems to have instilled the fear of appeal into the minds of government officials, who now seem inclined to take a more radical position than even some of the plaintiffs . . . . As politically unpopular as the words "recapture" and "consolidation" seemed last session, most people involved in the public education debate now agree that a solution will involve both concepts.

Wong, *supra* note 43, at 16, col. 1. Besides motivating the legislature to act, the threat of litigation may encourage them to appropriate enough funds for their new law. Plaintiffs could make an easy case against an underfunding legislature, using language from *Edgewood I*: "Under article VII, section 1, the obligation is the legislature's to provide for an efficient system [of education] . . . . [T]he legislature's responsibility to support public education is different because it is constitutionally imposed." *Edgewood I*, 777 S.W.2d at 397–98.

[171] Without public backing, ambitious school finance reforms can backfire, as New Jersey Governor Jim Florio has discovered. Poor and moderate-income residents of Newark, New Jersey, one of the poorest big cities in the nation, were as unsupportive as wealthy suburbanites of Florio's tax plan to aid poorer school districts. The reason, Newark Mayor Sharpe James said, is that Florio failed to explain his program and win support for it in the suburbs and cities before forcing it through the New Jersey legislature. *To Poor, Florio's Tax Plan is Just Another Promise*, N.Y. Times, Nov. 24, 1990, at 1, col. 3.

Now, however, with two decades of challenges to state systems and a new, third wave of victories to encourage potential plaintiffs to file suits, legislatures may have to do more than enact a good law. To prevent litigation from sabotaging a good law, legislatures may need to write the good law into the state constitution.

Like any bold plan, still untried in any state,[172] the two-step strategy has its dangers. Cementing specifics into an inflexible form like the constitution hinders future legislators from making necessary changes even to minor details. But a well-drafted constitutional amendment would include only the broad principles of a school finance system (e.g., that it should ensure minimum revenues to every district to fund an adequate program, that it should guarantee all districts equal access to educational dollars up to a point that reflects the true spending desires of the districts, and that unequalized revenues should be allowed beyond that point if the gap is periodically closed). The amendment would leave the details (e.g., that an adequate funding level is defined to be, say, $3,000 per student) to be written in more flexible statutory form.

A further problem is that such an amendment, particularly if it means major new costs to the state, may not pass, and it may be easier to wait out the terms of the high court justices and fill the court with different-minded judges than to amend the constitution.[173] The difficulties of amending the constitution, however, are not unique to this solution, since almost all the school finance proposals require at least one constitutional amendment. Besides, waiting for new judges to decide differently still leaves the initiative with the courts and not with the legislators.

Critics also argue that only litigation spurs the reforming "evolution" of school finance,[174] but Texas's litigation series seems a destructive kind of evolution. A gentler, but equally persuasive, push for reform comes from legislators' awareness of inchoate lawsuits and the restrictive judicial mandates that might follow, mandates they can preempt by acting before their options narrow.

Perhaps the most serious problem with the activist tactic of amending the constitution is that, if abused, it could disempower

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[172] Interview with John Augenblick, *supra* note 39.

[173] Two-thirds of both the House and Senate, and a majority of voters statewide, must approve any constitutional amendment. TEX. CONST. art. XVII, § 1.

[174] Interview with John Augenblick, *supra* note 39.

the property-poor districts who lack the political clout to demand legislative change[175] and who depended on the state constitution's education clause to win change through the courts. For example, a constitutional amendment excising from the state constitution education clauses the word "efficient," the key term upon which much of the *Edgewood I* and *II* opinions hinge, would have obviated any need for reform. One proposed amendment (itself constitutionally suspect) also would have made any school finance statute presumptively constitutional.[176] On the other hand, this amendment strategy is no more open to the danger of abuse than any other, more traditional legislative tactics, such as lobbying. If rightly done, however, the amendment strategy will allow states to enact and preserve an excellent school finance system.

Not all states will face judicial mandates as strict as Texas's, but education-minded legislators should take this most recent mandate in the third wave of litigation as a spur to action. Although judicial mandates like this one may help them push their colleagues to reform school finance, the mandates also limit their options and sometimes hinder constructive reform. When the legislature acts first, it preempts drastic court mandates and may choose from a wide field of legislative options and tailor the law to the state's and students' best interests.

V. Conclusion

The recent sweep of third wave victories may signal the beginning of a new string of judicial mandates on school finance and a new series of challenges for legislators to answer in the upcoming years. Legislators today may choose between two avenues of reform. Using one or more of the three equal educational opportunity principles, they can either work with the judicial mandates to draft a bill that meets the state's needs for educational quality as well as the court's demands for equality, or they can muster the political courage and foresight to reform well before the court orders them to act, preempting the chal-

[175] Interview with Billy D. Walker, *supra* note 169.

[176] H.J. Res. 10, 72d Leg. (1990) (amending article VII, section 1 of the Texas Constitution by adding the following: "A statute enacted by the Legislature to provide such [an educational] system or to provide for its support and maintenance is presumed to meet the requirements of this constitution if there is any evidence that the statute is not arbitrary and capricious.").

lenges with good laws and integrating those laws if possible into the state constitution.

VI. EPILOGUE

On February 25, 1991, in response to a motion for rehearing,[177] the court delivered a terse opinion that split the same court that had twice in the past fifteen months delivered a unanimous opinion on school finance. The court corrected the common misinterpretation that the *Edgewood II* opinion forbade even small amounts or brief periods of unequalized local revenue:

> Once the Legislature provides an efficient system in compliance with article VII, section 1 [which requires "a direct and close correlation between a district's tax effort and the educational resources available to it"], it may, so long as efficiency is maintained, authorize local school districts to supplement their educational resources if local property owners approve an additional local property tax.[178]

At this writing, Texas lawmakers are struggling to meet their quickly approaching April 1st deadline, to critique rapidly drafted proposals, and to satisfy a massive lobbying effort by school administrators, teachers, PTA presidents, and taxpayers.[179] This latest supreme court opinion, however, frees legislators to consider more—and better—options, and to enact plans that, like the floating cork plan, provide the best long-term systems of education finance for the students of Texas.

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[177] Edgewood Indep. School Dist. v. Kirby, No. D-0378, slip op. (Tex. S. Ct. Feb. 25, 1991).

[178] *Id.* at 3.

[179] *Grass-Roots Groups Lobbying on School Finance Plans*, Dallas Morning News, Feb. 24, 1991, at 1, col. 2.

NOTE

LIBERATOR OR CAPTOR: DEFINING THE ROLE OF THE FEDERAL GOVERNMENT IN SCHOOL FINANCE REFORM

CHRISTOPHER P. LU*

My apple trees will never get across
And eat the cones under his pines, I tell him,
He only says, "Good fences make good neighbours."[1]

—Robert Frost

Since 1973, when the United States Supreme Court ruled that disparities in education funding do not violate the United States Constitution,[2] the role of the federal government in public school finance reform has been almost nonexistent. In the wake of recent state litigation, however, this limited federal role is being reexamined. Former Representative Augustus F. Hawkins (D-Cal.) proposed a bill in 1990 that would withhold federal funds for elementary and secondary education from states with unequal funding. Instead, funds would be channelled directly to localities in order to promote equalization among school districts within any given state. The bill, entitled the Fair Chance Act,[3] also would attempt to equalize funding among the states.[4]

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* A.B. Princeton University 1988; Harvard Law School Class of 1991. Many of the ideas in this Note originated in Professor Gerald E. Frug's Local Government Law class. The author wishes to thank Rosemary Reeve and Erik H. Corwin for their invaluable suggestions.

[1] R. FROST, *Mending Wall*, in NORTH OF BOSTON 12 (1915).

[2] San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 24 (1973) (holding that "at least where wealth is involved the Equal Protection Clause does not require absolute equality or precisely equal advantages"). The Court also refused to find that education is "among the rights afforded explicit protection under [the] Constitution. Nor do we find any basis for saying it is implicitly so protected." *Id.* at 35.

[3] H.R. 3850, 101st Cong., 2d Sess. (1990), *reprinted in Hearing on H.R. 3850, The Fair Chance Act, Before the Subcomm. on Elementary, Secondary, and Vocational Education of the House Comm. on Education and Labor*, 101st Cong., 2d Sess. (1990) [hereinafter *Hearing*].

[4] The relevant provisions of the bill are:

> Title I—Fair Funding Within States
>
> Sec. 101. Fair Funding.
>
> Subject to section 103, no State may receive Federal funds from any program administered by the Department of Education to support its public schools after January 1, 1996, unless the Secretary of Education certifies that the

While Representative Hawkins's proposal never became

funding for public education in that State meets the standards for equalized spending as determined under section 102.

Sec. 102. Secretary's Review of Public Education.

(a) Secretarial Review.—Not later than January 1, 1991, and January 1 of each subsequent year, the Secretary of Education shall review each State's method of financing its public elementary and secondary schools.

(b) Certification.—Not later than January 1, 1991, and January 1 of each subsequent year, the Secretary of Education shall certify all States in which the funding for public education in the State meets the standards for equalized spending under subsection (c).

(c) Standards for Review.—

(1) In conducting any review under this Act, the Secretary shall use the expenditure disparity and wealth neutrality standards utilized in carrying out Public Law 81-874, as amended.

(2)(A) Except as provided in subparagraph (B), the Secretary shall follow the regulations concerning such standards as in effect on March 22, 1977.

(B) For purposes of the Secretary's review under this section—

(i) the expenditure disparity within any State may not exceed 5 percent; and

(ii) the wealth neutrality shall include not less than 95 percent of the revenues within the State.

Sec. 103. State Compliance.

Section 101 shall not apply to a State not certified under section 102(b) which submits to the Secretary, not more than 1 year after notice of certification status, a plan for State compliance with the requirements for certification within 5 years of such notice, which is approved by the Secretary.

Sec. 104. Alternate Use of Funds.

Federal funds allocated to a State affected by the prohibition under section 101 shall be distributed to local educational agencies within the State on a basis determined by the Secretary to carry out the purposes for which such funds were made available and to meet the standards for equalized spending under section 102.

Title II—Fair Funding Among States

Sec. 201. Authorization of Appropriations.

(a) General Provision.—Subject to subsection (b), there are authorized to be appropriated such sums as may be necessary to carry out a program to assure a fair chance for a good education for children in all the States.

(b) Limitation.—For any fiscal year, no funds are authorized to be appropriated for programs under this title unless appropriations for the preceding fiscal year for chapter 1 of the Elementary and Secondary Education Act were not less than an amount equal to—

(1) appropriations for the second preceeding fiscal year and cost of living increases; and

(2) $500,000,000.

Sec. 202. Allocation of Funds.

(a) Secretarial Determination.—Subject to subsection (b), the Secretary shall determine an appropriate and equitable formula for the allocation of funds among the States.

(b) Standards for Allocation of Funds.—To the greatest extent possible such allocation formula shall—

(1) move all States up to the level of funding the Secretary determines to be necessary to assure a good education for all children;

(2) give greater funding to those States which provide sufficient revenues to meet the special needs of economically disadvantaged, handicapped, and non-English speaking children; and

(3) measure the tax-effort for education of each State in terms of its fiscal capacity and reward those States making a greater effort.

law,[5] and is unlikely to become law in the near future,[6] the proposal is significant in suggesting a return of the federal government to this area.

Using the Hawkins bill as a starting point, this Note examines the desirability of expanding the federal role in public school finance reform.[7] The central question is whether the federal government should be viewed as a "liberator," capable of fostering local control over education by *both* rich and poor school districts,[8] or a "captor," adding yet another layer of bureaucracy and regulation.[9] This Note adopts the image of the federal government as a liberator, arguing that federal legislation along the lines of the Fair Chance Act would be entirely consistent with the federal government's traditional role in equalizing educational opportunity. It concludes that federal intervention could both aid poorer school districts and induce states to move towards equalization.

I. TRADITIONAL RESISTANCE TO A GREATER FEDERAL ROLE IN EDUCATION

> Federal aid to education has probably stimulated more controversy per dollar than has any other domestic aid program. Over its long history, debates over federal support for education have pinched the most sensitive nerves of the Amer-

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[5] A hearing on H.R. 3850 was held before the House Subcommittee on Elementary, Secondary, and Vocational Education. *See Hearing*, *supra* note 3. Although no further action was taken on the bill, one of its provisions—a requirement that each state report annually to the Secretary of Education on the equalization of education spending within the state—was included in a compromise education bill, H.R. 5932, 101st Cong., 2d Sess., 136 CONG. REC. 11,788–825, which passed the House but died before reaching the Senate floor. *1990 Ed Package Fails, Despite Last-Minute Bargaining & Bush Support*, 11 EDUC. REP. 3 (Nov. 5, 1990).

[6] "This is just not the time to push any education initiatives that require more money." Telephone interview with former Representative Augustus F. Hawkins (Jan. 30, 1991) [hereinafter Hawkins Interview].

[7] This Note assumes that equalization is desirable—an assumption that is not uncontroverted. While the Note does not advocate any particular form of equalization, a "wealth neutrality" or "power equalizing" system, which allows districts to raise funds for education regardless of their local property tax base, seems most consistent with the thesis of this Note. *See generally* J. COONS, W. CLUNE & S. SUGARMAN, PRIVATE WEALTH AND PUBLIC EDUCATION (1970). An increased federal role, however, could supplement any of the equalization models that have been proposed.

[8] For a persuasive argument for increasing local power, see Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057 (1980) [hereinafter *The City as a Legal Concept*].

[9] *See* H. LU, FEDERAL ROLE IN EDUCATION 267 (1965) ("the prevailing fear of Federal control . . . causes many valuable educational proposals to fail in legislation").

> ican body politic, the nerves of religion, race, and states' rights. Frequently, those debates center on questions of educational finance.[10]

Traditionally, education has been the responsibility of state and local governments. Although the *Rodriguez* decision emphasized the value of local control,[11] the states possess "plenary power" over education, despite having "delegat[ed] considerable educational policymaking authority to local agencies."[12] Furthermore, the doctrine of *Hunter v. Pittsburgh*[13] has given the states supreme control over all activities of localities.[14] States have general authority to raise revenues and control the ability of municipalities to raise local revenues.[15] *Hunter* is also significant in that it seems to limit the federal government's ability to interfere with the division of power between cities and states.[16]

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[10] Berke, Sacks, Bailey & Campbell, *Federal Aid to Public Education: Who Benefits?*, in FEDERAL AID TO EDUCATION: WHO BENEFITS? WHO GOVERNS? 1 (J. Berke & M. Kirst eds. 1972).

[11] As one commentator has argued, "[a] notable irony is that the fiscal scheme involved in *Rodriguez* was not imposed on the local level: the plaintiffs were challenging a mechanism of school financing imposed by the state of Texas." Williams, *The Constitutional Vulnerability of American Local Government: The Politics of City Status in American Law*, 1986 WIS. L. REV. 83, 108. Williams suggests that Justice Powell purposely "sh[ied] away from formulating the issue in *Rodriguez* as a clash between state autonomy and federal requirements, and characterize[d] the case instead as involving issues of local autonomy . . . ." *Id.*

[12] Project, *Education and the Law: State Interests and Individual Rights*, 74 MICH. L. REV. 1373, 1375–77 (1976).

[13] 207 U.S. 161 (1907).

[14] The *Hunter* Court stated:

> Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them . . . . The number, nature, and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the State . . . . [T]he State is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States.

Id. at 178–79. While still strong in theory, the *Hunter* doctrine is not without its exceptions. *See, e.g.*, Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) (applying the Fair Labor Standards Act to a local mass transit system); Lawrence County v. Lead-Deadwood School Dist. No. 40-1, 469 U.S. 256 (1985) (invalidating South Dakota statute that specified distribution of federal funds by local governments).

[15] *See The City as a Legal Concept*, *supra* note 8, at 1062–73 (describing powerlessness of cities). While Professor Frug writes that cities in general are powerless, this Note argues that some localities, specifically those without money, are more powerless than others. *See also* H. HUDGINS & R. VACCA, LAW AND EDUCATION: CONTEMPORARY ISSUES AND COURT DECISIONS 134–36 (2d ed. 1985); E. REUTTER, THE LAW OF PUBLIC EDUCATION 215–17 (3d ed. 1985) (both discussing the power of local school boards to tax).

[16] *Hunter*, 207 U.S. at 178–79. "This ability of states to control their cities without significant federal constitutional restraint—when combined with the failure of home-rule provisions effectively to limit state power over cities—has left cities without any meaningful immunity from state control." Frug, *Empowering Cities in a Federal System*, 19 URB. LAW. 553, 555 (1987) [hereinafter *Empowering Cities*].

This is not to say, however, that the federal government has abstained from a role in the education field. From this country's founding, the federal government "has exhibited an active interest in education . . . [but] it was established that the federal government was to play an indirect role in the development of public education, to serve as a stimulus function without direct control of educational policy and operation."[17] In particular, Congress has used both categorical and block grants to states and localities to promote education.[18] These grants usually condition how the federal money is spent.[19]

During the 1960's and 1970's, the federal role increased in terms of both spending and regulation. In the 1980's, however, President Reagan's New Federalism program reversed this two-decade trend. The Reagan philosophy of decentralizing power continues to shape the debate over education issues.[20]

> Whether by design or by accident, responsibility for educational policy-making clearly is now perceived to rest with the states and local school districts, with federal administrative officials exhorting, persuading, and serving as cheer-

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[17] K. ALEXANDER & D. ALEXANDER, AMERICAN PUBLIC SCHOOL LAW 55 (2d ed. 1985) [hereinafter ALEXANDER & ALEXANDER]; *see also* W. Taylor & D. Piche, *A Report on Shortchanging Children: The Impact of Fiscal Inequity on the Education of Students at Risk*, H.R. DOC. NO. 36-895, 101st Cong., 2d Sess. 49 (1990) (prepared for House Comm. on Educ. & Labor) [hereinafter *Taylor Report*] ("over the course of the past quarter century, Congress, while conceding the primacy of the states and local school districts in public education, has carved out an important role of assistance and regulation in specific areas"). For a general discussion of the historical development of federal education programs, see R. JOHNS, E. MORPHET & K. ALEXANDER, THE ECONOMICS AND FINANCING OF EDUCATION 330–39 (4th ed. 1983); Verstegen, *Two Hundred Years of Federalism: A Perspective on National Fiscal Policy in Education*, 12 J. EDUC. FIN. 519–47 (1987).

[18] For a discussion of the differences between categorical and block grants, see Wedeman, Passman & Day, *Educational Block Grants: Introduction to the Debate*, in FEDERAL BLOCK GRANTS TO EDUCATION 163–64 (E. Cohn ed. 1986); Levin, *Federal Grants and Educational Equity*, 52 HARV. EDUC. REV. 444, 447–49 (1982). Generally, categorical grants can be used only for specific programs, while block grants can be used for a number of programs within a broad area. *Id.* Constitutionally, Congress has justified federal aid under the spending clause, the commerce clause, and the fourteenth amendment. ALEXANDER & ALEXANDER, *supra* note 17, at 58–63.

[19] E. REUTTER, *supra* note 15, at 243–44; *see* ALEXANDER & ALEXANDER, *supra* note 17, at 59–60 (arguing that federal aid is based on "inducement" rather than compulsion); Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1430–32 (1989) (commenting that the Supreme Court has not invalidated a condition on federal spending since United States v. Butler, 297 U.S. 1 (1936)).

[20] *See* Rossmiller, *Federal Funds: A Shifting Balance?*, in THE IMPACTS OF LITIGATION AND LEGISLATION ON PUBLIC SCHOOL FINANCE: ADEQUACY, EQUITY, AND EXCELLENCE 9, 17 (J. Underwood & D. Verstegen eds. 1990) (providing charts demonstrating an increase in federal revenues from 1960–80 and a decrease from 1980–87). While Reagan's concern with returning power to the states was rooted in the Jeffersonian idea of local control, Jefferson actually supported a constitutional amendment to enumerate the federal government's role in education. H. LU, *supra* note 9, at 267.

> leaders for state and local reform activities. Although education has not been deemphasized, the federal role in education has been . . . . *The Reagan administration shifted the terms of the debate from equity to excellence and reemphasized the central role of the states and local school districts in educational policy making.*[21]

Notwithstanding President Bush's stated goal of becoming the "education president," the move towards greater decentralization[22] and emphasis on excellence at the price of equity[23] seems likely to continue, along with a decrease in federal spending. In 1980, federal funds comprised 9.8% of total revenues for elementary and secondary schools;[24] by fiscal 1991, the figure fell to six percent.[25] As David Gardner, president of the University of California system, notes, "Washington is no longer out front [on education] . . . . It's merely backing up the states."[26]

Although the federal government currently administers hundreds of educational aid programs,[27] it assumes a major policy role only in the education of the economically disadvantaged, the handicapped, and other at-risk groups.[28] Even in these

[21] Rossmiller, *supra* note 20, at 20 (emphasis added).

[22] *Id.* at 23–24. At the September 1989 education summit in Charlottesville, Virginia, President Bush and the nation's governors issued a statement noting that "[e]ducation has historically been, and should remain, a state responsibility and a local function . . . ." *The Statement by the President and Governors*, N.Y. Times, Oct. 1, 1989, § 4, at 22, col. 2.

[23] Hawkins, *Equity in Education*, 28 HARV. J. ON LEGIS. 565 (1991). Acting Education Secretary Ted Sanders said the President's fiscal 1992 education budget was "designed to address our educational problems by rewarding excellence, encouraging innovation, increasing flexibility, and eliminating waste." *Administration Requests $29.6 Billion in Education Department's Fiscal 1992 Budget*, 12 EDUC. REP. 2 (Feb. 1, 1991). This budget request includes $690 million in programs to improve educational excellence. *Id.* at 4–5; *see* Lerner, *Good News About American Education*, 91 COMMENTARY 19 (1991) (discussing success of minimum competency reform and failure of excellence movement); Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 63 (1990) [hereinafter *Part I*] ("In practice, however, the concern for excellence has thus far not led to greater fiscal equity.").

[24] Rossmiller, *supra* note 20, at 21.

[25] *Appropriations for Fiscal Year 1991: Hearings Before the Subcomm. on Dep'ts of Labor, Health and Human Services, and Education, and Related Agencies, of the Senate Comm. on Appropriations*, 101st Cong., 2d Sess. 174 (1990) [hereinafter *Appropriations Hearings*] (statement of Secretary of Education Lauro F. Cavazos).

[26] *From Bush On Down, A Greater Federal Role in Education is Sought*, N.Y. Times, June 22, 1988, at B6, col. 1 [hereinafter *From Bush On Down*].

[27] Verstegen, *supra* note 17, at 516 (noting the 500 federal aid programs in 1980).

[28] *See* Title I (now known as Chapter I) of the Elementary and Secondary Education Act of 1965 ("ESEA"), 20 U.S.C. §§ 2701–2976 (1988); Education For All Handicapped Children Act, 20 U.S.C. §§ 1401–1461 (1988); Bilingual Education Act (Title III of ESEA), 20 U.S.C. § 880b (1988); National School Lunch Act, 42 U.S.C. §§ 1751–1769(a) (1988); Head Start Act, 42 U.S.C. §§ 9831–9852 (1988). For a detailed description of these federal programs, see T. JONES, INTRODUCTION TO SCHOOL FINANCE 215–33 (1985); C. BENSON, THE ECONOMICS OF PUBLIC EDUCATION 376–90 (3d ed. 1978).

areas, however, states and localities view the federal government as an intruder. The prevailing perception is that the federal government contributes too little money, yet imposes too much bureaucracy and regulation.[29] From this perspective, the federal government is "a minor, albeit vocal, partner" in education.[30] But the most common and compelling argument for viewing the federal government as a "captor" is that a greater federal role in education compromises local control over education. This concern will be discussed in the next two sections.

II. Local Control as a Farce

> Today, it is easier to justify the need of Federal aid than to defend the need of Federal control. The American people have been so accustomed to the local control system that they forget how and why it came into being. There certainly are numerous merits to the American tradition, but there are also weaknesses and shortcomings, which, like fading leaves and drying branches of a tree, need careful trimming. As in all aspects of life, adaptation is the best means to survival.[31]

Most discussions about the "time-honored concept"[32] of local control focus on decisions about "selection of teachers, the nature of the curriculum, the length of school year, and the tax rate to be levied."[33] In every state but Hawaii, the legislature has delegated these decisions to local school boards.[34] As Chief Justice Burger wrote in *Milliken v. Bradley*, "No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational

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[29] *See* Tiedt, *Historical Development of Federal Aid Programs* in Financing Education: Fiscal and Legal Alternatives 389–92 (R. Johns, K. Alexander & K.F. Jordan eds. 1972); McKeown, *Consolidation of Federal Education Funds: State and Federal Issues*, 6 J. Educ. Fin. 399, 401 (1981).

[30] Rossmiller, *supra* note 20, at 24. Former Education Secretary William J. Bennett and his use of the Department of Education as a bully pulpit epitomizes this vocal federal role. *Id.* at 19.

[31] H. Lu, *supra* note 9, at 8.

[32] Alexander, *Equitable Financing, Local Control, and Self-Interest*, in The Impacts of Litigation and Legislation on Public School Finance: Adequacy, Equity, and Excellence, *supra* note 20, at 307.

[33] *Id.* at 299.

[34] Kaden, *Courts and Legislatures in a Federal System: The Case of School Finance*, 11 Hofstra L. Rev. 1205, 1210 (1983).

process."[35] In keeping with these ideas, it is at least arguable that direct federal influence over local curricular decisions should be limited, unless those decisions implicate some larger constitutional interest.[36] Local control over school financing, however, presents a different issue. The federal government has historically played a major role in equalizing educational opportunity.[37] Moreover, federal influence in the school finance area is justified by the inability of property-poor school districts to achieve meaningful local control over curricular and other matters in the absence of adequate resources.

Local governments, under authority granted by the states, generally raise their own educational funds through property taxes.[38] Because property wealth varies dramatically among school districts, even those neighboring each other,[39] a wealthy district with a low tax rate can still raise more money for its schools than a poor district with a high tax rate.[40] While local governments nationwide contribute forty-four percent of funds for elementary and secondary education,[41] the figure varies widely between rich and poor districts.[42] Furthermore, state

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[35] 418 U.S. 717, 741–42 (1974); *see Part I*, *supra* note 23, at 1 ("Localism as a value is deeply embedded in the American legal and political culture.").

[36] *See, e.g.*, Edwards v. Aguillard, 482 U.S. 578 (1987) (striking down Louisiana law that forbade teaching of evolution in public schools unless accompanied by "creation science" instruction). The National Defense Education Act of 1958, 42 U.S.C. §§ 1876–1879 (repealed 1986), is an exception to the limited federal role in curricular affairs. Motivated by fear of the Soviet space program, this act sought to encourage the learning of science, mathematics, and foreign languages. C. BENSON, *supra* note 28, at 376 n.1.

[37] *See, e.g.*, Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to 2000d-7 (1988); Elementary and Secondary Education Act of 1965; *see also* Plyler v. Doe, 457 U.S. 202 (1982) (forbidding a state from refusing to educate illegal alien children); Brown v. Board of Educ., 347 U.S. 483 (1954) (mandating desegregation of public schools).

[38] For a basic description of state and local taxation in this area, see Kaden, *supra* note 34, at 1205–07, 1210–13.

[39] *Part I*, *supra* note 23, at 20 ("Wealth differences regularly occur in districts located only a few miles apart in the same metropolitan area."); *see id.* at 20 n.62 (citing examples of dramatic wealth differences between neighboring districts).

[40] Property-rich districts are usually composed of affluent families, large industrial facilities, or older communities with small numbers of school-aged children. Kaden, *supra* note 34, at 1211. Property-poor districts are often in rural areas. *Id.* But urban areas with substantial property tax bases are also usually considered poor districts because of heavy demands on their tax revenues from other governmental services (called "municipal overburden") or "extraordinary education needs," such as remedial and bilingual education (called "educational overburden"). *Id.*

[41] *Taylor Report*, *supra* note 17, at 3. States supply about 50% of education funding, with the federal government supplying 6.4%. For a somewhat dated breakdown of education revenues for every state, see T. JONES, *supra* note 28, at 16–17 (Table 1-6).

[42] For example, Baltimore, Maryland, raises only 31% of its educational funds from local sources. Pleasantville, New Jersey, another property-poor district, receives 73% of its education budget from state funds. *Taylor Report*, *supra* note 17, at 3–4 n.5.

funds are insufficient to compensate for these local differences in wealth.[43]

Given their varying abilities to raise and spend revenues, all districts cannot participate equally in the ideal of local control. After all, a district with scarce resources has little to control. It cannot decide to emphasize foreign languages or advanced placement courses, buy more computers, offer pre-kindergarten or after-school programs, decrease class sizes, or even resod the football field.[44] As Professor Richard Briffault notes, "[F]or a substantial number of localities, fiscal incapacity makes a mockery of local control. Formal local autonomy for all, at the price of effective self-determination for some and fiscal burdens and impoverished public services for others is hardly a stirring ideal."[45]

At the core of the local control argument is the protection of the right of wealthy muncipalities, most often the suburbs,[46] to spend as much as they want on their children's education. Even Justice Powell's majority opinion in *Rodriguez*, which rested on federalism grounds,[47] conceded that "it is no doubt true that reliance on local property taxation for school revenues provides

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[43] *See Part I, supra* note 23, at 60–61.

[44] *See Taylor Report, supra* note 17, at 33–44 (describing disparities in vital educational services due to fiscal inequity).

[45] *Part I, supra* note 23, at 38–39; *see* Alexander, *supra* note 32, at 303 (arguing that local control "assumes that fiscal conditions are the same, that local autonomy is not restricted by lack of fiscal resources, and that all things are fiscally equal").

[46] As Briffault comments:

> Local control of education is more likely to be seen as a means of protecting the family interest in public schools if suburbs, rather than cities, are the norm in thinking about local governments. The tendency to conceptualize local government after the model of suburbs as centers of families and homes facilities the equation of local control with family control, encourages deference to state decisions devolving educational, administrative and financial responsibilities to the local level and makes it more difficult for concerns about interlocal inequality and the external effects of local actions to overcome the decentralization endemic to the system.

Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 385 (1990) [hereinafter *Part II*].

[47] "[I]t would be difficult to imagine a case having a greater potential impact on our federal system than the one now before us, in which we are urged to abrogate systems of financing public education presently in existence in virtually every state." *Rodriguez*, 411 U.S. at 44. Arguably, underlying the Court's concern for federalism was a fear that the federal government would stifle diversity. In speaking of the need for "experimentation" and "innovation," the majority noted, "No area of social concern stands to profit more from a multiplicity of viewpoints and from a diversity of approaches than does public education." *Id.* at 50. Alternatively, the Court may have feared the lack of specific reforms: "we are unwilling to assume for ourselves a level of wisdom superior to that of legislators, scholars, and educational authorities in 50 states, especially where the alternatives proposed are only recently conceived and nowhere yet tested." *Id.* at 55.

less freedom of choice with respect to expenditures for some districts than for others."[48] The roots of local control, however, go much deeper than mere control over local property tax rates. For a rich, suburban school district to provide money to a poor, inner-city district violates the suburban ideal of exclusivity,[49] forcing suburban residents to deal with inner-city problems they have sought to escape.[50] As Professor Michael Danielson notes, "The suburbanite says to himself, 'The reason I worked for so many years was to get away from pollution, bad schools, and crime, and I'll be damned if I'll see it all follow me.'"[51] According to this view of suburban life, local governments are a "sanctuary for people,"[52] their primary responsibility "to protect the home and family—enabling residents to raise their children in 'decent' surroundings, servicing home and family needs and insulating home and family from undesirable changes in the surrounding area."[53] Others have theorized that in a modern society, schools are an extension of the family[54] and thus intrusions into the operation of the schools strike close to the hearts of parents. Not surprisingly, then, when states such as New Jersey have placed a limit on what their wealthier districts can spend and have forced redistribution to poorer districts,[55] those

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[48] *Id.* at 50. In separate dissents in *Rodriguez*, both Justices White and Marshall emphasized the illusory character of local control. *See id.* at 64–65 (White, J., dissenting) ("In [property-poor] districts, no matter how desirous parents are of supporting their schools with greater revenues, it is impossible to do so through the use of the real estate property tax."); *id.* at 130 (Marshall, J., dissenting) ("[I]n striking down interdistrict disparities in taxable local wealth, the District Court took the course which is most likely to make true local control over educational decisionmaking a reality for *all* Texas school districts.") (emphasis in original).

[49] "[T]he evolution of public schools does suggest in many cases that local control has led to a continuation of a quasi-public school in which small, local enclaves of persons fortify themselves into small, usually affluent, school districts and operate them as though they were private schools." Alexander, *supra* note 32, at 302.

[50] *See* H. ARKES, THE PHILOSOPHER IN THE CITY 320–26 (1981) (discussing the unwillingness of suburbs to transfer control over education, since flight from cities is motivated by desire for political autonomy).

[51] M. DANIELSON, THE POLITICS OF EXCLUSION 20 (1976); *see Where America is Growing: The Suburban Cities*, N.Y. Times, Feb. 23, 1991, at 1, col. 1 ("Since the 1950s the movement of the middle class to the suburbs has helped generate economic and educational inequities and racial polarization.").

[52] *Part II*, *supra* note 46, at 383.

[53] *Id.* at 382.

[54] *Id.* at 386 ("schools are the public service most bound up with the idea of family"); Project, *supra* note 12, at 1380 ("[h]istorically, Americans have considered schools to be an extension of the local community").

[55] Goertz & Goertz, *The Quality Education Act of 1990: New Jersey Responds to* Abbott v. Burke, 16 J. EDUC. FIN. 104, 114 (1990); *see Taylor Report*, *supra* note 17, at 15.

laws have been attacked vociferously.[56] In short, local control is a farce. It is "merely an elaborate justification for inequality"[57] and "an effective rapier with which the more affluent can defend their preferred financial status."[58]

The inability of localities to cooperate and share financial resources[59] betrays the underlying self-interest that characterizes the school finance debate and inhibits effective reform. Wealthy localities cannot be trusted to cooperate voluntarily and share resources with their less fortunate neighbors. As Professor Gerald Frug notes, "there is no reason to negotiate over anything to which one is already entitled as a matter of law before the negotiation begins."[60] Nor can reformers trust state legislatures, often dominated by suburban interests, to correct the inequality without the threat of a court order.[61] Wealthy school districts simply do not perceive improving education as a statewide interest,[62] let alone as a national interest. Instead, they see the issue as purely a local matter to be handled by parents and local school boards. In such a self-interested, class-based regime, outside action is imperative.

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[56] *See Taylor Report*, *supra* note 17, at 6 n.18, 25.

[57] Alexander, *supra* note 32, at 305.

[58] *Id.* at 307. *See generally* J. GAVENTA, POWER AND POWERLESSNESS: QUIESCENCE AND REBELLION IN AN APPALACHIAN VALLEY 3–25 (1980) (arguing that prevailing groups will "invest in the development of dominant images, legitimations, or beliefs" to perpetuate their power).

[59] As Professor Kern Alexander points out:

> Local control is most vigorously defended by those school districts that are in a more dominant economic position . . . . Because of wealth differentials, many could maintain a high-quality school system with relatively low tax rates. Persons in these school districts have historically been reluctant to share their advantage with those in less fortunate economic circumstances.

Alexander, *supra* note 32, at 305. For contemporary examples of this resistance to sharing resources, see *Take Our Poor, Angry Hartford Tells Suburbs*, N.Y. Times, Feb. 12, 1991, at A1, col. 2 (describing suburban opposition to Hartford, Connecticut, plan to raise money by imposing a wage tax on nonresidents); *Despite Economic Woes, 2 States Seek More School Spending*, N.Y. Times, Jan. 7, 1991, at B9, col. 1 (describing wealthy Alamo Heights school district in San Antonio resisting consolidation of tax revenues on a countywide basis).

[60] *Empowering Cities*, *supra* note 16, at 558. Frug, however, provides a persuasive argument for interlocal cooperation. *Id.* at 562–68.

[61] C. BENSON, *supra* note 28, at 400 ("the political structure of many state legislatures renders any show of favoritism toward large cities anathema"). Boston Mayor Raymond Flynn has suggested that cities are neglected because "political power has shifted . . . and cities can no longer deliver votes or campaign contributions to candidates as they once did." *Mayors Attack Bush Plan to Shift Control Over $15 Billion to States*, N.Y. Times, Feb. 9, 1991, at 1, col. 1.

[62] *See* Buse v. Smith, 74 Wis. 2d 550, 247 N.W.2d 141 (1976) (striking down redistribution of local property tax revenues from rich districts to poor districts).

How then can control by all localities, both rich and poor, be fostered? State court action has proven effective,[63] but litigation takes time and money, and there are no guarantees that legislatures will implement court orders.[64] Alternatively, both the United States Supreme Court and Congress have suggested that the federal government can play a role in school finance reform. The next section examines the contours and possibilities of this proposed federal role.

III. Toward a Federal Role in Promoting Fair and Effective Local Control

Two recent Supreme Court cases have recognized the ability of the federal government to liberate localities from the constraints of state law in the education field.[65] In *Lawrence County v. Lead-Deadwood School District No. 40-1*,[66] the Court examined the constitutionality of the Payment in Lieu of Taxes Act,[67] which compensates localities for tax revenues lost from the location of tax-immune federal lands within their jurisdictions. South Dakota law required local governments to distribute such federal payments in the same way general tax revenues are distributed, and, in particular, to comply with a state provision that sixty percent of all county revenues go to school districts. Lawrence County objected to this limitation on its discretion to use the payments as it pleased. According to the

[63] *See* Edgewood Indep. School Dist. v. Kirby (Edgewood II), 34 Tex. Sup. Ct. J. 287 (1991); Abbott v. Burke, 119 N.J. 287, 575 A.2d 359 (1990); Rose v. Council for Better Educ., 790 S.W.2d 186 (Ky. 1989); Helena Elementary School Dist. No. 1 v. State, 236 Mont. 44, 769 P.2d 684 (1989). *But see Part I, supra* note 23, at 27 (reporting that many plaintiffs in state court litigation have argued, usually unsuccessfully, that local control should be fostered for all districts).

[64] For a discussion of the Texas legislature's inability to satisfy the Texas Supreme Court's mandate, see Levine, *Meeting the Third Wave: Legislative Approaches to Recent Judicial School Finance Rulings*, 28 Harv. J. on Legis. 507 (1991); *see also Taylor Report, supra* note 17, at 6 (commenting that elected officials lack the political will to make radical changes in school financing).

[65] The role of federal education funds to localities was first examined in Shepheard v. Godwin, 280 F. Supp. 869 (E.D. Va. 1968). In that case, Virginia had deducted from its state payments to a school district a sum equal to a percentage of federal impact aid that the district had received. A three-judge district court found that the Virginia law violated the supremacy clause of the United States Constitution. In other areas, however, the Supreme Court has reduced local autonomy vis-a-vis the states. *See, e.g.*, Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982) (limiting local antitrust exemption).

[66] 469 U.S. 256 (1985).

[67] 31 U.S.C. §§ 6901–6906 (1988).

Court, Congress clearly intended that a local government "should not encounter substantial interference from the State in allocating funds to the area of greatest need."[68] In striking down the state law, the Court noted:

> The School District and the State also argue that because of concerns of federalism, the Federal Government may not intrude lightly into the State's efforts to provide fiscal guidance to its subdivisions. The Federal Government, however, has not presumed to dictate the manner in which the counties may spend *state* in-lieu-of-tax payments. Rather, it has merely imposed a condition on its disbursement of federal funds. The condition in this instance is that counties should not be denied the discretion to spend [federal] funds for any governmental purpose, including expenditures that are linked to federal lands within their borders. It is far from a novel proposition that pursuant to its power under the Spending Clause, Congress may impose conditions on the receipt of federal funds, absent some independent constitutional bar.[69]

In dissent, then-Justice Rehnquist demonstrated a clear understanding of the significance of the majority's decision.[70] Referring to the *Hunter* doctrine, Rehnquist argued that the majority opinion, which he described as "flying in the face of this settled doctrine,"[71] did not adequately justify its deviation from the established notion that municipalities are subordinate to states.[72]

In the other major case, *Missouri v. Jenkins*, a federal district court imposed a local property tax increase to pay for the costs of desegregation.[73] In contrast to *Lawrence County*, where the county did not want to spend money on education, in *Jenkins* the school district wanted to raise money to fund desegregation but was barred from doing so by state law. Although holding that a federal court could not impose a tax increase, the Court held that "it could have authorized or required [the school district] to levy property taxes at a rate adequate to fund the desegregation remedy and could have enjoined the operation of state laws that would have prevented [the district] from exer-

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[68] *Lawrence County*, 469 U.S. at 269; *see also id.* at 263 ("Equally important [to Congress] was the objective of ensuring local governments the freedom and flexibility to spend the federal money as they saw fit.").

[69] *Id.* at 269–70 (emphasis in original).

[70] Justice Stevens joined Rehnquist's dissent.

[71] *Lawrence County*, 469 U.S. at 271 (Rehnquist, J., dissenting).

[72] *Id.* at 273.

[73] 110 S. Ct. 1651 (1990).

cising this power."[74] Taken together, *Jenkins* and *Lawrence County* stand for the proposition that federal action can bypass the states in order to give local governments control over their education finances. In fact, Justice Rehnquist's dissent in *Lawrence County* noted that the majority opinion assumed that a federal statute can "somehow *emancipate* the county from the state regimen as to what is and is not a proper governmental purpose for a county."[75]

Historically, the federal government's primary role—some would say its only role—in education has been to equalize educational opportunity. In addition to several of the statutes already described,[76] Congress has explored a possible federal role in remedying school finance inequities.[77] The most significant federal aid program to promote equal educational opportunity is Chapter I (formerly Title I),[78] which supplements local funds to help the economically disadvantaged. In the 1987-88 school year, this program served 4.9 million children, and it may now be serving more than six million.[79] Various statutes also provide for federal payments to school districts with federal tax-exempt property, such as military bases, since the federal property may increase school enrollment yet contribute no local revenue.[80] These "impact aid" laws are premised on the idea that "the federal government as a property owner has the responsibility of the normal citizen in the community to participate in the financial support of local government services."[81]

The 1974 Education Amendments, addressing whether states could count federal impact aid paid to a district as part of local tax receipts to determine the state contribution, was the first federal attempt to establish standards for state equalization.[82] The Amendments, however, did not produce equalization,[83] as

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[74] *Id.* at 1663.

[75] *Lawrence County*, 469 U.S. at 272 (Rehnquist, J., dissenting) (emphasis added).

[76] *See supra* note 28.

[77] *See generally Taylor Report*, *supra* note 17, at 49–53.

[78] *See supra* note 28.

[79] *Appropriations Hearings*, *supra* note 25, at 311 (statement of Daniel F. Bonner, Acting Assistant Secretary for Elementary and Secondary Education).

[80] For a description of these statutes, see Rossmiller, *supra* note 20, at 5–6; Johns & Lindman, *Federal Responsibilities for Financing Educational Programs*, in FINANCING EDUCATION: FISCAL AND LEGAL ALTERNATIVES, *supra* note 29, at 410–13.

[81] C. BENSON, *supra* note 28, at 389.

[82] *Hearing*, *supra* note 3, at 44–47. These standards would have been tightened by the Fair Chance Act. *See Taylor Report*, *supra* note 17, at 51–52.

[83] *Hearing*, *supra* note 3, at 47–50; *Taylor Report*, *supra* note 17, at 51–52.

only seven states currently meet the standards.[84] The 1978 Education Amendments commissioned a study that concluded that federal funds were inadequate to remedy disparties among states, but did not consider disparities within states.[85] In 1988 Congress authorized a new "concentration grant" program earmarking Chapter I funds to school districts with unusually high percentages of poor children.[86] Finally, participants in the 1989 education summit, though concerned primarily with promoting educational excellence, suggested that the federal government should "promote national education equity by helping our poor children get off to a good start in school [and] giving disadvantaged and handicapped children extra help to assist them in their school years . . . ."[87]

The most recent and detailed proposal for using federal influence to equalize educational financing, representing a culmination of congressional efforts thus far, is the Fair Chance Act.[88] The Fair Chance Act has a number of practical flaws that might impede its implementation[89] and is arguably only a symbolic gesture—after all, federal funding constitutes only six percent of all educational spending.[90] Nevertheless, the bill is designed

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[84] *Hearing*, *supra* note 3, at 71 (statement of K. Forbis Jordan, Professor of Educational Leadership and Policy Studies, College of Education, Arizona State University).

[85] *Taylor Report*, *supra* note 17, at 52.

[86] Pub. L. No. 100-297, 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 146.

[87] *The Statement by the President and Governors*, *supra* note 22.

[88] The Hawkins bill is not a new idea. In 1972 Joel Berke and Michael Kirst proposed that "[f]ederal aid should be addressed to eliminating the wealth and need-based disparities that characterize state patterns of raising and distributing revenues for education." Berke & Kirst, *Intergovernmental Relations: Conclusions and Recommendations*, in FEDERAL AID TO EDUCATION: WHO BENEFITS? WHO GOVERNS?, *supra* note 10, at 405. In justifying such an expansive use of federal funds, they wrote:

> We would propose, then, that a federal responsibility for assisting the states to meet the decisions of the courts and the dictates of equity and rationality should become a national policy. Such a policy would be consistent with the direction of major federal education programs to date, which as our data have shown, are far more equitable and rational in their distribution than are state aid funds or the distribution of local revenues. While the magnitudes of federal aid would be far in excess of those that the federal government has customarily provided, we maintain that they are not at all inconsistent with the national interest in the education of all citizens.

Id. at 406.

[89] The bill would probably require changes in the financing systems of 43 states. *Hearing*, *supra* note 3, at 71–72 (statement of Rep. Carl C. Perkins (D-Ky.)).

[90] The fiscal 1991 appropriations bill for the Department of Education provided $27.955 billion in spending authority, reduced by mandatory across-the-board deficit reductions to $27.425 billion. *Details Released on Fiscal 1991 Education Department Appropriation*, 11 EDUC. REP. 1 (Nov. 5, 1990). The fiscal 1990 appropriation was $24.719 billion. *Id.* The Bush administration fiscal 1992 budget requests $29.6 billion for the Department of Education, but the bulk of the $2.5 billion increase from the previous year is the result of "a new requirement that the [budget] request include expected future costs of

to make local control over education meaningful for all municipalities, not just wealthy districts. The fact that education traditionally has been viewed as a local or state interest "does not eliminate the need for a federal concern about access and equality of educational opportunity."[91] In the words of Robert Reich, "As federal support for elementary and secondary education has waned and states and localities have been forced to pick up the bill, the burden has fallen especially heavily on the poorest jurisdictions with the most limited tax bases."[92] Indeed, many educators have argued that federal money can reduce fiscal inequities both within and among states.[93] Not only would the bill directly aid poorer school districts, but it could motivate states to take positive action towards equalization:

> [T]he purpose of this law, the Fair Chance Act, would be to encourage States to do the right thing. It is very hard for States to do the right thing. That is why the courts have had to come into the picture, and that is why, I think, there is a basis for the Federal Government also coming into the picture. Legislative politics at the State level simply do not operate in a way that provides equality of educational opportunity. Outside instruments are necessary to prod states to do the right thing—on the one hand, State courts, and on the other hand, perhaps a national bill.[94]

The symbolic importance of the Fair Chance Act should not be underestimated. Arkansas Governor Bill Clinton has stated that a greater federal role in the form of establishing minimum education standards could "coax and embarrass states and

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borrowing for student loan programs." *Administration Requests $29.6 Billion in Education Department's Fiscal 1992 Budget, supra* note 23.

[91] *Hearing, supra* note 3, at 38 (statement of K. Forbis Jordan).

[92] Reich, *The Real Economy*, ATLANTIC MONTHLY 35, 47 (Feb. 1991).

[93] *See* W.N. GRUBB & S. MICHELSON, STATES AND SCHOOLS 67 (1974) ("State and federal aid do tend to reduce resource inequalities both among states and within states, although not as much as might be possible with a different distribution of current funds."); Heinold, *Impact of Federal Monies on Equity Among States in K-12 Public School Finance*, 8 J. EDUC. FIN. 461 (1983) (demonstrating that federal funds had a positive effect on equity for each of 22 years between 1959 and 1981); Levin, *supra* note 18, at 449–56 (describing the impact of different types of federal grants on equity). For an examination of how the federalism programs of Presidents Nixon and Reagan affected educational inequity, see Macchiarola & Bailey, *Equity and Federalism: The Role of the Local Education Administrator*, 15 URB. LAW. 3, 13 (1983) ("Achieving equity of input will be more difficult as the federal government withdraws from its equalization role.").

[94] *Hearing, supra* note 3, at 61 (testimony of Arthur Wise); *see id.* at 27 (statement by Arthur Wise) ("The Fair Chance Act would create additional incentives for states to provide what they morally, legally, and prudentially should—equal educational opportunity.").

schools into meeting them."[95] But by "reallocating entitlements"[96] from wealthy to poor, the Hawkins bill goes beyond mere standard-setting and requires positive state action to promote equity in education.

Whenever the federal government intervenes in the area of school finance, as it would under the Fair Chance Act, "the foundations of constitutional federalism are plainly tested."[97] There is an important distinction, however, between requiring states to equalize and channelling federal money directly to localities in order to spur state action. In the words of the *Jenkins* Court, the distinction is "far more than a matter of form."[98] In that case, Justice White wrote, "Authorizing and directing local government institutions to devise and implement remedies not only protects the function of those institutions but, to the extent possible, also places the responsibility for solutions to the problems . . . upon those who have themselves created the problem."[99] Similarly, in *Rodriguez*, both Justices White and Marshall, writing in separate dissents, argued that requiring Texas to equalize but giving it the flexibility to decide on a financing scheme would not be incompatible with local control.[100]

The Fair Chance Act would satisfy constitutional federalism concerns by allowing legislatures to devise their own systems of equalization and tailor their reforms to the specific needs and desires of their own states. Thus, the positive values of decentralization extolled in *Rodriguez*—diversity, experimentation, participation, community, and local discretion—would still exist under the bill, as long as the federal criteria for equalization were satisfied.[101] As Professor Lewis Kaden has noted, "School finance claims thus seem an especially appropriate category to remit to the diverse treatment under state constitutional guar-

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[95] *Governors and Experts Are Divided on Setting Nation's Education Goals*, N.Y. Times, Dec. 6, 1989, at B14, col. 4.

[96] This phrase is from *Empowering Cities*, *supra* note 16, at 565–66. Frug, however, would be critical of congressional action to reallocate entitlements. *See infra* text accompanying notes 104–105. An example of a state court reallocating entitlements is the New Jersey Supreme Court's decision in Southern Burlington County NAACP v. Township of Mount Laurel (Mt. Laurel I), 67 N.J. 151, 336 A.2d 713 (1975), which required localities to provide their fair share of low- and moderate-cost housing.

[97] Kaden, *supra* note 34, at 1236.

[98] 110 S. Ct. at 1663.

[99] *Id.*

[100] 411 U.S. at 68–69 (White, J., dissenting); *id.* at 132 (Marshall, J., dissenting).

[101] The equalization criteria established by the Fair Chance Act, *supra* note 4, are contained in section 102(c) of the bill and are based on the 1974 Education Amendments. *See Hearing*, *supra* note 3, at 44–50 (statement of K. Forbis Jordan).

antees, holding in reserve the prospect of federal intervention by the courts or the Congress *to establish uniform national rules*."[102] Furthermore, most state and local officials probably would prefer congressional establishment of a national goal of equalization to piecemeal intervention of the federal courts along the lines of *Lawrence County* and *Jenkins*.[103]

The most obvious criticism of a greater federal role is that education decisions will come from Washington and not state education departments or local school boards. "[C]ed[ing] power to a federal agency because of [localities'] failure to agree among themselves"[104] potentially substitutes a federal tyrant for a state tyrant. "Our only option," according to Professor Frug, "is to choose which danger to liberty seems more tolerable, more controllable, or more worth defending."[105] Local discretion over financing and property tax rates, however, is only one small aspect of local control over education. Under the Fair Chance Act, the federal government would not dictate curriculum decisions, apparently the primary concern of parents and local school boards.[106] Furthermore, the history of federal educational programs, most notably Chapter I and handicapped funding, has not revealed any federal desire to dominate education.[107] Finally, although the Department of Education—described by many as "bureaucratic and listless"[108]—would have to scrutinize the funding policies of states to determine equalization, such micromanagement already exists to some extent. Chapter I funds are distributed first to state and local educational agencies and then to designated schools.[109] Distributing funds to districts under the Fair Chance Act would be no more complicated.[110]

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[102] Kaden, *supra* note 34, at 1243 (emphasis added).

[103] For a discussion of the problems associated with federal court intervention, see *id.* at 1235–44.

[104] *Empowering Cities*, *supra* note 16, at 568.

[105] *The City as a Legal Concept*, *supra* note 8, at 1124.

[106] "This is a not a question of federal control over education or the curriculum. The federal government is putting up money with certain conditions and it's up to the states to accept the conditions. We do the same thing with the highway system." Hawkins Interview, *supra* note 6.

[107] *See* H. LU, *supra* note 9, at 287 ("History demonstrates that although most Federal aids have been accompanied with some control, they are beneficial rather than detrimental to the nation . . . . The fear of Federal control is unrealistic and unreasonable.").

[108] *With Bright National Goals for Schools Set, Governors Puzzle Over How to Attain Them*, N.Y. Times, Feb. 28, 1990, at B8, col. 3.

[109] T. JONES, *supra* note 28, at 217. The distribution of Chapter I funds is extremely complicated since it considers numerous factors in determining both what is a low-income family and low-income neighborhood. C. BENSON, *supra* note 28, at 383–87.

[110] *But see Taylor Report*, *supra* note 17, at 55–61 (indicating that better data collection on equalization is needed).

The bill's aim of fostering local control by poor districts is not merely theoretical. Evidence suggests that poor districts would prefer federal initiatives to equalize educational opportunity[111] over the intransigence of state governments.[112] Local distrust of state governments is not confined to education. A group of big-city mayors has fiercely opposed a Bush administration proposal that would give states control over $15 billion in federal funds that currently go directly to cities.[113] Some of this $15 billion in federal money is used for education. While the Administration has argued that this plan would give governors greater flexibility and discretion over the use of funds, mayors contend it would add a layer of state bureacracy while allowing governors to siphon off money intended for the neediest cities.[114] Thus, it is at least plausible, if not probable, that poor school districts would view federal reform as a "liberation" from traditional school financing schemes. Indeed, there may even be popular support for legislation along the lines of the Fair Chance Act: a 1989 Gallup Poll found that sixty-four percent of Americans were willing to pay higher taxes to improve public schools in poorer areas.[115]

Despite the salutary purpose of the Fair Chance Act and the indications of support, there are provisions in the bill that would undermine its ability to accomplish its goals. Although the Hawkins bill specifies that money is to be distributed to school districts "in order to assist in achieving greater equalization of resources within that state,"[116] section 104 appears to allow federal funds to go to wealthy districts with handicapped or disadvantaged children.[117] While poor districts are not composed

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[111] At the subcommittee hearing on the Hawkins bill, Rep. Donald M. Payne (D-N.J.) recounted, "[J]ust two days ago I had a meeting in my district with each of the superintendents of the school districts in the Tenth District of New Jersey. The superintendents are asking for assistance. They want to see Federal initiatives that assist the poorer districts." *Hearing*, *supra* note 3, at 68–69. Sy Fliegel, deputy superintendent of one of New York City's decentralized districts, noted, "On any issue this important the Federal government has to be involved." *From Bush On Down*, *supra* note 26.

[112] The speed of state reform has been described as "glacial and deliberate." ALEXANDER & ALEXANDER, *supra* note 17, at 293.

[113] *Mayors Attack Bush Plan to Shift Control Over $15 Billion to States*, *supra* note 61.

[114] *See Flynn, Dinkins Attack Bush's Funds Switch*, Boston Globe, Feb. 21, 1991, at 1, col. 3.

[115] *Poll: Higher Taxes OK for School Reform*, Chicago Tribune, Aug. 25, 1989, at 6, col. 1.

[116] *Hearing*, *supra* note 3, at 191.

[117] It is unclear from the hearing transcript how the bill would work. Representative Hawkins noted that federal funds would be channelled to districts "that had been denied

entirely of poor people nor wealthy districts of wealthy people,[118] the only effective federal bill would be one that withholds all federal funds, including Chapter I and handicapped aid, from wealthy districts. Indeed, only when rich communities are hurt will reform occur. Although at first glance this might seem draconian in that handicapped children or disadvantaged children would be penalized solely because of their place of residence, wealthy districts are likely to respond by either (1) using their own substantial funds to compensate for the cutoff in federal funds, or (2) lobbying state legislatures for an equalization plan that would satisfy the requirements of the Fair Chance Act.[119] The latter alternative seems more likely.[120]

Channelling federal funds only to poor districts also would increase the impact of the aid. An analogy can be drawn to the problems with Chapter I. Although the 1988 authorization of concentration grants provides for targeting especially needy areas,[121] Chapter I funds are distributed to about ninety percent of school districts nationwide,[122] diluting the effectiveness of the aid. Many of the wealthier districts that receive this assistance have sufficient resources to provide for the disadvantaged children in their schools. For example, Englewood, one of the wealthiest districts in New Jersey, has a high concentration of low-income families, yet funds a wide range of educational programs to help disadvantaged children. To do so, it relies almost

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equity," which seems to suggest that only poorer districts would continue receiving federal aid. *Hearing*, *supra* note 3, at 118. In another part of the transcript, Albert H. Kauffman of the Mexican American Legal Defense Fund voiced his support for a bill in which "moneys could only be used in those districts of very low property wealth or very low ability to raise money under the State system." *Id.* at 124.

[118] Generally, there is a correlation between income and property values; that is, wealthier people live in wealthier districts and are able to pay more in taxes. *Taylor Report*, *supra* note 17, at 4; *see Hearing*, *supra* note 3, at 111 (statement of Albert H. Kauffman) ("As it stands, in Texas there is a great concentration of poor students in poor districts."). *But see Rodriguez*, 411 U.S. at 57 (noting that "recent studies have indicated that the poorest families are not invariably clustered in the most impecunious school districts"). While the assumption that poor people live in poor districts is not always precise, it is an assumption that is used in distributing Chapter I funds. C. BENSON, *supra* note 28, at 384–87.

[119] A third option is that wealthy families will pull their children out of public schools and enroll them in private schools. While this is certainly a real possibility, it is a problem that plagues all equalization proposals and is not unique to a federal measure.

[120] The fear that wealthy districts will short-change the education of at-risk children is probably unfounded. Even in fiscally strapped districts, such as New York City, funds for handicapped and disadvantaged students are often exempt from budget cuts, or only cut as a last resort. *Cuts Loom in Classes for the Handicapped*, N.Y. Times, Mar. 21, 1991, at B1, col. 4.

[121] *See supra* note 86.

[122] *Appropriations Hearings*, *supra* note 25, at 311 (statement of Daniel F. Bonner).

exclusively on local revenues.[123] In contrast, a property-poor district must use Chapter I money to provide the same services that Englewood can fund with local revenues.[124] Given that at-risk students need an estimated $21 billion more each year for public education,[125] and that there is a widespread reluctance to raise taxes, the only solution is a redistribution of the federal and state aid that is currently going to wealthy districts.

Another flaw in the Hawkins proposal is the bill's second part, which is designed to equalize funding among states. While it is no doubt an admirable goal for all states to spend equal amounts per student on education,[126] this component of the bill raises many practical problems.[127] First, different states are able to raise different amounts of money: some have income taxes, some have large natural resources, some are industrialized, and some are largely rural. Different states also have different educational expenditures; a state with a large number of recent immigrants, for example, may have to supply costly bilingual education programs. Consequently, funding differences between states vary much more than funding within a state. The wealthiest districts in Alaska and New York spent more than $25,000 per pupil in 1986–87, while the poorest in Texas spent only about $1,200.[128] In contrast to this 20-to-1 ratio, intradistrict disparities are smaller; thirty-nine states have disparities of less than 4-to-1.[129] While the disparities in statewide spending per pupil are less dramatic,[130] a comparison of this sort would be misleading. If we were to equalize only the average spending per pupil for all fifty states, large fiscal inequities could still exist within each state.

Second, absent a commitment by Congress and the President to double or triple federal funds for education, equalization among the states is unrealistic. It is unlikely that a poor state

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[123] *Taylor Report*, *supra* note 701, at 33. Only one remedial and compensatory instruction program in Englewood is funded with Chapter I and state compensatory funds. *Id.*

[124] *Id.* at 53.

[125] *Id.* at 47 (citing a study by Henry Levin).

[126] As Hawkins noted, "I think a kid in Mississippi should be entitled to receive as decent an education as someone in another state." Hawkins Interview, *supra* note 6.

[127] *But see Taylor Report*, *supra* note 17, at 19–20 (noting that interstate inequities pose serious problems).

[128] *Hearing*, *supra* note 3, at 51 (statement of K. Forbis Jordan).

[129] *Id.* at 35.

[130] Alaska, with the highest average level, spends $7,971 per student. Utah, with an average of $2,454 per student, spends the least. *Taylor Report*, *supra* note 17, at 72–73 (Tables 1 & 2).

like Mississippi could ever generate enough revenues to match expenditures by a wealthy state like Alaska.

Finally, a federal attempt to equalize among states would implicate larger federalism concerns. While almost all state constitutions have education provisions, many of which require a "thorough and efficient" education,[131] there is no comparable provision in the United States Constitution, nor can it be implied in the fourteenth amendment after *Rodriguez*.[132]

IV. Conclusion

A more active federal role can spur school finance reform in the 1990's, but federal action will be effective only with greater federal spending for education. Given current economic and political realities, this seems unlikely. Nevertheless, even a relatively modest proposal such as the Fair Chance Act, which would have only a limited budgetary impact, can have an important symbolic effect.[133] Federal legislation could begin tearing down, in the words of Robert Frost, the "fences" that separate rich and poor "neighbors."[134] It also would be a crucial first step in recognizing that improving education is a national priority.[135] As former Representative Hawkins notes, "We have to decide whether or not it is in the national interest to educate every child. If it is, then the federal government should be held to its fair share of the cost. Everyone should be concerned about education. It's everyone's business. There's no reason the federal government shouldn't be involved."[136]

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[131] *See* Thro, *To Render Them Safe: The Analysis of State Constitutional Provisions in Public School Finance Reform Litigation*, 75 Va. L. Rev. 1639, 1661–70 (1989).

[132] *See supra* note 2.

[133] The federal-local partnership envisioned by this Note is not without its critics. *See* Johns & Lindman, *supra* note 80, at 406. One of the primary concerns raised by these authors is that federal officials will distribute funds based on political favoritism. This is a legitimate concern, but it can be addressed through the use of highly specific statutory language to control discretion.

[134] *See supra* note 1.

[135] *See Hearing*, *supra* note 3, at 32 (statement of K. Forbis Jordan) ("The Fair Chance Act will draw attention to the continuing problem of equitable financing for the Nation's public schools.").

[136] Hawkins Interview, *supra* note 6.

EQUITY IN EDUCATION

AUGUSTUS F. HAWKINS*

The concept of equal opportunity is deeply embedded in our national ethos. We Americans love to be seen as good sports who guarantee a fair chance for all. In practice, however, we fall short of this ideal.

In the realm of education, we have established free, universal public education. The twin goals of equity and excellence have been the beacon lights that have guided us through perilous times and across new frontiers of human achievement in industry, science, the arts, and diplomacy. To us Americans, there was no doubt that *all* would be educated. We accepted that. The facts were too evident to require examination.

So, we believed it when we were told on the authority of President Bush and fifty governors at the Education Summit of 1989, that by the year 2000 every child would be ready for school, even the poor, the homeless, the abused, the disabled, migrants, and immigrants; that American children would be first in math and science, despite the fact that there are no teachers to teach them; and that Americans would be universally literate, forgetting the usual twenty-five percent functional illiteracy rate, and the 800,000 student dropouts per year. We were obviously enchanted to sit back and await the millennium, which would arrive in ten years instead of a thousand. We were happy to know that all the other peoples on this planet would wait for us to catch up so that we could lead them into the "new world order."

Today, however, many Americans are growing weary of throwing money at problems they are being told are only becoming worse. No one has managed to keep the idealistic promise of American educational leadership. Former President Reagan, the Joint Economic Committee, and, more recently, White House Chief of Staff John Sununu, have lectured the public on how badly the public schools have performed despite the infusion of constantly increasing amounts of precious tax money.

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* Member, U.S. House of Representatives from 1963 to 1991; former chairman of the House Committee on Education and Labor and of the House Administration Committee; founder, chairman, and president of the Hawkins Family Memorial Foundation for Educational Research and Development.

They prove their case by pointing to declining test scores and correlating these with the investment of federal funds in programs like those created by the Head Start Act[1] and the Elementary and Secondary Education Act.[2] They imply that a cause-and-effect relationship exists, and that if we just abolish the Great Society—that is, reduce public education funding and educate only "the gifted"—money will be saved and taxes reduced with no loss to American education.

Not once has the truth been exposed. Reagan, Sununu, and the others measure the effect of educational expenditures with standardized test scores, taken from tests like the SAT. Extremely disadvantaged children, whose academic performances do improve with increased funding, are not represented fairly in tests of college-bound students.

Our federal budgets have been horrible examples of our priorities. They are also discouraging indicators of our expected progress by the year 2000. Spending less than one percent of the GNP and two percent of the federal budget on educational programs for the disadvantaged means that America will be last in education, instead of first.

Let me focus now on fiscal inequity, the reason we on the House Education and Labor Committee authorized our recent report.[3]

Thirty years ago, inequity in school financing was not even on the table for public discussion. It was generally assumed that school money was equitably distributed. The media had not addressed the plight of poorer school districts, let alone publicized the viability of litigation to address the inequity.

The public viewed money for equity (for remedial or compensatory programs) as an "add-on," as preferred treatment. In truth, the 1965 Elementary and Secondary Education Act did intend to give preferential treatment, although "targeting" might be a better description. The federal law sought to provide some equity in educational treatment for those children being shortchanged at the local level.

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[1] 42 U.S.C. §§ 9831–9852 (1988), *as amended by* Act of Oct. 23, 1989, Pub. L. No. 101-120, 103 Stat. 700, § 2 (1989).

[2] Elementary and Secondary Education Act of 1965, Pub. L. No. 89-750, 80 Stat. 1191 (codified as amended in scattered sections of 20 U.S.C.).

[3] W. Taylor & D. Piche, *A Report on Shortchanging Children: The Impact of Fiscal Inequity on the Education of Students at Risk*, H.R. Doc. No. 36-895, 101st Cong., 2d Sess. 49 (1990) (prepared for House Comm. on Educ. & Labor).

To the extent that these children were being short-changed, the federal assistance also helped more affluent taxpayers by providing federal dollars in place of what the states arguably had a duty to provide. There is nothing wrong with this swapping, if that is America's choice and if, in addition to helping the extremely disadvantaged, we address the educational financing problems faced by middle- and lower-income sectors.

Equity in education is a political and ideological requirement, not an educational one. And what we have here is a clash of ideological philosophies. The philosophy of equity was represented by the Civil Rights Act of 1964.[4] It sought to instill equality into education. An era of retrogression, or benign neglect, followed. James Coleman, author of the famous "Coleman Report" of 1965, and others guided educational policy away from equity. They urged a philosophy premised on the idea that pupil achievement depended on family environment, and that school inputs influenced very little. Others countered this philosophy with the view that pupil achievement depended upon the character of the school, and upon the quality of its personnel, instruction programs, resources, and curriculum. According to this view, the school was expected to transform bad effects of family background.

In 1988 we focused on the School Improvement Act,[5] which included teacher training and accountability for results. It was designed to improve *every* school, not just to make a few schools better for a select number of children.

Today an old ideology has re-emerged as a cure-all for education problems, a cure-all that would cost the federal taxpayers nothing. Proponents of this ideology suggest that pupil achievement is advanced by giving parents the choice of the schools that their children attend. Money previously used for failing schools, those public schools attended by most children, would be transferred to a few good schools, along with the best teachers. In addition, some propose that schools compete in a deregulated market, one unleashed from public sponsorship. Under this proposal, the money now spent on public schools for the disadvantaged would be used to purchase vouchers as a medium of exchange.

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[4] 42 U.S.C. §§ 1971, 1975a–1975d, 2000a to 2000h-6 (1988).

[5] Fund for the Improvement and Reform of Schools and Teaching Act of 1988, 20 U.S.C. §§ 4801, 4811, 4812, 4821–4823, 4831–4833, 4841–4843 (1988).

Bulldozing local educational agencies in the name of open attendance zones, however, goes beyond the federal role authorized by law. Indeed, it goes beyond the supportive and cooperative role the federal government has supplied throughout American history.

I suggest that federal efforts may be better directed at acknowledged national concerns like stimulation of funding support and development and expansion of trained intelligence programs, such as the National Commission on Excellence in Education and Head Start.

We have witnessed a loss of leadership in pioneering fields—automobiles, steel, tools, rubber, plastics, textiles, lasers, microelectronics, and medical research. Filling our need for scientists, mathematicians, engineers, and other trained personnel, including teachers of excellence, is critical to our prosperity and our survival. Our future as a world power depends on doubling financial committment to equitable education and on making education an urgent priority today. We should remember the admonition of the great general and President, Dwight D. Eisenhower, that "[t]he problem in defense is how far you can go without destroying from within what you are trying to defend from without."

RECENT DEVELOPMENTS

LIMITS ON LEGISLATIVE TERMS: LEGAL AND POLICY IMPLICATIONS

Despite predictions that the 1990 elections would be marked by a wave of anti-incumbency sentiment,[1] ninety-six percent of incumbent United States representatives and all but one incumbent senator were successful in their reelection bids.[2] These results continue a pattern of electoral security for members of Congress. Since the 1950's, House incumbents standing for reelection have typically succeeded more than ninety percent of the time.[3] The reelection rate for incumbent senators has been somewhat lower and more volatile during this period, but increased from seventy-two percent in the 1970's to over eighty percent in the 1990's.[4]

Nevertheless, the 1990 elections do provide evidence of a growing anti-incumbency mood among the electorate. One indication may be found in the smaller margins of victory for those incumbents who were reelected. Only "fifty-seven percent of [House] incumbents up for reelection won with sixty percent or more of the vote."[5] By contrast, in 1986 and 1988, more than eighty-five percent of incumbents received sixty percent or more of the vote.[6]

Perhaps more importantly, voters in three states passed ballot initiatives limiting legislative terms. Initiatives passed in Oklahoma and California limit the number of terms that individuals may serve in the state legislature.[7] Colorado's ballot initiative

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[1] *Incumbents Get the Jitters as Voters Grow Angry*, Cong. Q. Weekly Rep., Aug. 4, 1990, at 2473.

[2] *See Warning Shots Fired by Voters More Mood Than Mandate*, Cong. Q. Weekly Rep., Nov. 10, 1990, at 3796.

[3] G. JACOBSON, THE POLITICS OF CONGRESSIONAL ELECTIONS 26 (2d ed. 1987). Since 1950 the reelection rate for incumbents fell below 90% only in 1958, 1964, 1966, and 1974. N. ORNSTEIN, T. MANN & M. MALBIN, VITAL STATISTICS ON CONGRESS, 1989–90, at 56 (1990) [hereinafter N. ORNSTEIN].

[4] *See* N. ORNSTEIN, *supra* note 3, at 57.

[5] *Term Limits: Voting Feeds Fever & State Ballot Initiatives*, American Political Network, Nov. 29, 1990 (LEXIS, Nexis library, Omni file).

[6] *Id.*; *see also Most House Members Survive, But Many Margins Narrow*, Cong. Q. Weekly Rep., Nov. 10, 1990, at 3798 (noting that average vote for House incumbents with major party opposition fell from 70.2% in 1986 and 68.8% in 1988 to 65.8% in 1990).

[7] *Bush Gives Impetus to Term Limits*, L.A. Times, Dec. 13, 1990, at 32, col. 1 [hereinafter *Bush Gives Impetus*].

not only limits state legislative terms, but also places a cap on length of service for members of its congressional delegation.[8]

The success of the ballot initiatives in California, Oklahoma, and Colorado has provided the impetus for a nationwide drive to limit legislative terms. Term limits command widespread support in public opinion polls,[9] and advocates intend to place proposals on the 1992 ballot in as many as twenty states.[10] Although many of these proposals are likely to deal only with state legislative terms, at least some are expected to extend to members of Congress.[11] Moreover, President Bush has indicated support for a constitutional amendment to limit congressional terms.[12] Two state legislatures have endorsed the idea by passing resolutions calling for the convocation of a constitutional convention to adopt a congressional term-limit amendment.[13]

This Recent Development examines the advisability and constitutionality of state efforts to limit legislative terms. Part I provides a background by investigating the nature and sources

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[8] *See infra* note 57 and accompanying text. In addition to these statewide initiatives, Kansas City voters enacted a charter amendment limiting the terms of city council members. For a preliminary analysis of the validity of this amendment, see Lowe v. Kansas City Bd. of Election Comm'rs, 752 F. Supp. 897 (W.D. Mo. 1990).

[9] *See, e.g.*, Cronin, *Term Limits—A Symptom, Not a Cure*, N.Y. Times, Dec. 23, 1990, § 4, at 11, col. 1 (citing an October 1990 Gallup Poll showing that 73% of Americans favor term limits for members of Congress); *Hill Term Limitations: Hot Political Idea That's Looking for a Strategy and a Goal*, Roll Call, Dec. 10, 1990 (LEXIS, Nexis library, Omni file) ("polls show nationwide support for term limits at somewhere around 70 percent of the electorate") [hereinafter *Hill Term Limitations*].

[10] *Activists to Widen Term Limit Drive: Restrictive Measures Expected on as Many as 20 State Ballots in '92*, Wash. Post, Dec. 14, 1990, at A8, col. 1 [hereinafter *Restrictive Measures*].

[11] Pete Schabarum, the sponsor of the recently enacted California initiative, has already announced a drive to place on the ballot an initiative to limit the terms of the California congressional delegation. *See id.*; *see also Term Limit Supporters Warn Bush's Backing Blunts Bipartisanship*, Wash. Times, Dec. 14, 1990, at A4, col. 1 [hereinafter *Term Limit Supporters*]. A similar movement is underway in Texas, led by failed senatorial candidate Robert Mosbacher. *See* Murchison, *Limit the Terms, Limit the Power that Corrupts*, Texas Lawyer, Jan. 21, 1991, at 21. *See generally Hill Term Limitations*, *supra* note 9 ("experts on both sides of the issue say there is a good chance that between 10 and 15 states will actually pass term limits for their Members of Congress in the next few years").

[12] *Restrictive Measures*, *supra* note 10; *Bush Gives Impetus*, *supra* note 7. Despite these indications of support, President Bush has not yet issued a formal endorsement. Many expected such an endorsement to come in the 1991 State of the Union address. Rather than directly endorsing the proposal, however, Bush spoke generally of the need "to give people more choice in government, by reviving the ideal of the citizen politician who comes not to stay but to serve." He then observed that "one of the reasons . . . there is so much support across this country for term limitations is that the American people are increasingly concerned about big-money influence in politics," and called for elimination of political action committees. *State of the Union: Transcript of President's State of the Union Message to Nation*, N.Y. Times, Jan. 30, 1991, at A12, col. 1.

[13] The states are South Dakota and Utah. *See Bush Gives Impetus*, *supra* note 7.

of the incumbency advantage for members of Congress and state legislators. Part II briefly summarizes the term limitation measures passed during the 1990 election season. Part III examines the legal implications of state-imposed limits on the tenure of their congressional delegations, concluding that these limits violate the qualifications clauses of the United States Constitution. Part IV argues that, to the extent term limits mandate permanent ineligibility for particular offices, these limits may themselves be open to constitutional challenge. Part V assesses the policy concerns raised by term-limitation proposals, arguing that the objectives behind these measures would be better served by efforts to increase the competitiveness of legislative elections than by placing an arbitrary cap on the length of legislative service. Finally, Part VI offers a brief summary and conclusion.

I. SOURCES OF THE INCUMBENCY ADVANTAGE

A. *Elections to the United States Congress*[14]

To some degree, the growing movement to enact term limitations reflects a concern that congressional incumbents have become increasingly safe in recent years. In fact, the extent to which electoral security has increased is hotly debated. Those who claim that incumbents have become more secure point to the decline in the number of "marginal" districts—districts won with less than fifty-five or sixty percent of the vote—and the increase in the average vote received by incumbent candidates.[15] They also note that incumbents tend to lose only under special circumstances, so that "barring a Constitution threatening event such as Watergate, if a safe incumbent avoids redistricting and

[14] This discussion, like the literature on congressional elections, focuses heavily on House elections. For comparative views of Senate elections see M. FIORINA, CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT 115–18 (2d ed. 1989) (commenting that, in general, issues are relatively more important and constituency service is less important in Senate than in House elections); G. JACOBSON, *supra* note 3, at 93–95 (noting that Senate challengers are more formidable opponents, attract more campaign resources, and can use the media in a more cost-effective manner than House challengers); Westlye, *Competitiveness of Senate Seats and Voting Behavior in Senate Elections*, 27 AM. J. POL. SCI. 253 (1983) (noting that many Senate elections in small states are similar to House races).

[15] The literature on the "vanishing marginals" is immense. *See, e.g.*, M. FIORINA, *supra* note 14, at 7–13; Mayhew, *Congressional Elections: The Case of the Vanishing Marginals*, 6 POLITY 295 (1974).

scandal, chances of defeat are very close to nil."[16] By contrast, those who argue that incumbent security has remained constant point to the lack of appreciable increase in incumbent reelection rates since the 1950's and the increasing volatility of election results in individual districts.[17]

Regardless of whether the security of congressional incumbents has increased over time, incumbents possess immense advantages that enable them to maintain relatively secure holds on their positions.[18] First, the institutional structure and political processes of Congress provide significant benefits for incumbents.[19] The basic organizational characteristic of Congress is a decentralized committee system in which assignments are based largely on member preferences.[20] This allows members to "specialize in legislative areas where they can best serve local interests."[21] Congress is also characterized by weak party leadership, so that there is little fear of sanction for placing district interests above party positions; in fact, members are often encouraged to do so.[22] Finally, in the process of writing legislation, "[m]embers defer to each other's requests for particular benefits for their states or districts in return for deference to their own."[23]

A second advantage possessed by congressional incumbents is their ability to exploit the perquisites of office to increase their visibility in their home districts. Members of Congress receive "salary, travel, office, staff and communication allowances that are . . . conservatively estimated to be worth more

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[16] Bauer & Hibbing, *Which Incumbents Lose in House Elections: A Response to Jacobson's "The Marginals Never Vanished"*, 33 AM. J. POL. SCI. 262, 270 (1989).

[17] *See* G. JACOBSON, *supra* note 3, at 26–45; Jacobson, *The Marginals Never Vanished: Incumbency and Competition in Elections to the U.S. House of Representatives, 1952–1982*, 31 AM. J. POL. SCI. 126 (1987); Mann, *Is the House of Representatives Unresponsive to Policy Change?*, in ELECTIONS AMERICAN STYLE 261, 265 (A.J. Reichley ed. 1987) [hereinafter *Is the House Unresponsive?*].

[18] For a summary of the electoral advantages of congressional incumbents, see G. JACOBSON, *supra* note 3, at 34–42.

[19] *Id.* at 34. It is important to recognize that this institutional structure is not exogenously given but is itself a product of the very electoral security it has helped to create. On the endogenous character of legislative institutions, see generally B. CAIN, J. FEREJOHN & M. FIORINA, THE PERSONAL VOTE: CONSTITUENCY SERVICE AND ELECTORAL INDEPENDENCE 12–15, 214–19 (1987).

[20] On the committee assignment process, see K. SHEPSLE, THE GIANT JIGSAW PUZZLE (1978), and Rohde & Shepsle, *Democratic Committee Assignments in the House of Representatives*, 67 AM. POL. SCI. REV. 889 (1973).

[21] G. JACOBSON, *supra* note 3, at 35.

[22] *Id.* at 36–37.

[23] *Id.* at 35–36. For a theoretical perspective on this pattern of deference, see Niou & Ordeshook, *Universalism in Congress*, 29 AM. J. POL. SCI. 246 (1985).

than $1 million over a two-year house term."[24] They are also able to exploit the franking privilege to blanket their districts with free mail and have become increasingly active in doing so.[25]

A third advantage possessed by members of Congress is the ability to enhance their status with constituents by focusing on constituency service, or casework, activities.[26] The term casework refers to efforts to help constituents with their problems, particularly problems with the bureaucracy. As Fiorina notes:

> Congressmen possess the power to expedite and influence bureaucratic decisions. This capability flows directly from congressional control over what bureaucrats value most: higher budgets and new program authorizations. In a very real sense each congressman is a monopoly supplier of bureaucratic unsticking services for his district.[27]

Given the growth of the federal bureaucracy since World War II, members of Congress have had increasing opportunities to engage in casework activities.[28] They have also had the incentive to do so, as casework activities, unlike programmatic policy actions, offer a non-controversial way to increase electoral support without making enemies.[29]

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[24] G. JACOBSON, *supra* note 3, at 37.

[25] *Id.*; *see also* M. FIORINA, *supra* note 14, at 21.

[26] *See* M. FIORINA, *supra* note 14. For a brief summary of Fiorina's argument, see G. JACOBSON, *supra* note 3, at 39–42.

[27] M. FIORINA, *supra* note 14, at 41.

[28] *Id.* at 44.

[29] *Id.* at 43. It might be argued that the ability of incumbents to engage in casework activities on behalf of constituents should confer no electoral advantage, so long as challengers could be expected to perform the same types of services once in office. A similar argument could be made regarding the ability of incumbents to exploit the institutional structure of Congress to protect local interests: to the extent member preferences are honored in the committee assignment process, *see supra* notes 20–21 and accompanying text, challengers could, once in office, obtain committee posts relevant to local concerns. Such arguments, however, neglect the informational context of congressional elections. As with use of the perquisites of office, performing casework activities and providing local benefits through legislation permit incumbents to become well-known and project a favorable image among voters who rationally devote only limited attention to politics. These advantages may be difficult for challengers to overcome.

Moreover, as Fiorina and Noll point out, even if voters were perfectly informed, it may be rational for them to prefer incumbents over challengers. Specifically, incumbents are likely to be more effective than newly elected challengers in providing casework services and protecting local interests. Unlike challengers, incumbents possess a "store of experience" concerning both the legislative process and how to deal with the bureaucracy. In addition, as a result of the seniority system, incumbents are more likely to hold positions of authority, such as committee chairmanships. Holding such positions facilitates both casework activities and legislative efforts to further local concerns. To the extent that election of a challenger requires constituents to forgo some degree of effectiveness in furthering their interests, incumbents are structurally advantaged in the

A final advantage possessed by incumbents is money. Under the current system of campaign finance, the fundraising abilities of incumbents enable them vastly to outspend their challengers. Indeed, the gap between incumbents and challengers has widened over time. In the 1974 campaign season, the average House incumbent spent $56,539, roughly forty-one percent more than the $40,015 spent by the average challenger. By contrast, in the 1988 campaign, House incumbents spent an average of $378,316, a 318% advantage over the average challenger.[30] This incumbent advantage in campaign finance is at least partially attributable to political action committees ("PACs"), which demonstrate a marked preference for incumbents in their giving behavior.[31]

Incumbents' incentives and ability to deploy their advantages effectively have been enhanced by important changes in the electoral environment.[32] In particular, there has been a significant decline in the role of political parties since the 1960's. Not only has there been a decrease in party identification among voters, but the concept of partisanship has become less significant in structuring candidate choice, as is evidenced by the increase in split-ticket voting.[33] This has given rise to an era of candidate-centered politics, in which incumbents can no longer rely on partisanship as a secure source of support. As a result, incumbents have aggressively exploited their resources to build personal followings that can translate into success at the polls. Perhaps more importantly, incumbents seek to project an image of invulnerability to discourage the emergence of well-financed, politically experienced challengers, as challenger quality is critically important in determining election outcomes.[34] In general,

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electoral process. *See* Fiorina & Noll, *Majority Rule Models and Legislative Elections*, 41 J. POL. 1081, 1087 (1979).

[30] *See* N. ORNSTEIN, *supra* note 3, at 71. The authors caution that pre-1980 data may not be strictly comparable with post-1980 data because the 1979 Federal Election Campaign Act amendments exempted low-budget campaigns (less than $5,000) from reporting requirements. Nevertheless, the greatest growth in the gap between incumbents and challengers occurred during the 1980's when there were no data comparability problems.

[31] *See* K. SCHLOZMAN & J. TIERNEY, ORGANIZED INTERESTS AND AMERICAN DEMOCRACY 231–33 (1986); L. SABATO, PAC POWER 73 (1985).

[32] The insights developed in this paragraph rely heavily on M. FIORINA, *supra* note 14, at 112–15.

[33] *See* M. WATTENBERG, THE DECLINE OF AMERICAN POLITICAL PARTIES 17–27 (1984). Note, however, that there are some indications that parties have made modest gains in recent years. *See* L. SABATO, THE PARTY'S JUST BEGUN (1988).

[34] *See* G. JACOBSON, THE ELECTORAL ORIGINS OF DIVIDED GOVERNMENT 45–74 (1990) [hereinafter G. JACOBSON, DIVIDED GOVERNMENT]; G. JACOBSON, *supra* note 3, at 45–46.

incumbents have been highly successful in this pursuit. In the 1990 elections, eighteen percent of House incumbents running for reelection were unopposed in their party primary and faced no major party opponent in the general election;[35] many other incumbents faced only nominal opposition.[36]

B. *Incumbency in State Legislative Elections*

Although there are significant variations among states, the available evidence indicates that the incumbency effect in state elections has become increasingly similar to the incumbency effect in congressional elections. Particularly in large states with professionalized legislatures, it is not uncommon for the reelection rate of incumbent legislators to average ninety percent or more.[37] While there is no clear evidence of an increase in reelection rates over time,[38] there has been a steady decline in member turnover[39] and, as in congressional elections, an increase in the average margin of victory by which incumbents retain their seats.[40] In addition, the proportion of incumbent legislators running unopposed has increased in many states.[41]

The sources of the incumbency advantage in the states can be found, as with Congress, in the behavior of and resources available to state legislators. State legislators have increasingly devoted themselves to constituency service activities in order to enhance their electoral security.[42] They have also exploited an expanding range of official resources, most notably the in-

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[35] *74 House Members and 4 Senators Are Running Unopposed: A New Record*, Roll Call, Nov. 5, 1990 (LEXIS, Nexis library, Omni file).

[36] Common Cause estimates that only 23 of the 405 incumbents running for reelection in 1990 faced challengers with more than 50% of the incumbents' campaign resources. *In Congress, Money Talks—and Re-elects*, Chicago Tribune, Nov. 20, 1990, at 1, col. 3.

[37] Jewell & Breaux, *The Effect of Incumbency on State Legislative Elections*, 13 LEGIS. STUD. Q. 495, 500–02 (1990); Rosenthal, *The Legislative Institution: Transformed and At Risk*, in THE STATE OF THE STATES 69, 83 (C. Van Horn ed. 1989).

[38] *See* Jewell & Breaux, *supra* note 37, at 502–07. Note, however, that Jewell and Breaux examine largely the more professionalized state legislatures. The overall reelection rate may increase when legislatures undergoing the transition to professionalism are more fully taken into account.

[39] Niemi & Winsky, *Membership Turnover in U.S. State Legislatures: Trends and Effects of Districting*, 12 LEGIS. STUD. Q. 115 (1987) (surveying all 50 state legislatures).

[40] Jewell & Breaux, *supra* note 37, at 502–07.

[41] *Id.* at 507–09.

[42] *See, e.g.*, Rosenthal, *supra* note 37, at 82 (noting that "[p]robably of greatest help to members, as far as reelection is concerned, are the services they perform for their constituents."); Simon, *The Mighty Incumbent*, 12 ST. LEGISLATURES 31 (1986).

creased availability of party and personal staffs.[43] Finally, state legislatures are increasingly demonstrating the type of internal organization that is conducive to incumbent security, as is reflected in the growing entrenchment of state committee systems.[44]

II. The State Initiatives

In 1990 voters in Oklahoma, California, and Colorado approved constitutional amendments to limit legislative terms. Although the general thrust behind these measures is the same, they differ in important respects.

The Oklahoma amendment, passed by a resounding margin,[45] imposes a twelve-year maximum on state legislative service.[46] According to the terms of the amendment, "[y]ears served need not be consecutive and service in either House of the Legislature shall be counted" toward the limit.[47] As one commentator points out, the Oklahoma measure is notable in that it "seems to address a problem that doesn't really exist in" the state; "[m]embership turnover has remained fairly constant at 25 percent each election cycle over the past 20 years," and less than ten percent of the state's lawmakers have served more than twelve years.[48]

The California initiative, entitled the Political Reform Act of 1990,[49] limits state assemblymen to three two-year terms, and state senators to two four-year terms.[50] These restrictions are

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[43] Rosenthal, *supra* note 37, at 80–81.

[44] *Id.* at 94.

[45] The Oklahoma proposal received 67% of the vote. *See Hotspots*, American Political Network, Sept. 19, 1990 (LEXIS, Nexis library, Omni file).

[46] Okla. State Question 632 (on file with author), to be codified at Okla. Const. art. 5, § 17A.

[47] *Id.*

[48] Rosenthal, *How Long Is Long Enough?*, 66 St. Legislatures 27 (1990).

[49] Cal. Prop. 140 (on file with author), to be codified at Cal. Const. art. IV, V, IX, XIII, XX.

[50] Cal. Prop. 140, § 3, to be codified at Cal. Const. art. IV, § 2(a). The provision states that "[n]o member of the Assembly may serve more than 3 terms" and that "[n]o senator may serve more than 2 terms." This language suggests two possible interpretations. It could mean each individual is limited to a maximum of three terms in the Assembly and two Senate terms, with eligibility being permanently withdrawn after the specified number of terms have expired. Alternatively, it could be read to limit only consecutive terms, on the theory that once out of the legislature, an individual is not an assembly member or senator, and thus no longer subject to the provision. The former interpretation appears more likely to prevail and is the basis of a lawsuit currently being prepared to challenge the California law. *See California Term-Limit Foes Fight With Lawsuit*, Wash. Times, Jan. 23, 1991, at A3, col. 1.

part of a broad package of reforms that includes limits on terms for other statewide offices;[51] a ceiling on expenditures for legislative salaries, staff, and operations;[52] and a prohibition on pension benefits related to legislative service except for social security.[53] Unlike Oklahoma, California had been characterized by significant incumbent security prior to passage of the law: the number of incumbent California legislators losing in recent election cycles consistently remained in the single digits.[54]

Finally, the Colorado measure limits all state elective officeholders, including state legislators, to eight consecutive years in office.[55] As with California, the Colorado initiative responds to a low level of turnover within the state legislature.[56] The Colorado amendment, however, is significant in that it also limits the tenure of members of Congress. It provides that "no United States Senator from Colorado shall serve more than two consecutive terms in the United States Senate, and no United States Representative from Colorado shall serve more than six consecutive terms in the United States House of Representatives."[57]

III. Constitutionality of State Limits on Congressional Terms

A number of term-limit advocates have endorsed the Colorado approach of unilateral state action as the most effective strategy

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[51] Cal. Prop. 140, § 6, to be codified at Cal. Const. art. V, § 2 (limiting the governor to two terms); Cal. Prop. 140, § 7, to be codified at Cal. Const. art. V, § 11 (limiting the terms of the lieutenant governor, attorney general, controller, secretary of state, and state treasurer); Cal. Prop. 140, § 8, to be codified at Cal. Const. art. IX, § 2 (limiting the term of the superintendent of public instruction); Cal. Prop. 140, § 9, to be codified at Cal. Const. art. XIII, § 17 (limiting terms for members of the state board of equalization).

[52] The limit is $950,000. Cal. Prop. 140, § 5, to be codified at Cal. Const. art. IV, § 7.5.

[53] Cal. Prop. 140, § 4, to be codified at Cal. Const. art. IV, § 4.5.

[54] Rosenthal, *supra* note 48, at 28.

[55] Colorado Proposed Initiative on "Terms of Office" (on file with author), to be codified at Colo. Const. art. V, §§ 1, 3. In addition to limiting the terms of state legislators, the initiative also limits the terms of the governor, lieutenant governor, secretary of state, state treasurer, and attorney general. *Id.*

[56] Rosenthal, *supra* note 48, at 28.

[57] Colorado Proposed Initiative on "Terms of Office," to be codified at Colo. Const. art. XVIII, § 9, cl. 2. The provision also proclaims that "[t]he people of Colorado hereby state their support for a nationwide limit of twelve consecutive years of service in the United States Senate or House of Representatives and instruct their public officials to use their best efforts to work for such a limit." *Id.* cl. 3.

to limit the tenure of members of Congress.[58] This posture reflects recognition of the enormous practical obstacles to securing adoption of a term-limit amendment to the federal Constitution.[59] It is unrealistic to expect two thirds of the members of both houses to vote for a proposed amendment limiting their own career prospects. Consequently, the conventional channel for adopting a constitutional amendment is foreclosed.[60] The alternative method of amending the constitution—persuading two thirds of the states to call for a constitutional convention and then obtaining ratification from three fourths of the states[61]—would not only be time consuming, but it never has been employed successfully.[62]

The movement to limit congressional terms through unilateral state action, however, is likely to falter in the courts. Despite arguments by term-limit proponents that state-imposed term limits are constitutionally permissible,[63] the qualifications clauses of the Constitution[64] do not permit states to condition eligibility for Congress on the extent of prior service in the House or the Senate.

A. *The Qualifications Clauses and* Powell v. McCormack

The qualifications clauses set out basic age, citizenship, and residence requirements for membership in both the House of

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[58] *See, e.g., Elections That Count*, Wall St. J., July 5, 1990, at A10, col. 1; Glazier, *Each State Can Limit Re-Election to Congress*, Wall St. J., June 19, 1990, at A20, col. 3; *see also Term Limit Supporters*, *supra* note 11 (noting that "plans now are under way to place a measure on the 1992 ballot that would limit terms of California's members of Congress").

[59] *Elections That Count*, *supra* note 58. On the difficulties of amending the Constitution, see J. SUNDQUIST, CONSTITUTIONAL REFORM AND EFFECTIVE GOVERNMENT 242–44 (1986).

[60] *See* U.S. CONST. art. V; *Elections That Count*, *supra* note 58; *see also* Glasser, *Advocates of Congressional Term Limits Push for Votes in Ariz., Wash., Ohio, Fla.*, Roll Call, Feb. 14, 1991 (LEXIS, Nexis library, Omni file) (noting that "eight different constitutional amendments limiting Members' terms have been introduced" during the current congressional session, but that "[t]he real problem for the term-limit movement in Congress . . . is that the bills are unlikely to move out of the Judiciary Committee—ever").

[61] U.S. CONST. art. V.

[62] *See Elections That Count*, *supra* note 58.

[63] *See, e.g., id.*; Glazier, *supra* note 58.

[64] U.S. CONST. art. I, § 2, cl. 2; art. I, § 3, cl. 3.

Representatives and the Senate.[65] Article I, section 2, clause 2 states that "[n]o Person shall be a Representative who shall not have attained to the Age of twenty five Years, and has been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen."[66] The requirements for Senators, established in article I, section 3, clause 3, are somewhat stricter: "No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen."[67] These standards for members of Congress have been interpreted consistently and correctly by the courts as setting maximum requirements that may not be altered by either Congress or the states.[68]

The leading case on the qualifications clauses is *Powell v. McCormack*.[69] In that case, Adam Clayton Powell was denied his seat in the House of Representatives under the authority of a resolution passed by majority vote, even though he had been "duly elected" and met the age, citizenship, and residency requirements established by the qualifications clause.[70] The exclusion was premised on allegations that Powell had misappropriated public funds and abused the process of the New York courts. The House sought to justify its action under article I, section 5 of the Constitution, which states that "[e]ach house

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[65] In addition to the age, citizenship, and residence requirements established by the qualifications clauses, the Constitution sets several other limits on the eligibility of individuals to serve in Congress. *See* Powell v. McCormack, 395 U.S. 486, 520 n.41 (1969). For example, those convicted in impeachment proceedings may be disqualified from holding "any office of honour, Trust, or Profit, under the United States." U.S. CONST. art. I, § 3, cl. 7. Members of Congress are also prohibited from concurrently holding offices in the executive branch. *Id.* art. I, § 6, cl. 2. Finally, the fourteenth amendment provides:

> [n]o person shall be a Senator or Representative in Congress . . . who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof.

Congress, however, may remove this restriction by a two-thirds vote of both houses. *Id.* amend. XIV, § 3.

[66] U.S. CONST. art. I, § 2, cl. 2.

[67] *Id.* art. I, § 3, cl. 3.

[68] DeWitt, *Madison & Hamilton Settled the Matter*, Wall St. J., July 5, 1990, at 6, col. 1.

[69] 395 U.S. 486 (1969).

[70] *See infra* note 72 and accompanying text.

shall be the judge of the elections, returns, and qualifications of its own members."[71]

In an 8-1 decision, the Supreme Court held that the House is "without authority to exclude any person, duly elected by his constituents, who meets all the requirements for membership expressly prescribed in the Constitution."[72] Writing for the Court, Chief Justice Warren conducted an extensive review of early English parliamentary precedents, debates at the Constitutional Convention, debates over ratification of the Constitution, and congressional practice. From this survey, he concluded that "[a] fundamental principle of our representative democracy is 'that the people should choose whom they please to govern them,'"[73] and that "this principle may be undermined as much by limiting whom the people can select as by limiting the franchise itself."[74] In accordance with this principle and with the "Framers' understanding that the qualifications for members of Congress had been fixed in the Constitution,"[75] the congressional power to judge the qualifications of its members was confined to the ability to ascertain whether those elected to office met "the standing qualifications prescribed in the Constitution."[76]

The *Powell* Court's emphasis on the "fixed" and exclusive nature of the qualifications clause requirements would appear to foreclose state efforts to condition the eligibility of candidates for Congress on the extent of their prior service in public office. Term-limit proponents, however, attempt to distinguish *Powell* on the ground that the decision limits only the power of Congress to exclude a member-elect from being seated.[77] According to this view, the decision is "silent on the issue of state regulation," thereby leaving room for states to impose limits on length of service.[78]

Although it is true that *Powell* dealt with Congress's power to determine the qualifications of its members, the decision is

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[71] U.S. CONST. art. I, § 5, cl. 1.

[72] *Powell*, 395 U.S. at 522. The sole dissenter was Justice Stewart, who argued that the controversy had been rendered moot by the seating of Powell in the subsequent Congress. *Id.* at 559–63 (Stewart, J., dissenting).

[73] *Id.* at 547 (quoting 2 DEBATES ON THE ADOPTION OF THE CONSTITUTION 257 (J. Elliot ed. 1836) (statement of A. Hamilton)).

[74] *Id.*

[75] *Id.* at 540.

[76] *Id.* at 550.

[77] *Elections That Count*, supra note 58.

[78] *Id.*

not without implications for the allowable scope of state regulation. Congressional exclusions of members-elect and state statutes rendering certain individuals ineligible for congressional office may have identical effects on the basic interests protected by the *Powell* decision—the right of voters to "choose whom they please to govern them"[79] and the intent of the Framers to establish a minimally intrusive, fixed set of eligibility requirements in the Constitution. Assume, for example, that Congress initiated a policy of preventing the seating of all members-elect having served twelve or more years. Such a policy would have precisely the same effects as a state statute placing limits on congressional terms. Both would constrain voter choice, and both would effectively add to the "standing qualifications" established in the Constitution. The congressional policy would be invalid under *Powell*; it is difficult, if not impossible, to discern a reason why the state statute should be treated differently.[80]

Moreover, it is not entirely accurate that *Powell* is "silent on the issue of state regulation."[81] In reviewing post-ratification congressional practice to establish the immutability of the qualifications in the Constitution, Chief Justice Warren discusses the 1807 effort to prevent William McCreery from being seated in the Tenth Congress.[82] Although McCreery had received a majority of votes and satisfied the qualifications clause standards for members of the House of Representatives, he did not meet a supplementary residence requirement imposed by the state of Maryland. After extensive debate, the House voted by a margin of eighty-nine to eighteen to admit McCreery.[83] From this debate, Chief Justice Warren quotes with approval the House Committee on Elections' conclusion that "the qualifications of members are . . . determined [in the Constitution], without

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[79] *Powell*, 395 U.S. at 547; *see supra* text accompanying note 73.

[80] *See* Signorelli v. Evans, 637 F.2d 853, 858 (2d Cir. 1980) ("The principle that . . . Congress cannot add to, subtract from, or modify . . . those qualifications applies with equal force to the states.").

[81] *See Elections That Count*, *supra* note 58.

[82] *See Powell*, 395 U.S. at 542.

[83] The *McCreery* case is not the only example of Congress admitting members despite an individual's failure to satisfy additional requirements imposed by a state. In 1855 Judge Lyman Trumbull was elected to the Senate despite a state law requiring that judges not be eligible for the duration of their judicial term and one year thereafter. After some debate the Senate voted to seat Trumbull on the understanding that states could not add to the qualifications for members of Congress. For a discussion of the Trumbull case, see State v. Crane, 65 Wyo. 189, 197 P.2d 864 (1948).

reserving any authority to the State Legislatures to change, add to, or diminish those qualifications . . . ."[84] Chief Justice Warren also noted that the debate "tended to center on the more narrow issue of the power of the States to add to the standing qualifications set forth in the Constitution," rather than the power of Congress to exclude members-elect.[85] The use of this "more narrow" language, along with his quotation of the House Committee position, at least suggests Warren's belief that the ability of states to impose additional qualifications is even more problematic, and thus less likely to be upheld, than Congress's ability to use its power to judge qualifications to exclude members-elect.

Finally, the *Powell* decision was rendered against a background of widespread agreement among the state and federal courts that the qualifications clauses bar states from imposing additional requirements on candidates for federal office. In the case of *Hellmann v. Collier*, for example, the Maryland Supreme Court overturned a district residency requirement for congressional candidates on the theory that "no state has the power to fix the qualifications of Representatives in Congress."[86] Similarly, in *Exon v. Tiemann*, a federal district court overturned district residency requirements for representatives because "[s]tates have no authority to add qualifications to those set forth in Article I, Section 2, Clause 2 of the United States Constitution."[87]

B. *Term Limits and the Federalist-Anti-Federalist Debate Over Rotation in Office*

Even if one could argue that some state eligibility requirements for members of Congress are permissible, state-imposed term limitations directly conflict with the intent of the Framers

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[84] *Powell*, 395 U.S. at 542 (citing 17 ANNALS OF CONG. 871 (1807)). Chief Justice Warren also cited the committee chairman's assertion that "neither the State nor the Federal Legislatures are vested with authority to add to [the Constitution's] qualifications, so as to change them . . . ." *Id.* at 543 (citing 17 ANNALS OF CONG. 872 (1807)).

[85] *Id.* at 543.

[86] 217 Md. 93, 98, 141 A.2d 908, 911 (1958); *see also* State v. Crane, 65 Wyo. 189, 197 P.2d 864 (1948) (concluding, after an extensive review of historical sources, cases, and commentaries, that a state constitution cannot alter the eligibility qualifications for senators).

[87] 279 F. Supp. 609, 613 (D. Neb. 1968). Numerous commentators shared the view that states could not alter the qualifications for members of Congress. *See* commentaries of Story, Kent, and Burdick collected in *Crane*, 65 Wyo. at 190, 197 P.2d at 865.

to eliminate the policy of compulsory rotation in office.[88] The question of rotation was a critical issue in the debates surrounding the adoption of the Constitution, debates which in many respects echo the concerns voiced by proponents and detractors of term limits. The federalist preference for a system in which the prospect of reelection would be preserved provides a compelling reason to interpret the qualifications clauses as barring state-imposed term limits.

The principle of rotation in office was a central element of the scheme of representation established by the Articles of Confederation. Under the Articles, delegates to Congress could serve for no more than three years in any six-year period.[89] At the Constitutional Convention, however, this rotation policy was discarded, apparently with little or no debate.[90] The absence of a rotation requirement for the House of Representatives did not attract much attention from anti-federalists, perhaps because of a belief that biennial popular elections would be sufficient to keep members of the House closely tied to their constituents.[91] By contrast, incumbency in the Senate, with its longer terms and appointment of members by state legislatures, was seen as a greater threat. As a result, anti-federalists argued strenuously for both rotation in office and the power to recall senators.

The anti-federalist case for rotation in office was premised on a fundamental distrust of representative democracy: "the Anti-Federalists accepted representation reluctantly, as a necessary device in a community where people cannot assemble to do

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[88] To the extent states go beyond the Colorado initiative, *see supra* notes 55–57, by enacting term limits mandating permanent disqualification from office for those who have served a specified period in Congress, such measures would be even more restrictive than the rotation policies debated at the time the Constitution was ratified. Not even the anti-federalists advocated permanent ineligibility for elected representatives. Indeed, the anti-federalist position was premised at least in part on the idea that those forced to step down from office would live among the people and become re-acquainted with their concerns so that they could more faithfully represent their constituents when they returned to public life. *See infra* note 97.

[89] ART. OF CONFED. art. V, cl. 2.

[90] Note, however, Gouvernor Morris's comments during the debate over whether rotation should be required for the President: "Mr. Govr. Morris was agst. a rotation in every case. It formed a political School in wch. we were always governed by the scholars, and not by the Masters [sic]." 2 RECORDS OF THE FEDERAL CONVENTION 112 (M. Farrand ed. 1966).

There is some mention of the term "rotation" in the debate over the appropriate term for members of the Senate. In this context, however, the term was used to refer to the staggering of Senate elections to maintain the Senate as a continuous body. *See* 1 RECORDS OF THE FEDERAL CONVENTION, *supra* at 421–26.

[91] Some "extreme" anti-federalists opposed even the biennial election of representatives, preferring annual elections. *See* C. KENYON, THE ANTI-FEDERALISTS 41 (1966).

their common business."[92] Given this distrust, the anti-federalists sought to tie representatives closely to the interests of their constituents and to make the representative assembly "a substitute for an assembly of all the citizens, which ought to be as like the whole body as possible."[93] In the Constitution's scheme for election of senators, the anti-federalists perceived a threat that office-holding would become "perpetual"[94] and that individual senators would easily become corrupt or insulated from their constituents' concerns.[95] A rotation provision would prevent these abuses; it would limit the potential for corruption,[96] ensure that members of Congress would gain knowledge of local problems by living among the people,[97] and promote civic virtue by allowing a greater number of people to hold public office.[98]

To some extent, federalist arguments against rotation were based on the institutional purposes to be served by the Senate. As Madison makes clear in Federalist 62, the role of the Senate in the constitutional scheme was to provide a measure of stability[99] and expertise,[100] along with a check on the popular

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[92] H. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR 43 (1981).

[93] *Id.*

[94] 2 THE DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 309 (J. Elliot ed. 1987) (speech of Melancton Smith) [hereinafter, ELLIOT'S DEBATES]; *see also Letter of Brutus, April 10, 1788*, in THE ANTI-FEDERALIST 189 (H. Storing ed. 1985) [hereinafter *Letter of Brutus*] (arguing that "[i]t is probable that senators once chosen for a state will, as the system now stands, continue in office for life").

[95] C. KENYON, *supra* note 91, at 42.

[96] The term corruption was used to embrace both the possibility that senators would use their office to obtain personal benefits and the threat that federal power would be used against the states.

[97] *See, e.g.*, 2 ELLIOT'S DEBATES, *supra* note 94, at 288 (George Livingston argued that "senators . . . should not only return and be obliged to live with the people, but return to their former rank of citizenship, both to revive their sense of dependence, and to gain a knowledge of the country"); *Letter of Brutus*, *supra* note 94, at 190 (rotation "would return those, who had served, to their state, and afford them the advantage of becoming better acquainted with the condition and politics of their constituents").

[98] Melancton Smith, for example, argued:

> It is a circumstance strongly in favor of rotation, that it will have a tendency to diffuse a more general spirit of emulation, and to bring forward into office the genius and abilities of the continent: the ambition of gaining the qualifications necessary to govern will be in some proportion to the chance of success.

2 ELLIOT'S DEBATES, *supra* note 94, at 310.

[99] The Senate was seen as a remedy to "[t]he mutability in the public councils, arising from a rapid succession of new members" that was expected to occur in the House of Representatives. THE FEDERALIST No. 62, at 316 (J. Madison) (G. Wills ed. 1982).

[100] "Another defect to be supplied by a senate lies in the want of due acquaintance with the objects and principles of legislation." *Id.* at 315. Stability and expertise were thought to be especially important given the Senate's prominent role in foreign affairs:

> Without a select and stable member of the government, the esteem of foreign powers will not only be forfeited by an unenlightened and variable policy . . .

passions and tumult of the House.[101] These objectives would be ill-served by a policy requiring senators to step down from office after developing experience in the substance and process of legislation.

More broadly, however, the goal of preserving the potential for reelection was an essential element in the federalist theory of representation. The federalists were concerned with developing an institutional structure with (1) the capacity to govern well and (2) the ability to avoid "the mischiefs of faction" which they thought to be present in small direct democracies.[102] In designing the Constitution, the federalists looked to representation as a process through which those most fit would be chosen to govern: the effect of representation would be "to refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country."[103]

Based on this perspective, the federalist objection to rotation is clear. By disqualifying those in office from being reelected, rotation would prevent voters from returning to office those best suited to govern. It would also prevent the utilization of the accumulated experience of those who had served in Congress. As Robert R. Livingstone commented in the New York debates:

> The people are the best judges of who ought to represent them. To dictate and control them, to tell them whom they shall not elect is to abridge their natural rights. This rotation is an absurd species of ostracism—a mode of proscribing eminent merit, and banishing from stations of trust those who have filled them with greatest faithfulness . . . . The acquisition of abilities is hardly worth the trouble, unless one is to enjoy the satisfaction of employing them for the good of one's country. We all know that experience is indis-

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> but the national councils will not possess that sensibility to the opinion of the world which is perhaps not less necessary in order to merit, than it is to obtain, its respect and confidence.

THE FEDERALIST No. 63, at 318 (J. Madison) (G. Wills ed. 1982).

[101] "[A] senate, as a second branch of the legislative assembly, distinct from, and dividing the power with, a first, must be in all cases a salutary check on the government." THE FEDERALIST No. 62, *supra* note 99, at 315; *see also* 2 ELLIOT'S DEBATES, *supra* note 94, at 306 (speech of Alexander Hamilton).

[102] THE FEDERALIST No. 10, at 43 (J. Madison) (G. Wills ed. 1982).

[103] *Id.* at 46. The other great advantage of representation was that it permitted one to "extend the sphere"; that is, to extend the republic over a larger land area. A large republic would serve to reduce the probability that any one majority faction would emerge to oppress minorities. *See id.* at 48; *see also* H. STORING, *supra* note 92, at 43–44.

> pensably necessary to good government. Shall we, then, drive experience into obscurity?[104]

Similarly, Hamilton remarked that "the question is not, whether there may be more than two men [qualified to be senators in a particular state]; but whether, in certain emergencies, you could find two equal to those whom the amendment would discard."[105] Excluding merit and experience from legislative service would undermine the effectiveness of the national government.[106]

To their concern with preserving the prospects for voters to choose those best suited to govern, the federalists added a strong rebuttal to the anti-federalist claim that rotation reduces the potential for corruption. Turning the anti-federalist argument on its head, the federalists argued that it was the very prospect of reelection which would provide self-interested representatives with an incentive to attend to the interests of their constituents: "[i]f the senator is conscious that his reelection depends only on the will of the people, and is not fettered by any law, he will feel an ambition to deserve well of the public."[107] By contrast, "[w]hen a man knows he must quit his station, let his merit be what it may, he will turn his attention chiefly to his own emolument."[108]

The federalist arguments against rotation make it clear that the Framers consciously rejected the precise policy that state-imposed term limits are designed to promote. In light of this fact, the qualifications clauses can only be read as an absolute

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[104] 2 ELLIOT'S DEBATES, *supra* note 94, at 292.

[105] *Id.* at 320. In arguing against rotation, Richard Harrison similarly stressed the need for continuity and ability:

> We may suppose two of the most enlightened and eminent men in the state, in whom the confidence of the legislature and love of the people are united, engaged, at the expiration of their office, in the most important negotiations, in which their presence and agency may be indispensable. In this emergency shall we incapacitate them? . . . It might endanger our country, and involve us in inextricable difficulties. Under these apprehensions, and with a full conviction of the imprudence of depriving the community of the services of its most valuable citizens, I feel very strongly the impropriety of [rotation] . . . .

Id. at 298.

[106] Hamilton commented that "in contending for a rotation, the gentlemen carry their zeal beyond all reasonable bounds. I am convinced that no government, founded on this feeble principle, can operate well . . . ." 2 ELLIOT'S DEBATES, *supra* note 94, at 320.

[107] *Id.* at 298 (speech of Richard Harrison).

[108] *Id.* at 320 (speech of Alexander Hamilton); *see also id.* at 298 (speech of Richard Harrison) (if a legislator "knows that no meritorious exertions of his own can produce a reappointment, he will become more unambitious, and regardless of the public opinion").

prohibition on the ability of states to restrict the tenure of their congressional delegations.

C. *The Resign-to-Run and Ballot-Access Cases*

In arguing against the proposition that the qualifications clauses bar state limits on congressional terms, proponents of term limits have cited two types of cases in which state regulations have been upheld against qualifications clause challenges: (1) cases involving statutes requiring state officeholders to resign before seeking a federal position and (2) cases involving state limits on access to the ballot.[109] From these cases, term-limit advocates conclude that state-imposed limits are justified as inherent in the power of the states to determine "[t]he times, places and manner of holding elections for Senators and Representatives."[110] A careful review of the resign-to-run and ballot-access cases, however, reveals that they cannot be extended to provide a justification for state limits on congressional terms.

Two prominent examples of cases involving qualifications clause challenges to resign-to-run statutes are *Signorelli v. Evans*[111] and *Joyner v. Mofford*.[112] In *Signorelli*, the Court of Appeals for the Second Circuit upheld a New York statute which required a state judge to resign his position if he carried out his plans to become a candidate for the House.[113] Similarly, in *Joyner*, the Court of Appeals for the Ninth Circuit upheld a provision of the Arizona Constitution under which state elective officials were forced to resign their positions if they sought election "to any salaried local, state, or federal office" prior to the last year of the term being served.[114] The plaintiff in *Joyner* was a county supervisor who had unsuccessfully run for a Republican nomination to the House of Representatives.

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[109] *See* Glazier, *supra* note 58.

[110] U.S. CONST. art. I, § 4, cl. 1; *see Elections That Count*, *supra* note 58.

[111] 637 F.2d 853 (2d Cir. 1980).

[112] 706 F.2d 1523 (9th Cir. 1983), *cert. denied*, 464 U.S. 1002 (1983). The Texas resign-to-run statute upheld by the Supreme Court in Clements v. Fashing, 457 U.S. 957 (1982), was potentially applicable to state officers seeking election to Congress. All of the plaintiffs, however, sought higher state offices, so the qualifications clause issue was not raised. For further discussion of *Clements*, see *infra* notes 134–141 and accompanying text.

[113] 637 F.2d at 855–56.

[114] 706 F.2d at 1526.

The *Joyner* and *Signorelli* decisions, however, were premised on two factors that distinguish them from the case of state limits on the number of terms members of Congress may serve. First, in each case the court emphasized that the resign-to-run statute would not make the officeholders ineligible to pursue a seat in Congress.[115] The *Signorelli* court distinguished resign-to-run provisions from provisions that would render state officeholders ineligible to run during the terms of their current office.[116] The former were deemed permissible because they allowed state officials to run for Congress if they were willing to relinquish their position, while the latter were unconstitutional violations of the "'fundamental principle . . .' that 'the people should choose whom they please to govern them.'"[117] Similarly, the *Joyner* court emphasized that the Arizona provision does not "prohibit the filing for nomination to Congress by an elected state officeholder . . . . It merely requires that [he] resign or be removed from office if he wishes to 'offer himself for nomination or election.'"[118] State-imposed term limits, unlike resign-to-run provisions, do not preserve the choice to seek congressional office for those affected.

Second, in both *Joyner* and *Signorelli*, the courts stressed that the regulation of state officeholders is "a subject within traditional state authority."[119] As the *Signorelli* court noted, the purpose of such resign-to-run statutes is "to regulate the . . . office that [the state official] holds, not the Congressional office he seeks."[120] By contrast, state limitations on congressional terms are directly aimed at regulating those occupying congressional offices; they cannot be supported by reference to cases such as *Signorelli* and *Joyner*.

The other group of cases invoked by term-limit advocates are cases involving qualifications clause challenges to state regulation of ballot-access.[121] In *Storer v. Brown*,[122] for example, the Supreme Court upheld a California law precluding an individual from appearing on the ballot as an independent candidate for

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[115] *See also* DeWitt, *supra* note 68.

[116] 637 F.2d at 858.

[117] *Id.* (quoting Powell v. McCormack, 395 U.S. 486, 547 (1969), 2 ELLIOT'S DEBATES, *supra* note 94, at 257 (statement of Alexander Hamilton)).

[118] *Joyner*, 706 F.2d at 1531 (citation omitted).

[119] *Signorelli*, 637 F.2d at 859; *see also Joyner*, 706 F.2d at 1530.

[120] 637 F.2d at 859.

[121] *See* Glazier, *supra* note 58.

[122] 415 U.S. 724 (1974).

Congress if "he had a registered affiliation with a qualified political party at any time within one year prior to the immediately preceding primary election."[123] In the related case of *Williams v. Tucker*,[124] a federal district court upheld a Pennsylvania statute which effectively prohibited losers in primaries from appearing on the general election ballot.

The provisions upheld in *Storer* and *Williams* are readily distinguishable from state limits on legislative terms. The laws considered in *Storer* and *Williams* were designed "to maintain the integrity of the various routes to the ballot,"[125] not to restrict individuals from holding positions in Congress. Forcing a potential candidate to choose between two alternative methods to obtain ballot status cannot be equated with prohibiting a candidate from running at all. Moreover, to the extent that state election statutes permit write-in voting, they preserve the possibility, however slight, for candidates not on the ballot to be elected to Congress. By contrast, a term-limit law would foreclose this opportunity entirely.

IV. Constitutionality of Limits on State Legislative Terms

While there is widespread recognition that state limits on the terms of members of Congress will engender serious legal challenges, term-limit proponents generally assume that limits on state legislative terms do not raise significant constitutional issues. This characterization is probably accurate for measures, such as the Colorado law,[126] which apply only to consecutive years of service and preserve the possibility for reelection after a legislator rotates out of office for a brief period. Nevertheless, term-limit laws rendering certain individuals permanently ineligible to serve in the state legislature, such as the Oklahoma and California initiatives,[127] may raise more difficult constitutional questions. Indeed, a plausible, although not overwhelming, case can be made that these measures unconstitutionally infringe

[123] *Id.* at 726.
[124] 382 F. Supp. 381 (M.D. Pa. 1974).
[125] *Storer*, 415 U.S. at 724.
[126] *See supra* note 57.
[127] The argument presented in the text assumes that the California law is interpreted as an absolute limit on legislative service, rather than as a limit solely on consecutive terms. *See supra* note 50.

upon rights protected by the first and fourteenth amendments.[128] This section assesses the possibilities and problems of such an argument.

A. *The Standard of Review for State Term-Limit Laws*

Restrictions on candidate eligibility, like limits on access to the ballot, are typically challenged on two grounds. First, they are said to infringe upon the first amendment guarantees of free speech and association for potential candidates and their supporters. Eligibility requirements prevent certain individuals from attaining public office, a form of political speech that clearly implicates first amendment concerns. They also constrict the pool of available candidates, thereby limiting the right of citizens to associate effectively with and vote for the candidate of their choice.[129] Second, eligibility requirements are challenged as infringements on the fourteenth amendment guarantee of equal protection because they prohibit particular classes of individuals from holding political office.[130]

In order to assess the constitutionality of state term limitations, it is first necessary to determine the appropriate standard of review. Unfortunately, the Supreme Court has not articulated clear guidance as to the type of review to be applied to candidate eligibity restrictions.[131] The two most relevant cases for determining the standard of review are *Clements v. Fashing*[132] and *Anderson v. Celebrezze*.[133]

In *Clements*, a divided Court upheld a Texas law barring an elected justice of the peace from running for the state legislature prior to the expiration of the term of the office in which he was

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[128] A lawsuit challenging the California law on first amendment grounds is already in the planning stages. *See California Term-limit Foes Fight with Lawsuit*, Wash. Times, Jan. 23, 1991, at A3, col. 2.

[129] *See, e.g.*, Anderson v. Celebrezze, 460 U.S. 780, 787–88 (1983) (recognizing that "voters can assert their preferences only through candidates or parties or both" and that "[t]he exclusion of candidates . . . burdens voters' freedom of association because an election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying point for like-minded citizens"); Bullock v. Carter, 405 U.S. 134, 143 (1971) (noting that "the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters").

[130] *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 13-19, at 1098 (2d ed. 1988).

[131] *See* Matsumoto v. Pua, 775 F.2d 1393, 1396 (9th Cir. 1985); *see also infra* note 146.

[132] 457 U.S. 957 (1982).

[133] 460 U.S. 780 (1983).

then serving.[134] Writing for a four-Justice plurality, Justice Rehnquist conducted an equal protection analysis, making clear that the right to run for office is "not a fundamental right," and that restrictions on candidacy are not, of themselves, sufficient to trigger heightened scrutiny.[135] He then identified two "similar lines of ballot access cases" in which more rigorous scrutiny had traditionally been applied: (1) cases involving "classifications based on wealth," such as filing fee requirements, and (2) cases involving "classification schemes that impose burdens on new or small political parties or independent candidates."[136]

Justice Rehnquist was careful to note, however, that even if a statute did not fall into one of these two categories, more rigorous scrutiny might still be available. In such cases, courts should weigh "the nature of the interests that are affected and the extent of the burden these provisions place on candidacy"[137] to determine if heightened scrutiny is appropriate. Applying these factors to the Texas "serve-your-term" provision, Justice Rehnquist found that the burden imposed did not justify a departure from the traditional rational basis test. In effect, the statute established a "maximum 'waiting period' of two years for candidacy by a Justice of the Peace for the legislature," and this was characterized as no more than a "*de minimis* burden on the political aspirations of a current officeholder."[138]

In addition to the equal protection issue, *Clements* also involved a first amendment claim. Nevertheless, Justice Rehnquist indicated that the two claims could be analyzed in the same way. In his words, "analysis of appellees' challenge under the equal protection clause disposes of [the first amendment] argument . . . . The State's interests . . . are sufficient to warrant

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[134] 457 U.S. at 960. The law also applied to other state and federal officeholders, but the plurality opinion limited its review to the facts before it. *See id.* at 966 n.3, 968 n.5. In addition, the Court upheld a resign-to-run provision mandating "automatic resignation" for certain state officials who announced their candidacy for other state or federal offices. *See id.* at 970.

[135] *Id.* at 963 (quoting Bullock v. Carter, 405 U.S. 134, 143 (1972)). Joining in Justice Rehnquist's equal protection analysis were Chief Justice Burger, Justice Powell, and Justice O'Connor. The fifth vote was provided by Justice Stevens, who argued in a separate opinion that the restrictions were justified as inherent in the power of states to regulate their own officeholders. *See id.* at 973 (Stevens, J., concurring). Justices Brennan, Marshall, Blackmun, and White dissented in an opinion written by Justice Brennan. *See id.* at 976 (Brennan, J., dissenting).

[136] *Id.* at 964.

[137] *Id.* at 965.

[138] *Id.* at 967 (emphasis in original). As Professor Tribe notes, the Court may have underestimated the length of time for which a justice of the peace would be disqualified. *See* L. TRIBE, *supra* note 130, § 13-19, at 1099 n.7.

the *de minimis* interference with appellees' interests in candidacy."[139] Justice Rehnquist added, however, that his conclusion regarding the first amendment claim was supported by cases involving restrictions on the political activities of public workers.[140] Unlike the equal protection analysis, the first amendment review was able to command a majority of the Court.[141]

In *Anderson v. Celebrezze*, a ballot-access case[142] decided less than a year after *Clements*, the Court struck down an Ohio election statute requiring independent candidates for President to file and to meet signature requirements seven months before the general election. The Court, basing its conclusion directly on the first amendment rather than the equal protection clause,[143] emphasized that "the impact of candidate eligibility requirements on voters implicates basic constitutional rights."[144] In evaluating the Ohio law, the Court developed a broad balancing test under which

> a court . . . must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments . . . . It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights.[145]

Applying this test, the Court found that Ohio's asserted interests were not sufficient to justify the burdens imposed by the early filing deadline.

Untangling the precise relationship between *Clements* and *Anderson* is a complex process and the subject of considerable divergence among lower federal courts evaluating state eligibil-

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[139] 457 U.S. at 971–72.

[140] *See id.* at 972 (citing United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973); Broadrick v. Oklahoma, 413 U.S. 601 (1973); United Pub. Workers v. Mitchell, 330 U.S. 75 (1947)).

[141] *See Clements*, 457 U.S. at 973 (Stevens, J., concurring).

[142] For a summary of the ballot-access cases leading up to *Anderson*, see Note, *Judicial Protection of Ballot Access Rights: Third Parties Need Not Apply*, 28 HARV. J. ON LEGIS. 167, 172–93 (1991).

[143] *See Anderson*, 460 U.S. at 786 n.7.

[144] *Id.* at 786.

[145] *Id.* at 789.

ity requirements.[146] Nevertheless, a central element of both cases is a balancing analysis that considers both the magnitude of the burden placed on candidacy and the state interests invoked to justify the regulation.[147] In the case of term-limit laws such as those enacted in California and Oklahoma, the burden imposed is arguably more substantial than other restrictions that have been upheld by the courts, and there is reason to question the legitimacy of the state interests offered in support of these measures.

B. *The Nature of the Burden and the State Interests*

1. Extent of the Burden

The burden imposed by state-office eligibility requirements on candidate and voter rights is limited by two considerations. First, "so long as a sufficient number of candidates are eligible to represent the views of any particular constituency," supporters of a candidate who is disqualified from office are able to select another like-minded candidate to further their cause.[148] Second, candidates not meeting eligibility requirements are not prevented from engaging in other political activities, including running for other offices, to promote their beliefs.[149]

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[146] *See, e.g.*, Matsumoto v. Pua, 775 F.2d 1393, 1396 (9th Cir. 1985) (applying the *Anderson* balancing test rather than the *Clements* analysis to a law restricting the right of recalled officials to hold city office, on the ground that *Anderson* is "most recent"); Joyner v. Mofford, 706 F.2d 1523 (9th Cir. 1983) (applying a *Clements* analysis to a state resign-to-tun statute) *cert. denied*, 464 U.S. 1002 (1983); Zielasko v. Ohio, 693 F. Supp. 577 (N.D. Ohio 1988) (applying both the *Clements* equal protection analysis and the *Anderson* first-amendment analysis to a statute limiting the age of state judicial candidates).

[147] The *Anderson* approach appears to require more "tailoring" by instructing courts to examine the extent to which the state interests make it necessary to burden candidate and voter rights. *See supra* note 145 and accompanying text. In *Clements*, however, the weighing of burdens and state interests is designed to determine whether heightened scrutiny should apply. *See supra* note 137 and accompanying text. Thus, there is at least the potential for examination of the means-end nexus if the burdens are sufficiently great or the state interests relatively insubstantial.

[148] Note, *Developments in the Law—Elections*, 88 HARV. L. REV. 1111, 1218 (1975).

[149] *See, e.g., Clements*, 457 U.S. at 972 (noting that serve-your-term and resign-to-run statutes leave potential candidates free "to participate in the political campaigns of third parties"); Chimento v. Stark, 353 F. Supp. 1211, 1216 (D.N.H. 1973) (upholding a seven-year durational residency requirement for gubenatorial candidates in part because "[t]here are lesser but nonetheless important offices that a putative governor might well fill during the waiting period with benefit to both his own political career and the people of the state") *aff'd*, 414 U.S. 802 (1973).

Nevertheless, a ban on legislative service after having served a specified number of years imposes a significantly more severe burden than the eligibility requirements that courts have typically upheld. While courts have upheld minimum age; durational residency, and "serve-your-term" restrictions on candidacy, the effect of these measures is merely to impose a temporary "waiting period" on candidates.[150] By contrast, term-limit measures such as those enacted in California and Oklahoma mandate permanent ineligibility for individuals who have served the maximum amount of time in office.[151] This status of permanent ineligibility conflicts with scattered suggestions in the case law that measures imposing extended disqualification from office create unsustainable burdens on candidate and voter rights. For example, in *Matsumoto v. Pua*, the Ninth Circuit struck down a city charter provision preventing recalled councilmen from regaining their seats for five years and from holding any city office for two years.[152] According to the court, the provision imposed "a severe burden on the rights of recalled city officials and their supporters" that could not be justified by the governmental interest in ensuring the responsiveness of city officials.[153] Similarly in *Chimento v. Stark*, a three-judge federal court upheld a seven-year durational residency requirement for New Hampshire gubenatorial candidates, but noted that "the length of the residency requirement may approach the constitutional limit."[154]

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[150] *See, e.g., Clements*, 457 U.S. at 967 ("a 'waiting period' is hardly a significant barrier to candidacy"); *Chimento*, 353 F. Supp. at 1216 (finding that a seven-year durational residency requirement for gubenatorial candidates "does not act as an outright ban on anyone's candidacy for Governor; rather, it delays the eligibility of a candidate to the office of Governor"); Note, *supra* note 148, at 1224 (noting that minimum age restrictions deserve only minimal scrutiny because they "impose no permanent barrier to political participation by any citizen" and collecting cases). *But see* Hatten v. Rains, 854 F.2d 687 (5th Cir. 1988) (upholding a mandatory retirement age for state judges); Zielasko v. Ohio, 693 F. Supp. 577 (N.D. Ohio 1988) (upholding a maximum-age limit for judicial candidates). The mandatory retirement laws considered in *Zielasko* and *Hatten* permanently disqualify particular individuals, but the state interests for doing so may be stronger than in the case of term limits. *See Hatten*, 854 F.2d at 689 (noting "unrebutted evidence that judicial ability declines with age").

[151] Note, however, that this burden may be mitigated by the fact that the affected individuals have already had the opportunity to serve in the legislature. In this connection, the length of legislative tenure permitted by the statute is likely to play an important role in assessing the constitutionality of term limits.

[152] 775 F.2d 1393 (9th Cir. 1983).

[153] *Id.* at 1397.

[154] 353 F. Supp. at 1217.

2. State Interests

There are a number of interests that states might assert in support of term-limit laws. These include the state interests in (1) ensuring competitive elections and equalizing political opportunity,[155] (2) preventing corruption and the appearance of corruption, and (3) regulating public employees to ensure faithful performance of public duties. While these asserted interests reflect reasonable concerns, they may not be sufficient to justify the burden of permanent ineligibility for particular state legislators.

States have an interest in preserving competitive elections and equalizing political opportunity, both to ensure governmental responsiveness and to avoid cynicism in government.[156] Nevertheless, the campaign finance cases raise serious doubts as to whether this interest may be used as a justification for burdening first amendment rights. In *Buckley v. Valeo*, for example, the Supreme Court held that "the concept that government may restrict the speech of some elements of society in order to enhance the relative voice of others is wholly foreign to the first amendment."[157] In the case of term-limit laws, it can

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[155] The California initiative, for example, declares that "the Founding Fathers established a system of representative government based upon free, fair, and competitive elections," and that "[t]o restore a free and democratic system of fair elections, and to encourage qualified candidates to seek public office, the people find and declare that the powers of incumbency must be limited." Cal. Prop. 140, § 2, to be codified at CAL. CONST. art. I, § 1.5. Similarly, the Colorado initiative indicates that the purpose of the term limits for both state legislators and members of Congress is "to broaden the opportunities for public service." Colorado Proposed Initiative on "Terms of Office," to be codified at COLO. CONST. art. V, § 3, and COLO. CONST. art. XVIII, § 9.

[156] The goal of avoiding cynicism about government might be offered as an independent state interest. It is, however, logically derivative of the state interests in fostering competitive elections, avoiding corruption, and ensuring faithful performance of public duties. To the extent that the underlying interests are unable to justify term limits, the goal of preserving citizens' confidence should also fail.

Even if avoiding cynicism were postulated as an independent interest, the goal of preserving public respect for government may not be one that can be legitimately pursued through candidate eligibility requirements. In Deibler v. City of Rehoboth Beach, 790 F.2d 328 (3d Cir. 1986), for example, the court struck down a city charter provision requiring that candidates be "non-delinquent taxables." The court noted that the charter provision did not rationally relate to the goal of "avoiding public cynicism of elected officials" because it prevented citizens from "establish[ing] standards for their representatives through the power of the ballot box." *Id.* at 335–36. Similarly, it could be argued that the cynicism fostered by extended incumbency should be addressed through the voting process, not through state restrictions.

[157] 424 U.S. 1, 48–49 (1976); *see also* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 790–91 (1978) (noting that "the fact that advocacy may persuade the electorate is hardly a reason to suppress it . . . . [T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments.").

be argued that the main purpose of these provisions is precisely to restrict the speech of incumbents and their supporters in order to enhance the relative voice of others, a strategy that directly contravenes the principle laid down in *Buckley*.[158]

Moreover, it is not clear that the interest identified in competitive elections makes it necessary to impose permanent ineligibility on particular individuals.[159] Increased competitiveness could be fostered through a variety of mechanisms—including public financing of campaigns, restrictions on perquisites of office, and requirements of equal media time for challengers—without restricting tenure in office. Even if the effects of incumbency are deemed so inherently overwhelming that they could not be addressed through such measures, the interest in competitive elections could be satisfied by a rotation provision, as in Colorado, limiting only consecutive terms in office.[160]

The state interest in preventing corruption and the appearance of corruption is well established in the campaign finance cases that have come before the Supreme Court.[161] Despite the rhetoric of term-limit advocates, however, limits on legislative tenure appear to be wholly unrelated to this interest. It is by no means clear that longer legislative careers are associated with greater corruption; in fact, the true relationship may be precisely the opposite.[162] Furthermore, unlike campaign contributions[163] or expenditures in candidate elections,[164] where there is at least a reasonable fear of quid-pro-quo arrangements, the mere con-

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[158] For three reasons, however, one should be cautious about extending the *Buckley* principle to term-limit laws. First, the recent case of Austin v. Michigan Chamber of Commerce, 110 S. Ct. 1391 (1990), calls into question the continuing validity of the *Buckley* dictum. In *Austin* the Court upheld restrictions on expenditures of corporate treasury funds in candidate elections, citing the state interest in regulating "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form." *Id.* at 1397. Second, underlying the *Buckley* case is a concern that campaign finance regulations enacted by Congress may be used to ensure the security of incumbent legislators. By contrast, term-limit measures enacted through the initiative process cannot be construed as attempts at incumbent self-protection. Third, the *Buckley* dictum is premised on an understanding that campaign finance regulation represents an effort to limit the speech of a distinct group in society, the wealthy. In the case of term limits, however, there is no societal group whose interests can be seen as intimately connected with preserving the prospects for continued service in the legislature.

[159] Here the analysis employs the more "tailored" balancing test derived from *Anderson*. *See supra* note 147.

[160] *See supra* note 57.

[161] *See, e.g., Austin*, 110 S. Ct. 1391; *Buckley*, 424 U.S. 1.

[162] *See infra* notes 185–186 and accompanying text.

[163] *See Buckley*, 424 U.S. 1.

[164] *See Austin*, 110 S. Ct. 1391.

tinued presence of an incumbent in office does not, without more, suggest either the likelihood of or the potential for corruption.

Finally, there is the state interest in regulating public employment to ensure the faithful performance of public duties. A number of cases have made it clear that states may legitimately restrict the activities of public employees. For example, both federal and state civil servants may constitutionally be prohibited from engaging in partisan political activities, in part to secure "impartial execution of the laws."[165] Similarly, resign-to-run and serve-your-term provisions are upheld on the ground that they prevent neglect of duties or abuse of position due to aspirations for higher office.[166]

The interest in "ensuring the proper performance of current public duties"[167] is unlikely to provide an adequate justification for term-limit measures such as those enacted in Oklahoma and California. While an argument can be made that the desire to be reelected adversely affects the performance of incumbent legislators, this argument is inherently problematic. Not only is faithful performance of current duties by incumbents an obvious strategy to achieve reelection, but this argument would logically seem to require that legislators be limited to one term.

Moreover, the use of restrictions on political activities as a means to insure faithful performance of public functions becomes more difficult to justify after officials have resigned from office.[168] It is of course possible that state legislators, facing only a brief period of ineligibility, may alter their behavior to secure reelection in the future. Nevertheless, assuming there is at least some discounting of future reelection prospects, term limits extending ineligibility into the indefinite future may not be necessary to secure the state interest in faithful public service.[169]

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[165] United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 567 (1973). The other interests offered in support of the restrictions upheld in *Letter Carriers* were the goals of preserving citizen confidence in government, preventing the development of "a powerful, invincible, and perhaps corrupt political machine," and defending public employees from being subject to political pressures. *Id.*; *see also* Broadrick v. Oklahoma, 413 U.S. 601 (1973) (upholding state law restrictions on political activities of civil servants); United Pub. Workers v. Mitchell, 330 U.S. 75 (1947). *See generally* Note, *Developments in the Law—Public Employment*, 97 HARV. L. REV. 1611, 1651–60 (1984).

[166] *Clements*, 457 U.S. at 968, 970.

[167] *Id.* at 985 (Brennan, J., dissenting).

[168] *See id.*

[169] Here, again, the analysis reflects the more "tailored" *Anderson* standard. *See supra* note 147, 159.

C. *A Caveat: Federalism and the Role of the Courts*

Even if the foregoing arguments regarding burdens and state interests were accepted in their entirety,[170] it is important to recognize that judicial evaluation of state term-limit laws raises important federalism issues and concerns about the role of the courts. These factors may lead courts to uphold restrictive term-limit laws despite the effects on candidates and voters, and despite the problematic character of the interests invoked to justify the term limits.

The idea that states should be entitled to determine their own form of government, so long as it remains "republican" in nature,[171] seems inherent in the concept of federalism and the tenth amendment of the Constitution.[172] As the Supreme Court noted in *Oregon v. Mitchell*, "[n]o function is more essential to the separate and independent existence of the States and their governments than . . . the nature of their own machinery for filling local public offices."[173] Consequently, judgments relating to the election of state and local officials have often been respected, even when important rights, such as those secured by the first and fourteenth amendments, are implicated.[174] Term-limit measures not only fall within "the States' power to regulate the elections of their own officials,"[175] but they are closely connected with a substantive judgment concerning the appropriate form of government—that government by "amateurs" is pre-

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[170] Note, however, the reservations discussed *supra* notes 150, 158.

[171] U.S. CONST. art. IV, § 4.

[172] *See* Sununu v. Stark, 383 F. Supp. 1287, 1291 (D.N.H. 1974), *aff'd*, 420 U.S. 958 (1975); U.S. CONST. amend. X; *see also* Oregon v. Mitchell, 400 U.S. 112 (1970) (holding that "the Constitution was . . . intended to preserve to the states the power that even the Colonies had to establish and maintain their own separate and independent governments"); *Clements*, 957 U.S. at 975 n.4 (Stevens, J., concurring) (noting that "one cannot ignore the State's legitimate interest in structuring its own form of government" in considering the constitutionality of a state serve-your-term requirement).

[173] 400 U.S. at 125; *see also Clements*, 457 U.S. at 975 (Stevens, J., concurring) (arguing that "there is no federal requirement that a State fit the emoluments or burdens of different elective state offices to any particular pattern").

[174] *See, e.g., Mitchell*, 400 U.S. at 125 (holding that Congress lacks the power to lower the voting age in state and local elections and commenting that "[i]n interpreting what the Fourteenth Amendment means, the Equal Protection Clause should not be stretched to nullify the States' powers over elections which they had before the Constitution was adopted and which they have retained throughout our history"); Gaunt v. Brown, 341 F. Supp. 1187, 1190 (S.D. Ohio 1972), *aff'd*, 409 U.S. 809 (1972) (citing *Mitchell* and holding that federalism concerns would not permit the court to "grant a request that the voting age for primaries be lowered for . . . 17-year-olds who will be 18 by the time of the general election").

[175] *Mitchell*, 400 U.S. at 125.

ferrable to government by professional politicians. As a result, these measures may be seen as within the legitimate range of state choice of governmental structures and entitled to deference from the courts.[176]

Moreover, ruling that individuals cannot be rendered permanently ineligible for legislative office by virtue of their prior service would require courts to substitute their own judgment for the judgment expressed by the state citizenry through the referendum process. Once embarked on this path, courts would be faced with the difficult question of how long eligibility may restricted. They might also have to confront the issue of how and whether restrictions on eligibility for reelection to state governorships should be distinguished from limits on legislative terms.[177]

Thus, absent egregiously restrictive limits on the length of legislative service[178] or on eligibility for other offices,[179] federalism and prudential concerns may induce courts to sustain the constitutionality of even those statutes mandating permanent ineligibility. An example of such judicial deference can be found in the 1974 decision in *Sununu v. Stark*.[180] In that case, a three-judge district court upheld a seven-year durational residency requirement for state senatorial candidates. According to the court, striking down the law "without any discernible judicial standards, would be an improper intervention into an area reserved to the states by the Tenth Amendment."[181]

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[176] The willingness of courts to defer to state term-limit measures on federalism grounds may also be increased by the fact that, at the time of the adoption of the Constitution, Pennsylvania required rotation in office for its state legislators. Specifically, the Pennsylvania Constitution of 1776, which remained in force until 1790, provided that no person could serve as a state legislator for "more than four years in seven." PA. CONST. OF 1776, § 8. The existence of the Pennsylvania provision at the time of the founding may well indicate an intent of the Framers to permit laws mandating temporary ineligibility for state legislative service as a valid expression of states' power to determine their own form of government. This historical background, however, does not speak directly to laws mandating permanent ineligibility. In addition, its significance may be diminished to the extent it is seen as conflicting with interests protected by the subsequently-enacted fourteenth amendment. Nevertheless, it may be viewed as having some weight. *See also* G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 231 (1969) (noting that Pennsylvania was "unique" among the states in requiring rotation in office for state legislators).

[177] Currently 28 states place restrictions on length of service by governors. *See Hill Term Limitations*, *supra* note 9.

[178] *See supra* note 151.

[179] *See* Matsumoto v. Pua, 775 F.2d 1393 (9th Cir. 1983) (striking down a law that, in addition to preventing city councilmen from regaining their seats for five years, also barred them from holding any city office for two years).

[180] 383 F. Supp. 1287 (D.N.H. 1974).

[181] *Id.* at 1291.

V. POLICY ANALYSIS

The drive to limit legislative terms is motivated by the desire to (1) decrease corruption and the power of special interest groups, (2) improve the ability of Congress and the state legislatures to deal with complex problems, and (3) promote increased responsiveness to the electorate.[182] Although these are worthy goals, term limits are unlikely to be an effective means of achieving them, at least at an acceptable cost. Instead, efforts should be directed to political reforms which increase the competitiveness of legislative elections without placing an arbitrary cap on the number of years that individual legislators may serve.[183]

A. *Corruption and the Special Interests*

Term-limit advocates argue that limiting tenure in office will induce legislators to become more public-spirited, and thus less susceptible to corruption and special interest influence.[184] These arguments, however, are premised on an unrealistic assessment of the incentives of legislators and an inadequate appreciation of the value of legislative experience.

As the Framers of the Constitution recognized, the prospect of reelection provides an incentive for legislators to "deserve well of the public" rather than use their offices for personal gain.[185] Given the threat that public exposure of corrupt activities may lead to loss of office,[186] the career-oriented legislator has an interest in avoiding improprieties that might jeopardize

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[182] *See, e.g., Bush Gives Impetus, supra* note 7.

[183] The arguments presented in the text are addressed to measures, such as state term limits or a constitutional amendment to limit congressional terms, that apply equally to all members of a legislature. Unilateral limits on the terms of state congressional delegations are subject to an additional criticism. Specifically, given the seniority system in Congress, states enacting such limits will be structurally disadvantaged in their ability to influence public policy.

[184] *See, e.g.*, Cohen, *It's Time To Limit Terms*, Wash. Post, Dec. 7, 1990, at A23, col. 5.

[185] *See supra* notes 88–108 and accompanying text.

[186] *See* Peters & Welch, *The Effects of Charges of Corruption on Voting Behavior in Congressional Elections*, 74 AM. POL. SCI. REV. 697 (1980).

future electoral prospects.[187] Similarly, the electoral imperative that legislators remain attentive to constituent preferences constrains the ability of special interests to influence legislative voting. It would make little sense for legislators to "sell" their votes on issues closely connected to the welfare of their districts; doing so would give potential opponents an issue to exploit and risk voter retribution at the polls.[188] Instead, for most legislators, "the sensible political strategy is to cultivate a set of organized interests that are at least not inconsistent with the interests of their districts."[189] This enables legislators to "earn campaign contributions for voting as they would anyway."[190]

By contrast, when terms are limited, a significant proportion of legislators will be lame ducks. For these lame duck legislators, one can no longer rely on the electoral incentive to constrain behavior. In the words of one commentator, the question is whether these legislators would be "[m]ore ready to serve the community from which they come, or more eager to serve the interest by whom they wish to be employed?"[191] More generally, to the extent that the potential for a durable career within the

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[187] Admittedly, the reelection incentive is only an imperfect mechanism for dealing with the problem of legislators' misbehavior. As with any enforcement mechanism, the strength of this incentive will vary with the probability of detection. Moreover, some legislators are able to retain their seats even after a scandal becomes public, as is illustrated by the experiences of Adam Clayton Powell (D-N.Y.), *see* Powell v. McCormack, 396 U.S. 486 (1969) and Barney Frank (D-Mass.). *See Barney Frank's Story*, Newsweek, Sept. 25, 1989, at 14. Nevertheless, for purposes of assessing term limits, the issue is not whether misbehavior persists, but rather whether misbehavior is likely to increase without the reelection incentive.

[188] *See* Denzau & Munger, *Legislators and Interest Groups: How Unorganized Interests Get Represented*, 80 AM. POL. SCI. REV. 89 (1986) (arguing that when a legislator's constituents are opposed to a particular policy, it will be electorally costly for the legislator to support the policy and thus more difficult for interest groups to exert influence).

[189] M. FIORINA, *supra* note 14, at 128.

[190] *Id.* The debate over whether money follows votes or votes follow money, and consequently over the extent of special interest influence, is both extensive and inconclusive. A number of studies, however, have found that interest group contributions have only a small effect when other factors are taken into account. *See, e.g.*, J. KAU & P. RUBIN, CONGRESSMEN, CONSTITUENTS, AND CONTRIBUTORS 93 (1982); Chappell, *Campaign Contributions and Congressional Voting: A Simultaneous Probit-Tobit Model*, 64 REV. ECON. & STAT. 77 (1982); Welch, *Campaign Contributions and Congressional Voting*, 35 W. POL. Q. 478 (1982); Chappell, *Campaign Contributions and Voting on the Cargo Preference Bill: A Comparison of Simultaneous Models*, 36 PUB. CHOICE 301 (1981). These studies suggest that members of Congress in fact earn contributions for voting as they would anyway. *But see* Frendreis & Waterman, *PAC Contributions and Legislative Behavior: Senate Voting on Trucking Deregulation*, 66 SOC. SCI. Q. 401 (1985) (finding that contributions have a significant effect). *See also infra* note 193 and accompanying text.

[191] Blitz, *Give Congress Horse Races, Not Distracted Lame Ducks*, L.A. Times, Dec. 14, 1990, at B7, col. 1.

legislature is diminished, it is reasonable to expect legislators to be relatively more concerned with the careers they hope to develop outside the legislature.

Limits on legislative terms may also enhance the power of special interests by reducing the level of experience and expertise that legislators possess. Term limits would clearly prevent legislators with the most extensive substantive and procedural knowledge from remaining in the legislature. More broadly, however, term limits are likely to reduce the incentives for legislators to acquire information in the first place. The willingness of legislators to incur costs to acquire specialized information should vary directly with the benefits received: the ability to design policy to achieve desired outcomes. Insofar as these benefits can be seen as an income stream over time, truncating the time horizon of legislative careers reduces the overall level of benefits available and thus the incentive to develop expertise. The impact of legislators possessing less information will be to increase their reliance on other actors, including special interest groups, and reduce their capacity for independent policy judgment.[192]

This is not to say that concerns about special interest power and corruption are ill-founded. Interest groups are likely to have some effect on legislators' behavior. This is particularly true on issues where district preferences do not provide a clear voting cue[193] and pressure or contributions by one group are not balanced by similar activity from opposing groups.[194] Moreover, the appearance that legislators are "on the take"[195] and well-

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[192] *See* Cronin, *supra* note 9 (arguing that "one unintended consequence [of term limits] is a likely power shift away from Congress and to lobbyists, political action committees and experienced executive branch players"); Knee & Stewart, *Stop Me Before I Vote Again*, Wash. Post, Oct. 30, 1990, at A21, col. 1 (noting that, with term limits, "the formal and informal legislative bureaucracy—self-interested lobbyists and unelected staffers—would become the sole repository of institutional memory and expertise and thus more powerful relative to the elected representatives themselves").

[193] M. FIORINA, *supra* note 14, at 129. For a theoretical derivation of this result, see Denzau & Munger, *supra* note 187; *see also* Ginsburg & Green, *The Best Congress Money Can Buy: Campaign Contributions and Congressional Voting*, in DO ELECTIONS MATTER? 82–83 (B. Ginsberg & A. Stone eds. 1986) (finding that "the impact of campaign contributions is felt most by representatives with neither a strong positive nor a strong negative predisposition toward the contributor").

[194] *See* Evans, *PAC Contributions and Roll-Call Voting: Conditional Power*, in INTEREST GROUP POLITICS (A. Cigler & B. Loomis eds. 1985). On the conditions under which interest groups are likely to achieve influence through political contributions, see Corwin, Money and Congressional Politics 19–26 (1987) (unpublished paper, on file at the HARV. J. ON LEGIS.).

[195] M. FIORINA, *supra* note 14, at 129.

publicized abuses of legislators' official positions have undesirable consequences for citizen confidence in government.

Nevertheless, the appropriate way to address the issue of special interest power is by implementing a system of campaign finance reform that reduces the role of interest groups, particularly political action committees, in financing elections, not by placing limits on the tenure of elected representatives. Similarly, corruption should be addressed through stringent ethics laws mandating severe penalties for legislative misbehavior.

B. *Increasing the Ability to Deal with Complex Problems*

A second argument offered by supporters of term limits is that the electoral insulation of incumbents fosters an inability to deal with complex problems. In the case of Congress, for example, it is often argued that the parochial interests of reelection-oriented members, reflected and institutionalized in the committee system, prevent the development of comprehensive solutions to pressing national concerns such as the budget deficit. By contrast, enforcing a circulation of membership through term limitations would, advocates claim, provide a regular infusion of new ideas[196] and facilitate the breaking of legislative paralysis.

It is well-established that, in the United States, longer terms of legislative service and a careerist orientation among legislators are associated with a decentralized legislative structure involving powerful, semi-autonomous committees.[197] Nevertheless, a decentralized structure, and particularly the specialized knowledge that a committee system promotes, also serves as a source of institutional capacity. The very nature of complex problems, such as those involved in addressing the budget deficit, requires a high level of expertise on the part of individual legislators. The institutional division of labor accomplished by a committee system fosters the development of this specialized knowledge by allowing legislators to develop extensive familiarity with particular policy areas. As noted previously, how-

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[196] Whittelsey, *Throw the Rascals (and the Others) Out*, Newsday, Jan. 2, 1991, at 85, col. 1.

[197] *See* Polsby, *The Institutionalization of the U.S. House of Representatives*, 62 AM. POL. SCI. REV. 144 (1968) (describing the growth of autonomous committees in Congress at the turn of the twentieth century); Rosenthal, *supra* note 37, at 94 (documenting an analogous process in state legislatures).

ever, term limits both block legislatures from retaining their most experienced members and reduce the incentives to specialize.[198] Indeed, it is reasonable to question the desirability of having the nation's tax laws written by a Ways and Means Committee composed of "amateurs" with a relatively short mean length of service in the House and no long-serving representatives to provide stability.

Moreover, the independent policymaking capacity provided by specialization is also important for the stature of a legislature within its larger political system. As Polsby notes in his study of the "institutionalization" of the House of Representatives, "the total impact of a cadre of specialists operating over the entire spectrum of public policies is a formidable asset for a political institution; and it has undoubtedly enabled the House to retain a measure of autonomy and influence that is quite exceptional for a 20th century legislature."[199] The value of the autonomy maintained by the House, and more generally by Congress as a whole, should not be underestimated. It has allowed Congress to remain "a primary source of policy innovation in the federal government."[200] Perhaps more importantly, it has enabled Congress to provide a critically important check on executive abuse,[201] as is demonstrated by the examples of Watergate and the Iran-Contra affair. Similarly, the increasingly committee-oriented state legislatures have become more important sources of policy innovation and more active in overseeing the administrative acts of state executives.[202]

A more reasonable approach to improving the ability of legislatures to deal with complex problems is not to deprive them of their capacity through term limits, but rather to strengthen the role of party leadership institutions. Party institutions are valuable because, as the one centralizing organ in American legislatures, they provide a force for promoting policy coherence and managing trade-offs across issues.[203] At the national level,

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[198] *See supra* note 191 and accompanying text.

[199] Polsby, *supra* note 197, at 166.

[200] *Is the House Unresponsive?*, *supra* note 17, at 268.

[201] Mann, *Elections and Change in Congress*, in THE NEW CONGRESS 52 (T. Mann & N. Ornstein eds. 1981) ("the continuing desire of most senators and representatives to remain in office and to develop politically and personally rewarding legislative careers is terribly important for the internal shape of Congress and for its stature vis-a-vis the executive").

[202] Rosenthal, *supra* note 37, at 95.

[203] *See* G. JACOBSON, *supra* note 3, at 219 (quoting Fiorina, *The Decline of Collective Responsibility in American Politics*, 109 DAEDALUS 25, 26–27 (1980)).

there are already indications that party institutions are increasing in influence.[204] This trend might be accelerated by campaign finance reforms, such as those suggested above, limiting the role of political action committees in financing elections. Such reforms would increase the relative influence of parties on the electoral fortunes of legislators, thereby fostering an increase in the strength of party leadership institutions within Congress and the state legislatures.

C. *Improving Responsiveness*

Finally, term-limit advocates claim that the incumbency advantage has insulated legislatures from "changes in political sentiments among voters."[205] Claims that the prodigious advantages of incumbents undermine responsiveness operate at two levels.[206] First, term-limit advocates argue that individual representatives may become "insensitive to the needs of their constituents," and that "disgruntled voters lack any realistic opportunity to express their unhappiness with the incumbent at the polls."[207] Second, term-limit advocates argue that legislatures as a whole may become insulated from broad partisan and policy changes among the electorate. These arguments raise important concerns, but the problems presented are better addressed by reforms to increase the prospects for congressional challengers than by limiting legislative terms.

The idea that incumbent legislators are insensitive to the needs of their constituents is fundamentally misguided. To a large extent, incumbents are able to secure reelection precisely because they are so attentive to their constituents' interests.[208] Studies of congressional voting behavior, for example, consistently identify constituent interests as a critically important determinant of members' voting decisions.[209] Moreover, the increasing level of constituency service is itself a form of

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[204] *See* S. SMITH, CALL TO ORDER (1989) (identifying a trend toward more liberal use of restrictive rules by the Democratic party leadership in Congress); P. HERRNSON, PARTY CAMPAIGNING IN THE 1980s (1988) (focusing on the increasing role of national party organizations in congressional elections); Shepsle, *The Changing Textbook Congress*, in CAN THE GOVERNMENT GOVERN? 238–66 (J. Chubb & P. Peterson eds. 1989).

[205] *Is the House Unresponsive?*, *supra* note 17, at 261.

[206] *See id.* at 262.

[207] *Id.*

[208] *See* J. KINGDON, CONGRESSMEN'S VOTING DECISIONS 31 (2d ed. 1981).

[209] *See, e.g.*, *id.* at 17, 29–71, 248.

responsiveness to district interests that serves a valuable representational function.[210] By placing an arbitrary cap on the length of legislative careers and creating more lame ducks, term limits would only reduce the incentives for legislators to be responsive to constituent concerns.[211]

The claim that the incumbency advantage decreases responsiveness to broad changes in the electorate is best exemplified by the charge that its strength is responsible for the "permanent Democratic majority" in the House of Representatives.[212] According to this argument, the Democrats' nearly forty-year[213] hold over the majority position in the House is an artifact resulting from the fact that the Democrats held majority status at a time when the strength of the incumbency effect increased.[214] Term limits, advocates contend, would promote a greater number of more competitive open-seat elections, thereby allowing Congress to more accurately reflect the "true" preferences of the electorate.

There are important reasons to question the theory that the continued majority status of the Democratic party in the House can be traced solely, or even significantly, to the workings of the incumbency effect. As Jacobson has persuasively argued, the explanation for the inability of Republicans to win control of the House despite their success in presidential elections is "political, not structural."[215] Three factors in particular may be identified as promoting the minority position of the Republicans: (1) the structure and popular perceptions of the parties differ in ways that foster Republican success in presidential elections while undermining Republican chances in congressional races,[216]

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[210] *See* J. JOHANNES, TO SERVE THE PEOPLE 4 (1984).

[211] *See supra* note 191 and accompanying text.

[212] *See* Cohen, *supra* note 184 (commenting that "[i]t would take either term limitations or a killer flu for the GOP to once again take control of Congress"). This line of reasoning has also been extended to account for the continuing Democratic advantage in the state legislatures.

[213] The Democrats have remained continuously in control of the House since 1954.

[214] In addition, the Democrats have benefitted from what Chubb and Peterson term "the accidents of history." Both the 1958 recession and the Watergate scandal led to significant gains for the Democrats in the House. According to Chubb and Peterson, these gains were solidified and perpetuated through the power of incumbency. *See* Chubb & Peterson, *American Political Institutions and the Problem of Governance*, in CAN THE GOVERNMENT GOVERN?, *supra* note 204, at 32.

[215] G. JACOBSON, *supra* note 34, at 133.

[216] The broad, relatively diverse character of the Democratic coalition hurts the party in national elections, but allows members the freedom to appeal effectively to local interests in congressional contests. By contrast, the more unified, focused Republican program attracts voters in presidential campaigns, but may be interpreted as reflecting insensitivity to local concerns. *Id.* at 131–33.

(2) the Republican party has failed to field quality challengers,[217] and (3) "voters find it difficult to assign blame or credit when control of government is divided between the parties."[218] Indeed, even in open-seat races where the incumbency advantage is absent, Republicans have had only limited success.[219] This fact severely undermines the argument that the incumbency advantage has prevented Congress from reflecting partisan changes within the electorate.

These arguments are not intended to suggest that increased competitiveness in legislative elections is undesirable. Given the tendency of legislators to represent most assiduously their supporting constituencies within their districts,[220] the absence of viable challengers may indeed have disenfranchising effects for certain voters and groups. Moreover, even though the incumbency effect may not be responsible for the persistence of divided government, increasing the proportion of competitive elections would promote legislatures which more closely represent changes in public preferences. Nevertheless, increased competitiveness should be achieved through reforms which increase the prospects for, and thus the likelihood of, serious challenges to incumbents. Examples of such reforms include public financing of legislative campaigns to ensure that challengers have sufficient funds to mount credible campaigns, restrictions on use of the frank and other perquisites of office, and laws promoting equal access for challengers to media outlets.[221]

VI. CONCLUSION

This Recent Development has surveyed the legal and policy implications of state limitations on legislative terms. The analysis has developed three main points. First, state efforts to unilaterally limit the terms of members of Congress are unconstitutional violations of the qualifications clauses and are unlikely to be upheld in the courts. Second, there is a plausible,

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[217] Jacobson speculates that this may result from the fact that "[t]hose Republicans most strongly attracted to the party's conservative ideology" are not well suited to the emphasis on particularized benefits that is the bread and butter of a congressional career. *Id.* at 120.

[218] *Id.* at 105.

[219] *Id.* at 32–37.

[220] *See* J. KINGDON, *supra* note 208, at 34.

[221] On some of these proposals, see *Is the House Unresponsive?*, *supra* note 17, at 281.

although by no means overwhelming, argument that even state limitations on state legislative terms are constitutionally impermissible, at least to the extent that they render certain individuals permanently ineligible from returning to legislative service. Finally, term limits are undesirable from a policy standpoint: they are unlikely to significantly improve legislative performance and may well have detrimental effects.

*—Erik H. Corwin**

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PROTECTING THE RIGHT TO DIE: THE PATIENT SELF-DETERMINATION ACT OF 1990

Patients generally possess the right to refuse medical treatment, even if it will result in their death.[1] However, if the patient becomes incompetent, and his family seeks to terminate life-sustaining treatment, state law may provide the family and physician little guidance: who should make the decision to terminate treatment, and how should the decision be made?[2] This legal uncertainty, combined with ethical concerns, makes some health-care providers wary of discontinuing life-sustaining treatment.[3] Thus, the patient and his family may be forced to bear the tremendous costs of unwanted treatment.

Unwanted medical procedures make the patient and his family "passive prisoner[s] of medical technology."[4] Such procedures risk keeping the patient alive against his will, and subject him to invasive and often degrading treatment. Further, these procedures may impose a substantial financial burden on the patient's family. Besides being a burden in itself, financial cost can exacerbate the emotional suffering of the family. When the family members are responsible for the medical bills, their perceived financial interest in discontinuing expensive treatment only increases their guilt and anxiety as they attempt to do what their loved one would want.

The Patient Self-Determination Act of 1990[5] ("the Act") helps to reduce the devastating uncertainty accompanying the patient's right to die by encouraging patients to clarify *before* the onset of incompetency their intentions regarding life-support. Under the Act, health-care providers must give individuals in-

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[1] *See infra* notes 8–13 and accompanying text.

[2] *See infra* notes 14–25 and accompanying text.

[3] *See infra* notes 26–31 and accompanying text.

[4] Cruzan v. Director, Mo. Dep't of Health, 110 S. Ct. 2841, 2864 (1990) (Brennan, J., dissenting).

[5] Pub. L. No. 101-508, § 4206, 1990 U.S. CODE CONG. & ADMIN. NEWS (104 Stat.) 291 [hereinafter MEDICARE SELF-DETERMINATION ACT]; Pub. L. No. 101-508, § 4751, 1990 U.S. CODE CONG. & ADMIN. NEWS (104 Stat.) 519 [hereinafter MEDICAID SELF-DETERMINATION ACT]. Section 4206 conditions the receipt of Medicare funds upon compliance; § 4751 places conditions upon Medicaid. *See infra* note 33 and accompanying text. The original Senate bill was sponsored by Senators Danforth (R-Mo.) and Moynihan (D-N.Y.). S. 1766, 101st Cong., 1st Sess. (1989). A subsequent House bill was sponsered by Representatives Levin (D-Mich.), Swift (D-Wash.), Moody (D-Wis.), McDermott (D-Wash.), and Fauntroy (D-D.C.). H.R. 4449, 101st Cong., 2d Sess. (1990). An additional House bill was sponsered by these representatives and Representatives Waxman (D-Cal.), Pelosi (D-Cal.), Foglietta (D-Pa.), and Lewis (D-Ga.). H.R. 5067, 101st Cong., 2d Sess. (1990).

formation outlining their options under the law of their state to formulate a legally sanctioned written directive establishing their health-care decisions.[6] Health-care providers also must articulate their own policies on implementing such directives.[7]

Part I of this Recent Development recounts the state of uncertainty that inspired the Act. Part II then describes the Act and its expected practical and legal effects. Part III critically examines the preventive measures required by the Act, pointing out possibilities for abuse. In addition, Part III focuses on the Act's failure to create for patients substantive rights that would eliminate the problems surrounding termination of life-sustaining treatment.

I. THE CALL FOR FEDERAL LEGISLATION

A. *The Patient's Right to Refuse Health Care*

"The right to be free from medical attention without consent, to determine what shall be done with one's own body, *is* deeply rooted in this Nation's traditions . . . ."[8] In framing this tradition, courts have consistently upheld a competent patient's right to make decisions regarding medical treatment, even if the decision results in the patient's death.[9] Courts use several legal approaches to uphold the patient's freedom to choose. Some courts rely on the common law doctrine of patient self-determination, which holds that patients should be free from unwanted bodily intrusion. Under the common law, treatment is valid only when a patient has been fully informed of the medical

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[6] MEDICARE SELF-DETERMINATION ACT, *supra* note 5, § 4206(a)(2), at 292; MEDICAID SELF-DETERMINATION ACT, *supra* note 5, § 4751(a)(2), at 521.

[7] MEDICARE SELF-DETERMINATION ACT, *supra* note 5, § 4206(a)(2), at 292; MEDICAID SELF-DETERMINATION ACT, *supra* note 5, § 4751(a)(2), at 521. Of course, physicians and hospitals are expected to obey any relevant state law that gives force to such directives. However, since general advance directives may often appear ambiguous in specific medical situations, and since state law on determining and effectuating patient intent may be unclear, prompt compliance with a patient's treatment wishes may as a practical matter hinge upon the care-giver's personal or institutional policy on dealing with legal and ethical uncertainty.

[8] *Cruzan*, 110 S. Ct. at 2865 (Brennan, J., dissenting) (emphasis in original).

[9] *See, e.g.*, Bouvia v. Superior Court, 179 Cal. App. 3d 1127, 1137, 225 Cal. Rptr. 297, 300 (1986) (where a quadriplegic, afflicted with irreversible cerebral palsy and severely crippling, degenerative arthritis, was competent, in pain, and unable to commit suicide, removal of a nasogastric tube was allowed because "the right to refuse medical treatment is basic and fundamental"); Saltz v. Perlmutter, 379 So. 2d 359 (Fla. 1980); Matter of Melido, 88 Misc. 2d 974, 390 N.Y.S.2d 523 (N.Y. Sup. Ct. 1976).

risks involved, has knowledge of those risks, and freely consents.[10] Other state courts support the patient's right to choose based on provisions in their state's constitution or in statutes upholding patients' rights.[11] Finally, courts may base the determination that patients have the right to choose on a right to privacy found in state constitutions or in the federal Constitution.[12]

The advance of life-sustaining technology has problematized the strong legal tradition of protecting the patient's right to choose. Technological improvements in medical care increasingly blur the distinction between life and death. The dying process is now extended "through the use of artificial, extraordinary, extreme, or radical medical or surgical procedures."[13] Physicians most often perform these extreme and radical procedures upon patients who have been rendered incompetent by their medical condition. An artificial respirator may enable a brain-dead patient to survive. A patient in an irreversible coma may be given nutrition and hydration through a feeding tube. These patients are unable to express whether they wish to receive such "extraordinary" procedures. The parties involved—the patient's family and friends, his physician and health-care institution, and the state—face a difficult dilemma in ascertaining the patient's intent. They confront two questions: who should make the decision for the incompetent patient, and how should this decision be made?

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[10] RESTATEMENT (SECOND) OF TORTS §§ 892A, 892B (1977); *see also* Schloendorff v. Society of N.Y. Hosp., 211 N.Y. 125, 127, 105 N.E. 92, 93 (1914) (dictum) ("[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body . . . ."), *rev'd on other grounds*, Bing v. Thunig, 2 N.Y.2d 656, 143 N.E.2d 3, 163 N.Y.S.2d 3 (1957); Delio v. Westchester County Medical Center, 129 A.D.2d 1, 516 N.Y.S.2d 677 (1987) (right to refuse medical care is based on the common law right to self-determination).

[11] *See* Corbett v. D'Allessandro, 487 So. 2d 368 (Fla. Dist. Ct. App. 1986); Rivers v. Katz, 67 N.Y.2d 485, 495 N.E.2d 337, 504 N.Y.S.2d 74 (1986). For examples of provisions protecting patients' rights, see ILL. CONST. of 1970, art. 1, § 6; N.Y. PUB. HEALTH LAW §§ 2504, 2805-d (Consol. 1990); N.Y. CIV. PRAC. L. & R. § 4401-a (Consol. 1990); OHIO REV. CODE ANN. § 2317.54 (Baldwin 1988).

[12] *See, e.g.*, *In re* Farrell, 108 N.J. 335, 529 A.2d 404 (1987); *In re* Coyler, 99 Wash. 2d 114, 660 P.2d 738 (1983). However, in *Cruzan*, 110 S. Ct. 2841, the Supreme Court said that when a competent patient asserts a right to choose, he should invoke the fourteenth amendment's due process protection against deprivation of liberty.

[13] S. 1766, 101st Cong., 1st Sess. § 2(b)(2) (1989). "Medical advances have altered the physiological conditions of death in ways that may be alarming: highly invasive treatment may perpetuate human existence through a merger of body and machine that some might reasonably regard as an insult to life rather than as its continuation." *Cruzan*, 110 S. Ct. at 2883 (Stevens, J., dissenting).

B. *State Legal Obstacles to Resolving Complex Issues of Patient Intent*

Often the physician and the family quietly decide to discontinue life support, and the state is not consulted or involved. In some cases, however, the state, or some other interested party, may assert a strong interest in continuing the patient's life-sustaining treatment. In such cases, courts often assume the weighty task of ascertaining the incompetent patient's intent.[14]

Courts vary in their approach to ascertaining patient intent, demonstrating "both similarity and diversity" in their methods.[15] The basic approach consists of an initial search for express intent which, if unsuccessful, is followed by the application of some test or standard to determine the patient's implicit intent.

Most courts initially search for evidence of a patient's clearly stated intention regarding his illness. The courts may note recent oral directions that indicate the patient's desires, or may consider written advance directives.[16] If no evidence conclusively indicates the patient's wishes, courts diverge in their methods of establishing patient intent by weighing either subjective evidence, objective evidence, or both.

In considering subjective evidence, courts utilize the "substitute-judgment" test. This test places the burden on close relatives and friends to prove what a presently incompetent patient would choose were he competent to make a decision regarding life-sustaining treatment.[17] Courts using this test may be persuaded by evidence demonstrating the patient's religious or personal beliefs.[18]

A second test courts use is the objective, "best-interest" test. This test allows the court to make the determination for the

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[14] Courts faced with this responsibility sometimes assert that an adversarial judicial proceeding is not the best way to resolve the question. According to *In re Conroy*, these cases raise "moral, social, technological, philosophical, and legal questions involving the interplay of many disciplines. No one person has all the answers. Perhaps it would be best if the Legislature formulated clear standards for resolving requests to terminate life-sustaining treatment for incompetent patients." 98 N.J. 321, 344, 486 A.2d 1209, 1220 (1985).

[15] *Cruzan*, 110 S. Ct. at 2851.

[16] *See, e.g., In re* Gardner, 534 A.2d 947 (Me. 1987); *In re* Peter, 108 N.J. 365, 529 A.2d 419 (1987).

[17] *See, e.g., In re* Jobes, 108 N.J. 394, 529 A.2d 434 (1987); *In re* Conroy, 98 N.J. 321, 486 A.2d 1209 (1985); *In re Coyler*, 99 Wash. 2d 114, 660 P.2d 738.

[18] *See, e.g., In re Conroy*, 98 N.J. at 362, 486 A.2d at 1230 (citing *In re* Storar, 52 N.Y.2d 363, 378, 420 N.E.2d 64, 72, 438 N.Y.S.2d 266, 274, *cert. denied*, 454 U.S. 858 (1981)).

patient; it is especially useful for classes of patients that have never been competent to make treatment decisions, such as the mentally handicapped, infants, or minors. In effect, the patient's "intentions" (presumably on some abstract level) are postulated to coincide with the court's determination of the patient's "best interest." The court considers objective criteria to determine whether the benefit to the patient of ceasing treatment, including the cessation of his pain and suffering, outweighs the benefit of prolonging life through continued treatment. The following factors are essential to an objective disposition: the expected duration of the vegetative state, the constancy of pain with and without the proposed treatment, the incompetent's maturity and life expectancy, the prognosis of illness, the level of physical and cognitive functioning, the degree of humiliation, the burdensome nature of the proposed treatment, and alternative treatment options.[19]

The applications and outcomes of these tests necessarily vary according to the facts of the individual case.[20] A court may use a single test or a combination of them to arrive at a decision. However, the "facts" are often complex and ambiguous, making the result less certain. Moreover, a court may choose to apply a test that seems ill-suited to the facts of a case.[21] The resulting unpredictability creates confusion for those relying on the law to inform their decisions.[22]

Furthermore, states need not apply the substitute-judgment test or the best-interest test at all, and instead may require parties seeking to terminate life-support to bear a heavier evidentiary burden. In *Cruzan v. Director, Missouri Department of Health*,[23] the United States Supreme Court acknowledged that states may impose a strict standard of "clear and convincing" evidence of an incompetent patient's intent before allowing

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[19] *See, e.g.*, Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 370 N.E.2d 417 (1977); *In re Jobes*, 108 N.J. 394, 529 A.2d 434; *In re Conroy*, 98 N.J. 321, 486 A.2d 1209.

[20] For example, if the patient was once capable of developing views relevant to the decision to discontinue treatment, a court may apply a substitute-judgment test. On the other hand, if the surrogate has no basis for substitute judgment, or the patient has never had the ability to make such decisions, a court may be more likely to use the best-interest test.

[21] *See, e.g.*, *Saikewicz*, 373 Mass. 728, 370 N.E.2d 417 (court applied subjective substitute-judgment standard where patient had never been competent to make the decision).

[22] *See infra* notes 29–30 and accompanying text.

[23] 110 S. Ct. 2841 (1990).

termination of treatment.[24] In the absence of clear and convincing evidence, the states are not constitutionally required to employ a substitute-judgment or best-interest test to determine the patient's intent.[25] Thus, in states employing a strict standard, the patient's family cannot terminate treatment when the state or the doctor objects unless the patient has stated his intention in writing, or orally in very clear terms.

C. *Obstacles Within the Medical Community*

In addition to being burdened with strict or confusing state-law requirements, the family attempting to discontinue life-support for an incompetent patient may face resistance by health-care providers.[26] Some health-care providers believe that professional ethics require them to oppose the termination of treatment.[27] According to one expert, "[a]long with physicians' belief

[24] *Id.* at 2852. In 1983 Nancy Cruzan was resuscitated at the scene of an auto accident. She never regained consciousness but persisted in a vegetative state. After realizing that Nancy had virtually no chance of recovery, her parents sought to remove her nutrition and hydration tube. Employees of the Missouri State Rehabilitation Center refused their request. The trial court ordered removal, and the Missouri Supreme Court reversed. The state supreme court noted that Nancy's alleged conversation with a housemate evidenced her desire to terminate life-sustaining measures, but the conversation did not meet the clear-and-convincing-evidence standard required by Missouri law. The court ruled that Nancy Cruzan did not possess a sufficient common law or privacy right to terminate artificial sustenance. Moreover, her guardian had no authority to terminate her treatment unless specifically empowered by a state statute to do so. Cruzan v. Harmon, 760 S.W.2d 408 (Mo. 1988).

[25] *Cruzan*, 110 S. Ct. at 2855 ("[T]he Due Process Clause [does not require] the State to repose judgment on these matters with anyone but the patient herself.").

[26] Testimony of Juliane Delio Before the Subcommitte on Medicare and Long Term Care of the Senate Committee on Finance, 101st Cong., 2d Sess., July 20, 1990 (on file with author). An anesthesiologist negligently caused 33-year-old Danny Delio to enter a persistent vegetative state. Although Delio had clearly indicated to his wife that he did not wish to be maintained on artificial life-support equipment, the county hospital in charge of his care refused to terminate treatment and forced his wife to resort to litigation. "The Hospital administration was making all decisions from a 'risk management' viewpoint." After 13 months a New York court upheld Danny Delio's right to decide to be terminated in light of the clear and convincing evidence presented by his wife. Even after the decision, the hospital still refused to terminate Danny's life support and instead transferred Danny to another facility, "after a heart wrenching search" for a hospital. *Id.*; *see* Delio v. Westchester County Medical Center, 129 A.2d 1, 516 N.Y.S.2d 677 (1987). *Cf.* Bartling v. Superior Court, 163 Cal. App. 3d 186, 209 Cal. Rptr. 220 (1984) (patient's interests paramount and must control when the patient's and the doctor's wishes collide).

[27] Fifteen percent of U.S. physicians oppose withdrawing life support from patients under any circumstances, according to an American Medical Association survey. (Seventy-eight percent favored withdrawing life-support systems from hopelessly ill or irreversibly comatose patients if the patient or his family requests it.) *Most MDs Favor Withdrawal of Life Support—Survey*, Am. Med. News, June 3, 1988, at 9, col. 1. *Cf.* Somerville, *Survey Finds Support Among Colorado MDs for Euthanasia*, Am. Med. News, July 1, 1988, at 17, col. 1 (Colorado survey indicates that 95% of Colorado physicians believe they are not duty-bound to sustain life in all cases).

that they must cure disease and preserve life comes a conviction that the inability to cure or prevent death is medical failure. The attitude that everything must be done to save a life pervades the hospital environment."[28] This attitude informs physicians' treatment decisions, causing them to resist removal of life-sustaining equipment.

Legal questions exacerbate the uncertainty.[29] If the provider is found to have made the wrong decision in terminating life-support, he may be subject to civil liability and, possibly, criminal charges.[30] Even if ultimately exonerated, the providers still face the high costs of legal defense and career disruption. Thus, some providers may resist efforts to terminate, and may require a court order before they will act.

Resistance may inhere in features of the modern health-care system. Health-care providers may find it easier to overlook the value of patient self-determination in the modern health-care setting. The increasing depersonalization of health care due to technology, cost-containment measures, and government presence all help to foster an environment indisposed to patient self-

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[28] Testimony of Reverend Richard A. McCormick, S.J., John O'Brien Professor of Christian Ethics, University of Notre Dame, Before the Subcommitte on Medicare and Long Term Care of the Senate Committee on Finance, 101st Cong., 2d Sess., July 20, 1990 (on file with author) [hereinafter *Testimony of Rev. Richard A. McCormick*]. But the simple ethical mandate to sustain life must be qualified because it conflicts with "a very strong and older ethical duty," the duty to relieve suffering and accept death. 135 CONG. REC. S 13,568 (daily ed. Oct. 17, 1989) (statement of John C. Fletcher, Ph.D.). *See generally id.* at S 13,567–68. Also, according to James H. Sammons, M.D., executive vice president of the American Medical Association, "[f]rom the day they enter medical school, physicians are taught to cherish and preserve life. However, there comes the time with the terminally ill or irreversibly comatose patient that the physician must step back and, at the patient's or the family's request, allow the patient to die with dignity." *Most MDs Favor Withdrawal of Life Support—Survey*, *supra* note 27.

[29] In an American Medical Association survey, 54% of U.S. physicians surveyed were uncertain of their legal risks and responsibilties surrounding decisions to withdraw life-sustaining treatment. *Most MDs Favor Withdrawal of Life Support—Survey*, *supra* note 27; *see also supra* notes 15–25 and accompanying text.

[30] *See, e.g.*, Barber v. Superior Court, 147 Cal. App. 3d 1006, 195 Cal. Rptr. 484 (1983) (physicians charged with homicide for withdrawing medical care in response to the patient's wife's request). *But see* Note, *The California Natural Death Act: An Empirical Study of Physicians' Practices*, 31 STAN. L. REV. 913, 915 (1979) ("Though technically subject to homicide prosecution for withdrawal of treatment, or malpractice actions for negligent omission of treatment, physicians in fact rarely face such liability.").

On the other hand, if health-care providers resist efforts to terminate life-sustaining treatment, they may also face liability. *See, e.g.*, Strachan v. John F. Kennedy Memorial Hosp., 109 N.J. 523, 538 A.2d 346 (1988) (parents of brain-dead son, who was not taken off life-support because of delays caused by confusion over hospital's protocol, were entitled to maintain suit for damages). One extreme example is a suit for battery and negligence filed by a competent patient who now lives because he was resuscitated against his express order. *See Hospital Accused of Battery in "Wrongful Life" Lawsuit*, 6 MED. ETHICS ADVISOR 53 (1990).

determination. These factors may "have the effect of preprogramming . . . treatment."[31] Thus, health-care providers are less driven to confront patient self-determination issues, and will consequently fail to heed patients' health-care wishes.

II. An Answer: The Patient Self-Determination Act of 1990

A. *Provisions of the Act*

The Patient Self-Determination Act of 1990[32] seeks to eliminate the problems associated with terminating life-sustaining treatment for incompetent patients by mandating increased communication about patients' rights between patients and their health-care providers. The Act requires communication about patients' legal options *before* the onset of incompetency. In addition, it requires health-care providers to define and make known to patients their policies concerning patient choice.

The Act conditions health-care providers' participation in Medicare and Medicaid programs on their distributing written information to each adult individual receiving medical care.[33] Through this condition a variety of health-care providers are covered, including most hospitals, nursing facilities, home-health agencies, hospice programs, and health maintenance or-

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[31] *Testimony of Rev. Richard A. McCormick, supra* note 28.

[32] Medicare Self-Determination Act, *supra* note 5; Medicaid Self-Determination Act, *supra* note 5. Health-care providers furnishing services "on or after the first day of the first month beginning more than 1 year after the date of the enactment" of the Act must comply with its provisions. Medicare Self-Determination Act, *supra* note 5, § 4206(e), at 295; Medicaid Self-Determination Act, *supra* note 5, § 4751(c), at 523.

[33] The Patient Self-Determination Act amends the Social Security Act's provisions on Medicare and Medicaid. Opponents of the Act argued that new conditions of participation in Medicare and Medicaid were not appropriate means of popularizing advance directives. They worried about the precedential effects, fearing future incursions by lawmakers into their professional methods. Testimony of Senator John C. Danforth Before the Subcommittee on Medicare and Long Term Care of the Committee on Finance, 101st Cong., 2d Sess., July 20, 1990 (on file with author). Although some health-care providers bristle at the idea of conditioning the Medicare and Medicaid programs, they "will [not] be expelled from Medicare simply because they have forgotten to provide a brochure to a couple of patients . . . . [P]roviders need to be 'substantially out of compliance' with the conditions of participation before action to exclude them will be taken." Testimony of Representative Sander M. Levin Before the Subcommittee on Medicare and Long Term Care of the Senate Committee on Finance, 101st Cong., 2d Sess., July 20, 1990 (on file with author) [hereinafter *Testimony of Representative Sander M. Levin*].

ganizations.[34] The health-care provider must present its patients with the information either at the time of admittance to care, or at the time of enrollment in a program.[35]

The written information provided to the patient must do two things. First, it should describe the individual's rights to refuse treatment according to state statutory law or the law "as recognized by the courts" of the state.[36] The law discussed should cover the right to make decisions concerning medical care, "including the right to accept or refuse medical or surgical treatment and the right to formulate advance directives."[37] Second, the written information must outline the health-care provider's own policies respecting the implementation of patients' wishes.[38]

The central purpose of the Patient Self-Determination Act's mandate of information is to enable individuals more easily to formulate advance directives under state law. According to a congressional sponsor of the Act, Representative Sander M. Levin (D-Mich.), "[a]dvance directives can help people implement their desire to have life-sustaining treatments withdrawn or withheld when these treatments only serve to prolong death. They can also articulate treatments that are *desired*; clarifying for providers what the patient feels is acceptable or prefer-

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[34] MEDICARE SELF-DETERMINATION ACT, *supra* note 5, § 4206(a)(2), at 293; MEDICAID SELF-DETERMINATION ACT, *supra* note 5, § 4751(a)(2), at 522.

[35] MEDICARE SELF-DETERMINATION ACT, *supra* note 5, § 4206(a)(2), at 293; MEDICAID SELF-DETERMINATION ACT, *supra* note 5, § 4751(a)(2), at 522.

[36] MEDICARE SELF-DETERMINATION ACT, *supra* note 5, § 4206(a)(2), at 292; MEDICAID SELF-DETERMINATION ACT, *supra* note 5, § 4751(a)(2), at 521. The Act details how the information is to be prepared. The states, acting through a state agency, association, or other private nonprofit entity, develop a written description of their law (whether statutory or as recognized by the courts of the state) concerning advance directives. The Secretary of Health and Human Services must provide assistance to the state agent charged with developing the state-specific information. Finally, the state agent and the Secretary must distribute the summaries to the health-care providers. MEDICAID SELF-DETERMINATION ACT, *supra* note 5, § 4751(d)(3), at 524.

[37] MEDICARE SELF-DETERMINATION ACT, *supra* note 5, § 4206(a)(2), at 292; MEDICAID SELF-DETERMINATION ACT, *supra* note 5, § 4751(a)(2), at 521.

[38] MEDICARE SELF-DETERMINATION ACT, *supra* note 5, § 4206(a)(2), at 292; MEDICAID SELF-DETERMINATION ACT, *supra* note 5, § 4751(a)(2), at 521. Requiring a health-care provider to maintain policies is not a novel idea. For example, the Joint Committee for the Accreditation of Health Care Organizations requires hospitals to have protocols for making decisions on DNR (Do Not Resuscitate) orders. THE JOINT COMM'N ON ACCREDITATION OF HEALTHCARE ORGS., ACCREDITATION MANUAL FOR HOSPITALS, MA. 1.4.11 (1989).

Patients should be able to rely on health-care providers to inform them of all aspects of their treatment, including the providers' policies concerning the right-to-die issue. Unfortunately, the Patient Self-Determination Act may not be explicit enough in its policy mandate. *See infra* text following note 81.

able."[39] Advance directives include living wills and durable powers of attorney.

Forty states now have living-will laws.[40] These laws establish express statutory procedures through which competent people may exercise their choice about treatment decisions that might have to be made later when the individuals are no longer able to decide for themselves. The procedures established by the laws vary from state to state. For example, states have different standards regarding the qualifying medical condition that allows termination of life-support.[41] In addition, some states restrict certain categories of citizens from formulating living wills.[42] Finally, the procedural requirements of requesting termination vary among the states' living-will laws.[43]

In addition to or in place of a living will, individuals wishing to provide for decision-making in case of incompetency can appoint a proxy under their state's durable power of attorney law. A durable power of attorney is a written legal instrument whereby an individual appoints an agent to perform certain acts on his behalf.[44] The durable power of attorney is more flexible

[39] *Testimony of Representative Sander M. Levin*, *supra* note 33. The Act defines an advance directive as a "written instruction, such as a living will or a durable power of attorney for health care, recognized under State law (whether statutory or as recognized by courts of the State) and relating to the provision of such care when the individual is incapacitated." MEDICARE SELF-DETERMINATION ACT, *supra* note 5, § 4206(a)(2), at 293; MEDICAID SELF-DETERMINATION ACT, *supra* note 5, § 4751(a)(2), at 523.

[40] Levin, *So That There Will Be No More Nancy Cruzans*, Wash. Post, July 6, 1990, at A23, col. 5. Forty-seven states have passed advance-directive legislation. 136 CONG. REC. E2190 (daily ed. June 28, 1990) (statement of Rep. Levin).

[41] For example, the Illinois Living Will Act prohibits the withholding or withdrawal of nutrition and hydration from a qualified patient if such withholding or withdrawal "would result in death solely from dehydration or starvation rather than from the existing terminal condition." ILL. ANN. STAT. ch. 110 1/2, ¶ 702, § 2(d) (Smith-Hurd Supp. 1990). Nevada, on the other hand, allows the discontinuance of any life-sustaining procedure, defining such a procedure as "a medical procedure which utilizes mechanical or other artificial methods to sustain, restore or supplant a vital function. The term does not include medication or procedures necessary to alleviate pain." NEV. REV. STAT. ANN. § 449.570 (Michie 1986).

[42] For example, a state may restrict pregnant women from exercising rights under the living-will law. *See* CAL. HEALTH & SAFETY CODE § 7188 (West Supp. 1991); KAN. STAT. ANN. § 65-28,103 (1985); NEV. REV. STAT. ANN. § 449.610 (Michie 1986).

[43] Some states mandate the specific wording of the directive. *E.g.*, CAL. HEALTH & SAFETY CODE § 7188 (West Supp. 1991); IDAHO CODE § 39-4504 (1985); OR. REV. STAT. § 127.610 (Supp. 1989). Others set forth specific wording yet permit the addition of other specific directions. *E.g.*, KAN. STAT. ANN. § 65-28,103 (1985); TEX. HEALTH & SAFETY CODE ANN. § 672.004 (Vernon 1990). Other statutes do not include model constructions. *E.g.*, N.M. STAT. ANN. §§ 24-7-1 to 24-7-11 (1986).

[44] *See* 3 AM. JUR. 2D. *Agency* § 23 (1986). State statutes may limit the agent's decisions in some medical areas. For example, under the D.C. Health Care Decisions Act of 1988, the surrogate cannot consent to abortion, sterilization, psycho-surgery, convulsive therapy, or behavior-modification programs involving aversive stimuli unless authorized by a court. D.C. CODE ANN. § 21-2211 (1989).

than a living will. Under a living will, making treatment decisions in advance may be difficult because the individual cannot foretell exactly what his medical situation will be in the future. A durable power of attorney, on the other hand, establishes an agent who can react to any developing medical circumstance. Moreover, the simple living will gives no real assurance that an individual's directions will be followed by his physicians once he is rendered incompetent.[45] In contrast, the proxy decision-maker exercising a durable power of attorney must be consulted by the doctors for consent to medical treatment. The durable power of attorney is also more flexible because it is not severely limited in scope by statute in most states; it applies to most medical situations and can include specific instructions for the agent to follow.

After providing information about advance directives to the patient, the provider is required to document in the patient's record whether or not the patient has executed an advance directive.[46] The Act expressly provides that the health-care provider shall not refuse to treat or otherwise discriminate against an individual based on whether the individual has executed an advance directive.[47] This restriction against discrimination, of course, does not in any way suggest that the physician may provide care against the provisions of the advance directive.[48]

The Act also demands that the provider comply with state law concerning advance directives.[49] This requirement would seemingly strangle the health-care provider's freedom to choose its own ethical policy on implementing advance directives. However, the Act provides an escape hatch for some health-care providers: if their state has a law that allows for an objection by any health-care provider or any agent of such provider which, as a matter of conscience, cannot implement an advance directive, that law explicitly trumps this requirement.[50]

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[45] *See supra* note 7.

[46] MEDICARE SELF-DETERMINATION ACT, *supra* note 5, § 4206(a)(2), at 292; MEDICAID SELF-DETERMINATION ACT, *supra* note 5, § 4751(a)(2), at 521.

[47] MEDICARE SELF-DETERMINATION ACT, *supra* note 5, § 4206(a)(2), at 292; MEDICAID SELF-DETERMINATION ACT, *supra* note 5, § 4751(a)(2), at 521. This restriction attempts to eliminate potential abuse of the underprivileged and mentally handicapped under the Act. *See infra* notes 79–81 and accompanying text.

[48] MEDICARE SELF-DETERMINATION ACT, *supra* note 5, § 4206(a)(2), at 292; MEDICAID SELF-DETERMINATION ACT, *supra* note 5, § 4751(a)(2), at 521.

[49] MEDICARE SELF-DETERMINATION ACT, *supra* note 5, § 4206(a)(2), at 292; MEDICAID SELF-DETERMINATION ACT, *supra* note 5, § 4751(a)(2), at 521.

[50] MEDICARE SELF-DETERMINATION ACT, *supra* note 5, § 4206(c), at 294; MEDICAID

Under the Act, the health-care provider must provide (individually or with others) for the education of its staff and community on issues concerning advance directives.[51] These local education efforts are combined with a national campaign sponsored by the Secretary of Health and Human Services. The purpose of the national campaign is to inform the public of the option to execute advance directives and of a patient's right to participate in and direct health care decisions.[52]

B. *Advance Directives and the Patient-Physician Relationship*

Statistics show that a majority of the public supports the availability of advance directives and the right to self-determi-

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SELF-DETERMINATION ACT, *supra* note 5, § 4751(a)(2), at 522. The Act's requirements for the content of the health-care providers' written policies is not clear. *See infra* text following note 81. By mandating compliance with state advance-directive laws, the Act seemingly allows health-care providers no flexibility in determining their policy response. In the absence of a state conscientious-objector law or a similar law, the Act appears not to allow transfer on ethical grounds of patients with advance directives. In contrast, the original Senate bill required medical facilities to arrange for the prompt transfer of a patient if the facility was unable to implement the patient's directives. S. 1766, 101st Cong., 1st Sess. (1989). The Act appears not to provide for such a transfer right in the health-care provider.

For an example of case law on patient transfer, see Brophy v. New England Sinai Hosp., Inc., 398 Mass. 417, 497 N.E.2d 626 (1986) (upholding right of hospital not to be compelled to act against its ethical principles). *But cf. In re* Jobes, 108 N.J. 394, 529 A.2d 434 (1987) (nursing home that had not stated its institutional policy on the matter at the time the patient was admitted could not refuse to participate in the removal of life support), *stay denied sub nom.* Lincoln Park Nursing & Convalescent Home v. Kahn, 483 U.S. 1036 (1987).

[51] The original bill required a committee to develop educational programs on ethical issues, advise on particular cases, and serve as a forum on ethics. S. 1766, 101st Cong., 1st Sess. (1989). Under the Act, the extent of the health-care provider's educational effort is not explicitly defined, but the original focus on ethics seems to have been eliminated.

[52] MEDICAID SELF-DETERMINATION ACT, *supra* note 5, § 4751(d)(1), at 522. In addition to the national education campaign, the Secretary must develop and distribute nationwide information materials. *Id.* § 4751(d)(2), at 524. The Secretary must also mail information to Social Security recipients and add a page on advance directives to the Medicare handbook. *Id.* § 4751(d)(4), at 525. Earlier versions of the Act required the Secretary to evaluate its success. A study, done in connection with the Institute of Medicine of the National Academy of Science, would have analyzed the context in which health-care decisions were made and carried out, including the incidence and processes of making decisions about life-sustaining treatment that occured with and without advance directives. The study also would have investigated the transferability of the wishes of patients as they moved from one health-care institution to another. S. 1766, 101st Cong., 1st. Sess. (1989); H. 4999, 101st Cong., 2d Sess. (1990); H. 5067, 101st Cong., 1st Sess. (1990).

nation.[53] However, only fifteen percent have actually formulated an advance directive.[54] Justice Brennan explained the discrepancy in his *Cruzan* dissent:

> The probability of becoming irreversibly vegetative is so low that many people may not feel an urgency to marshal formal evidence of their preferences. Some may not wish to dwell on their own physical deterioration and mortality. Even someone with a resolute determination to avoid life-support . . . would still need to know that such things as living wills exist and how to execute one. Often legal help would be necessary . . . .[55]

Furthermore, seventy percent of the 1.3 million people who die in hospitals each year die after a decision has been made to forego life-sustaining treatment.[56] Many citizens therefore potentially face the problems of state and professional resistance associated with the removal of life support.[57]

The Act responds to the needs of the public[58] by providing easier access to advance directives. Forced exposure to advance

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[53] Three out of five adult Texans surveyed by the Public Policy Resources Laboratory of Texas A & M University reported having had to face right-to-die decisions in their lifetimes. Ninety-two percent of that group believed that the patient's family should have the right to choose to have the support disconnected. Among those who had not faced a termination decision, 84% supported disconnection. Thus, a total 87% of the 1007 surveyed supported withdrawal of life support. Society for the Right to Die Newsletter, Spring 1990, at 7, col. 1. In a survey by Yankelovich Clancy Shulman, 80% of respondents claimed that decisions about ending the lives of terminally ill patients who cannot decide for themselves should be made by their families and doctors, rather than by lawmakers. In addition, 81% believed that when the patient has left instructions in a living will, the doctor should be allowed to withdraw life-sustaining measures. Gibbs, *Love and Let Die*, TIME, Mar. 19, 1990, at 62.

[54] *Most MDs Favor Withdrawal of Life Support—Survey*, *supra* note 27. This survey also found that 56% of respondents had told their families what their wishes would be concerning the use of life-sustaining treatment if they ever became comatose, while 43% had not discussed the issue.

[55] *Cruzan*, 110 S. Ct. 2841, 2875 (Brennan, J., dissenting).

[56] Brief Amicus Curiae of the American Hospital Association at 3, Cruzan v. Director, Mo. Dep't of Health, 110 S. Ct. 2841 (1990) (No. 88-01503) (citing UNITED STATES NAT'L CENTER FOR HEALTH STATISTICS, VITAL STATISTICS OF THE UNITED STATES (1986); Lipton, McNamee & Campion, *Do-Not-Resuscitate Decisions in a Community Hospital: Incidence, Implications and Outcomes*, 256 J. A.M.A. 1164 (1986)).

[57] "[T]he policy currently favored in most hospitals, placing the burden on the patient, can in some cases effectively vitiate the patient's fundamental right of autonomous choice." McCrary & Botkin, *Hospital Policy on Advance Directives: Do Institutions Ask Patients About Living Wills?*, 262 J. A.M.A. 2411, 2413 (1989); *see supra* notes 26–31 and accompanying text.

[58] As of July 1990, the following groups supported the Patient Self-Determination Act: Alzheimer's Association, American Bar Association, American Health Care Association, American Jewish Committee, American Protestant Health Association, Catholic Health Association, National Council on Aging, and National Hospice Association. Telephone interview with Liz McCloskey, Legislative Aid to Senator John Danforth (July 23, 1990).

directives upon original admittance to medical care will certainly cause more citizens to take advantage of the opportunity to exercise their right to choose. If people formulate advance directives, they will circumvent potential resistance to the termination of life-sustaining treatment.

In addition to providing the public with easier access to advance directives, the Act will ensure that health-care providers do not resist termination of life support, at least if the patient has formulated an advance directive. Physicians have not actively utilized advance directives in their practices in the past.[59] A minority of physicians opposes termination of life support on ethical grounds and thus does not encourage advance directives.[60] Others are simply unaware that their states have established such enabling devices for their patients.[61] Even physicians who respect a patient's right to choose and are aware of advance directives may be uncertain of how to interpret state law in the area and as a result may resist involvement with advance directives.[62]

The Patient Self-Determination Act should close the "gap between the public's perception of advance directives and the actual implementation of such documents in the clinical setting."[63] The Act mandates compliance with state advance directive laws through conditions on Medicare and Medicaid funding; thus, physicians may not ignore advance directives formulated under state law. Furthermore, by requiring health-care providers

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[59] One Colorado study found that 74% of doctors in Colorado "do not extensively discuss living wills or durable powers of attorney with [their] patients." Somerville, *supra* note 27. Furthermore, according to one survey of hospitals, of the 219 responses from 394 randomly selected institutions, 67% reported having a formal policy on advance directives. Only 4%, however, took the initiative in inquiring about them. Hospitals in states with living-will laws were significantly more likely to have formal policies than hospitals in states without them. The pollsters noted that these statistics may have been larger than reality because large hospitals were overrepresented in the survey. McCrary & Botkin, *supra* note 57, at 2412–13.

[60] *See supra* note 27.

[61] A Colorado study found that 23% of doctors in Colorado are unfamiliar with living wills and that 74% are unfamiliar with durable powers of attorney. Somerville, *supra* note 27, at 17. In a similar study in Arkansas, only 38% of doctors reported knowing the state's advance-directive laws. This lack of physician knowledge about advance directives causes doctors to fear malpractice and turn away from family decision-making. 135 CONG. REC. E944 (daily ed. Apr. 3, 1990) (remarks of Rep. Levin).

[62] A survey conducted to determine California doctors' familiarity with California's Natural Death Act indicated that 92% of the doctors were acquainted with that Act but that many of those doctors knew little about the technical requirements of the Act. Note, *The California Natural Death Act: An Empirical Study of Physicians' Practices*, 31 STAN. L. REV. 913, 930–31 (1979).

[63] McCrary & Botkin, *supra* note 57, at 2411. On the existence of this gap, see generally Note, *supra* note 62, at 929–40.

to give their patients a written formulation of their policy concerning advance directives, the Act ensures that the physicians involved will be cognizant that such a policy exists. Finally, because the state must summarize its laws for patients, the physicians can utilize these summaries for their own information in applying the law to the medical situations they face.

C. *The Legal Implications of Advance Directives*

Although the Patient Self-Determination Act defers to state law, its emphasis on advance directives is crucial in protecting patients' legal rights to refuse treatment in the midst of confusing or strict state-law requirements.[64] As noted above,[65] in order to establish whether a patient should be removed from life support, courts examine the patient's medical history for evidence of a clearly stated intention regarding his illness, look for recent oral directions that indicate the patient's desires, and consider any written advance directives. If no evidence conclusively indicates the patient's wishes, courts may apply the substitute-judgment or best-interest tests. The Patient Self-Determination Act, by facilitating advance directives, will provide the courts with the conclusive evidence they need to sanction termination of life-sustaining treatment. It will not be necessary for the courts to apply confusing, unpredictable tests. Families and physicians can rely on this certainty in the law to obviate the need for judicial intervention and can safely terminate treatment on their own.

Moreover, states applying a stricter, clear-and-convincing-evidence standard to determine patient intent would probably accept living wills and durable powers of attorney as satisfying this burden of proof. For example, New York requires clear and convincing evidence to terminate life support.[66] In *In re O'Connor*,[67] the New York Court of Appeals denied permission to withdraw artificial feeding for a woman who had, while competent, made oral statements to the effect that she would not want her life to be sustained artificially were she to become ill and unable to care for herself. In order to meet New York's

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[64] *See supra* notes 14–25 and accompanying text.

[65] *See supra* note 16 and accompanying text.

[66] *E.g.*, *In re* Storar, 52 N.Y.2d 363, 420 N.E.2d 64, 438 N.Y.S.2d 266, *cert. denied*, 454 U.S. 858 (1981).

[67] 72 N.Y.2d 517, 531 N.E.2d 607, 534 N.Y.S.2d 886 (1988).

clear-and-convincing standard, at least in the area of artificial feeding, the court said that the patient should have formulated a detailed living will or a durable power of attorney.[68] It should be noted that some courts may not rely on the advance directive if it does not meet the express procedural requirements outlined in the state enabling legislation. In addition, it may be difficult to enforce an advance directive in a state that does not have specific enabling legislation.[69]

But living wills, and possibly durable powers of attorney, may ultimately turn out to be constitutionally protected means of ensuring a patient's right to refuse treatment, and therefore protected from state restrictions altogether. In *Cruzan*, the Court recognized that a competent person possesses a right to refuse treatment based on the due process clause of the fourteenth amendment.[70] The Court did not extend the equivalent right to incompetent persons. Chief Justice Rehnquist wrote for the majority: "An incompetent person is not able to make an informed and voluntary choice to exercise a hypothetical right to refuse treatment or any other right."[71] Rather than defer to the surrogate's decision to stop treatment, the Court supported the state's interest in preserving and protecting life,[72] holding that the state could set its own evidentiary standards for deter-

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[68] According to the majority, "[t]he existence of a writing suggests the author's seriousness of purpose and ensures that the court is not being asked to make a life-or-death decision based upon casual remarks." *Id.* at 531, 531 N.E.2d at 613, 534 N.Y.S.2d at 892.

[69] *See* Note, *supra* note 62, at 917 (absent specific enabling legislation it may be difficult to enforce a living will). *But see In re* Peter, 108 N.J. 365, 371, 529 A.2d 419, 426 (1987) ("Clearly, the best evidence is a 'living will,' a written statement that specifically explains the patient's preferences about life-sustaining treatment . . . . Unfortunately, the New Jersey Legislature has not enacted such a law. 'Whether or not they are legally binding, however, such advance directives are relevant evidence of the patient's intent.'") (quoting *In re* Conroy, 98 N.J. 321, 361 n.5, 486 A.2d 1209, 1229 n.5 (1985)).

Moreover, if the state's statutory scheme does not specifically allow for medical powers of attorney, the durable power of attorney alone may not authorize valid medical agency. *See* Cruzan v. Director, Mo. Dep't of Health, 760 S.W.2d 408, 425 (Mo. 1988) (third party prohibited from exercising another person's common law right to refuse treatment in the absence of formalities established by state law), *aff'd*, 110 S. Ct. 2841 (1990).

[70] *Cruzan*, 110 S. Ct. at 2851.

[71] *Id.* at 2852.

[72] *Id.* at 2855. Dissenting in *Cruzan*, Justice Brennan argued that an incompetent person has as much right as a competent person to be free from unwanted medical treatment. *Id.* at 2867 (Brennan, J., dissenting). According to Justice Brennan, the state, in the absence of an advance directive, should let the family decide. *Id.* at 2877. In a separate dissenting opinion, Justice Stevens emphasized that the patient's best interest should outweigh any general societal interest. *Id.* at 2879 (Stevens, J., dissenting).

mining the incompetent person's wishes.[73] Those standards, however, must take into consideration the person's fourteenth-amendment liberty interests. In framing this balance, the Court suggested that a person whose wishes are clearly known may possess an absolute constitutional right to a cessation of life-sustaining treatment, including nutrition and hydration.[74] Thus, an advance directive may constitutionally require termination, automatically squelching any state restrictions.

Even if the constitutional protection afforded by an advance directive is not absolute, advance directives will probably be given much weight by the Court in any balance against state rights. Although Justice O'Connor, concurring in *Cruzan*, made it clear that the Court was not deciding the legal aspects of surrogacy,[75] she did argue that "[t]hese procedures for surrogate decision-making, which appear to be rapidly gaining acceptance, may be a valuable additional safeguard of the patient's interest in directing his medical care."[76]

III. A CRITIQUE OF THE ACT

The Patient Self-Determination Act encourages the prevention of ambiguity surrounding patients' wishes. By allowing more people to formulate advance directives, it reduces legal and ethical uncertainty.[77] However, the Act can be criticized both on a procedural level (for what it does) and a substantive level (for what it fails to do).

On the procedural level, health-care providers could potentially abuse the process established by the Act. First, health-

[73] *Id.* at 2852. Moreover, "a State may properly decline to make judgments about the 'quality' of life that a particular individual may enjoy, and simply assert an unqualified interest in the preservation of human life to be weighed against the constitutionally protected interests of the individual." *Id.* at 2853.

[74] The Court stated:

> [p]etitioners insist that under the general holdings of our cases, the forced administration of life-sustaining medical treatment, and even of artificially-delivered food and water essential to life, would implicate a competent person's liberty interest. Although we think the logic of the cases discussed above would embrace such a liberty interest, the dramatic consequences involved in refusal of such treatment would inform the inquiry as to whether the deprivation of that interest is constitutionally permissible. But for purposes of this case, we assume that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition.

Id. at 2852.

[75] *Id.* at 2857 (O'Connor, J., concurring).

[76] *Id.* at 2858 (O'Connor, J., concurring).

[77] *See supra* notes 59–76 and accompanying text.

care providers could use the opportunity to persuade "undesirable" patients to forego life-support. Uninsured, old, or mentally disadvantaged patients could be intimidated into signing directives against their will, or at least without full knowledge. Further, the Act's vague demand that health-care providers give their patients a summary of their policies also could be abused. Because the statute is not specific, health-care providers may not feel constrained to give detailed policy summaries. General policy statements could vitiate the patient's ability to make a fully informed health-care decision.

On the substantive level, the Act does not attempt to answer any of the difficult legal and ethical issues that arise when the state's interest in preserving life conflicts with the individual's right to refuse medical treatment. Although the Act helps to prevent the conflict from arising in some cases, it does not eliminate it completely. The Act protects only those patients who live in states that sanction advance directives, and who have formulated a directive using correct statutory procedures; all depends on state law. The Act leaves many other patients and families to face potential resistance to the termination of life-support.[78]

A. *Procedural Abuse and the Patient-Physician Relationship*

On its face, the Patient Self-Determination Act is neutral; it "takes no stand on what particular decisions people should make."[79] Advance directives, encouraged by the Act, can protect an incompetent patient's right to receive all available interventions in the same way that they can protect those who wish to terminate treatment.

Some opponents of the Act, however, claim that health-care providers could use the opportunity created by the Act to persuade and manipulate mentally and financially disadvantaged patients to forego life-sustaining intervention, thereby decreasing the cost to the state of providing medical care to them.[80] At

[78] *See supra* notes 14–31 and accompanying text.

[79] 135 CONG. REC. E944 (daily ed. Apr. 3, 1990) (remarks of Rep. Levin).

[80] "Some critics have questioned whether the motive of the proponents is to promote living wills or to diminish Medicare expenditures by reducing the number of patients who exist in 'coma wards' at a cost of several hundred thousand dollars a year per patient." Apfel, *Cruzan Leads Courts, Legislators to Rethink Right-to-Die Issues*, Nat'l L.J., Nov. 19, 1990, at 22, col. 1.

the extreme, health-care providers, who are often agents of the state, could use their position of trust to intentionally convince "undesirable" patients to terminate life support. Less extreme, but potentially as damaging, health-care providers might give their patients information in a reckless or negligent manner. Patients thus could be misled into believing that their physician sanctions the choice to remove life-support, rather than simply the exercise of choice itself.

Although such manipulation is possible under the current Act, the chances of its occurring are decreased by delegating to health-care providers the role of information distributor, and not of information advocate. The information distributed to the patient is pre-compiled by the state and by the Secretary of Health and Human Services. The health-care provider is asked only to distribute the information, inform the patient of the provider's policy concerning advance directives, and document the patient's status on his record. The provider does not explain the law to the patient, nor does the provider help the patient act upon the information provided to him. The health-care provider's passive role limits the opportunity to persuade.[81]

The Act also attempts to ensure that patients will be informed of their health-care providers' policies regarding patient self-determination. This information could be crucial to the person facing a choice between physicians or institutions—for example, a person choosing a nursing home. Such a patient will be able to make a decision knowing how his wishes will be respected by the health-care provider.

The benefit to the patient of being given this information, however, could be illusory if the Act's policy mandate proves too general. As written, it imposes a broad requirement, mandating only general policy formulation. If health-care providers do not formulate detailed policies to provide to the patients, and instead provide only general statements, the patients will not be

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[81] The passive role also eliminates the possibility of suits for malpractice. The original bills gave vague, affirmative responsibilities to the health-care provider. For example, H.R. 4449, 101st Cong., 2d Sess. (1990), required providers to "inquire periodically" and to document in a patient's medical chart not only whether he had an advance directive, but also whether he simply had any wishes concerning his treatment that he wished documented. In order to alleviate medical providers' fears that they would be sued for giving inaccurate legal information to patients or for incorrectly complying with the vague procedures established by the Act, the later bills required less affirmative action from the providers and explicitly provided for the procedure of distribution.

able effectively to rely upon the policies in their decision-making.

B. *Substantive Shortcomings of the Act*

The Patient Self-Determination Act does not create any federal rights or impose restrictions regarding patient self-determination, but rather defers to state power over the issue. It acts as a mere procedural prophylactic, empowering patients to avail themselves of present legal alternatives, yet failing to provide substantive rights to all patients.

The Act fails in three situations, potentially leaving patients to face the very professional and state resistance that the Act attempts to circumvent through preventive measures.[82] First, the Act provides no protection for patients in states that have not enacted advance-directive legislation.[83] Second, the Act does not address cases where the patient has not executed an advance directive. A great number of these cases will be the result of emergency, such as an automobile accident, stroke, or heart attack. The Act provides no protection for the victim of an emergency situation, where the patient does not have the leisure of formally admitting herself to the health-care institution.[84] Finally, the Act leaves untouched the myriad state restrictions on advance directives. Thus, it provides no comfort for a patient whose state's advance-directive law restricts him in some aspect from exercising choice. For example, a patient who does not qualify as "terminally ill" as required by his state's law is not assured that his advance directive will be honored.[85]

Congress could enact legislation aimed at eliminating professional and state resistance in cases where a patient is not suffi-

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[82] *See supra* notes 15–31 and accompanying text.

[83] *See supra* note 69 and accompanying text.

[84] Indeed, *Cruzan* is an example of such a case. Nancy Cruzan, whose plight has been so often cited in support of the Act, would not have benefitted from it. *See supra* note 24.

[85] Some living wills do not take effect unless the patient is terminally ill, and state definitions of terminal illness vary. For example, the Illinois Living Will Act prohibits withholding or withdrawing nutrition and hydration from a "qualified patient" if such withholding or withdrawal "would result in death solely from dehydration or starvation rather than from the existing terminal condition." ILL. STAT. ANN. ch. 110 1/2, ¶ 702(d), § 2(d) (Smith-Hurd Supp. 1990). Thus, patients in irreversible comas, like Nancy Cruzan, may not be protected by their living wills.

ciently protected.[86] Although lawmakers could consider many different statutory approaches, one approach, broad in scope, would attempt to create a national consensus on the issue of patients' rights. The resulting federal legislation could provide a uniform procedure for determining an incompetent patient's intent. It could establish a system based on the substitute-judgment test, the best-interest test, or a combination of the two tests. Different categories of patients or treatments might require different legal analyses within the system. Another possible federal law, more deferential to state power, might require states to pass legislation defining more clearly their citizens' rights to refuse treatment.[87] Such a law would ensure that the states make clear the evidentiary burden to be borne by the patient and his family in cases where the patient executed no advance directive. This in turn would also facilitate scrutiny of state advance-directive law under the federal Constitution.

Such proposed federal legislation, however, arguably might intrude upon the states' rights to regulate the welfare of their citizens. Indeed, these laws might not survive judicial scrutiny.[88] The Patient Self-Determination Act of 1990, although only prophylactic, avoids this potential intrusion on states' rights.

But eventually, the federal government may feel constrained to protect citizens' liberty against state restrictions on the right to die. After all, "[d]ying is personal. And it is profound . . . . A quiet, proud death, bodily integrity intact, is a matter of extreme consequence."[89] Although Missouri's heavy evidentiary requirements are presently the exception, other states could similarly impose heavy burdens on incompetent patients seeking to terminate life-sustaining treatment.[90] Indeed, as technology

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[86] This might take the form of a federal law enacted pursuant to Congress's power under the commerce clause, U.S. CONST, art. 1, § 8, cl. 3, or a regulation that conditions a state's participation in Medicaid upon compliance.

[87] Compare the position of the original Senate bill S. 1766, 101st Cong., 1st Sess. (1989). Although that bill, like the current law, required health care facilities participating in Medicare or Medicaid to honor advance directives to the extent permissible under state law, the original bill also would have required states to enact legislation validating advance directives for health care if they had not already done so.

[88] There is some evidence that the Supreme Court may become increasingly sympathetic toward states' rights. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 581 (1985) (O'Connor, J., dissenting) ("[T]his Court cannot abdicate its constitutional responsibility to oversee the Federal Government's compliance with its duty to respect legitimate interests of the states.") Justice O'Connor warns that, in time, the Court will "again assume its constitutional responsibility." *Id.* at 589.

[89] *Cruzan*, 110 S. Ct. at 2868 (Brennan, J., dissenting).

[90] "Missouri and this Court have displaced [the patient's] own assessment of the processes associated with dying. They have discarded evidence of her will, ignored her

advances and the means to sustain life increase, states may feel increasing pressure to protect human life and may further restrict patients' rights to refuse treatment.

IV. CONCLUSION

Those seeking to discontinue life-support for an incompetent patient face the difficult dilemma of establishing what that patient's intention would be if he were competent. Unfortunately, the legal requirements for establishing intent in this situation are often uncertain. Parties involved in the decision may be stifled into inaction by the fear of legal liability, as well as ethical conflict. The Patient Self-Determination Act encourages people clearly to establish their intentions by formulating advance directives, so that if they become incompetent, their wishes will be known.

The Patient Self-Determination Act mandates prevention through clear communication, and in fulfilling that mandate it will probably be effective. It does not, however, provide substantive certainty about the right to die. It does not delineate the extent to which the state can restrict the patient's right to choose. The Patient Self-Determination Act, with its emphasis on prevention, does not respond to "the hard ethical questions that inevitably arise about when society's interest in preserving life, if ever, should outweigh a patient's right to self-determination . . . ."[91]

—Kelly C. Mulholland

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values, and deprived her of the right to a decision as closely approximating her own choice as humanely possible." *Id.* at 2878 (Brennan, J., dissenting).

[91] 135 CONG. REC. S. 13,567 (daily ed. Oct. 17, 1989) (statement of Sen. Danforth).

BOOK REVIEW

BEYOND THE CONSTITUTION. By *Hadley Arkes*. Princeton, N.J.: Princeton University Press, 1990. Pp. 248, notes, index. $24.95 cloth.

As Professor Arkes[1] readily admits, "[i]n our own day . . . the willingness to speak seriously of 'first principles' and necessary truths is bound to be regarded as quaint" (p. 71). Conservative jurists, most notably Chief Justice William Rehnquist and former D.C. Circuit Judge Robert Bork, wary of any departure from "the discipline of the Constitution," explicitly reject the notion of natural rights (p. 14). Liberal jurists, while subscribing to the notion of an "unwritten constitution" (p. 11), and using the language of moral outrage in reacting to discrimination based on race, sex, or sexual orientation (p. 13), nonetheless readily embrace the concept of moral relativism and deny the existence of truth. Arkes writes that "in our own time, nothing is more likely to stir discomfort among liberals, in dining rooms or courts, than the willingness to speak seriously about moral 'truths' that are 'absolute' and 'eternal'" (p. 11). The adherence to positivism and the denial of natural rights is reinforced by our law schools. As Arkes notes, "[r]egardless of whether lawyers are liberals or conservatives, they are products of our law schools, and since the inception of law schools, their students have been tutored in the reigning orthodoxy of legal positivism" (p. 15). This concept's most influential proponent was Oliver Wendell Holmes, who thought it would be an improvement "if every word of moral significance could be banished from the law altogether" (p. 15).[2]

Yet it is precisely the mission of *Beyond the Constitution* to assail this formidable inertia and attempt to restore the understanding of natural rights that underlay the Founders' creation of a national government. This book is not a veiled attempt to bind modern jurisprudence by adhering to the words and beliefs of the Founders out of a sort of filial piety or a longing for the past, in the way that strict constructionists seem to do. Rather, Professor Arkes approaches the subject of constitutional jurisprudence as a moral philosopher. Drawing on the writings of

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[1] Hadley Arkes is Edward Ney Professor of Jurisprudence and American Institutions at Amherst College.

[2] O.W. HOLMES, *The Path of the Law*, in COLLECTED LEGAL PAPERS 179 (1920).

the Founders, the classical thinkers who influenced them, various commentators on American government, and a host of unlikely subjects ranging from Henry James to Jeremy Bentham, Arkes seeks to demonstrate that the Constitution's significance lies not in its ratification, but in its embodiment of an idea. He argues that the government created by the Constitution was not a social contract that conferred rights on the people, but rather an affirmation of the rights and liberties to which all people were entitled antecedent to civil government (p. 17). Arkes believes that these rights and liberties should be pursued vigorously in our constitutional jurisprudence, yet with the careful discipline necessary to ensure that their application is consistent with their underlying principles (p. 17).

In the first chapters of the book, Arkes elaborates on the connection between law and morals. He argues that "when we cast a moral judgment, when we condemn racial discrimination as a 'wrong,' we mean to say that it is wrong for anyone, for everyone, engaged in the same act" (p. 30). To illustrate this proposition, Arkes cites Abraham Lincoln's response to Stephen Douglas's statement that, although he personally thought slavery was wrong, people should be able to choose whether or not they wanted to allow slavery:

> [W]hen Judge Douglas says he "don't care whether slavery is voted up or down," . . . he cannot thus argue logically if he sees anything wrong in it; . . . He cannot say that he would as soon see a wrong voted up as voted down. When Judge Douglas says that whoever, or whatever community, wants slaves, they have a right to have them, he is perfectly logical if there is nothing wrong in the institution; but if you admit that it is wrong, he cannot logically say that anybody has a right to do a wrong (p. 36).[3]

Arkes believes that this understanding of the connection between the logic of morals and the logic of law has been forgotten. He writes that "[i]n the tradition coming down from the classics . . . [t]he law could properly override the claims of personal choice if it could appeal to certain understandings of right and wrong that were in fact, valid or true, for the rulers as well as the ruled" (p. 37).

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[3] A. LINCOLN, *Speech at Quincy, Illinois* (Oct. 13, 1858), in 3 THE WORKS OF ABRAHAM LINCOLN 257 (R. Basler ed. 1953).

In an earlier work, *First Things*,[4] Arkes carefully developed his theory of extracting natural law principles from the concept of morality itself. This theory is not as fully developed in *Beyond the Constitution* as might be useful. Arkes seems to be aware of this, as evidenced by his frequent citing of his more comprehensive work and his invitations to the reader to explore the subject there. The purpose of *Beyond the Constitution*, however, is not so much to prove particular moral premises as to redirect our thinking about American constitutional law toward its foundation (p. 17). Americans, for example, intuitively recognize the justness of the proposition "persons accused of crime must be presumed innocent until proven guilty," despite the fact that this appears nowhere in the Constitution and thus cannot have its acceptance by people explained through their devotion to positive law (pp. 70–71). Arkes argues that this proposition is a necessary implication of the concept of attaching blame. Another example of what Arkes means by truth is the concept of natural equality which Lincoln saw as the central principle that "stamped the character of the American republic" (p. 40). Arkes explores how the moral wrong of slavery (p. 43), as well as the wrong of racial discrimination (pp. 112–49), may be deduced from this central proposition. These wrongs, Arkes adds, are universal wrongs, and our opposition to slavery and discrimination does not "rest simply on the habits of the local tribe or the sufferance of the local majority" (p. 43).

According to Arkes, many of the Founders were wary of adopting a bill of rights, for fear that the list be seen as exhaustive. Indeed, earlier, during the Constitutional Convention, James Wilson and Oliver Ellsworth expressed reservations over the inclusion of the prohibition against ex post facto laws in the Constitution, since the principle against ex post facto laws was, to them, inherently obvious. Ellsworth stated that "there was no lawyer, no civilian who would not say that ex post facto laws were void in themselves" (p. 27).[5] Arkes notes that an ex post facto law is inconsistent with the logic of law and the attachment of blame. Alexander Hamilton noted in *Federalist* 84 that bills of rights had their origin in "stipulations between kings and their subjects" (p. 60).[6] Arkes notes that Founders such as James

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[4] H. ARKES, FIRST THINGS (1986).
[5] 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 376 (1966).
[6] THE FEDERALIST No. 84, at 512 (A. Hamilton) (New American Library 1961).

Wilson and Hamilton recognized that when man leaves the state of nature and enters civil society, he does not give up any rights, for wrongs that occurred prior to civil society were, though unpunished, wrongs nonetheless. Arkes explains that "[t]he law that forbids a man to rape or steal does not restrain him from doing anything he was ever rightfully free to do" (p. 65).

The Federalists' alarm over the Bill of Rights, according to Arkes, was based on their fear that although the enumerated rights may be fundamental rights, their enumeration "would narrow our understanding of the rights that government was meant to protect . . . [,] it would misinstruct the American people about the ground of their rights [, and] it would make it even harder then to preserve republican government" (pp. 59–60). Theodore Sedgwick thought it preposterous to specify the right of free speech in a regime of law and constitutional liberty, stating that they might as well specify that "a man should have a right to wear his hat if he pleased; that he might get up when he pleased, and go to bed when he thought proper" (p. 66).[7] Arkes believes that Sedgwick was suggesting "that the people who produced this list of rights did not apparently understand the difference between a principle and the instances in which a principle may be manifested" (p. 66). Arkes likens such people to those "who would apparently believe that the series of positive integers were discovered *one at a time*" (p. 66).

Arkes realizes that many Americans feel they are adequately protected by a jurisprudence that relies on an often convoluted fitting of various unenumerated rights into the rights enumerated in the Constitution, as in the case of finding the right of privacy in the due process clause or the right of association in the first amendment (pp. 147–48). Arkes admits that "[t]he fictions of the law may be quite benign . . . " (p. 147). Yet Arkes argues that there is more than mere philosophical rigor at stake in opposing the contrived fictions of our jurisprudence:

> [A]long with this exercise in muddling through, there is a distraction of our jural imagination. If we could get clear about the true ground of principle that underlies the law in any case, we might be able to see more clearly then where the true analogies lie: we might begin to notice cases that have previously gone unperceived; cases masked in different settings, disguised by different circumstances, but engaging the same questions of principle (p. 148).

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[7] 1 ANNALS OF CONG. 732 (J. Gales ed. 1834).

Throughout the book Arkes analyzes court cases and issues of civil liberties and civil rights to demonstrate how our focus has been distorted and limited. For example, he devotes nine pages to a careful analysis of *Edwards v. California*,[8] which held that a California law making it a crime to bring indigent persons into the state was unconstitutional (pp. 83–91). The Court held that this law violated the commerce clause by deterring interstate travel. Concurring Justices William Douglas and Robert Jackson invoked the privileges and immunities clause to strike down the law. Arkes explains that the majority, as well as the concurring Justices, although apparently driven to their conclusions by some degree of outrage at the statute's treatment of indigent people, missed the real problem. Arkes contends that the true wrong was that the law attempted to draw an inference about a person's worthiness from the person's level of wealth. This, Arkes argues, is at odds with the very logic of government by law, which requires attaching blame only to actions and attributes with moral significance. As he explains at a different point in the book, it is a necessary principle of law that "we ought not hold people blameworthy or responsible for acts they were powerless to affect" (p. 167). We would not, he argues, hold a person who was thrown out of a window and who landed on someone on the street responsible for assault (p. 167). Arkes argues that "[w]hen we grasp the necessary force of this point, we understand that it is *tied logically* to the very idea of justice—that any system of justice would be incoherent if it denied this proposition" (p. 167). Arkes contends that the Court in *Edwards* could have argued that inherent in the logic of the establishment of a national government of a republican form in 1789 was an understanding that its citizens would not encounter arbitrary laws such as the one at issue as they traveled from state to state (p. 89), or anywhere else for that matter. This is the principle, he argues, that is reflected in the privileges and immunities clause and in the commerce clause (pp. 88, 91). However, Arkes stresses, it is the principle and not its reflection that deserves our attention.

Arkes is similarly critical of the reasoning used in *Skinner v. Oklahoma*,[9] which struck down a law authorizing the sterilization of chicken thieves and other crimes of moral turpitude, but

[8] 314 U.S. 160 (1941).
[9] 316 U.S. 535 (1942).

excluded criminals such as embezzlers, as violative of the equal protection clause. The real wrong here, according to Arkes, lay not in the disparate treatment of different types of criminals, but in making a moral connection between genetics and criminality. Such a move, according to Arkes, is inconsistent with the notion of a government of law. Arkes notes that Chief Justice Harlan Fiske Stone, in a concurring opinion, observed that the wrong of this case would not be alleviated by sterilizing all criminals (p. 98).[10]

Arkes sets forth numerous examples of how rights may be curtailed when underlying principles are ignored. He argues that the "maze of federalism" in the area of civil rights enforcement, with its requirement that there be state action to trigger federal authority to protect civil rights, is an unnecessary fiction (p. 112). Arkes argues that if we followed the reasoning of the Founders that when the Constitution was adopted a "real government" was created that could "act directly on those individuals who constituted its citizens," we would recognize a much broader scope to federal civil rights enforcement authority (p. 142). Arkes also suggests that attention to the principles underlying the Constitution would uncover constitutional problems with certain accepted practices such as plea bargaining, the imposition of wage and price controls, and the encouragement of testimony from informers (p. 205). Similarly, he suggests that we might require government to offer adequate justifications when it infringes on rights such as the right to practice one's profession without unjustified intrusion by the government (pp. 73–74). Arkes also argues that a principled analysis would lead to a clearer understanding of the reasons for which we might justifiably curtail speech in certain instances, such as verbal assaults of a racial character (pp. 74–76). He also devotes a chapter to developing an argument questioning the application of the right against self-incrimination to non-coercive contexts (pp. 173–205).

Arkes's vision of a reformed jurisprudence, he suggests, is more familiar than it at first may seem. The impulse to examine the principles underlying our jurisprudence can be found in varying forms throughout twentieth-century Supreme Court decisions. For example, in incorporating the Bill of Rights into the fourteenth amendment, that is, in applying its various provisions

[10] *Id.* at 543 (Stone, C.J., concurring).

to the states through the due process clause, the Court has only incorporated rights that it has deemed fundamental. It has refused to incorporate rights that are merely creatures of positive law and not based on the principles at the core of the Constitution and the Bill of Rights (pp. 156–59).

Similarly, Arkes examines Justice William Brennan's use of the due process clause of the fifth amendment in *Frontiero v. Richardson*[11] to prevent the federal government from committing precisely the same wrong, discrimination based on sex, that was found to violate the equal protection clause of the fourteenth amendment two years earlier in *Reed v. Reed*[12] (pp. 99–103). Arkes sees in this loose interchangeability of the clauses an appreciation by Justice Brennan of the type of constitutional analysis that he advocates. Yet, he notes, "[t]he Court remained silent while it performed this jural shell game because the judges still did not know how to explain this translation they were making" (p. 102).

Arkes clearly states that he would not have us abandon the Bill of Rights. He writes, "Of course, no man of prudence would urge us to repeal the Bill of Rights. But we must seek to free ourselves from the constricted vision of the Bill of Rights by restoring to our jurisprudence the understanding of our first generation of jurists" (p. 80). However, the book lacks a clear vision of how such a restoration would proceed. It does not adequately explore the risk that an attempt to restore the principles underlying the Constitution could result in even less principled decisions if judges begin to examine fundamental principles more closely as Arkes encourages, but do so in an undisciplined, self-serving way. For example, in suggestion that hate-speech might be curtailed, Arkes does not address the problem of the historical tendency of governments to suppress speech arbitrarily. It is arguable that speech merits enumeration and special attention, as a practical matter, because governments seem to find it so tempting to curtail without valid justification. Also, while Arkes discusses *Federalist* 10 and the particular competence of the federal judiciary in protecting

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[11] 411 U.S. 677 (1973) (invalidating an Air Force policy of automatically granting male members benefits for their spouses if listed as dependents, but requiring female members to demonstrate that their spouses were actually dependent in order to receive the benefits).

[12] 404 U.S. 71 (1971) (invalidating Idaho law giving preference to males in determining who will administer an estate).

minorities of various forms due to its relative impartiality (p. 125), he does not explore adequately the wisdom of leaving the interpretation of the principles underlying the Constitution to the judiciary. That is, although one may accept Arkes's argument that citizens, students, teachers of the law, and judges should strive to reexamine the principles underlying the Constitution, it is another question entirely whether it is prudent to leave the judiciary to apply, unchecked, these principles to the law. Although more elaboration may be necessary on this issue, Arkes does not seem to intend this book to be a concrete plan for reforming constitutional jurisprudence. Rather, the book's primary goal is to challenge jurists and others who think about the law to reexamine their assumptions. In this *Beyond the Constitution* is extremely effective.

Arkes's comfortable and flowing writing style is refreshing. In addition to case analyses, historical accounts, and discussions of political theorists, Arkes draws on a diverse range of sources to prove various points. He uses news stories about figures ranging from Andreas Papandreou (p. 58) to Joan Baez (p. 77) to illuminate his arguments. He freely draws upon personal anecdotes, which works surprisingly well. He refers to various literary and philosophical figures in a loose, pre-twentieth-century manner that may make those trained in the compulsive footnoting regime of modern legal education uneasy, but it is a welcome reminder that other traditions exist. He frequently uses the first person, and his language is often informal and even playful. For example, he is fond of referring to those who would violate the civil rights of others as "the local yahoos" (e.g., p. 119). He is not afraid to inject humor and an irreverent sarcasm into the work, which make it extremely enjoyable to read.

Beyond the Constitution is an important and intriguing work. The insights it provides and the challenges it makes to modern jurisprudence make it well worth the attention of all members of the polity. Despite the lingering problem of how an application of Arkes's vision of a reformed jurisprudence would proceed, the book's call for a renewed examination of the fundamental concepts underlying the Constitution and for a rigorous and principled application of these concepts merits careful consideration.

—*Eric W. Treene*